Online Trade, Offline Rules
A Review of Barriers to E-commerce in the EU
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Foreword

The digital revolution is profoundly affecting trade patterns. The growth of e-commerce epitomizes these changes. Technological innovation and business developments in online trade result in fast-evolving markets with the continuous emergence of new products and services.

In a short time span, e-commerce has evolved from a digitised version of the old-style mail order business to increasingly complex markets which combine access to online marketplaces with the launching of new types of platforms for digital distribution, peer-to-peer services or mobile applications. This in turn is facilitated by the increased ability to process large amounts of data (so-called “Big Data”) and the rapid expansion of cloud computing services.

The dynamism of e-commerce and its potential make it an important asset for Europe’s growth strategy. Yet, this development is slowed down by a number of legal barriers, and the EU markets for online trade are still divided along national borders. The completion of a Digital Single Market calls for the removal of these barriers.

This report aims to map out the barriers affecting e-commerce in the EU. It provides an inventory of rules, both national and EU-wide, that restrict online trade and discusses possible remedies to these problems. Our hope is to increase the understanding of an increasingly complex market and to show how its rapid transformation may be at odds with the relatively slower evolution of the regulatory framework.

This report is authored by Olivier Linden, Ola Landström and Philip Levin. Anna Egardt and Camilla Östlund have contributed with input in intellectual property issues. We wish to give our special thanks to the companies and organisations for their time and willingness to discuss barriers to e-commerce with us.

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Claims about the borderless nature of the internet are only true to a certain extent. For instance, looking at business-to-consumer e-commerce in Europe, statistics show that – far from having achieved a Digital Single Market – the EU is still fragmented into 28 online markets. Although an increasing number of European consumers shop online (47%), a small minority (12%) do so from sellers established in other EU States. Among the many reasons behind this fragmentation are trade barriers in the form of national requirements which oblige e-traders to adjust their businesses for each new market they wish to serve.

Four years ago, the National Board of Trade discussed some of those barriers in a survey on e-commerce in the EU. Those ranged from the obligation to have a physical presence in certain EU States in order to obtain a local top-level domain name (“.de” or “.fi”) to barriers on payment (e.g. the preferential treatment granted to e-traders offering Dankort payment facilities in Denmark) and more EU-wide problems such as differences in national consumer rules (right of withdrawal).

The present report provides an update of our review on trade barriers to e-commerce. One finding is that many of the traditional barriers identified in our previous survey are on their way to being removed. Positive developments such as the full harmonisation at EU level of national rules on distance selling or the abolition of certain establishment requirements contribute to the strengthening of the Digital Single Market.

Yet, some trade barriers remain. Large parts of the legal framework for e-commerce – from labelling requirements to the national VAT regimes – are still fragmented. Especially problematic for e-traders is the assessment of whether their national rules, or those of the consumers, will apply in a cross-border transaction. This may concern a wide variety of issues: the marketing of products, the handling of customer data or the formulation of the terms and conditions in sales contracts. We find that an effort to clarify those issues is needed.

Business and technological developments may also raise new issues. This is obvious for digital distribution confronted with a fragmented intellectual property landscape, but also subject to specific barriers (such as windowing, quota and investment requirements). Furthermore, the increasing roles of online marketplaces and cloud computing services challenge traditional rules on liability and raise new concerns in terms of data protection. Finally, the emergence of peer-to-peer services (from taxis to property rentals) disrupts traditional markets and may trigger political intervention that hinders trade. In order to avoid out-dated, maladjusted or simply unworkable rules, it may be necessary for the legislator to adopt a flexible (technology-neutral) approach focusing more on “what” needs to be achieved (consumer protection, personal integrity, etc.) rather than “how”. This, in turn, calls for adequate safety mechanisms to prevent the risk of abuse by the market players.

At the same time, we note that many of the problems affecting cross-border e-commerce are related to the functioning of the market rather than to intrusive legislation. Issues taken up by e-traders such as pricing for dispatching goods over the border, the role of quasi-monopolistic players on certain markets (apps, search engines, cloud providers, etc.) or the lack of consumer trust in online cross-border transactions are not necessarily solved by adopting new laws. The public authorities, whether national or at EU level, and the market players may need to rethink ways to address these issues if they want to achieve a truly integrated market for e-commerce in Europe.

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Notes
1. Introduction

Twenty years after the launching of e-Bay and Amazon, the growth of electronic commerce is an inescapable fact. With worldwide sales amounting to almost €1,200 billion in 2013, the annual growth rate of business-to-consumer (B2C) e-commerce was almost 14%. In the EU alone, B2C e-commerce amounted to €318 billion (2013) with a sales growth of almost 15% compared to the previous year. Clearly, e-commerce shows a remarkable dynamism in a period of economic crisis.

This is one of the reasons why the European Commission has given priority to the creation of a Digital Single Market – that is a market for online trade covering all 28 EU States – as part of its Europe 2020 Strategy for growth. In his opening statement given to the European Parliament, incoming Commission President Juncker stated that “by creating a connected digital single market, we can generate up to €250 billion of additional growth.”

E-commerce constitutes an important part of the Commission’s Digital Agenda. Here, the ambition of the Commission is to overcome the fragmentation of the EU market. Figures from Eurostat are quite illustrative on this point: although an increasing number of European consumers buy goods and services online (47% in 2013), a vast majority does so locally. In 2013, only 12% of European consumers ordered goods or services from sellers established in other EU countries. These figures show that we are still far away from the 20% target set by the Commission for 2015.

For a number of years the National Board of Trade (the Board) has followed the European Commission’s initiatives for the creation of a Digital Single Market. In 2011, we published a survey of trade barriers hindering e-commerce within the EU. The present report is a follow-up on this survey. Taking into account the business and technological developments of the last years, this report aims to map out the legal issues faced by e-traders and other market players in Europe. In that respect we believe that more knowledge and a better understanding of trade barriers which affect e-commerce is a necessary step towards the achievement of a Digital Single Market.

For the purpose of this report, we have defined e-commerce as the sale of goods and services over the internet. This definition focuses on B2C trade rather than business-to-business (B2B) which is often handled via electronic data interchanges (EDI). This report does however cover B2B transactions to the extent that they are conducted via the internet. That is for instance the case with certain cloud computing services.

The concept of legal barriers

The fragmentation of the European market for e-commerce is somewhat paradoxical. Whereas the internet abolishes distances and enables direct contact between potential buyers and sellers in different countries, it would seem natural that cross-border e-commerce would flourish in an EU-wide internal market. Yet, as illustrated above, to a large extent the market is still divided along national borders.

Several reasons may explain this fragmentation: cultural differences (languages, consumer preferences and payment methods), market deficiencies (pricing of delivery of goods across borders, the existence of monopolistic situations), a lack of trust for cross-border online transactions (both from consumers and e-traders), and legal barriers.

In this report, we focus on the last category. We define legal barriers as rules that render cross-border trade more difficult and sometimes impossible. The concept of rules encompasses laws and regulations, judgments and decisions in individual cases as well as guidelines, interpretation documents and recommendations by the public authorities. Unlike market deficiencies, legal barriers have their origin in the actions of the public authorities. As our report shows, most of those rules are national but, in some cases, trade restrictions may also be the result of maladjusted or impractical EU legislation.

Sources and method

Our review of trade barriers is based on a number of sources. First, we have interviewed some thirty companies and other operators active in e-commerce (trade organisations, public authorities). These companies represent a wide range of businesses, from online sellers (e-traders) to providers of cloud computing services, peer-to-peer services, online payment services, marketplace operators, search engines, digital distributors, app developers and providers of 3D printing solutions. They vary in size (from SMEs to multinational corporations) and, although predominantly Swedish, in some cases they are established in other EU States or outside of the EU.
Second, we have referred to a number of rules reported to the Solvit network or notified to the databases on technical regulations, as well as the case-law of the European Court of Justice and of the European Commission.

Finally, we have relied on a number of independent studies and articles, which are listed in the bibliography of this report. The hyperlink to these studies and articles are provided in footnotes and have been cross-checked as of 25 March 2015.

In several cases we found that what was perceived as a trade barrier in fact resulted from a lack of knowledge or misunderstanding of the content and the effect of national rules. Whenever feasible, we checked the official version of the rules presented here. Only the barriers which we were able to verify are included in this report. However, we do discuss some misunderstandings or misinterpretations where those are the result of a general lack of transparency of the regulatory framework for e-commerce.

Outline

This report starts with a short overview of the European regulatory framework applicable to e-commerce (Chapter 2). This framework, which aims to establish an internal market for e-commerce, is an indispensable tool in order to assess the lawfulness of national trade barriers. Indeed, only the barriers that are expressly authorised under EU law or which can be justified by the protection of legitimate interests, such as the protection of consumers or of the environment, may be upheld. All other barriers should under EU law be abolished.

Following this survey of the EU regulatory framework, we examine the trade barriers to cross-border e-commerce. We have divided our review of these barriers into two parts:

- **Chapter 3** covers the barriers to traditional e-commerce, i.e. the sale of goods or services via the e-trader’s own website – an extension of the old-style mail order business. Notably, this chapter provides an update on the Board’s survey on barriers to e-commerce (2011).

- **Chapter 4** focuses on barriers affecting new trends in e-commerce ranging from the development of online marketplaces – particularly for digital distribution, to the app economy, Big Data, cloud computing and the Internet of Thing. The distinction made here between traditional e-commerce and newer forms of e-commerce, although somewhat arbitrary, is motivated by the differences in the maturity level of those business phenomena. This in turn impacts on the level of adaptation of the regulatory framework, a source of friction and a trade barrier in itself. In particular, we find that the increasing complexity of new e-commerce trends, as illustrated in Box 1, triggers the application of a whole new range of national rules which in turn may potentially have a restrictive effect on trade in so far as they differ from the rules of other countries.

We conclude this report with some general reflections on the nature of the barriers affecting e-commerce and discuss possible ways to remedy them (Chapter 5). This last part of the report focuses on the possible explanations for the occurrence of trade barriers, notably the disruptive nature of e-commerce and the gap between, on the one hand technological and business advances and, on the other hand the slower pace of development of the regulatory framework. We also argue for a more flexible approach to regulating e-commerce as a means to avoid rules becoming obsolete, maladjusted or impractical. In the same time, we do find that this approach should be balanced with the market’s need for clear and predictable rules.
In what we have labelled as “traditional e-commerce”, a consumer would order goods or services directly from the seller's website. Yet this market has developed quickly and is now engaging in much more complex transactions:

- consumers have access to more powerful electronic devices (inner ring on the figure above): desktops, tablets, smartphones and things connected to the internet;
- e-traders may reach consumers via a wide range of platforms (middle ring): online market places, mobile apps, peer-to-peer platforms; and
- the range of goods and services available is also widening (outer ring): from traditional consumer goods to music, films, games, flight tickets, maps, car rental or car sharing.

All this is made available by a number of enablers such as the cloud or Big Data (located outside of the rings).

This gives an almost infinite combination of trade patterns with each triggering different rules which, in turn, may result in trade barriers. For instance, the use of a smartphone instead of a desktop may raise new issues such as how consumer information should be displayed on a smaller screen. On a similar note, the use of a peer-to-peer platform such as Uber to order a ride may trigger the application of rules related to taxis, traffic congestion or tax accounting. Finally, the development of the Internet of Things, illustrated here by a refrigerator ordering a new bottle of milk on behalf of its owner, may challenge the traditional notions of consent and personal integrity.
2. The EU Regulatory Framework

In order to assess potential trade barriers to e-commerce; it is first necessary to give an overview of the rules that apply to cross-border transactions in the EU.

In short, there are two types of rules that may affect the sales of goods or the provision of services online: national rules adopted by each EU State, such as those on consumer protection or the protection of intellectual property rights, and EU rules which aim to facilitate the free movement of goods and services within the Union.

It is not feasible to provide a description of the national rules applicable in each of the 28 states of the Union (the EU States). Instead in this chapter we focus on the EU regulatory framework. This framework builds upon a few general principles which safeguard the freedom of movement of goods, services, persons and capital within the EU. These four freedoms constitute the backbone of the internal market.

The EU rules on goods and services are central to e-commerce. Under these rules, goods and services that are legally sold in one EU State may be exported to other EU States without any restriction. However, this freedom to sell goods or services across the border is not absolute. The EU States may impose restrictions if those are motivated by legitimate interests such as the protection of consumers or the environment. It is for each state to define the level of protection that it seeks to achieve. Hence some EU States may impose stricter rules on consumer protection than others, which may in turn make it cumbersome to export goods or provide services to consumers in those countries.

It should be noted that the EU States cannot restrict trade at wish on the sole ground that they seek higher protection standards. Under EU law, a specific test – also called the “proportionality test” – is imposed on national barriers to trade. In order to comply with the EU rules on free movement, this test imposes on the state restricting trade to demonstrate that the barrier in question is necessary to protect a certain legitimate objective and that such an objective would not be achieved by other measures that are less restrictive on trade.11

Hence, the rules on free movement aim to balance free trade with the protection of certain national legitimate interests. The general principle of freedom of movement is enshrined in the EU Treaty.12 This principle has also been developed in sector-specific legislation. The main aim of these EU directives and regulations, examined in Annex I, is to harmonise national legislations within a specific area (IP rights, consumer protection, data transfer, etc.). This implies the adoption of common levels of protection of certain legitimate interests, hence removing the possibility for the EU States to rely on stricter national standards.

The EU rules on free movement, both in the Treaty and in sector-specific legislation, have in common the idea that it should be as easy to sell goods or provide services within the EU as it is within any state. These rules may therefore facilitate e-commerce in a number of aspects and in particular by:

- removing barriers to goods sold online across borders, such as national product regulations or rules on marketing;
- removing barriers to the online provisions of cross-border services, such as national rules on the quality of services or the qualifications of the service providers;
- identifying the national rules applicable in cross-border transactions where several jurisdictions would otherwise apply;
- facilitating the establishment of subsidiaries or branches of e-traders in other EU States;
- ensuring the free flow of data within the EU by removing national barriers to the storage or transfer of such data;
- securing cross-border payments by removing national barriers such as discriminatory fees or providing for common principles applicable to the national VAT regimes;

This of course is only a short list of how the EU rules may contribute to the creation of a Digital Single Market. However, as illustrated in this report, general principles on free movement, even supplemented by sector-specific legislation, are not sufficient to remove all barriers to trade. In particular, the harmonisation of national rules affecting e-commerce is far from being comprehensive and the EU States still enjoy a certain margin of discretion to maintain stricter standards than those agreed upon at EU level.
3. Barriers Affecting Traditional E-commerce

Traditional e-commerce, as we have defined the online sale of goods and services via the e-trader’s own website, is an extension of the old-style mail order business. As such, it has for a long time been subject to the national rules on distance sales. Gradually, the legislator (national and EU) has modernized the regulatory framework in order to take into account the technological developments of the market.

This modernization has not been painless for e-traders and, still today, we find rules that are more suited for physical trade than for e-commerce. This is for instance the case with the rules on waste management and sales periods. However, most barriers examined in this chapter result from the fragmented regulatory framework for e-commerce in the EU. Differences in national requirements often lead to additional costs for the e-traders and undermine the objectives of transparency and for a level playing field across borders.

As the structure of this chapter shows, we have identified trade barriers which affect most aspects of traditional e-commerce. In particular, we look at the following barriers:

- bans on e-commerce as a sales form (Section 3.1), i.e. bans on the online sales of goods and services that are otherwise legally available in brick-and-mortar shops;
- establishment requirements (Section 3.2) whereby e-traders are obliged to hold a physical presence in the country where they sell goods and services online;
- a lack of transparency in respect to the laws and jurisdictions applicable in cross-border transactions (Section 3.3);
- barriers linked to sales conditions (Section 3.4);
- problems related to the fragmentation of the intellectual property landscape (Section 3.5);
- barriers on cross-border payments (Section 3.6); and
- the difficulties encountered by e-traders in their contacts with the national administrations (Section 3.7), in the processing of personal data (Section 3.8) and in the cross-border delivery of goods (Section 3.9).

As mentioned in the introduction, the review of barriers affecting traditional e-commerce is a follow-up on our previous survey from 2011. Therefore in this chapter we pay special attention in updating the status of the barriers which were identified four years ago.

3.1 Ban on e-commerce as a sales form

The growing importance of the retailers’ omni-channel strategies shows the interdependence between online and offline sales channels. Technically, it is feasible to sell online any product, which is also available in brick-and-mortar stores. There may be commercial reasons for not doing so, especially for luxury goods, but we have found only a few examples of EU States restricting the online sales of goods and services that are otherwise legally available “in real life”.

In our survey from 2011, we identified a number of such bans on e-commerce as a sales form. Those concerned the online sales of pharmaceuticals in Germany, contact lenses in Hungary and the provision of gambling services in the Netherlands. All cases were subject to review by the European Court of Justice (the EU Court) which acknowledged that the distribution of some of these goods and services may, under certain conditions, be banned from the internet. Below is an update on the status of the restrictions examined by the EU Court. We also discuss a current proposal to partly ban the online sales of alcohol products in Sweden and a sales ban on tobacco products in some EU States.

3.1.1 Ban on the online sales of certain drugs

In the EU, the sale of drugs has traditionally been reserved to pharmacies. The exclusive rights of licensed pharmacists were considered as a prerequisite to guarantee the safety of the consumers. However, the development of internet-based pharmacies and the possibility to sell online medicines cross-border forced most EU countries to adjust their legislation. The responses varied between EU States, with some countries banning all online sales while others adopted a more liberal approach. The disparities between different national rules resulted in a fragmented market and difficulties in the online cross-border sales of drugs.

The EU Court addressed this issue in a 2003 judgment related to the online sales of drugs by a Dutch operator in Germany which at the time was
subject to a general prohibition on the mail-order trade in medicines. In its ruling, the EU Court held that EU States may impose a ban on the online sales of prescription drugs as long as this is motivated on the grounds of public health. The EU Court also stated that no such ban may in principle apply to over-the-counter (OTC) drugs.

Since that ruling, a number of EU countries have legalised the online sales of OTC drugs,18 and, in some cases, also for prescription drugs.19 We have found no evidence of EU States which still ban the online sales of non-prescription drugs.20 Cases of abuses due to the selling of outdated or counterfeit medicines by illegal operators have led to discussions on the risks posed by the online trade in pharmaceuticals. In some countries, a ban on the online sales of OTC drugs has been debated.21 But as far as we could see, the public authorities in the EU are looking for a way to regulate and control such trade and inform consumers about possible risks, rather than forbidding the activities of online pharmacies.

3.1.2 No ban on the online sales of contact lenses
Striking a balance between free movement and consumer protection was also a key issue in the discussions on the legality of an online sales ban for contact lenses. The ban in place in Hungary was quashed by the EU Court in 2010. In its ruling, the EU Court made it clear that the protection of the health of consumers did not justify a general measure such as a prohibition to sell contact lenses online.

Although a number of restrictions may remain in force in the EU, such as who is qualified to sell contact lenses online or under which conditions, to our knowledge there is no such ban in place.

3.1.3 Ban on the provision of online gambling services
Although the gambling sector is highly profitable, with revenues of over €80 billion a year in the EU,22 it is still a fragmented market. The EU lacks a uniform view on the risks posed by the gambling industry. Whereas some EU States (the UK and Malta) have opened their markets to competition, others are concerned with the threats associated with gambling such as addictions that may lead to excessive indebtedness and the risks of fraud and criminal activities. Some EU States have restricted gambling activities, often by limiting the possibility
to provide gambling services and in some cases by granting exclusive rights to local operators. In countries where gambling activities are reserved to national monopolists or license-holders, a debated issue concerns the way to deal with competition from foreign online gambling operators. In 2010, the EU Court shed some lights on this issue in a ruling that acknowledged the right of the EU States to ban the online provision of gambling services under certain conditions.

According to a study from the European Commission in 2012, one can now distinguish between different national approaches in respect of online gambling. First, a number of EU States have banned the online provision of certain gambling activities (such as Germany and the Netherlands). Meanwhile other countries that have imposed a monopoly on online gambling activities (such as Finland, Sweden and Portugal) where foreign operators are prohibited from offering their services. A third group opted for a licensing regime (e.g. Denmark, France, Italy and Spain) and in some cases recognise licenses delivered in other EU States, hence allowing cross-border trade in gambling services. Finally, the Commission’s report notes that a few EU States still lack rules on online gambling services (e.g. Ireland and Lithuania).

3.1.4 Partial ban on the online sales of alcohol products?
In most EU countries, it is as easy for a consumer to buy a bottle of wine online as it is in a supermarket. However some of the Nordic countries have long-standing restrictive alcohol policies which are at odds with most of their European neighbours. In Finland, Norway and Sweden the sale of alcohol products is reserved to State-owned retail monopolies.

Those monopolies are facing competition from online retailers established in other EU States which could ultimately jeopardise the restrictive alcohol policies in the Nordic countries. In Sweden, for instance, the consumption of alcohol bought online, although still marginal, has grown exponentially in the past years.

In that respect, the EU Court held in 2007 that Sweden may not prohibit private persons from importing alcoholic beverages from other EU States as this would be in breach of the EU rules on free movement of goods. That ruling led to a number of Swedish operators setting up websites to mediate between consumers in Sweden and vendors of alcohol products in other EU States. The development of this online intermediation industry was considered by the Swedish authorities as a threat on the country’s alcohol policy. The Swedish Government therefore commissioned an inquiry which, in the summer of 2014, proposed to ban commercial mediation (other than transportation services) between buyers and sellers of alcohol products.

