UNIVERSITÀ EUROPEA DI ROMA

Facoltà di Economia - 2020/2021

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EU INNOVATION POLICY

Prof. Valeria Falce (UER - Jean Monnet Chair)

OBJECTIVES OF THE JEAN MONNET CHAIR

THE **JEAN MONNET CHAIR** IN EU INNOVATION POLICY AIMS TO :

- **foster** the **dialogue** between the **academic world** and **policy-makers**, in particular to enhance governance of EU policies on innovation
- **promote innovation** in **teaching** and **research** through cross-sectorial and multi-disciplinary studies, open education, networking with other institutions

The Chair focuses on **European innovation policy** with a particular attention to the **single innovation market** and **intellectual property rights strategy**.

AIMS OF THE EU INNOVATION POLICY COURSE

- THE **TEACHING COURSE** AIMS TO :
  - **build** a **solid knowledge-base** on **Innovation Policy**, which is essential to the construction of a community of innovation for economic and social growth, sustainable development and competitiveness
  - **allow students** to **develop** a **critical approach** on substantive issues in innovation policy and competition law, with particular focus on EU integration and a Single Innovation Market for the EU

MODULE I

INNOVATION UNION & EU INNOVATION POLICY

(*Lecture I*)

Innovation in Europe
Scoreboard Performance and Indicators

ROLE AND MEANING OF INNOVATION

Innovation is a **key driver** for economic and sustainable **growth,** as well as for empowering communities and responding to societal challenges. As stated in the *Communication on Innovation Union*, **innovation policy** plays a **fundamental role** in order to inspire future visions and insights on **policy-making** and R&D funding in the knowledge-based economy. Innovation is the engine of economic growth, creating **new markets**, reaching new **productivity** levels and improving long-term **welfare**.

Innovation in Europe
Scoreboard Performance and Indicators

ROLE AND MEANING OF INNOVATION

However, **innovation** is a pervasive and elusive subject. It is **pervasive** since it entails both public and private investments, it **permeates** all areas of **public policy** (tax, labour, telecom, energy, competition, IP and industrial policy, education, immigration, health, agriculture etc), and **requires action** at local, regional, national, global levels. At the same time, it is a very **elusive** subject since it is **hard to define** and there is no 'one size fits all solution' to maximize the potential of innovation in a given country.

Innovation in Europe
Scoreboard Performance and Indicators

ROLE AND MEANING OF INNOVATION

All **governments** are willing to **promote innovation**, but none of them can be sure of how to fully boost its potential. It might be **difficult** to **strike** a **balance** between different **forces**: on the one hand, **innovation** is accelerating, becoming more **global** and **open**; on the other, it requires sophisticated **skills**, global **cooperation** between private and public players, and monitoring of **societal needs**. It might also be **difficult** to **craft** innovation **policies** that will not be obsolete when they come into force.

Innovation in Europe
Scoreboard Performance and Indicators

ROLE AND MEANING OF INNOVATION

As to its **definition**, different suggestions have been proposed. It could be defined as:

- process by which individuals & organizations generate and put in practice new ideas
- process by which value is created for customers, by transforming new knowledge and technology into profitable goods and services for national and global markets
- adoption of new products, processes, approaches that create a valuable outcome

Innovation in Europe
Scoreboard Performance and Indicators

ROLE AND MEANING OF INNOVATION

- introduction of new goods, methods of production, new markets (Schumpeter)
- creation of new (or efficient reallocation of existing) resources which contribute to progress - *i.e.* allocative efficiency and social welfare (Granieri & Renda)

Given this broad range of definitions, it is clear that **there is no 'one size fits all' recipe for defining innovation** which can be applied to all sectors of economy and countries.

Innovation in Europe
Scoreboard Performance and Indicators

INNOVATION AND THE EUROPEAN UNION - A BRIEF OVERVIEW

Europe has not an Internal Market for innovation yet. **Investing** more in **research**, **innovation** and Innovation Policy entrepreneurship is the sole **answer** within **Europe 2020** to neutralize the weaknesses in public education & innovation systems, **enhance** capacity to deliver smart, sustainable and inclusive **growth**, favor smart specialization & circular innovation, **create** a **balanced IP system**. As a result of the *Innovation Union flagship initiative* (2010), a strategic and integrated approach to innovation - boosting European national regional research and innovation potential - is essential.

Innovation in Europe
Scoreboard Performance and Indicators

- OBJECTIVE OF THE EUROPEAN INNOVATION SCOREBOARD

- The **European Innovation Scoreboard,** launched in 2000 & published yearly by the Commission**,** offers a comparative **analysis** of **research** and **innovation performance** in **EU countries**, other European countries, and regional neighbours. It examines **strengths** and **weaknesses** of national **research** and **innovation systems**, and helps countries to **track progress** & **spot priority areas** to boost innovation performance.

Innovation in Europe
Scoreboard Performance and Indicators

WHICH INDICATORS ARE USED FOR THE SCOREBOARD ?

4 main categories – 10 innovation dimensions - 27 performance indicators

- ► Framework Conditions (capture main drivers of innovation performance)
- ► Investments (include public and private investments in R&D)
- ► Innovation activities (capture innovation efforts at company level)
- ► Impacts (show how innovation translates into benefits for the whole economy)

ANNEX 1

Table 1 – European Innovation Scoreboard: dimensions and indicators

FRAMEWORK CONDITIONS

Human resources

1.1.1 New doctorate graduates

1.1.2 Population aged 25-34 with tertiary education

1.1.3 Lifelong learning

Attractive research systems

1.2.1 International scientific co-publications

1.2.2 Top 10% most cited publications

1.2.3 Foreign doctorate students

Innovation-friendly environment

1.3.1 Broadband penetration

1.3.2 Opportunity-driven entrepreneurship

INVESTMENTS

Finance and support

2.1.1 R&D expenditure in the public sector

2.1.2 Venture capital expenditures

Firm investments

2.2.1 R&D expenditure in the business sector

2.2.2 Non-R&D innovation expenditures

2.2.3 Enterprises providing training to develop or upgrade ICT skills of their personnel

INNOVATION ACTIVITIES

Innovators

3.1.1 SMEs with product or process innovations

3.1.2 SMEs with marketing or organisational innovations

3.1.3 SMEs innovating in-house

Linkages

3.2.1 Innovative SMEs collaborating with others

3.2.2 Public-private co-publications

3.2.3 Private co-funding of public R&D expenditures

Intellectual assets

3.3.1 PCT patent applications

3.2.2 Trademark applications

3.2.3 Design applications

IMPACTS

Employment impacts

4.1.1 Employment in knowledge-intensive activities

4.1.2 Employment fast-growing enterprises of innovative sectors

Sales impacts

4.2.1 Medium and high tech product exports

4.2.2 Knowledge-intensive services exports

4.2.3 Sales of new-to-market and new-to-firm product innovations

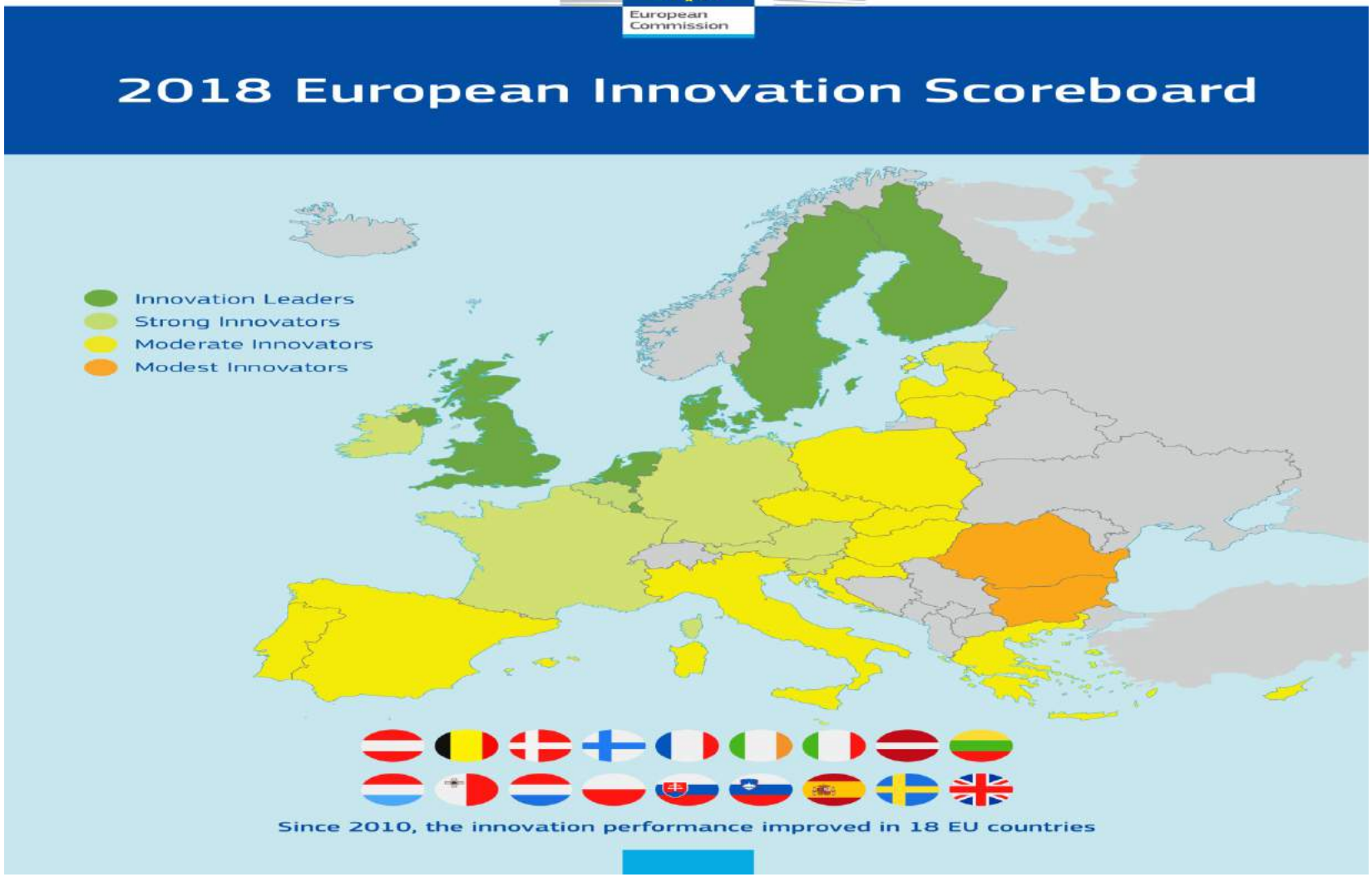
Innovation in Europe
Scoreboard Performance and Indicators

EUROPEAN INNOVATION SCOREBOARD (2018)

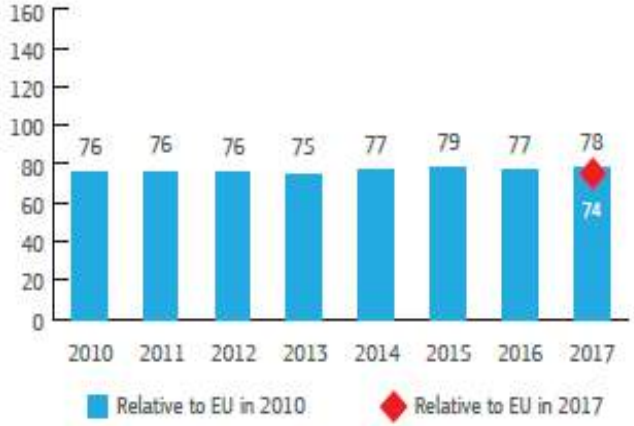
According to the last edition of the Scoreboard, the **EU innovation performance** continues to **improve**, **progress** is **accelerating** and the outlook is positive. Progress has been strongest in the dimensions of i) **innovation-friendly environments**, ii) **human resources**, and iii) **attractive research systems**.

- ► **EU innovation leaders**: Sweden, Denmark, Finland, UK, Luxembourg
- ► **Fastest growing innovators**: Lithuania, Netherlands, Malta, UK, France


European Commission
SWEDEN
Innovation leader
Sweden is once again the EU innovation leader, followed by Denmark, Finland, the Netherlands, the United Kingdom and Luxembourg
In particular areas of innovation, the EU leaders are:
DENMARK
human resources and innovation-friendly environment
LUXEMBOURG
attractive research systems
FRANCE
finance and support
IRELAND
innovation in SMEs, employment impacts, and sales impacts
BELGIUM
innovation linkages and collaboration

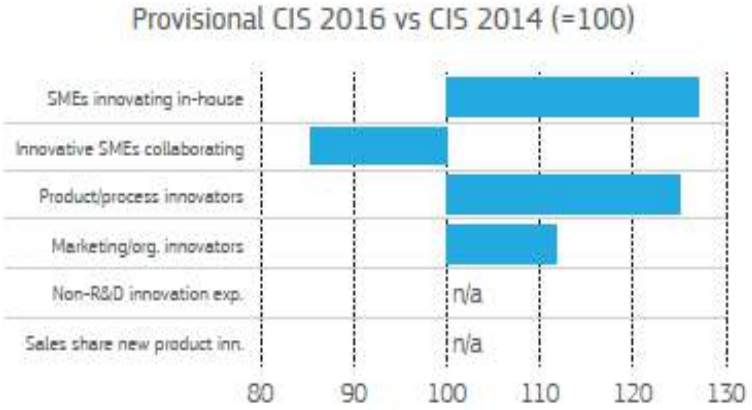

European Commission
2018 European Innovation Scoreboard
Innovation Leaders
Strong Innovators
Moderate Innovators
Modest Innovators
Since 2010, the innovation performance improved in 18 EU countries

Italy is a **Moderate Innovator**. Over time, performance has increased relative to that of the EU in 2010.



Innovators and Intellectual assets are the strongest innovation dimensions. Human resources and Finance and support are the weakest innovation dimensions.

Provisional CIS 2016 data show improved performance for three indicators and reduced performance for one indicator. There are no fast-track data for the other two indicators.



Structural differences with the EU are shown in the table below. The turnover share of large enterprises and the value added share of foreign-controlled enterprises are well below the EU average.

Innovation in Europe
Scoreboard Performance and Indicators

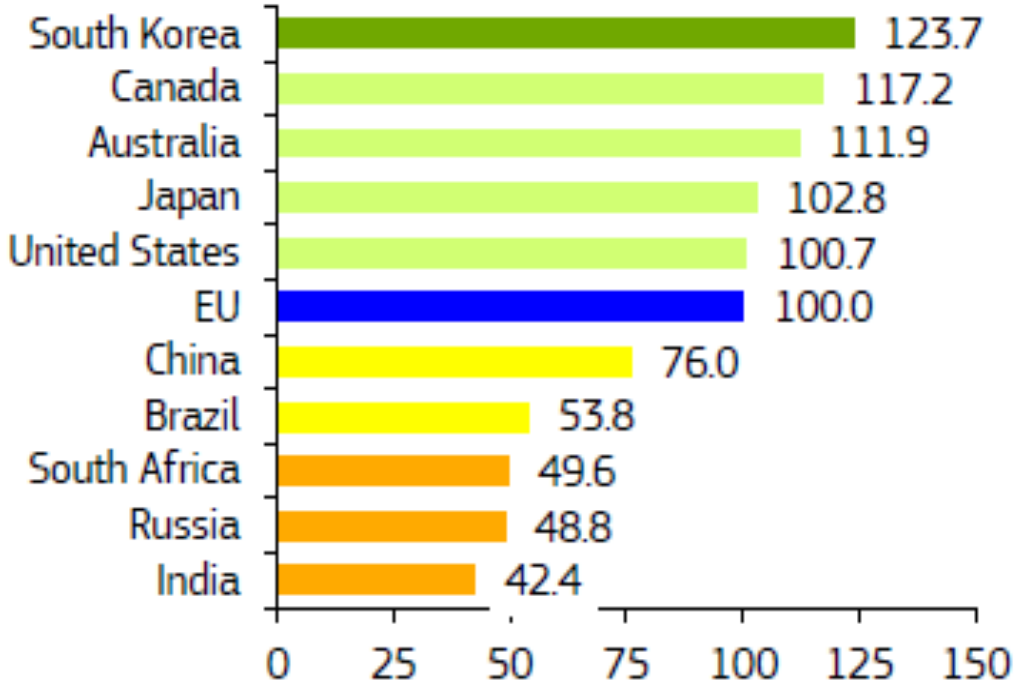
EUROPEAN *v* GLOBAL INNOVATION PERFORMANCE (2018)

The **EU** continues to **improve** its **position** (+ 5.8% between 2010-2017); it maintains a performance lead over China, Brazil, South Africa, Russia and India. China however has a much higher innovation performance growth rate, and is catching up very fast.

► **South Korea** is the most innovative country (+ 24% above EU performance)

► **Canada**, **Australia**, **Japan** and the **U.S.** are performing better than the EU

Figure 4: Global performance



Bars show countries' performance in 2017 relative to that of the EU in 2017.

Innovation in Europe
Scoreboard Performance and Indicators

EUROPEAN *v* GLOBAL INNOVATION PERFORMANCE (2018)

To achieve a high level of innovation performances, countries need a **balanced innovation system**, with an appropriate level of **investments** in **education**, **research** & **development**, innovation friendly **business environment**, strong **digital infrastructure**, **competitive markets**, and efficient **allocation of resources**.

► **EU** needs to **reinforce** its **efforts** to **innovate,** and move towards cleaner and smarter industry to **boost** its **competitiveness** and increase societal **welfare**.

Innovation in Europe
Scoreboard Performance and Indicators

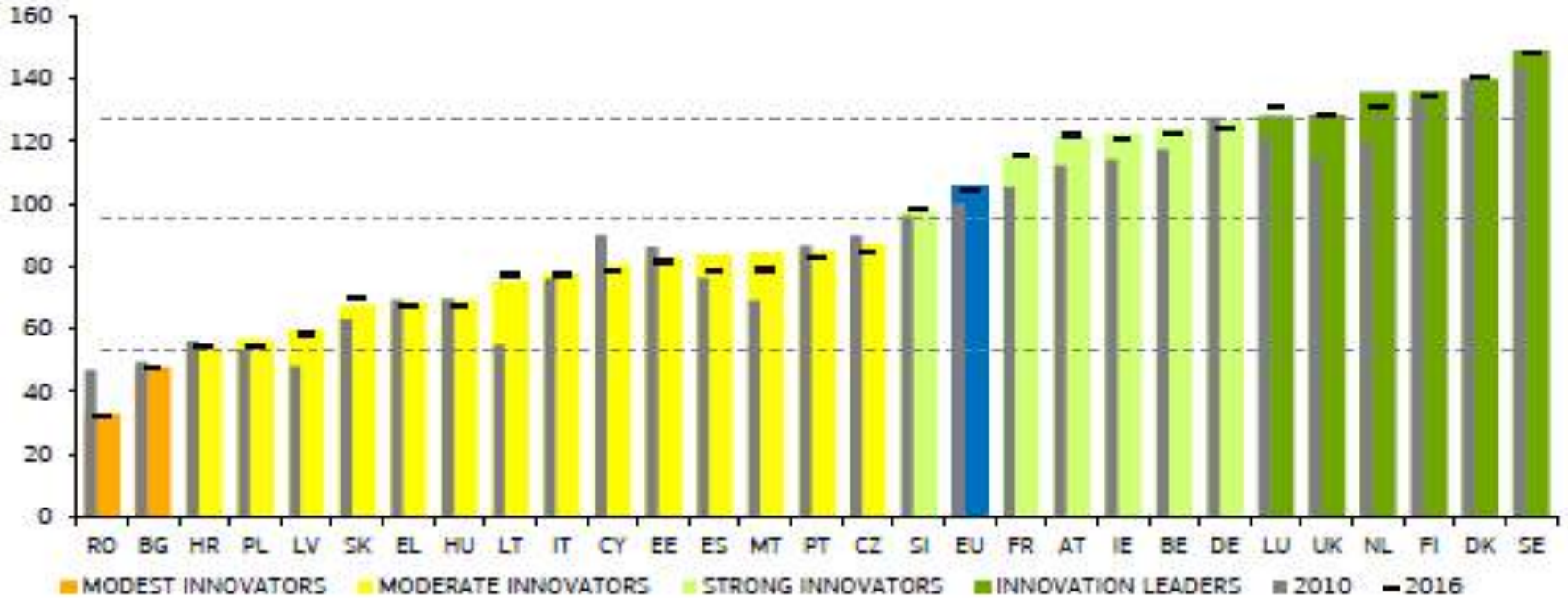
EUROPEAN *v* GLOBAL INNOVATION PERFORMANCE (2018)

In particular, the **European Union** has to work on a variety of **weaknesses**:

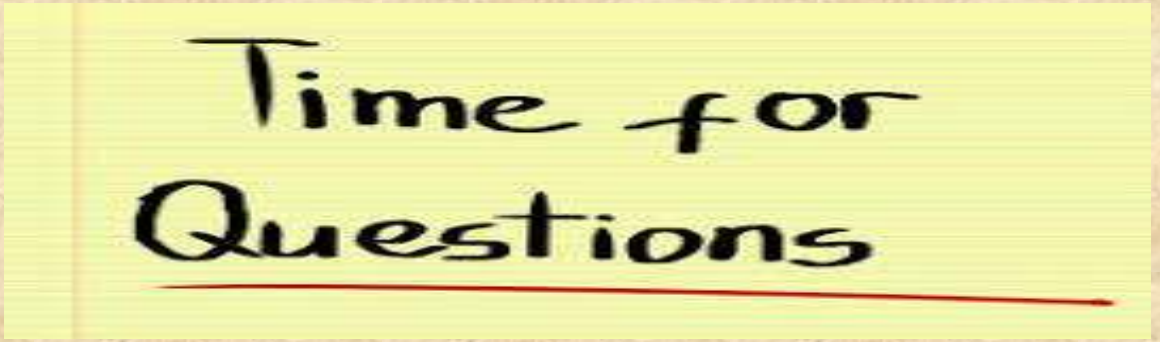
- ► EU **companies spend less** on **innovation** than their competitors
- ► **public investment** across the EU **falls short** of 3% GDP target
- ► 40% of **workforce** in Europe **lacks** the necessary **digital skills**
- ► **R&D intensity** is not homogenous (investments concentrated in west EU regions)

European Innovation Scoreboard 2018

Figure 2: Performance of EU Member States' innovation systems



Coloured columns show Member States' performance in 2017, using the most recent data for 27 indicators, relative to that of the EU in 2010. The horizontal hyphens show performance in 2016, using the next most recent data for 27 indicators, relative to that of the EU in 2010. Grey columns show Member States' performance in 2010 relative to that of the EU in 2010. For all years, the same measurement methodology has been used. The dashed lines show the threshold values between the performance groups in 2017, comparing Member States' performance in 2017 relative to that of the EU in 2017.



- how can we define innovation ?
- why is innovation so important for the society ?
- which key indicators does the Innovation Scoreboard look at ?

Innovation in Europe
Scoreboard Performance and Indicators

SUGGESTED READINGS

- EU Commission, 'European Innovation Scoreboard' (2018)
- EU Commission, 'European Innovation Scoreboard 2018: Europe Must Deepen its Innovation Edge' , (2018) Press Release IP/18/4223
- EU Commission, '2018 European Innovation Scoreboard – Frequently asked questions', (2018) Fact Sheet Memo/18/4224
- M. Granieri & A. Renda, *Innovation Law and Policy in the European Union* (Springer 2012)

MODULE I

INNOVATION UNION & EU INNOVATION POLICY

(*Lecture II*)

The Lisbon Strategy

- INNOVATION AND THE EARLY DAYS OF THE EC
- The Commission first identified **innovation as a process** which needs to be supported at Community level only during the **1960s,** when the first measures about research and innovation were adopted. A **Working Group** on Scientific and Technical Research Policy was established to promote the advancement of research and innovation.
- It noted that **innovation** was becoming **increasingly important** but that the situation in **Europe** was **problematic**. It identified a number of issues to be addressed both at Member States and Community levels: low dynamism in universities, a lack of suitable human resources, and lack of an environment conducive to research and innovation.

The Lisbon Strategy

- INNOVATION AND THE EARLY DAYS OF THE EC

- In the **1970**s, innovation was mainly considered as a **policy topic** related to the development of a broader policy on **research.** The goal of a policy for research was to strengthen Europe's position in international competition through innovation, and to create conditions favourable to innovation. Later, however, the concept of innovation was progressively linked to industrial and economic policies. This phase marked a widening of the scope of innovation well beyond its technological component.

- **Innovation** was generally interpreted as a **linear process** which translates **knowledge into products**. The '**European paradox**' meant that Europe had failed in turning knowledge into products, due to a lack of favourable climate for SMEs, a tax & cultural environment hostile to risk taking, and resistance of employees to innovation.

The Lisbon Strategy

- <u>EVOLUTION OF INNOVATION POLICY</u>
- A **Commission Communication** on '*industrial development and innovation'* (1980) set a new dynamic, highlighting the **need** for a **successful innovation**, which should act as a bridge between industrial strategies and scientific & technological policies.
- A 1981 Communication established a **first Community policy for innovation**, strongly linked to industrial policies. It also remarked the **failure** of the Community in **enhancing innovation,** due to many factors (R&D, taxation, funding, skilled workforce). It suggested that **solutions** should be focused on various aspects of the EC **internal market** (*e.g*, standards, IPRs, norms, public markets), and that the Community **lending instruments** should give priority to innovation.

The Lisbon Strategy

- <u>EVOLUTION OF INNOVATION POLICY</u>
- **Various programs** supporting innovation were implemented in the **1980s**:
  - ○ SPRINT (strategic programme for innovation and technology transfer)
  - ○ EUREKA (supporting stronger links between public and private partners)
  - ○ Framework Programme for Research and Development (R&D)
  - ○ Programme for SMEs (promotion of small and medium sized enterprises)

The Lisbon Strategy

- TOWARDS THE LISBON STRATEGY
- The Commission **White Paper** on '*growth competitiveness and employment'* (**1993**) marked a further evolution of the concept of **innovation**, by recognising that the linear model had been replaced by **more complex mechanisms**. According to the document, innovation requires an organized **interdependence** between the **upstream phases** (linked to technology) and the **downstream phases** (linked to the market).
- **Other initiatives** (1994-95) included: i) *Fourth Framework Programme for Research*, with specific innovation program (promotes an environment encouraging innovation); ii) *Regional Innovation Strategy* (supports definition & implementation of innovation policy at regional level); iii) *Institute for Prospective Technological Studies* (contributes to understand the industrial innovation & growth); iv) *Green Paper on Innovation* (EU innovation policy as distinct from research & industrial policies).

The Lisbon Strategy

TOWARDS THE LISBON STRATEGY

Only in **1996**, the Commission implemented the **first action plan** in support of **innovation**, trying to address the limited capacity in Europe to convert scientific inventions in commercial successes (*European Paradox*). It argued that action at EC level was necessary, to draw up and enforce *inter alia* rules on competition, IPRs and internal market. The action plan suggested **three areas for action**:

- **foster innovation culture** (improve education & training, facilitate researcher mobility, stimulate innovation in the public sector etc)
- **establish a framework conducive to innovation** (simplify legal & regulatory environment, and ease innovation financing in Europe)
- **better articulate research & innovation** (both at national and at Community level)

The Lisbon Strategy

- <u>WHAT WAS THE STRATEGY ABOUT</u> ?

- The Lisbon Strategy was an **action** formulated in 2000, for **addressing** the **EU economy** in the period **2000-2010**. Its objective was to make the Union 'the **most competitive and dynamic knowledge-based economy** in the world, capable of **sustainable economic growth** with more and **better jobs** and **greater social cohesion**', by 2010.

