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(SUPERIOR COUNCIL OF LITERARY AND ARTISTIC PROPERTY)

PASSIVES SALES MISSION

- Report -

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This report, based on numerous hearings, commits only its authors.

Report translated by ATENAO

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SUMMARY

The passive sales theory was originally a corrective instrument used to avoid the creation of absolute territorial exclusivities on the market for the sale of material goods within the European Union: vertical agreements that bind suppliers to their distributors and organise the sale of goods according to territorial exclusivities can only benefit from the European Exemption Regulation (block exemption) if they leave room for the possibility of passive sales, that is to say if they allow for sales to be concluded between a distributor and an end customer, at the initiative of the customer (without solicitation by the distributor). The alternative is to show that the vertical restraints envisaged have beneficial effects that offset their anti-competitive effects (individual exemption, Article 101 (3) TFEU).

*Presented as an application of competition law, the acceptance of passive sales is therefore in fact part of the pursuit of a single market. Passive selling strains and breaks the established territorial exclusivity, but this effect is regarded as admissible because spontaneous demands are supposed to remain marginal and produce little effect on the market in question (*de minimis *logic). All the more so as the passive selling theory does not go so far as to force a distributor to provide a consumer with the desired product. Passive sales theory prevents the supplier from prohibiting the distributor from responding to a passive sale.*

The application of the passive sales theory to the digital distribution of audiovisual works – and in particular cinematographic works – as envisaged in the Sky case shows that the transposition of the physical world to the immaterial world does not produce happy outcomes, for many reasons.

First, because it is not certain that the designation of the concept – "passive sales" – perfectly covers all the possibilities of digital audiovisual distribution. In addition to the fact that the concept of "selling" seems totally inappropriate for the designation of the legal transaction in question in the audiovisual field, there are grounds for doubt as to whether the transaction in question is truly "passive", because of the facilities offered by the digital networks which allow dematerialised, immediate satisfaction. Or because it is easy for a distributor wanting to move in on the territories of other exclusive rightholders to organise an underground but very effective system of advertising its supply and thereby solicit these consumers. Or because, even under the assumption of spontaneous consumer demand, the viral facilities offered by social media have the effect of causing solicitations well beyond the de minimis *threshold that justifies the admission of the theory. The legitimacy of passive selling that can be evoked in the analogue world is called into question in the digital world.*

There is reason to observe that the exclusivities contractually created by the disputed agreements do not have, in the audiovisual field, the absolute effect which exists in the world of material goods sales, of cars or cosmetics for example. The televised exclusivities granted are, in most cases, only temporary and are themselves exposed to competition because, even before the television broadcast or after it, the works in question are offered to consumers via other distribution channels (VoD, SVoD, etc.).

Even if it could be said that there were nothing misleading about applying this passive sales theory to a field different from that in which it arose, it should still be borne in mind that the

effects of implementing the theory in the audiovisual field would be particularly unfortunate.

Firstly, because eliminating territorial exclusivities would put in question all the material and economic organisation on which the audiovisual sector is based. The production of cinematographic works today calls for the mobilisation of capital that producers are no longer able to provide on their own. This has led to the implementation of a system of presales with distributors who, in exchange for exclusivity granted in their mode of operation and on a given territory, pre-finance the work upstream. Without the benefit of exclusivity giving them a return on their investment downstream, it is doubtful that these actors, who are essential to the audiovisual sector, would agree to take the risks necessary for the production of the work. That is to say that an unnuanced application of the passive sales theory would be destructive of this system that has existed for decades, so that one of the effects to be feared is that it could drive these actors away from this area. This would have the consequence of causing production to dry up, and therefore reducing the supply available to consumers. This means that although these consumers would be likely be regarded, initially, as an indirect beneficiary of the passive sales theory, it should be noted that these same consumers would, in the medium term, suffer from the effect of dwindling or disappearing production that we have just described.

Secondly, we should bear in mind that a distributor wishing, in the name of this theory, to respond to consumer demand located in another territory would put themselves in the position of a counterfeiter since they would be making the work available to the public in a territory for which they did not own the rights.

It could not be otherwise unless the distributor acquired the rights for the entire territory of the European Union. This leads to the observation, thirdly, that only the most powerful distributors, mostly from states outside of the Union, would survive. These giants would gradually come to replace the myriad of actors whose activity today guarantees the diversity and cultural richness of production. The consequence would be an application of competition law producing one of the very anti-competitive effects that is so dreaded and fought against!

From this point of view, it is essential to note that, probably because of these various observations, the European normative work, contemporaneous with the application of this theory by the Commission, is adopting solutions resolutely headed in the opposite direction since the recently drafted texts take care to exempt the audiovisual field from the task of eliminating territorial exclusivities. It seems difficult to admit that the assessment of the advantages and disadvantages of the solutions created by the legislator, with a view to achieving a fair balance and producing happy outcomes, can be challenged immediately by other European institutions. It is at least a question of consistency. All the more so since the application of the passive sales theory directly impacts copyright's very essence: its exclusivity. It should be noted that copyright is not simply a property right but also a constitutional right in many member states, and one elevated to the rank of fundamental right by the Charter of Fundamental Rights of the European Union.

This means that the application of this theory to the distribution of audiovisual works should be rethought. Either to the point of being rejected because of the negative effects that the result of its application can produce, or of simply being applied with greater caution, bearing a number of factors in mind.

Among these factors, the following should be highlighted:

- *The presence of a supply on the requesting consumer's territory, a factor which is unfavourable to the admission of passive sales: difficulties of simple convenience cannot receive the same treatment as those related to a total impossibility of having access to a work.*
- *The study of economic issues and the potential effects. The existence of a real analysis, within the meaning of Article 101 (3), on the possible presence of happy outcomes of partitioning that might offset its anti-competitive effects. The presence of passive sales cannot be the be-all and end-all of the examination.*
- *The usefulness of "sanctuarising" the exclusivity granted, for a certain period of time.*

If the theory were to be applied, it might be advisable to consider setting up Europe-wide platforms, which would make it easier for consumers to apply for licences directly from producers rather than from distributors.

INTRODUCTION

1. ***Modus operandi***. This report is the result of the work carried out by Pierre Sirinelli (Chairman) and Sarah Dormont (Recorder), for over a year (January 2018 – June 2019) for France's Superior Council of Literary and Artistic Property (Conseil supérieur de la propriété littéraire et artistique – CSPLA). The purpose of this report was set out in the engagement letter by the Chairman of the Superior Council of Literary and Artistic Property, Mr Pierre-François Racine, dated 8 January 2018.

2. The aim of the mission was as follows: *"to list existing processes at European level (texts in preparation, consultations conducted, procedures in progress, etc.) which make reference to the application of the concept of "passive sales", to verify the relevance of the application in the digital world of a concept that appeared and is applied in a physical realm, then to examine the justification for territorial contractual restrictions with regard to the specificities of making audiovisual works available online, of their territorial mode of financing and operation, as well as their compatibility with existing rules, in particular copyright, and the impact of European texts in preparation. Finally, if necessary, it will be a matter of formulating proposals that the French authorities could make at European level in the context of negotiations on these texts, consultations and procedures in progress".*

This year, the mission conducted various hearings of French and foreign professionals (from European Union member countries as well as other states) along with academics (lawyers or economists) and institutions (such as the European Commission), a list of which is given in the appendix. The report presented at the plenary meeting on 3 June 2019 is the result of these various hearings although it is naturally not possible to attribute responsibility for its content to any one of the individuals heard.

3. **Context.** Although one of the events that led to the establishment of this mission was undoubtedly the Sky case, which saw the European Commission criticising certain producers of audiovisual works for requiring the British television channel to respect absolute territorial exclusivity, thus preventing the channel from distributing the works concerned on territories other than those for which it had obtained permission, this report is in no way intended to assess the merits of the objections thus stated by the European authorities.

4. This case was in fact an opportunity to assess, more generally, the appropriateness of applying the so-called "passive sales" theory – which is its legal basis – to the distribution of audiovisual works. Consequently, although reference will be made to this case on occasions, it will only be as a possible illustration of certain aspects or consequences of implementing this theory in this professional field.

5. This report can therefore not be read as an endorsement or criticism of the approach taken by the European Commission (and its outcome) in a specific case, the outcome of which may depend on special considerations. For the same reasons, this work cannot be regarded as a commentary on the judgment by the Court of First Instance of the European Union, on 12 December 2018[1], in the same case. In any case, the European authorities reason in a very circumstantial manner, especially when the question of passive sales is at issue: it is not a question

[1] General Court of the European Union, 12 December 2018, case T-873/16, *Groupe Canal Plus v European Commission*.

of prohibiting any organisation of the market but of penalising restrictions which go "beyond" what is needed to organise a market. In this perspective, for each dispute, a number of factors are taken into account by the competition authorities, which are specific to the market examined, thus explaining the fact that the solutions in this area are quite unpredictable[2]. The unpredictability of solutions is therefore inherent in competitive reasoning and it is not possible to establish, in absolute terms, the competition authorities' position on an abstract situation.

6. In this report, the members of this Mission wanted to take a more general approach to assessing the appropriateness of applying the passive sales theory to the audiovisual sector[3] by assessing its theoretical legitimacy, especially on the legal level, on the one hand and its practical, social, economic and legal consequences on the other.

7. **Plan.** The implementation of passive sales in the audiovisual distribution sector raises a variety of questions that must be analysed successively.

- First, it is the very principle of the transposition of passive sales to audiovisual distribution that creates difficulties (2).
- Next, it is necessary to evaluate the consistency of applying passive sales to the audiovisual sector with regard to competition logic, since it is from competition law that this theory is derived (3).
- Since this is a question of implementing passive sales in a sector where objects are protected by copyright, the consequences of passive sales with regard to copyright should also be explored (4).
- Lastly, it is necessary to explain the consequences that the application of the passive sales theory could have on the audiovisual market (5).
- These questions being considered, it may be possible to put forward a number of proposals aimed at improving the implementation of the passive sales theory for the sector concerned (6).
- However, it is still obviously essential, first and foremost, to present the theory of passive sales and its application to the audiovisual sector (1).

[2] The conclusions for one market cannot necessarily be applied to a neighbouring market, which is very frustrating for actors on that market and especially rightholders who, in certain circumstances, will be blamed for exercising a right which would be lawful in other circumstances. This unpredictability is exacerbated by the fact that it is hard to define exactly what is meant by the expression "*beyond what is needed*".

[3] For the application of passive sales in the book industry, see *addendum* p. 59.

1. Passive sales and the audiovisual sector: the data on the problem

8. We will set out the concept of passive sales in general (1. 1.) before focusing in particular on their application to the audiovisual sector and especially the *Sky* case (1. 2.).

1. 1. Where do passive sales appear in the European normative landscape?

9. First definition and aim of passive sales. The concept of passive selling was developed in competition law in the context of vertical agreements[4]. To find a definition of it, we must refer to the Commission Guidelines on vertical restraints[5] which accompany the 2010 Exemption Regulation[6]: '"passive' sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers"[7]. A passive sale is therefore one which is concluded without the professional having solicited the customer. In the context of exclusive distribution agreements, the various distributors are mutually bound to respect their exclusivity[8]. In other words, a distributor in the network cannot actively solicit customers who fall within the territory of a competing distributor: active sales outside the contractually defined spheres of exclusivity are prohibited. This is the very principle of exclusive distribution, which is not called into question by passive sales. On the other hand, according to this theory, competition between distributors can come from customers: the latter can themselves solicit the distributors of their choice, independently of the contractually planned organisation of distribution. **Passive sales outside of the network are thus allowed. Or at least, suppliers cannot prohibit their distributors from meeting spontaneous customer demand, even when this customer is located outside of their sphere of exclusivity.**

The absence of a ban on passive sales constitutes one of the conditions for a vertical agreement to escape the classification of prohibited agreements within the meaning of Article 101 of the Treaty on the Functioning of the European Union[9]. There is, by construction, a tension between satisfaction of spontaneous consumer demand and respect for the various distributors' exclusivity. The *Consten and Grundig* judgment of the Court of Justice of the European Union (CJEU)[10] was the first decision to implement the logic of passive selling, although the term was not explicitly used.

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[4] We also find a similar concept in private international law. Although the texts do not directly use the same vocabulary, in substance, private international law and in particular the European texts distinguish between passive consumers who have concluded a consumption agreement after being solicited by a professional (correlatively, this is an active sale) from active consumers who have approached the professional themselves (a passive sale). The distinction has consequences for the implementation of the conflict of protection rule: the Rome I regulation states that the protection rule can only be implemented if the professional is found to have "directed" their activity towards the member state in which the consumer is domiciled (Regulation no. 593/2008 of 17 June 2008 on the law applicable to contractual obligations, recitals 24 and 25 and Article 6. 1. b)). In private international law, passive consumers – ones concluding an active sale – are therefore better protected than active consumers – ones concluding a passive sale.

[5] Guidelines on vertical restraints, *OJEU* C 130, 19 May 2010, pp. 1-46 (hereinafter "guidelines").

[6] Regulation no. 330/2010 of 20 April 2010 concerning the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (hereinafter "Exemption regulation" or "Regulation").

[7] Point 51 of the guidelines.

[8] These exclusivities can be territorial or linked to a certain customer group, for example, or product categories. In the distribution of audiovisual works, exclusivities are territorial: each distributor of an audiovisual work benefits from distribution exclusivity for a contractually defined geographical area, which generally corresponds to one or more states. The terms *broadcasters* and *TV broadcasters* are often used to describe distributors of audiovisual works. We will subsequently be using both terms interchangeably.

[9] Hereinafter "TFEU".

[10] CJEC, 13 July 1966, joined cases 56 and 58-64, *Consten and Grundig v Commission, Rec.* 1966, p. 429.

The theory was first applied to markets for material goods, like distribution of cars or cosmetics. Recently, the emergence of digital technology has given the theory a new lease of life[11]. To understand its logic properly and question the appropriateness of transposing it to the audiovisual sector, it is necessary to look again at the general context in which passive sales take place.

10. Vertical agreements. It is very common for a supplier on a given market to seek to coordinate its distributors' activity in order to improve its products' distribution. In practice, suppliers contractually require their distributors to meet certain conditions for the sale of products, which all incur costs: training of sellers, terms of presentation and promotion of products, information given to the consumer, etc. In return, the supplier guarantees its distributors exclusivity for the distribution of the products on a territory or, to use another example, for a particular customer group. Correlatively, the supplier requires its distributors to respect the exclusivity of other distributors, on their respective territories or with regard to the customer groups defined. It therefore involves a sharing of the market[12] based on reciprocal contractual obligations, which in principle are mutually advantageous.

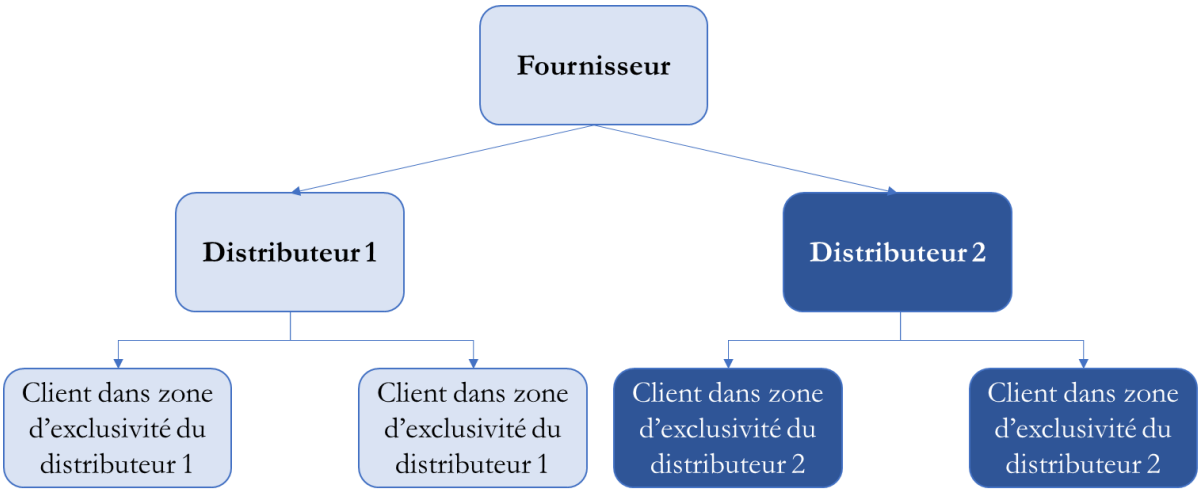


Diagram of an exclusive distribution organisation

From the competition law point of view, this way of organising distribution is called a vertical agreement[13]. In this context, geographical exclusivity constitutes a vertical restraint, *a priori* prohibited by Article 101 (1) TFEU[14]. Such an agreement can nonetheless escape the prohibition in Article 101 if it is possible to prove that it improves "*the production or distribution of goods*", or promotes "*technical or economic progress, while allowing consumers a fair share of the resulting benefit*", as

[11] The application of passive sales to "traditional" markets was consolidated in the 1990s. Digital technology brought a renewed focus on the issue. One of the issues in this report is precisely that of determining whether passive sales can be applied to "digital distribution". See *infra* no. 36 et s. for further developments.
[12] Geographical sharing or sharing of clientele, depending on the case.
[13] See in Article 1 a) of the Exemption Regulation: a vertical agreement is considered to be *"an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services"*.
[14] See Art. 1 b) of the Exemption Regulation.

stipulated by Article 101 (3) TFEU[15]. According to the logic of Article 101 TFEU, it therefore appears in principle to be up to the judge to determine, on a case-by-case basis, whether a vertical agreement – like any other form of agreement – can escape the prohibition in Article 101 (1) TFEU, following an economic assessment of the agreement[16]. In other words, **competition law tolerates agreements which, despite having anti-competitive effects, have sufficient positive effects to offset them.**

11. The exemption regulations technique. In practice, such an approach is complex, lengthy and therefore ill-suited to the needs of the market. European institutions have gradually adopted block exemption regulations, in order to avoid the need for individual assessments and provide security for market actors[17]. Today, the Regulation of 20 April 2010 is in force[18], complemented and clarified by the guidelines on vertical restraints[19]. The approach as well as the substance of these texts reflects a very clear integration of the economic analysis by the Commission[20] as well as the will to take a pragmatic approach in order to reach scenarios of presumption of legality or illegality. The result is that in principle, an exemption is granted for vertical agreements "*for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101 (3), of the Treaty*"[21], or, in short, agreement categories which improve "*economic efficiency*" [22], although they have anti-

[15] Also, contrary to the case of abuse of a dominant position (Art. 102 TFEU), competition law accepts that an agreement, and in particular a vertical restraint, may be of benefit to the market and in particular to the consumer. What matters is the effect of the practice and not its form.