According to that inquiry, similar bans on online commercial mediation are in place in Finland and in Norway. The Finnish regime is currently subject to a legal review by the EU Court. The outcome of that case may have consequences for the Finnish and Norwegian regimes as well as for the Swedish proposal.

3.1.5 Ban on the online sales of tobacco products
The ban on the online sales of tobacco products is special in that it is explicitly allowed under the newly-adopted EU Tobacco Directive. According to the Directive, “cross-border distance sales of tobacco products” could facilitate access to illegal tobacco products (e.g. not complying with health warnings and ingredients requirements) and may lead to “an increased risk that young people would get access to tobacco products.” An additional problem with online sales of tobacco products is the risk of smuggling products which are heavily taxed in many EU countries.

In 2009 France adopted a law prohibiting all online sales of tobacco products and we understand that a similar ban is also in place in Austria.

3.2 Establishment requirements
One of the advantages of e-commerce is the ability for a trader to directly reach out to customers wherever they are located. In that respect, establishment requirements imposed in some EU States, i.e. the obligation to have a local physical presence in order to serve customers abroad, are viewed by e-traders as particularly counterproductive. Those requirements may be especially painful for smaller businesses which do not necessarily plan in opening local offices for each market they are targeting.

In our study from 2011, we identified a number of such requirements: permits in Ireland for the online provision of travel services to local consumers, an obligation to have a physical presence in
order to register a local top-level domain name in some EU States (Finland, Germany and Estonia), and requirements related to the local storage of customers’ personal data (Poland). As seen below, all of these issues have been addressed at EU level since that time, albeit with different outcomes. In addition to these obligations, in this section we will examine another type of establishment requirement in respect to waste management.

3.2.1 Irish permit for foreign online travel agencies
Ireland’s requirements, which were examined in our study in 2011, obliged foreign online travel agencies offering package travel to Irish customers to obtain a local licence. Among the conditions for such a licence were the obligation to have a minimum capital of € 25,000 and to deposit funds into an Irish bank account. At the time, those rules which were aimed at protecting consumers were subject to scrutiny by the European Commission.

In September 2013, the Commission found that the Irish requirements were in breach of the EU rules on free movement and that traders should be entitled to provide services cross-border on a temporary basis (including electronically) in Ireland without being subject to unjustified or disproportionate requirements.\(^{34}\)

As a result, the Irish rules on travel operators were amended in July 2014 with the entry into force of the Shannon Group Act.\(^{35}\) In particular, the permit requirements which included the obligations of a minimum capital and the posting of a bond were abolished with regards to travel operators established in other EU States. The latter are now authorised to offer travel packages to Irish customers subject only to a pre-notification to the Irish authorities and the provision of evidence of “security in respect to packages offered for sale or sold by him or her in [Ireland]”.\(^{36}\)

3.2.2 Restrictions on the registration of top-level domain names
Probably one of the most noticeable barriers examined in our study from 2011 concerned the obligation for e-traders to have a physical presence (branch, subsidiary or premises) in some EU States in order to register a local top-level domain name.

So-called “country code top-level domains” (cc-TLD), such as “.se”, “.de” or “.es”, are important for ensuring the visibility of websites. A Swedish e-trader with a local cc-TLD may find it more interesting to sell its products to German consumers via a mirror or a customised website with a German cc-TLD. Indeed, this is a way of bridging the trust gap between local consumers and foreign e-traders. More importantly, search engines rank local content higher which means that websites with local cc-TLD will appear first on a search result. Given the importance of search results for the visibility of a trader, the granting of a local cc-TLD constitutes an obvious competitive advantage.

Yet, as shown in our previous study, this advantage is not always available to foreign e-traders. In 2011, we found that some sort of physical presence was required in at least Germany, Finland, Estonia and Norway. As far as we understand, those requirements are still in place in those countries and new cases have been highlighted in other EU States.\(^{37}\) One company interviewed by the Board in 2013 appreciated the costs of establishment requirements in Norway, Denmark, Germany and Finland at € 10,000 per year (overhead costs for maintaining an office in each of those countries).

In 2014, the European Commission addressed this issue in a reply to a parliamentary question.\(^{38}\) The Commission acknowledged that establishment requirements may constitute obstacles but that “these requirements alone do not prevent online service providers from selling their goods or providing their services in another Member State, as their website would still be accessible outside of their home country”. In our view, the Commission missed the point which is that e-traders are concerned by the lack of visibility of their websites abroad. From a legal perspective, we doubt that the Commission’s argument is relevant since EU law prohibits all unjustified trade barriers, regardless of the severity of their impact on trade.\(^{39}\)

There are however some positive developments. A number of EU States have initiated a so-called “Frontrunners initiative” with the objective of achieving a better functioning internal market. This initiative is based on the voluntary cooperation between EU States.\(^{40}\) Within that frame, Sweden initiated a project on establishment requirements that hamper cross-border e-commerce linked to the registration of domain names under cc-TLD.\(^{41}\) The project shows the will of certain EU States to deal with trade barriers in a concrete manner. In that respect, it must be noted that Finland recently announced its plan to abolish the establishment requirements for the acquisition of a local cc-TLD.\(^{42}\)
3.2.3 Data storage requirements
The Board has in previous studies highlighted the worldwide emergence of trade barriers in the form of local data storage requirements. Within the EU, the Data Protection Directive prohibits restrictions on the free flow of data. The Directive however restricts the transfer of personal data from the EU to third countries that do not have an equivalent level of data protection.

Hence, we do not find any data storage requirements applicable to purely intra-EU transactions. In particular, an e-trader in one EU State may freely transfer and store data pertaining to customers residing in other EU States. In our 2011 study we mentioned the abolition of a local storage requirement in Poland following the European Commission’s intervention. This example illustrates the freedom of movement of data within the EU.

3.2.4 Waste management and recycling requirements
The treatment of waste is partly harmonised at EU level. The EU rules on waste impose an obligation on e-traders of certain goods to register with the competent authorities of each EU State of consumption. For instance, this is the case for electrical goods and electronic equipment covered by the WEEE Directive. The Directive also imposes reporting requirements in respect to quantities of goods sold, collected and treated for each calendar year. Further requirements may be imposed on e-traders in accordance with the Packaging and Packaging Waste Directive. In particular, this Directive obliges e-traders to join local pack-aging and packaging waste schemes. The e-trader also needs to keep track of the amount of pack-aging sold.

The implementation of these pieces of EU legislation vary from one country to the other which makes it difficult for an e-trader to assess its obligations in the case of cross-border sales. For instance, in the case of electronic waste, some EU States have adopted mandatory regulations whereas others have opted for voluntary agreements between government and industry or voluntary industry initiatives. Similarly, the e-trader’s responsibilities in respect to the tonnage of produced waste differs from one country to the other.

The Board has been in contact with e-traders which have had difficulties in adapting to these different national regimes. They found that the obligation to register locally and participate in national recycling schemes in practice necessitated a physical presence in the EU State in question. Their understanding was that the EU legislation on waste aims at situations where the trader operates a brick-and-mortar store that can collect and treat waste but was not adapted for the reality of e-commerce.

3.3 Unclear rules on jurisdiction
Probably the most common issue raised by e-traders contacted by the Board concerns the difficulties in asserting which rules – those of the e-traders or of the customers – apply to cross-border transactions. For instance, in the case of a Swedish e-trader selling goods to a French consumer, the e-trader will have to identify whether French or Swedish rules will apply in respect of a variety of issues including consumer rights, the marketing and presentation of an offer, licensing requirements, product labelling, VAT payments, data protection and so on.

In spite of growing harmonisation, the national rules affecting these issues vary from one EU State to another. It is therefore important to identify the applicable rules at an early stage. This however is not an easy task. A number of EU rules address the issue of allocation of law and jurisdiction, but they are not always clear nor are they consistent. Indeed, the law of the e-trader may apply for some aspects of a given transaction whereas the law of the consumer will apply for others. In the case of data protection, the law of a third EU State may even apply if personal data are transferred to, and processed in, that state. The following examples illustrate the lack of clarity of these rules.

First, EU law provides that the laws of the state of establishment of the e-trader should apply in the case of online advertising. Yet, we find situations where some EU States consider that their rules on advertisement may apply to foreign e-traders. This is particularly the case in France where some authors argue that the French rules on sales periods may apply to foreign e-traders targeting the French market.

Second, EU law provides that the consumer rules of the EU State where the consumer is a resident apply in a cross-border transaction if the trader directs its activities to that state. However it is unclear what is meant by “directing activities at a
specific state”. In that respect, the EU Court has identified a number of factors to be taken into account such as the language of the website, the currency offered for payment, whether a local customer helpdesk number is provided and/or the use of a local top-level domain name. However, the EU Court does not conclude whether the trader is targeting a certain EU State solely based on the existence of these factors. Rather it cautiously states that these factors should assist in identifying whether the e-trader “was envisaging doing business with consumers domiciled in one or more Member States, [...] in the sense that it was minded to conclude a contract with them”.

This somehow cryptic formulation leaves a broad margin of appreciation for all involved parties: the e-traders, the consumers and the national consumer organisations. Given the differences in national consumer rights, for instance in respect to the liability for faulty goods, the lack of clearly allocated rules may have serious consequences for e-traders, especially the smaller ones that may be reluctant to sell cross-border.

The European Commission is aware of problems related to the allocation of law and jurisdiction. In its 2014 Communication on Internet Policy and Governance, it acknowledged that the complexity of today’s rules on applicable law and jurisdiction may give rise to a certain degree of legal uncertainty. The Commission announced recently that it will launch an in-depth review of the risks of conflicts of law and jurisdictions arising on the internet. At the time of writing it is unclear whether this investigation will result in concrete proposals.

3.4 Barriers linked to sales conditions

Offering a product via a website may potentially trigger the application of innumerable consumer and sales laws worldwide. As shown above however, consumer rules of other EU States may in practice only apply when the e-trader directs its activities at those markets. Other national rules affecting sales conditions, such as the rules on product labelling, are only relevant if actual sales take place.

Nonetheless, it is important for the e-trader selling goods in other EU States to understand which rules would apply to the presentation of its offer, the drafting of its contract and more generally to the import of those goods. In spite of a growing harmonisation, our study reveals that a number of barriers related to sales conditions remain within the EU.

In our study from 2011, we focused on two issues: the fragmentation of the regulatory framework for consumer protection and the French requirement limiting sale offers to certain periods. Following an update on these questions, in this section we examine additional types of barriers to trade in the form of national labelling requirements on goods and the legal uncertainty in respect of omni-channel sales.

3.4.1 A less fragmented framework for consumer protection

From a consumer’s perspective, shopping experiences online and offline differ in at least one important aspect: the consumer’s opportunity to
examine, touch, smell or try a product in a brick-and-mortar shop is not (yet) available with a computer, a tablet or a mobile phone. This absence of a tangible experience is compensated by a number of rights granted to the online consumer, the main one being the right of withdrawal.

One problem we noted in 2011 was that the right of withdrawal differed within the EU. Cooling-off periods, during which consumers may change their mind and decide to return a product bought online, varied from 7 to 15 days depending on the country of residence of the buyer. This was viewed as an important obstacle for e-traders that were not familiar with the consumer rules of each EU State and eventually needed to adjust their terms and conditions (and their stock management) to the rules of each national market.

Today, this issue has been solved. The Consumer Rights Directive, 57 which is applicable since June 2014, provides for full harmonisation within the EU of certain consumer rights in the case of online transactions. In particular the right of withdrawal is now regulated in the same way in all EU States. The cooling-off period, which is set at 14 days, applies regardless of the country of residence of the consumers.

Likewise, ancillary rules such as the obligation imposed on consumers to pay the cost for sending an item back to the trader when exercising the right of withdrawal apply in the same manner in all EU States. 58 The Consumer Rights Directive also fully harmonises the national rules on the passing of risk in the case of loss of, or damage to the goods dispatched by the e-trader. The harmonisation of these national consumer rules removes significant barriers to cross-border trade and is an important move towards the completion of a Digital Single Market. Website owners do not need to customise their terms and conditions according to the country of residence of their consumers. From a consumer’s perspective, the Directive contributes by building trust for traders located in other EU States.

Although it reduces fragmentation, a number of critics have voiced their opposition towards the harmonisation of consumer rights at EU level.

First, several companies have mentioned to the Board that the right of withdrawal, as it is formulated in the Directive, is too restrictive on e-traders. One particular issue concerns the length of the cooling-off period which is 14 days, as previously mentioned, but in practice can be extended to up to 28 days. 59 One company stated that this was a long period during which the goods were out in circulation. This may be especially problematic in the case of fashion-sensitive or seasonal products that become rapidly out-of-date. Another e-trader mentioned that this is particularly problematic in the case of regulated sales period as there is a risk that items sold at discounted rates are not returned until the sales period is over and may therefore have to be resold at full price. 60

A trade organisation for e-commerce mentioned that the e-trader’s obligation to refund their consumers within such a short period of time means that the refund may actually take place before the trader has received the goods in question. This does not give the trader any chance to examine the product before reimbursement, especially to assess whether it is the correct item or whether the consumer has used it in an appropriate manner.

Second, a number of consumer rights remain subject to minimum harmonisation. One example concerns the liability for non-conformity of goods (faulty goods) for which EU law imposes a minimum period of two years. 61 Although most EU States have opted for two years, 62 some have set a higher level; for instance three years in Sweden 63 and six years in Ireland. 64 The rules on burden of proof also vary from one EU State to another. 65 Another example of potential disparities between national consumer rights concerns unfair contract terms which are only subject to minimum harmonisation. 66 This makes it possible for the EU States to go beyond the EU level of consumer protection and introduce stricter national rules on unfair contract terms.

Hence a certain level of fragmentation remains within the regulatory framework for consumer protection. This means that e-traders still need to identify relevant national consumer rules and adapt them when targeting the markets of other EU States. As noted in our study from 2011, the e-traders contacted for this report have adopted different approaches to handle this fragmentation. While some want to make sure that they comply with all national rules before entering a market – which can result in a costly due diligence work – others have opted for a more risky approach, launching into new markets without proper legal due diligence and adjusting their offers if necessary when confronted by consumers or authorities.
3.4.2 Unclear rules on periods of special sales
In our study from 2011, we identified a French ban on offering special sale offers outside legally determined sales periods as a barrier to cross-border e-commerce. Since then, a number of judgments by the EU Court and some national courts have questioned the legality of this type of regulation. As a result, we find it unlikely that the French ban, should it be upheld, would apply in cross-border situations.

The French rules, which are still in force, set periods during which special sales may be held. There are two sales periods with a 6-week duration, one in winter and one in summer. The rules apply to both forms of retail – offline and online – and may, according to a French governmental report, apply to foreign websites which are targeting at the French market. The latter report particularly noted that at least one UK site was found to be in breach of the sales rules in 2011.

Sales periods are not only regulated in France but in other EU States as well. However, recent case-law from the EU Court questions the legality of such national sales periods’ regulations. Although those judgments were primarily concerned with the Belgian and Austrian rules, it is likely that the French restrictions on sales periods would also be viewed as violating the EU rules on unfair commercial practices.

In that respect, it is interesting to note that following the judgments of the EU Court, the supreme courts of two EU States, Cyprus and Belgium, have invalidated their national rules on sales periods. At the time of writing, we do not know of any legal action challenging the validity of the French rules on sales periods.

3.4.3 Labelling requirements
Similar to products sold in brick-and-mortar shops, products sold online must comply with local labelling requirements. To a certain extent, the national labelling rules are harmonised at EU level. However, this harmonisation is not complete and the EU States enjoy a certain level of discretion to impose additional requirements, for instance in respect to the language used for product labelling.

In practice, this means that an e-trader will have to label its products differently depending on the shipping destination of the goods.

One EU retailers’ organisation has claimed that product labelling requirements are “a major headache” for retailers. Even if the requirements are applicable to both online and offline situations, they hit online retailers harder since the latter often lack local presence in the host state and knowledge of the local labelling requirements. Unlike physical traders, e-traders may aim to achieve a sufficient sales volume by combining several markets, which renders them more vulnerable to differences in national labelling requirements.

According to a study on cross-border e-commerce within the EU, “retailers with one, common inventory for both stores and online operations must put the same label on all inventory, and in multiple languages, regardless of the goods’ specific destinations.” This was confirmed by one of the companies interviewed by the Board, which stated that it did not adapt its product line to different countries and did not separate products in its warehouse based on the country of destination. The study mentioned above also concluded that national labelling rules have a severe impact on potential profitability.

Hence, national labelling requirements, to the extent that they differ from one EU State to another, make it more difficult and costly to sell goods to consumers across borders, although this trade barrier may not necessarily be in breach of the EU rules on free movement. In most cases, such national requirements are motivated by the need to protect consumers who demand that information on exported products be available in a language they understand.

3.4.4 Unclear rules for hybrid sales
As mentioned above, an increasing number of retailers are developing omni-channel strategies. The demarcation between online and offline sales is sometimes blurred which creates uncertainties as to which rules will apply in the case of a hybrid transaction.

One such example of a hybrid transaction concerns the application of the right of withdrawal in a situation where a consumer would order a product, pre-pays for it or makes a down payment online, but actually purchase it or simply have it delivered in the trader’s physical store. Given that the right of withdrawal only applies to distance and off-premise contracts, it is important to determine the nature of the transaction at stake.

According to a company interviewed on this issue, present legislation has not kept up with the changes in the retail sector. Uncertainties created
by out-dated legislation are an impediment to cross-border e-commerce. In that respect, the trade organisation EuroCommerce has suggested that all legislation applicable to retail should be subject to an omni-channel/e-commerce test in order to create a “level-playing field for all forms and business models of commerce” and facilitate channel neutrality.68

3.5 Intellectual property-related obstacles

While the internet and e-commerce are global phenomena, intellectual property rights are territorial in nature. In most cases these rights are regulated at national level and their geographical scope is limited to the territory of the EU State granting them.69 Enforcement is also exerted on a country-by-country basis. The fragmentation of the intellectual property landscape leads to disparities in the offer of e-traders. This is particularly true with respect to digital distribution, examined in Section 4.3.

Aside from digital distribution, we identified one barrier in our 2011 study which concerned an e-trader’s obligation to bar customers from outside the Nordic countries from viewing its website in order to comply with music copyrights. The company in question provided a fashion show application on its website. It had secured the music copyrights for the Nordic countries only and was therefore compelled to geoblock the showroom function for non-Nordic viewers.

Although this goes against the idea of a Digital Single Market, we do not see that the fragmentation of the intellectual property landscape results from legal barriers. As far as we understand, e-traders are not prohibited by national rules from acquiring licensing rights for the territory of the EU. In that respect, the economic interests of each actor (e-traders and right-holders), rather than national regulations, explain why certain intellectual property rights are licensed for a limited territory.70

3.6 Barriers on payments

An essential step of all e-commerce transactions, payment, has proved challenging for a number of e-traders contacted by the Board. Not all issues raised by these operators constitute trade barriers.71 In this section we focus on national rules on payment that may hinder e-commerce.

Most of the barriers described in our 2011 study have been addressed by the public authorities and in many cases the restrictions have been removed or at least mitigated. This is the case for the Danish card regulation and the Belgian ban on advance payment. There is still an unsolved issue regarding the administrative burden imposed on cross-border trade by money laundering legislation.

We provide an update on these issues below and examine additional problems that were newly raised by e-traders: the UK licensing requirements imposed on e-traders who wish to offer payments in instalments and the disparities between the national VAT regimes.

3.6.1 The Dankort regime

Most Danish consumers hold a Dankort payment card.72 In practice it is very difficult for foreign e-traders to enter the Danish market without offering Dankort payment options. In our 2011 study, we identified two types of obstacles linked to the Dankort-system.

First, Danish law73 provided for a preferential treatment in favour of Dankort that made it less attractive to use other card payments. The law made a distinction between payments with Dankort for which banks were not allowed to charge a fee and payments with international cards issued in Danish kroner that may be subject to such a fee. International payment cards issued in other countries may be subject to even higher fees than those issued in Denmark.

Following pressure from the European Commission, the Danish law was amended in late 2011. The new Danish rules allow merchants to put a surcharge on payments with credit cards (both Danish and foreign) whereas no charges may be imposed on payments with Danish and foreign-issued debit cards.74 In that respect, it is interesting to note that current Commission proposals for new EU legislation are considering the abolition of any surcharge fees.75

The second barrier identified in our 2011 study concerned the obligation to provide a Danish registration number (CVR) in order to be able to offer Dankort as a payment method. In practice this means that foreign e-traders need some kind of establishment in Denmark.76 This requirement imposed by the company Nets – the provider of Dankort for merchants – is still in place. To our knowledge, there are no plans to abolish that
requirement. As Nets is a private operator, it is uncertain as to whether it is subject to the prohibition set in the EU rules on free movement.

Given the importance of Dankort for foreign e-traders wishing to access the Danish market, the abolition of the discrimination against foreign cards examined above may be of little consolation as long as the market, in practice, requires a local establishment for the provision of Dankort payment facilities.