- [VIDEO 1 - VIDEO 2]

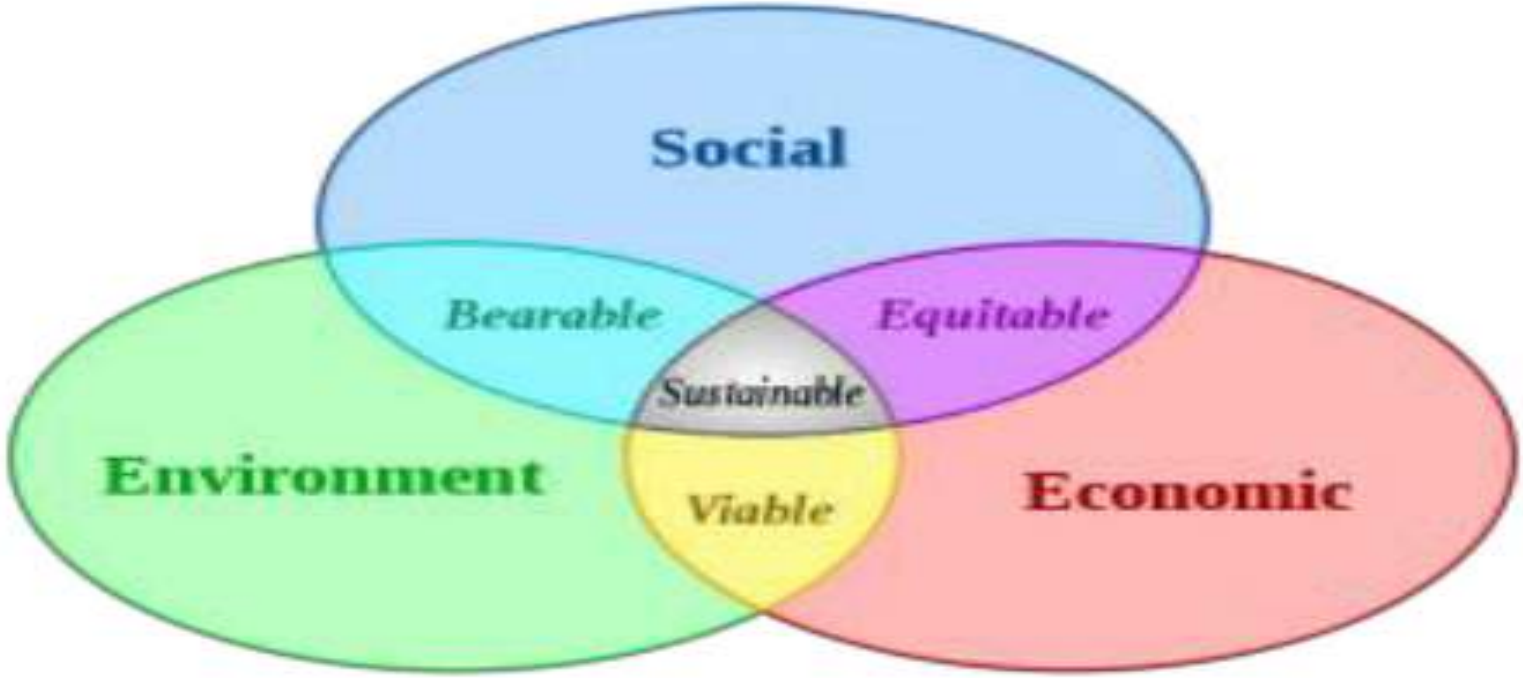
The Lisbon Strategy

- SCOPE AND GOALS OF THE STRATEGY

- Set out by the European Council, it aimed at **addressing** the **low productivity levels** and the **stagnation** of the **EU economic growth.** To this end, it formulated various **policy initiatives** to be implemented by the EU Member States. The main goals identified by the Strategy were to be **achieved by 2010**.

- At the core of the Strategy, heavily based on the concept of **innovation** (seen more as a process to achieve other aims, rather than a goal in itself), there were the following areas: **economic, social, environmental renewal and sustainability**.

The Lisbon Strategy



The Lisbon Strategy

SCOPE AND GOALS OF THE STRATEGY

► under the Lisbon Strategy, a **more robust economy** would **improve employment** in the Union; **inclusive social and environmental policies** would contribute themselves to **boost economic growth.**

► key concepts of the Strategy referred to the **knowledge economy**, **innovation**, and **technology governance**. **Innovation** was identified as one of the **pillar** of the EU resurgence, and **research** as a means towards the achievement of **higher levels** of **prosperity** and **growth** (*Communication Towards a European Research Area* – 2000)**.**

The Lisbon Strategy

- THE KEY ROLE OF RESEARCH

- In particular, the importance of the **role of research** had previously led to the creation of a **European Research Area (ERA – January 2000).** This project was endorsed by the Lisbon European Council in March 2000, with the aim of **strengthening Europe's leadership** in **research**. The general impression was that Europe was not investing enough in progress and in knowledge.

- Thus, the **Commission** proposed a broad action plan to **raise R&D expenditure** in the EU, and **Member States** set national **R&D** investment **targets** at 3% of the GDP.

The Lisbon Strategy

- VARIOUS POLICY INITIATIVES (2000)
- More in general, during the decade of the Lisbon Strategy, **several initiatives** were implemented to **increase investments** in **research** and **innovation** capacities. Below, a brief review of the main acts and documents adopted by the EU institutions.
- According to a **Commission Communication** on '*innovation in a knowledge driven society*' (**2000**), i**nnovation policy** should be seen as a new horizontal policy **connecting different areas** (economic, industrial and research policies). It was also recognised that the **fragmentation** of the European innovation system needed **to be addressed**, in order to limit the risks connected to an 'innovation divide'.

The Lisbon Strategy

VARIOUS POLICY INITIATIVES (2000)

The Commission Communication (2000) identified **5 goals**, in order to **support Member States** and go beyond the unsuitable linear model that had led to unsuccessful measures: i) **ensuring** the **coherence** of **innovation** policies (through the coordination & assessment of national policies); ii) **establishing** a **regulatory framework** conducive to innovation (*i.e.*, effectively regulate, without over-regulating); iii) **encouraging** the creation and growth of **innovative enterprises** (build a favourable legal, fiscal and financial environment); iv) **improving key interfaces** in the innovation system (promote interactions between the actors of the innovation process); v) **creating** a **society open** to **innovation** (*i.e.*, a well-informed European society). Other initiatives also followed the 2000 Communication.

The Lisbon Strategy

VARIOUS POLICY INITIATIVES (2001-2003)

► the **2001 European Innovation Scoreboard** noted that all Member States had improved their innovation performance, and underlined that innovation has a strong regional dimension. However, it also identified two major weaknesses at EC level: patenting and business R&D.

► the **Commission Communication on '*Industrial Policy*' (2002)** highlighted the characters of innovation, which is the result of complex and interactive processes.

► the **Commission Communication on '*Choosing to Grow*' (2003)** held that creating the right environment for innovation is the new competitiveness challenge.

► the **European Technology Platform** was introduced in 2003, as an industry-led stakeholders forum, which aimed at improving innovation and knowledge transfer.

The Lisbon Strategy

- VARIOUS POLICY INITIATIVES (2001-2003)

- In another **Communication** (**2003**), the Commission published an update of its policy for innovation in the context of the Lisbon Strategy. **Innovation** was identified as a **cornerstone** of the **Strategy**, and the innovation process was seen as a **complex interaction** between individuals organizations & their operating environment. Further, the Commission noted that innovation policies must extend their focus **beyond** the **link** with **research**. Innovation policy indeed has an ubiquitous nature & covers many **different policy areas**: Single Market & competition, regional policy, taxation policy, labour market, education, standards, IPRs, and sectoral policies. It concluded that **coordination** between **Member States** & **EC** was necessary to balance conflicting interests and priorities, and that it was urgent to **define** a **common framework** – and a set of priorities and goals - for both European and national innovation policy.

The Lisbon Strategy

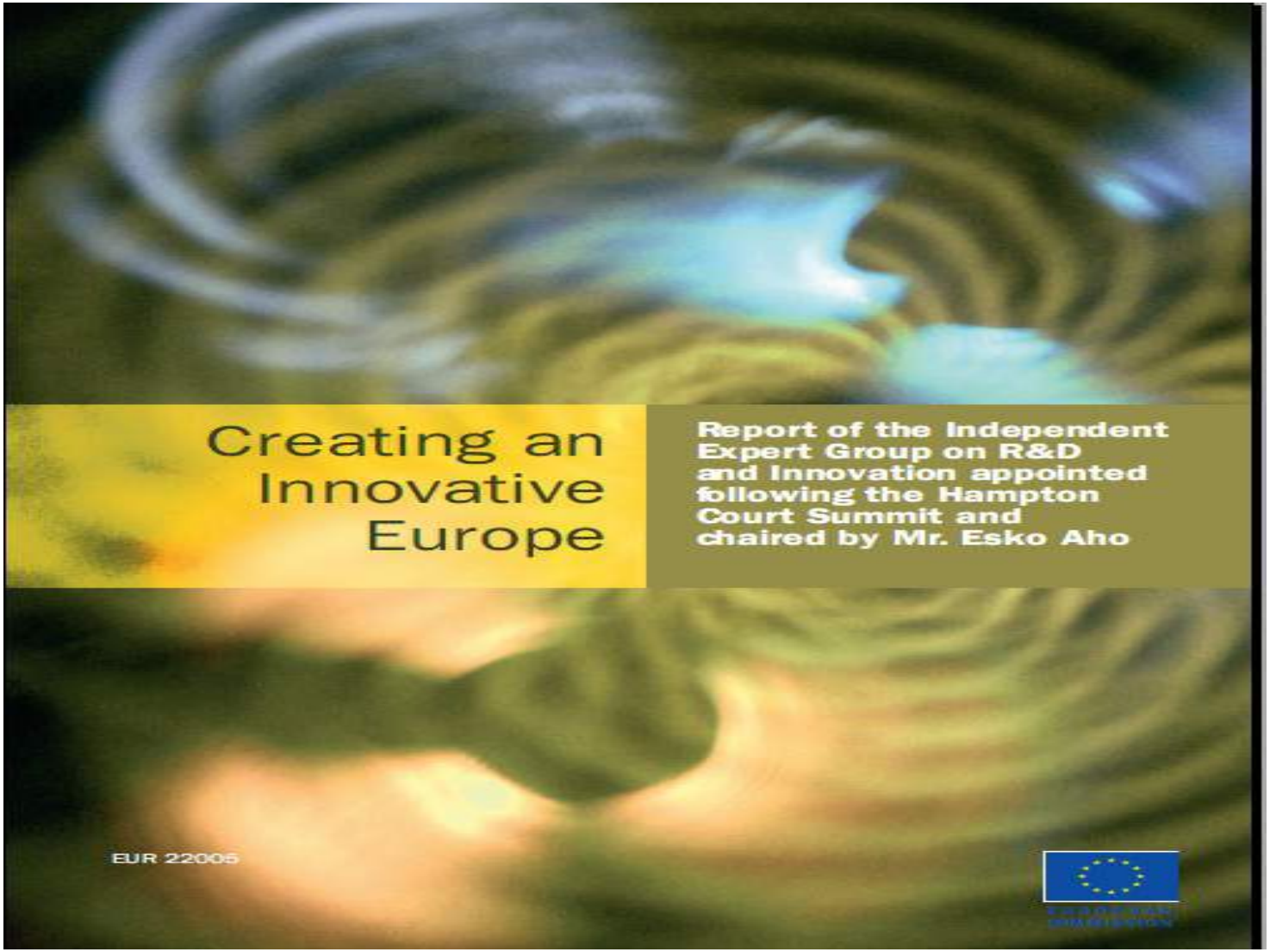
- VARIOUS POLICY INITIATIVES (2005-2006)

- ► in **2005**, the Commission presented '***a new start for the Lisbon strategy***', with the intent to ensure that knowledge and innovation are the beating heart of European growth; it proposed the creation of a European Institute of Technology, of innovation poles at regional level, and of European technology initiatives.

- ► Commission issued a **proposal** for a '*competitiveness and innovation framework programme*' (to bring together EC programs in fields critical to innovation & growth).

- ► in the same year, the **European Council** published economic policy **guidelines**, stressing the importance of innovation capacity for the EC economy and inviting Member States to introduce innovation as a topic in their national reform programmes.

- ► in a different **communication** (2005), the Commission also stressed the key role of Member States to reform & strengthen their public research and innovation systems.


Creating an Innovative Europe
Report of the Independent Expert Group on R&D and Innovation appointed following the Hampton Court Summit and chaired by Mr. Esko Aho
EUR 22005

The Lisbon Strategy

- VARIOUS POLICY INITIATIVES (2005-2006)

- ► the **Aho Report** on '*creating an innovative Europe*' (2006) had to find ways to **accelerate** the **implementation** of initiatives reinforcing Europe **research** and **innovation performance**. Its key recommendation was that 'a **pact** for research and innovation is **needed** to drive the agenda for an innovative Europe', which also required will and commitment from political business and social leaders. The expert group of the report suggested acting on **regulation**, **standards, public procurement** and **IPRs**, fostering a culture conducive to innovation.

- The **Parliament** (Resolution, 2006) endorsed the suggestions of the Aho Report, and supported the adoption of an 'open innovation approach' to boost R&D capacity.

The Lisbon Strategy

- VARIOUS POLICY INITIATIVES (2005-2006)

- ► in a new **Communication** (**2006**), on '*a broad based innovation strategy for the EU*', the Commission highlighted the **EU innovation potential**. In order to create a true European innovation space, it proposed a **roadmap of 10 actions** regarding *inter alia* education, internal market, regulatory environment, IPRs, cooperation between stakeholders, financial instruments, and the role of government in supporting innovation. The Commission concluded that there was a need for an **improved governance structure for innovation**; the priority was to establish strong innovation systems in all Member States.

- ► in different circumstances (**2006**), the **European Council** concluded that **innovation** policy should be best understood as a set of instruments, validating the **wide policy mix approach**. It invited both Commission and Member States to **push forward** the **implementation** of the innovation policy **strategy**.

The Lisbon Strategy

- VARIOUS POLICY INITIATIVES (2007-2009)

- ► a **European Parliament Resolution** (2007) stressed the importance of promoting favourable market conditions, in order to create a regulatory environment encouraging innovation; according to the Parliament, **innovation** is a **means** to enhance **welfare**.

- ► in a **2007 Communication** on knowledge transfer, the **Commission** noted that many companies were developing **open innovation approaches** to R&D, aiming to maximise economic value from their intellectual property.

- ► the **European Council (2007)** also observed that **faster progress** was **necessary** to respond to the need of business to operate in an environment of open innovation.

The Lisbon Strategy

- VARIOUS POLICY INITIATIVES (2007-2009)
- What is more, a community framework for **state aid** for research & innovation was adopted in **2007**, together with the other actions addressing the full spectrum of the innovation policy mix.
- Further efforts were also made by the Commission and the Member States to **re-launch** the **European Research Area**, and to end the fragmentation of the research landscape (2007-2008). Member States then launched **partnership initiatives** to increase **cooperation** in the areas of: i) careers & **mobility** of **researchers**; ii) design & operations of **research programs**; iii) creation of quality **research infrastructures**; iv) **cooperation** between public **research** & **industry**; v) international **cooperation** in **science** & **technology**. Unfortunately, all these initiatives did **not** prove to be fully **effective** to **overcome** the European **weaknesses** in the field.

The Lisbon Strategy

- <u>VARIOUS POLICY INITIATIVES (2007-2009)</u>
- In **2008**, the **European Council** had called for the launch of a **European plan** for Innovation. The **Commission**, in response to this step, noted (Communication 2009) that there was still a **need** to **foster** a policy and regulatory **framework** promoting globally competitive EU industries and rewarding investments in research & innovation. **Better coordination** was also needed in relation to innovation policies at EU, regional and national levels, despite the relevant number of innovation programs.
- The **Commission** launched an **open consultation** on Community Innovation Policy (2009). The results showed the need to simplify and streamline EU funding programs, improve coordination between different governance levels (EU, national, regional), better align research/education/innovation policies, and focus more strongly on SMEs.

The Lisbon Strategy

- ASSESSMENT OF THE STRATEGY
- As noted, in the decade 2000-2010, several **reports** were issued on the **advancement** and **progress** of the Lisbon **Strategy**. Most of these reports (*Kok Report* 2004; *Aho Report* 2006) highlighted that the innovation potential of the EU was not being fully exploited, that the business climate should be made more innovation friendly, and that the **European Union** was **not** generally **on track** to achieve the Lisbon targets.
- A **new action plan** (2009), at both national and European level, identified certain **priorities**: improvements in the **education systems**; the creation of a **EU Institute** of **Innovation** and **Technology**; the promotion of **employment** for **researchers**; the facilitation of **knowledge transfer** between universities and the industry; the need to reshape **legislation** on the governments support to research and investments.

The Lisbon Strategy

ASSESSMENT OF THE STRATEGY

By 2010, even if some progress had been made, most of the **goals** had **not** been **achieved**. Possible causes of the failure of the Strategy were identified in a **lack of coordination** among the Member States, **conflicting priorities**, an **overloaded agenda**, **lack of efficient governance &** of **determined political action**, investments spread over **too many programmes**, and the **non-binding character** of the Strategy.

The official review of the Lisbon Strategy took place in a European Summit in 2010; in that context, the **new Europe 2020 Strategy** was also launched.

The Lisbon Strategy

- END OF THE STRATEGY

- In brief, after the decade 2000-2010, the EU Commission started to work on many of the Lisbon **targets** for the **following decade** (**2010-2020**). To this end, countless **policy actions** have been formulated and **massive investments** have been made in the field of innovation to **achieve smart, sustainable and inclusive growth.**

The Lisbon Strategy

- NEW CONCEPT OF INNOVATION

- **Innovation** has thus evolved to be understood as a
- **highly complex process**, which involves various
- actors (*i.e.* universities, private firms, governmental
- agencies, research centres) exchanging funds, skills
- and knowledge.

The Lisbon Strategy

- NEW CONCEPT OF INNOVATION

- Such a model is known as **'Open Innovation'**. Innovation policy is nowadays considered as an **umbrella policy**, rather than a single policy, which seeks to identify and address any bottleneck or limitation in the innovation process. It is **connected** to R&D / industrial / education policies, and with **other policies & instruments** providing the framework conditions for the innovation process (*e.g.*, taxation, financial support, state aid, regulation, standards, IPRs).

- At the EU level, moreover, regional & cohesion policy and the single market & competition policy are also related to the **innovation policy mix**. Thus, it can be said that innovation policy is a concept overarching & permeating a large range of policies.

The Lisbon Strategy

- EU INNOVATION POLICY MIX

- ► some elements of this innovation policy mix mainly **support the process of innovation** (*e.g*, by fostering the creation of knowledge, or stimulating the production of goods), and are referred to as **supply-side policies.**

- ► other policies & instruments instead will mainly **create demand for innovation** (*eg*, IPRs favouring the commercialization of knowledge, or new regulations implying the improvement of existing goods), and are referred to as **demand-side policies.**

- Supply-side policies have been widely used since the 1960s, to boost the innovation process. In the last 20 years, the set of instruments and policies on the demand-side has been broadened. Sector policies often create a demand for innovation.

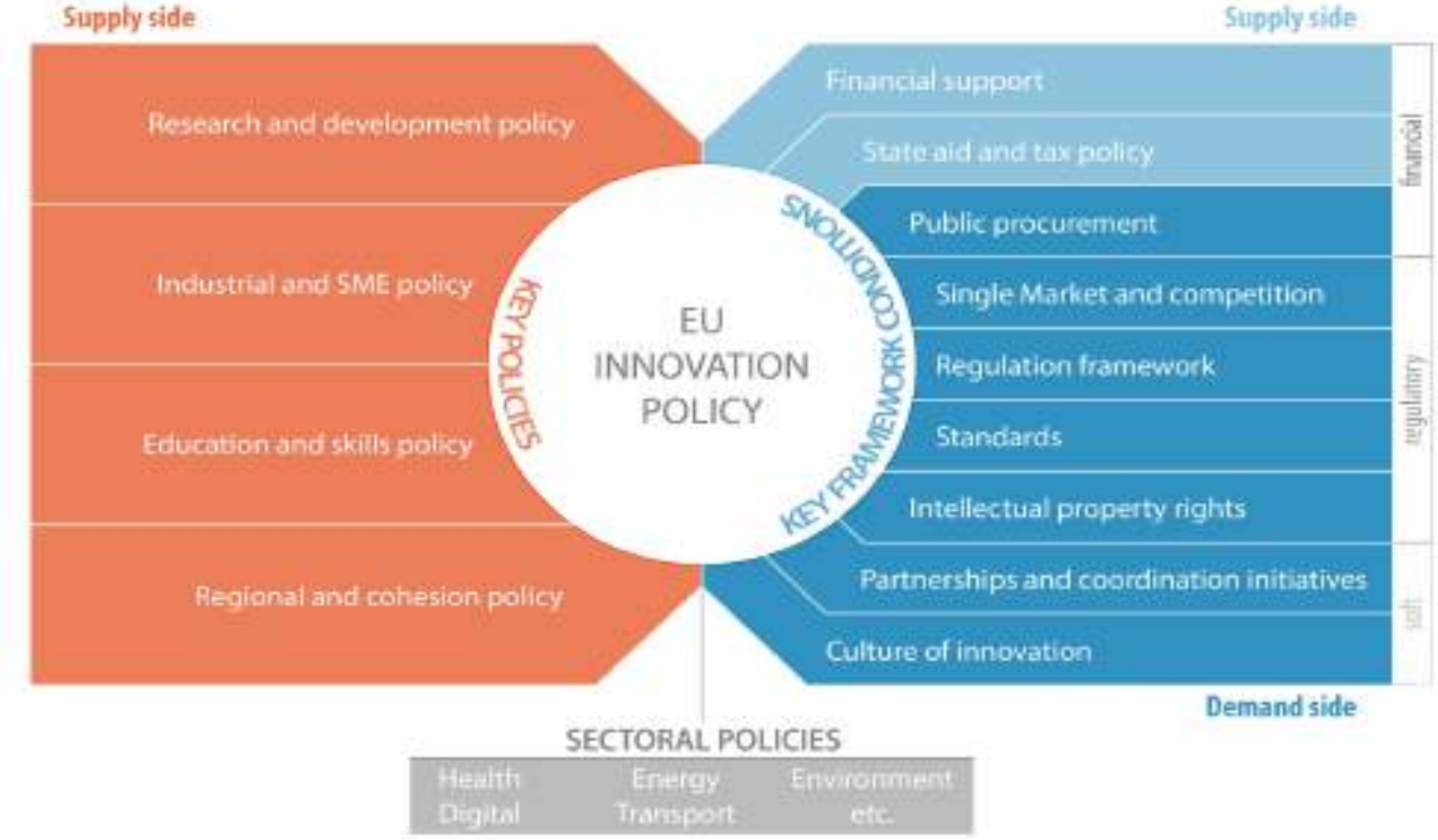
Table 1 – Key components and aspects of an innovation policy mix

	Policy or instrument	Regulatory	Financial	Soft
Supply-side	R&D policy	✓✓✓	✓✓	✓
	Industrial policy	✓✓✓	✓	✓
	Education policy	✓✓✓	✓	✓
	Direct financial support		✓✓✓	
	State aid and tax policy		✓✓✓	
Demand-side	Public procurement		✓✓✓	
	Regulation framework	✓✓✓		
	Standards	✓✓✓		✓
	IPR	✓✓✓		
	Partnerships and initiatives			✓✓✓
	Culture of innovation			✓✓✓
	Sectoral policies	✓✓✓	✓	✓

Source: EPRS ✓: Potential feature ✓✓: Important feature ✓✓✓: Main feature

- **Regulatory** tools setting rules for social and market interactions;
- **Financial** tools providing specific pecuniary incentives (or disincentives); and
- **Soft** tools characterised as voluntary and non-coercive (recommendations, voluntary agreements, etc.).

Figure 1 – The EU innovation policy mix



Source: EPRS.

The Lisbon Strategy

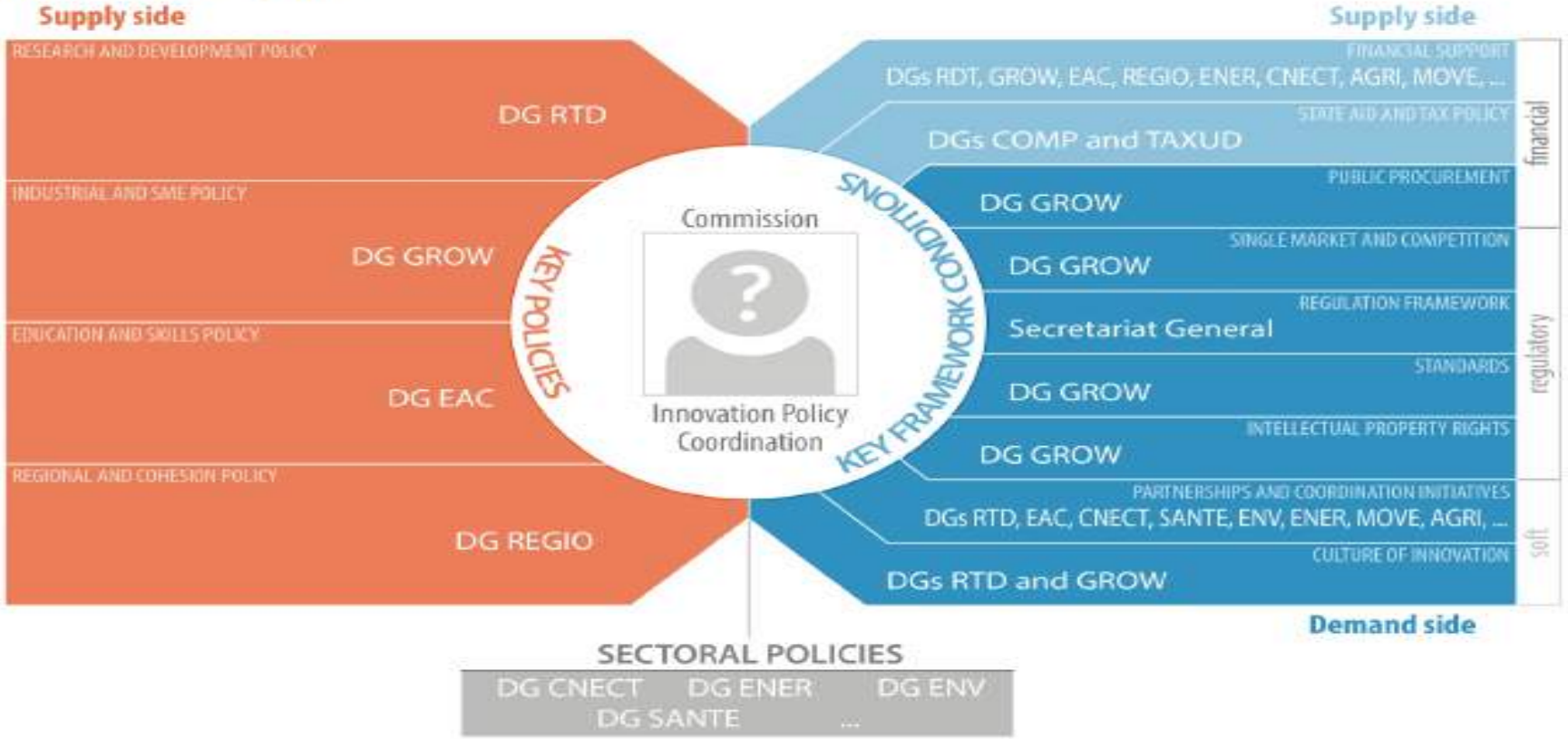
EU INNOVATION POLICY MIX

► the **efficiency** of each instrument of the **innovation policy mix** mainly depends on the **socio-economic, cultural and geographical context** in which it is introduced. Each instrument has to be carefully designed for the context in which it will be used.

► the crucial **goal** of innovation policy is to **shape** the **best policy mix** to support innovation, in light of the given time & governance level (local, regional, national, European) and considering the interactions between all elements and factors.

► designing an efficient innovation policy mix is a **continuous** and **dynamic process** which entails trade-offs between instruments and policies.

Figure 2 – The Commission Directorates-General involved in the development of the EU innovation policy mix



Directorates General

RTD (Research and Innovation), **GROW** (Internal Market, Industry, Entrepreneurship and SMEs), **EAC** (Education and Culture), **REGIO** (Regional and urban policy), **COMP** (Competition), **TAXUD** (Taxation), **CNECT** (Communications Networks, Content and Technology), **ENV** (Environment), **SANTE** (Health and food safety), **MOVE** (Mobility and transport), **ENER** (Energy), **AGRI** (Agriculture and rural development)

Source: EPRS.

The Lisbon Strategy

EU INNOVATION POLICY MIX

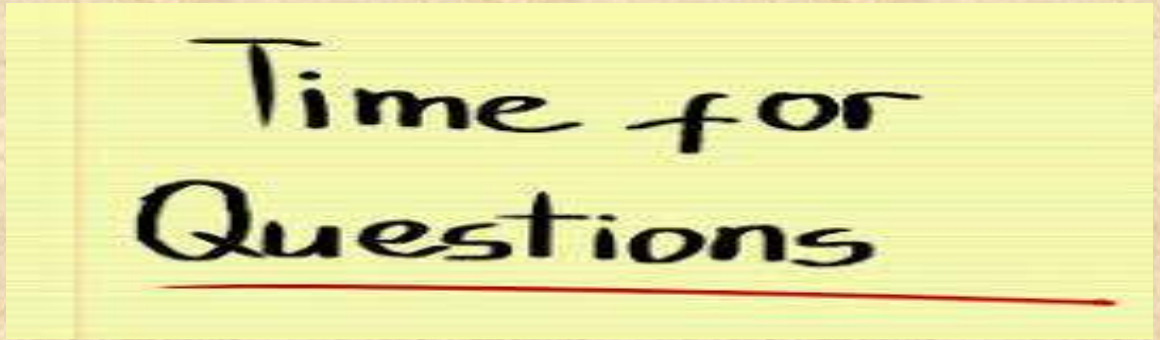
The **EU innovation policy mix** includes all cited policies and instruments, and **complements** the **measures** adopted at **national** & **regional** levels. Yet, two aspects are specific to the EU level:

- **Regional** and **cohesion policies**, which support the actors of the innovation process at regional level and influence the design of regional innovation policy mixes

- **Single Market** and **competition policies**, which strongly influence the shaping of the innovation ecosystem at EU level (think about the unified regulatory environment, and the free movement of goods, skills & knowledge, both beneficial for innovation)

The Lisbon Strategy

- <u>EU INNOVATION POLICY MIX</u>
- Depending on the components of the mix, the **EU competence** may be highly significant or of simple support to national or regional measures. In brief, the EU has a **different level of responsibility** for each element of the policy mix.
- For instance, the EU enjoys **full competence** on competition policy, the adoption of some regulations, and the implementation of standards. Then, the EU **shares responsibility** with the Member States on issues regarding R&D policy, regional policy, tax policy and IPRs. Finally, the EU **influence** is **limited** with regard to industrial policy and education policy. For many aspects of the mix, the EU adopts a **soft approach** (making recommendations to the Member States, setting monitoring activities, promoting exchanges of best practices & coordination activities).