[16] This reasoning is directly inspired by the "*rule of reason*" drafted by the American antitrust judge during the implementation of the *Sherman act*. We should note that the European authorities have firmly condemned the implementation of the rule of reason (competitive assessment) in Article 101 (1) TFEU. In the *Métropole télévision (M6)* decision in 2001 (TFEU, 18 Sept. 2001, case T-112/99, *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom et Télévision française 1 SA (TF1) v Commission of European Communities*), the Court of First Instance of the European Union indeed considered that the very existence of a rule of reason in EU law, consisting in weighing up the pro and anti-competitive effects of an agreement, was in itself "doubtful" (see point 72 of the decision) and that it was preferable to assess the restrictive nature of an agreement or certain clauses in the specific context of Article 85 (3) of the Treaty (which became 101 (3) TFEU) and in the relevant "economic and legal" context (point 79 of the decision), that is following a broader economic assessment. See also F. Buy, M. Lamoureux et J.-Ch. Roda, *Droit de la distribution*, LGDJ, 2017, no. 552 et s., pp. 407 et s.

[17] Originally, the regulations distinguished between agreement types: see Commission Regulation (EEC) no. 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements, Commission Regulation (EEC) no. 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements, Commission Regulation (EEC) no. 4087/88 of 30 November 1988 on the application of Article 85 (3) of the Treaty to categories of franchise agreements. Since 1999, there has been one single regulation governing categories of vertical agreements and concerted practices: see Commission Regulation (EC) no. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, *OJEC* L 336 of 29 December 1999.

[18] Regulation no. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (hereinafter "Exemption Regulation" or "Regulation"). See in particular L. Idot, "Aperçu du nouveau régime des accords verticaux", *Europe* no. 7, July 2010, study 8. We must also mention the Regulation specific to the motor vehicle distribution sector (Regulation no. 461/2010 on the application of Article 101(3), of the Treaty on the Functioning of the European Union to categories of vertical agreement and concerted practices in the motor vehicle sector, OJEU L 129 of 28.5.2010, p. 52-57) and a regulation on technology transfers (EU Comm., reg. (EU) no. 316/2014, 21 March 2014 on the application of Article 101(3), TFEU to categories of technology transfer agreements, OJEU no. L 93, 28 March 2014, p. 17).

[19] Aforementioned text. These guidelines are usually designed to apply to the vertical agreements, beyond exemptions: see point 1 of the guidelines: "*These Guidelines set out the principles for the assessment of vertical agreements under Article 101 of the Treaty on the Functioning of the European Union.*"

[20] American law has had a major influence in this respect, especially on the drafting of the guidelines. European jurisprudence seems to take a more formalist approach.

[21] Recital 5 of the Exemption Regulation.

[22] Recital 6 of the Exemption Regulation. In other words, the theoretical proof of economic efficiency justifies recourse to a presumption of legality for the agreements concerned, with regard to the competition rules.

competitive effects[23].

12. Hardcore restrictions. According to the logic of the Regulation, the presumption of legality – the exemption, therefore – benefits agreements that do not exceed certain thresholds of market share and do not contain any hardcore restrictions or excluded restrictions. The existence of a hardcore restriction is envisaged as a particularly serious infringement of the competitive principles, so that it prevents the agreement from benefiting from the exemption regulation[24]. Its presence leads to the presumption that the agreement in question falls within the scope of Article 101 (1) and that moreover, "*the agreement is unlikely to fulfil the conditions of Article 101(3)*"[25]. For the agreement in question to not be considered as a prohibited agreement, it must be proved that "*likely efficiencies result from including the hardcore restriction in the agreement and that in general all the conditions of Article 101(3) are fulfilled*"[26]: this brings us back to the classic and onerous implementation of Article 101 TFEU.

13. Territorial exclusivities and hardcore restrictions. Sharing a market in territories or customer groups is one of the hardcore restrictions identified by the Regulation; in principle, an organisation of goods distribution based on territorial exclusivities means that the agreement cannot benefit from the exemption[27]. Logically, in such circumstances, in order to save the agreement, it would then be necessary to demonstrate circumstantially that it has beneficial effects offsetting its anti-competitive effects, according to the criteria of Article 101 (3) TFEU.

14. Passive sales. The Exemption Regulation nonetheless provides for a relaxation of the rules in certain circumstances: "*territorial or customer group exclusivities are legal by exception*" if they permit *passive sales*[28]. Passive sales are defined in the guidelines as sales concluded following unsolicited requests from individual clients[29]. Active sales, on the contrary, are concluded following prospecting for customers. Thus, "*networks providing for (or combining) territorial or customer group exclusivities [can still benefit from the exemption] if they confine themselves to prohibiting active sales*"[30]. Following this approach, **it is absolute exclusivity that is prohibited**. An exclusive distributor is therefore not prohibited – in particular by its supplier – from responding to requests from customers, even outside of its sphere of contractual exclusivity, if the requests in question come spontaneously from customers. The prohibition creates a presumption that the agreement is illegal with regard to antitrust law.

Thus, permission of passive sales – or the absence of clauses prohibiting them – constitutes a *sine qua non* condition of an agreement based on territorial exclusivities on a market being able to benefit

[23] See A. Decocq and G. Decocq, *Droit de la concurrence. Droit interne et droit de l'Union européenne*, LGDJ, 2010, no. 257, p. 358: "*the exemption implies the weighing up of the harms inherent in any harm to competition on the one hand, and any advantages resulting from the agreement or category of agreements in question on the other and, after this assessment, the conclusion that the latter outweigh the former.*"

[24] Article 4 of the Regulation.

[25] Guidelines, point 47. *Adde* F. Buy, M. Lamoureux and J.-Ch. Roda, *op. cit.*, no. 128, p. 109: "*the presence of these restrictions is so serious […] that they bring the agreement (in its entirety) into the sphere of presumed illegality.*"

[26] Guidelines, point 47.

[27] Art. 4, b) of the Exemption Regulation.

[28] F. Buy, M. Lamoureux and J.-Ch. Roda, *op. cit.,* no. 132, p. 112.

[29] See Commission guidelines on vertical restraints, point 52 (section on conditions of application of the Block Exemption Regulation): "*'passive sales' mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers*". *Adde* L. Vogel, *Traité de droit économique, tome 1, Droit de la concurrence – Droits européen et français*, éd. Lawlex Bruylant, 2015, spec. no. 115, pp. 232-233.

[30] F. Buy, M. Lamoureux and J.-Ch. Roda, *op. cit.,* no. 132, p. 212.

from the Exemption Regulation. In other words, **competition law thus tolerates some vertical agreements and in particular accepts the possibility of geographically organised product distribution if geographical exclusivities are not absolute**, which results in the fact **that the agreement enables distributors to satisfy spontaneous solicitations from individual clients** located outside of their respective spheres of exclusivity.

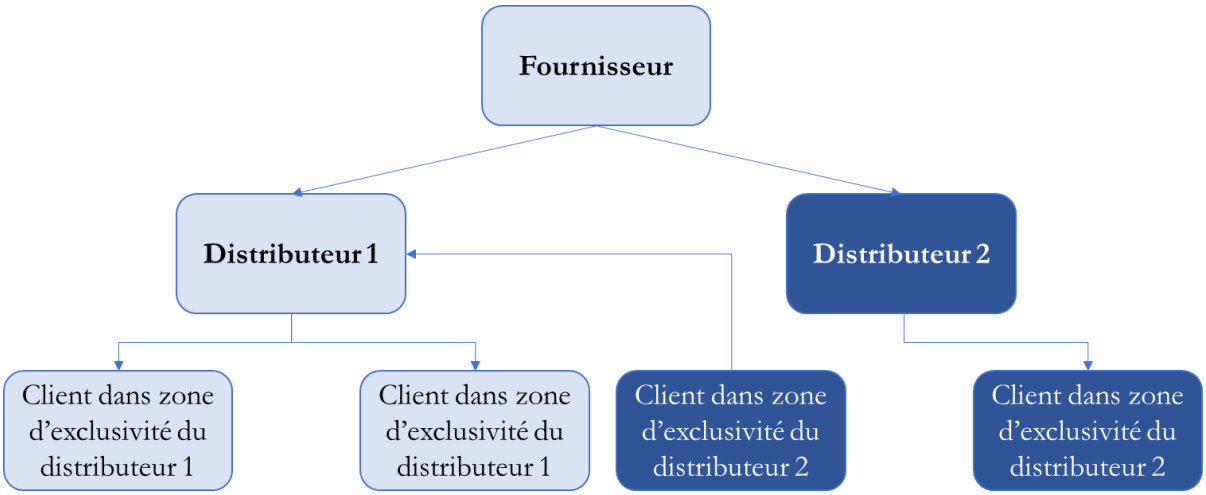
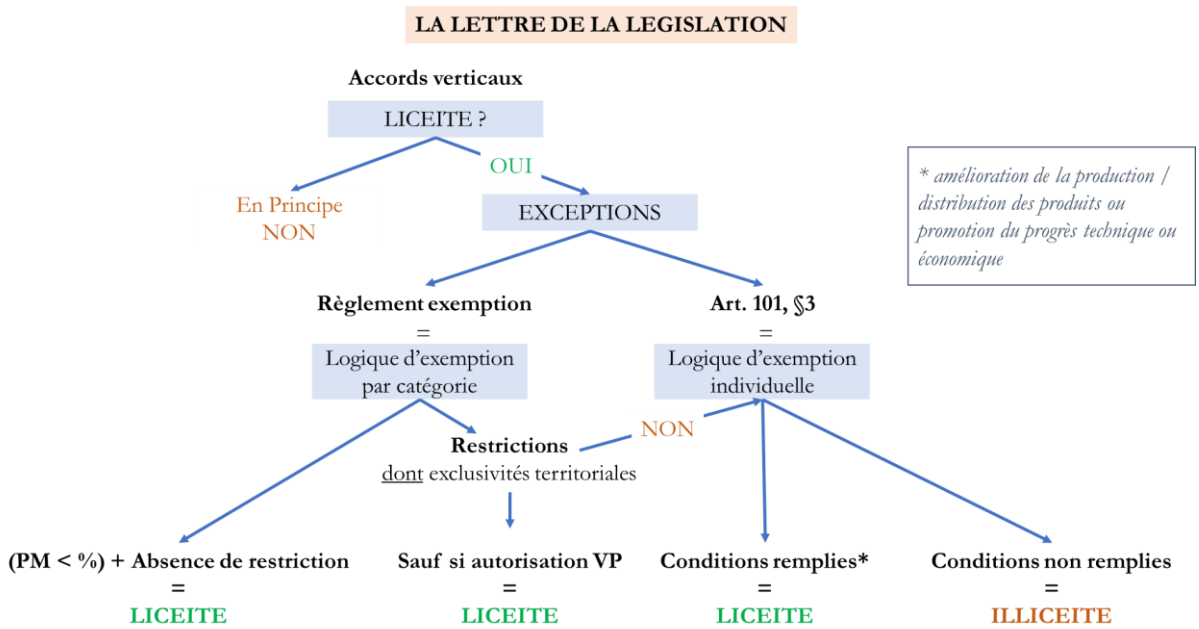


Diagram of an exclusive distribution organisation

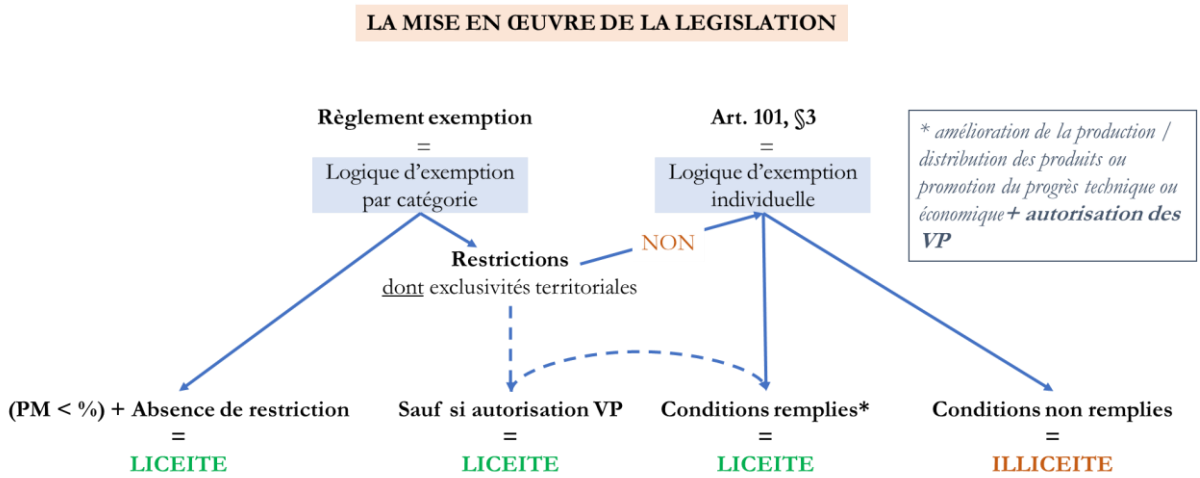
Illustration of a passive sale

15. A questionable shift in the place of passive sales. Passive sales feature in European texts in an exemption regulation context. Therefore, strictly speaking, it should still be possible to save an agreement that does not allow passive sales by proving that the conditions of Article 101 (3) TFEU are met. Indeed the logic of the regulation is to save agreements *a priori* and by categories but outside the scope of the exemption regulation, we fall back on the logic of individual assessment.



<u>According to the letter of the law</u>, permission of passive sales (PV) only appears in the study of conditions for benefiting from the exemption regulation, and in the particular scenario of territorial exclusivities existing; Art. 101 (3) makes no mention of permitting PVs (see box)

16. Yet the Commission seems to make passive sales a *sine qua non* condition of the legality of the agreement[31]. Admittedly, while it is true that although it is theoretically possible to demonstrate that an agreement prohibiting passive sales can still fall under Article 101 (3) TFEU[32], it is very difficult to demonstrate in practice. **Yet the normal reasoning must be properly understood. While passive sales are a condition for benefiting *a priori* from an exemption regulation, they must not be allowed to gradually become a general and necessary condition for an organisation of distribution to be legal under competition law. It should be possible to save the agreement despite the absence of passive sales under Article 101 (3).**



In the implementation of the law, it would appear that passive selling has gradually become a condition to be met in order to benefit from individual exemption under Article 101 (3) TFEU (see box)

1. 2. How passive sales have been implemented in the audiovisual sector: introduction to the Sky case

17. **Inquiry and statement of objections.** On 13 January 2014, the Directorate-General for Competition of the European Commission launched a major inquiry among American studios and European broadcasters into the distribution of audiovisual works on European territory by pay-TV channels[33]. These channels broadcast their programmes by satellite or online[34]. The inquiry finally resulted in a statement of objections on 23 July 2015 regarding agreements between the

[31] See *infra* no. 42 et s. for the discussion on the qualification of passive sales as a restriction by object and the Court's position on the question.
[32] And therefore escape the prohibition.
[33] The European Commission has created a page dedicated to the case, available at the following address: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40023
[34] Not all of the broadcasters originally referred to were ultimately investigated further: this was the case in particular for the French channel Canal plus. The channel nonetheless remained involved in the proceedings as an interested third party, as did other actors such as certain European producers, the EFADs (*European Film Agency Directors*, a kind of equivalent to France's CNC at European level), the *British Film Institute*, etc. The Canal plus channel in particular appealed against the Commission's decision validating Paramount's commitments. In these proceedings, it received considerable support from the French Government for the defence of territoriality.

British channel *Sky UK* and six American studios[35]. The Commission accused these actors of contractually organising *absolute territorial exclusivities* through geo-blocking when distributing audiovisual works on European territory. By virtue of the clauses contained in the agreements between American studios and distributors, the latter can only distribute works on a predetermined territory and must refuse to respond to solicitations from customers on another territory: passive sales are contractually prohibited. Agreements between studios and distributors are thus based:

- on a territorial organisation of distribution in which the supplier (the American studios) guarantees each distributor (television channels for example) exclusivity on its territory
- and, moreover, on the obligation for each distributor to respect the territorial exclusivity of other distributors by refusing to respond to any solicitation – even spontaneous – from a consumer located on a territory outside of its sphere of exclusivity.

18. In its statement of objections, the Commission thus concluded that Article 101 of the TFEU had probably been breached[36]: the clauses in question had the effect of "*partitioning the internal market along national borders*"[37]; henceforth, "*in the absence of convincing justification, the clauses would constitute a serious violation of EU rules that prohibit anticompetitive agreements (Article 101 of the Treaty on the Functioning of the European Union)*"[38]. For the distribution of audiovisual works, the Commission thus reasoned in a similar way to the Court of Justice of the European Union regarding the organisation of football match broadcasts on European territory in the *Premier League* case[39].

19. Commitments made by Paramount. On 15 April 2016, one of the studios referred to in the statement of objections, the *Paramount* studio, decided to make commitments[40] which were validated by the Commission on 26 July 2016[41], on the basis of Article 9 of Regulation no. 1/2003[42], thus making them binding. The commitments in question remove from the agreements concluded between the *Paramount* studio and the British pay-TV channel *Sky* the clauses prohibiting *Sky* from responding to consumer requests for access to *Paramount*'s catalogue of works, even if these customers are located outside of *Sky*'s exclusive territory[43]. In other words, the commitments have

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[35] Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland (IP/15/5432). The studios in question are: *Walt Disney, NBCUniversal, Paramount Pictures, 20th Century Fox, Warner Bros and Sony Pictures.* The rather limited nature of the statement of objections can be explained, without any really tangible grounds to support it, by the Commission's strategy of attacking only American and British protagonists, who are probably less attached to the question of copyright territoriality. The statement of objections constitutes a preliminary assessment within the meaning of Article 9 (1) (article on commitments) of Council Regulation 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 (hereinafter "2003 Regulation").

[36] And 53 of the article on the European Economic Area (EEA).

[37] Press release of 23 July 2015.

[38] *Ibidem*.

[39] CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others versus QC Leisure and Others* and *Karen Murphy versus Media Protection Services Ltd*. In this case, the Court had found that the clauses between the *Premier League* (holder of football match broadcasting rights) to broadcasters "*prohibit the broadcasters from effecting any cross-border provision of services that relates to those matches, which enables each broadcaster to be granted absolute territorial exclusivity in the area covered by its licence*" (point 142). Thus noting the elimination of competition between the various broadcasters as well as the lack of justification for such a contractual organisation, the Court found that Article 1 TFEU had been breached.