3.6.2 Constraints on advance payment
In the absence of physical contact with its customers, it is important for the e-trader to secure the payment of goods and services purchased online. This is particularly true in the case of cross-border transactions where it may be more difficult for a trader to enforce payment against bad payers. One way to secure payment is to require advance payment or card payment details prior to shipping the goods or providing the services. In our 2011 study, we found that Belgium had imposed a ban on both of these practices.

Those rules were subject to a judicial review by the EU Court in late 2008. In its ruling the EU Court found that the Belgian ban on requiring card payment details in advance was disproportionate and should be abolished. However the EU Court upheld the Belgian ban on requiring advance payment which it found justified by the need to protect consumers.

In spite of this ruling, Belgium amended its law in order to allow e-traders to request advance payment. In fact, the EU Consumer Rights Directive which has been in force since 2014 provides that the EU States may not "prohibit the contracting parties from performing their contractual obligations during the withdrawal period".

However, we understand that in practice, some restrictions on advance payment still exist in certain EU States. In the Netherlands, for instance, a consumer may only be obliged to pay half the purchase price in advance, i.e. before delivery. E-traders may require Dutch consumers to pay by credit card in advance as long as the card is not charged until after delivery.

3.6.3 Money laundering legislation restricts cross-border trade
Money laundering legislation may render online payments via payment service providers problematic in the case of cross-border transactions. In our 2011 study, we noted that the EU rules on money laundering impose an obligation on financial intermediaries to conduct customer due diligence. In practice, this means that payment service providers need to verify a new customer's identity.

Whereas the payment service providers have access to national databases and standardised procedures that facilitate such verification for local transactions, they may have to request paper copies of identification documents in the case of customers who reside in other EU countries. One Swedish operator contacted by the Board in 2011 mentioned that this administrative burden may have a deterrent effect on foreign customers, especially when the transaction concerns small sums.

To the Board's knowledge, the problem identified in our earlier study remains to this day. The European Commission recently proposed to amend the EU rules on money laundering without addressing this issue.
3.6.4 Credit license requirements for payments in instalments

E-traders are usually able to offer a wide range of payment methods to their customers: debit or credit card, invoice or payment in instalments. The latter amounts to consumer credit in practice.

One company interviewed for this study stated that the national rules on credit payment vary from one EU State to another. In particular, the company in question mentioned that in some countries, such as the UK, a credit license is required in order to offer consumer credit,97 while in others, such as Sweden, there is no such requirement if the credit is supplied in connection to the sale of goods or services and the company’s main purpose is not financial activities.98

The disparities between national legislations makes it more difficult for e-traders established in one EU State to provide the same payment offers throughout the territory of the Union. Credit license requirements, even if they are justified by legitimate interests such as the protection of consumers, may in addition amount to establishment requirements which, as seen above, are particularly counterproductive in the field of e-commerce.

3.6.5 VAT – A complex system in cross-border transactions

An issue that is closely associated to payments is the taxation of e-commerce transactions. Several companies interviewed for this study have stated that VAT is a complicated field when selling goods or services across borders. In spite of common EU rules on VAT, there are still disparities between the national VAT regimes which can result in a costly due diligence and a heavy administrative burden.

At EU level, the VAT Directive sets up a framework for VAT,99 but it does not set individual VAT-rates which is left to the competence of each EU State. As a result, VAT-rates for a transaction with a certain product or service may vary between the EU States.

Furthermore, an e-trader established in one EU State may need to register in other EU States if its sales volumes in those countries exceed a certain amount.100 Not only do these thresholds vary between EU States (€ 35,000 or € 100,000 depending on the country) but the registration procedure may also differ. For instance, VAT registration may be conducted online in certain countries,101 but not in others.102 E-traders contacted by the Board have also complained that the process of reporting VAT differs between EU States and is cumbersome. Requirements regarding the information which should be included on invoices may also vary between the different EU States.103

These differences taken together represent a burden for cross-border sales. They are time-consuming and costly, especially for small and medium-sized companies. We find that the fragmented VAT regime can be especially challenging for start-ups which often lack in-house tax expertise.

3.7 Barriers linked to e-government

E-traders may also face problems in their contacts with the public authorities. In our 2011 study, we identified a number of barriers in respect to e-signatures, e-invoices, e-reporting and e-registration procedures. In those cases, the systems adopted by the public authorities did not recognise technical solutions in place in other EU States. Thus, an e-signature issued in one EU State was not compatible with the registration system in another state, which resulted in an increased burden on the trader. To our knowledge, these types of problems remain today.

However, this lack of mutual recognition is not specific for e-commerce. Indeed, it is equally likely to harm other types of businesses who use digital solutions. Therefore we will focus on barriers that are more specific to e-commerce in this section.

In that respect; we have been in contact with a Swedish developer of navigation apps. In order to develop its services, the operator needs access to hydrographic data from the public authorities in several EU countries. In principle, such access is guaranteed by an EU Directive from 2003.104 In practice, however, the company experienced difficulties in getting access to this data from Poland, Spain and Portugal. It took over two years of fruitless contacts and in the end the intervention of the Solvit-network for the Polish authorities to provide the relevant hydrographic data.105 As far as we understand, the problem remains unresolved in Portugal and Spain.
3.8 Fragmented framework for data protection

Obviously, because e-commerce relies on digital technology, it is especially concerned by the rules on the handling, storage and transfer of data. In addition to the now-abolished storage requirement in Poland examined above, the most common problem for traditional e-commerce relates to the fragmentation of the European regulatory framework for data protection. In spite of harmonised rules, notably via the Data Protection Directive, there remains a number of differences between EU States’ rules.

One example concerns the definition of “personal data”, a core notion in the Directive, which is very broad, and has been interpreted differently by the EU States. In particular, this notion does not cover IP-addresses in all countries. For instance, whereas Irish courts have found that IP-addresses do not constitute personal data, the opposite view was held in Sweden. In France and in Germany, some courts have found that IP-addresses constitute personal data whereas others have rejected this view.

Similarly, whereas most EU States aim to protect data related to private persons, Austria has extended the scope of its rules to legal entities. A further example of national differences concerns the notion of consent to the use of personal data. For instance, consent in Germany has to be given in written form and cannot be implied from an action or inaction on the part of the person concerned, whereas Ireland does not specify the form in which consent must be given and acknowledges that consent may even be implied. A middle ground can be found in Poland which does not require consent to be given in written form, but does not allow for consent to be implied.

These different approaches can lead to barriers for cross-border trade, since they oblige e-traders to adapt their businesses to different rules in different EU States.

A new regulation (as opposed to the current rules in the form of a directive) is currently being negotiated. It is still unclear to what extent these new rules will address these problems. However, some e-traders have already expressed concerns that proposed rules which oblige companies to appoint a data protection officer if they process personal data relating to more than 5,000 data subjects during any consecutive 12-month period would be especially burdensome on SMEs. At the time of writing, the new rules are not yet finalised. They are expected to be adopted at the end of 2015 and implemented by 2018.

3.9 Obstacles to cross-border parcel delivery

Parcel delivery is an essential part of the online sales of goods. Several studies have identified barriers and problems related to parcel delivery across borders as experienced by e-traders and consumers. Those problems include: the lack of information, the lack of transparency on available services and prices, high costs for cross-border deliveries, the lack of a so-called “track and trace” mechanisms and return procedures not adapted to cross-border deliveries.

A number of e-traders interviewed for this study have mentioned some of these problems as barriers
to cross-border e-commerce. In particular, the price structure (lack of transparency and high costs) for cross-border deliveries was taken up by several interviewees.

Although it is without a doubt that these barriers have a negative effect on cross-border e-commerce, they are not caused by national rules and therefore fall outside the scope of this study. Instead, these obstacles seem to result from market imperfections, as this was confirmed by e-traders we have been in contact with. This is also the understanding of the European Commission which, in its roadmap for completing the single market for parcel delivery, is not proposing new legislation on this matter but rather leaves it up to delivery operators and e-traders to improve the situation.

3.10 Conclusions

The review of trade barriers affecting traditional e-commerce — summarised in Table 1 — shows that the EU’s internal market, officially completed 20 years ago, still has room for improvements.

Still, we note some positive developments. Several of the barriers examined in our 2011 study are on their way to being removed or at least mitigated. Positive developments such as the full harmonisation at EU level of national rules on distance selling or the abolition of certain establishment requirements contribute to the strengthening of the Digital Single Market.

We also note that the most damaging barriers on cross-border trade are rare. This is the case for the bans on online sales. Such measures are often motivated by the fear that trade in sensitive goods or services will fall outside the control of the public authorities if they take place online. In most cases where such fears arise, however, the EU States will have recourse to less drastic measures than a straight sales’ ban, for instance by regulating the sales transaction as such (e.g., imposing notification and/or information requirements) or the qualifications of the sellers (e.g., by way of licensing and/or establishment requirements).

Similarly, only a handful of e-traders interviewed for this report have mentioned establishment requirements as obstacles to their cross-border operations. One possible explanation may be found in market developments, particularly the growing importance of omni-channel strategies and the consolidation of the online retail market, which allow traders to be less dependent on a single local website offer. The need to bridge the trust gap between e-traders and consumers abroad also calls for investment in local infrastructures (premises, customers’ helpdesk, storage facilities, etc.) which at the same time fulfils most national establishment requirements.

Yet, some trade barriers remain. Large parts of the legal framework applicable to e-commerce — from labelling requirements to the national VAT regimes — is still fragmented. Especially problematic for e-traders is the assessment of whether their national rules, or those of the consumers, will apply in a cross-border transaction. This may concern a wide variety of issues: the marketing of products, the handling of customer data or the formulation of the terms and conditions in a sales contract. We find on those issues that an effort of clarification can be made by the public authorities.

At the same time, we note that several of the barriers examined in this chapter are not legal barriers, i.e. national rules hindering trade. In some cases, obstacles to cross-border transactions are the result of market imperfections. For instance, issues related to the fragmented intellectual property landscape of the pricing of cross-border delivery. Although the public authorities may play a supportive role, it is ultimately for the market to find ways to remedy these issues.110
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<td>Establishment requirements (Section 3.2)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Irish permit on online travel agents</td>
<td>✓</td>
<td>Solved</td>
<td></td>
</tr>
<tr>
<td>Top-level domain names</td>
<td>✓</td>
<td>Problem remains. Initiatives by some EU States to remove barriers (Frontrunners)</td>
<td></td>
</tr>
<tr>
<td>Data storage</td>
<td>✓</td>
<td>Solved</td>
<td></td>
</tr>
<tr>
<td>Waste management</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unclear rules on jurisdictions (Section 3.3)</td>
<td>Lack of consistency and of clarity of rules on jurisdiction and applicable laws</td>
<td>Problem remains. The European Commission plans to examine this issue</td>
<td></td>
</tr>
<tr>
<td>Barriers linked to sales conditions (Section 3.4)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fragmented rules on consumer protection</td>
<td>✓</td>
<td>Partly solved (right of withdrawal). Remaining issues include liability and unfair contract terms</td>
<td></td>
</tr>
<tr>
<td>Sales periods applicable to foreign e-traders</td>
<td>✓</td>
<td>Judgment by the EU Court may result in the inapplicability of these rules</td>
<td></td>
</tr>
<tr>
<td>Labelling requirements</td>
<td></td>
<td>Problem remains</td>
<td></td>
</tr>
<tr>
<td>Unclear rules for hybrid sales</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intellectual property obstacles (Section 3.5)</td>
<td>Fragmented intellectual property landscape</td>
<td>✓ Problem remains</td>
<td>✓</td>
</tr>
<tr>
<td>Barriers on payment (Section 3.6)</td>
<td>Dankort-restrictions</td>
<td>National rules amended. Private barrier (establishment requirement) remains</td>
<td>✓</td>
</tr>
<tr>
<td>Ban on advance payment</td>
<td>✓</td>
<td>Problem partly solved by the new Consumer Rights Directive</td>
<td></td>
</tr>
<tr>
<td>Money laundering restrictions</td>
<td>✓</td>
<td>Problem remains</td>
<td></td>
</tr>
<tr>
<td>Credit license requirements</td>
<td></td>
<td>Problem remains</td>
<td></td>
</tr>
<tr>
<td>Fragmented VAT regime</td>
<td></td>
<td>Problem remains</td>
<td></td>
</tr>
<tr>
<td>Barriers linked to e-government (Section 3.7)</td>
<td>Access to public sector information</td>
<td>Problem solved in some EU States but not others</td>
<td></td>
</tr>
<tr>
<td>Fragmented framework for data protection (Section 3.8)</td>
<td>Fragmented application of the EU data protection rules</td>
<td>Problem remains but may be solved with the proposed Data Protection Regulation</td>
<td></td>
</tr>
<tr>
<td>Obstacles to cross-border parcel delivery (Section 3.9)</td>
<td>Quality and pricing issues</td>
<td></td>
<td>✓</td>
</tr>
</tbody>
</table>

* See National Board of Trade "Survey of e-commerce barriers within the EU – 20 examples of trade barriers in the digital internal market" (2011:2).

As shown in Box 1, technological advancements and business developments lead to an increasingly complex market for e-commerce. In this chapter we review recent trends in e-commerce and the legal issues those may trigger. The range of trends examined here, although not exhaustive, is very broad. It covers the following:

- the growing importance of online marketplaces (Section 4.1);
- search engines which play a considerable role in web navigation and in matching potential buyers and sellers (Section 4.2);
- the market for digital distribution which has become prominent in the last decade (Section 4.3);
- the development of the app economy (Section 4.4);
- the emergence of cloud computing (Section 4.5) and Big Data (Section 4.6), both enablers in e-commerce transactions;
- the development of the sharing economy, particularly peer-to-peer platforms (Section 4.7);
- additive manufacturing and notably the development of 3D-printing (Section 4.8); and
- new payment methods such as the use of virtual currencies and m-payment (Section 4.9).

We find that, unlike the barriers on traditional e-commerce examined in the previous chapter, those affecting new trends are more diffuse. In some cases, we are referring to potential, rather than actual, barriers as it is still unclear how the regulatory framework applies to emerging business trends.

4.1 Online marketplaces

The selling of goods and services via online marketplaces constitutes a growing part of e-traders’ multichannel strategies. These marketplaces are platforms usually in the form of websites where multiple sellers (so-called “third party vendors”) may offer their goods or services to other businesses or consumers. The use of marketplaces varies around the world. In the U.S. sales through marketplaces account for one-third of online sales, while in China it is close to 80%.122

There are different types of marketplaces, such as app stores for mobile applications (examined more in detail under Section 4.4) or peer-to-peer platforms (Section 4.7). Some platforms are generalist and offer a wide range of goods (e.g. eBay, Amazon) whereas others specialise in certain products (such as Zalando for clothing).123 The common denominator is that the marketplace operator is responsible for processing the transaction, particularly the payment,124 whereas products and services are provided by the third party vendors.

The move from a traditional e-commerce connecting two parties (an e-trader and its customer) to a two-sided market involving a third player (the marketplace operator) raises legal issues. In this section, we examine two of those issues: the lack of clarity of the rules on intermediate liability and the lack of flexibility of the rules on product information.

4.1.1 Unclear rules on intermediate liability

The Board has in a previous report examined the issues of piracy and trademark infringements, including those over the internet.125 We discussed in particular the difficulties faced by the right-holders to enforce their rights in cross-border situations. Closely related to these issues is the liability of the marketplace operators in cases of piracy and counterfeiting by third party vendors using their platforms. The rules on intermediate liability, here the liability of the marketplace operators, may also concern other situations than piracy and counterfeiting, such as cases of fraud by third party vendors.

The dilemma for marketplace operators is that they generally have limited knowledge about products offered via their platforms but at the same time their visibility makes them more likely to be the target of legal actions by victims of fraud or piracy. This dilemma is partly addressed by the EU rules on intermediate liability set in the E-commerce Directive.126 These rules however have been interpreted differently by the national courts across the EU and several companies have complained about the lack of transparency and uniform application of the regulatory framework in respect to the liability of marketplace operators.

The general principle under the E-commerce Directive is that a website storing information on behalf of a customer shall not be held liable for that information if it has no knowledge of illegal activity. The storing of information in those circumstances is defined as “hosting” and the website (the host) will only be held liable if, upon obtaining knowledge of illegal activity,127 it fails to remove or to disable access to the information.

In a ruling from 2011, the EU Court clarified the application of the rules on hosting with regards to
online marketplaces in a trademark infringement case. In particular, the EU Court held that the operators of online marketplaces may rely on the exemption from liability under the E-commerce Directive provided that they have not played an “active role” in the unlawful transaction. Furthermore the EU Court stated that marketplace operators are to be held liable if they fail to act promptly to remove data from their websites upon obtaining knowledge of such unlawful activities.

In spite of this clarification, a number of questions of interpretation remain unsolved. One such question concerns the concept of “hosting”. In France, the national courts have adopted divergent views on this issue. In one case, a court considered that an online marketplace (eBay) had an inactive role towards third party content, and in another case that the same marketplace played such an active role that it was deemed to have knowledge and control over the data it stores. In Germany, the Supreme Court has distinguished hosting services that fall under the liability regime of the Directive from those which do not, based on whether the service provider assimilates third party content.

One marketplace operator contacted by the Board commented that the approach adopted in Germany was unique, which illustrates the further need for clarification of the rules on intermediate liability with respect to online marketplaces. The absence of uniform interpretation of these rules obliges marketplace operators to customise their services nationally, which in turn contributes to the fragmentation of the Digital Single Market.

4.1.2 Rigid rules on product information

Online marketplaces often act as platforms via a fixed interface (website) regardless of the products offered on sale. Large marketplaces offering everything from cars to quilts will thus make use of the same interface which comprises of a standard product description. This standardised product information may in turn conflict with the specific information requirements imposed by EU legislation in respect of certain products.

Those requirements are usually harmonised at EU level and cover a broad variety of products for which specific information needs to be displayed on the seller’s website. These requirements may be easier to fulfil in the case of traditional e-commerce where the e-trader can customise its website. For instance an e-retailer selling refrigerators may find it relatively
4.2 Search engines

Search engines are essential tools for navigating the internet. Not only do they allow users to find information among the billions of webpages available on the net, they also enable e-traders to reach out to potential customers with a number of advertising services.

Google, which is by far the largest search engine in Europe, has been in the spotlight of the public authorities in the EU in recent years. In November 2014, the European Parliament adopted a resolution calling for the unbundling of search engines from other commercial services. Although symbolic, the call for breaking up Google’s activities should be seen as the last of a series of tensions between European regulators and the aggregator of information.

In this section, we focus on two issues: the introduction of so-called “snippet taxes” in some EU States and the application of the right to be forgotten to search engines.

4.2.1 Linking and snippet taxes

Search engines such as Google present results with a link to the relevant webpage and a two-line summary or extract of that webpage, a so-called “snippet”. Online newspapers in various EU States have for some time argued that such a display infringed on their intellectual property rights. For instance in 2006, a Belgian court held that Google violated the copyright of local newspapers and ordered the removal of the link and snippets from the search results. The issue was also discussed in Sweden in a case which was ultimately settled by the EU Court. In its ruling from February 2014, the EU Court found, unlike the Belgian court, that copyright protection does not apply in the case of clickable links in so far as those refer to works freely available on another website.

Another issue that has been debated in past years concerns the imposition of a levy on news aggregators for the display of snippets of third party material. Both Spain and Germany have recently introduced snippet taxes which aim to compensate publishers for the use of their work. Such measures qualify as trade barriers insofar as they hinder the provision of news aggregator services.

In Germany, a law was passed in 2013 that allows publishers to charge search engines and news aggregators for linking to their stories and therefore using their content. In practice however, the law has had a limited effect as Google decided to exclude publishers from its search results unless the latter would agree to waive their right to compensation. Given the dependency of publishers on the traffic generated by Google, most of them complied with this condition leaving the law de facto inapplicable.

In Spain a law similar to the German one was adopted in October 2014. The Spanish law declares that publishers cannot refuse the use of non-significant fragments of their articles by third parties. However, it creates a levy on such use to compensate the publishers. Unlike the situation in Germany, the Spanish law declares this right to payment inalienable which makes it impossible for the news organisations quoted to waive it. This has led to Google shutting down its Spanish version of Google news.

4.2.2 The right to be forgotten

The debate regarding the right to be forgotten has been ongoing since the European Commission presented its proposal for a new Data Protection Regulation in 2012. Such a right already exists though in the current EU Directive from 1995. According to the Directive, a person may ask for the deletion of information that is liable to significantly affect the fundamental rights to privacy and the protection of personal data.

In May 2014, the EU Court found that this right also applies to search engines. The case concerned a request addressed by a Spanish private citizen for the removal of personal data in Google Spain’s search results. The EU Court held that in certain circumstances “the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person”.

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Such an obligation is burdensome for search engines. First, it is surrounded with uncertainties. In particular, it is up to the search engine to weigh up each individual request, considering the right to privacy against other fundamental rights such as freedom of expression and of the media. Clearly it is not an easy task for an economic operator to act as a regulator.\textsuperscript{143} It is also unclear whether the ruling of the EU Court applies to EU domains only (e.g. Google Spain or Google France) as argued by Google or whether it should be global (e.g. Google.com) as discussed by the EU Data Protection Authorities.\textsuperscript{144}

Second, the obligation to assess individual requests is demanding in terms of resources. During the first four days following the EU Court’s ruling, Google received 41,000 requests and as of November 2014 Google alone had received around 175,000 removal requests referring to 600,000 websites.\textsuperscript{145} This in turn calls for the setting up of routines and recruiting personnel in order to handle those requests.