- **how has innovation policy evolved in the EU ?**
- **which were the aims, pillars and key areas of the Lisbon Strategy ?**
- **how do we balance actions on innovation policy at EU and state level ?**

The Lisbon Strategy

SUGGESTED READINGS

- European Council, 'Presidency Conclusions', Lisbon 23-24 March 2000
- Report (Aho) of the Independent Expert Group, 'Creating an Innovative Europe' (2006)
- European Parliament (Research Service), 'EU Innovation Policy - Part I' (2016)
- M. Granieri & A. Renda, *Innovation Law and Policy in the European Union* (Springer 2012)

MODULE I

INNOVATION UNION & EU INNOVATION POLICY

(*Lecture III*)

Europe 2020 Growth Strategy & the Innovation Union

SCOPE AND GOALS OF EUROPE 2020

In 2010, at the end of the decade characterised by the partially unsuccessful Lisbon Strategy, the Commission presented the **Europe 2020 Strategy**. It defined **three main objectives** (covering five areas)**, seven flagship initiatives, and various ambitious targets** to be met during the decade and ultimately by 2020. The three main goals are:

i) **smart growth** - aimed at developing an economy based on knowledge & innovation

ii) **sustainable growth** - promoting a greener, more efficient & competitive economy

iii) **inclusive growth** – aimed at fostering a high employment economy [VIDEO]

Europe 2020 Growth Strategy & the Innovation Union

SCOPE AND GOALS OF EUROPE 2020

The **5** target **areas** of Europe 2020 comprise:

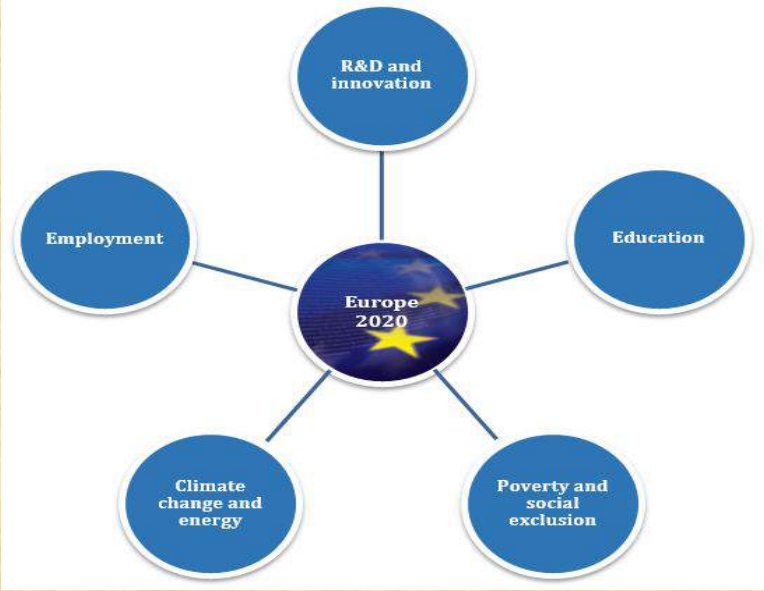
1) **employment**

2) **education**

3) **R&D** and **innovation**

4) **climate change & energy**

5) **poverty** & **social exclusion**



Europe 2020 Growth Strategy & the Innovation Union

SCOPE AND GOALS OF EUROPE 2020

The **seven flagship initiatives** of the Europe 2020 Strategy include:

- ***Innovation Union*** (improve framework conditions and access to finance for R&D)
- ***Youth on the move*** (enhance education and facilitate job market for young people)
- ***Digital agenda for EU*** (improve high speed internet & create digital single market)
- ***Resource-efficient EU*** (promote energy efficiency & the use of renewable energy)
- ***Industrial policy for globalisation era*** (improve the business environment)
- ***Agenda for new skills & jobs*** (modernize job markets, better match supply/demand)
- ***Platform against poverty & social exclusion*** (ensure social / territorial cohesion)

Europe 2020: Seven flagship initiatives

Education and Training

Smart Growth	Sustainable Growth	Inclusive Growth
Innovation *« Innovation Union »*	**Climate, energy and mobility** *« Resource efficient Europe »*	**Employment and skills** *« An agenda for new skills and jobs »*
Education *« Youth on the move »*	**Competitiveness** *« An industrial policy for the globalisation era »*	**Fighting poverty** *« European platform against poverty »*
Digital society *« A digital agenda for Europe »*		

	Targets	Flagship initiatives
Smart Growth	— 3 % of GDP to be invested in the research and development (R&D) sector. — Reduce the rates of early school leaving to below 10 %, and at least 40 % of 30 to 34 year olds to have completed tertiary or equivalent education.	— Innovation Union — Youth on the move — A digital agenda for Europe
Sustainable Growth	— Reduce greenhouse gas emissions by 20 % compared to 1990 levels. — Increase the share of renewables in final energy consumption to 20 %. — 20 % increase in energy efficiency.	— Resource efficient Europe — An industrial policy for the globalisation era
Inclusive Growth	— 75 % of 20 to 64 year old men and women to be employed. — Reduce poverty by lifting at least 20 million people out of the risk of poverty and social exclusion.	— An agenda for new skills and jobs — European platform against poverty and social exclusion

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - MEANING

The smart aspect of the **Europe 2020 Strategy** has its roots on the development of an **economy** based on **knowledge & innovation**. As one of the seven flagship initiatives, the **Innovation Union** aims '*to improve framework conditions and access to finance for research and innovation, so as to ensure that innovative ideas can be turned into products and services that create growth and jobs*'.

The Commission was still looking for a solution of the 'European paradox', and to this end was promoting the **strengthening** and further development of the role of EU **instruments** to **support research and innovation.**

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INNOVATION UNION INITIATIVE - MEANING

In the Communication (2010) presenting the Innovation Union initiative, the **Commission** recognised that '**innovation** is the **overarching policy objective**', and that the EU and Member States have to adopt a more strategic approach to innovation.

The **EU Parliament**, in two resolutions (2010), welcomed the Europe 2020 Strategy & the Innovation Union initiative. It suggested the EU Commission:

- ► to work towards a **more coherent innovation strategy**
- ► to **increase** the total **budget** allocated to **research** & **innovation**
- ► to work with MSs and further **converge policies** on **innovation**

[VIDEO]

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - MEANING

Two **Commission's Communications (2010)** completed the vision set under the Innovation Union. A **communication on '*regional policy*'** defined regional innovation policy as 'a key mean of turning the priorities of the Innovation Union into practical action on the ground'. Another **communication on '*integrated industrial policy*'** stated that 'a new industrial innovation policy is needed to encourage the much faster development and commercialization of goods and services, and to ensure that EU firms are first onto the market'. Both Council and Parliament supported the initiative:

► **Council**: EU & MS should adopt a strategic, **integrated approach** to innovation

► **EU Parliament**: the policy success of the initiative depends on strategic orientation, design & implementation of all the policies and measures, coordination among the different policy areas actions and instruments, and **prevention of fragmentation**

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - PRIORITY AREAS

The Innovation Union tries to address six priority areas: **i) strengthening the knowledge base and reduce fragmentation** (create an excellent education system in all MSs; complete the European Research Area; streamline EU research and innovation funding instruments); **ii) getting good ideas to the market** (create a Single Innovation Market regarding IPRs and standards; promote openness, knowledge and ideas); **iii) maximising social and territorial cohesion** (spread the benefits of innovation across EU & promote social innovation); **iv) European Innovation Partnerships** (promote a new approach to innovation through partnerships & ensure efficient governance-implementation); **v) leveraging EU policies externally** (attract leading talent and deepen scientific/technological cooperation with non-EU countries); **vi) making it happen** (measure and monitor progress; reform both research and innovation systems).

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INNOVATION UNION INITIATIVE - PRIORITY AREAS

For instance, among the cited priorities, the **European Research Area (ERA)** continues to constitute a crucial pillar of the Innovation Union. The intent is to provide researchers with a unique and comprehensive research space, and allow them to share ideas and generate new *momentum* for European innovation. Therefore, the ERA chapter of the Innovation Union initiative promote:

- **mobility** of researchers across countries and sectors
- **cooperation** and dissemination of research results
- **interaction** between researchers and businesses (SMEs)
- **cross-border operation** of research performing bodies

Europe 2020 Growth Strategy & the Innovation Union

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INNOVATION UNION INITIATIVE - RELEVANT PROJECTS

Several projects have been launched or strengthened in the context of the initiative:

► '**European Institute of Innovation and Technology (EIT)**', launched in 2008, has been strengthened under the Innovation Union. Its aim is to increase European sustainable growth and competitiveness by reinforcing the innovation capacity of the Member States and the EU. The Institute has created integrated structures (Knowledge Innovation Communities - KICs) connecting higher education, research and business sectors to one another, thereby boosting innovation and entrepreneurship. The KICs generally focus on priority topics with significant societal impact (*e.g.*, climate change, sustainable energy, information and communication technology).

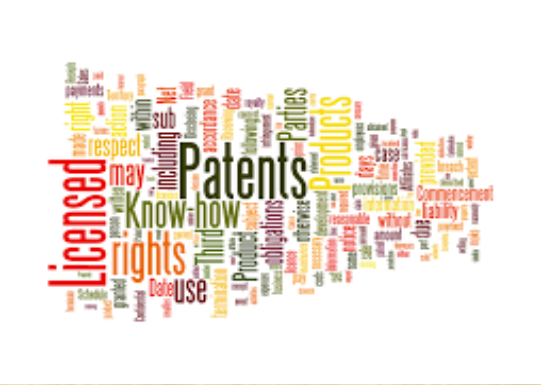
Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - RELEVANT PROJECTS

► **'European Innovation Partnerships'** have been launched in order to accelerate the development and use of the technologies needed to tackle societal challenges. They bring together existing resources & competences from all over Europe, and are active across the whole research and innovation chain. Hence, such partnerships represent a new approach to coordinate and streamline new or existing actions of actors of the innovation process in a specific area (*e.g.*, energy, transport, climate change, health).

► **'Contractual Public Private Partnerships'** consist in contractual arrangements between the Commission and associations representing the interests of the private sector in specific areas. Both parties commit to a long term investment in research and innovation. They emerged at the end of the Lisbon Strategy decade, in order to increase the level of investments in research and innovation from the private sector.

Europe 2020 Growth Strategy & the Innovation Union



Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - RELEVANT PROJECTS

► **'Smart Specialization Strategies' (S3)** extend the concept of Regional Innovation Strategy, launched in 1994. The S3 identify a number of priority areas at the regional level in order to concentrate resources and efforts, and avoid distributing investments across a broad range of topics. Such specialization strategies are developed and agreed by the local actors of the innovation ecosystem.

► **'Innovation Output Indicator'** was developed by the Commission in 2013 as a single integrated indicator for innovation, reflecting the outputs of the innovation process. It combines four indicators of the European Innovation Scoreboard with a new measure of employment in fast growing firms of innovative sectors.

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - RELEVANT PROJECTS

► '**European Knowledge Market for Patents and Licensing**', proposed by the Commission and based on the use of trading platforms, facilitating the match between supply & demand of IPRs and enabling financial investments in intangible assets.

► **Review of the role of competition policy**, proposed with specific reference to the antitrust rules on horizontal agreements (R&D agreements, technology transfer agreements), in order to safeguard against the use of IPRs for anticompetitive aims.

► **Achievement of the EU Single Market,** through the creation of an EU patent & by strengthening standardization policy to make it consistent with innovation patterns (Communication 2017 on '*investing in a smart innovative and sustainable industry*').

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - RELEVANT PROJECTS

► **'Horizon 2020 (8th Framework Programme for Research and Innovation)',** which is a funding programme launched by the EU Commission and represents the financial instrument for implementing the Innovation Union. It supports & fosters research in the European Research Area, and aims at its completion also by coordinating national research policies. The specific focus is on innovation, and its main pillars are: *Excellent Science* (focused on basic science), *Industrial Leadership* (focused on streamlining EU industries), *Societal challenges* (focused on implementing solutions to social & economic problems). The program covers the period 2014-2020.

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - MONITORING & DEVELOPMENT

After the launch of the Innovation Union flagship, the **progress** in the implementation of the strategy has been constantly **monitored**. In a first **report** of the Commission (**2011**), the authority reviewed the several commitments deriving from the flagship. It highlighted that most of the **commitments** were **on track**. It further noted that it was necessary that 'all actors take **collective responsibility** for Innovation Union delivery', and that the success of the Innovation Union was strictly related to the successful implementation of **actions** at both **national** and **regional levels**.

In the following **report** (**2012**), the Commission confirmed that progress had been made in strengthening the policy framework for an Innovation Union. On the other side, however, it pointed to a substantial **delay** in designing the **European Research Area**, and to the existence of relevant **divergences** in innovation at **regional levels**.

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - MONITORING & DEVELOPMENT

In a **communication** on '*research and innovation as sources of renewed growth'* (**2014**), the EU Commission clarified that some important **gaps remain** and need to be filled in order to turn Europe into a more innovative society'. As stated in the communication, 'research and innovation affect many policy areas and involve a large number of actors and should therefore be driven by an **overarching strategy**'. It was also specified that further efforts were needed to address the **fragmentation** and the **inefficiencies** in the **Single Market**, and that a **human resource base** with the necessary skills was crucial to achieve the goals identified.

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - MONITORING & DEVELOPMENT

The **Commission** also presented (**2014**) '***an investment plan for Europe***', based on three different routes:

1) **mobilising finance for investments**: the *European Fund for Strategic Investments* (2015) represented the main action. It was suggested that funds should be used mainly for the areas of research and innovation.

2) **making finance reach the real economy**: the goal was to channel extra public and private money to projects with a solid added value for the EU social market economy.

3) **improve the investment environment**: the objective was to remove barriers to investment across Europe, reinforce the Single Market, and create the optimal framework conditions for investment in Europe (*e.g.*, lower barriers to knowledge transfer, open access to scientific research, and greater mobility of researchers).

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - MONITORING & DEVELOPMENT

In the **2015 communication** on '*better regulation for better results*', the Commission elaborated a new **framework** to **assess** and **design regulation**. It launched the Regulatory Fitness Programme (REFIT) platform in order to collect suggestions on 'regulatory and administrative burden reductions'. The Guidelines on Better Regulation, adopted together with the Communication, include a research and innovation tool to examine the impact of new or existing regulations on innovation.

► the aim was to **address regulatory uncertainties** identified by innovators (which can hinder innovation within the existing legal framework), and **promote** an **innovation-friendly regulatory environment.**

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - MONITORING & DEVELOPMENT

In the following **report** on the progress of the Innovation Union and its outcomes (**2015**), mixed conclusions were drawn. It recognised that the Innovation Union has introduced a **more strategic approach to innovation**, by promoting decisive actions that addressed both the supply and demand-side elements of the innovation ecosystem.

However, it was also noted that the outcome of such processes has been uneven across the various Member States. As previously emerged in other reports, the main issues concern: the need to address **skills shortage**; the need for **closer investments** by society to develop an innovation culture; and **inconsistencies** of rules and practices regarding the Single Market.

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - MONITORING & DEVELOPMENT

In a **2016 Communication**, on '*science, research and innovation performance of the EU*', the Commission stressed the importance of the concept of '**Open Innovation**', and remarked the need to create the **right ecosystem**, **increase investments**, and bring more companies and regions into the **knowledge economy**. A main problem is still represented by the persistence of an **innovation divide** (fragmentation) across the European Union. Further issues also concern the essential framework conditions :

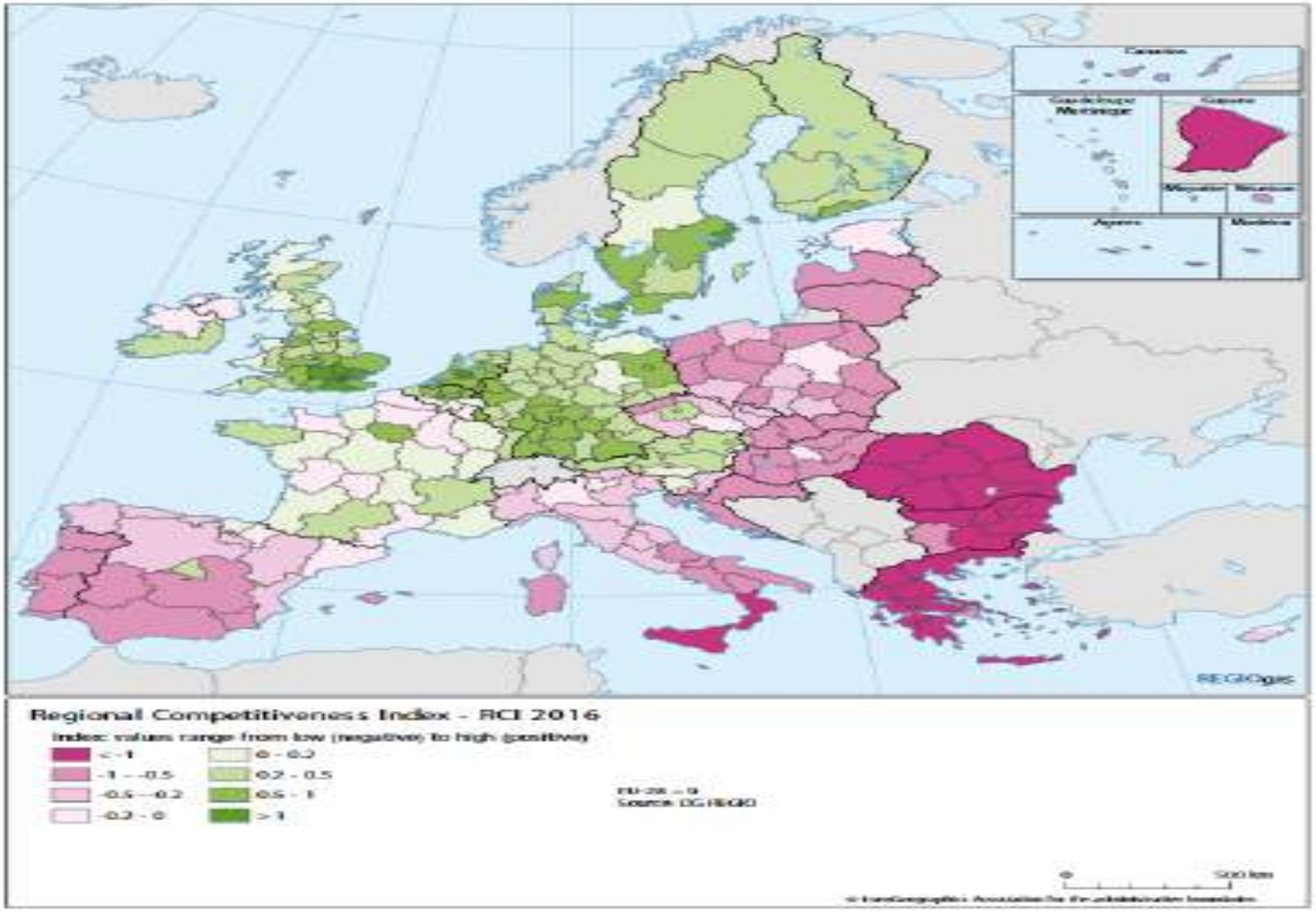
- ► product market regulations
- ► barriers to entrepreneurship
- ► intellectual property rights protection

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - MONITORING & DEVELOPMENT

In the context of regional innovation policies, the Commission adopted a specific **communication** (**2017**) on '*strengthening innovation in Europe's regions*'. Here, it remarked the importance of enabling EU **regions** to build on **smart specialization** and fully **unlock** their **potential** for technological change, digitization and industrial modernization. The Commission also identified some **challenges** which need to be addressed: i) further reform of research and innovation systems within regions; ii) increasing cooperation in innovation investment across regions; iii) leveraging research and innovation in less developed regions; iv) exploit synergies and complementarities between EU policies and instruments.

Performance of EU regions in terms of innovation[44]



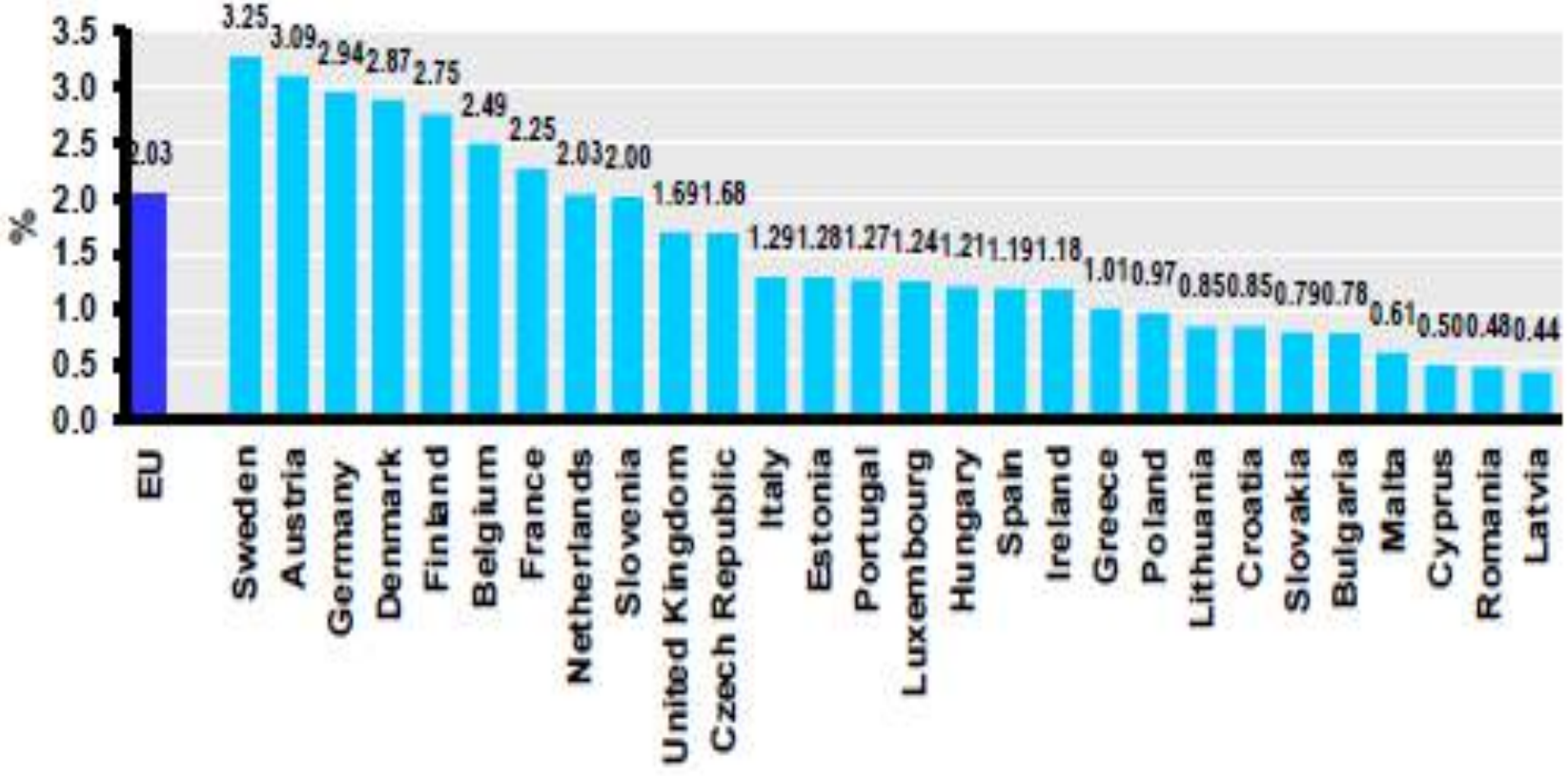
Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION INITIATIVE - MONITORING & DEVELOPMENT

► in the interim **evaluation** of the **Horizon 2020** programme (**2018**), the Commission recognised that 'it has been an EU **success story** with undeniable EU added value'. In this regard, Horizon 2020 seems on track to contribute significantly to the creation of jobs and growth; it is increasing EU attractiveness as a place for research & innovation.

► in the **2018 Communication** on '*a renewed European agenda for research and innovation',* the Commission remembered the importance of **connecting** the different local & regional research and innovation **ecosystems** to foster innovation across EU value chains. It further highlighted the need to stimulate **investment** in R&I, and to make **regulatory** frameworks fit for innovation.

Research and Development intensity 2016[13]



Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION AND THE OTHER INITIATIVES

As clarified by the many reports and communications, the **Innovation Union initiative** is clearly at the core of innovation policy for the new decade. Yet, some of the **other initiatives** are also **connected** to innovation, with key innovation-related components.

► **Digital Agenda** (which aims at strengthening a key infrastructure for modern innovation patterns)

► **Agenda for new Skills &Jobs** (investments in education may eventually boost research and innovation potentials)

Europe 2020 Growth Strategy & the Innovation Union

INNOVATION UNION AND THE OTHER INITIATIVES

► **Industrial Policy for a Globalization Era** (*eg,* in relation to the action of assessing the sector-specific innovation performance for some economic fields, such as construction / bio-fuels / road and rail transport etc)

► **Resource-efficient Europe** (*eg,* for issues related to the sustainability of transports or smart grids, and to the concept of eco-innovation)

- what did the Commission plan in order to connect research and industry?
- what are the main bottlenecks faced in shaping the Innovation Union?
- how does the Innovation Union relate to the other initiatives?

Europe 2020 Growth Strategy & the Innovation Union

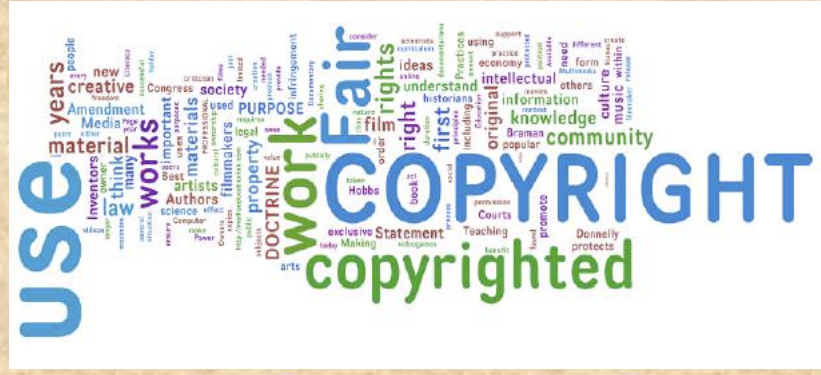
SUGGESTED READINGS

- EU Commission, 'Europe 2020 – A Strategy for Smart, Sustainable and Inclusive Growth', COM(2010) 2020
- EU Commission, 'Europe 2020 – Flagship Initiative Innovation Union', COM(2010) 546
- EU Commission, 'A Renewed European Agenda for Research and Innovation – Europe's Chance to Shape its Future', COM(2018) 306
- EU Commission, 'Proposal for a Regulation Establishing Horizon Europe', COM(2018) 435
- European Parliament (Research Service), 'EU Innovation Policy - Part I' (2016)
- M. Granieri & A. Renda, *Innovation Law and Policy in the European Union* (Springer 2012)

MODULE II

SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS

(*Lecture IV*)



The Modernization of Copyright and Related Rights

IPR AS PART OF THE FRAMEWORK CONDITIONS

As noted earlier, the EU **innovation policy mix** comprises on the one hand **key policies** targeting those actors involved in the innovation process (R&D, education, regional, industrial policies); on the other, it also includes **key framework conditions**. The latter cover policies and instruments organizing the flows of knowledge skills and funds between the actors of the innovation process, and shaping their interactions.