[40] Commitments made on 22 April 2016 (*OJEU* C 141/13 dated 22 April 2016), in accordance with Article 9 (1) of the aforementioned 2003 Regulation.

[41] Case AT.40023 – Cross-border access to pay-TV.

[42] Aforementioned 2003 Regulation.

[43] More specifically, the following commitments were made legally binding on Paramount:

the effect of enabling – and not requiring – *Sky* to conclude passive sales with consumers located outside of its exclusive territory.

20. Appeal by the *Canal +* group. The *Canal* + group appealed before the Court of the European Union on 8 December 2016 against the Commission's decision validating the commitments made by *Paramount*[44]. This appeal was rejected in a decision of the Court of the European Union on 12 December 2018[45].

21. Decision of the Court. The decision remains difficult to analyse, in any case: we must not misunderstand its scope; it is not possible, in principle, to consider that the European Judge is really ruling on the merits of the case. It is for the Court to rule on the Commission's decision which makes the commitments made by Paramount binding. Such commitments have "*the effect of dispelling the competition's concerns […] by precluding any infringement of Article 101 (1) TFEU in the future*"[46]. By accepting them, the Commission is meant to content itself with noting that they are a prerequisite for dispelling the risk of an infringement of competition rules[47]. Therefore, on the one hand, the commitments can go beyond what would be strictly necessary to bring an end to the infringement[48]. On the other hand, by accepting the commitments, the Commission is not carrying out a detailed, in-depth analysis of the incriminated practice. For example, in the *Sky* case, the Commission's decision says nothing about the possibility that the organisation of the market for the distribution of audiovisual works prior to the commitment might conform to the provisions of Article 101 (3) TFEU. This is precisely why the Court, when considering the appeal against the Commission's decision, explains that it is not for the Court, in this context, "*to rule on the arguments whereby the applicant alleges that the relevant clauses promote cultural production and diversity and that their abolition will allegedly jeopardise cultural production within the European Union*" [49]. **One possible**

(i) when licensing its film output for pay-TV to a broadcaster in the EEA, Paramount will not (re)introduce contractual obligations, which prevent or limit a broadcaster from responding to unsolicited requests from consumers within the EEA but outside of the broadcaster's licensed territory (no "Broadcaster Obligation");
(ii) when licensing its film output for pay-TV to a broadcaster in the EEA, Paramount will not (re)introduce contractual obligations, which require it to prohibit or limit broadcasters located outside the licensed territory from responding to unsolicited requests from consumers within the licensed territory (no "Paramount Obligation");
(iii) Paramount will not seek to bring an action before a court or tribunal for the violation of a Broadcaster Obligation in an existing licensing agreement;
(iv) Paramount will not act upon or enforce a Paramount Obligation in an existing licensing agreement.
The commitments will apply for a period of five years following notification of the decision of the Commission and are legally binding on *Paramount* as well as its successors in title and subsidiaries.

[44]The appeal by the *Canal* + group was based on Article 263 of the TFEU. In the judgment of 13 July 2017, the *European Consumer Organisation* (BEUC) was allowed to intervene in support of the Commission; *l'Union des producteurs de cinéma* (UPC), the *European Film Agency Directors* (EFADs) and *C More Entertainment AB* (Swedish pay-TV channel) were allowed to intervene in support of the Canal + group's conclusions. The French Republic was also allowed to intervene in support of the applicant (*Canal* +).

[45] CFIEU, 12 December 2018, case T-873/16, *Canal + group v European Commission.*

[46] Point 64 of the Court's decision.

[47] This fear of a breach of competition rules is what originally justified the proceedings. The Commission must also, during the preliminary assessment phase, carry out an analysis of the market and demonstrate the reality of the breach of competition rules in a sufficiently precise manner to allow possible examination by the European judge. V. L. Vogel, *op. cit.*, no. 228, p. 437.

[48] The commitments may in particular go beyond what the Commission might impose in the context of proceedings to end an infringement provided for by Article 7 of the 2003 Regulation. V. L. Vogel, *op. cit.*, no. 228, p. 436.

[49] Point 66 of the Court's decision; "*Those arguments may, on the other hand, be put forward by the applicant before the national court*". *Adde* point 99 of the decision: "*Article 9 of Regulation No 1/2003 is based on considerations of procedural economy and is designed to ensure the effective application of the rules on competition laid down in the FEU Treaty through the adoption of decisions that make binding commitments proposed by the parties and deemed appropriate by the Commission in order to provide a more rapid solution to the competition problems which it has identified. In that context, the Commission's role is confined to examining, and possibly accepting,*

interpretation of the Court's decision is therefore that the jurisdiction contented itself with verifying that the Commission had accepted the commitments that brought an end to the illegal activity.

22. It is nonetheless disturbing to note that the Court takes a position on the merits of the case on several occasions. This is particularly clear when the Court deems that clauses prohibiting passive sales "*impose restrictions that go beyond what is necessary for the production and distribution of audiovisual works that require protection of intellectual property rights and thus do not satisfy at least one of the cumulative conditions laid down in Article 101(3) TFEU, namely the condition that the agreement in question does not impose on the undertakings concerned restrictions which are not indispensable for the protection of those rights*"[50]. Moreover, the Court is making the same shift as the Commission with regard to the role that passive sales are supposed to play in the analysis of the legality of distribution patterns for audiovisual works. It is no longer only a matter of verifying that the distribution agreements benefit from the exemption in principle of the regulation – the original role of passive sales – but of observing that the agreements in question do not comply with the prohibition of cartels[51]. In other words, the Court is keen to stress that the clauses prohibiting passive sales do not satisfy Article 101 (3) TFEU, whereas this was not strictly necessary in the context of this particular appeal. The Court also limits itself to making assertions here. We cannot help but notice there seems to be no justification for what is termed "*absolute territorial protection*" in the eyes of the European authorities[52].

23. Subsequent commitments. During the proceeding or after the Court's decision, a number of studios involved in the Commission inquiry initiated in 2014 made similar commitments to those made by *Paramount* in 2016[53] :

- on 25 October 2018, in the middle of its merger with *Fox, Disney* offered the Commission commitments on the basis of Article 9 of the 2003 Regulation, commitments which were later clarified on 5 February 2019
- on 12 and 13 December 2018[54], *NBCUniversal*, *Sony*, *Warner Bros.* and *Sky* also offered new commitments

24. Therefore, in the context of the pay-TV market and in particular in agreements between the main American studios and European television channels, **clauses limiting or prohibiting**

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the commitments offered by the undertakings concerned in the light of the problems identified by it in its preliminary assessment and having regard to the aims pursued".

[50] Point 67 of the Court's decision.

[51] Point 45 of the Court's decision: "*when the agreements concluded by the copyright holder contain clauses under which the holder is thereafter required to prohibit all its contracting partners on the EEA market from making passive sales to geographic markets situated outside the Member State in respect of which it grants them an exclusive licence, those clauses confer a contractually specified absolute territorial exclusivity and thereby infringe Article 101(1) TFEU*".

[52] The circular reasoning that is often used in the Court's decision itself shows the impossibility of providing a justification. One example is paragraph 68. Here, the Court asserts that "*absolute territorial protection manifestly goes beyond what is indispensable for the improvement of the production or distribution or the promotion of technical or economic progress required by Article 101(3) TFEU, as shown by the prohibition, intended by the parties to the agreements concerned, of any cross-border supply of television broadcast services*". In short, the Court finds no justification for the "*absolute territorial exclusivity*" organised by the parties because it finds that the parties are enforcing this absolute territorial exclusivity… But how is it possible to object to a behaviour for which justification is sought by saying that this behaviour has been observed…?

[53] On 25 October 2018, the *Disney* studios offered their commitments; on 12 December 2018, it was the turn of the *NBCUniversal* and *Sony Pictures* studio, along with the broadcaster *Sky*. Lastly, on 13 December 2018, the *Warner* studio offered its commitments. All of this information can be found on the European Commission's page dedicated to the *Sky* case*: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40023*

[54] In other words, respectively on the same day and the day after the CFIEU decision on the appeal by Canal +.

passive sales are gradually disappearing. However, it should be noted that judging by *Disney*'s commitments, the commitments specify systematically that they are made without prejudice to copyright legislation[55], raising questions about the scope and terms of implementation of passive sales[56].

25. The general context of copyright territoriality being called into question. The question of the application of passive sales to the distribution of works arises within a more general context of discussions on the limits of the copyright territoriality principle in Europe[57].

[55] And without prejudice to the rules on portability, derived from the European Parliament and Council Regulation (EU) 2017/1128 of 14 June 2017 on cross-border portability of online content services in the internal market *OJEU L* 168, 30 June 2017, pp. 1-1, see *infra* no. 60 for further developments of this Regulation.
[56] See in particular *infra* no. 64 et s.
[57] See no. 60 et s. for this aspect.

2. The problems caused by transposing the passive sales theory to the distribution of audiovisual works

26. Passive sales have been designed mainly for a world of physical distribution of material objects. Therefore, their application to the broadcasting of audiovisual works poses problems of consistency in itself: is it possible to keep using the term "passive sale" when an audiovisual work is being distributed (2. 1.)? Moreover, the context of digital distribution raises particular issues (2. 2.).

2. 1. Transposing the passive sales theory to the online audiovisual sector raises an issue of terminology

27. A passive sale requires two conditions to be met: a sale (i) and passivity of the seller in the conclusion of this sale (ii). However, it is doubtful whether these two basic requirements are met when the broadcasting of audiovisual works is at issue.

(i) Is it possible to speak of a "sale"?

28. "Sale" in the copyright sense. Is the term distribution not misleading when applied to audiovisual works? In competition law, distribution covers both marketing of goods and provision of services. In copyright, the term distribution has a narrower meaning, implying a transfer of ownership[58]. A sale is thus a mode of distribution in which transfer of ownership takes place in exchange for payment of a price. One might ask, therefore, whether it is appropriate to use the term "sale" in the field of intellectual property rights licensing. Is there at any time a transfer of a property right, even intangible, in the context of copyright licensing?

29. "Sale" classification for the distribution of a dematerialised software program (*Usedsoft* judgment). The Court of Justice of the European Union already had the opportunity to examine the question during the *Usedsoft* case[59], in the context of software licences and expiry of the right to distribute software. In this case, the Court in particular considered the question of whether "*the contractual relationship between [the software copyright holder] and its customer, within which the downloading of a copy of the program in question has taken place, may be regarded as a* 'first sale of a copy of a program*' within the meaning of Article 4(2) of Directive 2009/24*"[60]. In interpreting the directive in question, the CJEU had concluded that the "*transfer by the copyright holder to a customer of a copy of a computer program, accompanied by the conclusion between the same parties of a user licence agreement, constitutes a* 'first sale of a copy of a program*' within the meaning of Article 4(2) of Directive 2009/24*". Therefore, in interpreting the Directive on software protection, the CJEU unambiguously (but contrary to the existing doctrine) classified the transfer of a copy of a computer program to a customer as a "*sale*".

30. The necessarily strict interpretation of the *Usedsoft* judgment. We must be wary of generalisations based on the Court's solution in the *Usedsoft* judgment, and avoid transposing this solution generally to all transfers of an immaterial copy of a protected object. Firstly, the CJEU

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[58] See the definition in Article 6. 1. of the World Intellectual Property Organisation (WIPO) Copyright Treaty dated 20 December 1996: "Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale *or other transfer of ownership*" (emphasis ours). *Adde* CJEU, 17 April 2008, case C 456/06, *Peek & Cloppenburg v Cassina SpA,* spec. point 33.

[59] CJEU, 3 July 2012, case C−128/11, *Usedsoft v Oracle* (hereinafter *Usedsoft*).

[60] See in particular point 38 of the *Usedsoft* decision.

clearly states, in this same decision, that it is interpreting the Directive in relation to software, for which the legislator may not have wanted to make a distinction between immaterial and material copies, unlike the Directive on copyright and related rights in the information society of 22 May 2001, for example. The concept of a sale thus provided is indeed specific to the "*distribution*" of a particular category of works: software programs[61]. Next, in the *Usedsoft* case, a copy of the software is made and is located on the customer's hardware, which is *a priori* different from the service offered by *Sky*, for example, when the channel offers its programmes to its customers. In any case, we would have to check, on a case-by-case basis, that a copy of the work is indeed transferred onto customers' hardware for us to be able to apply the *Usedsoft* solution by analogy. Although it could possibly be envisaged when the work is transmitted online, it is far less likely to apply to works transmitted by satellite. Above all, the *Usedsoft* case only permits the sale classification to be used for software programs; no mention is made of the sale of copies of any audiovisual works. Therefore, it seems to us that even if we adopt a broad interpretation of the *Usedsoft* decision, it is hard to say that a sale of a copy of the audiovisual works is taking place within the meaning of copyright, especially in the context of the *Sky* affair. So this already poses an initial problem with applying the concept of *sales*, even passive ones.

31. The danger of adopting a broad concept of "*sale*" in the field of copyright. We must admit that for the definition of "*passive sales*", the guidelines focus on the fact of "*responding to unsolicited requests from individual customers including delivery of goods* or services *to such customers*"[62]. It is possible to say that by making audiovisual works available, one is providing a service. From this point of view, the refusal to classify the distribution of an audiovisual work as a "*sale*" is no longer appropriate. **However, this means transposing classifications derived from competition law to acts which fall under copyright law**. Structurally, competition law takes a broader and more flexible approach to concepts, in order to cover a broader range of situations and expand its field of application[63]. Above all, competition law adopts an economic perspective: from this point of view, there may be no real distinction between the existence of a sale strictly speaking[64] or a communication of the work to the public[65]. Therefore, the approach is not the same as for copyright. And it so happens that the "*sale*" classification applied broadly to copyright, far from being neutral, weakens the implementation of copyright. Indeed, the right to distribution is exhausted in a European context: once they have authorised the distribution of copies of their work on a European territory, the author or copyright holder no longer controls their fate. The copies may circulate and be distributed to all other European territories, without the copyright holder being able to object. **Likening the distribution of audiovisual works over the Internet to a sale is therefore not only open to criticism with regard to the operation of legal classification, it is also in itself an insidious factor in the erosion of copyright.**

(ii) Is it possible to identify "passive" behaviour by the distributor?

32. Passivity outside of the digital realm. In the term "passive selling", passivity refers to

[61] See in particular point 58 of the *Usedsoft* decision.
[62] Point 51 of the guidelines. Emphasis ours.
[63] For example, competition law adopts a very flexible concept of the *undertaking*: it is the entity that pursues an economic activity and to which the competition rules are applied. From the point of view of this body of law, it does not matter whether it has legal personality or not. What matters is its activity on the market.
[64] Which implies a transfer of ownership.
[65] Which does not imply that there is a transfer of ownership.

the attitude of the distributor. In the context of a vertical agreement based on territorial exclusivities granted and imposed on each distributor, it means that they are not to solicit customers located in competing distributors' spheres of exclusivity. Indeed, active sales are defined as sales resulting from prospecting and in this context, the Commission refers to very varied means such as "*direct mail, including the sending of unsolicited e-mails*", or "*advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory*"[66]. On the other hand, "*general advertising or promotion*" that reaches customers outside of the sphere of exclusivity without targeting them exclusively will be included in passive sales[67].

33. Difficulties relating to digital technology. The difficulty is that digital technology is totally blurring the issue of customer targeting. It is much easier for a distributor to reach customers outside of its sphere of exclusivity, while giving the appearance of targeting customers within its sphere of exclusivity. Social networks can subtly play a role in promoting products, for example through Internet users spreading a promotional message, without it being possible to classify such behaviour as prospecting within the meaning of passive sales. The audiences thus targeted can easily be located beyond contractually defined territories. In other words, digital technology makes it possible, under the guise of an absence of promotion, to carry out very effective prospecting – probably more effective than the traditional means used in active selling – within the meaning of the guidelines.

34. In conclusion, it is possible to assert that according to a certain interpretation, there is no sale strictly speaking, nor any real passivity in a digital world, particularly on the market for the distribution of works online or by satellite. However, it should be noted that neither the European Commission nor the Court of First Instance of the European Union accept this argument for the impossibility – or at least the difficulty – of distinguishing between *active* sales and *passive* sales in a digital context. On the contrary, according to the European authorities, digital technology makes it possible to "*to regulate active promotion activities in order to limit them to the territory for which an exclusive licence is granted*"[68].

The impact of digital technology on the way agreements are concluded also arises from another point of view: it is no longer a question of considering that prospecting is made easier, as we have just discussed, which calls into question the passive nature of the sale. The next question is whether digital technology has the effect of allowing such a spread of passive sales that in response, it would be appropriate to reconsider their merits.

2. 2. Digital technology requires a change in implementation of the passive sales theory

35. Digital technology is a factor in the spread of passive sales (i). For the Commission, this is an additional reason to encourage the conclusion of passive sales (ii). Yet one could defend the exact opposite position (iii).

(i) Digital technology has the potential effect of encouraging passive sales

36. A customer seeking to buy goods or services from a territory other than their territory of

[66] Guidelines, point 51.
[67] *Ibidem.*
[68] See in particular the aforementioned decision of the Court, dated 12 December 2018, especially points 55 and 58.

residence faces different restrictions depending on whether the context is analogue or digital. In a world of digital distribution, passive selling is doubly facilitated: on the one hand by the consumer, who has much easier access to the information and can therefore easily identify a distributor of goods, even if the latter is not prospecting[69]; on the other, digital technology makes it easier to acquire the goods in practice. Moreover, if the goods are themselves in digital format, the "distribution" of the goods is the same globally, whether or not the distributor is located on the same territory as the buyer[70]. Additionally, we must admit that the digital tool can also be a factor in reinforcing territorial exclusivities by enabling the distributor to engage in geo-blocking. Customers located outside of the territory are easily identified and, technically, it is simple to prevent them from concluding the agreement[71]. This is precisely what the European Commission is fighting against.

(ii) The European Commission takes a very favourable approach to passive sales in a digital context

37. The Commission itself is well aware of the role that the Internet can play in passive sales. In its own words, "*the internet is a powerful tool to reach more and different customers than will be reached when only more traditional sales methods are used […]. In general, having a website is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor. The fact that it may have effects outside one's own territory or customer group results from the technology […]. If a customer visits the web site of a distributor and contacts the distributor and if such contact leads to a sale, including delivery, then that is considered passive selling*"[72]. Thus, according to the Commission, digital technology has the consequence of increasing the volume of passive sales. This observation, far from calling into question the requirement for passive sales, is considered by the Commission to be a real opportunity for consumers that must not be hindered, as to do so would constitute a restriction on sales: "*If a customer visits the website of a distributor and contacts the distributor and if such contact leads to a sale, including delivery, then that is considered passive selling. The same holds if a customer opts to be kept (automatically) informed by the distributor and this leads to a sale*"[73]. Moreover, "*On their own the language options used on the website or in the communication are considered a part of passive selling*"[74]. The Commission thus takes a very favourable approach to passive selling in the distribution of goods over the Internet: passive selling includes sales where the distributor quite clearly wishes to attract consumers on other territories, for example using a website offering language options other than the language of its territory of exclusivity[75]. Moreover, the Commission identifies a number of situations that it deems to be "*hardcore restrictions of passing selling*", including a web user being unable to access the website of a distributor on another territory or a customer being geo-blocked at the payment stage[76]. From the same perspective, in the *Pierre Fabre* case[77], the

[69] The argument developed here is therefore different from that relating to the false passivity of the distributor, *supra* no. 32 et s.