It must be noted that the discussion on the shortcomings of the right to be forgotten is not limited to search engines. It may also affect other services involving the processing or transferring of personal data, such as cloud computing services or the Internet of Things.

4.3 Digital distribution

Digital distribution, i.e. the online delivery of music, video, books, software or games, became prominent in the early 2000s. As such it is not a new phenomenon. However technological developments such as increased bandwidth capabilities and the advancement of cloud solutions as well as the emergence of new business models such as subscription-based streaming services (as opposed to download) have dramatically changed the market for digital distribution in the last years.

The expansion of the market for digital distribution has not been painless. Problems such as piracy and illegal use as well as the fragmentation of the intellectual property landscape are recurrent. Although these copyright-related issues do not qualify as trade barriers, strictly speaking (as defined in Chapter 1), their impact on the Digital Single Market calls for a closer look. In this section, we also examine specific barriers affecting the digital distribution of movies (windowing, investment
and content requirements) as well as VAT differences between digital and physical products in respect to e-books.

4.3.1 A fragmented intellectual property landscape

As mentioned above, the intellectual property landscape is fragmented in the EU. This is particularly true with regards to copyright which is paramount to the delivery of media content. This fragmentation does not primarily stem from differences in national rules, although the latter play a role notably regarding enforcement. The main reason is the complex rights clearance and licensing procedures for platforms/service providers wishing to cover the whole EU market. Licenses are typically granted by the right-holders for a defined, often national, territory. Furthermore licenses are often required from a number of licensors. A platform for movie or music distribution may negotiate a regional or a pan-European license but this is costly and not always profitable as the users’ preferences may vary from one country to the other and do not necessarily motivate a uniform catalogue.

In practice, this fragmentation results in platforms which customise their offer nationally. For instance a customer in France will not have access to the same catalogue of movies or music as one residing in Sweden. Online distributors will commonly use an IP-address or credit card details to direct a customer to a specific catalogue. They may further use geo-blocking measures in order to bar access to other national catalogues. For consumers, these types of restrictions are particularly frustrating when they are denied content portability, i.e. the access to services legally bought while travelling abroad.

In the music and movie segments, the lack of transparency of the licensing procedures have been highlighted by online distributors. It is particularly difficult to identify what is already protected and who owns and licenses the rights. This is especially true in cross-border situations. As copyright relates to a bundle of rights that can be traded separately, it is even more difficult to keep track of ownership in order to get a license for use.

In the case of music, the right-holders are generally represented by collective management organisations that manage authors’ rights and negotiate license agreements on their behalf. Those organisations have traditionally been national and multi-territorial licensing is still rare. As mentioned this may be due to the lack of profitability of such clearance. Part of the problem is that there is no common register on copyright in the EU and collective management organisations do not always have the capacity to keep track of rights ownership for different territories.

In that respect, an EU Directive aimed at facilitating multi-territorial licensing and encouraging cross-border cooperation between collective management organisations was recently adopted. A number of industry initiatives to facilitate multi-territorial licensing have also developed and are still on-going, such as the cooperation between different collective management organisations and the creation of pan-European databases with information on works and ownership. However, the recent investigation of such cooperation by the EU competition watchdog also illustrates the limits of these initiatives.

The situation experienced by online movie distributors is complicated by the fact that films may be pre-financed by local distributors and broadcasters. As a consequence, right-holders and producers may give priority to exploitation in their own territory. Furthermore, film licenses are often limited in time and by type and it may be difficult to agree on long-term licenses.

4.3.2 Copyright issues for games

Copyrights are fundamental for the computer and games industry. Computer and video games are complex works comprising of several elements (for instance music, code, story, characters and game title), and each of these potentially gives rise to intellectual property protection.

The unauthorised use of intellectual property, such as misusing copyrighted material or counterfeiting trademarked products, is a recurring problem for the computer and video game industry. One example is the set-up of fake websites which sell accounts to popular games as well as pirate servers for online games. Illegal copies of games (game cloning) or illegal downloading of game applications (jailbreaking) are also affecting the developing app market for games.

Game developers have complained about the lack of effective enforcement remedies available in such situations. In particular a trade organisation noted that developers can find it difficult to know who and where the infringer is as well as how to provide enough evidence that an infringement has occurred in the case of game cloning.
4.3.3 Ownership in digital content

Whereas the re-selling of a DVD or CD does not raise any particular intellectual property issue, the same is not true about the digital version of a movie or music. This difference in treatment gives a competitive advantage to old distribution models relying on physical copies.

The uncertainty surrounding the reselling of digital movies or music stems partly from unclear rules. In particular, the EU rules on copyright focus on the exhaustion of distribution rights in respect to tangible copies of protected works. In a ruling from 2012 the EU Court put the online transmission of a copy on par with the supply of a material medium with regards to computer programs. It remains to be seen to what extent that interpretation will also apply to music and movies.

4.3.4 Windowing requirements

The online distribution of movies, for instance in the case of video-on-demand (VOD) or subscription video-on-demand (SVOD), is subject to national windowing requirements. These requirements set a chronology for releasing a movie in different supports such as cinema, home video and VOD/SVOD. Windowing requirements are used in some EU States to protect movie theatres by granting them an exclusivity period during which movies may only be shown in cinemas. Several VOD and SVOD service providers have mentioned windowing requirements as a major issue affecting their business.

In particular, those requirements are unfavourable to VOD and SVOD which are usually the last supports to be opened. In France for instance, the SVOD-window occurs at 36 months, which means that an online distributor must wait three years after the theatrical release of a movie before distributing it online. This puts VOD at a clear disadvantage with competing distribution methods. Obviously, the longer the SVOD-window, the greater the competitive advantage is for traditional media support such as theatres and home video.

Differences between the national windowing requirements also contribute to the partitioning of VOD-catalogues. For instance, movies that may be available for VOD release in one EU State may have a longer waiting period before release in a neighbouring country.

4.3.5 Investment and content requirements

The application of investment and content requirements to SVOD distributors is explicitly regulated in the Audiovisual Media Services Directive. The Directive requires the EU States to “promote, where practicable and by appropriate means, the production of and access to European works.” (Article 3). It further indicates that such promotion may take the form of financial contribution or “the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.”

Local film productions are promoted through investment requirements and content requirements in several EU States. The application of such requirements to VOD service providers has an impact on their business strategies. For instance, the media has speculated that among the many reasons for Netflix to set up its European headquarters outside of France was to avoid the high investment requirements in that country.

Since 2011, French SVOD providers with a turnover exceeding €10 million must invest up to 26% of their annual revenues in European films and up to 22% of these revenues in French-speaking productions. Similarly, in Spain, SVOD distributors need to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television, 60% of that funding being reserved for the production of works in Spanish. The law was brought before the EU Court which found it in compliance with the Audiovisual Media Services Directive and the EU rules on State aids.

One particular issue that was raised in France concerned the application of investment requirements to distributors established abroad. Under French law, such requirements may, under certain conditions, apply to foreign SVOD providers targeting mainly at a French audience. This rule however has not been applied in practice and its legality is doubtful as it would contravene the country-of-origin principle set in the Audiovisual Media Services Directive.

Closely related to investment requirements, some EU States oblige film distributors to comply with a number of content requirements. Again, this is the case in France which imposes local distribution quotas on SVOD service providers. Under French law, the latter’s catalogues shall comprise of 60% of European films and 40% of films in the
French language. Similar content requirements are imposed in regards to works presented on the main webpage of the SVOD service providers as well as the trailers available on this page.

Similar investment and quota requirements can be found in Italy. In the French-speaking part of Belgium, on the other hand, quotas have been replaced by a system where European works are “given prominence” via an attractive presentation in electronic programme guides, advertising inserts on homepages and the creation of a special category of programming in electronic catalogues.

4.3.6 VAT on e-books
The difference of treatment between physical products and their digitised version has been discussed above with regards to films and music. A similar issue arises regarding e-books which are subject to higher taxation rates than paper books, and which in turn undermines their competitive advantage.

The taxation of books is partly regulated in the EU VAT Directive. The Directive provides for the possibility for the EU States to apply lower rates in favour of paper books. This possibility however is not applicable to e-books. As a result, VAT rates for paper books are lower than those for e-books. This difference of treatment is motivated by the nature of the transaction involved in buying a paper book (a tangible good) and an e-book (service license). This distinction was recently confirmed by the EU Court which held that France and Luxembourg had breached the VAT Directive in imposing reduced rates to e-books.

4.4 The app economy
The launch of smartphones in 2007 is intrinsically connected to the rise of the app economy. An app, the abbreviation for application, is a computer software which is usually downloaded on mobile devices such as smartphones or tablets. The market for these programs has grown exponentially in the past years: from US$ 0.21 billion in 2008, the combined revenue for the main app stores is expected to reach US$ 8.3 billion in 2014. The growing use of apps has also opened a secondary market for data being generated by app users.

In a study from 2012, the Board identified a number of barriers affecting the app market outside the EU. In particular we found that app developers were concerned with the dominance of the market by Apple and Google. The unbalanced market power of these two operators led to problematic terms and conditions restricting the access to their platforms. This picture is confirmed by several of the interviews conducted by the Board for the purpose of the present report. App developers in the gaming sector have particularly mentioned concrete problems such as content interference and difficulties in terms of repayment. As those barriers are of a private nature and fall outside the scope of this report, we do not examine them further here.

One specific legal barrier related to the app economy concerns the different information requirements imposed on e-traders. Several of these requirements were adopted at EU level in the early 2000s, at a time when most e-commerce took place via desktops and laptops. As such these information requirements are not always adapted to the smaller screen size of smartphones. The lack of clear rules for those devices has in turn a negative impact on the app market.

Information requirements are regulated in numerous pieces of EU legislation: the directives on e-commerce (2000), on services (2006) and on consumer rights (2011) but also on data protection (1995) and on e-communications (2002). In short, the e-traders are required to provide their customers with information in respect to a number of issues such as their identity (name, address), the goods and services offered, payment terms, delivery methods or claims. All this information should be made available on the trader’s website in a clear and accessible way.

Some authors have argued that these requirements which are aimed at protecting consumers may have a counterproductive effect as they lead to an overload of information. This is all the more true with respect to smartphones which do not allow for sufficient space to present all the information required in a legible way. One risk associated with this information overload is that it may complicate the process of purchases via mobile devices. One marketplace operator noted in particular that the numerous information obligations imposed at several stages of the purchasing process lead to a distortion of the user experience. They prevent the e-trader or the online marketplace from providing consumers with a user-friendly, clean and simple experience. This is particularly problematic in the case of mobile transactions.
The 2011 Directive on Consumers Rights takes into account the smaller size of the smartphones’ screens. However, its formulation on this point is ambiguous. In particular, the Directive states that if a "contract is concluded through a means of distance communication which allows limited space [...] the main characteristics of the goods or services" must be given to the consumer prior to conclusion of the contract. One company interviewed for this report pointed out that what constitutes the “main characteristics” of a product and how this should be displayed was still very unclear.

Another problem concerns the possibility given by the Directive in the case of small screen devices to refer non-essential, yet compulsory, information via a link to a dedicated webpage. As mentioned in a recent article, this solution is still somehow unsatisfactory since the screen, that is too small for all the information to be displayed in the first place, will not become bigger after clicking the link.

In Germany, a requirement known as “Impressum” obliges e-traders to display information regarding their name and contact details on their websites. This requirement has been interpreted by a local court as meaning that the Impressum requirement is not fulfilled if the user has to scroll down to the “fourth screen” on a computer screen of 1024 x 768 pixels. Further German rulings state that the user should not have to scroll at all in order to see the Impressum. It is unclear how this case-law relates to smartphones and other mobile devices. This uncertainty illustrates the problems of adaptation of rules designed for desktops and laptops to small screen devices.

4.5 Cloud computing

Cloud computing can be defined as a way “of providing IT functions such as information storage, processing power and computer programmes as services over the internet, through the usage of external (often remote) servers.” Cloud computing is a generic term that covers a wide range of infrastructures and services. In this section, we focus on so-called “public clouds” which, as opposed to other models, are usually accessible to the public over the internet.

Cloud computing enables users to store data on external servers, hence reducing costs for the building and maintaining of an in-house infrastructure. Although not a new phenomenon, cloud computing services have grown dramatically in recent years, partly as a result of technological developments such as increased processing power and high speed networks.

The transfer and storage of data to a third party (the cloud provider) raises legal issues notably in terms of ownership of data and of privacy. The latter has been discussed in the EU in relation to the rules on the protection of personal data. In this section, we examine three types of problems posed by the application of data protection rules to cloud computing services: the potential gap between these rules and the actual functioning of cloud services, the fragmentation of the European legal framework for data protection, and the transfer of data to countries outside the EU.

We conclude this section with a specific issue raised in relation to the transfer and storing of other (non-personal) data.

4.5.1 Unclear rules on data protection

The national rules on data protection are harmonised at EU level by the Data Protection Directive from 1995. This Directive subjects the operator which collects and processes personal data – the “data controller” (for instance a retailer) – to a number of obligations. Those comprise an obligation to seek consent from the person to whom the data relates – the “data subject” (e.g. the retailer’s customer) – in order to collect and process the data. The data controller shall also inform the data subject about the purpose of the processing of the data in question and possible recipients of the data.

The responsibility and obligations of the data controller remain unchanged even if the data is processed by a third party, here the cloud provider. It is therefore necessary for the data controller to secure that personal data handled on its behalf by the cloud provider is in accordance with data protection rules. In practice, this is solved by means of a contract between the data controller and the cloud provider.

The problem for data controllers is that they are not always in a position to control that data processed on their behalf is in accordance with data protection rules. In particular it may be difficult to know where the data are processed as cloud computing can involve different servers located in several jurisdictions around the globe. Nor is it clear how and by whom the data are processed as a cloud provider may have passed the processing to
subcontractors. It must be noted that the cloud provider is not always either in a position to locate where a specific data is nor how it is processed.

In several Nordic countries, decisions by the national data protection authorities (DPAs) illustrate the difficulties for data controllers to fulfil local requirements. For instance, in a number of cases the Swedish DPA has criticised cloud service agreements between municipalities and cloud providers. It found notably that the terms related to the use of subcontractors were insufficient to meet the requirements set in the data protection rules. Similar critics have been formulated by the Danish DPA in respect of the obligations of the cloud providers and in Norway where the DPA imposed conditions with respect to risk and vulnerability analyses and regular audits.

The uncertainty surrounding the data controller’s responsibility with respect to cloud computing has been mentioned by several companies contacted by the Board. They particularly noted the lack of foreseeability of the current regulatory framework which is worsened due to the fact that ex-ante assessments of cloud service agreements by DPAs are not always available and in any case are not binding.

To a certain extent, this uncertainty is also acknowledged by the DPAs themselves. For instance, in the UK, the Independent Commissioner’s Office (ICO) noted: “When using a public cloud, the ICO recognises that a cloud customer may find it difficult to exercise any meaningful control over the way a large (and perhaps global) cloud provider operates”. Clearly, the problem in applying rules which are 20 years old to today’s economic and technological realities of the cloud has a negative impact on cloud computing.

4.5.2 A fragmented regulatory framework for data protection

The fragmentation of the regulatory framework for data protection was examined in Section 3.8. Differences of interpretation between the EU States on such crucial notions as “personal data” and “consent” may have a particularly negative impact on cloud computing services as those are often provided cross-border.

The geographical spread of cloud servers triggers the application of several, potentially contrary, national data protection rules. For instance the processing of personal data by a cloud provider located in Ireland will be subject to German rules in respect to data collected in Germany and to Swedish rules if the cloud user is active in Sweden. Adjusting the terms and conditions for cloud services may be appropriate in some EU States but not in others. One cloud provider interviewed for this report mentioned difficulties with the competent authorities of one EU State as a reason for not offering its services in that country.

The current proposal for a Data Protection Regulation may at least partly solve issues related to the fragmentation of the regulatory framework. The proposal presented by the European Commission in 2012 is still currently debated and has already been subject to drastic amendments. At this stage it is unclear how it will ultimately be shaped, but one cloud provider already mentioned that it contains too many exceptions for guaranteeing a uniform application of the data protection rules throughout the EU.

4.5.3 Transfer of personal data outside the EU

Under EU law, the transfer of personal data to third countries is in principle not allowed unless those countries provide an adequate level of data protection. This restriction has been criticised by several companies contacted by the Board. As mentioned, cloud providers, especially the larger ones, use a number of servers located within and outside the EU. In some cases, they cannot track whether personal data are transferred to a server located in a third country which may be in breach of the Data Protection Directive.

It should be noted however that some cloud providers have adapted to this restriction by allocating servers in the EU to local customers. Regarding cloud services, the Board has also found that the extent of the ban on transfer to third parties is unclear. In particular, we note that this ban is not absolute and that transfers to third countries may be allowed under certain conditions. It may, for instance, take place if the data subject has consented to the transfer or if the transfer is necessary for the performance of a contract between the data subject and the controller or of a contract concluded in the interest of the data subject between the controller and a third party.

4.5.4 Transfer of accounting data outside the EU

One cloud broker company interviewed for this report took up a Swedish local storage requirement
with respect to certain accounting documents. The Swedish Bookkeeping Act provides that documents such as a company’s annual reports, balance sheets and annual financial reports must be physically stored in Sweden for a period of seven years. As far as we understand, the Swedish Act allows the storage of this information in other EU States under certain conditions if the competent authority is duly notified. However, this requirement may be problematic to the extent that the cloud providers use servers located outside of the EU.

In a study from 2013, similar types of storage requirements are taken up in respect of other EU States. The study particularly notes the storing requirements for tax and accounting records (Belgium, Denmark, Germany and Italy), corporate documents (Belgium, Germany and the UK) and social documents (Belgium).

4.6 Internet of Things and Big Data

The Internet of Things (IoT) is a comprehensive structure of physical objects connected to the internet that are capable of identifying themselves and communicating data between themselves. The IoT is widespread today and its applications extend to multiple parts of society: cars using a Global Positioning System (GPS), street light control systems, or home automation systems. Yet, the IoT is expected to grow exponentially in the coming years both with regards to the number of things connected to the internet and in the sophistication and use of IoT technology.

The development of IoT and its benefits for society cannot be underestimated. Many health issues can be dealt with using the IoT, from toothbrushes connected to dentist services (allowing for better dental care) to smart shoes guiding people with visual impairments. Similarly, issues related to traffic congestion, energy savings or environmental monitoring can be addressed with developing IoT technologies.

At the same time, this development challenges existing standards of consumer protection and personal integrity. Indeed, the IoT acts as an aggregator of Big Data, i.e. large volumes of data about everything from search queries on the internet to a heart rate monitor embedded in a user’s watch. Big Data can be compiled for marketing purposes, for instance in order to conduct consumer behaviour
analyses or to customise advertising for a defined target group. It can also be used for other more sensitive purposes, for instance when medical data is shared with third parties (insurers, employers or public authorities).

The relevant rules applicable to the processing of data is set in the Data Protection Directive. As examined in the previous section, the EU rules on data protection are based on the principle that personal data may only be used with the consent of the data subject. Consent however may not always be easy to assess in the case of the IoT where data are collected by objects such as toasters, cars or clothes.

In particular, it is unclear if consent can be given once and for all (i.e. when the object is activated for the first time) or for each collection of data. Questions may also arise as to the scope of the consent: too generally-formulated clauses may not fulfil the data protection rules. On the other hand, consents which are too narrowly defined may negatively affect the development of the product. In the case of products that may be used by several family members, such as a toaster, it is unclear if and how all users have consented to the use of personal data.

The transparency issue raised here in respect of the IoT applies more generally to the treatment of Big Data, even when it is not related to IoT. The growing litigation against major internet corporations, from search engines to social media, illustrates the lack of clarity on the existing rules on data protection. At this stage it is too early to assess the impact that the existing rules will have on the development of IoT and Big Data; nor is it really feasible to assess whether the issues raised here are temporary (due to the novelty of the IoT and Big Data) or of a more permanent nature.

4.7 Peer-to-Peer services

The emergence of the sharing economy is much debated in the EU. Hot issues examined in this section include regulated taxis demonstrating against Uber and the hotel industry complaining about the unfair competition of Airbnb. These issues have been the focus of intense media coverage in several EU States.

The sharing economy is based on an economic model whereby people swap, barter, trade, rent or share resources with each other. This behaviour has been branded as "collaborative consumption" and includes areas such as space sharing, co-working, household item rental, ridesharing, funding and lending, currency and car sharing as well as general service providers.

Such Peer-to-Peer (P2P) services are made possible by internet platforms operated by P2P service providers. The obstacles faced by these operators in Europe are mainly caused by the measures adopted in some EU States as responses to the disruptive nature of P2P services. In this section, we examine some of these measures for different types of P2P services, specifically ridesharing and space sharing activities.

4.7.1 Obstacles to ridesharing services

The provision of ridesharing services consists of connecting a car’s driver with a car passenger for a specific ride. The US-based operator Uber is one of the most prominent players in Europe. In several countries its establishment has been met with complaints from regulated taxis which argue that its services constituted unfair competition. Below is a brief overview of obstacles faced by Uber and other P2P providers of ridesharing services.