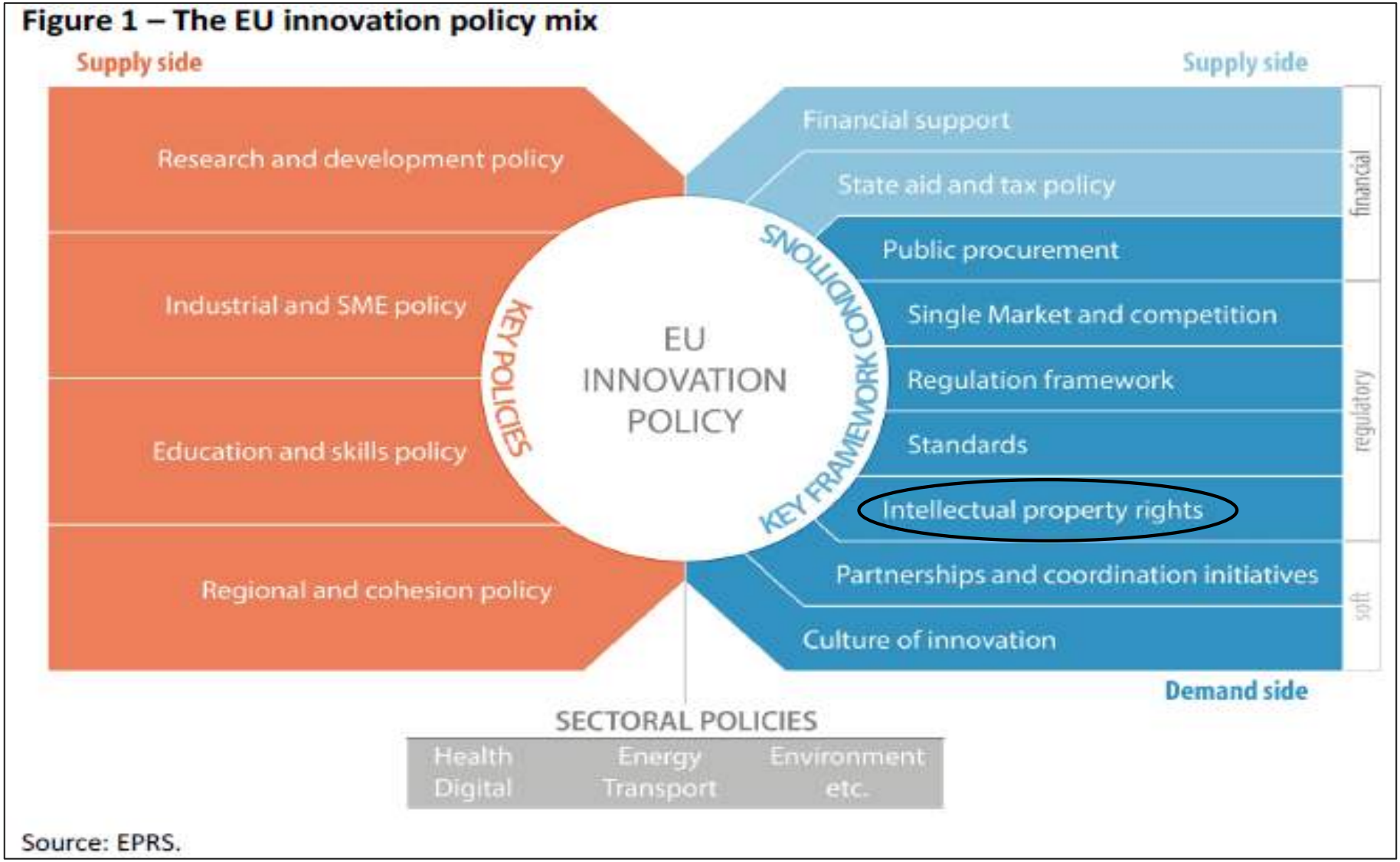
Intellectual property rights are part of these key framework conditions, together with other elements (*i.e.,* regulation, standards, single market and competition, taxation).

The Modernization of Copyright and Related Rights

IPR AS PART OF THE FRAMEWORK CONDITIONS

The **key framework conditions** (which can be classified in financial, regulatory and soft tools) are directly linked to the creation of a Single Market. Several measures have been adopted at EU level to create an EU framework for **IPRs,** to align **regulations** facilitating the innovation process, to harmonize **standards,** to promote **funding** of innovation-related activities. Most of these measures aim at **tackling** the **fragmentation** of the EU landscape for innovation, and at **addressing** those **barriers** hindering the innovation process in the various Member States.

Figure 1 – The EU innovation policy mix



Source: EPRS.

Table 1 – Competences of the EU for each of the components of the EU innovation policy mix

Key policies	Fund	Regulate	Promote
R&D policy	✓✓	✓	✓✓
Industrial and SME policy	✓	✓	✓
Education and skills policy			✓✓
Regional and cohesion policy	✓✓		✓✓
Key framework conditions	**Fund**	**Regulate**	**Promote**
Financial support	✓✓	✓	✓
State aid and tax policy		✓	✓✓
Public procurement	✓	✓	✓✓
Single Market and Competition		✓✓✓	✓
Regulation framework		✓	✓✓
Standards		✓	✓✓
IPR		✓✓✓	✓
Partnerships and initiatives	✓✓	✓	✓✓
Culture of innovation			✓

Source: EPRS ✓: Potential action or low competence ✓✓: Important feature ✓✓✓: Strong competence

The Modernization of Copyright and Related Rights

IPR AND THE SINGLE MARKET

IPRs, as the other framework conditions, are closely **related** to the **development** of a **Single Market**. The creation of a **common market** was a key goal of the European Economic Community established by the Treaty of Rome in **1957**. Efforts focused on ensuring the **free movement** of **persons**, **goods**, **services** and **capital**. Yet, the establishment of a fully functioning single market in Europe is still a work in progress.

It can be argued that the establishment of a Single Market is the **driver** for many of the **framework conditions** concerning the enhancement of the innovation process. The Single Market policy itself includes measures related *inter alia* to IPRs (beyond to the areas of taxation, regulation, standardization). Achieving the goals set under the single market policy is a key aspect of EU innovation policy.

The Modernization of Copyright and Related Rights

GENERAL FRAMEWORK FOR IPR

Intellectual property rights comprise **copyright**, **patents**, **trademarks**, **design rights**, and **related issues** such as trade secrets and geographical indications. In the context of the creation of the single market, the EU institutions launched in the 1990s a **process** aimed at **harmonizing** the **legislation** on **IPRs.**

► in the **1996 action plan** for innovation in Europe, the Commission noted that 'action at Community level ... is necessary to draw up and enforce the rules of the game, particularly those on competition, IPRs and the internal market'.

The Modernization of Copyright and Related Rights

GENERAL FRAMEWORK FOR IPR

► the **Treaty of Amsterdam** (1997) introduced the possibility for the Council of the EU acting unanimously to adopt measures on IPRs after consulting the Parliament.

► in 2007, the **Treaty of Lisbon** included provisions dealing with IPR in the Treaty on the Functioning of the EU. Article 118 TFEU states that the ordinary legislative procedure - involving EU Commission, Parliament and Council - is to be used (rather than an unanimous vote in the Council & mere consultation of the Parliament) for the EU to establish measures for the creation of intellectual property rights aimed at providing uniform protection of intellectual property rights throughout the EU.

The Modernization of Copyright and Related Rights

GENERAL FRAMEWORK FOR IPR

► in 2011, in the context of the **Europe 2020 Strategy** and the Innovation Union flagship initiative, the Commission started to work on the project of a **single market for IPRs in Europe**. Despite all measures taken, it recognised that the IPRs framework is still **fragmented** in the Union. Further, the acceleration of technological progress seems to put the legal framework under pressure for a change. As the EU Commission held, the 'EU IPR legislation must provide the appropriate enabling framework that incentivises investment by rewarding creation, stimulates innovation in an environment of undistorted competition and facilitates the distribution of knowledge'.

The Modernization of Copyright and Related Rights

GENERAL FRAMEWORK FOR IPR

► the **EU Commission** planned to **revise** the whole **IPR framework** and to review the 2004 **Directive** on **IPR enforcement**. In this regard, in 2014, it published an **action plan**, and in 2016 conducted a **public consultation** on the evaluation and modernization of the legal framework for the enforcement of IPR.

► the **EU Parliament** supported this action plan and underlined that Member States are responsible for IPR enforcement. It also highlighted that 'the key objective of the action plan should be to ensure the effective, evidenced-based enforcement of IPR, which plays a key role in stimulating innovation, creativity, competitiveness, growth and cultural diversity'.

The Modernization of Copyright and Related Rights

THE DIGITAL SINGLE MARKET

IPRs, and in particular **copyright**, are at the core of some policy actions promoted by the **Digital Single Market Strategy for Europe**, which was presented by the Commission in **2015**. The strategy is based on **three pillars**: i) **boosting** consumers' and businesses' access to digital goods and services; ii) **developing** the conditions for digital networks and services to expand; iii) **making** the best of the growth potential of the digital economy. The Digital Single Market can be considered as one of the sectoral policies included in the **innovation policy mix**.

The Modernization of Copyright and Related Rights

THE DIGITAL SINGLE MARKET

The cited three pillars are related to three main **policy areas**:

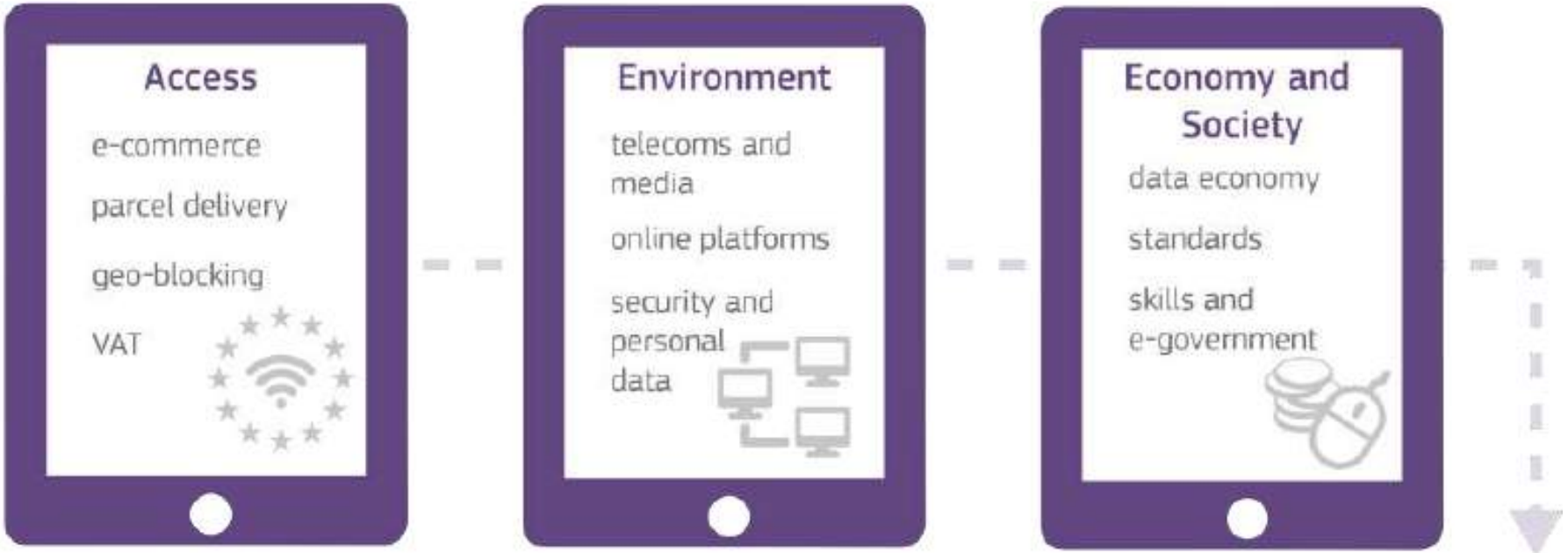
► **better access** for consumers and businesses to online goods: making the EU digital world a level market to buy and sell

► **optimal environment** for **digital** networks & services: implementing rules which support the development of infrastructures and match the pace of technology progress

► **economy and society:** ensuring that industry, economy and employment take full benefit of the advantages offered by the digital world

A DIGITAL SINGLE MARKET FOR EUROPE

MORE INTEGRATED NETWORKS, PRODUCTS AND SERVICES



Creating a #DigitalSingleMarket

Annex: Roadmap for completing the Digital Single Market

Actions[22]	Timetable
Better access for consumers and businesses to digital goods and services across Europe	
Legislative proposals for simple and effective cross-border contract rules for consumers and businesses	2015
Review the Regulation on Consumer Protection Cooperation	2016
Measures in the area of parcel delivery	2016
A wide ranging review to prepare legislative proposals to tackle unjustified Geo-blocking	2015
Competition sector inquiry into e-commerce, relating to the online trade of goods and the online provision of services	2015
Legislative proposals for a reform of the copyright regime	2015
Review of the Satellite and Cable Directive	2015/2016
Legislative proposals to reduce the administrative burden on businesses arising from different VAT regimes	2016
Creating the right conditions for digital networks and services to flourish	
Legislative proposals to reform the current telecoms rules	2016
Review the Audiovisual Media Services Directive	2016
Comprehensive analysis of the role of platforms in the market including illegal content on the Internet	2015
Review the e-Privacy Directive	2016
Establishment of a Cybersecurity contractual Public-Private Partnership	2016
Maximising the growth potential of the Digital Economy	
Initiatives on data ownership, free flow of data (e.g. between cloud providers) and on a European Cloud	2016
Adoption of a Priority ICT Standards Plan and extending the European Interoperability Framework for public services	2015
New e-Government Action Plan including an initiative on the 'Once-Only' principle and an initiative on building up the interconnection of business registers	2016

The Modernization of Copyright and Related Rights

THE DIGITAL SINGLE MARKET

As the EU Commission noted, our **world** has been drastically **transformed** by the **internet** and **digital** technologies. Yet, the existence of **barriers online** does not allow businesses and governments to fully benefit from digital tools; further, consumers are not able to take advantage of the newest goods and services.

Offline barriers to the **single market** often **spread** to the **online digital environment**. For example, online markets are still mainly domestic in terms of online services. A small percentage (7%) of SMEs in the EU sells cross border. Such a situation can change by **putting** the **single market online**, letting people - firms to trade and innovate freely and safely.

The Modernization of Copyright and Related Rights

- THE DIGITAL SINGLE MARKET

- In other words, it is necessary to **make** the EU **single market fit** for the **digital age**, by eliminating regulatory barriers and by guaranteeing the free movement of persons, goods, services, capital and data – thus creating a market where citizens and firms can securely and fairly access online products whatever their nationality and residence is.

- A digital single market could have a **big impact** by contributing € 415 billion per year to our economy, by boosting jobs investments competition growth and innovation. It could further offer better products, expand markets, and create opportunities for new start-ups. Ultimately, the digital single market can help the European Union to hold its position as a world leader in the digital economy.


"I want to see pan-continental telecoms networks,
digital services that cross borders
and a wave of innovative European start-ups.
I want to see every consumer getting the best
deals and every business accessing the widest
market – wherever they are in Europe."
Jean-Claude Juncker, 6 May 2015
European
Commission


"Our rules now need updating for the digital age. They have to become more conducive for investors and promote more competition. No more barriers to access, splintered markets or national distortions."
Andrus Ansip, 13 October 2015
"The vision of a Digital Union can only become a reality if we have unconstrained connectivity. To improving opportunities for businesses and citizens everywhere, we must make connectivity available for all SMEs, research centres and the wider economy in general."
Günther H. Oettinger, 13 October 2015
#DigitalSingleM
European Commission

The Modernization of Copyright and Related Rights

THE DIGITAL SINGLE MARKET

To sum up, the main **actions** of the Digital Single Market strategy are about :

- **boosting e-commerce** in the EU (*e.g.*, tackle geo-blocking)
- **strengthening cyber-security** and **adapting e-privacy rules**
- **updating** the audiovisual-media rules
- **promoting** the development of **digital skills & ** of better **internet connectivity**
- **unlocking** the potential of a European **data economy**
- **modernising** the **EU copyright** rules to fit the digital age

The Modernization of Copyright and Related Rights

- WHAT IS COPYRIGHT ABOUT ?
- Before looking at the modernization process of copyright in details, it is appropriate to understand what copyright is about. The term '**copyright**' describes the rights that creators have over their literary, scientific, artistic works. Copyright does not protect ideas; it rather **protects** the **expression** of **ideas**. In the EU, copyright protection is obtained from the moment of **creation** of the **work**; this means that **no registration** (or other formality) is required. Nevertheless, in some countries, it is possible to voluntarily register or deposit works protected by copyright – this may be useful, for instance, to solve disputes over ownership, or to facilitate financial transactions.

The Modernization of Copyright and Related Rights

COPYRIGHT AND RELATED RIGHTS

As to the **requirements** to obtain copyright protection, it must be said that copyright is **regulated** at **national level**. Therefore, the requirements may in theory vary from one country to another. In general, the **work should**:

► **be original** - there is no complete harmonization, at EU and international levels, on the meaning of the word 'original'; however, based on EU jurisprudence, the originality requirement is satisfied when the author expresses his creativity by making free and creative choices, resulting in a work that reflects his personality.

► **exist in some form** - there is no harmonization at EU level on whether the work has to be fixed in a material form in order to benefit from copyright protection.

The Modernization of Copyright and Related Rights

- <u>COPYRIGHT AND RELATED RIGHTS</u>
- As to the type of protection conferred, **copyright** is **territorial** and **national** in scope. Consequently, the law of the country in which the author seeks protection applies.
- However, a number of **conventions** and **international treaties** allow authors to benefit from copyright protection in several countries (EU nations included).

The Modernization of Copyright and Related Rights

COPYRIGHT AND RELATED RIGHTS

For instance, the **Berne Convention** 'on the protection of literary and artistic works' (1886) **grants authors** the following categories of rights:

► **economic rights -** enable authors to control the use (*e.g.*, making and distributing copies) of their works and be remunerated by selling or licensing them to others. They last at least 50 years from author's death. Economic rights are harmonised at EU level.

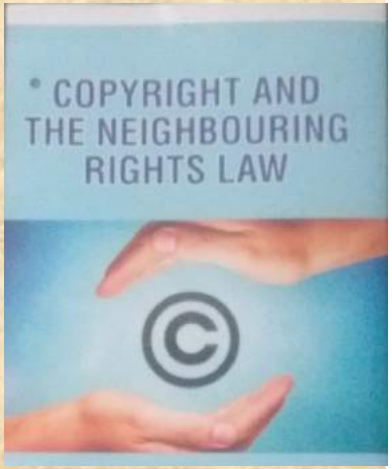
► **moral rights -** usually non transferable, include the right to claim authorship, the right to object to a distortion or mutilation of the work which would affect their honour. They usually have no time limit. Moral rights are not harmonised in the EU.

The Modernization of Copyright and Related Rights

COPYRIGHT AND RELATED RIGHTS

Despite being related to copyright, **neighbouring or related rights** differ as they have a specific subject matter and protect the interest of right-holders different from the work's author.

Indeed, neighbouring rights usually **confer protection** to the **performers**, **producers**, **publishers**, **broadcasting organizations**.



The Modernization of Copyright and Related Rights

- <u>COPYRIGHT AND RELATED RIGHTS</u>
- The **Rome Convention** (1961) regulates such rights at international level, and establishes a term of **protection of 20 years** from the end of the year in which :
- i) the performance took place
- ii) the broadcast took place

- iii) the fixation was made (for phonograms & performances incorporated in them)
- However a **longer term** of protection may in theory be provided for by national laws.

The Modernization of Copyright and Related Rights

COPYRIGHT AND RELATED RIGHTS

It is not possible to outline an exhaustive list of works that can be protected by copyright. Nevertheless, the following **works** are usually **covered** by **copyright**:

- literary works (poems, novels, plays, newspapers articles etc)
- musical compositions, films, choreographies
- artistic works (photographs, sculptures, drawings, paintings)
- databases, computer programs
- architecture, technical drawings, maps

The Modernization of Copyright and Related Rights

- HOW DID COPYRIGHT DEVELOP IN THE EU ?

- In the EU, copyright rules have been subject to scrutiny in different circumstances:

- ► in **1988**, the Commission published a **Green Paper** which represented the first step in creating a Community framework for copyright and neighbouring rights. It was followed by a **Working Program (1991)** defining a possible roadmap to harmonise copyright legislation. Such a programme also addressed issues concerning piracy, computer programs and databases, copying at home. A new Green Paper on copyright was adopted in 1995, in the context of the emerging information society.
- ► the digitalization of information, goods and services brought a new **challenge for copyright**. This later led to the adoption of **Directive 2001/29**, on the harmonization of certain aspects of copyright & related rights in the information society.

The Modernization of Copyright and Related Rights

HOW DID COPYRIGHT DEVELOP IN THE EU ?

► a review of the framework of copyright in Europe was further promoted by the **Commission's Communication** (**2011**) on the Single Market for IPR. The copyright framework was seen as no longer fit for purpose in the digital age. After a public **consultation** launched in **2014** on the review of EU copyright rules, the Commission announced (**Communication 2015**) that it would revise Directive n. 2001/29 and would consider amending the legal framework for IPR enforcement. It would also propose solutions concerning the remuneration of authors and performers in the EU.

► in the last years, many stakeholders have invoked a reform of copyright that would support creativity and innovation (***Copyright Manifesto***). EU stakeholders in research also stressed the need to provide a text and data mining exception for research activities in the review of the copyright reform.

The Modernization of Copyright and Related Rights

- HOW DID COPYRIGHT DEVELOP IN THE EU ?

- ► in **2016**, the EU Commission adopted a **Proposal for a Directive on Copyright in the Digital Market** (EU Copyright Directive). Aim of the Directive is to **harmonize** the **Union law** applicable to copyright and related rights in the framework of the internal market, taking into account digital and cross-border uses of protected content. In particular, it intends to **ensure** a **well-functioning marketplace** for the exploitation of works and other subject matter.

The Modernization of Copyright and Related Rights

HOW DID COPYRIGHT DEVELOP IN THE EU ?

► in **2019**, following the EU Commission proposal, the Council of the European Union and the European Parliament adopted a **Directive 2019/790/EU** on copyright and related rights in the Digital Single Market (EU Copyright Directive).

- in which way are IPRs related to innovation and the Single Market ?
- what are the main pillars of the Digital Single Market Strategy ?
- what is the scope of copyright protection ?

The Modernization of Copyright and Related Rights

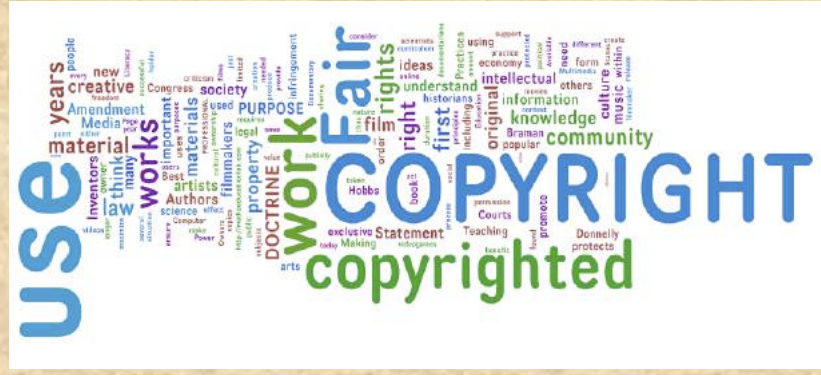
SUGGESTED READINGS

- EU Commission, 'A Digital Single Market Strategy for Europe', COM(2015) 192
- EU Commission, 'A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen', (2015) Press Release IP/15/4919
- EU Commission (IPR Helpdesk), *Your Guide to IP in Europe* (2017)
- European Parliament (Research Service), 'EU Innovation Policy - Part II' (2016)

MODULE II

SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS

(*Lecture V*)



The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

In the mentioned **2015 Communication**, on a *Digital Single Market Strategy for Europe*, the EU Commission explicitly promoted the modernization of the **copyright framework,** which is essential to overcome fragmentation within the single market**.** The authority noted that copyright underpins creativity and the cultural industry, and that the Union strongly relies on creativity to compete globally.

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

More in details, the 2015 Communication highlighted that :

► **copyright** is a **key element** of the EU cultural social and technological environment, and of the digital economy too

► **copyright** and related rights **stimulate** the creation of and investments in **new works**, as well as their exploitation, thereby contributing to boost competitiveness employment and innovation

► **copyright-intensive industries** (*e.g.*, audiovisual, music, books) are one of EU most dynamic economic sectors, and generate several millions jobs

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

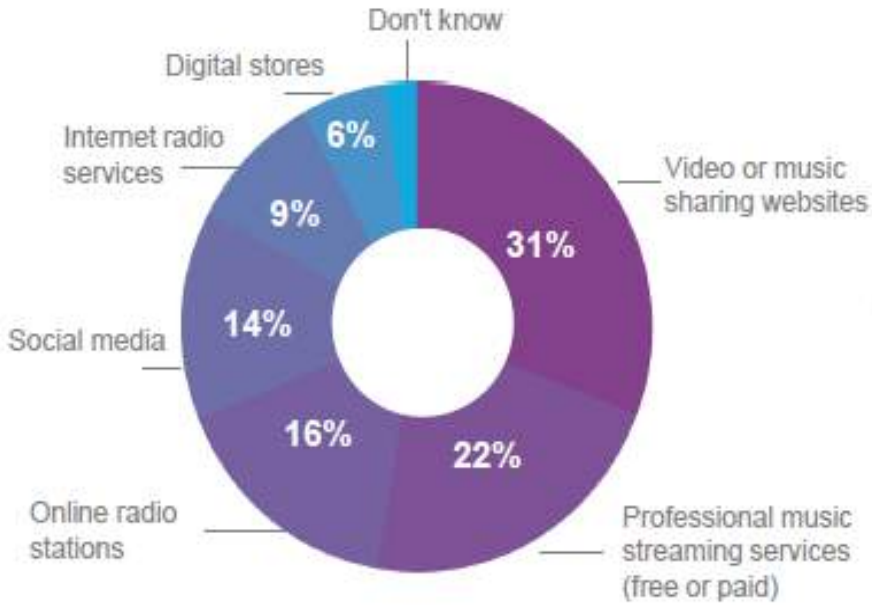
► the **modernization of copyright** is needed in order to achieve a wider availability of creative content across the Union, ensure that EU copyright rules adequately protect right-holders, and maintain a proper balance with other public policy goals – all these objectives are fundamental for the EU economic and societal progress

► in particular, **copyright rules** need to be **adapted** so that all market players and citizens can benefit from the opportunities of the new digital environment

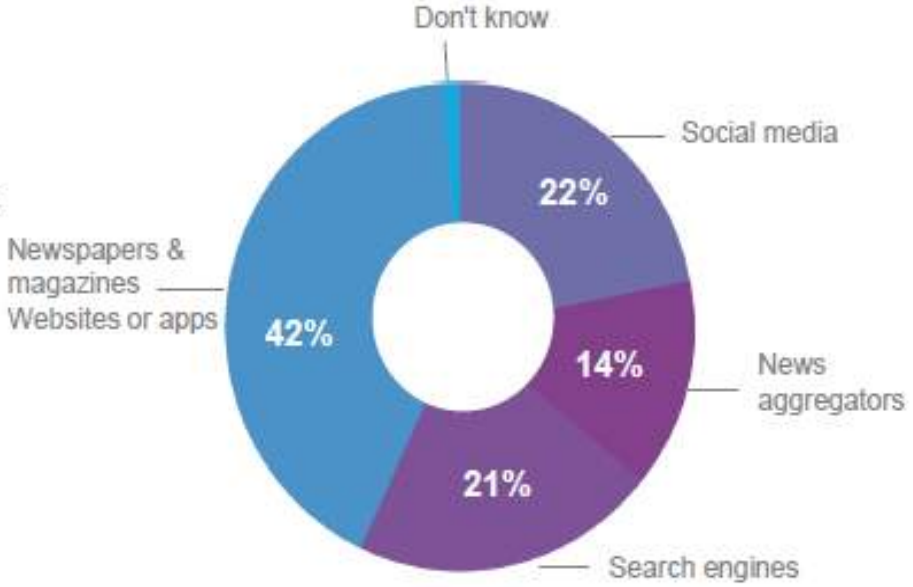
► the **digitization process** has had indeed a strong impact on the way copyrighted works and services are created and consumed, with the internet functioning as a key distribution channel (*eg*, social media, news aggregators, video/music sharing web …)

HOW THE DIGITAL REVOLUTION CHANGES OUR BEHAVIOUR

What type of service do you use most often to access music online?



What are the services you mainly use to access news online?



Flash Eurobarometer 437, March 2016

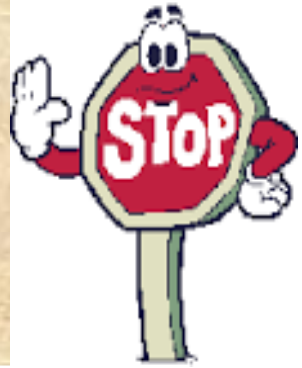
The Modernization of Copyright and Related Rights

- COPYRIGHT IN THE DIGITAL SINGLE MARKET
- The Commission further stressed that **digital content** is one of the main **drivers** of the **growth** of the **digital economy**. This is because consumers increasingly view content (music, videos, games) on mobile devices, and expect to get access to such content wherever they are. However, several problems may arise; **barriers** to cross-border **access** to copyright protected content services and their portability are still common.