[70] With practical difficulties nonetheless, concerning payment methods, and regulatory difficulties, see in particular *infra* no. 89 et s.

[71] And there again, there are workaround solutions, in particular by using a VPN (virtual private network) enabling web users to use a misleading IP address and give the impression that they are on the distributor's territory.

[72] Point 52 of the guidelines.

[73] Point 52 of the guidelines.

[74] Point 52 of the guidelines.

[75] A typical example of this would be a distributor who has exclusivity on a European territory but offers products for sale on its website in foreign languages and for users on other territories.

[76] Points 52 a) and b) of the guidelines.

[77] CJEU, 13 Oct. 2011, case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Others*, *Europe* Dec. 2011, comm. 471, obs. L. Idot. Report and Press release of 17 May 2001, IP/01, 713, Yves Saint Laurent. Press release of 6 December 2001, IP/00/1418, *BW / Loudspeakers*. But the *Coty* case adds nuance to this

Court of Justice ruled that a clause in a selective distribution agreement prohibiting distributors from selling products over the Internet constituted a restriction of competition by object, unless the clause was objectively justified.

38. In the view of the European authorities, a distributor must therefore at all times be able to allow the conclusion of a passive sale, failing which it contravenes the rules of competition law. **While we can understand how, technically, the digital tool facilitates the conclusion of passive sales, it precisely seems to us that legally, this phenomenon could call into question the very principle of the tolerance of passive sales, since this volume of sales risks eventually competing with distributors' exclusivities. The legitimacy of the theory itself is then called into question.**

(iii) Digital technology fundamentally raises an issue with the legitimacy of passive sales

39. The basis of the passive sales theory is, as we have seen, relatively vague. This is a requirement originating in case-law which was later explicitly taken up by the exemption regulations[78]. The fact of permitting the conclusion of passive sales reflects the wider desire of the Commission[79] to **fight absolute territorial exclusivities** which, according to its analysis, are directly at odds with the establishment of the internal market, especially when geographical exclusivities coincide with state borders[80]. We find this idea as far back as 1966 in the *Consten and Grundig* judgment[81]. Passive sales have the function of limiting absolute territorial exclusivities while preserving the vertical agreement: the volume of sales resulting from spontaneous solicitations can indeed only be marginal since by definition customers are not solicited, a different situation from active sales. Distributors' territorial exclusivity is therefore largely preserved: active sales outside of the exclusivity remain prohibited; distributors cannot compete directly on their territories of exclusivity. In the analogue world, the passive sales theory is justified in particular with reference to de ***minimis*** **logic**, even though this is never explicitly explained as such: passive sales cannot cause a major change to distributors' situation since they are only marginal by their very nature. However, they make life easier for some individual customers by fulfilling their spontaneous demand[82]. Henceforth, in a digital distribution scenario, we may legitimately ask the question:

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approach. At least, the Court admits that the desire to protect a product's luxury image can justify the refusal to allow it to be distributed on certain platforms (*Amazon* in this case): CJEU, 6 December 2017, case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*.

[78] We find an explicit mention of "*passive sales*" in the exemption regulation no. 2970/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. Passive sales do not appear in the earlier version dating from 1983 (Regulation no. 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements).

[79] Or more generally that of the European authorities.

[80] Decis. no. 88/86 of the Commission, 18 Dec. 1987, *OJEC*, no. L 49, 23 Feb. 1988, *Fisher-Price/Quaker Oats Ltd* (no express mention of the term "*passive sales*" but the reasoning on the impossibility of prohibiting parallel imports is very similar); CFIEC, 19 May 1999*, BASF Coatings (AG),* case T-175-95 (the decision explicitly uses the term "*passive sales*" and condemns an agreement prohibiting them); CJEC, 21 September 2006, *JCB Service,* case C-167-04 P (judgment in which the Court in particular sanctions the Commission's position that "passive sales must be allowed in an exclusive distribution system to avoid the disadvantages for competition outweighing the benefits", point 178).

[81] Aforementioned judgment.

[82] Increasing consumers' well-being constitutes an important argument, as always in competition law. This preoccupation is explicit in the *Sky* case*:* see in particular the Commission's Press release on the statement of objections dated 23 July 2015, IP/15/5432, quoting the Commissioner in charge of competition policy, Margrethe Vestager: "*European consumers want to watch the pay-TV channels of their choice regardless of where they live or travel in the* EU*. Our investigation shows that they cannot do this today, also because licensing agreements between the major film studios and Sky UK do not allow consumers*

whereas the Commission rejoices in the Internet's role in passive sales, on the contrary, does this tool not radically call the legitimacy of these sales into question?[83] In other words, the basis for the passive sales theory already seems fragile in the analogue world but is understandable. **Strictly speaking, the risk of a spread of passive sales in the digital era should call their very principle into question.** This is not the direction in which the Commission is heading, as it is tending on the contrary to give passive sales an increasingly privileged position.

40. Moreover, one question underlying the application of passive sales to the audiovisual sector concerns the appropriateness of applying such a theory in the digital era[84]. For passive sales, digital technology produces a variety of effects: on the one hand, it can give the false impression that a sale was passive when it was actually deliberately aimed at a consumer. On the other hand, the risk of an expansion of sales concluded in this way is such that we might ask whether it is still appropriate to distinguish between active sales and passive sales. This would involve reinstating a principle whereby the distributor, outside of its domain of exclusivity, could make neither active nor passive sales, in order to protect the functioning of the market.

Digital technology calls the distinction between passive sales and active sales into question. Once we are operating outside of the purely material world, it should be impossible for this theory to continue playing the role currently assigned to it.

in other EU countries to access Sky's UK and Irish pay-TV services, via satellite or online. We believe that this may be in breach of EU competition rules."

[83] This observation is perhaps even more important with regard to another approximation: the Commission sometimes refers to the beneficiaries of passive sales as "*individual customers*". It is not clear whether this excludes professionals. The ability for professionals to conclude passive sales in another territory would radically disrupt the distribution market for audiovisual works.

[84] In reality the problem goes beyond the specific issue of passive sales, it is a more general problem: it is often difficult to transpose concepts arising from the analogue world to the digital world. Contrary to what is often proclaimed, the technology is far from neutral.

3. Passive sales applied to audiovisual distribution raise questions about the logic of competition law

41. Competition law views the prohibition of passive sales as a restriction by object (3. 1). However, a flexible implementation of the passive sales theory is desirable (3. 2.)

3. 1. The prohibition of passive sales is viewed by competition law as a "restriction by object"

42. The act of classifying the prohibition of passive sales as a "*restriction by object*" has consequences in evidentiary matters, generally speaking and in particular for the *Sky* case (i). The particularly severe approach taken by the competition authorities can be explained by the priority given by them to the objective of free movement (ii).

(i) What are the issues at stake with the "restriction by object" classification?

43. **Restrictions by object and by effect**. The distinction between restrictions by object and restrictions by effect has a textual basis: the practices referred to in Articles 101 TFEU or L. 420-1 C. Com. are those which have "*the object or effect of preventing, restricting or distorting competition*"[85]. The criterion used to distinguish between a restriction by object or by effect is not intent but harmfulness: restrictions by object are those considered particularly severe, those considered to have "*harmful effects in all cases*"[86]. Certainty – or virtual certainty – of the harmful effect forms the basis for the classification[87], which the Court of Justice explicitly repeated in the *Cartes bancaires* judgment[88]: restrictions by object are defined as "*collusive behabiours [which] may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market*"; restrictions by effect cover behaviours that do not present "*a sufficient degree of harm to the competition*", which implies that "*the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent*". So it is very explicitly the "*degree of harm*" that is the decisive factor in making a distinction between restriction by object and by effect[89].

44. **Evidentiary issue.** The issue of the distinction lies in the evidentiary field: a restriction by object classification lightens the burden incumbent on the competent authority. There is no need to prove the effects of a restriction by object on the market in order to condemn it, because prior experience makes it possible to predict its harm. Although, following the logic of the texts,

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[85] Emphasis ours.

[86] S. Gervasoni, "Restriction par objet, restriction par effet : quelle portée encore accorder à cette distinction ?", *Concurrences*, 17 April 2015.

[87] M. Behar-Touchais, "Restriction par objet, restriction par effet : quelle portée encore accorder à cette distinction ?", *Concurrences*, 17 April 2015.

[88] See CJEU, 11 Sept. 2014, case C-67/13 P, *Groupement des cartes bancaires (CB) v Commission,* point 51. This case has been analysed as constituting a return to a strict conception by the Court of the restriction by object, which it seemed to have abandoned for a while.

[89] Beyond the text of the decision, the distinction between restriction by object or by effect is less clear: for example, the Court of Justice takes account of the context of the practice and advocates a concrete and individual examination in both cases. It also sometimes tends to take account of the effects of the practice when deciding whether to classify it as a restriction by object… So in reality, the difference between the two practices is one of degree rather than nature, see S. Gervasoni, aforementioned art..

European law allows for the possibility of saving a restriction by object[90], in practice, it will be very difficult – perhaps even impossible – to do so[91].

45. The restriction by object in the *Sky* case. In the *Sky* case, and more generally in cases where territorial protections are at issue[92], the European authorities consider that the fact of not permitting passive sales by introducing geo-blocking constitutes a restriction by object[93]. A similar reasoning had previously been followed in the *Premier League* judgment[94]: **the harmful effect of the restriction lay in its adverse effects on the internal market. Yet the Court had taken a far more nuanced approach in the *Coditel II* judgment[95].**

46. In the ***Sky*** case, the European authorities, and the CFIEU in particular, deem that **territorial exclusivity could be replaced by a system of multi-territorial licences** taking account of the effective and potential audience in each Member State in question[96]: such a system would be more favourable to European consumers; distributors would offset losses incurred by abandoning exclusivity by extending their territorial field of action. Apart from the fact that the demonstration was not supported and in a way is limited to making assertions, the reasoning completely neglected the balances and legal principles on which the European audiovisual landscape is based[97]. The shift in European jurisprudence that we have observed in this area is a cause for concern for all parties involved in the sector given the issues at stake.

(ii) The restriction by object classification reveals the priority given by the European Union authorities to the objective of free movement, to the detriment of an approach based on economic efficiency

47. An analysis based on the form of behaviour. By classifying the prohibition of passive sales as a restriction by object, the Commission is adopting a reasoning based on the form of the litigious behaviour rather than its effects: it views territorial restrictions as restrictions of competition because they infringe on the internal market. Indeed, the exercising of exclusivities on a territory-by-territory basis is contradictory to the idea of a single market, within which goods and services circulate unhindered. From this point of view, therefore, following this market logic, we can understand the authorities' hostility to exclusivities: they block free movement by creating legal barriers. But beyond this observation, territorial restrictions should be analysed in terms of their economic efficiency, that is, in terms of the quantity, diversity and quality of the goods and services produced and distributed.

48. The necessity of taking the efficiency of exclusivities into account. The economic analysis indeed teaches us that in a distribution system, exclusivities granted to the distributor can be justified in some situations as they constitute incentives to distribute better and more widely. Economists thus value inter-brand competition – that is, competition between undertakings

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[90] Restriction by object is not in principle synonymous with restriction *per se*.
[91] See M. Behar-Touchais, aforementioned art..
[92] See for example the aforementioned judgment of the Court of Justice on *Consten and Grundig*.
[93] See in particular point 48 of the Court's decision.
[94] Aforementioned judgment. In this judgment, the Court of Justice deemed that "*an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of a single market*"; henceforth, such agreements "*must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) TFEU*" (emphasis ours, point 139).
[95] CJEU, 6 October 1982, case 262/81, *Coditel SA and Others v Ciné-Vog Films SA and Others*, *OJEC* 1982, p. 3381.
[96] See the decision of the CFIEU, mainly points 55 to 57.
[97] See *infra* no. 56 et s. for the problems posed with regard to copyright and no. 74 et s. for the problems posed with regard to the European audiovisual economic system.

offering competing goods or services on the same market – to the detriment of intra-brand competition – that is, competition between distributors of the same goods or services[98], even if this means being less favourable to the free movement of the goods or services in question. From this point of view, the economic analysis is more favourable to vertical restrictions – for example, territorial exclusivities granted to distributors – than the European competition authorities sometimes are, as these authorities must also – and above all? – pursue the objective of market integration[99]. This competition policy is generally observed in all European law[100]: **focussing on building and maintaining the internal market, the authorities all too often – although not systematically[101] – neglect the consequences in terms of economic efficiency**. The difficulty is perhaps even more significant when the exclusivities are based not only on a commercial and contractual organisation but also on the implementation of literary and artistic property rights.

3. 2. Regulating passive sales over time could limit their adverse effect while preserving the logic of competition

49. The approach which consists in taking a more flexible approach to passive sales is firstly found in texts which sometimes recommend regulating this requirement over time (i). This reasoning could be transposed to the audiovisual sector (ii).

(i) The idea of regulating passive sales over time appears in some texts in order to protect the appearance of a new product

50. New product and regulation over time. Exclusivities are not systematically fought by competition law. Some texts show that a desire to preserve exclusivities still exists in some cases, in particular in vertical restraint situations. For example, the guidelines on vertical agreements acknowledge that it can be helpful to preserve territorial exclusivities by postponing implementation of the passive sales theory, particularly when **a new product** has come into existence[102]. The guidelines take account of the fact that the distributor who first introduces a product to the market in question "*may have to commit substantial investments to start up and/or develop the new market where there was previously no demand for that type of product in general or for that type of product from that producer*". Yet, the Commission continues, "*such expenses may often be sunk*", to the point that "*in such circumstances it could well be the case that the distributor would not enter into the distribution agreement without protection for a certain period of time against (active and) passive sales into its territory or to its customer group by other distributors*". Therefore, for the Commission, absolute territorial exclusivities can be justified, for a time, by the behaviour that they entail on the distributor's side. And the Commission

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98 M. Motta, *Competition policy - Theory and practice*, Cambridge Univ. Press 2004, pp. 305 et s.

99 Moreover, American competition law, which integrated the economic analysis much earlier on, takes a less dogmatic approach and refuses to implement the passive sales theory, preferring to preserve exclusivities that ensure a certain economic efficiency. The Chicago School, in particular the writings of Judge Richard Posner, influenced American law from the 1970s onwards and in the field of vertical restraints, led to a far more flexible approach that is much more favourable to exclusivities. For the French research into vertical restraints, please refer to P. Rey and J. Tirole, *Handbook of Industrial Organization,* 2007, published by Elsevier, vol. 3, spec. chapter 3, pp. 2145-2220.

100 V. *supra* no. 47 et s. on the confusion between the objective of competition and the objective of an internal market. *Adde* no. 98.

101 Some decisions acknowledge the benefits of exclusivities, particularly when they are based on intellectual property rights: see for example the aforementioned *Coditel II* decision (CJEU, 6 October 1982, case 262/81). In this judgment, the Court of Justice deems that a contractual prohibition against broadcasting a film within an exclusive territory under licence to another does not intrinsically breach Article 85 EEC (now 101 TFEU).

102 Particularly point 61 of the guidelines referring explicitly to the arrival of a "*new brand*".

specifies that in these circumstances, "*restrictions of passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup these investments generally fall outside Article 101(1) during the first two years that this distributor is selling the contract goods or services in that territory or to that customer group, even though such hardcore restrictions are in general presumed to fall within Article 101(1)*". **A special place is therefore reserved for vertical restraints, and especially territorial exclusivities, for the purpose of encouraging distributors to make the investments needed to introduce a new product to a territory**.

51. Technology transfers and regulation over time. Following the same logic, we can also add the guidelines on the application of Article 101(1) TFEU to technology transfers[103]: the Commission recalls that the prohibition of passive sales concluded by licensees on a territory is "*normally a hardcore restriction*" but that it can escape Article 101(1) TFEU for a "*certain duration if the restrictions are objectively necessary for the […] licensee to penetrate a new market*"[104]. "*This may be the case where licensees have to commit substantial investments in production assets and promotional activities in order to start up and develop a new market*". In this case, the prohibition of passive sales can be tolerated because, in the absence of (temporary) absolute exclusivity, "*it is often the case that licensees would not enter into the licence agreement*"[105]. We can conclude from this that competitive logic – economic logic, in the texts – invites a **more moderate application of passive sales than the Commission seems to want, particularly in the *Sky* case.**

(ii) Why regulate passive sales over time in the audiovisual sector?

52. Preliminary comment: false exclusivities in the audiovisual sector? If we precisely observe the functioning of the audiovisual market, we can see that distributors' territorial exclusivity is relative. If only because there is a multitude of ways to exploit audiovisual works and even if cinematographic works in particular are governed by media chronology rules[106], the exclusive release windows available to the various distributors all overlap after a while[107]. Therefore, after a maximum of 4 years, there is actually no more real exclusivity within each territory: all forms of exploitation compete with each other[108]. **To summarise, exclusivity only ever relates to a given mode of exploitation. This exclusivity is usually temporary and the modes of exploitation may sometimes be concomitant or in competition[109].** In other words, from the point of view of industry professionals, consumers' expectations are usually satisfied.

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[103] The Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, *OJEU* no. C 89, 28 March 2014 and see commentary by L. Idot, *Europe* no. 5, May 2014, comm. 212. The aforementioned exemption regulation for technology transfers of 2014 formally ended the temporary tolerance of the prohibition of passive sales which existed in the regulation prior to 2004 but the logic is found once more in the guidelines.

[104] Point 126 of the guidelines on technology transfers.

[105] As in the guidelines on vertical restraints, the Commission deems that the prohibition of passive sales must be tolerated for a period of around two years or more, for the period "necessary for the licensee to recoup those investments. In most cases a period of up to two years from the date on which the contract product was first put on the market in the exclusive territory by the licensee in question or sold to its exclusive customer group would be considered sufficient for the licensee to recoup the investments made. However, in an individual case a longer period of protection for the licensee might be necessary in order for the licensee to recoup the costs incurred" (point 126).