In Germany, the use of Uber’s ridesharing application has been prohibited in Berlin and Hamburg. These decisions were motivated by the lack of a proper licence for the drivers as well as a failure to provide adequate insurance for its drivers or their passengers. The German authorities also stated that the decision aimed to protect the taxi industry.

In Catalonia, the local government concluded that any transport of persons performed by an employee for a remuneration is considered to be public transport and is, as such, subject to a regime of prior authorisation. This resulted in a ban of the Uber application as well as a sharp reminder to every driver using the app that they would be fined up to €6,000 as well as having their cars seized if caught using the application. The Catalanian authorities motivated their decision with safety and consumer concerns as well as issues of social security and working conditions for the drivers and a risk of tax evasion.

In France, the legislator recently adopted a new law prohibiting the use by drivers that are not registered as taxis of geolocation services, a crucial technology for Uber. The new law also imposes a number of obligations on the private drivers offering ridesharing services (registration, pricing, oper-
Market-place obligations are examined more in detail in the case study set in Annex II.

In Belgium, a local court found it was unlawful to transmit requests for ridesharing services between customers and drivers that lacked the proper authorisation. Finally, in Sweden discussions are ongoing as to whether the obligation to install a taximeter equipment in all taxis also applies to Uber. At this stage, it is unclear whether this obligation, motivated by the objective of fiscal supervision, also applies in respect to ridesharing services. Several operators which have applied for an exemption have received negative answers from the Swedish authorities.

4.7.2 Obstacles to space sharing services
Space sharing services consist of connecting a host and a guest in view of renting a property. As for the ridesharing market, US-based firms are active on the European market with Airbnb being one of the largest platforms for space sharing services. These platforms have faced complaints from the hotel industry but also from the public authorities which are concerned that space sharing services negatively affect local residential property markets. In particular, these services may lead to owners renting their properties to tourists rather than for residential purposes, hence leading to an increase of rental prices in central areas.

As a result, a number of measures have been adopted in several EU States. In Catalonia, a registration obligation was recently introduced for the rental of private properties. This obligation was combined with a requirement stating that private rentals should not be less than 30 days. A similar registration obligation was introduced in Berlin. In France, a new law adopted in 2014 obliges the owners of secondary residences in major cities to apply for an authorisation for rental. This last obligation is examined in more detail in Annex II of this report.

4.8 Additive Manufacturing
3D printing is only one of a host of technologies known as additive manufacturing. It is a process used to make three-dimensional objects from a digital model by the deposition and fusing of material, layer by layer. The oil, gas, health and defence sectors are already using additive manufacturing
processes and technology to produce hugely complex parts on demand. Research is well underway into using the technology to make everything from medicines to foodstuffs.

This technology has been available for decades but has developed dramatically in recent years partly due to the steep reduction in the cost of hardware. Online portals have been launched for the sales of digital designs for a range of products. These marketplaces are often combined with an on-demand provider of 3D printing services which allows the customer to print their design and then place the design for sale for others to print.

The novelty of online 3D printing services is such that it is difficult to assess the impact this technology will have on trade. Similarly, it is not easy to identify trade barriers that may affect this market. At this stage we are left with speculations as to which legal issues may arise in the future. In this section, we examine two possible areas of law where the lack of adapted rules may impact on the development of 3D printing: the rules on product liability and consumer protection and those on intellectual property.

4.8.1 Product liability, conformity and safety issues

3D printing challenges the traditional supply chain: the customer becomes de facto the manufacturer of the goods and the product manufacturer becomes a service supplier. This in turn challenges the traditional legal framework whereby the manufacturer is liable in respect of the quality and conformity of the product.

This role reversal is generally not taken into account in the current regulatory framework which may lead to a lack of transparency. For instance, it is unclear if, for what, or whom a consumer may sue for a defective 3D printed product: the designer of the software file from which the product is printed, the manufacturer of the 3D printer or the supplier of the material used in the 3D printing.

The obligation for manufacturers to CE-mark their products illustrates this problem. Under EU law, the manufacturer shall affix a CE marking on certain products before they can be placed on the market. This obligation aims at guaranteeing the conformity of the product with relevant rules and standards. The conformity assessment procedure may in some cases call for the involvement of an authorised third party (Notified Body).
The EU rules on CE marking are not designed to address 3D printing situations. Hence it is unclear what the conformity assessment and CE marking can cover and by whom it may be processed. The lack of clarity on current rules may have a deterrent effect on traditional manufacturers or service suppliers contemplating a move into the 3D printing business. In some sectors where 3D printing is developing faster, the legislator is attempting to regulate this activity. For instance this is the case with medical devices. In that field, 3D printing is combined with new scanning technology which has proved highly useful for the customisation of medical devices such as prosthetic limbs. In the EU, a proposed Regulation on medical devices is currently under discussion. Although this proposal is not explicitly concerned with 3D printing technology, it aims to improve the rules on custom-made devices. Yet, questions have been raised about the level of adequacy of the proposed rules to the reality of 3D printing. In particular, it has been questioned whether the low-risk qualification of custom-made medical devices, which is appropriate for traditional products such as orthopaedic shoes, really fit the types of devices such as 3D printed orthopaedic implants.

4.8.2 3D printing and intellectual property infringements

As experienced by the music and film industry with the introduction of digital distribution in the early 2000s, 3D printing technology may be abused and lead to violations of intellectual property rights. In particular, the technology makes it easier to sell counterfeit goods (or at least their digitised version) in breach of patent, trademarks or design rights. The threat posed by unlawful 3D printing is not yet expressly regulated in the EU which may raise legal issues, notably in respect of the burden of proof and enforcement actions. It is however too early at this stage to speculate whether the lack of clear rules on this issue may lead to trade barriers. 3D printing providers contacted by the Board have minimised the risk of intellectual property infringements. In their view, there still remains fundamental differences between an original (protected) product and its 3D printed replica. It has also been argued that it is unlikely that the technology behind 3D printing will develop at the nearly exponential rate of solid state circuits that rendered possible the large scale P2P file sharing of movies and music.

4.9 Developing payment forms

The past years have witnessed the development of new payment forms such as virtual currencies and mobile payments. These new payment forms may in turn conflict with existing rules. In this section, we address two types of issues: the threat posed by the use of virtual currencies and problems of identification in relation to mobile payments. So far, none of these issues have resulted in concrete legal barriers. We are rather dealing with potential restrictions on trade.

4.9.1 Virtual currencies

Virtual currencies have attracted a lot of attention in the past years, although they do not play a substantial role as money in society. The European Banking Authority (EBA) defines virtual currencies as a “digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency, but is used by natural or legal persons as a means of exchange and can be transferred, stored or traded electronically.” Virtual currencies present several advantages: transactions are faster and cost less than with other means of payment, and users do not have to give up any confidential information. They may also contribute to financial inclusion, at least outside of the EU (where financial inclusion is already fairly high). Virtual currencies also present some risks in terms of fraud, money laundering, terrorist financing and financial crime.

Bitcoin is probably the most well-known virtual currency and is by far the largest. Bitcoins can be traded among users, but they can also be used for making purchases in the real economy. For example, a number of airlines, computers and electronics retailers as well as major retailers accept this currency as a means of payment. Bitcoin has faced resistance in countries outside of the EU. China for example has barred financial institutions from handling the virtual currency and Russia is planning to ban exchanging bitcoin into real money.

Virtual currencies are not regulated at EU level. The EU States therefore enjoy a margin of manoeuvre to restrict their use. However, as far as
we understand, no such move has been undertaken by the EU States so far, although the national tax authorities are gradually looking into the taxation of these currencies.39

Yet, some forms of restrictions are currently discussed in the Union. In particular, the EBA, invoking the high risks associated with virtual currencies, has recently encouraged the EU legislator to regulate them. It has also recommended the national supervisory authorities to discourage credit institutions, payment institutions and e-money institutions from buying, holding or selling virtual currencies. The Bank of England recently noted that digital currencies do not currently pose a material risk to monetary or financial stability in the UK, but added that regulatory supervision may be necessary if a digital currency was to attain systemic status as a payment system.40

At this stage it is unclear whether the EBA recommendations will be followed by legislative action at EU level. Nor is it clear if the national supervisory authorities will enforce the recommendation from the EBA. Clearly, if this recommendation leads to financial institutions refusing virtual currencies, their legitimate use would be hampered as there would be less ways to interact with the real economy. Trade barriers may also arise in case of differences in national approaches to virtual currencies.

4.9.2 Restricted access to mobile payments
Mobile payments (m-payments) is an increasingly popular payment form for shopping in brick-and-mortar stores or to buy services (from bus tickets to movie theatres). One advantage with m-payments is that the cost per transaction may be lower than with other payment forms, such as credit cards.41

M-payment solutions usually involve the downloading of an app on the user’s smartphone and the creation of a user account. The requirements for creating such accounts may vary from one digital payment provider to another but they commonly include some proof of identification. Since most identification systems are national; there is a risk that foreign users are barred from accessing local m-payment solutions.

In Sweden for instance, the Board has previously reviewed restrictions on foreign nationals residing in the country that were not able to get a personal identification number.42 We particularly found that the restricting approach of the Swedish authorities in granting such an ID number negatively affected the everyday life of foreign citizens who were barred from accessing many services (from opening a bank account to registering at the local gym). Similarly, we have noted that Swedish digital payment providers require their user to key in their personal identification number in order to register with them, hence excluding foreign users.

Although technically not a trade barrier, as this type of restriction is imputed to private operators, it counteracts the completion of a Digital Single Market.

4.10 Conclusions
As mentioned in the introduction of this chapter, not all problems examined here constitute actual trade barriers. Rather in several cases, we are discussing potential issues that may arise as a result of unclear or maladjusted rules. This particularly concerns those rules which are closely related to the novelty of the technology used, for instance, the processing of data in the Internet of Things or conformity issues in respect of 3D printing. We find it difficult to assess the real impact which the lack of transparency of the regulatory framework may have on these emerging trends.

We also find that some obstacles to trade do not technically speaking, qualify as trade barriers (as defined in Chapter 1). Most of the problems related to the fragmentation of the intellectual property landscape for instance, are not imputable to the public authorities. Rather, they reflect an economic reality and may therefore chiefly be addressed by the market.

Still, we have identified actual barriers which affect new trends in e-commerce (see Table 2). Those barriers can be divided into two groups.

First, a number of barriers stem from the disruptive nature of e-commerce which triggers legislative intervention. This is clear in the case of P2P services with the negative effect that ride-sharing and space sharing services may have on traditional industries (taxis, hotels) but also on the general interest (housing policy). The current discussions on virtual currencies, the requirements imposed on SVOD and the introduction of snippet taxes also fit this category. On most of these issues, individual actions by certain EU States contribute to the fragmentation of the regulatory framework.
examined in respect to traditional e-commerce (Chapter 3).

In contrast, the second category of barriers is due to a lack of legislative intervention. Here, new-comers are facing rules that are not designed for the level of technological advancement they bring. The laws in place lack the particular flexibility required to address the needs of the market in a clear and foreseeable way. The uncertainties surrounding the application of data protection rules on cloud computing services or search engines illustrate this point. Similarly, the rules on intermediate liability may need clarification in respect to online marketplaces. On a positive note, one should consider that legislative intervention aimed at solving these problems are discussed at EU level, hence reducing the risks of fragmentation observed elsewhere.

Table 2 – Trade barriers affecting new trends in e-commerce

<table>
<thead>
<tr>
<th>Barriers due to national rules</th>
<th>Barriers due to maladjusted or unclear EU rules</th>
<th>Potential barriers</th>
<th>Private barriers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Online marketplaces (Section 4.1)</td>
<td>• Rules on intermediate liability • Rules on product information</td>
<td></td>
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<tr>
<td>Search engines (Section 4.2)</td>
<td>• Snippet taxes • Data protection rules (the right to be forgotten)*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Digital distribution (Section 4.3)</td>
<td>• Windowing requirements • Content requirements • Investment requirements • Ownership in digital content • Fragmented intellectual property landscape</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The app economy (Section 4.4)</td>
<td>• Consumer information requirements • Dominant position of app stores</td>
<td></td>
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<tr>
<td>Cloud computing (Section 4.5)</td>
<td>• Location requirements for financial data • Data protection rules*</td>
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<tr>
<td>IoT &amp; Big Data (Section 4.6)</td>
<td>• Data protection rules*</td>
<td></td>
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</tr>
<tr>
<td>P2P services (Section 4.7)</td>
<td>• Restrictions on ridesharing services • Restrictions on space sharing services</td>
<td></td>
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</tr>
<tr>
<td>3D printing (Section 4.8)</td>
<td>• Rules on product conformity</td>
<td></td>
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<tr>
<td>New payment forms (Section 4.9)</td>
<td>• Possible restrictions on virtual currencies • Residence requirements for m-payments</td>
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</table>

* Note that problems related to data protection are not limited to the sectors identified in this report (search engines and cloud computing) but cover all types of businesses that include the transfer and processing of personal data.
5. Drawing the Lines Together

The review of trade barriers presented in the previous chapters covers a wide range of businesses and obstacles. It may therefore leave a sprawling impression. In this chapter we aim to draw the lines together, looking at the nature and types of barriers affecting e-commerce, and discuss in general terms possible ways to handle these problems.

Some of the barriers identified in this report are very specific to individual operators (e.g. the bans on online gambling or the requirements on digital movie distribution), whereas others have a more widespread impact on e-commerce as a whole (e.g. unclear rules on applicable laws or on data protection). It is therefore difficult to address possible remedies in a uniform way. However, for the purpose of discussing adequate responses, we can categorise most of the barriers examined here.

The first category consists of trade barriers that are unlawful, i.e. do not comply with EU law. Those in breach of the EU rules on free movement can be addressed by way of legal action or, if the obstacles are common to many EU States, by way of harmonisation. Without ruling on the final outcome – which ultimately is a matter for the EU Court – we can for instance question the lawfulness of certain barriers examined in this report. This would be the case for some establishment requirements in respect to the registration of national top-level domain names (Section 3.2.2), the obligation imposed on foreign e-traders to comply with national rules on sales periods (Section 3.4.2) or possibly certain restrictions on P2P ridesharing services (Section 4.7.1).

Among the barriers which are lawful, a second category concerns rules that are designed for physical trade with unintended consequences for e-commerce. This is for instance the case with the requirements on waste and packaging waste (Section 3.2.4), on labelling (Section 3.4.3) or on product conformity (Section 4.8.1). These issues may call for adjusting the existing rules to the digital reality of today. There are several ways to improve legislation in that respect. One is to subject the legislation on physical trade to a digital conformity test consisting of an assessment of the possible effects such a rule may have on e-commerce. Furthermore, in some cases it may be justified to exempt online trade from these rules, or at least provide for some adjustments which take into account the particulars of e-commerce.

A third category of barriers is due to the fragmentation of the regulatory framework for e-commerce. This is a problem which especially affects traditional e-commerce with regards to some consumer rights (Section 3.4.1) or the barriers on payment (Section 3.6), as well as digital distribution, for instance with the investment and content requirements imposed on SVOD (Section 4.3.5). Deeper harmonisation is a way to mitigate fragmentation, preferably by way of EU regulations (directly applicable in all EU States) rather than EU directives (leaving the EU States a margin of appreciation). It is also important to coordinate the actions of the national authorities, similar to what is done regarding the data protection rules.

National initiatives such as Frontrunners, in respect to establishment requirements, may also contribute to a more uniform regulatory framework.

A fourth category of barriers relates to measures aimed at tackling the disruptive effects of e-commerce. Those are rules which are specifically designed for online trade which aim to correct some of the consequences this type of trade may have on traditional industries or the public interest. These corrective measures may in turn restrict trade. As mentioned in the conclusion of our previous chapter, this notably concerns the snippet taxes (Section 4.2.1), windowing requirements on SVOD (Section 4.3.4), most barriers on P2P services (Section 4.7) and current discussions on virtual currencies (Section 4.9.1). These types of barriers and possible remedies are examined below in more detail (Section 5.1).

The fifth category of barriers concerns rules designed for the digital economy but that fail to adapt to technological and business developments. Those are rules on e-commerce or regulating the digital environment that lack the necessary flexibility to meet the needs of a fast-developing market. The rules on intermediate liability for e-commerce (Section 4.1.1), those on consumer protection for the app economy (Section 4.4) or the rules on data protection in respect to cloud computing (Section 4.5) and Big Data (Section 4.6) fit in this category. We discuss these barriers and some possible improvements below (Section 5.2).

Finally, in this report we have identified a number of obstacles that are due to market imperfections, rather than to intrusive legislation. Those include pricing problems for cross-border parcel delivery (Section 3.9) or the fragmentation of the
Table 3 – Types of trade barriers

<table>
<thead>
<tr>
<th>Potentially unlawful barriers</th>
<th>Rules designed for physical trade</th>
<th>Fragmented regulatory framework</th>
<th>Corrective rules to tackle disruption</th>
<th>Maladjusted EU rules on the digital economy</th>
<th>Private barriers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Traditional e-commerce (Chapter 3)</td>
<td>• Bans on the online sales of goods/services • Establishment requirements • Rules on sales period • Denied access to public data</td>
<td>• Rules on jurisdiction • Labelling rules • Waste rules</td>
<td>• Bans on the online sales of goods/services • Establishment requirements • Consumer rules • Labelling rules • Waste rules • Credit license requirements • VAT regime • Data protection regime*</td>
<td>• Rules on jurisdiction • Consumer rules on hybrid sales</td>
<td>• Dankort establishment requirement • Fragmented intellectual property landscape • Cross-border parcel delivery</td>
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<tr>
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<td>• Data protection rules (the right to be forgotten)</td>
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<td>• Windowing, content and investment requirements</td>
<td>• Windowing requirements</td>
<td>• Ownership in digital content • VAT on e-books</td>
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<td>Residence requirements for m-payments</td>
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</table>

* Note that problems related to data protection are not limited to the sectors identified in this report (search engines and cloud computing) but cover all types of businesses that include the transfer and processing of personal data.
5.1 The disruptive nature of e-commerce

The disruptive nature of the internet is a well-documented phenomenon. More than protectionist interests, it is the revolutionary changes brought by internet-based services that, in our view, explain the occurrence of certain e-commerce barriers in the EU. In this section, we examine the types of disruption caused by the emergence of online services to understand the nature and level of intervention of the public authorities. Our point is that e-commerce may not only disrupt traditional industries in what is sometimes referred to as unfair competition, but that it may also affect other public policy interests.

These interests are to varying degrees legitimate, in the sense that they may objectively justify restrictions on trade. As opposed to purely protectionist measures, which are objectionable from an economic perspective and unlawful under the EU regime, there is no obvious way to handle barriers aimed at correcting the disruptive effects of e-commerce. Instead a case-by-case analysis of each problem is necessary in order to find an answer that balances national interests with free trade.

5.1.1 Understanding the nature of the disruption

In this report we have presented a number of barriers that may be viewed as responses to the disruptive effects of certain online businesses. In order to understand the nature of the disruption and the adequacy of the corrective measures, we find it necessary to dig further into the motivation of the legislator in concrete situations. To this effect, we provide in Annex II a case study that examines a number of issues which have recently arisen in France. Our case study on the French market focuses on the following trade barriers:

- restrictions on book pricing strategies by online bookstores (the so-called “Anti-Amazon law”);
- barriers imposed on ridesharing services affecting P2P platforms such as Uber;
- limitations on the rental of private properties affecting P2P space sharing platforms such as Airbnb; and
- requirements imposed on the retail sector in respect to click & collect services (the “drives”).

This case study shows that the digital economy may not only have a disruptive impact on the competitive relationship of a given market but also on other public policy interests.

The Uber-story illustrates the first type of issues with the introduction of a new source of supply that challenges the established position of old-style professions. It shows how newcomers make use of modern technology such as electronic geolocation and mobile matching applications in order to provide more flexible and cheaper services to customers than licensed taxis. Similarly, Amazon’s development of an online platform offering a broad catalogue of books and free home delivery constitutes an undeniable competitive advantage against small brick-and-mortar bookstores. In both cases the French legislator intervened in order to curb the decline of traditional (offline) industries.

The measures adopted in those cases differ in intensity. In the case of taxis which already enjoy a legal monopoly, the prohibition of geolocation services and the strict requirements imposed on picking up of customers may have far-reaching consequences for ridesharing operators such as Uber. In contrast, it is doubtful that the price regulation imposed on online booksellers will have a lasting negative impact on Amazon’s development.

In both cases, it is clear that the main objective of the French legislator is to fight unfair competition. To some extent the need to secure competition on fair and equal terms is also present in the cases of Airbnb and the click & collect services. Indeed, the hotel industry has held a strong stance against private rental operators which it considers to be harming its position. Similarly, the fierce competition on the retail sector has been exacerbated by the arrival of new concepts such as the “drives” that combine online sales with delivery warehouses.

However, the political intervention in those two cases is primarily motivated by interests other than the fight against unfair competition. The disruption which the public authorities seek to avert, or at least mitigate, relates to the housing shortage in major cities (Airbnb) and the need to maintain a coherent land-use planning policy (the drives). Both services are victims of their successes as their rapid growths create imbalances in society. Public policies that have been shaped over long periods are suddenly confronted with radical and unexpected changes that challenge their own efficiency.