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

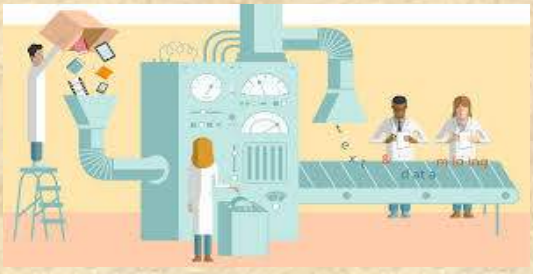
In relation to **portability**, when **consumers** move from one Member State to another, they are often **prevented** – on grounds of copyright – from using the content services purchased in their home country. On a further ground, when trying to access or buying online copyright protected content from another Member State, consumers sometimes find it unavailable or not accessible from their own country. The reasons behind this are related to the **territoriality** of **copyright,** and/or to the difficulties regarding the **clearing** of **rights**. In other cases, **contractual restraints** between right holders and distributors (or simply distributors' decisions) may also eventually result in the lack of availability and/or access.



The Modernization of Copyright and Related Rights

- <u>COPYRIGHT IN THE DIGITAL SINGLE MARKET</u>

- The Commission then underlined the need for **greater legal certainty** and for a **clearer legal framework** to enable certain categories of **users** to make wider use of copyright protected **materials**, included across borders; this means access without the need to ask the authorization from right-holders (**exceptions & limitations**).



The Modernization of Copyright and Related Rights

- COPYRIGHT IN THE DIGITAL SINGLE MARKET

- In the EU, indeed, certain uses of copyright-protected works take place under **exceptions and limitations to copyright**, which have been provided in light of the inability of the markets to deliver contractual solutions or in light of the need to achieve public policy goals. In such cases, as mentioned above, certain categories of users do **not need** to **be authorised** for the use of the protected works.
- Yet, most **exceptions** in the copyright field foreseen by EU law remain **optional** for the Member States to implement. This eventually results in a **fragmented framework** across the European Union, as optional exceptions may or may not have been transposed in the national laws (and may also vary in scope).

The Modernization of Copyright and Related Rights

- COPYRIGHT IN THE DIGITAL SINGLE MARKET

- **Exceptions** may play a **key rol**e in certain areas which are particularly relevant to the Digital Single Market, such as **education research** and **cultural heritage**. In these areas, characterised by the growing relevance of the cross-border aspects, differences in the way Member States deal with the exceptions may be problematic; hence, the importance to promote a **clearer legal framework** and adequate / balanced changes.

- One example concerns the use of innovative technologies by researchers exploited in the context of **text and data mining** (copying of text and datasets in search of significant correlations). Another example relates then to the work of **cultural heritage institutions**, in charge of promoting access to knowledge.

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

Other key points of the 2015 Communication also referred to the need of :

► developing an **effective** and **balanced IP enforcement system** against commercial scale copyright infringements, while protecting fundamental rights - effective copyright enforcement can indeed promote an efficient marketplace for copyright works, reduce the costs of fighting infringements, and may eventually have a relevant impact on the functioning of the digital single market (recent available data confirm the existence of a correlation between the growth of cultural and creative industries and effective IP protection legislation)

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

► further clarifying on the **rules** applicable to the activities of **online intermediaries** in relation to copyright protected works, given the substantial involvement of these intermediaries in content distribution (*e.g.*, removal of illegal content from the web)

► developing measures to safeguard the **fair remuneration of creators**, in order to stimulate the future generation of contents - content creators are indeed concerned about the fairness of remuneration conditions, in a context of lack of legal certainty and of differences in bargaining power when licensing or transferring their rights

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

► striking a better balance in the **relation between right-holders**, on the one hand, **and news aggregators & online platforms**, on the other - specifically, a sense of unfairness is perceived by right-holders, in relation to the transfer of value generated by some of the new forms of online content distribution; further, right-holders point to a lack of level playing field in the online content market

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

In this context, the Commission will thus examine whether the **benefits** of the online use of copyright-protected works are **fairly shared**. It will look at specific **questions**:

- are **authors** and **performers** fairly remunerated ?
- are **current rights** clear enough and fit for the digital age ?
- what is the role of **online platforms** ?
- is action related to **news aggregators** needed at the EU level ?

EU COPYRIGHT RULES FIT FOR THE DIGITAL AGE

Better choice and access to content online and across borders

A fairer online environment for creators and the press

Improved copyright rules to make more material available from education, research and cultural heritage organisations and to promote inclusion of disabled people

The Commission will make legislative proposals before the end of 2015 to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU, including through further harmonisation measures. The proposals will include: (i) portability of legally acquired content, (ii) ensuring cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector, (iii) greater legal certainty for the cross-border use of content for specific purposes (e.g. research, education, text and data mining, etc.) through harmonised exceptions,(iv) clarifying the rules on the activities of intermediaries in relation to copyright-protected content and, in 2016, (v) modernising enforcement of intellectual property rights, focusing on commercial-scale infringements (the 'follow the money' approach) as well as its cross-border applicability.

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

In brief, the Commission highlighted the importance of **developing** a more **harmonised copyright regime** in the EU, which can provide 'incentives to create and invest while allowing transmission and consumption of content across borders'.

To this end, the Commission 'will propose solutions which **maximise** the **offers** available to **users** and open up new opportunities for content creators, while **preserving** the **financing** of EU **media** and **innovative content**'.

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

Furthermore, and in order to ensure an effective and uniform application of copyright legislation, it remarked that close **collaboration** with **Member States** is essential.

In the long term, the objective is the **full harmonization** of copyright in the Union, possibly in the form of a single copyright code and a single copyright title.

The Modernization of Copyright and Related Rights

- <u>COPYRIGHT IN THE DIGITAL SINGLE MARKET</u>
- In a different communication (*Towards a modern, more European copyright framework*, 2015), the Commission further explained how it intends to achieve the goal of a **more modern and European copyright regime**.
- It identified **targeted actions** with related proposals for the short term, and remarked the importance of the 'Creative Europe' programme and of other policy instruments to financially support the growth of the copyright industry.

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

The European Commission, in particular, remembered the need to:

- inject more **single market** and a higher level of **harmonization** into the EU copyright framework (*eg*, addressing aspects concerning the territoriality of copyright)
- adapt copyright rules to the **new technological realities,** and promote wider access to creative content online (including access to 'out of commerce works')
- make sure that **EU copyright rules** are properly **transposed** and **enforced**

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

Inter alia, and in relation to the **exceptions to copyright**, it was clarified that the Commission was assessing options in order to:

- ○ allow public interest research organizations to carry out **text and data mining** of content they have lawful access to, for scientific research purposes
- ○ provide clarity on the scope of the EU exception for '**illustration for teaching**', and its application to digital uses and to online learning
- ○ provide a clear space for (digital) preservation by **cultural heritage institutions**
- ○ support **remote consultation**, in closed electronic networks, of works held in research and academic libraries (and other institutes), for research and private study

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

Moreover, as to the **transfer of value**, the Communication made clear that :

- the Commission would reflect on the different factors around the **sharing of the value** created by new forms of online distribution of copyright-protected works among the various market players. The goal is to ensure that players that contribute to generating such value have the ability to fully ascertain their rights, thus contributing to a fair allocation of this value and to the adequate remuneration of copyright-protected content for online users
- the Commission would further consider whether solutions at EU level are required to increase legal certainty, transparency and balance in the system that governs the **remuneration of authors and performers** in the EU

The Modernization of Copyright and Related Rights

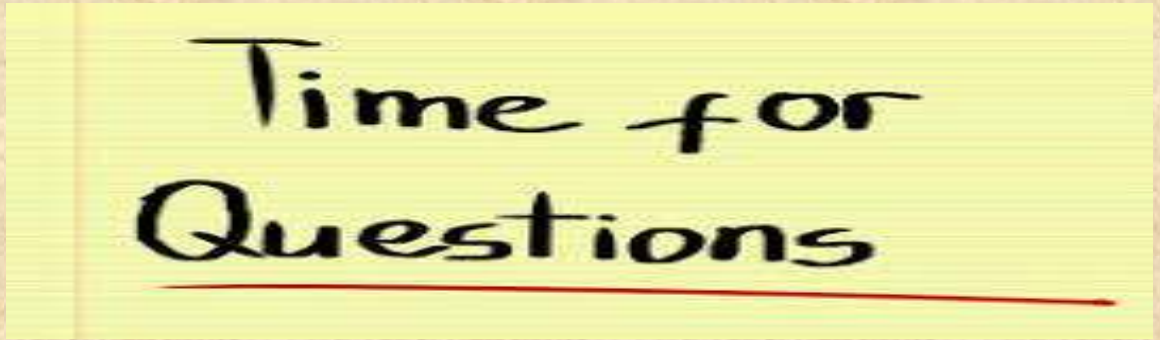
- <u>COPYRIGHT IN THE DIGITAL SINGLE MARKET</u>
- Finally, the Commission reaffirmed the relevance of an **efficient IP enforcement system,** including copyright. In this context, it would assess options to amend the legal framework focussing on commercial scale infringements, in order to clarify the rules for identifying infringers, the application of provisional and precautionary measures and injunctions (and their cross-border effect), and the calculation and allocation of damages and legal costs.
- The Commission would further assess, in the context of the **activities of online platforms**, the effectiveness of 'notice and action' mechanisms and of the 'take down and stay down' principle in order to tackle illegitimate uploads of protected contents.

The Modernization of Copyright and Related Rights

COPYRIGHT IN THE DIGITAL SINGLE MARKET

In the end, the **Communication '*Towards a modern, more European copyright framework'*** upheld the approach defined by the Digital Single Market Strategy on copyright issues, and shared its conclusions about the **need to promote**:

- ► the further **convergence** of the Member States' copyright systems
- ► **dialogues** between Member States to ensure a shared vision of EU copyright law
- ► **appropriate measures** against potential barriers to the single market for IPRs
- ► a **long term vision** for copyright in the EU, where authors performers creative industries and users are subject to the very same rules irrespective of where they are



- why is the modernization of copyright linked to EU growth / progress ?
- what are the exceptions to copyright about ? what risk do they raise ?
- why is it essential to have an effective copyright enforcement system ?

The Modernization of Copyright and Related Rights

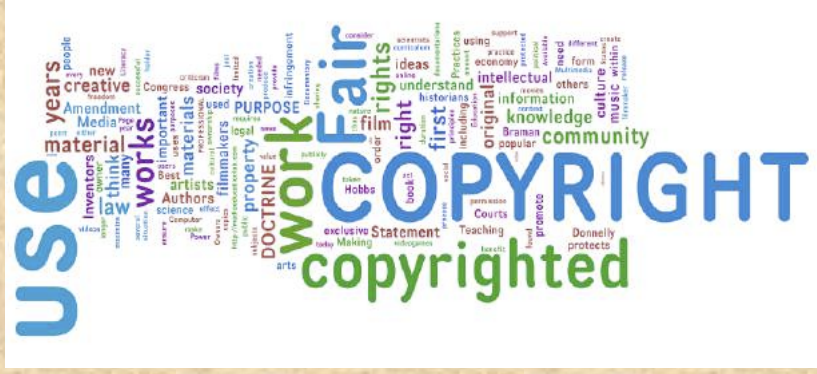
SUGGESTED READINGS

- EU Commission, 'Towards a modern, more European copyright framework', COM (2015) 626
- EU Commission, 'A Digital Single Market Strategy for Europe', COM(2015) 192
- EU Commission, 'A Digital Single Market Strategy for Europe – Analysis and Evidence', SWD(2015) 100

MODULE II

SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS

(*Lectures VI and VII*)



The Modernization of Copyright and Related Rights

- PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE - BACKGROUND

- In the context of the various initiatives supporting the modernization process of copyright and related rights, the EU Commission adopted a ***Proposal for a Directive on Copyright in the Digital Single Market*** (2016).

- As part of the Digital Single Market project, the Proposal intended to ensure a **well functioning marketplace** for the **exploitation** of **works** and other subject matter, taking into account in particular **digital** and **cross-border uses** of protected contents.

The Modernization of Copyright and Related Rights

- PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE - BACKGROUND

- Specifically, the Directive Proposal has been adopted in the context of the **review process** of the existing copyright rules, which took place between 2013 and 2016 with the aim 'to **ensure that copyright and copyright-related practices stay fit for purpose in the new digital context**'. Such a review process had found **problems** with the implementation of certain **exceptions** and their **lack** of **cross-border effect**. It had also highlighted the difficulties affecting the **use** of **copyright-protected content** in nowadays digital and cross-border context.

The Modernization of Copyright and Related Rights

- PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE - BACKGROUND

- Several **consultations** moreover were held in the same period, providing the Commission with an overview of **stakeholders' perspective** on the review process (including on exceptions and limitations, on the remuneration of authors and performers, on the role of intermediaries in the online distribution of works, and on the role of publishers in the copyright value chain).

- In addition, an **impact assessment** was carried out for the proposal, having as object the topics of: i) ensuring **wider access** to content; ii) adapting **exceptions** to the digital and cross-border environment; iii) achieving a well-functioning **market** for copyright.

What is the problem and why is it a problem at EU level?

This IA examines a number of issues linked to the functioning of EU copyright rules in the Digital Single Market. It considers adjusting existing rules or introducing new rules in three distinct areas: (i) access to content online; (ii) the functioning of key exceptions in the digital and cross-border environment; and (iii) the functioning of the copyright marketplace.

In the first area, the problems addressed in the IA are directly related to difficulties encountered with the clearance of online rights, by broadcasters, retransmission services, Video-on-Demand (VoD) platforms or cultural heritage institutions (CHIs). Broadcasters face difficulties in particular when clearing rights for making TV and radio programmes available online across borders; similarly, the clearance of rights can be complex for retransmission services other than cable operators when they offer channels from other Member States (MS). The main findings of the evaluation of the functioning of the Satellite and Cable Directive (Directive 93/83/EEC) have been taken into account when assessing the extent of these problems and the possible solutions. Also, difficulties in acquiring online rights contribute to the limited availability of European audiovisual works on VoD platforms. Finally, CHIs face important difficulties when clearing rights for digitising out-of-commerce (OOC) works of their collections and disseminating them to the public.

In the second area, the legal uncertainty as to the acts allowed under the existing copyright exceptions, in particular the digital environment, has been identified as a major issue for the functioning of the Digital Single Market. Teachers and students are affected by legal uncertainty when using content in digitally-supported and cross-border teaching activities. Researchers face legal uncertainty with regard to the possibility to carry out text and data mining (TDM) on content they have lawful access to. Preservation of works by CHIs, in particular in digital forms, may also be hampered by legal uncertainty and disproportionate transaction costs.

In the third area, the IA concentrates on issues related to the distribution of value in the online environment, with a distinction between the problems faced 'upstream' by right holders when trying to license their content to certain types of online services and those faced 'downstream' by creators when negotiating contracts for the exploitation of their works. Right holders face difficulties when seeking to control and monetize the use of their content by online services storing and giving access to content uploaded by end-users. It has also become difficult for press publishers to license their publications and prevent unauthorized uses by online services. Also, all publishers face legal uncertainty as regards the possibility for them to receive a share in the compensation for uses of works under an exception. Finally, authors and performers (creators) may not always have sufficient information on the exploitation of their works allowing them to negotiate an appropriate remuneration in exchange for the exploitation of their rights.

What should be achieved?
Three general objectives have been identified: (i) allow for wider online access to protected content across the EU, focusing on TV and radio programmes, European audiovisual works and cultural heritage; (ii) facilitate digital uses of protected content for education, research and preservation in the single market; and (iii) ensure that the online copyright marketplace works efficiently for all players and gives the right incentives for investment in and dissemination of creative content.
What is the value added of action at the EU level (subsidiarity)?
By concentrating on the functioning of EU copyright rules in the digital and online environment, this IA addresses problems which have an important cross-border dimension. As regards the first area, national solutions for the above mentioned problems related to online access to content, including cross-border, may generate further fragmentation in the Digital Single Market. Therefore, in order to produce clear benefits, a common approach and action should be provided at EU level. As regards the second area, the existing level of harmonisation limits the possibility for MS to act in the area of copyright, as they cannot unilaterally alter the scope of the harmonised rights and exceptions. Moreover, EU intervention is indispensable to guarantee legal certainty in cross border situations. As regards the third area, the rationale for EU action stems both from the harmonisation already in place (notably in terms of rights) and the cross-border nature of the distribution of content online. Intervention at national level would not be sufficiently efficient to address the identified problems (notably because it would lack scale) and could create new obstacles and market fragmentation. Action at EU level is necessary in order to ensure legal certainty for creators and those investing in content, for distributors and for users. It will also allow right holders to better exercise their rights in the online environment and guarantee a level playing field in the Digital Single Market.

The Modernization of Copyright and Related Rights

- PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE - DEBATE
- Overall, the Proposal has raised **substantial debate** about its text, scope and goals.
- The two most controversial provisions were undeniably those in **Article 11** (new right for publishers) and **Article 13** (liability of online content sharing service providers) of the Proposal.

The Modernization of Copyright and Related Rights

- PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE & OPPOSITION
- In particular, **Articles 11 and 13** have attracted harsh **criticism** from **U.S. technology companies**, **civil liberties groups** and **academics**. Opponents also include **law scholars**, **internet experts** and **law makers**. Within the EU Parliament, the Proposal has then been opposed by **populist parties** (*e.g* the *Five Star Movement* coalition).
- A German MEP, **Julia Reda**, has described the efforts behind the Directive as large media companies trying 'to force platforms and search engines to use their snippets and to pay for them'. A *UKIP* member of the Parliament then argued that 'the proposal may destroy the capacity for free speech on the internet and social media'.


Reform des EU-Urheberrechts: "Völlig jenseits von Gut und Böse" - S...
Die EU bekommt ein neues Urheberrecht. Was langweilig klingt, könnte das Internet stark verändern. Die Piratin Julia Reda erklärt, welche Einschrän...
spiegel.de
European Commission copyright plans would make Twitter and others pay news publishers when they show link previews like this one.
They claim they are "eroding [news sites'] ad revenue":
In 2016, social media (22 %), news aggregators (14 %) and search engines (21 %) are, taken together, the main way to read news online for 57 % of users in the EU.[453]
On the other hand, 47 % of consumers browse and read news extracts on these websites without clicking on links to access the whole article in the newspaper page, which erodes advertising revenues from the newspaper webpages.[456]
They say "individuals won't be affected" – but if Twitter doesn't pay up, say hi to
"This tweet is not available in your country"
Sources:
• "The target would be services like Twitter", unnamed Commission representative to DPA, Sept 1 (in German)
• Commission's draft Impact Assessment, pg. 143
• Commission's draft Directive on Copyright in the Digital Single Market
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The Modernization of Copyright and Related Rights

PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE & OPPOSITION

► **GOOGLE** (owner of YouTube): opposed the Directive since 2016, saying that it would 'turn the internet into a place where everything uploaded to the web must be cleared by lawyers'.

► **YOUTUBE:** its CEO urged content creators on the platform to take action to oppose the Proposal, as 'it poses a threat to both their livelihood and their ability to share their voice with the world'.

► **FACEBOOK:** argued that the Proposal could have 'serious unintended consequences for an open and creative internet'.

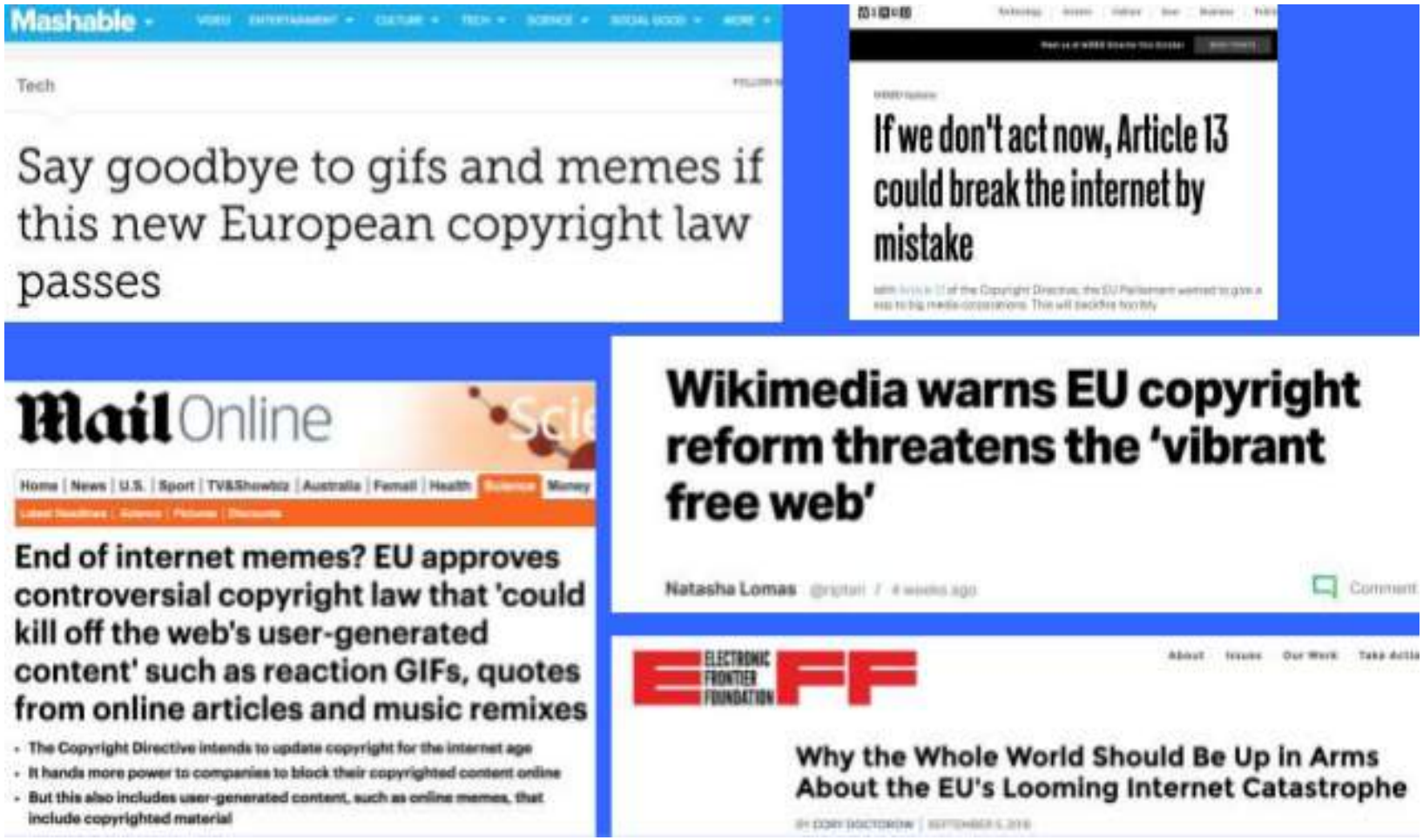
The Modernization of Copyright and Related Rights

- <u>PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE & OPPOSITION</u>
- Campaigners generally oppose **Article 11** as it would amount to a **'link tax'** requiring web publishers to obtain a license before linking to news stories. Many refer to the negative effects of the recent introduction in Germany and Spain of an ancillary right.

Article 11 - A Link/Google Tax Revamp	
News publishers have lobbied intensively in the past	
Why?	News publishers wanted to charge news aggregators such as Google News to benefit from the advertising revenue generated by the traffic.
How?	Through intense lobbying, the governments **gave publishers the right to charge online news aggregators.**
What happened?	As soon as they tried to enforce this right, Google stopped indexing Axel Springer links which led to a **drop of 80% traffic.**
	Google removed Google News altogether from Spain leading to a cumulated **drop of 20% of traffic overnight for publishers.**

The Modernization of Copyright and Related Rights

- PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE & OPPOSITION
- **Article 13** has been viewed as a **'meme ban'**, as the content matching technologies which could be used to meet its requirements cannot identify 'fair dealing' (parody).


Mashable
Tech
Say goodbye to gifs and memes if this new European copyright law passes
If we don't act now, Article 13 could break the internet by mistake
Mail Online
Home | News | U.S. | Sport | TV&Showbiz | Australia | Femail | Health | Science | Money
End of internet memes? EU approves controversial copyright law that 'could kill off the web's user-generated content' such as reaction GIFs, quotes from online articles and music remixes
The Copyright Directive intends to update copyright for the internet age
It hands more power to companies to block their copyrighted content online
But this also includes user-generated content, such as online memes, that include copyrighted material
Wikimedia warns EU copyright reform threatens the 'vibrant free web'
Natasha Lomas
Comment
ELECTRONIC FRONTIER FOUNDATION
About
Issues
Our Work
Take Action
Why the Whole World Should Be Up in Arms About the EU's Looming Internet Catastrophe

The Modernization of Copyright and Related Rights

- <u>PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE & OPPOSITION</u>
- It has also been noted that the **duration** of the new ancillary right is too long and that the proposal creates **no harmonization** within the EU. Other issues regard the **costs** and effectiveness of **upload filters** and the negative effects on free speech online.
- On a last note, **academic criticism** has raised several concern about the impact of Article 11 on the readership of online scientific publications, and about the obligations on service providers under Article 13 which would heavily affect small players.


The content you are trying to view has been banned by the EU copyright law

The Modernization of Copyright and Related Rights

- PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE & SUPPORT
- On the other side of the spectrum, most **media groups**, **major music labels**, **mainstream newspapers**, many **artists** (Ennio Morricone, James Blunt, Paul McCartney etc) and **publishers** were in **support** of the Directive.
- A group of major **European press publishers** issued a **letter** in strong support of the proposal, defining it as 'key for the media industry, the consumers' future access to news, and ultimately for a healthy democracy'. They argued that **financial support** to struggling news media should not be provided by Member States, but should rather come **from the internet giants**.

The Modernization of Copyright and Related Rights

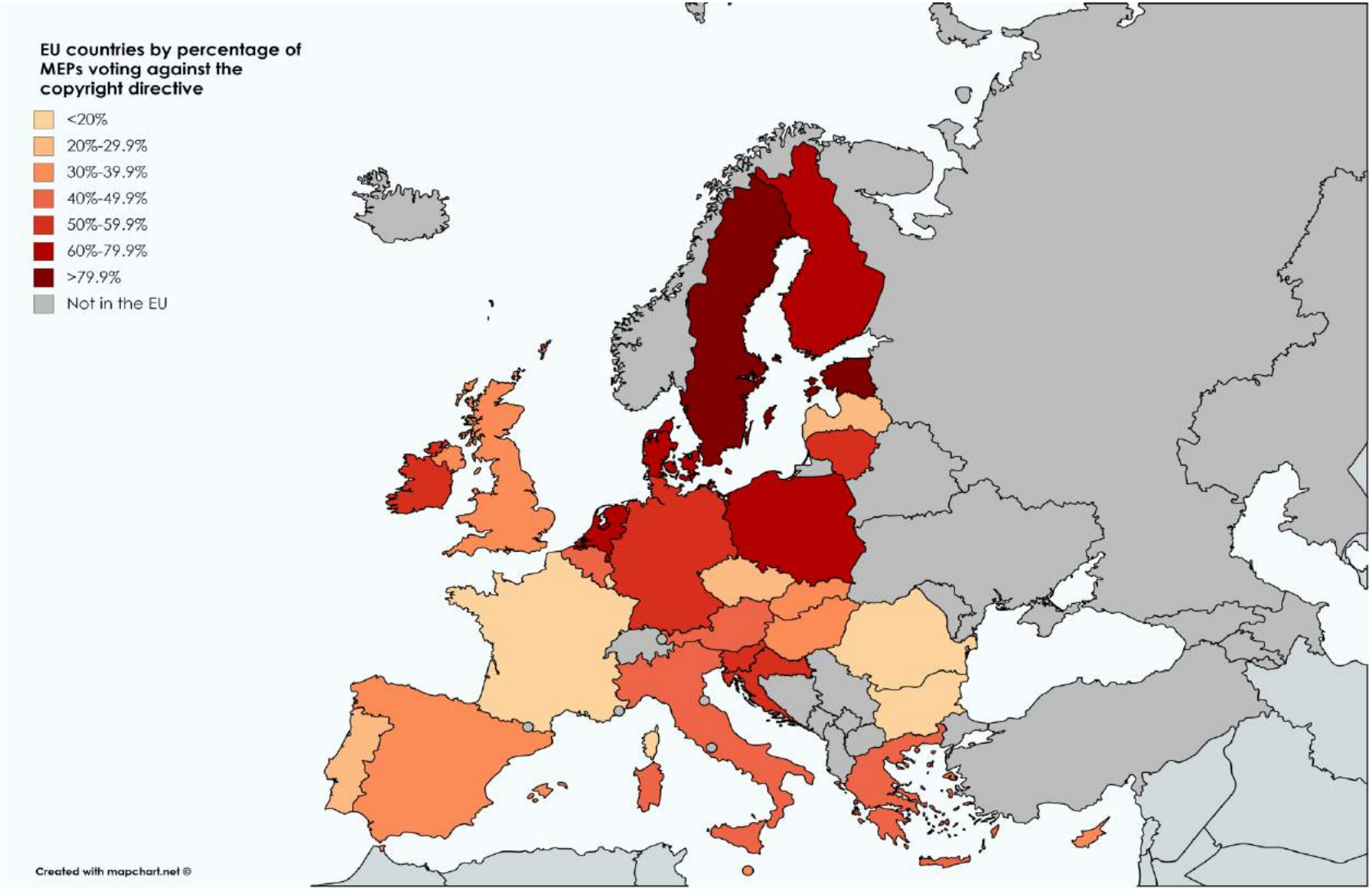
- PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE & SUPPORT
- It has even been said that the Directive Proposal has a positive effect on **fundamental rights**. In this regard, it may strengthen copyright as a **property right**, as long as the bargaining position of authors and performers improve and as long as right-holders have a better control of the use of their copyright protected contents. Such impact would be reinforced by the measures implemented to improve licensing mechanisms. The exceptions to copyright, furthermore, have been interpreted as having a positive impact on the **right to education** and on **cultural diversity**.