[106] See *infra* no. 83 et s.

[107] Exploitation in cinemas, DVD and VoD, film channels, pay-TV, SVoD, general interest channels, etc. See *infra* no. 83 et s. for developments in media chronology.

[108] Against which one could argue that competitive reasoning views each mode of exploitation as a relevant market in itself, to the point that on each market, there is indeed "absolute" exclusivity.

[109] However, for a rejection – without explanation – of this argument, see the decision of the Court, point 70.

53. Protecting investment in the audiovisual sector. It is possible to transpose the reasoning defended by the aforementioned texts to the audiovisual sector. Audiovisual production requires several kinds of investment by distributors: creative expenses, costs of linguistic adaptation of the work, promoting the work in the media or highlighting the work on the relevant platforms[110]. The production model for audiovisual works in Europe also has the particularity of being based, in part, on pre-financing of the works by distributors in the phase upstream of production[111]. The volume of investment required and the risk inherent in this type of activity call for this type of financing. The system has not developed in this way for convenience but out of necessity. Participating distributors therefore expect to recoup these investments when the work is exploited on their territory, which is only possible if they are, for a time, the only ones to distribute the work in question in the mode of communication concerned. The risk of not recouping these investments would totally discourage distributors from making them[112], jeopardising production funding as well as the functioning of the audiovisual market[113].

54. Protecting competition on the audiovisual market. By wanting to apply the passive sales theory too narrowly (and immediately) to the distribution of audiovisual works, we run the risk of a long-term reduction in competition: the loss of control over the distribution of works by American studios could lead them to distribute their own works, to integrate vertically in other words. The other risk is that of encouraging the creation of one big, single distributor of audiovisual works on European territory, a distributor that has managed to benefit from passive sales and succeeded in absorbing competing distributors. Here we come back to a lesson from the economic analysis, which has sometimes been endorsed by the judges and which we have already discussed: it is preferable to allow the absence of intra-brand competition for a while in order to encourage inter-brand competition in the long run[114].

This questioning is all the more important since it is reasonable to wonder if the Commission is trying to solve a problem that does not exist. This is now a long-running debate between the Commission and the stakeholders. For example, is there really a demand for access to audiovisual works on European territory that is not being met? Is there really an efficiency problem in the audiovisual sector? It is doubtful. The application of passive sales to the audiovisual sector is all the more worrying as copyright is fundamentally at stake, in its exercise of course, but perhaps, more radically, in its existence. The fundamental characteristics of this right are indeed called into question by passive sales.

55. Distinguishing between free movement and economic efficiency. The question of the exhaustion of copyright is a central one, of course, since it is a question of reconciling the implementation of copyright on the one hand and the logic of competition law on the other, especially when the latter is confused with the objective of free movement. As already noted, when the authorities consider vertical restraints from the perspective of competitive logic, their findings

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110 Here we are talking about editorialisation.

111 See *infra* no. 74 et s. on the audiovisual market.

112 The mechanism is particularly well described by the Commission in the guidelines on technology transfers, another form of transfer of intangible assets, point 126: "The risks facing a new licensee may therefore be substantial, in particular since promotional expenses and investment in assets required to produce on the basis of a particular technology are often sunk, that is to say, that upon leaving that particular field of activity the investment cannot be used by the licensee for other activities or sold other than at a significant loss."

113 See *infra* no. 74 et s. on the audiovisual market.

114 See *supra* no. 47 et s.

may be favourable to restrictions as they encourage distributors to make efforts that improve the quality of goods for consumers. On the other hand, when the question is viewed through the prism of the free movement principle, the perspective is very different and it then becomes very difficult to save the vertical agreement, even if it is based on the exercise of copyright, an exclusive right of ownership.

The logic of free movement must not prevail systematically over competitive logic. It must be accepted that it may be desirable to tolerate partitioning in some cases, where it benefits consumers in the long run.

4. Passive sales applied to audiovisual distribution raise questions regarding the logic of copyright

56. The calling into question of territorial exclusivities through recourse to the passive sales theory is in itself an infringement on the exclusive nature of copyright (4. 1). Furthermore, there are serious problems with the terms of implementation of passive sales on the audiovisual market with regard to respect for copyright (4. 2).

4. 1. The implementation of the passive sales theory challenges the exclusive nature of copyright, whereas the European normative context aims to protect it

57. Exclusivity is the foundation of copyright. It is part of its nature (i). Moreover, the latest European texts directly or indirectly related to the territorial exclusivity of copyright can be read as a direct or indirect reaffirmation of European law's attachment to the exclusivity principle, and therefore of the possibility of a territory-by-territory exercise of copyright (ii). In this context, the implementation of the passive sales theory seems all the more unjustified (iii).

(i) Exclusivity is the foundation of copyright and is only challenged very circumstantially

58. Affirmation of the exclusivity of copyright. The patrimonial aspect of literary and artistic property law is based on the recognition of an exclusive right for the benefit of creators and rightholders. This characteristic, directly derived from property law, is enshrined in French law[115] as well as at European[116] and international level[117]. Apart from a set of exceptions[118], only the author or those assigned the rights to their works can decide their fate: allow them to be exploited or prohibit it, decide on the terms of exploitation where applicable[119]. Therefore, when a studio chooses a distributor for their works on a given territory, and imposes and limits the terms for exploiting these works, all under an agreement, this is an expression of the exclusivity of its rights to its works[120]. Copyright is therefore by nature the power to say "yes" or "no", "how", "when" and "how much". This universal approach is naturally sanctioned by the Court of Justice of the

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115 Art. L. 111-1 of the CPI (French Intellectual Property Code): "The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons."

116 For the definition of the right of reproduction, please refer to Article 2 of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJEU* L 167, 22 June 2001, pp. 10-19 (hereinafter the "DADVSI directive"). Article 3 on the definition of the right of communication to the public, along with the many references to "the exclusivity" of the rights thus granted to authors in this European text alone, considered to constitute common European copyright law, from the very pen of the Court of Justice (see the aforementioned *Usedsoft* decision, point 56: the directive on the legal protection of computer programs ("constitutes a *lex specialis*" in relation to the DADVSI directive).

117 See in particular Article 9 (definition of the right of reproduction) and Article 11 (definition of the right of representation) of the World Intellectual Property Organisation (WIPO) Treaty on copyright of 20 December 1996, which constitutes the latest arrangement of the Berne Convention to date. The CJEU has affirmed several times that the Berne Convention is an integral part of Union law.

118 It should also be noted that when an exception to copyright is made, it is necessary to check that the exception passes the three-step test and that in particular, the implementation of the exception runs no risk of infringing on the normal exploitation of the work. Here, there is a serious risk of the implementation of the passive sales theory opening up a market in direct competition to the normal exploitation of works.

119 See Ch. Caron, *Droit d'auteur et droits voisins*, Lexis Nexis, 4th ed., 2015, spec. no. 297, p. 260.

120 In French domestic law, Article L. 131-3 of the CPI explicitly states that in order to be valid, the assignment of copyright must specify the territory concerned: "Transfer of authors' rights shall be subject to each of the assigned rights being separately mentioned in the instrument of assignment and the field of exploitation of the assigned rights being defined as to its scope and purpose, *as to place* and as to duration" (emphasis ours).

European Union. It is accepted worldwide that the patrimonial rights granted to an author are divided into two aspects: on the one hand, the right to allow the use of a work; on the other, the right to prohibit it. The latter aspect was highlighted by the Court of Justice in its presentation of what is commonly known as the exploitation monopoly. Thus the CJEU was able to state in point 30 of its decision given – in its Grand Chamber – on 30 June 2016[121]: "*Under Article 3(1) of Directive 2001/29, authors have a right which is preventive in nature and allows them to intervene, between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such use*" (emphasis ours).

59. Exception to the exhaustion of the right of distribution. The strength of this exclusivity is attenuated by European law, in order to integrate the principle of free movement of goods into the internal market, under very specific conditions: this is exhaustion of the right of distribution. Indeed, the exercise of copyright, an exclusive right, *a priori* conflicts with the European logic of the single market: the territoriality of rights – directly derived from the exclusive nature of copyright – recreates, for the circulation of works, the borders that the free movement principle is meant to abolish. This opposition is not new and since the 1970s, the Court of Justice has been developing a solution of reconciliation with the theory of the exhaustion of the right to distribute material copies of works[122]: once the rightholder has consented to the circulation of physical copies of their work on one European territory, they can no longer oppose their circulation, in particular through imports, within other territories of the Union; this permission then applies to all territories of the Union. As things currently stand, the jurisprudence on the exhaustion of rights only applies to the physical distribution of copies of a work or to an immaterial copy of a software program[123]. The jurisprudence thus excludes the exhaustion of **the right of communication[124], a kind of immaterial distribution of works. The exhaustion of the right of distribution, a kind of exception to the territoriality of rights, is therefore only interpreted strictly and corresponds to clearly defined hypotheses.**

(ii) The latest European texts implicitly reaffirm the attachment to a possible territorial implementation of copyright

60. The latest texts from Europe on copyright[125] are all still founded on the exclusivity principle – even when expressly tempering it - and also recall the principle of its territoriality, even if the aim

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121 CJEU, (Grand Chamber) 31 May 2016, Case C-117/15, *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH versus Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)*

122 The first decisions on the exhaustion of the right of distribution concerned the sale of music recordings: see CJEC, 8 June 1971, case 78-70, *Deutsche Grammophon v Metro-SB-Großmärkte GmbH & Co. KG, Rec.* 1971, p. 487 and CJEC, 20 Jan. 1981, joined cases 55/80 and 57/80, *Musik-Vertrieb v* GEMA, *Rec.* CJCE 1981, I, p. 117. The Court sought to reconcile the old Articles 30 and 36 of the Treaty of Rome (the Treaty instituting the European Economic Community or CEE) dated 25 March 1957. Article 30: "Quantitative restrictions on imports and all measures having equivalent effect shall […] be prohibited between Member States". Article 36 constitutes an exception to the implementation of Article 30, particularly if restrictions are linked to the protection of "industrial and commercial property", as long as there is no disguised restriction).

123 *Usedsoft* judgment.

124 CJEC, 18 March 1980, case 62/79, *Coditel and Others v Ciné Vog Films and Others*, *Rec.* 1980, p. 881 (*Coditel I*). Only the right of reproduction is exhausted, not the right of communication to the public (right of representation in French law), see Ch. Caron, *op. cit.,* spec. no. 319, p. 289. More recently, but on the other side of the Atlantic, see the *ReDigi* decision whereby the American judge refused to sanction the doctrine of the *first sale* and declared that the activity of reselling mp3 files on the used goods market was illegal: District Court Southern District of New York, *Capital Records LLC v ReDigi Inc,* 30 March 2013.

125 We could also add a text from French soft law to this: in the audiovisual field in France, transparency agreements require producers to account for each territory.

is apparently to limit its exercise. With regard to this last aspect, apart from the Directive of 12 December 2006 on services in the internal market[126], which explicitly excludes copyright and related rights, and intellectual property rights in general, from the field of free provision of services[127], we can identify three recent texts which in one way or another, directly or indirectly, have upheld the copyright territoriality principle, in contexts where it could have been abandoned: the portability regulation dated 14 June 2017[128], the geo-blocking regulation dated 28 February 2018[129] and the text amending the satellite and cable directive of 1993[130], dated 17 April 2019[131].

- **the Portability Regulation** seeks to allow consumers residing in one European Union Member State and subscribing to an online content service[132] in their original country of residence to access this content, even content protected by intellectual property rights, when they are temporarily residing in another Member State. In practice, this access was not possible before the regulation, because the content suppliers only held rights for the State of habitual residence. By means of a legal fiction[133], the regulation allows access to services in all European Union States, while explicitly affirming that it has no intention of changing "*the existing licensing models, such as territorial licensing*" or "*affecting the existing financing mechanisms*"[134]. Moreover, the Regulation very explicitly distinguishes between the issue that it addresses and that of passive sales, specifying that this text cannot form the basis for such sales: "*The concept of cross-border portability of online content services should be distinguished from that of cross-border access by consumers to online content services provided in a Member State other than their Member State of residence, which is not covered by this Regulation*"[135].
- **the Geo-blocking Regulation** seeks to remove geographical blocks put in place by online services, which have the effect of restricting each consumer to national online services. The regulation excludes a number of industries from its scope, and in particular Audiovisual services, including "*services the principle purpose of which is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licenses*"[136]. Moreover, the review

[126] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJEU* L 376, 27 Dec. 2006 pp. 36–68.
[127] Art. 17. 11 of the directive on services.
[128] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, *OJEU L* 168, 30 June 2017, pp. 1-11 ("portability regulation"), applicable since 20 March 2018.
[129] Regulation (EU) 2018/302 of the European Parliament and of the Council of 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 (hereinafter "geo-blocking regulation").
[130] Council Directive 93/83/EEC of 27 September 1993, on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *OJEU* L 248, 6.10.1993, pp. 15-21.
[131] Directive of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC.
[132] Subscription to a pay-TV channel (*Canal* + or *OCS,* for example), an SVoD service (*Netflix, Amazon*) or an online music service (*Deezer, Apple music*, etc.).
[133] Art. 4 of the portability regulation: "*The provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber's Member State of residence*".
[134] Recital 12 of the portability regulation. In the wording used in the text, territorial licences are associated with the "high level of protection guaranteed by copyright and related rights in the Union".
[135] Recital 12 *in fine* of the portability regulation.
[136] Geo-blocking regulation, recital 8.

clause specifies that the question of the scope of the regulation will need to be discussed again in particular, for the purpose of "*assessing […] whether this Regulation should also apply to electronically supplied services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter*". However, and this clarification is fundamental, the regulation clearly specifies that this extension of the scope should only take place "*provided that the trader has the requisite rights for the relevant territories*", **which *a priori* excludes, for example, a passive selling mechanism, even if the scope of the regulation is extended to include audiovisual works.**

- **the Directive on certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes**[137] seeks to extend the country of origin principle in order to facilitate the broadcasting of programmes in the context of ancillary online services[138]. The country of origin principle, already set out by the 1993 directive on the broadcasting of works by satellite[139], indeed makes it easier to obtain rights to the programmes in question, by avoiding a territory-by-territory negotiation process: this principle is directly contrary to a territory-by-territory exercise of copyright. It nonetheless is still very narrowly restricted in the new text: only relationships between rightholders and broadcasting organisations are concerned by the country of origin principle[140]. Moreover, only certain programmes are concerned: news and information programmes, and programmes entirely financed by the organisation[141]. Furthermore, similarly to the portability regulation, this directive text affirms its autonomy – even its antinomy? – in relation to passive sales: "*The country of origin principle set out in this Directive should not result in any obligation for broadcasting organisations […] to provide such ancillary online services in a Member State other than the Member State of their principal establishment*"[142].

61. These texts do not merely acknowledge the reality of copyright territoriality: implicitly, they sanction it. And they all seem to reject the implementation of passive sales, albeit in a different way. There are two ways to interpret this legislative landscape. The first consists in commenting that when the balances are considered at the normative level, between all stakeholders, copyright exclusivity, which at European level results in a different implementation of copyright in each Member State, is preserved: its benefit is acknowledged to be sufficiently legitimate for this principle to be "sanctuarised". Consequently, the application of a rule derived from competition law (passive sales theory), which might curb or break the territorial exercise of these rights, would affect copyright exclusivity and so could only be viewed as illegitimate. Indeed, it **would potentially constitute a much more general derogation from the exclusivity principle than the texts referred to, in line with a far more radical logic of free movement**. The other way of interpreting these texts is to say that the implementation of competition rules is still European common law, so the passive sales theory can be implemented despite this normative

137 Aforementioned directive of the European Parliament and of the Council of 17 April 2019.
138 Catch-up TV, online streaming, etc.
139 See also *infra* no. 70 et s.
140 Recital 9 of the directive of 17 April 2019.
141 Recital 10 and Article 3 of the directive of 17 April 2019.
142 Recital 11 of the directive of 17 April 2019.

context which is rather favourable to copyright exclusivity [143]. But what would be the good of drawing up specific laws, after considering the imperatives of competition as well as the specific needs of literary and artistic property, only to undo the previously designed and desired balances later on? How could a department of the Commission destroy a construction that was carefully thought over by the Parliament, the Council and… the Commission? And all within such a short space of time.

62. The challenge to exclusivity in the *Sky* case. Territorial exclusivity in agreements concluded between studios and distributors of audiovisual works is therefore not only the result of a commercial strategy: **it is a way of exercising a right recognised by all texts on copyright, at all levels in the hierarchy of standards**[144]. Since copyright territoriality results from the contractual implementation of the exclusive right granted to rightholders, it makes no sense to give the assurance, as the Commission does, that the proceedings brought against *Paramount* and the other American studios are only meant to challenge contractual restrictions and not copyright[145]. On the contrary, one could go so far as to assert that **contractual restrictions are a natural expression of copyright, which is based on an appropriation principle implemented by a system of reservations**. Territoriality is the consequence of exclusivity, a principle of property law, of which copyright is a manifestation. In fact, exclusivity has been proclaimed to have constitutional value in some countries[146]. It is naturally present in all national constructions that respect the worldwide legal order. It is consubstantial with the proprietary nature of copyright law, which puts the latter in the category of fundamental rights. Thus, the Charter of Fundamental Rights of the European Union, of 18 December 2000[147], guarantees, in Article 17. 2, the protection of intellectual property under the "right to property". **This status of fundamental right is also recognised by the Court of Justice of the European Union**[148] and can be deduced from the jurisprudence of the European Court of Human Rights[149]. The solutions of the French

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[143] This can also be one way of interpreting Recital 13 of the directive of 17 April 2019, which states that "*On account of the principle of contractual freedom, it will remain possible to limit the exploitation of the rights affected by the country of origin principle set out in this Directive,* ***provided that any such limitation is in compliance with Union law***" (emphasis ours).

[144] Moreover, European texts and court decisions now attach copyright to the fundamental rights.

[145] Which refers to a kind of distinction between the existence and exercise of copyright, which we find in particular in the decisions applying competition law to copyright law.

[146] Like in the United States of America, for example.

[147] O.J. no. C 364/01, 18 December 2000.

[148] CJEU (Grand Chamber), 12 September 2006, case C-479/04, *Laserdisken ApS v Kulturministeriet*: point 65 "*In the present case, the alleged restriction on the freedom to receive information is justified in the light of the need to protect intellectual property rights, including copyright, which form part of the right to property*".