In those situations the legislator finds that it needs to adjust its policies, which in turn will be
viewed by internet-based newcomers as trade barriers. An additional problem is that the extent and the novelty of the challenges faced by the public authorities make it difficult for them to shape well-balanced and timely responses. More often than not, the legislator will resort to a trial and error method that will create uncertainties for all parties involved.

5.1.2 Finding a balanced response

Technological developments and innovation inevitably lead to disruption. This is a natural process which benefits society as a whole. However the disruptive effects of e-commerce may in some cases call for corrective measures from the public authorities. The type and intensity of these measures may vary from one EU State to another depending on the national sensitivities in terms of interests to be protected and the traditions of political intervention. Without questioning the legitimacy of such responses, we find the need here to discuss possible ways to mitigate the negative effects such corrective measures may have on e-commerce.

First, the measures should be balanced, i.e. take into accounts a wide range of interests including those of the consumers. The successes of Amazon's online distribution services of books and Uber's ridesharing services are due to them fulfilling a demand that was not properly addressed. Too restrictive measures may lead to an artificial situation whereby consumers are barred from accessing a technology designed for them. As seen in the Uber case where tools developed by newcomers are now reserved to traditional taxis, such measures may be a deterrent to innovation.

Second, in the case of measures aimed at correcting the disruptive effects of e-commerce on traditional industries (taxis, bookstores), the fight against unfair competition shall not be used as a cover-up for the protection of certain interest groups. It is one thing to protect consumers against unlicensed drivers, but it is another to shield an entire profession from competition. Measures aimed at curbing the decline of traditional industries in that respect should follow an in-depth discussion on the notion of unfair competition.

Lastly, hasty measures shall be avoided as they are seldom a guarantee of quality. In that respect, the 15 minute decree adopted against ridesharing services in France and its almost immediate suspension by the French courts shows the need for thorough preparatory works. The technological developments brought by online newcomers are there to stay and improve in some form or another. It is seldom efficient to adopt punctual measures aimed at very specific situations without considering the bigger picture, i.e. the creation of a whole new environment and the potential applications that may result from these technological advancements.

5.2 Updating the EU rules on e-commerce

In the last 20 years, a number of rules have been adopted at EU level to regulate the digital economy. Notably those concern the EU rules on data protection (1995), e-commerce (2000) or consumer protection in the case of distance sales (2011). However, the rapid transformation of e-commerce patterns contrasts with the relatively slow evolution of the legal framework for e-commerce. This dichotomy explains some of the trade barriers identified in this report.

In this section, we first examine the nature of this dichotomy and the effects it may have on the market. We then discuss possible improvements that would remedy some of the barriers created by outdated or maladjusted legislation.

5.2.1 Contrasting timelines

The history of e-commerce maybe short, but it has already witnessed major revolutions. Less than 20 years have passed between the launching of Amazon and eBay and the development of new business platforms for digital distribution, peer-to-peer services and the mobile app economy. Yet, many studies predict even greater revolutions in trade patterns with the increasing importance of 3D-printing or the creation of shopping avatars taking over individuals’ roles as consumers.

The speed of market developments contrasts with the relatively slow legislative process. This may be illustrated by the harmonisation of the right of withdrawal in online B2C transactions. The issue was first raised in the early 2000s by e-traders who were concerned that the fragmented regulatory framework for consumer protection hindered cross-border trade. A fully harmonised right of withdrawal was discussed by the European Commission in 2004 and subject to a public consulta-
tion in 2007, which after a year resulted in a Commission proposal. After 3 years of intense deliberations, the EU legislator adopted the Directive on Consumer Rights in 2011. Given the transposition delays, however, it was not until June 2014, i.e. ten years after the issue was first considered at EU level, that a uniform right of withdrawal entered into force in all EU States.

Yet, this is not an isolated case. A time span of 5-10 years between the identification of a problem and its regulation is not uncommon for EU legislation. This is mainly because, in addition to different interests (consumers, traders, etc.), the EU legislative process needs to take into account the legislations of each EU State. In that respect, full harmonisation which requires a higher degree of convergence will, as a rule, take a longer time to achieve.

The slow pace of the EU legislative process affects businesses negatively in that it delays the release of untapped potential for cross-border trade. This loss of opportunities is obvious in the case of the right of withdrawal where many e-traders missed years of opportunities to develop their businesses abroad.

Likewise, the mobile app economy initiated in 2007 with the introduction of iPhone and Android is still waiting for a suitable EU regulatory framework. For instance, consumer information requirements adopted at a time when desktops and laptops dominated e-commerce are to a certain extent not adapted to the smaller screens of smartphones. Unclear rules have also been discussed in this report in respect to the liability of online platforms or the obligations of traders with regards to the data protection rules.

Looking a few years ahead, it is reasonable to assume that many pieces of EU legislation on e.g. the manufacturing of goods would need adjustments to suit the developing 3D printing business. Yet, it is likely that such revision will take some time during which the industry will have to live with legal uncertainties. This is just one more example of a time-consuming legislative process which slows down cross-border trade.

The gap between market and legal developments is all the more damaging for cross-border trade because the pieces of legislation adopted by the EU do not always hold a high standard. Besides the now famous example of the Data Retention Directive recently invalidated by the EU Court eight years after its adoption, businesses have complained about inapplicable rules such as the requirements to seek users’ consent for cookies to be stored on their computer.

Similar criticisms have been formulated with regards to other pieces of EU legislation. Recently, the EU Court’s ruling on the “right to be forgotten”, itself an emanation of the Data Protection Directive, was criticised by several actors including the House of Lords in the UK for being “misguided in principle and unworkable in practice”. Likewise the EU rules on jurisdiction in respect to data protection have been condemned by several authors as impractical. This is not to mention the many critics formulated by the industry towards some of the provisions of the proposed Data Protection Regulation.

However one should not exaggerate the failing quality of some pieces of EU legislation on e-commerce. In spite of the examples mentioned here, EU rules generally have a strong positive effect on free movement. The full harmonisation of certain consumer rights is a prime illustration of the creation of a single digital market without internal borders. Given the consensual nature of the EU legislative process, where each national solution and each interest needs to be taken into account, it is inevitable that the end-result may to some extent be unsatisfactory. Still, we see some room for improvement.

5.2.2 Room for improvement

Based on the above, the completion of a Digital Single Market would, in our view, demand rules on the digital environment that are:

- **up-to-date**, that is relevant for the industry and its users;
- **clear**, in order to avoid uncertainties and create a transparent level-playing field;
- **flexible**, i.e. able to take into account unforeseen market developments; and
- **well-founded**, i.e. based on an in-depth assessment of all interests at stake.

This wish-list may be viewed as paradoxical as it contains objectives that are difficult to reconcile. A well-founded rule for instance demands time for discussion and analysis which may be difficult to conciliate with the call for up-to-date legislation. Similarly, flexible rules require a certain level of
abstraction that may in turn conflict with the objectives of clarity and transparency.

Hence EU rules will inevitably present some shortcomings. Although it is not the point of this study to present a ready-made solution for all incoming EU legislation affecting e-commerce, we would like to present a number of principles that may help in mitigating those shortcomings.

First, flexibility is better achieved with a technology-neutral and principle-based approach. Such an approach consists of identifying a suitable level of protection — e.g. what the consumer should be informed about or which risks related to the use of personal data should be averted — and then regulate in generic terms the means to reach those objectives. In other words, the legislator should focus on defining an obligation of result (“what” needs to be protected) rather than an obligation of conduct (“how” it should be protected). This is also the solution proposed by a number of trade organisations in respect to data protection.

Second, this flexible approach calls for adequate safety mechanisms to prevent the risk of abuse by the market players. An approach focusing on the “what” rather than the “how” should not mean that the market is given a carte blanche to set up mechanisms to achieve the objectives fixed by the legislator. The risks of abuse, hacking or simply loopholes in those mechanisms need to be averted. This may be done by focusing on the supervision of the market.

This supervision may in turn take several forms. One way is to issue interpretative documents with practical guidelines, a common approach today in respect to data protection. Another is to strengthen the control of the market players. It may even be relevant to discuss setting up a transitory regime of comfort letters whereby the public authorities would assess certain companies’ safety mechanisms prior to their entry into force. Inspiration for this may be found in the supervision of the competition rules.

The combination of a flexible approach with adequate safety mechanisms may in our view guarantee the fulfilment of the conditions listed in the introduction to this section. The increased flexibility of this approach may result in rules that are up-to-date (the legislator having less factors to consider) and better founded (the market players being involved in the enforcement process together with the supervisory authorities).

5.3 Tackling private barriers

No market is perfect, and the markets for e-commerce are no exception. In this report, we have mentioned a number of obstacles resulting from market imperfections or from market immaturity, notably the delivery of parcels over the border, the fragmentation of the intellectual property landscape or the dominant position of certain players on the app market.

The risk of abuse of a dominant position has similarly been discussed with e-traders with regards to cloud computing services and online marketplaces. The recent resolution by the EU Parliament calling for a possible unbundling of search engines’ activities is another contribution to the debate on dominant ICT companies. Further issues related to the competitive relationship on the markets for e-commerce have been taken up by e-traders and, notably include the prohibitions imposed by suppliers on local distributors to sell certain goods online or to sell those goods across the border.

The lack of trust for online transactions, especially cross-border ones, is another obstacle which
is slowing down the completion of a Digital Single Market. The lack of trust from both e-traders and consumers has been discussed in several fora, notably with the European Commission.\textsuperscript{66} It is partly explained by the novelty of e-commerce for many consumers and the risks associated with it in terms of fraud or for privacy concerns.

Those obstacles are of a private nature and as such, they may primarily be addressed by the market. Indeed, a number of private initiatives have been launched to remove some of these obstacles. For instance, independent websites and online marketplaces which provide customer reviews or price comparisons are becoming powerful tools in building trust. In fact, several e-traders interviewed for this report have stressed the importance that a single decimal in these grading systems may have on their turnover. On a similar note, national trade organisations have for some years set up e-commerce trustmarks,\textsuperscript{69} now followed with the launching of pan-European trustmarks,\textsuperscript{68} which also contribute to building trust. Another example of private initiative concerns the creation of pan-European databases for protected musical works mentioned above which may remedy the fragmentation of the intellectual property landscape in respect of multi-territorial licensing.\textsuperscript{69}

Still, the public authorities do have a role to play in removing private barriers. They can particularly encourage private initiatives, as is the case with the new EU Directive aimed at facilitating multi-territorial licensing of copyrights.\textsuperscript{70} In respect of copyright licensing, the legislator may have a limited margin of manoeuvre given the restrictions imposed by international conventions.\textsuperscript{71} However, we note that the possibility to facilitate licensing and access to content has recently been discussed by stakeholders at EU level.\textsuperscript{72} The incoming digital strategy, to be launched by the European Commission in May 2015, may shed some light on these proposals.

The supporting role of the public authorities may also include an effort of clarification of the regulatory framework for e-commerce. As an example, one e-trader mentioned the harmonisation of consumer rights will only bridge the trust gap if consumers are made aware that the same rules apply throughout the EU.

In addition, the public authorities may need to review whether existing rules and enforcement mechanisms are adequate when tackling some of the private barriers mentioned here. The EU rules on competition are of special interest here. Market partitioning by suppliers should be carefully monitored in light of the rules on vertical restraints.\textsuperscript{73} Other pieces of legislation may also be called on to play a prominent role in e-commerce. In particular, the decades-old rules on defamation may need adjustments in order to meet the growing concern of some e-traders with problems in enforcing their rights in the case of unjustified customer reviews.

Lastly, it should be discussed if, and how, the public authorities should intervene in regulating the pricing policies of private operators. In the summer of 2014, the European Commission took actions against a number of car rental companies which, for the same online transaction, charged different tariffs depending on the geolocation of the customers.\textsuperscript{74} Such actions should, in our view, be motivated by the legitimate fight against discriminatory practices by market players and should not constitute an undue interference with the freedom to conduct a business.\textsuperscript{75}

As mentioned above, problems related to the pricing of certain services is also relevant for cross-border parcel delivery. In other areas such as telecommunications and payment services, the EU regulates the fees charged by private operators for cross-border transactions.\textsuperscript{292} The appropriateness of similar forms of regulation may be discussed regarding parcel delivery. We note that the European Commission did not make a proposal to this effect in its recent communication on parcel delivery.\textsuperscript{297} However, it did warn that it “will consider appropriate corrective or additional actions to remedy market failures” should the problems related to cross-border delivery remain.

Discussions on a possible ceiling for the pricing of these services should in our view carefully balance the interests of foreign consumers for lower tariffs with the impact that this may have in the business of delivery operators and on domestic consumers. Similar to our above example of the online car rental operators, public intervention in order to lower cross-border fees should take into account the principle of economic freedom.

Clearly, the above shows that the public authorities, whether national or at EU level, need to rethink ways to address private barriers if they want to achieve a truly integrated market for e-commerce in Europe. The range of measures is broad and does not necessarily include the adoption of new rules.
Annex I – EU Rules on E-commerce

Many aspects of e-commerce are subject to harmonisation. Below is a short overview of the main issues covered by EU legislation.

1. EU rules on applicable laws

The borderless nature of the internet will inevitably result in e-traders being involved in cross-border transactions. This in turn raises the question of applicable laws to cross-border activities: will the national rules of the country of establishment of the e-trader apply (the so-called “home State law”) or will it be those of the country where the customers are resident (the “host State law”)? A number of EU directives and regulations address this issue.

The general principle, set in the E-commerce Directive,278 is that the home State law applies in the case of cross-border activities. Hence a German e-trader will only be subject to German requirements in respect of its qualifications, authorisation, the quality or content of the service provided (including advertisement), even in the case of cross-border transactions.

This principle is not an absolute and does not apply, for instance, in the case of requirements applicable to goods as such or to services, other than digital ones. For example, should German e-traders sell clothes to Italian customers then the Italian rules on the content, presentation or labelling of those clothes would apply to the transaction.

Furthermore, in the case of consumer contracts, the host State consumer legislation would apply to the transaction if the e-traders “direct [its] activities” to the state of residence of the consumer. This follows from the Rome I and Brussels I Regulations.279 As an example, if a German e-trader targets its activities at the Italian market then Italian consumers will be protected by Italian rules on the liability for defective products.

Finally, specific EU rules on the allocation of national laws in cross-border transactions also apply in respect of data protection and VAT.280

2. Consumer protection

National consumer rules applicable to e-commerce have been almost fully harmonised via the Consumer Rights Directive which was implemented in the EU States in June 2014.281 Paramount to e-commerce is the right of withdrawal which is now regulated in the same manner in all EU States. According to the Directive, consumers are granted a cooling-off period of 14 days during which they may withdraw from a contract. The conditions for withdrawal, including reimbursement and bearing the costs of sending back the goods, are also fully harmonised.

The Consumer Rights Directive also regulates critical issues such as the delivery of goods, payment fees and the passing of the risk when dispatching goods.

Other EU Directives provide so-called minimum harmonisation of certain consumer rules, such as unfair contract terms, certain aspects of the sale of consumer goods and associated guarantees and misleading and comparative advertising.282 The EU States remain free to adopt stricter standards, which explains why disparities still remain between national rules.

In addition, the newly-adopted Directive on Alternative Dispute Resolution (ADR) and the Regulation on Online Dispute Resolution (ODR) provides for dispute resolution mechanisms between e-traders and consumers.283 In particular, a digital platform will be set up, which can be used by consumers who have made an online purchase and it will direct the dispute to the competent ADR-body.

Finally, the Directive on Unfair Commercial Practices prohibits misleading and aggressive commercial practices in B2C-trade.284 For instance an e-trader shall not provide false or untrue information about its products nor information that is likely to deceive the consumer or to create confusion with another product or with a competitor’s trademark.

3. Payments and taxation

A number of aspects of payment transactions have been regulated at EU level. In particular the Payment Services Directive deals with payment fees that e-traders may be subject to, and may pass to their customers.285 It also includes rules on authorisation of payments and liability. As a general rule, the payer may under the Directive be liable for up to €150 in the case of unauthorised transactions, for instance if the payment instrument is stolen. The EU States are allowed to set a lower limit.
The taxation of e-commerce transactions is another critical issue dealt with by EU legislation. The VAT Directive which applies in the case of cross-border sales of goods and services plays here an important role.\footnote{\textsuperscript{286}}

The Directive provides that goods and services should normally be subject to a standard VAT rate of at least \(15\%\) and that EU States may apply one or two reduced rates which may be of no less than \(5\%\) to some goods and services.\footnote{\textsuperscript{286}} Different rates applied in the EU States can be found in a list compiled by the European Commission, which is regularly updated.\footnote{\textsuperscript{288}} It further regulates a number of procedural issues related to VAT payment, i.e. where, for what and by whom VAT should be paid. For instance, the general principle for B2C sales of goods is that the e-trader will have to pay VAT in its home State rather than in the country of residence of its customer, until sales reach a certain threshold. As from 2015, the reverse applies in respect of digital services. Another important requirement set in the Directive concerns the obligation for e-traders to register for VAT with the tax authorities of the countries where their sales when the threshold is reached.

4. Intellectual property

Intellectual property rights are partly harmonised at EU level. For instance the Trademark Directive defines the rights of national trademarks owners whereas the Community Trademark Regulation provides for the possibility to register EU-wide trademarks.\footnote{\textsuperscript{289}} This applies for instance to the protection of an e-trader’s business name, logos and product names.

Copyright which is critical for digital distribution services is also partly harmonised in the EU. Unlike trademarks, it is not possible to register EU-wide copyrights. The national rules on the rights of reproduction, distribution, making available to the public, the legal protection of anti-copying devices and rights management systems however are harmonised in the Directive on Copyright in the Information Society.\footnote{\textsuperscript{290}} Furthermore one of the purposes of the newly-adopted Directive on Collective Management of Copyright is to ease multi-territorial licensing by collective management organisations of authors’ rights in musical works for online use.\footnote{\textsuperscript{291}} When it comes to enforcement of the rights, civil law measures, procedures and remedies are harmonised in the IP-Rights Enforcement Directive.\footnote{\textsuperscript{292}}

5. Data protection

More than any other types of businesses, e-commerce is dependent on the transfer of data from one state to another. In order to facilitate trade within the EU, it is necessary to secure the free flow of data without jeopardising the protection of the integrity of the data subjects.

The Data Protection Directive aims to balance the principle of free movement, here the free flow of data, with the right of privacy of natural persons.\footnote{\textsuperscript{293}} In particular, the Directive harmonises the national rules on the processing of personal data (name, address, customer number, etc) in an automated form. It sets a number of principles to be observed by the operator which collects and processes personal data, for instance an e-trader in relation to its computer database of customers. According to the Directive, personal data may be processed only if the data subjects (here the e-traders’ customers) have unambiguously given their consent or if processing is necessary in certain situations, for instance for the performance of a contract to which the customer is party.

The Directive also prohibits the EU States from restricting the free flow of data within the EU. This freedom is extended to a number of countries outside the EU which have an equivalent level of data protection.\footnote{\textsuperscript{294}} The transfer of personal data to third countries that lack such level of data protection is subject to certain conditions, for instance that the data subjects have unambiguously given their consent or if processing is necessary in certain situations, for instance for the performance of a contract to which the customer is party.

Another important piece of EU legislation in the field of data protection is the Directive on Privacy and Electronic Communications.\footnote{\textsuperscript{295}} The Directive harmonises a number of national rules in order to ensure the protection of the rights of users in the ICT sector. It also imposes a number of obligations on e-traders, such as the prohibition of unsolicited communications (“spamming”) and the requirement for websites to obtain the consent of users for information to be stored on their computers (“cookies”).
6. Information requirements

An important factor to succeed in e-commerce, especially when it takes place cross-border, is to build trust between the seller and the buyer. In the absence of physical contact between a website owner and a consumer, trust can partly be achieved by adequate information on i.a. the seller, the transaction and the goods or services sold online.

To that effect, the EU legislator has imposed a number of user information requirements. Those requirements are found in several EU directives which complete each other and to some extent overlap. The main acts are the E-commerce Directive, the Services Directive and the Consumer Rights Directive. According to these instruments, a website owner must inform users about its identity and provide its contact details. It must also give details about the payment and delivery methods as well as the characteristics of the goods or services in question and the rules applicable in the case of disagreements (right of withdrawal, dispute resolution, etc.).

Additional information on the treatment of personal data is also regulated in the Data Protection Directive and the Directive on Privacy and Electronic Communications.

7. EU competition rules

The EU competition rules aim to secure a level-playing field within the Union by removing two types of anti-competitive practices. The importance of the competition rules for e-commerce is illustrated by the recent inquiry launched by the European Commission in that field.

The first type of prohibition concerns agreements and concerted practices that have as their object or effect the restriction of competition within the EU. With regards to e-commerce, the European Commission has in several instances pointed at the refusal of e-traders to sell goods or provide services to consumers in other EU States. This may be the case where the market has been divided up between different agents/dealerships through the application of exclusive distribution agreements or where suppliers forbid their agents to sell their goods via the internet.

Such practices are subject to the application of the competition rules and in particular the European Commission Guidelines on Vertical Restraints. In the case of exclusive distribution schemes, a supplier may forbid its distributors from actively selling outside their assigned territory. Under such a scheme, however, a supplier may not restrict the passive sale of goods outside a distributor’s territory. In the case of selective distribution agreements, the general rule is that suppliers may not limit the possibility for distributors to sell (actively or passively) outside a specific territory.