The Modernization of Copyright and Related Rights

- PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE & SUPPORT

- Furthermore, **Axel Voss**, German MEP and ***rapporteur*** of the Directive, **rejected** the arguments of critics according to which the Proposal would promote **censorship**. He criticised such perspective as 'excessive, unjustified and objectively wrong', pointing out that content filtering technologies (Art. 13) have been in use on Youtube for more than a decade and that big internet platforms have mounted **fake news campaigns**.
- **Publishing trade bodies** have similarly noted that companies such as Google and Wikipedia have conducted bad-faith, misleading campaigns to influence members of the Parliament. As to Article 11, some newspapers have also argued that the reform is a **battle** between EU media **pluralism** and monopolistic foreign **internet giants.**


We are not ending internet, we are not ending memes at all. What we want is to make sure that the same copyright rules apply in the real world and online.
AXEL VOSS
RAPPORTEUR ON COPYRIGHT RULES


EU countries by percentage of MEPs voting against the copyright directive
<20%
20%-29.9%
30%-39.9%
40%-49.9%
50%-59.9%
60%-79.9%
>79.9%
Not in the EU
Created with mapchart.net ©

The Modernization of Copyright and Related Rights

PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE - BACKGROUND

As a premise, in the explanatory memorandum, the Proposal recalled the key role of the Digital Single Market Strategy and of the Communication *Towards a more modern, European copyright framework* in identifying the steps for the modernization of copyright. It pointed again to the **main changes**, concerning :

► the role played by **digitization** in the way goods / services are created or exploited

► the emergence of **new players**, **new business models**, **new uses** of products

► the increase of **cross-border uses** of copyright-protected content

Hence, it referred to the need to **adapt** the **copyright framework** to the **new realities.**

The Modernization of Copyright and Related Rights

PROPOSAL FOR AN EU COPYRIGHT DIRECTIVE - GOALS

Given this background, the **key goals** pursued by the Directive Proposal included:

- creating **copyright exceptions** and ensuring **wider access** to online content
- protecting **press publications** through a new neighbouring right
- reducing the **value gap** between the profits of online platforms & content creators
- preventing **unauthorised posting** of copyrighted content on the internet
- encouraging **collaboration** between platforms and content creators

The Modernization of Copyright and Related Rights

- <u>EU COPYRIGHT DIRECTIVE - ADOPTION</u>

- In **2019** the Council of the European Union and the European Parliament finally adopted the **Directive 2019/790/EU** on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

Article 1

Subject matter and scope

1. This Directive lays down rules which aim to harmonise further Union law applicable to copyright and related rights in the framework of the internal market, taking into account, in particular, digital and cross-border uses of protected content. It also lays down rules on exceptions and limitations to copyright and related rights, on the facilitation of licences, as well as rules which aim to ensure a well-functioning marketplace for the exploitation of works and other subject matter.

The Modernization of Copyright and Related Rights

- <u>EU COPYRIGHT DIRECTIVE - EXCEPTIONS</u>
- The EU Copyright Directive explicitly addresses the field of **exceptions and limitations to copyright**, in order to adapt them to the new digital environment and ensure the achievement of a fair balance between the authors' and the users' rights.
- The three scrutinised **areas** by the EU intervention concern, specifically: i) text and data mining in the field of scientific **research**; ii) digital and cross-border uses in the field of **education**; iii) preservation of **cultural heritage.**

The Modernization of Copyright and Related Rights

EU COPYRIGHT DIRECTIVE - EXCEPTIONS

The objective is to **guarantee** the **legality** of certain uses in these fields, including across borders. As a result of a modernised framework of exceptions and limitations:

- **researchers** will take advantage from a clearer legal space to exploit innovative text and data mining research tools (Article 3);
- **teachers** and users will benefit from digital uses of protected works and other subject matter for the purpose of illustration for teaching (Article 5);
- **cultural heritage institutes** (libraries, museums etc) will be allowed to make copies of protected works in their collection for their preservation (Article 6).

Article 3

Text and data mining for the purposes of scientific research

1. Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.

2. Copies of works or other subject matter made in compliance with paragraph 1 shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results.

3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.

4. Member States shall encourage rightholders, research organisations and cultural heritage institutions to define commonly agreed best practices concerning the application of the obligation and of the measures referred to in paragraphs 2 and 3 respectively.

Article 4

Exception or limitation for text and data mining

1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining.

2. Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining.

3. The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.

4. This Article shall not affect the application of Article 3 of this Directive.


PATTERNS
DATA
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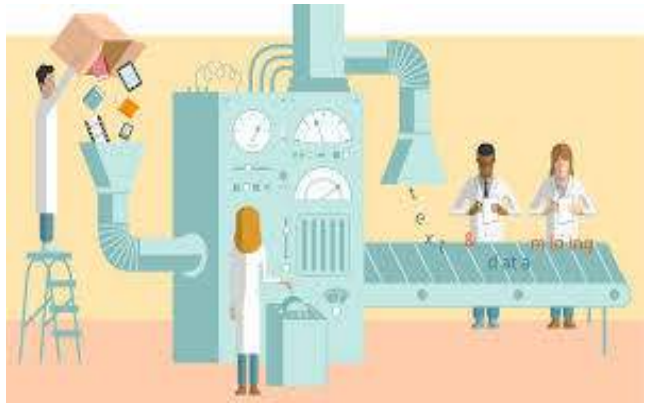

Article 5

Use of works and other subject matter in digital and cross-border teaching activities

1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC and Article 15(1) of this Directive in order to allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, on condition that such use:

(a) takes place under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff; and

(b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

2. Notwithstanding Article 7(1), Member States may provide that the exception or limitation adopted pursuant to paragraph 1 does not apply or does not apply as regards specific uses or types of works or other subject matter, such as material that is primarily intended for the educational market or sheet music, to the extent that suitable licences authorising the acts referred to in paragraph 1 of this Article and covering the needs and specificities of educational establishments are easily available on the market.

Member States that decide to avail of the first subparagraph of this paragraph shall take the necessary measures to ensure that the licences authorising the acts referred to in paragraph 1 of this Article are available and visible in an appropriate manner for educational establishments.

3. The use of works and other subject matter for the sole purpose of illustration for teaching through secure electronic environments undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.

4. Member States may provide for fair compensation for rightholders for the use of their works or other subject matter pursuant to paragraph 1.

Article 6

Preservation of cultural heritage

Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) of Directive 2009/24/EC and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation.

Article 7

Common provisions

1. Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable.

2. Article 5(5) of Directive 2001/29/EC shall apply to the exceptions and limitations provided for under this Title. The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to Articles 3 to 6 of this Directive.

The Modernization of Copyright and Related Rights

- <u>EU COPYRIGHT DIRECTIVE - LICENSING</u>

- The EU Copyright Directive furthermore aims at **removing obstacles** to cross-border **access** to **works** and other subject matter. Such obstacles may arise from the difficulty to clear rights, *e.g* in the context of out-of-commerce works stored by cultural heritage institutions or in the context of the online exploitation of audiovisual works (art 8-11).
- The EU Copyright Directive addresses these problems by requiring Member States to introduce **mechanisms** that should **facilitate** the **licensing** and clearing of rights processes, and should thus allow all EU citizens to access cultural heritage and audiovisual works online.

Article 8

Use of out-of-commerce works and other subject matter by cultural heritage institutions

1. Member States shall provide that a collective management organisation, in accordance with its mandates from rightholders, may conclude a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works or other subject matter that are permanently in the collection of the institution, irrespective of whether all rightholders covered by the licence have mandated the collective management organisation, on condition that:

(a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights that are the subject of the licence; and

(b) all rightholders are guaranteed equal treatment in relation to the terms of the licence.

2. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC, and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make available, for non-commercial purposes, out-of-commerce works or other subject matter that are permanently in their collections, on condition that:

(a) the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible; and

(b) such works or other subject matter are made available on non-commercial websites.

3. Member States shall provide that the exception or limitation provided for in paragraph 2 only applies to types of works or other subject matter for which no collective management organisation that fulfils the condition set out in point (a) of paragraph 1 exists.

4. Member States shall provide that all rightholders may, at any time, easily and effectively, exclude their works or other subject matter from the licensing mechanism set out in paragraph 1 or from the application of the exception or limitation provided for in paragraph 2, either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned.

5. A work or other subject matter shall be deemed to be out of commerce when it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public.

Member States may provide for specific requirements, such as a cut-off date, to determine whether works and other subject matter can be licensed in accordance with paragraph 1 or used under the exception or limitation provided for in paragraph 2. Such requirements shall not extend beyond what is necessary and reasonable, and shall not preclude being able to determine that a set of works or other subject matter as a whole is out of commerce, when it is reasonable to presume that all works or other subject matter are out of commerce.

[...]


7-8-9
Oocw
Out-of-commerce
works


Cultural
Heritage
Information
Cartography
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Open
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Fusion
Web
spatial
Sciences
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innovative
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Data
Knowledge
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massive
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Scenarios
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Article 9

Cross-border uses

1. Member States shall ensure that licences granted in accordance with Article 8 may allow the use of out-of-commerce works or other subject matter by cultural heritage institutions in any Member State.

2. The uses of works and other subject matter under the exception or limitation provided for in Article 8(2) shall be deemed to occur solely in the Member State where the cultural heritage institution undertaking that use is established.

Article 10

Publicity measures

1. Member States shall ensure that information from cultural heritage institutions, collective management organisations or relevant public authorities, for the purposes of the identification of the out-of-commerce works or other subject matter, covered by a licence granted in accordance with Article 8(1), or used under the exception or limitation provided for in Article 8(2), as well as information about the options available to rightholders as referred to in Article 8(4), and, as soon as it is available and where relevant, information on the parties to the licence, the territories covered and the uses, is made permanently, easily and effectively accessible on a public single online portal from at least six months before the works or other subject matter are distributed, communicated to the public or made available to the public in accordance with the licence or under the exception or limitation.

The portal shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.

2. Member States shall provide that, if necessary for the general awareness of rightholders, additional appropriate publicity measures are taken regarding the ability of collective management organisations to license works or other subject matter in accordance with Article 8, the licences granted, the uses under the exception or limitation provided for in Article 8(2) and the options available to rightholders as referred to in Article 8(4).

The appropriate publicity measures referred to in the first subparagraph of this paragraph shall be taken in the Member State where the licence is sought in accordance with Article 8(1) or, for uses under the exception or limitation provided for in Article 8(2), in the Member State where the cultural heritage institution is established. If there is evidence, such as the origin of the works or other subject matter, to suggest that the awareness of rightholders could be more efficiently raised in other Member States or third countries, such publicity measures shall also cover those Member States and third countries.

Article 11

Stakeholder dialogue

Member States shall consult rightholders, collective management organisations and cultural heritage institutions in each sector before establishing specific requirements pursuant to Article 8(5), and shall encourage regular dialogue between representative users' and rightholders' organisations, including collective management organisations, and any other relevant stakeholder organisations, on a sector-specific basis, to foster the relevance and usability of the licensing mechanisms set out in Article 8(1) and to ensure that the safeguards for rightholders referred to in this Chapter are effective.

The Modernization of Copyright and Related Rights

- EU COPYRIGHT DIRECTIVE - COLLECTIVE LICENSING WITH EXTENDED EFFECT

- The EU Copyright Directive contains provisions on collective licensing with extended effect that the Member States may adopt.

- In the event an extended effect or legal presumption applies, the EU Copyright Directive also provides for certain additional safeguards need to be in place (e.g. rightholders whose rights are covered by the extended effect may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism “opt out”).

Article 12

Collective licensing with an extended effect

1. Member States may provide, as far as the use on their territory is concerned and subject to the safeguards provided for in this Article, that where a collective management organisation that is subject to the national rules implementing Directive 2014/26/EU, in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject matter:

(a) such an agreement can be extended to apply to the rights of rightholders who have not authorised that collective management organisation to represent them by way of assignment, licence or any other contractual arrangement; or

(b) with respect to such an agreement, the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly.

2. Member States shall ensure that the licensing mechanism referred to in paragraph 1 is only applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned, and shall ensure that such licensing mechanism safeguards the legitimate interests of rightholders.

3. For the purposes of paragraph 1, Member States shall provide for the following safeguards:

(a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights which are the subject of the licence, for the relevant Member State;

(b) all rightholders are guaranteed equal treatment, including in relation to the terms of the licence;

(c) rightholders who have not authorised the organisation granting the licence may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism established in accordance with this Article; and

(d) appropriate publicity measures are taken, starting from a reasonable period before the works or other subject matter are used under the licence, to inform rightholders about the ability of the collective management organisation to license works or other subject matter, about the licensing taking place in accordance with this Article and about the options available to rightholders as referred to in point (c). Publicity measures shall be effective without the need to inform each rightholder individually.

4. This Article does not affect the application of collective licensing mechanisms with an extended effect in accordance with other provisions of Union law, including provisions that allow exceptions or limitations.

This Article shall not apply to mandatory collective management of rights.

Article 7 of Directive 2014/26/EU shall apply to the licensing mechanism provided for in this Article.

[...]

Article 13

Negotiation mechanism

Member States shall ensure that parties facing difficulties related to the licensing of rights when seeking to conclude an agreement for the purpose of making available audiovisual works on video-on-demand services may rely on the assistance of an impartial body or of mediators. The impartial body established or designated by a Member State for the purpose of this Article and mediators shall provide assistance to the parties with their negotiations and help the parties reach agreements, including, where appropriate, by submitting proposals to them.

Member States shall notify the Commission of the body or mediators referred to in the first paragraph no later than 7 June 2021. Where Member States have chosen to rely on mediation, the notification to the Commission shall at least include, when available, the source where relevant information on the mediators entrusted can be found.

The Modernization of Copyright and Related Rights

- EU COPYRIGHT DIRECTIVE - FAIR SHARE

- In line with the Proposal, the EU Copyright Directive also aims at tackling the **difficulties** faced by **right-holders** when seeking to license their rights and be **remunerated** for the online distribution of their works. Such a situation, already identified by the EU Digital Single Market Strategy, may lower the incentive to produce new creative contents.

- It is therefore necessary to ensure that right-holders receive a **fair share of the value** generated by the online use of their works and other subject matter, and to set (at EU level) **suitable measures** improving their position in the context of licensing negotiations.


COPYRIGHT
DIRECTIVE


copyright
publishers
internet
reform
eu
directive
article
parliament
filter
council
european
governments
germany
hungary
letter
meps


entertainment
authors
arts
MEI
UNI
creators
order
holders
creation
remuneration
rights
fair
copyright
Union

The Modernization of Copyright and Related Rights

EU COPYRIGHT DIRECTIVE - FAIR SHARE

- A fair share of the value is then specifically necessary to **sustain** the **press publication** sector. The category of press publishers, according to the Proposal for an EU Copyright Directive, is directly affected by the **difficulties** to **license** their publications online and to obtain adequate remuneration. The ultimate risk is to affect citizens' access to information.
- For this reason, the EU Copyright Directive has provided for a **new right for press publishers** (Article 15), with the aim of facilitating: i) online licensing of their publications; ii) the recoupment of their investments; and iii) the enforcement of their rights.

The Modernization of Copyright and Related Rights

- EU COPYRIGHT DIRECTIVE - FAIR SHARE

- **Article 15** of the EU Copyright Directive conferred remuneration rights to the press publishers for **snippets** used by online platforms. The same provision equally grants a new right to press publishers for the digital reproduction and distribution of press content.

- Nevertheless, the EU Copyright Directive **exempts** '**hyperlinks** accompanied by individual words' and legitimates **private and non-commercial use** by individual users. Despite the EU Commission's draft proposed a 20 year term for the press publishers' right, the EU Copyright Directive limits the term to **2 years.**

Article 15

Protection of press publications concerning online uses

1. Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers.

The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users.

The protection granted under the first subparagraph shall not apply to acts of hyperlinking.

The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication.

2. The rights provided for in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject matter incorporated in a press publication. The rights provided for in paragraph 1 shall not be invoked against those authors and other rightholders and, in particular, shall not deprive them of their right to exploit their works and other subject matter independently from the press publication in which they are incorporated.

When a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights provided for in paragraph 1 shall not be invoked to prohibit the use by other authorised users. The rights provided for in paragraph 1 shall not be invoked to prohibit the use of works or other subject matter for which protection has expired.

3. Articles 5 to 8 of Directive 2001/29/EC, Directive 2012/28/EU and Directive (EU) 2017/1564 of the European Parliament of the Council ([19]) shall apply mutatis mutandis in respect of the rights provided for in paragraph 1 of this Article.

4. The rights provided for in paragraph 1 shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published.

Paragraph 1 shall not apply to press publications first published before 6 June 2019.

5. Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.

The Modernization of Copyright and Related Rights

EU COPYRIGHT DIRECTIVE - FAIR SHARE

The EU Copyright Directive also addresses the uncertainty concerning the possibility for all publishers to receive **compensation** for **uses** of works under an **exception** (article 16).

Article 16

Claims to fair compensation

Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right.

The first paragraph shall be without prejudice to existing and future arrangements in Member States concerning public lending rights.

The Modernization of Copyright and Related Rights

EU COPYRIGHT DIRECTIVE - LIABILITY

It further regulates the position of **online content sharing service providers,** which perform an act of communication to the public and therefore have to obtain an authorisation from the rightholders (**Article 17**), for instance by concluding a licence agreement, that covers the liability for works uploaded by users.

The Modernization of Copyright and Related Rights

- EU COPYRIGHT DIRECTIVE - LIABILITY

- In brief, Article 17 makes **qualifying platforms** directly liable for copyright infringements caused by user-generated content (UGC) published on their platforms. The EU Commission's draft defined qualifying platforms to include service providers 'providing access to **large amount** of works'. The Parliament's draft focuses instead on the term '**significant amount**', and seems to pay higher attention to the requirement that service providers '**optimize**' (promote, display, tag, curate etc) **UGC**.
- Moreover, according to the EU Copyright Directive, micro-sized, small-sized, and non-commercial enterprises are **exempted** from **liability** for UGC. Under EU law, a small-sized company has fewer than 50 people and less than €10 million in annual turnover.

The Modernization of Copyright and Related Rights

- <u>EU COPYRIGHT DIRECTIVE - LIABILITY</u>
- On a further note, the **European Union Parliament's draft** seems to consider all online content sharing service providers to be directly '**communicating to the public**' (which means acting in a copyright-relevant way). In order to avoid liability for copyright infringements, platforms should ideally introduce content-recognition technologies and should also enter into comprehensive licensing agreements.
- Finally, the EU Parliament's draft states that its provisions
- shall not prevent the **availability of non-infringing content**
- and shall implement 'redress mechanisms'.

Article 17

Use of protected content by online content-sharing service providers

1. Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.

2. Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues.

3. When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.

The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to those service providers for purposes falling outside the scope of this Directive.

4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:

(a) made best efforts to obtain an authorisation, and

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

5. In determining whether the service provider has complied with its obligations under paragraph 4, and in light of the principle of proportionality, the following elements, among others, shall be taken into account:

(a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and

(b) the availability of suitable and effective means and their cost for service providers.

6. Member States shall provide that, in respect of new online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC ([20]), the conditions under the liability regime set out in paragraph 4 are limited to compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject matter or to remove those works or other subject matter from their websites.

Where the average number of monthly unique visitors of such service providers exceeds 5 million, calculated on the basis of the previous calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.

7. The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

(a) quotation, criticism, review;

(b) use for the purpose of caricature, parody or pastiche.

8. The application of this Article shall not lead to any general monitoring obligation.

Member States shall provide that online content-sharing service providers provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

[...]

The Modernization of Copyright and Related Rights

- <u>EU COPYRIGHT DIRECTIVE - APPROPRIATE AND PROPORTIONATE REMUNERATION AND TRANSPARENCY</u>

- The EU Copyright Directive also includes (Articles 18-20) measures to increase **transparency** and **better balanced contractual relationships** between authors and performers, on the one hand, and those to whom they assign their rights, on the other.

- In other words, the EU Copyright Directive explicitly addresses the weak bargaining position of the categories of **authors and performers** when negotiating their rights. The ultimate goal of such broad approach is to achieve a **well functioning marketplace for copyright**, to the benefit of all players involved.

The Modernization of Copyright and Related Rights

- EU COPYRIGHT DIRECTIVE - APPROPRIATE AND PROPORTIONATE REMUNERATION AND TRANSPARENCY

- Authors and performers are entitled to receive appropriate and proportionate remuneration in the cases in which they license or transfer their exclusive rights for the exploitation of their works or other subject matter (art. 18).

- In order to achieve the above, the EU Copyright Directive provides that the Member States are free to use different mechanisms, but have to take into account the principle of contractual freedom and a fair balance of rights and interests (art. 18).

Article 18

Principle of appropriate and proportionate remuneration

1. Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.

2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.

Article 19

Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.

2. Member States shall ensure that, where the rights referred to in paragraph 1 have subsequently been licensed, authors and performers or their representatives shall, at their request, receive from sub-licensees additional information, in the event that their first contractual counterpart does not hold all the information that would be necessary for the purposes of paragraph 1.

Where that additional information is requested, the first contractual counterpart of authors and performers shall provide information on the identity of those sub-licensees.

Member States may provide that any request to sub-licensees pursuant to the first subparagraph is made directly or indirectly through the contractual counterpart of the author or the performer.

[...]

Article 20

Contract adjustment mechanism

1. Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.

2. Paragraph 1 of this Article shall not apply to agreements concluded by entities defined in Article 3(a) and (b) of Directive 2014/26/EU or by other entities that are already subject to the national rules implementing that Directive.

Article 21

Alternative dispute resolution procedure

Member States shall provide that disputes concerning the transparency obligation under Article 19 and the contract adjustment mechanism under Article 20 may be submitted to a voluntary, alternative dispute resolution procedure. Member States shall ensure that representative organisations of authors and performers may initiate such procedures at the specific request of one or more authors or performers.

The Modernization of Copyright and Related Rights

EU COPYRIGHT DIRECTIVE - RIGHT OF REVOCATION

Finally the EU Copyright Directive provides the authors and performers that have licensed or transferred their rights in work or other subject matter on an exclusive basis with a **right of revocation** in whole or in part of the license or the transfer of rights where there is a **lack of exploitation** of that work or other protected subject matter (art. 22).

Article 22

Right of revocation

1. Member States shall ensure that where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter.

2. Specific provisions for the revocation mechanism provided for in paragraph 1 may be provided for in national law, taking into account the following:

(a) the specificities of the different sectors and the different types of works and performances; and

(b) where a work or other subject matter contains the contribution of more than one author or performer, the relative importance of the individual contributions, and the legitimate interests of all authors and performers affected by the application of the revocation mechanism by an individual author or performer.

[...]

3. Member States shall provide that the revocation provided for in paragraph 1 may only be exercised after a reasonable time following the conclusion of the licence or the transfer of the rights. The author or performer shall notify the person to whom the rights have been licensed or transferred and set an appropriate deadline by which the exploitation of the licensed or transferred rights is to take place. After the expiry of that deadline, the author or performer may choose to terminate the exclusivity of the contract instead of revoking the licence or the transfer of the rights.

[...]

The Modernization of Copyright and Related Rights

- <u>EU COPYRIGHT DIRECTIVE - KEY RULES</u>

- The EU Copyright Directive seems to favour content creators over internet giants, by creating **monitoring obligations** for platforms and **ancillary copyright** for press publishers.

- To sum up, the most significant innovation are that:

- ► **online platforms** would be required to pay a **license fee** to press publishers for publishing snippets beyond mere hyperlinks and a few individual words (**Article 15**);

- ► commercial **online content-sharing platforms** could be **liable** for copyright **infringements** arising from user-uploaded content (**Article 17**).

- which were the goals of the 2016 Proposal for a Copyright Directive ?
- what are the main reasons for supporting & opposing the Directive ?
- What do article 15 and 17 provide for in the EU Copyright Directive?

The Modernization of Copyright and Related Rights

SUGGESTED READINGS

- EU Commission, 'Proposal for a Directive on Copyright in the Digital Single Market', COM(2016) 593 final
- EU Commission, 'Executive Summary of the Impact Assessment on the Modernization of EU Copyright Rules ', SWD(2016) 302 final
- EU Commission, 'Promoting a Fair Efficient and Competitive European Copyright-Based Economy in the Digital Single Market', COM(2016) 592 final
- Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

MODULE II

SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS

(*Lecture VIII*)

Trademarks and Related Rights Package

- TRADEMARKS AND INNOVATION

- Besides copyright, the category of IPRs also include **trademarks**. The latter are equally important in the context of the **innovation policy mix** and of the **key framework conditions** previously mentioned. The legal protection and economic advantages granted by trademarks may indeed stimulate firms to generate new ideas and products, and eventually be active players of the **innovation process**.

Trademarks and Related Rights Package

TRADEMARKS AND INNOVATION

A trademark, more in details, works as an **engine of innovation**. The necessity to keep it relevant stimulates investments in research and development. This consequently leads to a continuous process of **product improvement** and **development**. Among the many effects of this dynamic process, there also is a positive impact on **employment**.

According to a **study** led by the **EU Intellectual Property Office** (2013), almost 21% of all jobs in the EU during the period 2008-2010 were created by trademark-intensive industries. In the same period of time, those industries were shown to have generated almost 34% of the total economic activity (GDP) in the European Union.

Trademarks and Related Rights Package

WHAT IS A TRADEMARK ABOUT ?

But what is a trademark about ? In other words, how do we define a trademark ?

► **sign distinguishing goods and services of one company from those of another**

As indicators of business origin, trademarks may consist of **words**, **logos**, **letters, numbers, colours, sounds, shapes / packaging** of goods, **other distinctive features**, or a combination of them. They should be represented in a **clear** and **precise** manner.

Trademarks and Related Rights Package

WHAT IS A TRADEMARK ABOUT ?

A trademark can become one of the **most important assets** for an enterprise, since it is the mark used by the business to **attract** and **retain customer loyalty**, and **generate value** and **growth**. Specifically, besides identifying the commercial origin of a product, trademarks also **convey** a **message** about the **quality** of a product; in this way, they are able to facilitate the choice of consumers. Moreover, they play a pivotal role in the context of **advertisement**, and can even be interpreted as **investment instruments** (due to the fact that trademarks can be assigned, licensed, etc).

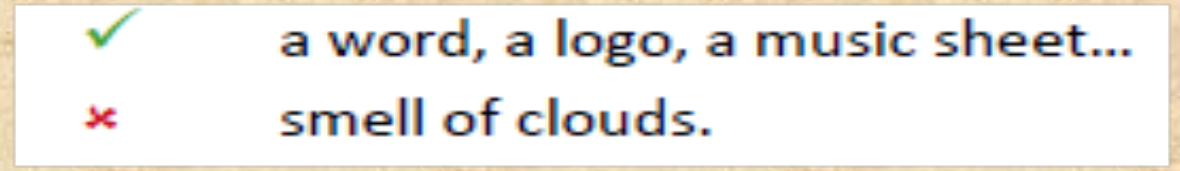

Castrol
chili's
Colgate
DELL
DHL
ESPN
Esso
FedEx
FINLANDIA
Firestone
FLOWMASTER
GOODYEAR
EXPRESS
IKEA
JVC
Kool-Aid
LAND ROVER
LEGO
Mobil
VISA
NBC
NOS
OLD NAVY
Oral-B
OREO
PEPSI
PENNZOIL
PowerBar
Red Lobster
SAFEWAY
STP
SUBWAY
swissair
TACO BELL
TEXACO
Tropicana
UNITED STATES POSTAL SERVICE
WAL★MART
zippo
Zantac

Trademarks and Related Rights Package

REQUIREMENTS FOR TRADEMARK REGISTRATION

The following **requirements** are usually needed in order to register a trademark :

► **clear and precise representation** - the sign, whose registration as a trademark is sought, must be capable of being represented in a manner that enables the subject matter of protection to be determined with clarity and precision



European IPR Helpdesk

Trademarks and Related Rights Package

REQUIREMENTS FOR TRADEMARK REGISTRATION

► **distinctiveness** – the sign, whose registration as a trademark is sought, must be capable of distinguishing the goods and services bearing the trademark from those of other traders

✓ "BANANA" in relation to clothing.