Adde: CJEU, 2nd ch., 8 September 2016, case C-160/15, *GS Media BV v Sanoma Media Netherland BV and Others*: "*31. At the same time, it follows from recitals 3 and 31 of Directive 2001/29 that the harmonisation effected by it is to maintain, in particular in the electronic environment, a fair balance between, on one hand, the interests of copyright holders and related rights in protecting their intellectual property rights, safeguarded by Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and, on the other, the protection of the interests and fundamental rights of users of protected objects, in particular their freedom of expression*".

[149] ECHR, 29 Jan. 2008, case 19247/03, *Balan v Moldova*.

In this case, a photographer complained that one of his works, depicting a Moldovan castle, had been reproduced without his permission (and without remuneration) on all national identity cards issued by the State of Moldova to its citizens. In this decision, the Court in Strasbourg acknowledged that works of the mind protected by copyright are "property" within the meaning of the European Convention on Human Rights and more specifically within the meaning of Article 1 of the first additional protocol. To characterise the infringement of the photographer's copyright, the Court verified that the copyright infringement committed by the Moldovan State was not justified by "the public interest", in accordance with Article 1(2) of the aforementioned protocol (the usual reasoning in cases of conflict between two fundamental rights). To do this, it performed a "proportionality test" consisting in analysing the use of

Constitutional Council are in the same vein[150].

63. Conclusion. As a result, attacking the territoriality of literary and artistic property rights means attacking the exclusivity principle and thus detracting from one of the fundamental effects of copyright, running the risk of transforming its very nature. We might question the benefit of a paradigm shift when this transformation would not necessarily have the consequence of actually offering consumers access to audiovisual works[151] – access for which we wonder if there is even a real demand[152] – and when it would also have significant practical effects that could threaten the funding and therefore perhaps the very existence of a European audiovisual industry[153].

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the work with regard to the public interest aim concerned, which led it to conclude that the copyright violation could not be justified.

[150] Decision no. 2006-540 DC of 27 July 2006*: "14. The right to property appears in the list of the Rights of Man enshrined in Article 2 of the Declaration of 1789; Article 17 of the latter states that 'Since the right to property is inviolable and sacred, no one shall be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and on condition that fair and prior compensation is given'; 15. The purposes and conditions for exercising the right to property have since 1789 undergone changes in the form of an extension of the scope thereof to new fields; among the latter are to be found intellectual property rights and related rights in the information society*".

[151] The commitments require the prohibition of passive sales, they do not require the conclusion of sales spontaneously solicited by consumers, see *infra* no. 64 et s.

[152] See *infra* no. 75 et s.

[153] See *infra* no. 74 et s.

4. 2. The modes of implementation of the passive sales theory raise questions about respect for copyright

64. Preamble on the scope of passive sales. We should recall that, following the logic of competition law, the passive sales theory consists in not prohibiting them, without necessarily imposing them. For example, as mentioned above, *Paramount*'s commitments consisted in removing clauses prohibiting distributors – in this case the *Sky* channel – from making passive sales but in no way guaranteed that such sales would take place. In short, it is an obligation not to prohibit the supplier from passive selling, not an obligation for the distributor to engage in it, and it also seems to us that the conditions for a refusal to sell would not, in this case, be met[154]. These circumstances therefore put the consistency of the commitments into perspective. However, if we take the reasoning further and imagine a scenario where such sales are taking place, difficulties arise.

65. Identification of copyright-specific problems. The difficulties discussed here are specific to the distribution of materials protected by literary and artistic rights[155]. The existence of these rights implies that for a distributor to be able to exploit works on a territory, it must have obtained the rights for that territory (or benefit from an expressly provided exception). Yet in the audiovisual sector, it is common practice for distributors to obtain rights not for the entire territory of Europe but only for a given territory within it – sometimes for a linguistic area[156]. For example, the *Sky* channel negotiates rights to exploit works and offer them to its customers for the United Kingdom and Ireland: it is on these territories that the channel can make active sales, by virtue of its agreements with the studios which are the original holders of the rights to the audiovisual works. Thus, for example, the *Sky* channel negotiates rights to exploit works and offer them to its customers for the United Kingdom and Ireland: it is on these territories that the channel can make active sales under its agreements with the studios holding the rights to the audiovisual works. The application of the passive sales theory aims to permit *Sky* to allow access to its programmes, by satellite or online, to customers located on territories outside of the United Kingdom and Ireland. This provision is therefore outside of the contractually negotiated rights. However, the Commission does not rule on the modalities of this openness to passive sales (how, for example, can they avoid the accusation of infringement that may be incurred by satisfying the consumer's request?), to the point that one wonders if it has fully grasped the problem. In reality, several hypotheses are conceivable without it being possible to know which solution is thought necessary by those promoting the application of the theory. To illustrate the problem, we will take the Sky channel's situation as an example even though on the one hand, as we have said, this report is not intended to deal with this particular case and on the other, the authors of this report are unaware of the actual situation of the parties in this dispute.

- The first hypothesis is based on the idea that passive sales do not require any additional rights to be obtained, other than those obtained in the context of the initial agreement (i).
- According to the second hypothesis, on the contrary, the distributor must obtain the rights to all territories, whether the sales are passive or active (ii).

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[154] See appendix on developments in the refusal to sell.
[155] Copyright and rights related to copyright.
[156] See *infra* no. 74 et s. on the functioning of the audiovisual market in Europe.

- Lastly, the third hypothesis joins a reasoning implemented in the portability regulation and is based on the admission of a legal fiction (iii).

(i) First hypothesis: passive sales do not require rights to be obtained on territories covered beyond the exclusivity area

66. Statement of the hypothesis. The first hypothesis is to assume that the Commission considers that the *Sky* channel must grant customers outside of the territory of exclusivity access to the works without having obtained the rights from the holders upstream. This situation would lead to the unauthorised exploitation of a protected work, i.e. an act of infringement. This situation would be even more open to criticism from a legal point of view than when, for example, the European authorities implement the theory of essential facilities for the exercise of copyright, since in these cases[157], the use of the object protected by a competitor is based on a compulsory licence and not an act of infringement.

67. Exclusion of the hypothesis. It is hard to imagine that the Commission could contemplate allowing a competition policy to be implemented at the cost of allowing acts of infringement, when European law itself protects copyright and considers that rightholders must obtain "*appropriate remuneration for the use of their works*"[158]. The Court of Justice has even considered that "*the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work*"[159]. Moreover, in the *Sky* case, the Commission and the Court alike repeat several times that the aim is not to challenge copyright. The contradiction seems too great for this hypothesis to be upheld. The informal discussions between the authors of this report and the Commission confirm its refusal to accept any infringing acts.

(ii) Second hypothesis: passive sales require rights to be obtained on all territories effectively covered

68. The second hypothesis is the opposite of the first: from a maximalist perspective, the implementation of the passive sales theory would be based on the obligation for the distributor to obtain, upstream, the rights relating to the audiovisual works that it wishes to distribute across all European territories. This solution would certainly have the advantage of respecting some copyright principles. It would nonetheless be unrealistic. Firstly, few distributors would be financially able to acquire the rights to audiovisual programmes for all of the Union's territories: passive sales would then have the effect of favouring the biggest distributors, **at the risk of a significant concentration of the sector**[160]. The other potential effect is that, **having lost control of their works on secondary markets, rightholders could end up demanding higher fees on the principal market**. The logic of exercising copyright market by market and its "essential function" would then be called into question without necessarily having any beneficial effects for

[157] The essential facilities theory has been applied to copyright, mainly in the following judgments: CJEC, 6 April 1995, joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP)* v *Commission of the European Communities, Rec*. 1995, I, p. 743 ("Magill"*)*; CJEU, 29 April 2004, case C-418/01 *IMS Health v NDC Health GmbH, Rec.* 2004, I, p. 5039 ("IMS Health"); CFIEU, 17 September 2007, case T-201/04, *Microsoft Corp. versus Commission of the European Communities*, *Rec.* 2007, II, p. 3601.

[158] Recital 10 of the DADVSI Directive.

[159] Aforementioned *Coditel I* judgment, point 14.

[160] See the 2015 study by the European Audiovisual Observatory, spec. p. 14, on the idea that the conclusion of multi-territorial agreements mainly benefits bigger SVoD services and that such a system would be to the detriment of smaller services.

the users of the works[161].

69. Moreover, the obligation to obtain rights for all territories of the Union **contravenes the principle of free trade and contractual freedom** since, according to this construction, the Commission would impose the geographical scope of agreements between studios and distributors[162] by requiring the latter to invest in geographical areas which, *a priori*, did not interest them.

(iii) Third hypothesis: passive sales are based on a legal fiction

70. Statement of the hypothesis. The third hypothesis refers to the creation in case-law of a legal fiction: acting *as if* the exploitation of the works, in the context of passive sales, were taking place only on the exclusive territory of the distributor. From this perspective, granting access to audiovisual works to a customer who spontaneously requests it does not constitute an infringement and does not require rights to have been acquired for the customer's actual territory of residence.

71. Analogy with the portability regulation. Here we can find an analogy with the system put in place at legislative level by the recent Portability Regulation described above[163]. This text seeks to solve the problem of consumers who have acquired a right to access protected works on their territory of residence, in particular by subscription[164], and when travelling to another Member State[165], wish to access the content in question, be it music, games, audiovisual works or sports events[166], on their "portable devices"[167]. In practice, and precisely for the purpose of respecting rightholders' territorial exclusivities[168], online content service providers arrange for content to be geo-blocked so their customers can no longer access the content in question once they are outside of their territory of residence[169]: this is one of the very real consequences of territorial exclusivities, which are increasingly having repercussions for consumers. To circumvent this difficulty, the regulation creates an obligation of cross-border portability which primarily concerns online content providers: these providers must allow their customers to access content in the Member State in which they are temporarily present, under the same conditions as if they were in their Member

161 The Court of Justice itself asserted that "*the right of a copyright owner and his assigns to require fees for any showing of a film*" as well as the requirement for appropriate remuneration were part of "*the essential function of copyright in this type of literary and artistic work*" (aforementioned *Coditel I* judgment, point 14).

162 It so happens that, in the specific field of copyright, the principle of contractual freedom is specifically referred to by the Directive of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, in its Recital 13.

163 See *supra*, no. 60.

164 The regulation specifically states that it applies "*to online content services which are provided against payment of money*" (Recital 18).

165 The first Recital of the portability regulation refers to the placement scenarios of "leisure, travel, business trips or learning mobility".

166 First Recital of the portability regulation.

167 The portability regulation refers to "*laptops, tablets and smartphones*", see Recital 2. The situation concerns for example a Canal + subscriber residing in France who wants to access the channel's video on demand service on his tablet while travelling in Italy.

168 Like radio broadcasting organisations for example.

169 In practice, providers of access to content services recognise internet protocol (IP) addresses and deny access when the address is outside of the territory covered by the licence contract. To the point that, as the portability regulation states, "*one of the obstacles to the cross-border portability of online content services is to be found in the contracts concluded between the providers of online content services and their subscribers, which reflect the territorial restriction clauses included in contracts concluded between those providers and the rightholders*" (Recital 10).

State of residence[170], even if they do not have these rights on the territories of temporary residence. This obligation is based on a legal fiction: when the customer demands access to services from the territory of temporary residence, the regulation "deems" the act in question to be taking place in the Member State of residence[171]. Technically, the act is indeed taking place on a territory other than the Member State which is the customer's habitual place of residence and therefore on a territory other than that for which the service in question holds the rights to exploit the works. However, the text acts "as if" the acts were taking place on the territory of residence, "as if" the online content service providers were performing the acts requested by the travelling customer on the basis of the permissions given by the rightholders to the providers[172]: this is an accepted "lie" in the European text[173].

72. Analogy with the satellite and cable directive (1993). The same logic of a territorial fiction had already been sanctioned in the text of the satellite and cable directive of 1993[174] and is found again in the text amending that directive[175]. The fact of permitting access to protected programmes by way of a satellite constitutes an act of communication to the public – or performance – of the programmes[176]. Retransmission by satellite thus assumes that the satellite bouquet has obtained the retransmission rights to be able to offer the programmes to its subscribers. In practice, the satellites' footprint is such that it crosses the national borders beyond which the satellite operators would like to limit their activity. Taking account of this reality, the satellite and cable directive pragmatically made a provision sanctioning the transmission theory in its first article[177]: the only law applicable to the act of broadcasting programmes by satellite is the law of the country from which the signal is transmitted, even though technically, the signal may be received beyond that territory and so potentially could benefit an audience located beyond the territory of transmission. This enables the satellite operator to avoid negotiating rights for territories that it does not particularly wish to cover but in actual fact does cover[178]. The operator only negotiates for one territory, the one from which the signal is transmitted and, legally, it is covered for all territories where the programmes are received.

73. Limits of the analogies. There are fundamental differences between the possible fiction underpinning the Commission's reasoning in the *Sky* case[179] and the other cases, expressly provided for, which have just been discussed. Firstly, the fictions proposed by the portability regulation and the satellite and cable directive are provided for by texts, the terms of which have been debated thoroughly by the parties involved in order to achieve a satisfactory balance, at least in theory[180].

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170 Article 3 and Recital 21 of the portability regulation.
171 Article 4 and Recital 23 of the portability regulation.
172 Recital 23 of the portability regulation.
173 To paraphrase J.-L. Baudouin, according to whom, "*the law lives on fictions which are opposed to reality, officialises lying and deliberately fabricates error*", in "Rapport général sur le thème : La vérité dans le droit des personnes – Aspects nouveaux", in *La vérité et le droit*, Travaux de l'Association Henri Capitant 1987, t. 38, Paris, Economica, 1989, p. 22.
174 Aforementioned directive.
175 Aforementioned directive of 17 April 2019, spec. Article 3 and Recital 9.
176 Article 2 of the 1993 directive, Art. L. 122-2 *in fine* of the CPI: "the transmission of a work to a satellite is viewed as a performance of the programme".
177 *Adde* Recital 14 of the 1993 directive.
178 If the European legislator had adopted the reception theory, satellite bouquets would have had to obtain as many permissions as there were territories covered, in practice, by the satellite's footprint. For developments, see Ch. Caron, *op. cit.*, spec. no. 320, p. 290.
179 Supposing that this is a correct interpretation.
180 For example, note the many recurrences in the portability regulation of the need to maintain a "*high level of protection*" for rightholders, alongside the creation of the portability requirement.

Next, the hypotheses referred to by the fictions in the texts cover acts that are potentially more limited than the application of the passive sales theory in a digital context. The satellite footprint, for example, remains geographically limited[181] and it was this technical limitation which convinced officials voting on the text that the transmission theory would not totally disrupt the implementation of copyright. The hypotheses put forward by the portability regulation are also meant to be limited to allowing works to be used by subscribers during occasional travel. This is a temporary solution to a provisional mobility situation. On the other hand, when applying the passive sales theory, the aim is to meet a demand from a consumer who is permanently based on a different territory from the distributor. Therefore, in these hypotheses, by construction, the works are only used to a limited extent, restricted by space or time. However, in the context of the *Sky* case or its equivalents, the passive sales could potentially be much greater: as things stand, there is no time limit on them[182], and for passive sales made using digital technology, there is no technical restraint limiting access to the works[183]. The potential high volume of passive sales in this context is such that one might wonder whether the market opened up in this way could ultimately replace the active sales market. If this were the case, implementing the passive sales theory could hinder the normal exploitation of the work, going back to one of the conditions of the three-step test which is imposed upon the legislator and which the judge applies in the context of exceptions to copyright. This reasoning would thus rely on an extension of the use of the works, which might have an effect that is not tolerated even in the context of legally agreed exceptions.

The passive sales theory is therefore a way for the European Commission, in the particular context of the distribution of audiovisual works, to free itself of the restrictions and balances provided for by European copyright law.

[181] The satellite footprint overlaps onto part of the territories adjacent to the territory of transmission but it is far from able to cover the whole territory of the European Union.

[182] Unlike the scenarios concerned by the portability regulation. See also the proposals for regulating the time window for implementing passive sales, *supra* no. 49 et s. and *infra* no. 98.

[183] Unlike the scenarios concerned by the satellite footprint, which remains limited in space. See *supra* on the problems caused by transposing passive sales to the digital distribution scenario, no. 35 et s.

5. The application of passive sales to audiovisual distribution could disrupt the economy of the audiovisual market

74. The implementation of passive sales poses problems specific to the audiovisual sector, of several kinds: financial (5. 2.), regulatory (5. 3.) and practical (5. 4.). But first, we should ask whether there really is a problem on the market in question (5.1.).

5. 1. Are passive sales a response to a real problem on the audiovisual market?

75. This is a legitimate line of enquiry with regard to the various questions discussed above, in view of the undesirable effects that applying the passive sales theory would have. Would the disruption of the current order be a response to a real need? Is there really a competition problem on the European audiovisual market?

76. The European authorities often start by observing that not all audiovisual works can be found on all territories, which justifies the application of competition rules to this sector. But is this truly a market problem or is it simply a reflection of a very specific market? In a *Green Paper* dated 2011, the Commission itself found that "*the European cinematographic industry is confronted with some unique structural characteristics including the language and cultural specificities and preferences of national markets and the limited availability of financial sources*"[184]. And it continued: "*European films often enjoy success in their home territory, but […] tend to have limited distribution and appeal outside the territory of their production*", which explains the "*fragmentation*" of the audiovisual market. A study by *Oxera, Oliver and Ohlbaum* in May 2016[185] provides insights into consumer behaviour in Europe with regard to audiovisual works and confirms the Commission's own findings very clearly. It notes that due to cultural habits and the language barrier, consumers prefer works made on their habitual territory of residence or at least in nearby regions or linguistic areas[186]. Additionally, apart from national works, only works in the English language, which are mainly British or American works, are popular with European consumers. At macroeconomic level, it is not possible to identify a massive demand among European consumers for access to all works produced on European territories. The study concludes that audiovisual markets are by nature territorial and that in order to meet demand, the works on offer to consumers are specifically developed for local markets[187]. **The partitioning of audiovisual markets is therefore not artificial, according to this study, but coincides with the nature of the demand for such works, not forgetting more exogenous factors**[188]. This casts doubt on the existence of a real competition problem on the European audiovisual market: is it not above all problem of demand? And is this demand – a minority one –

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[184] *European Commission Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market*, 13 July 2011, COM[2011] 427 final, p. 11 (hereinafter "Green Paper" or "Green Paper on online distribution"), p. 12. *Adde* the study by the European Audiovisual Observatory in 2015, spec. p. 21: "*the EU market is heterogeneous and highly fragmented […] and requires that distributors adapt to different national specificities and put into place specific marketing and distribution efforts on all platforms […]*".