In that respect it is important to mention a specific provision of the Services Directive that prohibits service providers, including e-traders, from imposing discriminatory conditions (e.g. prices, refusal to sell) on their customers. Such differences of treatment based on the place of residence of the customers, however, are allowed if they are objectively motivated.

The second type of prohibition under the EU competition rules concerns the abuse of dominant position. Unfair tariffs and trading conditions, price discrimination or tying clauses are examples of such abusive practices. The rules on dominant position may be topical for e-commerce with regards to major actors in the digital economy such as search engines, digital distribution platforms or providers of cloud services. In the past years both the US and EU competition authorities have investigated the trade conditions of operators such as Google, Microsoft or Apple.
Annex II– Case Study: France’s Responses to the Digital Revolution

This case study provides an in-depth review of measures adopted in previous years in France in order to tackle some of the issues raised by the arrival of new online players and business models. It contributes to a better understanding of the types of disruptions which result from the use of new technology, and in that respect, illustrates our discussion on the disruptive nature of e-commerce (Section 5.1).

Our case study on the French market focuses on the following:

• Amazon’s growing share of the retail book market;
• The conflict on private passenger transportation between Uber and licensed taxis;
• The impact of Airbnb on the French housing policy; and
• The development of click & collect services in the large retail sector.

We are aware that France’s reaction to online newcomers may not be representative of the other EU States’ responses. National sensitivities in terms of interests to be protected and the traditions of political intervention vary greatly from one EU State to the other. However, we find that the French debate on disruptive technology is in many ways illustrative of the discussions taking place in neighbouring countries.

1. Book market
   – The “anti-Amazon” law

The digital revolution has brought radical changes to the book market. New forms of distribution via the internet are now competing with brick-and-mortar bookstores. In addition, the introduction of e-books is challenging the centuries-old institution of the paperback. To varying degrees, those changes negatively affect the activities of traditional bookstores all over Europe.

In France, where e-books are still marginal and are not expected to grow substantially in the short-term, the main cause of concern for traditional bookstores comes from online sales via platforms such as Amazon. Amazon has been particularly successful on the French book market in the last years. Part of its success is due to its broad catalogue and its free home delivery services. The large local bookstore chain FNAC provides a similar service with free shipping, enabling it to compete with Amazon. However for most small to medium-sized bookstores, online distribution has resulted in losses and, in several instances, bankruptcy.

One could see the demise of small bookstores as a sad but inevitable reality. Indeed, most developed countries are witnessing similar trends which, despite the laments by book lovers, are not curbed by political intervention. In France, however, bookstores – especially small bookstores – fulfil a function as social and intellectual hubs. Their status as cultural institutions is widely accepted and their survival has been a constant concern for the French authorities. Already in the early 1980s the legislator introduced a fixed book price regime (the Lang Law) in order to protect small bookstores from the growing competition of major supermarket chains. The Lang Law imposes a fixed price for books sold in France, with a maximum price discount of 5%.

The threat to small bookstores from online platforms such as Amazon has led to an adjustment of the existing fixed book price regime. In July 2014, the French legislator adopted a new law according to which online retailers are no longer able to offer the 5% discount available to brick-and-mortar stores. In addition, online retailers are barred from offering free home delivery services but may grant a discount on those services amounting to up to 5% of the book price. This new rule, commonly dubbed in the media as the “Anti-Amazon Law”, guarantees in practice that books sold in physical stores will be at least 5% cheaper than those sold online. Online operators with physical retail facilities, like FNAC, may still offer a 5% discount in case of delivery at those facilities.

The impact of this law on the competitive relationship in the book market remains to be seen. Several actors in France have questioned the efficiency of the law, arguing that Amazon still has comparative advantages (a broad catalogue and almost free home delivery) and that those affected by the law are the consumers and culture itself rather than online sites. The European Commission has also expressed concerns that this law would restrict the freedom of establishment for foreign online retailers and hence be in violation of the EU rules on the internal market. Therefore, legal actions against the Anti-Amazon Law cannot at this stage be excluded.
2. Paris taxis v. Uber

The past years have seen new actors challenging the monopoly situations of taxis in many cities worldwide. In France, but also in the US, Germany or Spain to name a few, peer-to-peer ridesharing services companies have made headlines for disrupting the private passenger transportation industry. Conflicts between Uber, one of the main players in ridesharing services, and traditional taxi operators have led to different responses from the public authorities. The political intervention in France, and especially in Paris, does not differ substantially from reactions in other European cities.

Taxi services are highly regulated in France. Drivers need to pass a number of tests in order to obtain a professional card and acquire a license which is subject to a *numerus clausus* and costs around € 250,000 in Paris. In addition, taxi drivers are subject to regular medical examinations. Licensed taxis enjoy a number of monopolies, in particular with picking up street hails (so-called “cruising”) and entering taxi stands located in Paris and at its airports.

The introduction of smartphones and the development of peer-to-peer services together with a demand for cheaper and more flexible private passenger transportation services contributed to the launching in Paris of ridesharing services in the early 2010s. These services consist of matching a customer’s online request for a specific ride with a private driver. This service, offered via a mobile application, makes use of GPS navigation services and may include the customer’s and/or driver’s preferences (from a particular route to music tastes). A number of local companies offer ridesharing services in Paris but the main operator, with around 1,000 drivers (i.e. half of the ridesharing market), is the US-based company Uber.

The success of Uber and other ridesharing operators has been met with strong reactions from licensed taxis: “escargot operations” with cabbies moving at a snail’s pace in protest and in some cases violent outbursts on ridesharing cars. Legal actions have also been initiated by the Paris taxi organisation resulting in some cases with heavy fines. On its end, the legislator has attempted to regulate ridesharing activities in the name of consumer protection and fair competition.

The first attempt consisted of imposing a 15-minute waiting period on ridesharing cars before they could pick up customers. This measure was put into place on 1 January 2014, and aimed at balancing the competitive advantage of ridesharing operators (in terms of a lesser administrative and financial burden) vis-à-vis licensed taxis. From a customer’s perspective, it may indeed be more interesting to hail a taxi (available almost immediately) rather than waiting 15 minutes for a cheaper solution. The 15-minute decree was suspended by the French Council of State (the highest administrative court) one month after its entry into force and was invalidated in December 2014. In its interim ruling, the Council of State considered that the decree constituted a serious obstacle to the development of ridesharing operators and was in breach of the freedom of trade and industry.

Following the suspension of the 15-minute decree, a parliamentary report proposed to prohibit ridesharing operators from using geolocation services. Those services allow potential customers to identify on their smartphone the actual location and availability of ridesharing cars and hence facil-
itate the booking process. The parliamentary report considered that those services should be covered by the cruising monopoly of licensed taxis. As a result of this report, a new law was adopted in October 2014 which grants taxis an exclusive right on geolocation services also dubbed “electronic cruising” (maraudage électronique). In addition, the law aims to regulate ridesharing services by imposing a number of obligations on the operators and drivers: registration, technical requirements on the cars and the pricing of ridesharing services at a pre-agreed fare (as opposed to taximeter fares). Finally, the law imposes an obligation on ridesharing cars to return to their depot after each fare and forbids them from parking close to railway stations and airports.

The law may seriously disrupt the development of ridesharing operators. With regards to geolocation services, the law reverses roles. Indeed, ridesharing operators which invested in the development of those services lose their right to use them whereas licensed taxis, which have so far been reluctant to this type of innovation, are being granting an exclusive right of use. The lack of flexibility of a pre-agreed fare and the obligation to return to a depot may also have a discouraging effect on ridesharing drivers, especially in the case of long-distance rides.

3. Regulating Airbnb

The conflict between Airbnb and hotel companies is another classic example of an internet-based service provider disrupting a traditional industry by creating new sources of supply. Airbnb is the main online platform offering space sharing services in France. As in the case of Uber, public authorities have intervened in a number of countries in order to regulate the new type of activities which online peer-to-peer services represent. France makes no exception here.

However, rather than focusing on the competitive relationship between the hotel industry and Airbnb, France’s main concern has been the disruptive impact that online private rental services may have on local housing policies. Indeed the housing shortage crisis in certain areas of the country may be exacerbated by the boom of short-term holiday rental which de facto removes properties from the residential market. It is this concern that explains the dual response of the French authorities to the growth of operators such as Airbnb.

First, a new law was passed in the spring of 2014 in order to facilitate some types of short-term private rentals. The new law recognises the freedom of private persons to rent their primary residence for a period not exceeding 4 months per year. No formality or price restriction applies to such rental agreements. This is positive for Airbnb because an important part of the French market is concentrated in Paris (40%) where rentals mostly concern primary residences (83%).

The same law however restricts the rental of secondary residences, at least in major cities (over 200,000 inhabitants) and in the Inner Ring of the Paris region (with a population of 4.5 million). In those areas, the hosts must first apply for an authorisation for rental with the local authorities and provide the rental website with a declaration of compliance. It is up to each municipality to set the conditions for granting a rental authorisation which in practice consists of re-classifying a residential premise into a commercial one.

The Paris municipality has adopted a restrictive approach on the rental of secondary residences which it considered a threat against its housing policy to keep affordable housing for local residents. As a result, an authorisation may only be granted in Paris for a specific property if the applicant can show that a commercial premise of an equivalent area is re-classified into a residential premise. This compensation mechanism is difficult to fulfil and may be costly, especially if the applicant needs to pay for the re-classification of a third party’s property into a residential premise.

4. Regulating “click & collect” services

As for the US, the UK or the Netherlands, several French retail chains have heavily invested in drive-through services these past years. Those services, which are part of the retailers’ omnichannel strategy, enable customers to send their shopping lists online and collect their groceries at a nearby supermarket or warehouse. These click & collect services are free of charge and present an obvious time-saving advantage for the consumers.

For the retail chains the provision of these services is a necessity given the fierce competition in
that sector. In 2013 there were approximately 2,000 drive-throughs in France (aka “drives” in French) with around 50–60 new openings every month. Almost all the drives are owned by the main retail chains. Drives set up in warehouses are often a cheaper alternative for retail chains in terms of easier stock management and lower operating costs. Another advantage of drive-through warehouses is that they are not subject to the strict urban planning and tax regulations that affect brick-and-mortar supermarkets and grocery stores. This is however about to change with the passing of a new law that aims at regulating the drives industry.

Until recently, click & collect services were considered online sales and the warehouse which served as a delivery point did not qualify as a “sales premise accessible to customers”. As such those services were exempt from the urban authorisation scheme applicable to commercial premises larger than 1,000 square meters.

In order to avoid the disruption of land-use planning, a new law was adopted in the spring of 2014 which subjects drives to this authorisation scheme. The legislator noted in particular that the rapid growth of drives created an imbalance on local land-use policies. In the words of the preparatory works, the absence of regulation leads to an explosion of uncontrolled buildings that could be a threat to town and country planning and environmental sustainability policy objectives. One of the issues taken up by the legislator was that drive-through warehouses generated increased traffic and fuel consumption in certain areas without taking into account environmental considerations.

Although the bill also mentions the need to “regulate the development of a form of distribution which enjoys a competitive advantage against traditional commercial activities”, the legislator does not seem to be overly concerned with the competitive relationship in the retail sector. In fact, an amendment aimed at subjecting drives to the tax on commercial premises which already applies to the retail sector was later rejected by both the Parliament and the Government. The latter explicitly stated that drives warehouses are not commercial premises within the meaning of the tax regime as the sales transaction took place online.
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C-222/07 Unión de Televisones Comerciales Asociadas (UTECA)
C-258/08 Ladbrokes
C-236/08 Google France
Joined cases C-585/08 and C-144/09, Pammer and Alpenhof.
C-108/09 Ker-optica
Case C-324/09 L’Oréal v. eBay
C-288/10, Wamo
C-126/11 Inno
C-128/11 Oracle
C-206/11 Köck
C-131/12 Google v. Spain
Joined cases C-293/12 and C-594/12 Digital Rights Ireland
C-466/12 Svensson
C-479/13 Commission v. France
C-502/13 Commission v. Luxembourg
C-198/14 Visnapuu
C-362/14 Schrems
C-582/14 Breyer
C-13/15 CDiscount SA
Ecommerce Europe European B2C Ecommerce Report 2014 – Light version. Note that these figures are higher than those of IMRG (£ 825 billion in 2012) and eMarketer (US$ 1,220 billion in 2013), see IMRG, International Developments in E-Commerce, p.3 and eMarketer B2C Ecommerce Climb Worldwide, as Emerging Markets Drive Sales Higher.

For instance a national ban on the sale of certain goods to give feedback to the Commission or national authorities. Through dialogue with the authorities, Solvit aims to resolve problems within ten weeks. With a presence in all the EU and EEA countries, the network is coordinated by the European Commission (see the Commission’s website). In Sweden, the Solvit Centre can be found at the National Board of Trade.


The Solvit problem-solving network aims to address the obstacles to free movement within the EU that companies and individuals encounter in their contact with public authorities. Through dialogue with the authorities, Solvit aims to resolve problems within ten weeks. With a presence in all the EU and EEA countries, the network is coordinated by the European Commission (see the Commission’s website). In Sweden, the Solvit Centre can be found at the National Board of Trade.

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Given the linguistic capabilities of the authors, this report’s focus has been on national rules available in English, Swedish, French, Spanish and German.

For instance a national ban on the sale of certain goods deemed to be harmful to consumers in one state may not be in line with EU law if less restrictive measures, such as labelling requirements informing consumers of the potential risk of that product, would fulfil the same level of consumer protection.

Treaty on the Functioning of the European Union (TFEU).

Omni-channel strategies offer seamless interactions between a trader’s different sales channels: website (desktop), mobile application and brick-and-mortar stores. For instance, a trader will give its customers the possibility of returning online purchases to a physical store, or delivering goods which were ordered online to a brick-and-mortar shop. Consumers may also make use of mobile devices in-store (e.g. scanning a QR code in a shop), to improve their shopping experience.

The same may not be entirely true in respect of services which due to their intangible nature may be more suitable for online sales in some cases (for instance digital distribution services) and for offline trading in others (for instance where the provision of a service requires a physical performance).

See for instance Bloomberg Businessweek “Luxury Brands Are Stupid to Snub the Internet”, 3 April 2014.

Case C-322/01 Deutscher Apotherverband (pharmaceuticals), C-108/09 Ker-optica (contact lenses) and C-258/08 Ladbrokes (online gambling).

For instance, Spain, Ireland, Austria, France, Belgium.

For instance, Sweden, Germany, the Netherlands and the United Kingdom.

Note that in 2011 the European Commission presented a study according to which six unnamed EU States still prohibited the online sales of medicine. Our review of the legislations in a dozen EU States, however, was inconclusive on this point and it is unclear whether the Commission’s findings from 2011 are still up-to-date.

For instance see the statement of the Spanish national consumer association (March 2013).

EU Observer “Gambling in the EU: A long way from harmonised rules” (April 2014).

For instance in Sweden, the Netherlands or Germany.


In Sweden, the prohibition is limited to mediation services, i.e. Swedish operators may not support, promote, or otherwise link to gambling websites set up in other EU States (Article 38 of the Swedish Act on Lotteries).

The opening of a market to foreign gambling license-holders is on the agenda of the European Commission as illustrated by the threat of legal action taken by Brussels against Sweden (see iGaming Business “EGBA warns Sweden over gambling legislation”, 18 February 2014).

According to the Swedish Centre for Social Research on Alcohol and Drugs, the percentage of consumers aged 16-80 ordering alcohol products online has increased from 0.4% in 2008 to 1.2% in 2012 (quoted in the report “En väg till ökad tillsyn: marknadsföring av och e-handel med alkohol och tobak”, SOU 2013:50, p. 198).

Case C-170/04 Rosengren.


Case C-198/14 Visnapuu (pending at the time of writing).

Article 18 of Directive 2014/40/EU.

Article 569ter of the French Tax Code (Code Général des Impôts).

Notes

1. Ecommerce Europe European B2C Ecommerce Report 2014 – Light version. Note that these figures are higher than those of IMRG (£ 825 billion in 2012) and eMarketer (US$ 1,220 billion in 2013), see IMRG, International Developments in E-Commerce, p.3 and eMarketer B2C Ecommerce Clims Worldwide, as Emerging Markets Drive Sales Higher.


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17. Case C-322/01 Deutscher Apotherverband (pharmaceuticals), C-108/09 Ker-optica (contact lenses) and C-258/08 Ladbrokes (online gambling).

18. For instance, Spain, Ireland, Austria, France, Belgium.

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28. Case C-170/04 Rosengren.


30. Case C-198/14 Visnapuu (pending at the time of writing).


32. Article 569ter of the French Tax Code (Code Général des Impôts).
33 See information on the website of the Austrian consumer organisation Verein für Konsumenteninformation.

34 See Commission press release “September infringements package: main decisions” (September 2013).

35 State Airports (Shannon Group) Act (part 9).

36 Our understanding is that the amendments which are motivated by the need to protect consumers are in line with the Commission’s position. The pre-notification obligation imposed on online travel operators established in other EU States may be cumbersome but still constitutes an improvement in comparison with the establishment requirements examined in our 2011 study.

37 A number of complaints have been made in previous years against similar establishment requirements in Greece and Cyprus within the Solvit-network. In Spain, the registration of a local cc.TLD can be made by individuals, corporate bodies and even unincorporated entities that have interests in or maintain links with Spain, without having to be a resident of the country. See Bond, “Getting the deal through – e-Commerce 2014”, Law business research (2014), p.121.

38 Answer given by Mr Barnier on 16 May 2014 (E-003510/2014).

39 Note that we do not argue that all establishment requirements are in violation of EU law. They may be justified by legitimate interests such as the protection of consumers.

40 Sweden, the UK, Denmark and the Netherlands.

41 See Op-ed by the Swedish Minister of Trade and the Dutch Minister of Economic Affairs “Clearing away the single market’s barriers” (European Voice, 4 April 2014).

42 The new regulations regarding domain names will enter into force in 2016. The Parliament is yet to approve the Bill on this issue.

43 See for instance the National Board of Trade “No Transfer, No Trade” (2014).

44 Note that the same is not true if an intra-EU transaction implies the transfer of personal data to third countries, for instance in the case of storage in the cloud located outside the EU. This situation is examined below under Section 4.5.


46 See for instance in Sweden, the Swedish authority’s website.


48 See the European Commission report on the transposition of the WEE Directive.

49 For instance in the UK, see the national authority’s website.


51 See Section 3.4.2.

52 Rome I-regulation (593/2008/EC) and Brussels I-Regulation (1215/2012/EU).

53 Joined cases C-585/08 and C-144/09, Pammer and Alpenhof.

54 See Section 3.4.1.


56 This would be the case if a Swedish e-trader is marketing its goods in Ireland, in which case Irish consumer protection laws would apply to sales to Irish consumers (see Section 3.3).

57 Directive 2011/83/EU.

58 The trader may of course, on a voluntarily basis, offer free returns.

59 According to the Directive, the consumers have 14 days from delivery to notify that they wish to withdraw from the contract (Article 9), and then another 14 days to send the goods in question back to the trader (Article 14).

60 The issue of sales period is examined below in Section 3.4.2.

61 According to the Directive, the trader shall refund the consumer within 14 days from the day it has been informed of the decision of the consumer to withdraw from the contract (Article 13).

62 Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.


64 See Article 23 of the Swedish Consumer Sales Act.

65 European Consumer Centre Ireland, Buying Goods and Services.

66 For instance, in Sweden the burden of proof in respect of the conformity of a product lays on the trader for a period of six months following delivery. In France, this period is extended to two years. See August & Debouzy Avocats, The object of all legislative attention in the coming months, and the Swedish Consumer’s Association "Frankrike stärker konsumentskyddet".


68 See article L 310-3 of the Commercial Code (Code du Commerce).

69 The possibility, which was described in our 2011 study, of offering reduced prices during two additional 2-week moveable periods was abolished on 1st January 2015.

70 See information on the website of the French Ministry of Economy.

71 "L’impact du commerce électronique en matière de soldes et promotions” (2011) p. 4.

72 For instance in Belgium, see City of Brussels, Winter sales 2015.

73 See cases C-288/10, Wamo, C-126/11, Inno and C-206/11, Kock.
See the Danish Act for Certain Payment Means (Lov om visse).

The possibility that the future ruling in that case will also affect the lawfulness of the French rules on sales periods cannot be ruled out.

See for instance the Regulation on cosmetic products (1233/2009/EC) and the Regulation on textile names (1007/2011/EC).

Language requirements may explicitly be allowed under EU law, such as in the case for textiles when such products are offered for sale or are sold to consumers in the territory of the EU State, see Article 16(3) of the Regulation on textile names.

Comments by Dennis Kredler, Director General of the European Retail Roundtable, All Party Parliamentary Group for European Reform – Inquiry into the EU single market in services, p. 18.


In accordance with the Consumer Rights Directive discussed above (Section 3.4.1).

EuroCommerce, E-commerce, omni-channel retail, and EU policy, p. 13.

There are exceptions, for instance in the case of Community trademarks, Community designs or patents that are not limited to the territories of individual EU States.

Given the importance of this issue for digital distribution, we examine the fragmentation of the intellectual property landscape in Section 4.3 with respect to the online delivery of digital content (such as music, films, e-books or games).

For instance the fact that payment methods vary from one EU State to another (direct payment, credit, third party payment, etc.) is more closely related to local traditions rather than national regulations.