✗ "BANANA" in relation to bananas.

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Trademarks and Related Rights Package

REQUIREMENTS FOR TRADEMARK REGISTRATION

- ► **non-deceptiveness** – the sign, whose registration as a trademark is sought, must not deceive the public (*e.g.*, in relation to the nature, quality or geographical origin of the goods or services)

✗ "GLUTENFREE" for a product that contains gluten.

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Trademarks and Related Rights Package

REQUIREMENTS FOR TRADEMARK REGISTRATION

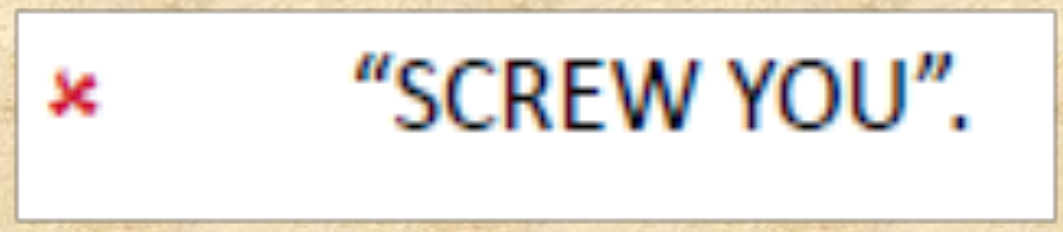
► **non-descriptiveness** – the sign, whose registration as a trademark is sought, must not serve to designate the characteristics of the goods or services bearing the mark (*e.g.*, type, quantity, quality, value, intended use etc)

✘ "BANK" for financial services.

Trademarks and Related Rights Package

REQUIREMENTS FOR TRADEMARK REGISTRATION

- ► **non-contrary to public order and morality** – the sign, whose registration as a trademark is sought, must not be contrary to public policy or morality



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Trademarks and Related Rights Package

REQUIREMENTS FOR TRADEMARK REGISTRATION

- ► **non-customary in the language** – the sign, whose registration as a trademark is sought, must not be a sign or indication which has become customary in the current language or in the good faith and established practices of the trade

✘ "STIMULATION" for energy drinks.

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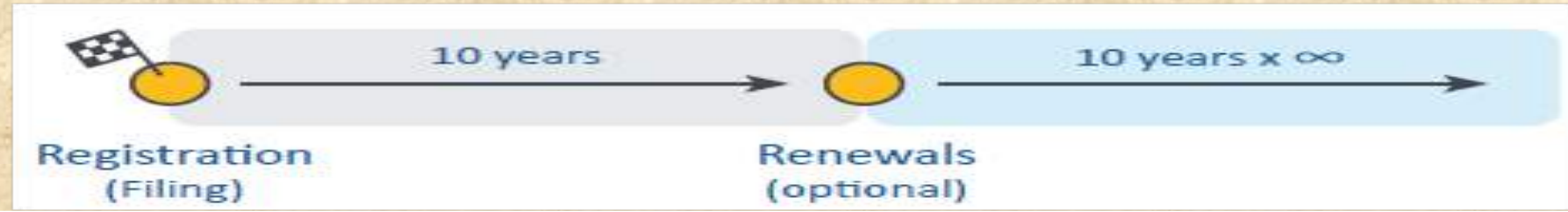
Trademarks and Related Rights Package

- <u>SCOPE OF PROTECTION</u>

- ® a trademark confers an **exclusive right**, which allows the owner to **prevent others** from using the same or similar signs for identical or related goods & services as those protected by the trademark in the course of trade, without owner's prior permission.
- ® the owner, moreover, may either **sell** the **trademark** to someone else or give permission to others to use the trademark on mutually agreed terms (via a **license**).
- ® further, trademarks are **territorial** in **nature**, which means that they are granted and enforceable within the geographical boundaries of the region - country of registration.

Trademarks and Related Rights Package

- <u>TERM OF PROTECTION</u>
- In most countries, **protection** lasts for **10 years** from the date of filing of the trademark application, and it can be **renewed** *ad infinitum* for periods of 10 years.
- After the **expiration** of a trademark, protection ends and anyone can use it in relation to the products covered by the expired trademark without the risk of infringing it.



Trademarks and Related Rights Package

- <u>OBLIGATION OF USE</u>

- On a further note, and in order to maintain registration, a **trademark** has to be put to **genuine use** in relation to the products for which it was registered within a specific period of time following registration (**5 years** for the '**EU trademark**'). In other words, trademarks need to be used in the consumer society. Otherwise, the owner may face the risk of losing it, as third parties may use and register the unused trademark for the same products. Such **obligation** has been adopted in **most countries**.

Trademarks and Related Rights Package

- REGISTRATION PROCESS

- Overall**, trademark registration** is one of the most efficient ways to build and defend a brand, and to make sure that no one else will use it. Registration is performed in one or more **classes** of **specific goods** and **services**, corresponding to the products traded by its owner. A trademark can be usually registered as long as it is **not identical** or **similar** to any earlier trademark for the same or related goods or services (classes).

- Generally, the **'first-to-file principle'** applies; this means that the first natural person or legal entity to file a valid application for a given trademark will become its owner.

TRADEMARK REGISTRATION PROCESS

Application for Name Search in IPO Office.	Preparation and Submission of Forms and required Fee	Substantial Examination of Application	Journal Publishing	Opposition and Hearing	Trademark Registration

Trademarks and Related Rights Package

- <u>REGISTRATION PROCESS</u>

- Generally, after an application has been filed, the intellectual property office will check whether any **absolute or relative grounds** exist for refusing registration. Absolute grounds are typically reasons which are inherent in the mark itself. Relative grounds usually relate to the existence of a conflict with prior rights of third parties.

Trademarks and Related Rights Package

REGISTRATION PROCESS

► **absolute grounds of refusal** may occur for instance in case of: non-distinctive marks; deceptive marks; descriptive marks; marks against public order or accepted principles of morality; marks which have become customary in the current language

► **relative grounds of refusal** may *inter alia* arise in those situations where the mark that someone applies for is already in use or is similar to one already in use

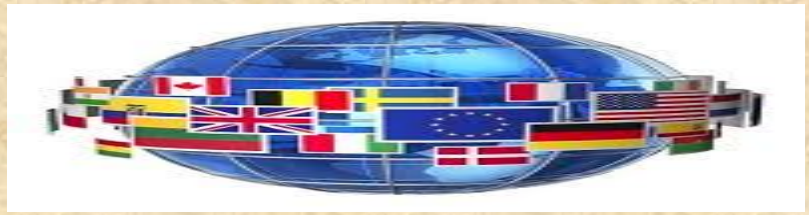
Trademarks and Related Rights Package

REGISTRATION PROCESS

A first possible route concerns registration at the International level. Indeed, the **World Intellectual Property Organization** – **WIPO international Trademark registration** system (known as the '*Madrid system'*) allows applicants to obtain trademark protection in **more than 100 countries** by filing **one application**. Before filing an international application, the applicant needs to have an existing national trademark or application (basic mark) in the IP office of one of the territories of the *Madrid system*.

Trademarks and Related Rights Package

- REGISTRATION PROCESS
- Another **condition** is that the applicant must either have a business in, or be domiciled in, or be a national of any territory that is a party to the *Madrid system*. Although the application has an **international character**, national laws govern the registration in each territory. This means that a granted international trademark is a **bundle** of **national trademarks** that need validation from the IP offices of the countries selected by the applicant for it to be effective in those countries. In the end, an international application may be successful in some designated territories and be rejected in others.



Trademarks and Related Rights Package

ADVANTAGES OF THE MADRID SYSTEM

Different **advantages** of the **international trademark system** have been identified :

A single application in one language and paying a single set of fees to obtain trade mark protection in more than 100 territories

Time saving and cost effective filing since there is no need to pay for translations into multiple languages or to spend extra time working through the administrative procedures of multiples offices

Easy management of filing and post-application processes (e.g. recordal of change in owner's name, address etc.), instead of dealing with different jurisdictions

Trademarks and Related Rights Package

REGISTRATION PROCESS

On a further ground, a trademark can be registered both at national level as a **national trademark** at the industrial property offices of the Union countries, and at EU level as a '**European Union trademark**' at the EU Intellectual Property Office (EUIPO). National and EU trademarks coexist and are complementary to each other; thus the **same trademark can be registered at EU and/or national level**.

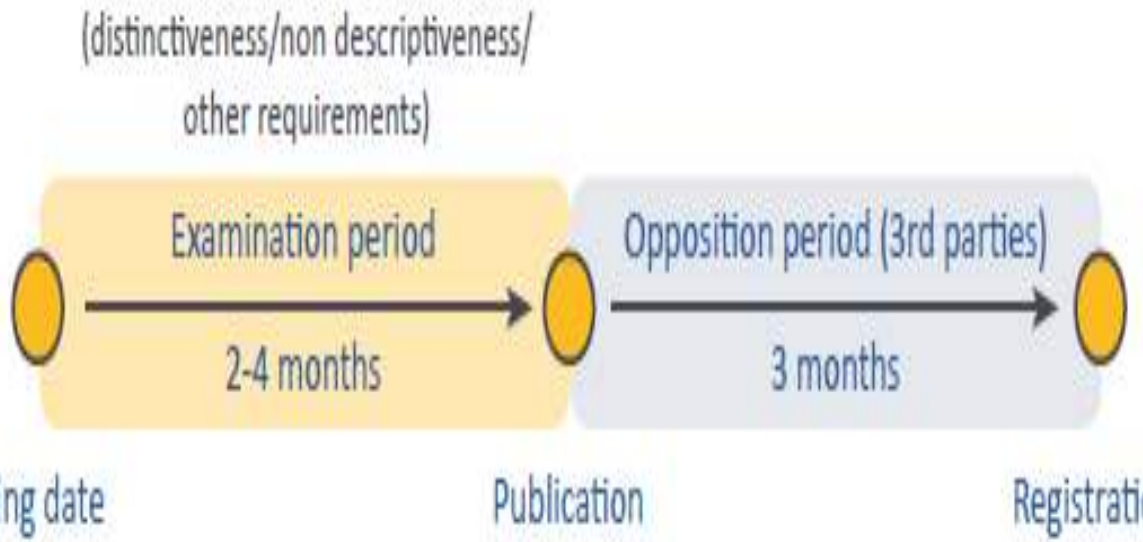
Trademarks and Related Rights Package

- <u>REGISTRATION PROCESS</u>
- The **EU registration,** in particular, consists of **one single registration procedure** that grants the owner an **exclusive right** to use its trademark in all **28 countries** of the Union. Such a system is able to meet the requirements of enterprises of different sizes, markets and financial capabilities. For instance, **small and medium sized enterprises (SMEs)** or local firms who do not need EU-wide protection may perhaps have a preference for registration at **national level** only.
- The EU Commission constantly monitors the **EU trademark system** to identify ways to improve its effectiveness and accessibility for businesses.

Trademarks and Related Rights Package

- ‘ALL OR NOTHING‘ PRINCIPLE
- Notably**, EU trademarks** are subject to the ‘**all or nothing principle**’. This means that an application for an EU trademark will be refused by the EUIPO if there is a cause of refusal even for one country only – *e.g,* due to a similar or identical earlier trademark. In other words, EU trademarks necessarily have to cover all EU countries.
- Nevertheless, if an **EU trademark** application is eventually **rejected** or if the trademark is declared **invalid** or **revoked**, the application may be converted into **national trademark applications** in those EU Member States in which the ground of refusal, invalidity or revocation does not apply.

What happens after filing an EU trade mark application at the EUIPO?



Trademarks and Related Rights Package

ADVANTAGES OF EU TRADEMARKS

The EU Commission has identified the following **advantages** of the **EU trademark** :

Trademarks and Related Rights Package

TRADEMARKS AND TRADE NAMES

On a last note, trademarks must be distinguished and must not be confused with trade names. A **trade name** is simply the name of a company or business, and its function is to **identify** that **company** or **business** (for instance, the '*Coca Cola Company*').

Trade names are usually **words**, and **not logos**. They can match with trademarks and *vice versa*, but they are not automatically interchangeable. It is the way in which they are used that will determine whether they are trade names or trademarks.

Trademarks and Related Rights Package

- TRADEMARKS AND TRADE NAMES

- ***The Coca Cola Company*** ***Nike Incorporated Company*** ***Ralph Lauren Corporation***

- in which way do trademarks contribute to innovation ?
- what are the main functions of a trademark ?
- which options are available for registration ?

Trademarks and Related Rights Package

SUGGESTED READINGS

- EU Commission (IPR Helpdesk), *Your Guide to IP in Europe* (2017)
- EU Commission (IPR Helpdesk), *IPR Chart - EU Trademark* (2017)
- European Parliament (Research Service), 'EU Innovation Policy - Part II' (2016)

MODULE II

SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS

(*Lectures IX and X*)

Trademarks and Related Rights Package

INTRODUCTION TO THE EU TRADEMARK REFORM

- The **first Directive** on trademarks was adopted in **1988** (89/104/EEC) to harmonize the registration of trademarks at national level. It was complemented by a **Regulation** in **1993** (40/94/EC), which introduced a Community trademark.

Trademarks and Related Rights Package

INTRODUCTION TO THE EU TRADEMARK REFORM

In 2009, the EU Commission launched a **review** of the overall functioning of the **European trademark system**. According to a *Max Planck Institute* study (2011), while the foundations of the system were still valid, there was the chance to make it more effective, efficient and accessible in terms of lower costs and complexity, increased speed, greater predictability, enhanced cooperation with national TM offices.

Trademarks and Related Rights Package

INTRODUCTION TO THE EU TRADEMARK REFORM

Following the study, in 2013 the Commission proposed to **modernize** the **framework** for trademarks, in order to upgrade & streamline the legislation. The **reform package** included a **Directive** (2015/2436) and a **Regulation** (2015/2424), with the aim to:

i) simplify, accelerate and harmonise **trademark application procedures**

ii) ensure better **coordination** between national offices and the EU trademark agency

iii) update the **governance rules** of the EU trademark agency

Trademarks and Related Rights Package

INTRODUCTION TO THE EU TRADEMARK REFORM

In particular, the **2015 reform** consists of several **elements** :

- a **recast** of the **1989 Directive** approximating the laws of the Member States relating to their national trademarks
- a **revision** of the **1994 Regulation** on the Community trademark, establishing the first EU-wide unitary IPR granted by the office now called 'EUIPO' (earlier, 'OHIM')
- the **introduction** of **implementing** and **delegated acts** (*i.e.*, regulations) concerning the more technical aspects of the EU trademark reform

Trademarks and Related Rights Package

INTRODUCTION TO THE EU TRADEMARK REFORM

The ultimate **effects** of the 2015 EU trademark reform (in terms of harmonization, modernization, efficiency and effectiveness) should mainly benefit both:

- **Consumers**

- **Trademark owners**

Trademarks and Related Rights Package

- MEANING OF THE REFORM FOR USERS
- The reform **package** is a significant step towards a **more harmonised**, **modern** and **efficient trademark system**. Among other things, the package intends to :
- ○ introduce a **more flexible fee-structure** and substantially reduce the (application & renewal) fees for European Union trademarks
- ○ **eliminate** the requirement for a trademark to be capable of **graphic representation** (thus, allowing registration of more types of non-traditional trademarks)
- ○ **allow international registrations** designating the EU to proceed much faster

Trademarks and Related Rights Package

- MEANING OF THE REFORM FOR USERS
- ○ **allow** trademark **owners** to **seize counterfeit goods** in customs situations in the European Union under defined circumstances
- ○ further **harmonize** substantive and procedural **law** relating to **national trademarks**, included requiring Member States to make available office-based cancellation actions
- ○ **provide** owners of EU trademarks with the **possibility** to **clarify specifications** of trademarks filed for the *Nice Classification* headings prior to 2012 (due to the CJEU's decision that class headings do not automatically cover all products in relevant class)

Trademarks and Related Rights Package

MEANING OF THE REFORM FOR USERS

- **facilitate searching** of **new trademarks** in view of new provisions for intervening rights, namely creating defenses where later trademarks are adopted at a time when earlier conflicting trademarks were dormant (vulnerable to revocation for non-use)
- **establish** a formal **framework** for **cooperation** between EUIPO and national marks
- **give rise** to new **governance rules** for the EU Intellectual Property Office (EUIPO)
- **eliminate** the possibility to make a **declaration** disclaiming exclusive rights to non-distinctive elements of trademarks so as to avoid doubts as to the scope of protection

Trademarks and Related Rights Package

- THE NEW FACE OF EUIPO

- In relation to the **new EUIPO**, the Regulation explicitly identifies its **tasks** in :

- ® the **management** of the EU trademark and design **systems** (to provide for effective, efficient and expeditious examination and registration of EU trademarks and designs)

- ® the **promotion** of **convergence** of practices and tools in the fields of trademarks and designs in cooperation with national IP offices of the EU Member States

- ® the **management** of the online EU-wide **database** for orphan works

- ® the **management** of the European **Observatory** on infringements of IPRs, which raises awareness on the value of IP and provides relevant data to EU IP policymakers

Trademarks and Related Rights Package

- <u>THE NEW FACE OF EUIPO</u>

- According to the Regulation, the **EUIPO** (formerly, Office for the Harmonization in the Internal Market) shall continue to **cooperate** with institutions, authorities, bodies, industrial property offices and international organizations in relation to these tasks.

Trademarks and Related Rights Package

THE NEW FACE OF EUIPO

In order to promote convergence of practices and tools in the fields of trademarks and designs, the EUIPO shall cooperate with the EU Member States' national IP offices in:

- ► the **development** of common examination **standards**
- ► the **creation** of connected or common **databases** and portals
- ► the **sharing** of data and **information** and the **exchange** of technical **expertise**
- ► the **establishment** of common **practices** and the **fight** against **counterfeiting**

Trademarks and Related Rights Package

- THE NEW FACE OF EUIPO

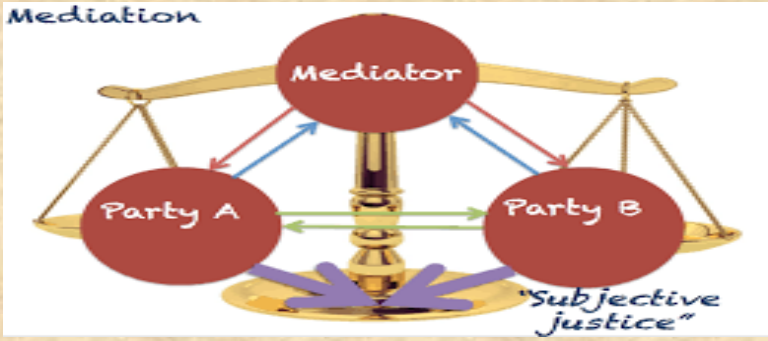
Further, in the context of cooperation, the EUIPO shall propose **common projects** with the aim of **benefiting undertakings** using the trademark systems in Europe. To this end, the EUIPO shall **consult** with the **user representatives**, both in the phase of defining projects and in their ultimate evaluation. It shall also fund such projects.

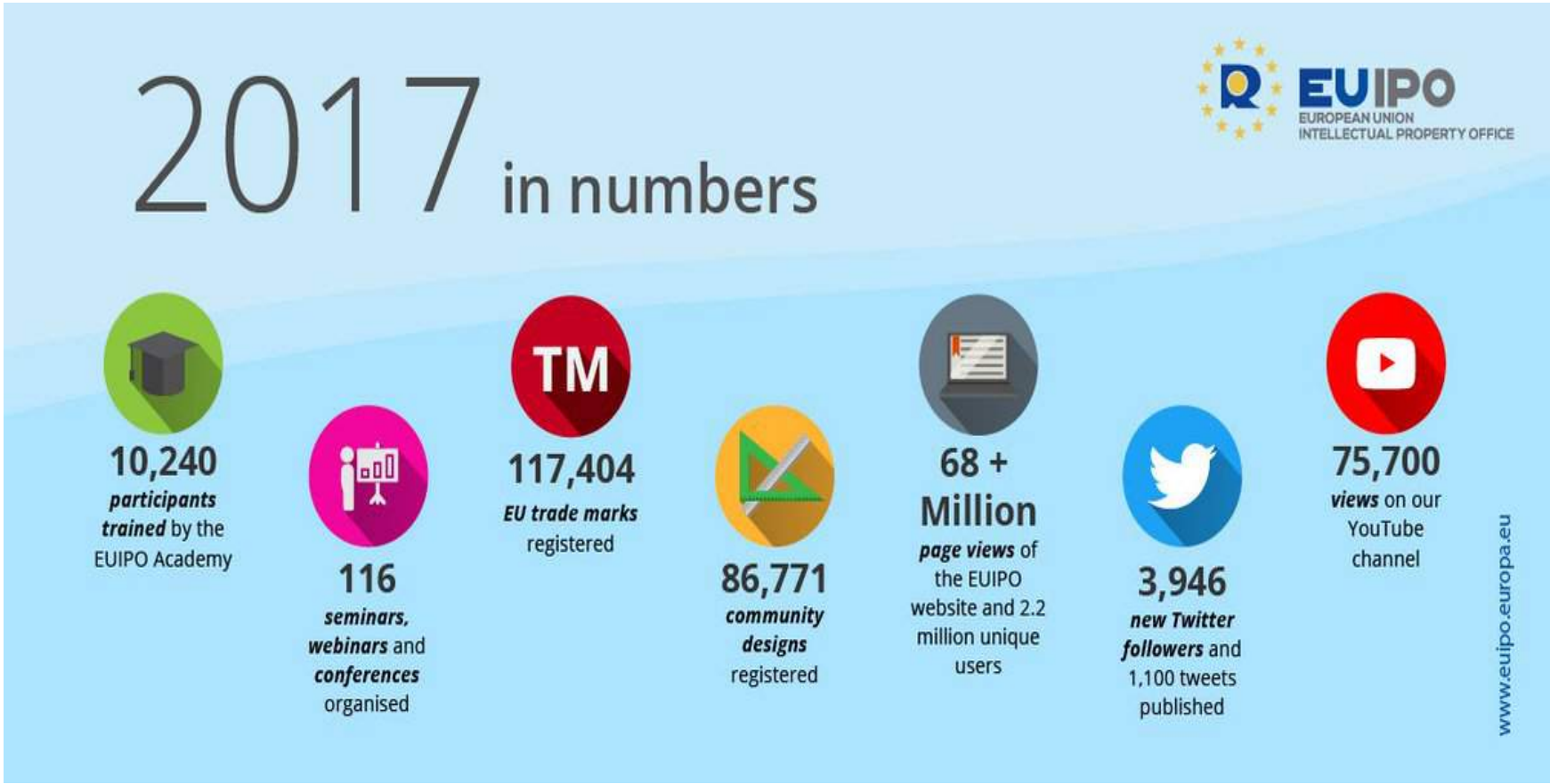
On a different ground, the EUIPO shall **offset** the **costs** faced by the **national IP offices** of the Member States and other relevant authorities in carrying out tasks stemming from the implementation of the EU trademark system (such as opposition and invalidation procedures involving EU trademarks, enforcement activities etc).

Trademarks and Related Rights Package

THE NEW FACE OF EUIPO

The Regulation, what is more, establishes a **mediation centre** at the EUIPO and includes provisions supporting such dispute resolution method. Its function is to allow parties to look for amicable resolutions via mediation to overcome trademark disputes.




2017 in numbers
EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE
10,240
participants trained by the EUIPO Academy
116
seminars, webinars and conferences organised
TM
117,404
EU trade marks registered
86,771
community designs registered
68 + Million
page views of the EUIPO website and 2.2 million unique users
3,946
new Twitter followers and 1,100 tweets published
75,700
views on our YouTube channel
www.euipo.europa.eu

Trademarks and Related Rights Package

- <u>IMPACT ON CLASSIFICATION OF GOODS AND SERVICES</u>

- The EU legislator has expressly recognised the **importance** of the **specification** of trademark registrations for the functioning of the EU and national trademark systems. The new legislation codifies the **CJEU's requirements** (*IP Translator* – C 307/10) according to which: i) all **terms** used in specifications of products have to be **clear** & **precise,** to allow trademark offices courts and traders to be able to determine what is covered; ii) **general indications** from class headings are permissible but include only products covered by their literal meaning. Before, the practice was to consider that full class headings in any given *Nice Classification* covered all products in that class.

Trademarks and Related Rights Package

- IMPACT ON CLASSIFICATION OF GOODS AND SERVICES
- The **reform** basically **requires** EU trademark applicants to **classify** their **products** in accordance with the ***Nice Classification***. As noted earlier, it provides for the chance to **amend** existing EU **trademarks** filed before June 2012, indicating class headings, so as to include those products not covered by the literal meaning of the class heading.

List of Trademark Classes

Trademarks and Related Rights Package

- IMPACT ON CLASSIFICATION OF GOODS AND SERVICES
- The Directive and Regulation then establish that **trademark offices** have to carefully **examine specifications**, and that if the terms indicated are found to be too vague they have to object and (in the absence of appropriate amendments) reject those terms.
- **Classification** has **no impact** on the assessment of the **similarity** of **goods** and **services**. This means that the fact that products are in the same class does not make them similar, and being in different classes does not make them dissimilar.

Trademarks and Related Rights Package

- NEW ADMINISTRATIVE PROCEDURES IN MEMBER STATES

- Administrative procedures for revocation or declaration of invalidity (**cancellation proceedings**) and **opposition proceedings** have been examined in the reform, in light of their key role in the protection of trademarks. They represent the most accessible tools for trademark owners to tackle violations of their exclusive rights.

Trademarks and Related Rights Package

- NEW ADMINISTRATIVE PROCEDURES IN MEMBER STATES

- **Before** the **reform**, and according to the results of the *Max Planck Institute* study (2011), **opposition proceedings** were generally **available** in the EU Member States. Yet, substantial **differences** had been identified in the various **national systems**, in relation to the possible (absolute and relative) grounds of opposition and to the average timing of the proceedings.
- On the other side, in relation to **administrative cancellation proceedings** (for revocation or invalidity), the study highlighted that such proceedings were available in some EU nations but not in others; in the latter, trademark users had to resort to legal actions before national courts in order to have an infringing trademark cancelled.

Trademarks and Related Rights Package

- NEW ADMINISTRATIVE PROCEDURES IN MEMBER STATES

- In the **reform**, the EU legislator has introduced a **mandatory administrative procedure** in all Member States. The Trademark Directive refers to the issue of opposition and cancellation proceedings under **Recital 38** :

> For the purpose of ensuring effective trade mark protection, Member States should make available an efficient administrative opposition procedure, allowing at least the proprietor of earlier trade mark rights and any person authorised under the relevant law to exercise the rights arising from a protected designation of origin or a geographical indication to oppose the registration of a trade mark application. Furthermore, in order to offer efficient means of revoking trademarks or declaring them invalid, Member States should provide for an administrative procedure for revocation or declaration of invalidity within the longer transposition period of seven years, after the entry into force of this Directive.

Trademarks and Related Rights Package

- NEW ADMINISTRATIVE PROCEDURES IN MEMBER STATES

- **Articles 43 and 45** specifically address **opposition** and **cancellation proceedings** :

Article 43

Opposition procedure

1. Member States shall provide for an efficient and expeditious administrative procedure before their offices for opposing the registration of a trade mark application on the grounds provided for in Article 5.

2. The administrative procedure referred to in paragraph 1 of this Article shall at least provide that the proprietor of an earlier trade mark as referred to in Article 5(2) and Article 5(3)(a), and the person authorised under the relevant law to exercise the rights arising from a protected designation of origin or geographical indication as referred to in Article 5(3)(c) shall be entitled to file a notice of opposition. A notice of opposition may be filed on the basis of one or more earlier rights, provided that they all belong to the same proprietor, and on the basis of part or the totality of the goods or services in respect of which the earlier right is protected or applied for, and may be directed against part or the totality of the goods or services in respect of which the contested mark is applied for.

3. The parties shall be granted, at their joint request, a minimum of two months in the opposition proceedings in order to allow for the possibility of a friendly settlement between the opposing party and the applicant.

Article 45

Procedure for revocation or declaration of invalidity

1. Without prejudice to the right of the parties to appeal to the courts, Member States shall provide for an efficient and expeditious administrative procedure before their offices for the revocation or declaration of invalidity of a trade mark.

2. The administrative procedure for revocation shall provide that the trade mark is to be revoked on the grounds provided for in Articles 19 and 20.

3. The administrative procedure for invalidity shall provide that the trade mark is to be declared invalid at least on the following grounds:

(a) the trade mark should not have been registered because it does not comply with the requirements provided for in Article 4;

(b) the trade mark should not have been registered because of the existence of an earlier right within the meaning of Article 5(1) to (3).