[185] *Oxera, Oliver and Ohlbaum*, *The impact of cross-border access to audiovisual content on EU consumers* (hereinafter "the *Oxera and O&O* study" or "the Oxera study"), available at the following address: https://www.oxera.com/publications/the-impact-of-cross-border-access-to-audiovisual-content-on-eu-consumers/

[186] See the *Oxera and O&O* study, spec. pp. 26 et s. *Adde* V. O. Bomsel and C. Rosay, aforementioned art., spec. p. 3.

[187] See the *Oxera and O&O* study, spec. p. 27: "*AV markets are territorial – consumers demand locally tailored offerings, and are most responsive to localised marketing and promotional campaigns*".

[188] *Ibidem.* The study also notes other factors explaining the European audiovisual landscape: technical infrastructure, youth protection rules varying from one country to another, differing regulations, income disparity within the European territory, etc.

which the passive sales theory aims to meet substantial enough to merit risking certain unwelcome consequences that its implementation would entail?

At the present time, it is questionable whether there really is a competition problem on the European audiovisual market, and whether it would be advisable to run the risk of destructuring the audiovisual market by implementing passive sales.

5. 2. Applying the passive sales theory would create financing problems for the audiovisual sector

77. Need for editorialisation. The audiovisual sector functions in a particular way that distinguishes it from other sectors and explains the importance of territorial exclusivities. The content industry – and the audiovisual industry in particular – is an industry of prototypes, of goods "of experience"[189]. Consequently, distributors resort to a high degree of editorialisation, without which the content in question would be drowned out by the mass of other content[190]. This editorialisation effort – which is actually sometimes imposed or at least encouraged by the regulations, especially in France[191] – represents a substantial cost[192] that yields very unpredictable returns[193]. The Court of Justice of the European Union says so itself in its *Luksan* judgment of 9 February 2012: "*the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work and, second, that the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned*"[194]. It is therefore only in the distributor's interest to make a major investment if it is certain to avoid competition from other actors: it must benefit from exclusivity and, in the audiovisual industry, that means exclusive release windows[195] and territories of exclusivity[196]. This explanation, already mentioned above[197], in itself proves the legitimacy of some vertical agreements, and in particular some territorial exclusivities[198]: "*any other approach would have the effect of reducing average income per product, which would affect producers' international competitiveness as well as their ability to finance creative work*"[199]. Such a view of territorial exclusivities is moreover fairly typical in the field of distribution, outside of the audiovisual landscape, and this is what leads competition law to take a favourable approach to

189 O. Bomsel and C. Rosay, "De l'importance de la territorialité", Cerna, Mines Paris Tech, Nov. 2013.
190 *Ibidem.*
191 See *infra* no. 83 et s. on media chronology, respect for a certain editorialisation effort enables some SVoD services to benefit from distribution windows closer to the theatre release date.
192 See O. Bomsel and C. Rosay, aforementioned art., spec. p. 3: "*investments in Europe for the theatre release of an American blockbuster have now reached 25 million euros […], whereas the logistics of circulating the film (the copies) only cost 6.5 million euros. […] Media coverage costs 3 to 4 times more than distribution, in the logistical sense of the term*".
193 See O. Bomsel and C. Rosay, aforementioned art., spec. p. 3: "*media coverage costs are stranded costs, in other words they can only be recouped by selling the product*".
194 CJEU, 9 February 2012, case C. 277/10, *Martin Luksan versus Petrus van der Let*, spec. point 77.
195 See *infra* no. 83 et s. on media chronology.
196 See O. Bomsel and C. Rosay, aforementioned art., spec. p. 3: "*to avoid parasitism, the licence contract includes exclusivity clauses. These secure a return for the distributor and stimulate investment in media coverage*".
197 See *supra* no. 49 et s. and *infra* no. 98 on the need to regulate passive sales over time.
198 See in particular Recital 6 of the exemption regulation: "*Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels*".
199 See O. Bomsel and C. Rosay, aforementioned art., spec. p. 4.

vertical restraints under certain circumstances[200].

78. Pre-sales system. In addition, the audiovisual sector in Europe relies on a particular way of working that reinforces exclusivity: the pre-sales system. In practice, content producers have distributors partially finance their creation upstream, ensuring that these distributors benefit from territorial exclusivities to distribute the produced content in exchange for the sums paid before the production stage. **Therefore, in the audiovisual sector, territorial exclusivities are not solely based on the need to put a great deal of effort into marketing the works to customers, or on the exercise of copyright. They are also related to the financing model for the content itself. They have become almost consubstantial with it. The territorial exercise of rights makes it possible to attract finance; it also makes it possible to differentiate the prices charged to consumers, according to their territories of residence and therefore their desire to access the work in question[201].**

79. This way of working is peculiar to the sector: automobile dealers do not pre-finance the production of cars, nor do booksellers pay sums to publishers for the creation of literary works, to take an example from the cultural sector. In the texts on vertical restraints and especially territorial exclusivities, this factor is never discussed, probably because it is deemed too specific[202]. More disturbing is the total lack of reference to the specificity of the audiovisual sector and in particular the pre-sales system in the decision of the CFIEU in the *Sky* case.

80. The exclusivity granted to distributors in the audiovisual field is therefore unique in that it is justified by a multitude of interconnected reasons. This is a factor that should most certainly be taken into account when applying passive sales to the audiovisual sector. Geographical exclusivity should not only be seen as a comfortable way of distributing audiovisual works; as things stand, it is fundamental to the functioning of the market. The infringement of this exclusivity has, according to some studies, led to an estimated loss of billions in revenue per year for the film industry, which is in itself a very clear risk to production levels in the sector[203]. The Commission itself recognised this in its *Green Paper on the online distribution of audiovisual works*: "*any approach that removed from producers and distributors the opportunity to recoup investments through contractual distribution and marketing arrangements, would be likely to lead to a significant loss of incentive to invest in film production*"[204].

Key figures on cinema financing by television channels in France[205]

Focussing on the French case, pay-TV and free TV channels are key players in financing French and European film production. In 2018, these channels financed a total of 175 films, or 58.3% of all approved films, of which 159 were French initiatives[206]. It should however be noted that investment by television channels fell by 22.5%

[200] See in particular F. Buy, M. Lamoureux and J.-Ch. Roda, *op. cit*, spec. no. 104 et s., pp. 99 et s.

[201] See the *Oxera and O&O* study, in particular p. 29, in its passage on the decision to produce content: the possibility of discriminating by price, ahead of production, is a decisive factor when it comes to making the decision to produce upstream.

[202] The only justification for tolerance of territorial restrictions is the marketing work downstream.

[203] See in particular the *Oxera and O&O* study which estimates that the loss of revenue for producers would be 8.2 billion euros in the short term, and says that the loss of well-being for consumers could be estimated at 9.3 billion euros and that production of content would fall by 48% (see table 5.1 p. 76).

[204] Aforementioned Green Paper on online distribution, spec. p. 11.

[205] The figures all come from the aforementioned CNC study "La production cinématographique en 2018" for 2018.

[206] Which accounts for 65% of French-initiated films. For all of these figures, see the CNC study "La production cinématographique en 2018", spec. p. 27 published on 18 March 2019 and available at the following address: https://www.cnc.fr/cinema/etudes-et-rapports/etudes-prospectives/la-production-cinematographique-en-2018_959126.

in 2018, the year in which the number of films financed was at its lowest level in 10 years[207]. The channels' contribution is especially important to French films with a budget exceeding 4 M€[208]: television channels finance 97.8%[209] of these French-initiated films exceeding 4 M€[210]. Moreover, **all budgets taken together, the channels contribute an average of 1.72 M€ to the French-initiated films that they finance and cover 30.8% of their costs[211]**.

For pre-purchases, the role of the pay-TV channels – the ones which benefit from the first release windows – is crucial and, among these pay-TV channels, Canal + plays a leading role by financing over 70% of all pay-TV channel investment[212]. In 2018, pay-TV channels pre-purchased a total of 164 films, i.e. over half of all approved films, including 154 French-initiated films, accounting for 65% of French-initiated films[213].

81. Apart from this very particular financing structure, the audiovisual sector also has a very specific regulation system, which offers another explanation for the exclusivity granted to distributors.

5. 3. Passive sales overlook the specific regulation of the audiovisual sector

82. Regulatory constraints, which are numerous in the audiovisual sector, have the effect of shaping a specific landscape and economy. The media chronology principle is the main issue here (i), but there are other financing obligations placed upon certain broadcasters (ii).

(i) Media chronology

83. Purpose of the media chronology system. The media chronology is a regulatory system designed for to protect certain methods of exploiting cinematographic works, movie theatres primarily[214], by setting release windows for the methods concerned. These time windows are mandatory, which normally prevents any exploitation of the work in the method in question before the agreed time. However, they may be amended when a film has not been a commercial success. Beyond this cultural and industrial purpose, from an economic viewpoint, the media chronology rules make it possible to charge consumers different prices according to their willingness to pay more for earlier access to works, thus maximising revenue for each work[215]. In France, the rules were introduced following the advent of television sets in private homes. Since then, the system has been periodically reviewed when new distribution methods have appeared, in particular those using digital technology. There is a trend towards a considerable shortening of release windows,

[207] See "La production cinématographique en 2018", p. 28. The number of films financed fell by 9.3% in 2018, meaning 18 fewer films financed by television channels than in the previous year.
[208] Which is equal to the average budget of a French film.
[209] Versus 96.9% in 2017, see "La production cinématographique…", p. 29.
[210] Channels only finance 15.9% of films with a budget below 1 M€ and 77.2% of films with a budget between 1 M€ and 4 M€, see "La production cinématographique…", p. 29.
[211] See "La production cinématographique…", p. 29.
[212] See *infra* no. 88 et s. on production obligations and the study "La production cinématographique…", specifically p. 33 for the obligations of Canal +.
[213] See "La production cinématographique…", p. 30.
[214] The European Commission itself acknowledges, in its Green Paper, that "*Audiovisual markets across the world are predicated upon exclusive release arrangements, with theatrical release playing a crucial element in the creation of a 'brand identity' of a film in each country in which it is released*" (aforementioned Green Paper, p. 10). We could draw a parallel with France's fixed-price book law which is intended to protect bookshops against competition from supermarkets selling books (Law no. 81-766 of 10 August 1981 on book pricing).
[215] See R. E. Caves, *Creative industries,* Harvard University Press, 2000: "High prices to consumers eager for the latest thing ; lower for those who will wait until the movie comes out on videocassette". *Adde* O. Bomsel and C. Rosay, aforementioned art., spec. p. 4.

with the particular aim of fighting the circulation of pirate copies of works online[216].

84. Functioning of the media chronology system. The media chronology is thus based on a timeline of the various methods of exploiting a cinematographic work[217] in order to preserve the economic model of each method and optimise the amortisation of the work, window by window[218]. Despite a tendency in European law to contractualise the chronology, France has maintained some regulatory and even legislative provisions regarding media chronology[219]. The economics of the system consist in favouring the channels or services that contribute the most to financing films, by granting them shorter wait times; conversely, the less the channel or service contributes to financing films, the longer they will have to wait before they can show the work following the theatre release. Moreover, the number of different windows has kept on growing in recent years with the advent of new distribution methods and, correlatively, new behaviours: VHS, DVD, video on demand (VOD[220]), subscription video on demand (SVOD[221]), etc.

85. The starting point of the chronology is the theatre release of the cinematographic work[222]. Next the work can be distributed 4 months later in DVD or VOD format[223], or 3 months if the film originally sold less than 100,000 tickets in theatres. The recently amended interprofessional agreements[224] state that the window following the theatre release of a work is 8 months for first-run film services which have signed an agreement with professional film organisations[225], or 6 months if the film sold less than 100,000 tickets in theatres. 17 months after the theatre release[226] comes the window granted to pay-TV channels other than Canal + which have signed agreements with professional film organisations, along with subscription video on demand services – SVOD – which have signed agreements and fulfilled a number of important obligations[227]. Thus, a service like *Netflix* could benefit from this release window if it honours this type of commitment. If not, it will have to wait for a window 30 months following theatre release[228], or possibly 36 months. In most cases, the window is 22 months after theatres for free-to-air television services and pay-to-view services other than film services, which commit to co-producing by donating a minimum of

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216 See in particular the European Audiovisual Observatory report, "Video on demand and catch-up TV in Europe", October 2009, p. 75.

217 In other words a work that obtains an exploitation visa. See appendix for a summary timeline.

218 There are also rules prohibiting general interest channels on French television from showing films in certain time slots: films on Wednesday and Friday evenings, and Saturdays and Sundays before 8.30 pm.

219 Art. L. 231-1 to L. 234-3 from order no. 2009/1358 of 5 November 2009 amending the Cinema and Moving Image Code, *JORF* no. 258 of 6 November 2009, p. 19209.

220 For *video on demand*.

221 For *subscription video on demand*.

222 Which requires an exploitation visa to be obtained.

223 Art. L. 231-1 of the Cinema and Moving Image Code. VoD allows online access to the work by purchase or rental on a fee-for-service basis.

224 Arrêté du 25 janvier 2019 portant extension de l'accord pour le réaménagement de la chronologie des médias du 6 septembre 2018 ensemble son avenant du 21 décembre 2018 (Judgment of 25 January 2019 extending the agreement for the revision of the media chronology of 6 September 2018 together with its addendum of 21 December 2018) which entered into force on 11 February 2019.

225 This window applies to the Canal + and OCS channels. The wait is 6 months if the film sold less than 100,000 tickets.

226 15 months for works that have sold less than 100,000 tickets.

227 Financing and pre-financing of French and European works, payment of guaranteed minimum amounts, editorialisation of content, diversity clauses, etc. See point 1.6 of the aforementioned decree.

228 The 30-month window is for SVoD services fulfilling certain commitments in the fields of pre-financing, distribution and valorisation of European and French works, payment of certain taxes, etc. See point 1.8 of the aforementioned decree of 25 January 2019.

3.2% of their turnover[229]. Finally, the last window is 44 months after theatre release, and is for free video on demand.

86. Compatibility with European law. European law ruled on the compatibility of French regulations with the free movement principle in 1985 with the Court of Justice's *Cinéthèque* decision[230]. The Court deemed that the system did not go against the principles of European law, and in particular the free movement principle, as the aim was not to "*favour national production as against the production of other Member States, but to encourage cinematographic production as such*"[231]. Thus, "*any barriers to intra-Community trade*" brought about by the media chronology regulation are proportionate and according to the Court, do not "*exceed what is necessary for ensuring that the exploitation in cinemas of cinematographic works of all origins retains priority over other means of distribution*"[232]. The chronology principle was then sanctioned by the texts: in its Article 7, the *television without borders* directive of 1989[233] laid down a period of 2 years between theatre release and broadcasting on a television channel. From 1997 onwards[234], the chronology principle was maintained but its implementation was left to the parties to discuss. This solution, now a constant one, also features in the *audiovisual media services* directive[235] as well as in the new European text, passed on 14 November 2018[236]. The French solutions, set out in the agreement of 10 February 2019, are therefore totally compliant with European law.

87. Challenge to the media chronology by passive sales. While the media chronology is often disrupted, whether in terms of its very principle[237] or the exact definition of release windows, this is a system which operates in different ways in France and other European countries: Portugal has a similar system to France whereas Germany and Austria make the granting of film subsidies conditional on complying with the release windows[238]. Yet the implementation of passive sales could call the national regulations into question: **due to passive sales in digital format, customers located on a certain territory who are aware of this chronology could bypass the chronology in force in that state by requesting access to the works from distributors on territories with a faster chronology – or no chronology at all.** The protection of cinemas and more generally the various methods of exploiting the works would be greatly affected. Although these behaviours already existed on the fringes of the analogue world[239], digital technology totally changes the scale of the problem. This technology not only makes it easier to gain material access

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229 In France, this concerns the channels OCS, Ciné +, TF1 and M6.

230 CJEC, 11 July 1985, joined cases 60 and 61/84*, Cinéthèque v Fédération nationale des cinémas français*, *Rec.* 2605.

231 Point 21 of the *Cinéthèque* decision.

232 Point 24 of the *Cinéthèque* decision.

233 Directive on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, no. 89/552 of 3 October 1989, *OJEC* L 298.

234 Directive no. 97/36 of 30 June 1997, *OJEC* L 202.

235 Directive no. 2007/65 of 11 December 2007, *OJEU* L 332, Art. 8: "*Member States shall ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rights holders*".

236 Directive no. 2018/1808, of 14 November 2018, amending directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

237 In its aforementioned 2011 Green Paper, the Commission explicitly questioned the appropriateness of maintaining the system: "*Are the current models of film financing and distribution, based on staggered platform and territorial release options, still relevant in the context of online audiovisual services*?", a*foremention*ed *Green Paper*, p. 16.

238 *Rép. de droit européen*, *Cinéma*, Sept. 2018, no. 66, A.-M. Oliva.

239 A customer located on French territory could already buy a film in VHS or even DVD format in Great Britain, for example, without having to wait for the staggered release windows in their own country.

to the works in itself, it also solves problems that in the analogue era, might have limited the benefits of buying a film from abroad, like subtitling or dubbing issues, for example. Far more than in the analogue world, digital passive sales risk short-circuiting the national cinema markets.

(ii) Financing obligations incumbent on television channels

88. Apart from the obligation to comply with the media chronology, in French law there are obligations for television channels to finance French and European film production in order to maintain a dynamic industry and avoid a hegemony of American works on the French market[240]. The source of these obligations lies in two decrees[241] which are complemented cumulatively by the framework agreement between the Conseil Supérieur de l'Audiovisuel (CSA) and each channel, and the professional agreements negotiated between television channels and professional film organisations[242]. Moreover, these financing obligations are offset by the assurance for each channel of recouping its investment through exclusivities from which it will later benefit, when the work is distributed. In this respect, not all European television channels are subject to the same restrictions. Therefore, allowing passive sales on European territory could have the consequence of reinforcing competitive gaps between channels and disrupting the balance of the system.

5. 4. Passive sales pose problems with practical implementation

89. Conflict with the system of catalogues of work. We have already discussed the intersection of passive sales and respect for copyright[243]. Other practical problems arise when this theory is applied to the audiovisual market.