See the website of Nets, which is the provider of Dankort.

The Danish Act for Certain Payment Means (Lov om visse betalingsmidler).

See Commissioner Barnier’s response to question by MEP Morten Løkkegaard. Note that in 2013 the Danish Competition and Consumer Authority found that the fees charged in connection to internet transactions were too high (see the authority’s report ‘Vurdering af Nets’ ændring af dankortgebyrer som følge af Konkurrence- og Forbrugerstyrelsens afgørelse (May 2013) and Horten, “Dankort fee in connection with e-trade is lowered significantly”).


Although the negotiations for these acts have not yet been finalised, our assessment at this point is that changes will have to be made to the applicable legislation in several EU States, including Denmark.

Nets, Vejledning af regler (Guidance and rules).

Case C-205/07 Gysbrechts.


Article 9(3) of the Consumer Rights Directive.

Article 26 of Book 7 of the Dutch Civil Code.


Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorism financing (2005/60/EC).

COM(2013) 45 final, p. 10 and Section II of the proposed Directive.

See for instance the website of the UK Authority on Financial Conduct.

See the Swedish Act on Consumer Credit.

Directive 2006/11/EC.

European Commission, Taxation Information and Communication - Annex 1: Thresholds.

See the UK Government’s website.

See information on the websites of the Finnish and Swedish tax authorities.

Information on VAT obligations for each EU State can be found on the Commissions’ website.


Solvit case no 0562/14/SE.

Section 3.2.3.

Directive 95/46/EC.

As the answer to the question is dependent on whether the IP-address is dynamic or static, whether it is in the hands of the Internet Service Provider (ISP) or of a third party and, if so, the likelihood that the third party can obtain additional information in order to identify the individual, it is not surprising that interpretations vary between the EU States and sometimes even within an EU state.


See Administrative Court of Appeal in Stockholm, Judgment of 8 June 2007.

See in France: Appeal Court of Paris, 13th Ch., 27 April 2007 [not personal data], Supreme Court, Criminal Ch., 13 January 2009 [not personal data] and Constitutional Council, decision of 10 June 2009, [personal data] and in Germany: District Court of München, judgement of 30
112 See Section 4.3 of the Austrian Federal Data Protection.
113 See Section 4a of the German Federal Data Protection Act.
115 See Article 5 (7) of the Polish Act on the Protection of Personal Data.
116 European Commission proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data, COM(2012)11.
118 See our definition of trade barriers in Chapter 1. Note that there are legal barriers affecting cross-border parcel delivery but those are not specific for e-commerce. One company mentioned that the driving bans for trucks on Sundays in certain EU States (France, Austria and Germany) lengthened not only the delivery of goods in those countries but also throughout the EU insofar as they affect transit to other countries.
120 See below our discussion on possible remedies to private barriers (Section 5.3).
121 E. Shannon “Will marketplaces devour e-commerce?” Multichannel Merchant (March 2014). We have not found corresponding data for the EU.
122 Further distinctions between marketplaces comprise of the geographical scope (local, regional or global) and pricing methods (fixed price or auction).
123 All the big marketplace operators have set up subsidiaries to handle payments: Amazon (Amazon pay), eBay (PayPal), Rakuten Ichiba (Rakuten bank), Ali baba (Ali pay) and Mercado Libre (MercadoPago).
124 National Board of Trade “Piratkopiering i världshandel” (2012:5).
125 Directive 2000/31/EC.
126 For instance after notification by the victim of the fraud or of piracy.
127 Case C-324/09 L’Oréal v. eBay.
128 In particular, the operator shall not have knowledge of, or control over, the data relating to the offers for sale.
129 CA Paris Brocanteurs c/ eBay (April 2012).
130 Cour de cassation Chambre commerciale, financière et économique LVMH, Hermes (May 2012).
131 In the case at hand a site hosted cooking recipes provided by the users, checked the content for completeness and accuracy before making the recipes visible and obtained a licence from the user as part of the user agreement. The German court found that this was sufficient to subject the marketplace operator to duty of care standards arising from copyright law. (BGH vom 12.11.2009 - I ZR 166/07).
132 Note that the lack of clarity in respect to the liability regime for hosting may also affect other types of services besides online marketplaces. For instance, this is the case for cloud computing services and for search engines (with the exception of Adwords examined by the EU Court in cases C-236-238/08 Google France).
133 For instance, Regulation (518/2014/EU) with regard to labelling of energy-related products on the internet, Regulation (1107/2009/EC) concerning the placing of plant protection products on the market or Directive (94/62/EC) on packaging and packaging waste.
134 For instance, it was estimated that eBay’s US website comprised more than 20,000 product categories in 2012. See Quora “How many categories of product exist on Ebay?” (June 2012).
135 EP Resolution on supporting consumer rights in the digital single market (2014/2973(RSP)).
136 See Article 3(1) of the Directive on copyright in the information society granting authors an exclusive right to authorise or prohibit any communication to the public of their works. However the Berne Convention for the Protection of Literary and Artistic Works (Article 10) states that it is permissible to use quotations, including quotations from newspapers in the form of press summaries.
137 Case C-466/12 Svensson. Note that a breach of copyright rules may occur in the case of a clickable link that circumvents restrictions, for instance by displaying a snippet of a text available on another website to subscribers only.
138 Leistungsschutzrecht für Presseverleger (LSR).
139 The law is incorporated in the Ley de Propiedad Intelectual (LPI).
140 See information on Google’s website.
142 Case C-131/12 Google v. Spain.
143 See for instance the Letter from Google addressed to Isabelle Falque-Pierrotin, Chair of the Article 29 Working Party, (July 2014) and the Advisory Council to Google on the Right to be Forgotten (February 2015).
145 ITPro “EU demands Google extend ‘right to be forgotten’ to all domains” (November 2014).
146 See Section 3.5.
for VOD release (from 4 to 3 months) and SVOD release (from 36 to 24 months). See Les Échos “La nouvelle chronologie des médias est sur les rails” (August 2014).

163 Directive 89/552/EEC.

164 Les Échos “L’américain Netflix se lancera en France en passant par le Luxembourg” (April 2014).

165 Décret no 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande. The percentages vary depending on a number of factors such as the number of films distributed annually, the release window used and the year of activity of the SVOD provider.

166 Real decreto 1852/2004 por el que se aprueba el Reglamento que regula la inversión obligatoria para la financiación anticipada de largometrajes y cortometrajes cinematográficos y películas para televisión, europeos y españoles.

167 Case C-222/07 Unión de Televisoras Comerciales Asociadas (UTECA).


169 Décret no 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande. See the French broadcasting authority’s website.

170 Pursuant to Article 3(1) of Italian Resolution 66/09/CONS, broadcasters must reserve over 50% of their transmission time for European works. The regulation also sets sub-quota requirements. A broadcaster must also allocate an annual financial contribution to the production of, or purchase the rights to, European works for their catalogues, representing at least 5% of the revenue specifically attributable to the public provision of on-demand audiovisual content within the same catalogues in the preceding year. See Federica De Santis “European works quotas for on-demand media service providers”, www.internationalla-wolffice.com (February 2012).

171 See information on the European Audiovisual Observatory’s website.


173 Directive 2006/112/EC.

174 In Sweden the VAT for paper books is 6 % whereas it is set at 25% for e-books. In the UK the VAT rates are 0% (paper) and 20% (digital).


179 For an overview of these EU directives, see Annex I.


181 The notion of “main characteristics” has been clarified in respect of another EU Directive (on unfair contract terms). It is however uncertain whether this also applies in respect to the Consumer Rights Directive.

182 A. R. Lodder, p. 16.

183 § 5 § Telemedienegesetz (TMG)


185 OLG Hamburg, Beschluss vom 20.11.2002 - 5 W 80/02 (LG Hamburg).

186 National Board of Trade “How Borderless is the Cloud? – An introduction to cloud computing” (2012). p.3.

187 For instance clouds may be private (dedicated to one user), public (available to all users) or common for a group of users (community cloud). Cloud services may be limited to the access of an infrastructure (hardware), platforms or software.

188 The public cloud services market was forecasted to amount to US$131 billion worldwide in 2013 and grow to US$677 billion by 2016 (Gartner “Gartner Says World-wide Public Cloud Services Market to Total $131 Billion” (February 2013)). According to McKinsey, the total economic impact of cloud technology could be US$1.7 trillion to US$6.2 trillion annually in 2025 (McKinsey Global Institute, “Disruptive technologies: Advances that will transform life, business and the global economy”, (May 2013), p. 61).

189 Although this section focuses on cloud computing services, it must be noted that several of those issues may likewise affect other types of services involving the processing or transfer of personal data; for instance search engines, the Internet of Things or online marketplaces.

190 Directive 95/46/EC.

191 The cloud provider is in principle a data processor rather than a data controller. Note however that the cloud provider may qualify as a data controller depending on the degree of control it exercises over the processing operation.

192 For instance decisions of the Swedish DPA in cases 263-2011 and 1351-2012 (later upheld by the Swedish administrative court) and more recently in case 3538-2014.

193 See Danish DPA's decision 2011-082-0216.

194 See the website of the Norwegian DPA.

195 ICO “Guidance on the use of cloud computing” (2012), para.31. See also information on cloud services on the website of the Swedish Data Protection Authority.

196 European Commission proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data, COM(2012)11. EU regulations are directly applicable in all EU States as opposed to EU Directives which must be implemented (often with variants).

197 For instance Canada, Israel and Argentina. Note that the USA are not considered as having an adequate level of protection. However the EU-US Safe Harbor regime allows the free flow of personal data to those US companies which adhere to a number of data protection rules.

198 See for instance GigaOm “Amazon mulls setting up a German cloud” (March 2014).

199 Chapter 7, Section 2 of the Swedish Bookkeeping Act (Bokföringslagen).


201 For instance in Denmark and Germany, permission must be granted by the relevant authorities to store tax and accounting data outside their jurisdiction.

202 In those countries certain corporate documents must be stored at specific locations, e.g. at the premises of the company.

203 In Belgium certain social documents such as work regulations and employee health data must be stored at specific locations (e.g. at the premises of the company).

204 A system aimed at reducing energy consumption whereby street lights will only switch on when a passer-by or a car is recorded by the system's sensors.

205 For instance, smart homes can be equipped with smoke sensors connected to the nearest fire station or with home appliances, such as a refrigerator connected to the local grocery store.

206 There are currently 10 billion things wirelessly connected devices in the market. This figure is expected to triple in the coming years. See ABI Research “More Than 30 Billion Devices Will Wirelessly Connect to the Internet of Everything in 2020” (May 2013) and Gartner “Gartner Says the Internet of Things Installed Base Will Grow to 26 Billion Units By 2020” (December 2013).

207 See for instance Deutsche Post DHL “Global e-tailing 2025”, (May 2014) on the creation of shopping avatars taking over individuals’ roles as consumers (p.61).


209 Directive 95/46/EC.

210 See the Board’s study “No transfer, no production” (2015)

211 Note, however, that in order to qualify as personal data, it is necessary to link specific data with an identifiable person.

212 See for instance the pending case before the EU Court on the application of the data protection rules to Facebook (case C-362/14 Schrems) and in respect of Google, legal actions in Italy (judgment in Google vs. Vividown (February 2010)) and in Germany (Administrative order of google data processing (September 2014)). See also the press
release of the Article 29 WP “EU data protection group says Google, Microsoft and Yahoo! do not comply with data protection rules” (May 2010).


215 See the press release of the Catalanian authorities (June 2014).

216 See the judgment of the Tribunal de commerce of Brussels (March 2014).

217 See the Swedish Transport Agency “Om Uber och möjligheten att få undantag från krav på taxameter” (April 2014).

218 Ibid.

219 This threat on local residential areas is illustrated in Annex II with our case study on the French market.

220 See Catalanian Decreto (159/2012) de establecimientos de alojamiento turístico y de viviendas de uso turistico.

221 See information on Airbnb’s website in respect of “The new housing law in Berlin” (April 2014).

222 See for instance the websites of Shapeways, MyMiniFactory, 3DLT, Threeding, CGTrader.


224 This issue is not addressed under EU consumer law, although it cannot be excluded that it is dealt with specifically by the rules on contracts in certain EU States.

225 See for instance the statement made by a UK supplier of telecommunications solutions: “If we were to produce and sell 3D models then we would need to ensure we comply with a wide variety of legislation, not least of which is Product Safety, Toy Safety, CE marking, Copyright, Design rights, Patents, and Trademarks. Given that we would be printing models provided by customers, many of which we would not even see before printing, it would be impractical and prohibitively expensive for us to act as manufacturer or distributor of any such models.”

226 See for instance McCue “3D Printed Prosthetics” (Forbes, August 2014).


228 E. Vollebregt “3D printing of custom medical devices under future EU law” Medical devices legal and regulatory blog.


230 Materials used for 3D printing for instance cannot replicate the exact blend used for the original manufacturing of products.


233 EBA Opinion on virtual currencies, (July 2014) p. 11.

234 See for instance CoinDesk “Why use bitcoin?” (February 2014).


236 EBA Opinion on virtual currencies, (July 2014) p. 21-36.

237 RT “You can play with you bitcoins, but you can’t pay with them”: Russia may ban cryptocurrencies by 2015” (September 2014).


239 See for example HM Revenue Service in the UK “Bitcoins and other crypto currencies” or the Swedish Tax Authority’s position on bitcoins.


241 Computer Sweden “Mobilbetaling ska prispressa i handeln” (May 2014).

242 National Board of Trade “Moving to Sweden – Obstacles to the Free Movement of EU Citizens” (2014:2).

243 A similar test is proposed by EuroCommerce in E-commerce, omni-channel retail, and EU policy, p. 13. See Section 3.4.4.

244 A working group consisting of all DPAs aims to coordinate the national positions on the interpretation of the EU rules on data protection.

245 See above, Section 3.2.2.

246 As mentioned in the introduction to this chapter, those concern the snippet taxes (Section 4.2.1), windowing requirements on SVOD (Section 4.3.4), most barriers on P2P services (Section 4.7) and current discussions on virtual currencies (Section 4.9.1).

247 See Annex I for a review the EU regulatory framework on e-commerce.

248 As mentioned in the introduction to this chapter, those concern the rules on intermediate liability for e-commerce (Section 4.1.1), those on consumer protection for the app economy (Section 4.4) or the rules on data protection in respect of cloud computing (Section 4.5) and Big Data (Section 4.6).


250 Deutsche Post DHL “Global e-mailing 2025”, (May 2014), p.61. see also N. Lomas “Amazon Patents “Anticipatory”
261 See above, Section 4.5.2 in respect of cloud computing services.

262 The Industry Coalition for Data Protection “General approach to modernize the European data protection regime” (November 2014).

263 Under the EU competition rules, mergers are subject to a prior approval from the European Commission or the national competition authorities. This pre-approval mechanism earlier also applied with respect to certain agreements between undertakings. The granting of so-called “comfort letters” gave those companies legitimate expectations as to their compliance with the competition rules.

264 See above, Section 3.4 on parcel delivery, Section 4.3.1 on the fragmentation of the intellectual property landscape in respect of digital distribution and Section 4.4 on the app economy.

265 See above, Section 4.2.

266 See EcommerceEurope “European legislators: lack of trust in cross-border e-commerce” (January 2015).

267 For instance “EHI - geprüfter Online-Shop” in Germany, “Confianza Online” in Spain or “Trygg E-handel” in Sweden. Note that in certain cases, establishment requirements are imposed in order to use a local trustmark.

268 See the trustmarks launched by EcommerceEurope and EMOTA.

269 Section 4.3.1.

270 Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. See above, Section 4.3.1.

271 Unlike other protected rights such as patents or trademarks; no mechanism for mandatory registration of copyright is allowed under the Berne Convention for the Protection of Literary and Artistic Works.

272 See the European Commission’s “Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules” (July 2014).

273 European Commission’s Guidelines on Vertical Restraints (19 May 2010), para. 52–57, also discussed in Annex I to this report.

274 See the Commission press release “Commission presses car rental companies to stop discriminatory practices against consumers” (August 2014).

275 The Board has in a previous (non-published) report argued that the prohibition of discriminatory practices under the EU Directive on services (2006/123/EC), at stake in the Commission’s action against the online car rental operators, should not apply where price differences result from a demand-supply based pricing policy. See the Board “Interpretation of Article 20(2) of the Services Directive” (September 2013).

276 See Regulation on cross-border payments (924/2009/EC) which forbid banks from charging a higher fee for cross-border payments than for local payments and Regulation on roaming on public mobile telephone
networks (717/2007/EC) which imposes on telecom operators a ceiling tariff for roaming services.


278 Directive 2000/31/EC.

279 Regulation 593/2008/EC (Rome I Regulation on applicable law) and Regulation 1215/2012/EU (Brussels I Regulation on applicable jurisdiction).

280 In respect to data protection, the laws of the EU State where the data controller (i.e. the person that determines how personal data is processed) is established will apply to the processing of data even if those concerns data subjects in other EU States. With regards to VAT, the rules on applicable laws vary depending on the nature of the transaction concerned.

281 Directive 2011/83/EU.


283 Directive 2013/11/EU on Alternative Dispute Resolution and Regulation 524/2013/EU on Online Dispute Resolution.

284 Directive 2005/29/EC.


286 Directive 2006/112/EC.

287 See the European Commission’s website on VAT.


290 Directive 2004/26/EC.

291 Directive 2014/26/EU.


293 Directive 95/46/EC. A Data Protection Regulation is currently debated at EU level.

294 For instance Canada, Israel and Argentina. Note that the USA are not considered to have an adequate level of protection. However the EU-US Safe Harbor regime allows the free flow of personal data to those US companies which adhere to a number of data protection rules.

295 Directive 2002/58/EC.

296 Those rules are enshrined in the EU Treaty (Articles 101 and 102 TFEU) and have been developed in a number of EU regulations and European Commission guidelines.


298 See for instance the Commission Communication on Cross-border e-commerce between companies and consumers in the EU.


300 Directive 2006/123/EC (Article 20(2)).

301 For instance, the Commission has objected to Google’s displaying of competitors’ links on its website.

302 E-books in France represent less than 3% of the total book market against ca 10% in the UK and 20% in the US (Rüdiger Wischebart “Global eBook”, April 2014, p.35-38).

303 According to the New York Times: “People in the industry estimate that Amazon has a 10 or 12 percent share of new book sales in France. Amazon reportedly handles 70 percent of the country’s online book sales, but just 18 percent of books are sold online.” (see Op-Ed dated 9 July 2014)


305 French law number 2014-779, of 8 July 2014, relating to the distance selling of books (Loi sur les conditions de la vente à distance des livres).

306 For instance digitalbookworld.com “France Passes Anti-Amazon’ Law” (30 June 2014).

307 Provided that physical stores offer a 5% discount (which is common practice in France).

308 Major online providers like Amazon and FNAC have been quick in adjusting their shipping policies, setting tariffs at € 0.01 per home delivery.

309 Communication of the European Commission TRIS/(2014) 01114.

310 See Section 4.7.1.

311 The Paris taxi license is granted for free by the public authorities but due to the limited amount of licenses (ca 19,000); it takes between 15-18 years for an applicant to obtain one. The easiest and more common way for a driver to acquire a license is to buy one second hand from a retiring taxi driver. See e.g. the website of the Prefecture de Paris.

312 For instance LeCab, SnapCar, and Allocab.


314 Decree number 2013-1251 dated 27 December 2013 on the prior reservation of ridesharing services (Décret relatif à la réservation préalable des voitures de tourisme avec chauffeur). Note that some trade unions had asked for a waiting period of 2 hours (see La Tribune “Taxis contre VTC : la bataille des 15 minutes tourne au grotesque” (Octobre 2013).


317 Law related to taxis and ridesharing operators (Loi relative aux taxis et aux véhicules de transport avec chauffeur).

318 See section 4.7.2.

319 French law number 2014-366 dated 24 March 2014 related to the access to housing and to renovated planning (Loi ALUR).

320 See Le Figaro “Louer à des touristes sera plus compliqué” (3 April 2014).

321 In an interview with Bloomberg, the housing advisor of the mayor of Paris explains: “It’s simple math: A studio on Airbnb can be 1,000 euros a week. That’s four times the price usually paid by a Parisian […]. We’re fighting to keep the middle class in town, they are the heartbeat of the city.” (“Paris Airbnb Cops Want to Know if Your Rental Is Legal”, 7 August 2014).

322 Se Article 2 of the municipal regulation on the compensation mechanism for the rental of secondary residences (Règlement municipal fixant les conditions de délivrance des autorisations de changement d’usage de locaux d’habitation). Note that in some areas of Paris with more severe housing shortage the compensation ratio is 2:1.

323 Note that the 2014 law mentioned above allows municipalities to conduct inspections of rentals and to impose heavy fines in case of abuse (up to € 25,000).

324 For instance Intermarché, Leclerc, Auchan or Carrefour.

325 See the website of Guide-drives.

326 French law number 2014-366 dated 24 March 2014 related to the access to housing and to renovated planning (Loi ALUR). A proposal to subject drive-through to the tax on commercial premises was later withdrawn.

327 The quote above (our translation) is from the impact assessment of the Government Bill, p.363.

328 See isaf.fr “Les drives vont échapper à la taxe sur les surfaces commerciales” (17 February 2014).