90. Firstly, the authorities' reasoning, when applying passive sales to the audiovisual sector, seems to be based on a work-by-work analysis: in its objections, the Commission considers a consumer wishing to obtain access to a particular work from a distributor located in another Member State. In practice, rightholders and their partners work on the basis of catalogues rather than individual works. Therefore, the implementation of passive selling, apart from the other fundamental criticisms made of it, could come into conflict with the reality of distributors' catalogue management practices, in concrete terms. For a pay-TV channel, allowing an individual customer to access its programmes does not mean that it has to negotiate the rights for a single work on the territory, or for the catalogue of a single studio. It means allowing access to a multitude of works, produced by different studios, along with shows or programmes that are also protected. While digital technology makes managing such requests easier, the implementation might be complex and could potentially require the distributor to re-open a multitude of negotiations for

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240 See the CNC report on channels' financing obligations and also see the opinion of the Autorité de la Concurrence no. 19-A-04 of 21 February 2019, which amongst other things recommends an easing of the film and audiovisual production obligations and independent production obligations. General interest television services that show over 52 different cinematographic works per year must contribute "*at least 3.2% of their net turnover from the previous year to the production of European cinematographic works and 2.5% of this turnover must be spent on original French films"* (source: CSA https://www.csa.fr/Arbitrer/Promotion-de-la-production-audiovisuelle/Soutenir-la-creation/La-production-cinematographique). Art. 27 of the law of 30 September 1986 on freedom of communication.

241 Decrees no. 2010-416 of 27 April 2010 on the cinematographic and audiovisual contribution by providers of television services and providers of radio services that do not use frequencies assigned by the Conseil Supérieur de l'Audiovisuel and no. 2010-747 of 2 July 2010 on the contribution to the production of cinematographic and audiovisual works by providers of television services broadcast terrestrially.

242 See " La production cinématographique…" study, pp. 33 et s. for figures on the obligations of channels in France.

243 See *supra* no. 56 et s.

new territories in order to respect copyright.

91. The question of what price to charge the consumer also arises: should they be asked to pay for a complete subscription? Pay a lower price that only gives them limited access to the distributor's repertoire? **It may be argued that, under these circumstances, it is up to the distributor to arbitrate by assessing the benefit of making the passive sale versus the burden of the negotiations that it would entail. That it is only a question of negotiation and therefore a market issue. This is partly true. However, on the one hand, this argument shows that the fear of passive sales favouring large distributors is justified: they are the only ones who will have strong enough interest and bargaining power to enter the passive sales markets. On the other, it shows that the application of passive sales to the audiovisual sector poses very specific problems that need to be anticipated – which the Commission seems to have neglected to do so far.**

92. **Tax difficulties.** Passive sales also face the problem of compliance with rules other than copyright, like tax rules for example. To cite just one example, VAT rates vary from one European territory to another. Therefore, what rate should apply to a passive sale of an audiovisual work[244]? The rate in the distributor's country of operation? That would be more convenient for the distributor. But then another risk appears, that of unwittingly favouring distributors in states with lower tax. The resulting lower price for the consumer could create a vicious circle liable to accelerate the passive sales phenomenon. As consumers willingly go to the cheapest distributors – the ones favoured by lower tax – word of mouth online will boost demand beyond the *de minimis* threshold that once provided a practical justification for applying the theory. So should the rate in the customer's country of residence apply instead? That would be more logical from a tax point of view. But in practice, the system would be eminently complex for the distributor, which would have to apply a different VAT rate each time a request came from a customer on a different territory. Potentially, the distributor would have to provide as many different invoices as there are different territories in the Union. Unless we apply the same fictional reasoning to VAT rates as we do in the case of copyright enforcement[245], however that brings us back to the first objection. These practical realities, amongst others[246], all entail very onerous obligations that are unrealistic for small distributors, which might not benefit from honouring passive sales, unlike the big distributors.

244 Supposing that this formula makes sense.
245 See *supra* no. 70 et s.
246 For example, online distributors very often resort to technical protection measures, specifically geo-blocking access to the works that they distribute. Having to honour passive sales would therefore disrupt their technique for managing and controlling works.

6. A few proposals for the possible implementation of passive sales in the European audiovisual sector

93. **Appraisal -** At the end of this study, the analyst is indisputably in an awkward position. While he may well understand that the Commission is only doing its job by seeking to uphold the principles of which it is the guardian, he also has grounds to be circumspect or even worried by the consequences of applying this theory. Why disrupt the fundamental principles of literary and artistic property, why disorganise a precariously balanced sector without any guarantee of a happy outcome?

94. Firstly, there is no guarantee of effect. The theory prohibits prohibition but does not require a distributor to meet demand from consumers outside of its distribution area. And the accusation of infringement risked by anyone considering responding favourably to this demand is enough to justify the distributor's final refusal.

95. Next, there is no guarantee of a beneficial outcome. On a purely economic level, the theory threatens an industry's financing method even though the current model ensures richness and cultural diversity. The existing film financing arrangements are not designed solely to optimise profits, they also help to make production possible. Destabilising the financing method based on territorial exclusivities risks endangering this production. Moreover, on the cultural and social level, even supposing that a consumer's demand is satisfied in the short term, the disorganisation of the market that would result from an inevitably non-marginal practice of supposedly passive sales would cause some actors to disappear, leading to a reduction in content production and thus in the supply available to this consumer. An alternative outcome whereby a few giants, the only ones able to survive the new deal, replace the myriad of existing protagonists is not exactly the effect usually sought by competition law.

So, what should be done?

96. As things stand, even though the Commission proclaims that it does not apply the theory of passive sales to the European audiovisual sector without nuance and asserts that it leaves open the possibility of admitting the validity of certain territorial agreements, the first applications of this theory have not led to happy outcomes, as we have seen. Change is therefore necessary.

97. **Directions** – Logically, observing the anti-competitive effects of implementing the passive sales theory in the audiovisual sector should lead to it being abandoned in this field, so as not to favour large distributors or content producers, which are usually American. Moreover, toleration of acts of infringement - which would almost inevitably follow the application of the theory - is obviously equally inadmissible. Only the legislator could attempt to construct a different organisation but recent experience shows that it does not consider such a change wise or appropriate. At least not in the medium term.

98. **Principal proposal: Abandoning the theory** - In the light of this legislative prudence with full knowledge of the facts, a reasonable course of action would be to give up on trying to apply the theory. The duty of consistency and prudence is at stake.

99. Yet there is no indication that the Commission or other authorities are willing to take this course of action. Things cannot remain as they are, however.

100. **Elementary precautions if institutions persist in wanting to apply the theory.** The

following developments naturally do not encourage the maintenance of the passive sales theory, of which the negative effects on the audiovisual sector have been described. They are merely aimed at tempering the implementation of this theory, were it to be called upon again for some reason, and are an attempt at limiting its negative effects, although they will not make these effects disappear. These developments are not, in themselves, an incentive or even an option. They are a last resort at best.

101. Evolution of the theory for a far more measured application based on new criteria - If the European authorities were unmoved by the arguments put forward and still felt that passive sales were not called into question by digital technology, it would seem absolutely essential to consider a different and far more measured application at least. Should these authorities wish to uphold the principle of applying the theory, it would be necessary to review the implementation methods as the audiovisual environment is so different from that of the economic sectors in which the theory first came to prominence. The general idea of a future construction would be to avoid sacrificing the architecture in which an important cultural industry for the European Union has been built, in the name of unduly rigid adherence to a competitive dogma – or rather, in the name of an unnuanced pursuit of a single market.

102. Factors to take into consideration - The corrective intervention of competition law should only take place in very specific scenarios and according to the following guiding principles:

1. In the event of a consumer soliciting a passive sale, whether or not a work is already available on said consumer's territory of residence should be a determining factor in the possible implementation of the theory.

1. 1. If the work is unavailable, the concrete existence of the consumer's unfulfilled demand, due to a lack of supply on their territory of residence, may *a priori* justify viewing the analysis in a less unfavourable light.

The acceptance of the theory is, in the first analysis, less shocking because although it is a matter of stretching the right of ownership somewhat, it should be noted that there is no problem of infringement on another distributor's exclusivity. However, the analysis of economic issues and potential effects cannot be ignored. It should also be noted that the situation at Time T of demand may have changed by time T + 1. A work which has found an audience in certain states may subsequently be distributed in the country of demand. It is therefore important not to interfere with this career opportunity. In other words, some caution is still required.

1. 2. In the opposite case of the work sought being available in the country of consumer demand, the territorial exclusivities granted do not directly go against consumers' interests. If the work is accessible from the territory of residence of the consumer who is seeking a distributor in another territory, the reasons for meeting the consumer's request appear less convincing due to the distortion of the nature of the right of ownership and the consequences that applying the theory would likely entail. Here it is not impossible for the consumer to obtain the work, rather it is a question of convenience or practical issues. Admittedly, these are not negligible but they are less important than economic issues and the risk of a subsequent production slowdown. On the understanding that any obstacles to satisfying this demand are usually only temporary, the passive sales theory should in this

case, *a priori*, be abandoned.

2. Yet if despite all this, the application of the theory is still envisaged, its implementation should:

- be subject to a more rigorous reasoning process,
- be improved by considering other factors,
- take account of important factual and technical data,
- not discard the principle of respect for the right of ownership unnecessarily.

3. It thus seems necessary to introduce a period of "sanctuarisation" from the outset in order to preserve, for a time, the exclusivity of a distributor offering a new product on the market. The starting point and length of this period could vary depending on the situation. Based on the guidelines on vertical restraints, a two-year period seems reasonable.

4. After this period, the authorities could examine the legitimacy of the passive sales request, taking into account the specificities of the market concerned and in particular the fact that it is based on the exercise of copyright, which is not the case for the more traditional markets on which passive sales are traditionally implemented.

5. Another factor to be taken into consideration would be the method of financing the work in question: whether or not it was the subject of one or more pre-sales to distributors, which are essential to raising the budget required to begin production, complete the work in question and make it available to the public. This situation reinforces the need for exclusivity to be granted to the distributor(s) in question (a factor unfavourable to the conclusion of a passive sale).

6. It is also necessary to weigh up the constraints and understand the material and legal mechanisms on which the conclusion and implementation of the desired passive sale would be based. Material obstacles may arise: what infrastructure is there to meet the demand? Beyond the technical aspect lies the question of how to respond to a request to buy a single work when the distributor's economic model is subscription-based. How will the price be set? What VAT rate will apply? Etc...

7. It should also be recalled that, in the event of the theory being implemented, the existence of a territorial exclusivity is not sufficient grounds for rejecting the validity of the incriminated agreement. In any event, an examination based on the factors mentioned in paragraph 3 of Article 101 must be carried out, and in order to save the agreement, it must be possible to offer a circumstantial demonstration of the agreement's beneficial effects offsetting its anti-competitive effects.

8. Lastly, if despite all these considerations, which should be understood as calls to reject the theory, its application is still being envisaged, it would perhaps be appropriate to think about an alternative and totally exceptional way of making works available by establishing Europe-wide platforms, which would make it easier for consumers to request licences directly from producers rather than from distributors.

The application of the theory should be rejected due to its lack of benefit for the consumer

as well as its unfortunate effects on the sector.

If this reasonable course of action were not to be taken, the utmost caution would be advised.

When a consumer solicits the conclusion of a passive sale, whether or not they can access the work on their own territory is a decisive factor: if they can, we must consider that a sanctuarisation period for the exclusivity of the distributor is open; if they cannot, their request may be examined but a number of factors must be taken into account.

Addendum: PASSIVE SALES AND E-BOOKS

Based on discussions in the book sector, it seems that the following analysis could be conducted.

The first sentence in Recital 1 of Regulation (EU) 2018/302 of the European Parliament and of the Council of 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*" establishes a framework for the reflection on passive sales in the book sector and elsewhere:

> ***"In order to realise the full potential of the internal market, as an area without internal frontiers in which the free movement of, inter alia, goods and services is ensured, it is not sufficient to abolish, between Member States, State barriers alone. Such abolition can be undermined by private parties putting in place obstacles inconsistent with internal market freedoms."***

In concrete terms, the purpose of this Regulation is (i) to prohibit the blocking of access to websites and other online interfaces and the re-routing of customers from one national version to another and (ii) to prevent professionals from discriminating in terms of access conditions between customers based on the country where the demand originates.

E-books and, more generally, services offering copyright-protected content online are temporarily exempt, pending a re-evaluation of the scope of this exemption, for the first time on 23 March 2020 then every five years (Article 9.2 of the Regulation).

The framework set out in this text shows the real scale of the issue of prohibiting passive sales, as studied by Mr Sirinelli and Ms Dormont: the aim of the Regulation is no longer even to distinguish passive sales from active sales in order to allow *in fine* the existence of territorial exclusivities, as long as they are not absolute, but purely and simply to prevent any consideration of the country of origin of a consumer's request when the consumer appears online.

This is a sign that the very concept of passive selling is not effective in the world of online sales. In its aim of encouraging a large, single, internal market, the European legislator finds no more use for the concept of passive sales (i). It therefore resorts to an even stronger form of prohibition which, like the ban on passive sales, fails to achieve its aims (ii) and moreover has negative effects on respect for intellectual property and market balance (iii).

i) An ineffective concept in the world of online sales

The requirement here is to force distributors to meet spontaneous requests from individual customers located outside of their respective spheres of exclusivity.

In the online sale of books as in the sale of any other type of goods, the concept of spontaneous solicitation no longer makes sense.

Either it is considered that putting items up for sale online is a form of solicitation and that any online commercial offer is necessarily active, or the situation is seen from the point of view of the end consumer who, having taken the initiative to log on to a website, can be considered to be acting spontaneously of their own free will, and online sales can no longer be considered active.

The European legislator has seen this and is now insisting that the country of origin of the purchase request can no longer be taken into account in online sales agreements. For e-books, such a measure is as useless as it is harmful.

ii) A measure ill-suited to the aim pursued

The stated aim of advocates of permission of passive sales or, in its enhanced form, a prohibition on territorial restrictions, is the construction of the European single market.

In practice, the measure aims to break down obstacles that are currently believed to exist, for example, between a Romanian, Maltese or Czech consumer and the purchase of an e-book published by a French publisher.

Yet this market does not exist.

If we consider the most recent e-book sales, since the beginning of 2019, for a French publisher, on average 96% of them come from the French-speaking world (France, Belgium, Canada, Switzerland).

The remaining sales (4%) come from the rest of Europe, but also from Latin America, New Zealand, Australia and Japan.

Demand for e-books in French from non-French speaking countries in the European Union is therefore almost nil.

And this at a time when several digital distribution platforms serve these countries, as evidenced by the Bief study on the export of French e-books, published in 2016 and including the following table (page 31):

5. TABLEAUX DE DISPONIBILITE ET VENTES DE LIVRES NUMERIQUES FRANÇAIS DANS L'UNION EUROPEENNE ET LES TERRITOIRES D'OUTRE-MER

UNION EUROPEENNE

Pays ouverts à la vente de livres numériques français – déclarations revendeurs

Ensemble des revendeurs
Partie des revendeurs
Aucun revendeur

Union Européenne – zone euro	Plateforme de vente en ligne	Solution marque blanche - librairies physiques françaises
Allemagne		
Autriche		
Belgique		
Chypre		
Espagne		
Estonie		
Finlande		
France		
Grèce		
Irlande		
Italie		
Lettonie		
Lituanie		
Luxembourg		
Malte		
Pays-Bas		
Portugal		
Slovaquie		
Slovénie		
Union européenne – hors zone euro		
Royaume-Uni		
Suède		
Danemark		
Pologne		
République tchèque		
Hongrie		
Croatie		
Roumanie		
Bulgarie		
Hors UE – pays francophones		
Suisse		
Canada		

Répondants : 6 revendeurs nationaux et internationaux ; une solution en marque blanche et une librairie.
Source : entretiens qualitatifs réalisés pour l'enquête "Exportation de livres numériques français", BIEF 2016.

Source: Export of French e-books - Study by the Bureau International de l'Edition Française February 2016

iii) A measure with multiple negative effects

The passive sales theory is first and foremost an instrument of competition law and its results must therefore be measured against the aim of maintaining vigorous competition, driven by diversified actors (a).

It must then be weighed up against the requirements of copyright (b).

a. Prohibition of passive sales versus diversity of industry actors

❖ Any retailer making online sales must identify the country of origin of the purchase request for a variety of reasons, including:

- The correct application of the VAT rate in the purchaser's country
- The correct application of consumer law in the purchaser's country
- Displaying of the price in the applicable currency
- etc.

Small or medium-sized retailers cannot implement technical systems for identifying the country of origin of each consumer who logs on to their site without making investments that are out of proportion to the revenue generated.

On a technical level, their only option is therefore to accept only purchase requests originating from a given country.

If they were forbidden from doing this, the prohibition would result in only the very big digital players, generally American ones, being able to develop online stores that could tailor the sales process to each consumer's country of origin.

The level of diversity on the market would therefore be seriously affected.

❖ The diversity of the industry is also protected, in several European countries (France, Germany, Belgium, Spain...), by laws regulating the price of books.

According to these laws, a person residing in one of these countries can only be charged the price set by the publisher, when purchasing a book published on national territory.

This type of law serves to maintain the value of books at a high enough level to support the entire book industry (author, editor, distributor, bookseller) on a market where prices are not increasing, as it happens. In 2018, book prices increased by 0.5% versus a 1.8% rise in the general consumer price index for the same period – Source: French Ministry of Culture – SLL – "*Le secteur du livre : chiffres clefs 2017-2018*".

If it is forbidden for an online store to distinguish between its customers according to their country of origin, then residents of countries where book prices are regulated will be able to circumvent the application of the price set by the publisher by going to websites established outside of their national territory.

If pricing laws are recognised, as is the case in the current *Geo-blocking* regulation, distributors will have to be able to apply the regulated price to consumers in countries with price regulation. Once again, the only players capable of implementing this differentiated application of prices by country of origin of the purchase request will be the operators with the most substantial financial and human resources. Smaller players will de facto be excluded from the market.

b. Prohibition of passive sales versus copyright

- At first glance, the exclusivity issue raised in the audiovisual field seems to be less of a pressing concern than in the field of books.

  In fact, quite often, the publisher has worldwide rights to exploit the publication that it is selling.

  This statement is generally true for French publishers publishing books by French authors.

  On the other hand, the question of territorial management arises when a French publisher has been assigned the right to publish a work and translate it into French by an Anglo-Saxon publisher because it is customary for Anglo-Saxon publishers or agents to place strict limits on the geographical scope of the rights assigned. In 2018, works translated into English represented 11% of all books published in France (Source: French Ministry of Culture – SLL – "*Le secteur du livre : chiffres clefs 2017-2018*").

- Beyond the copyright-related aspects, publishers must also be able to manage the availability of their publications in light of national rules on press offences or the protection of privacy, which vary significantly from one country to another. A text that is defamatory in Spain may not be defamatory in France; the definition of privacy protected by law in Ireland is not the same as that used in French law. A publisher must therefore be able to select in detail the territories where its publication will be made available.

- Apart from the purely legal aspects, the prohibition against prohibiting passive sales poses a real problem of contractual freedom and freedom of trade: a publisher may want to choose one retailer over another for a particular country and possibly adapt its prices to the standard of living in the customer's country, or according to the marketing efforts and costs specific to the territory concerned.