4. The administrative procedure shall provide that at least the following are to be entitled to file an application for revocation or for a declaration of invalidity:

(a) in the case of paragraph 2 and paragraph 3(a), any natural or legal person and any group or body set up for the purpose of representing the interests of manufacturers, producers, suppliers of services, traders or consumers, and which, under the terms of the law governing it, has the capacity to sue in its own name and to be sued;

(b) in the case of paragraph 3(b) of this Article, the proprietor of an earlier trade mark as referred to in Article 5(2) and Article 5(3)(a), and the person authorised under the relevant law to exercise the rights arising from a protected designation of origin or geographical indication as referred to in Article 5(3)(c).

5. An application for revocation or for a declaration of invalidity may be directed against a part or the totality of the goods or services in respect of which the contested mark is registered.

6. An application for a declaration of invalidity may be filed on the basis of one or more earlier rights, provided they all belong to the same proprietor.

Trademarks and Related Rights Package

NEW ADMINISTRATIVE PROCEDURES IN MEMBER STATES

Basically, **Article 45** expressly specifies the possible grounds for **cancellation** :

- **lack** of **use** for a period of at least 5 years
- acquired **generic** or **misleading character**
- absolute grounds for **refusal** or **invalidity**
- **conflicts** with earlier **identical** or **similar trademarks**, including trademarks covering goods or services which are not similar to those covered by the earlier trademark, if the earlier sign enjoys a reputation (relative grounds for refusal)

Trademarks and Related Rights Package

- NEW FAIR USE PROVISIONS

- The new **Regulation** (article 12) and the new **Directive** (article 14) both provide then for **new limitations** of the **rights** conferred by a **trademark**. In particular, they deal with the following situations:

  - ► the '**own name defense**'
  - ► the **use** of **descriptive terms**
  - ► **referential use**

'Article 12

Limitation of the effects of an EU trade mark

1. An EU trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade:

(a) the name or address of the third party, where that third party is a natural person;

(b) signs or indications which are not distinctive or which concern the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of the goods or services;

(c) the EU trade mark for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark, in particular, where the use of that trade mark is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts.

2. Paragraph 1 shall only apply where the use made by the third party is in accordance with honest practices in industrial or commercial matters.'.

Trademarks and Related Rights Package

NEW FAIR USE PROVISIONS

► in relation to the '**own name defense**', as included in the previous version of Article 12 (former Regulation), reference was not only to personal names but also to trade names and company names. This meant that Member States in the past have applied the 'fair use' provision also to company names regardless of whether the rights concerning the company name had been established prior to the trademark owner's right. The new Regulation (and the corresponding provision in the new Directive) establishes that the 'own name defense' will be **limited only to personal names or addresses of a natural person**. Such amendment should lead to more legal certainty and harmonization among the Member States.

Trademarks and Related Rights Package

NEW FAIR USE PROVISIONS

► in relation to the second fair use situation, the new **text** is **no longer limited** to the use of **descriptive terms**; it also covers **non-distinctive signs**. This amendment mirrors the principle included in Article 7 of the new Regulation, which establishes that not only will descriptive terms be denied registration, but also trademarks which do not have any distinctive character (grounds for refusal of an application).

► in the new amended version, the Regulation finally refers to the allowed **use** of a **trademark** for the purpose of **identification** of or **reference** to the trademark owner's own goods and services (so-called **referential use**).

Trademarks and Related Rights Package

NEW FAIR USE PROVISIONS

► interestingly, the final version of Article 12 of the new Regulation did not eventually include the proposal of the EU Parliament to also justify the '**fair use defense**' in case of use for the purpose of **parody**. This means that such uses continue to constitute a trademark **infringement**, even if the defendant claims this to be a joke (in Recital 21, it is noted that use of a trademark by third parties for the purpose of **artistic expression** is seen as fair as long as it is under honest practices in commercial & industrial matters).

Trademarks and Related Rights Package

- <u>IMPLICATIONS FOR NON-TRADITIONAL MARKS</u>
- For what concerns the **registration of non-traditional marks** (*e.g.*, shapes, colours, sounds, scents), the relevant provisions of the trademark reform are those included in **Articles 4** & **7(1)(e)** of the Regulation, and **Articles 3** & **4(1)(e)** of the Directive.
- Some of the amended articles may raise **obstacles** to the registration of applications and may become a ground for **invalidation** of registrations for other types of marks.

Non-traditional Trademark Matrix

Sound Marks	Taste Marks	Touch Marks	Smell Marks	Holograms	Motion Marks	3D Marks	Single Colors	Color Combinations	Trade Dress

IPIC


TASTE
HEARING
SMELL
TOUCH
VISION

Trademarks and Related Rights Package

- IMPLICATIONS FOR NON-TRADITIONAL MARKS
- First, the reform has removed the **requirement** for **graphic representation** when registering a trademark – signs can now be represented in any appropriate form, using generally available technology. Under the new Regulation (art. 4) & Directive (art. 3):

Signs of which a trade mark may consist

A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

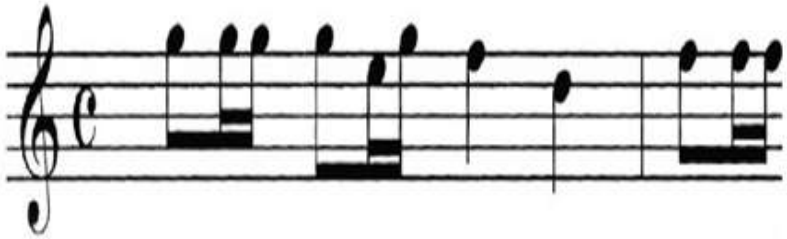
(a) distinguishing the goods or services of one undertaking from those of other undertakings; and

(b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

Trademarks and Related Rights Package

- <u>IMPLICATIONS FOR NON-TRADITIONAL MARKS</u>
- Such a **change** could be **positive** for **non-traditional marks holders**, as it allows the registration of marks that could not be previously registered. From this standpoint, the new legislation should boost the number of applications for non-traditional marks.
- The new legislation (Recital 13 of the Directive and Recital 9 of the Regulation) also provides that the **representation** has to be **'clear, precise, self-contained, easily accessible, intelligible, durable and objective'.** This definition may in theory give rise to **uncertainty** and **litigation** about whether a mark meets such conditions. Consequently, trademark searches and examination by trademark offices could possibly last longer and be more complex.

(Sole Color) (Combination of Colors)



Trademarks and Related Rights Package

IMPLICATIONS FOR NON-TRADITIONAL MARKS

In relation to the **absolute grounds for refusal**, the **previous version** of Article 7(1)(e) of the **Regulation** established that:

'*The following shall not be registered :*

……

(e) signs which consist exclusively of :

i. the shape which results from the nature of the goods themselves

ii. the shape of goods which is necessary to obtain a technical result

iii. the shape which gives substantial value to the goods'

Trademarks and Related Rights Package

- IMPLICATIONS FOR NON-TRADITIONAL MARKS
- The **rational** of such provision (and of the corresponding Article 3(1)(e) of the former Directive) was to **prevent** trademark **protection** from granting its proprietor a monopoly on **technical solutions** or **functional characteristics** of a product which a user is likely to seek in the products of competitors.
- In other words, the aim was to prevent the protection conferred by trademark right from being extended beyond signs which serve to distinguish a product from those offered by competitors, so as to form an **obstacle preventing competitors** from freely offering products incorporating such technical solutions or functional characteristics in competition with the trademark owner (CJEU - Case C 299/99 *Philips v Remington*).

Trademarks and Related Rights Package

IMPLICATIONS FOR NON-TRADITIONAL MARKS

In the **new version**, **Article 7(1)(e)** of the **Regulation** reads as follows :

'*The following shall not be registered :*

……

(e) signs which consist exclusively of :

i. the shape, or another characteristic, which results from the nature of the goods themselves

ii. the shape, or another characteristic, of goods which is necessary to obtain a technical result

iii. the shape, or another characteristic, which gives substantial value to the goods'

Trademarks and Related Rights Package

IMPLICATIONS FOR NON-TRADITIONAL MARKS

Basically, the lawmaker decided to **extend** the permanent **exclusion clauses** in Article 7(1)(e) from the signs consisting exclusively of the shape of the goods **to other types of signs**. In order to do so, the words 'or **another characteristic**' were added.

The **amendment** was considered necessary to **counterbalance** the **removal** of the **graphical representation requirement** from the definition of a trademark in Article 4 of the Regulation. Put differently, as the removal of the graphic representation requirement permitted the expansion of types of marks that could be registered, the grounds for refusal should also be extended.

Trademarks and Related Rights Package

CERTIFICATION MARKS

The EU trademark reform, what is more, covers **certification marks**, which are a new type of trademark at EU level (though they already exist in some national IP system).

Certification marks allow a certifying institution or organization to permit adherents to the certification system to use the mark as a sign for goods or services **complying** with the **certification requirements**.

Trademarks and Related Rights Package

CERTIFICATION MARKS

- ► an **EU certification mark** usually concerns the **guarantee of specific characteristics** of certain products (material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics).

- ► in brief, such a mark indicates that the products bearing the certification mark **comply** with a **given standard set** out in the regulations of use and controlled under the responsibility of the certification mark owner.

Certification Marks

Trademarks and Related Rights Package

- <u>COUNTERFEIT GOODS IN TRANSIT</u>
- Another relevant aspect concerns the **transit of counterfeit goods** through multiple jurisdictions, which is a **growing phenomenon** requiring a **proper balance** between: on the one hand, allowing right holders to **enforce** their **rights**; on the other, enforcing the applicable law in a manner that does **not disrupt** legitimate **transit trade**.

Trademarks and Related Rights Package

- COUNTERFEIT GOODS IN TRANSIT

- **Before** the **reform**, the rule was that **goods** in transit could be **detained** (or the related release suspended) whenever custom offices had **suspicions** that such goods might in fact be **destined** for the European Union **market**. Suspicions could, for instance, be grounded on the fact that the consignor could not be identified or that the shipper was disguising commercial intentions (Court of Justice of the EU, Case C-495/09 *Nokia*).

- In brief, **counterfeit goods** could be **detained** by customs only if there was a **risk** that they could **enter** the European Union **market**. Otherwise, they had to be released.


Top Counterfeit Brands
The top 10 brands counterfeited
LACOSTE
Reebok
adidas
Microsoft
SONY

Trademarks and Related Rights Package

- COUNTERFEIT GOODS IN TRANSIT
- In the context of the launch of the 2015 EU trademark reform (new regulation and new directive), the **EU institutions announced** that :
- '*……the reform will improve conditions for businesses*
- *to innovate and to benefit from more effective trademark*
- *protection against counterfeits, including non-authentic*
- *goods in transit through the EU ' s territory '.*

Trademarks and Related Rights Package

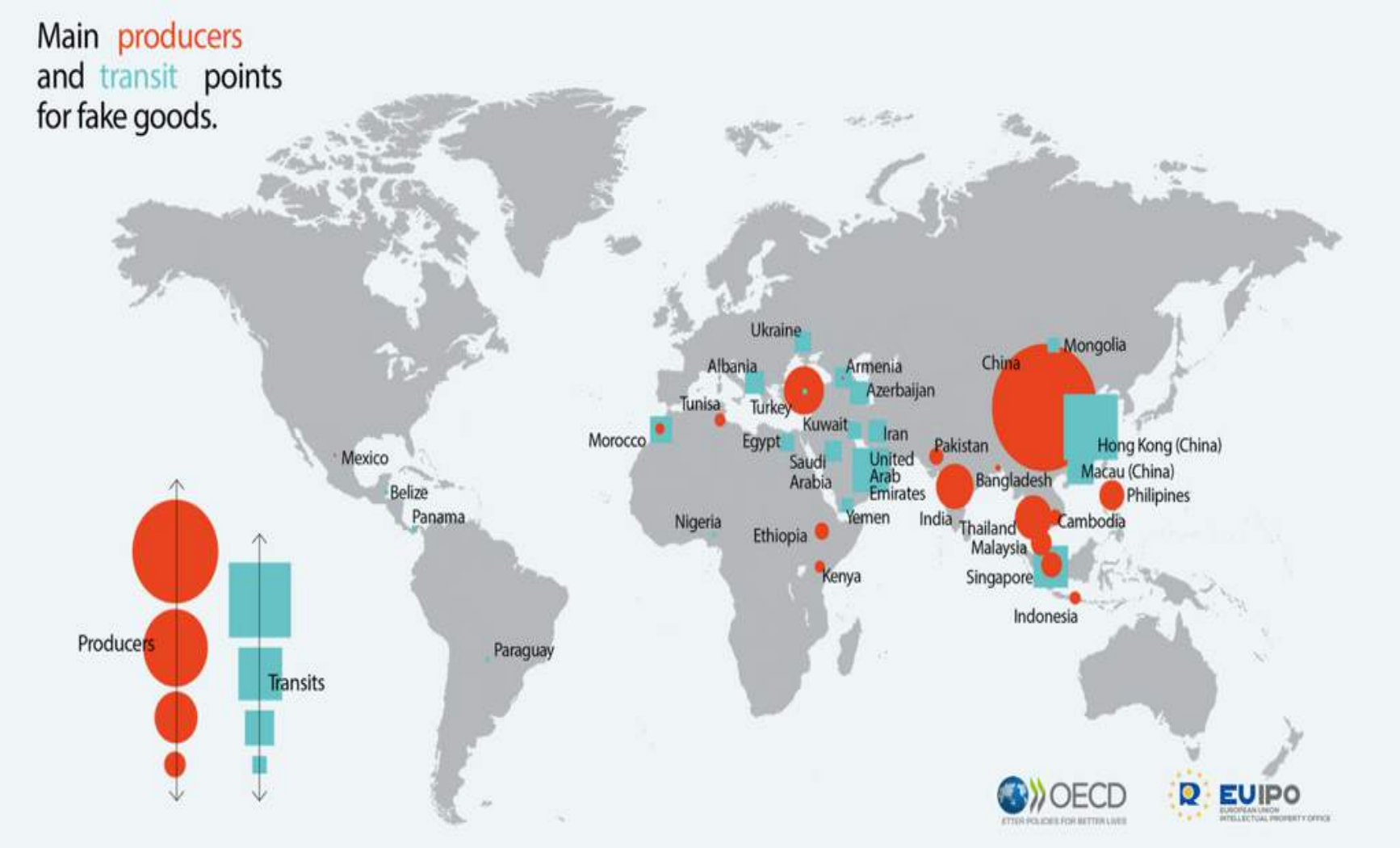
- <u>COUNTERFEIT GOODS IN TRANSIT</u>
- Notably, the (2015) **substantive trademark legislation** – in combination with the new **EU Customs Regulation** adopted in 2013 – has **expanded** the EU national **customs'** power to **stop counterfeit goods** in **transit** in the **Union territory**.

Trademarks and Related Rights Package

- <u>COUNTERFEIT GOODS IN TRANSIT</u>
- The reform extends the **rights** of the **proprietor** of a **EU trademark** registered at EU level or of a **national trademark** registered at Member State level to **prevent** third parties from **bringing** – in the course of trade, **into the Union** without being released for free circulation, **goods** coming from **third countries** and bearing without authorization a **trademark** which is **identical** with the trademark registered with respect to such goods or which cannot be distinguished in its essential aspects from that trademark, even if the goods are not intended to be placed on the EU market.
- (SEE RECITAL 15 OF THE REGULATION 2015/2424 & RECITAL 21 OF THE DIRECTIVE 2015/2436)

Trademarks and Related Rights Package

- <u>COUNTERFEIT GOODS IN TRANSIT</u>
- In order to ensure the **free flow of legitimate trade**, the mentioned **rights** of the owner of the EU or national registered trademark **shall lapse** if, during the proceedings initiated to determine whether the registered trademark has been infringed, **evidence** is provided by the declarant or the holder of the goods that the **proprietor** of the registered trademark is **not entitled** to **prohibit** the placing of the goods on the market in the country of final destination.
- ► see also the **EU Commission Guidelines (2016)** to EU national customs on the implementation of the relevant provisions in the new trademark legislation


Main producers
and transit points
for fake goods.
Ukraine
Albania
Armenia
Azerbaijan
Tunisa
Turkey
Kuwait
Morocco
Egypt
Iran
Pakistan
Saudi
Arabia
United
Arab
Emirates
Mexico
Belize
Panama
Nigeria
Ethiopia
Yemen
India
Kenya
Paraguay
China
Mongolia
Hong Kong (China)
Macau (China)
Philipines
Bangladesh
Thailand
Cambodia
Malaysia
Singapore
Indonesia
Producers
Transits
OECD
EUIPO

- what is the ‘fair use’ provision about ?
- can non-traditional marks be registered as trademarks ?
- what does the EU reform say about counterfeit goods ?

Trademarks and Related Rights Package

SUGGESTED READINGS

- EU Parliament and Council of the EU, Directive n. 2015/2436 to approximate the laws of the Member States relating to trademarks, [2015] O.J. L 336
- EU Parliament and Council of the EU, Regulation n. 2015/2424 on the Community trademark, [2015] O.J. L 341
- EU Commission, 'Modernization of the EU trademark system', (2013) MEMO/13/291

MODULE II

SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS

(*Lecture XI*)

European Patent with Unitary Effect

- PATENTS AND INNOVATION

- **Patents** are an **essential** instrument to encourage investments in **innovation** and boost its dissemination. They represent an incentive for undertakings to devote substantial resources in **research and development** (R&D).

- In order to promote innovation in the Union, the EU Commission is constantly monitoring the **need** for **patent-related laws** and is working to introduce an efficient **uniform patent protection system**, where patent exploitation is also enhanced.

European Patent with Unitary Effect

PATENTS AND INNOVATION

The **Innovation Union Communication** (2010) promoted *inter alia* the economic exploitation of IPRs. In one Staff Working Document, the Commission examined the main **obstacles** that (SMEs) companies in the Union face in the **exploitation** of the so-called '**dormant patents**' – patents unutilised by the owners, thus not valuable to them. In this scenario, it identified options for making better use of dormant patents & ultimately enhance patent valorisation.

European Patent with Unitary Effect

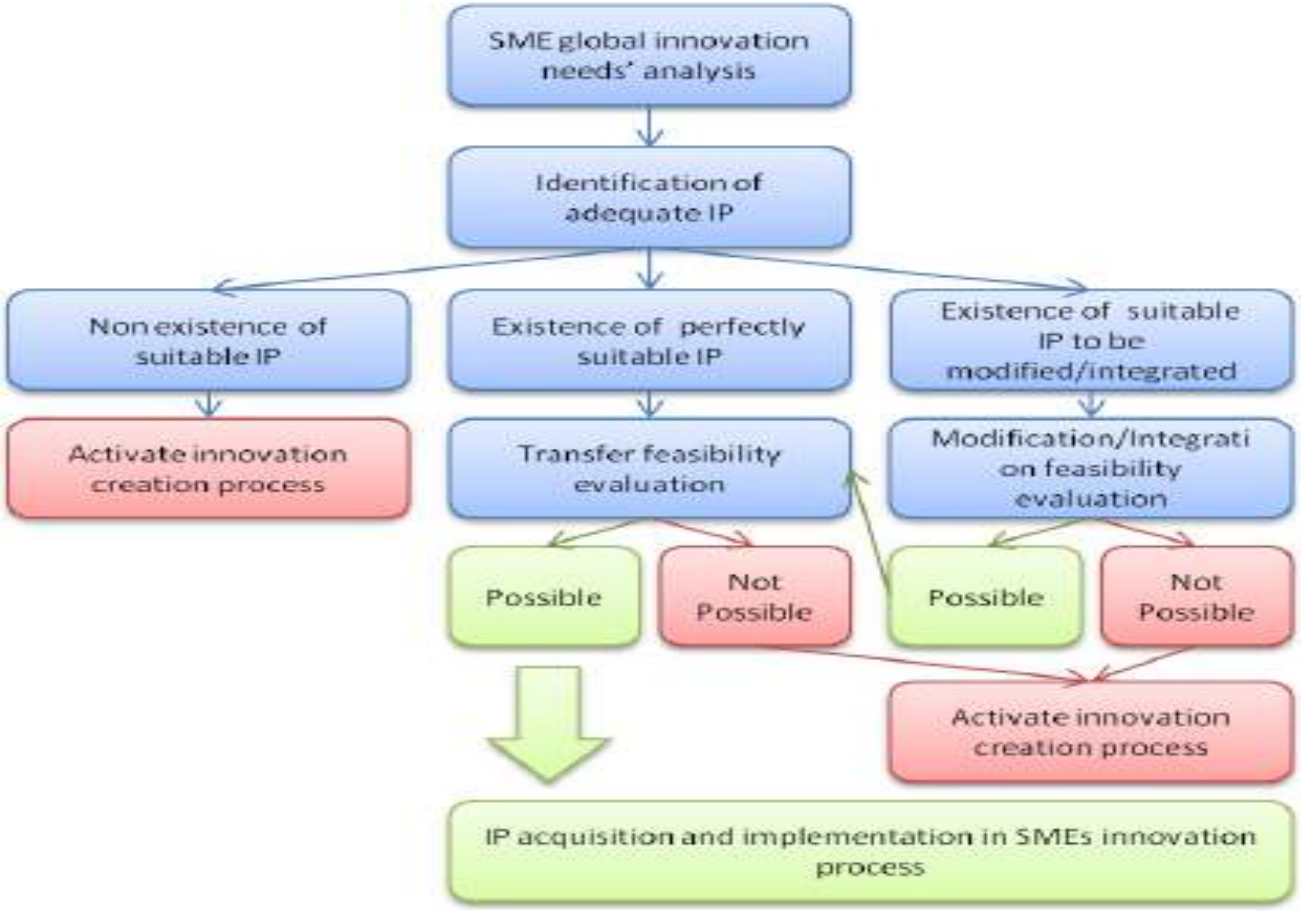
- PATENTS AND INNOVATION

- On a further ground, in a project titled '*Exploitation of IP for industrial innovation*' (2015), the EU Commission tested the **design** of a **policy instrument promoting** the **development** of new **business** based upon **external IPRs acquisition**, including unused (*i.e.*, dormant) patented inventions. The outcome of the project showed that a policy instrument can be effectively developed to increase the acquisition and use of external (third parties') IPRs by SMEs, focusing on awareness and transaction costs.

IPI

Exploitation of IP for Industrial Innovation

Exploitation of IP for industrial innovation



European Patent with Unitary Effect

- <u>WHAT IS A PATENT ?</u>
- A patent can be defined as a legal title or **exclusive right** granted for the **protection** of **inventions** (products or processes) offering a **new technical solution** or facilitating a **new way** of doing something – a patent can cover how things work, what they do, what they are made of and how they are made; anyone can apply for a patent.
- ► the owner of the patent benefits from the exclusive right to **prevent** third parties from commercially **exploiting** his **invention** for an established period of time; in return, the owner must **disclose** the **invention** to the **public** in the patent application.

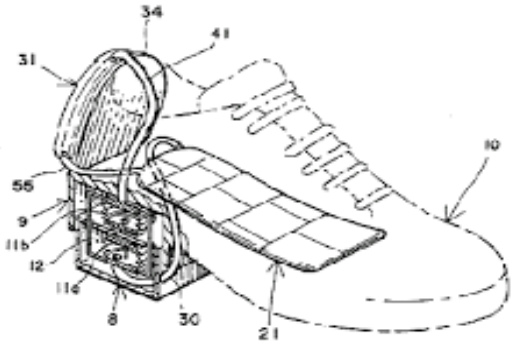

34
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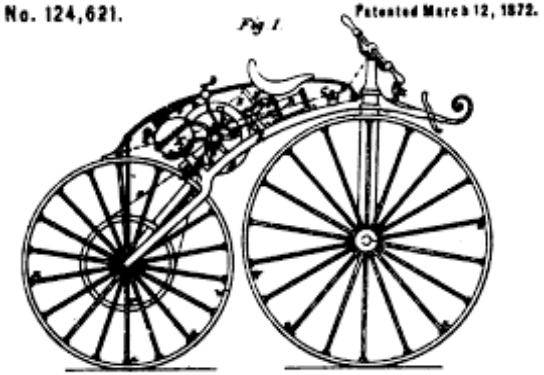
FIG. 2


No. 124,621.
Fig 1.
Patented March 12, 1872.

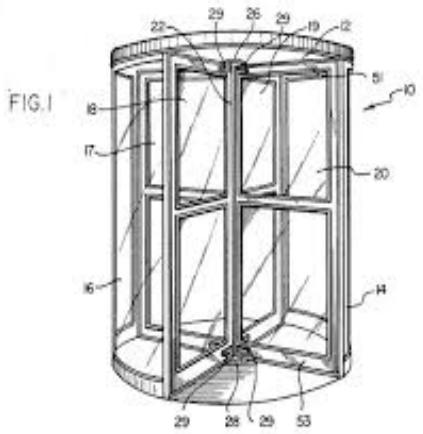


FIG. 1
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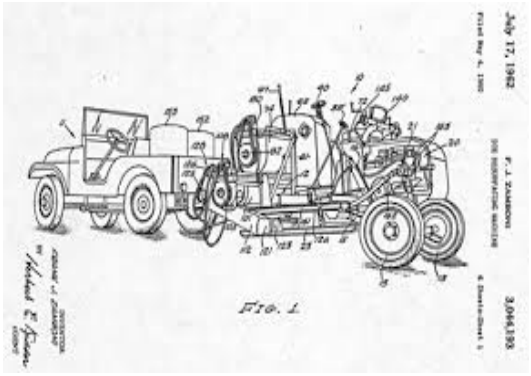
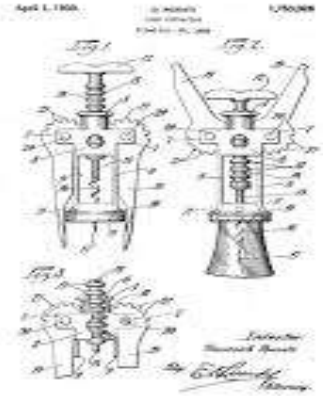
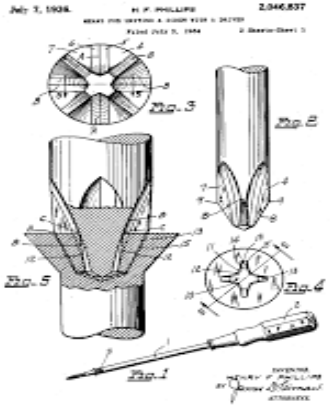

July 17, 1962
3,044,193
FIG. 1




2,046,837
FIG. 3
FIG. 2
FIG. 5
FIG. 4
FIG. 1

European Patent with Unitary Effect

REQUIREMENTS TO REGISTER A PATENT

In order to **register** a **patent**, the following **requirements** are usually **necessary**:

- ***NOVELTY***
- ***INVENTIVE STEP***
- ***INDUSTRIAL APPLICATION***

European Patent with Unitary Effect

REQUIREMENTS TO REGISTER A PATENT

► under the **novelty** requirement, the invention must be new in comparison to the existing knowledge in the relevant technical field - in other words, it must not be part of the state of the art.

► as to the **inventive step**, the invention must be non-obvious; *i.e.*, it cannot be deduced easily by a person with average knowledge in the relevant technical field.

► finally, the invention must be capable of **industrial application -** this simply means that it can be made or used in any kind of industry.


PATENTED

European Patent with Unitary Effect

- AVAILABLE ROUTES FOR PATENT PROTECTION

- The **registration** of a **patent** can be sought at **three different levels**: national, regional (*e.g.*, EU), and international. Depending on the territories where a firm intends to exploit a patent, the choice of registration may consequently vary.

European Patent with Unitary Effect

AVAILABLE ROUTES FOR PATENT PROTECTION

- First, a patent may be registered at **national level**, at a national IP office. Legal **protection** is obtained only in the **national territory** where the patent is **registered**. Any issue about ownership validity infringement will be tackled by the national court.

European Patent with Unitary Effect

AVAILABLE ROUTES FOR PATENT PROTECTION

■ Secondly, a (regional) **European patent** can be obtained by filing a single application with the **European Patent Office (EPO)** in one of its official languages (English, French, German) or with a **national patent office** of a contracting state**.** Such a registration can be obtained for all the **European Patent Convention - EPC** contracting states (*i.e.*, 38 countries). However, the **registration** is **governed** by the **national laws** in each respective territory. Therefore, a European patent eventually amounts to a **bundle of national patents**, and to be effective it has to be **validated** at the **national offices** of the countries which the applicant has selected.

European Patent with Unitary Effect

- AVAILABLE ROUTES FOR PATENT PROTECTION
- […] In other words, a **European patent is not a unitary right** and differs from the so-called 'European patent with unitary effects'; it remains a **national patent subject to national rules,** and it is **enforced** at **national level.** Only some **procedures** are **centralised** under the European Patent Convention, such as the **opposition procedure** which allows third parties to challenge the validity of a patent.
- Further, decisions of the **EPO Board of Appeals** do not bind the national courts; the latter usually have exclusive jurisdictions on validity and infringement issues after a European patent has been granted (except during the 9 months opposition period).

Getting patents – the European Patent Convention

EN / FR / DE

European Patent Office – The EPC 1973 (revised 2000)

EPO Search

EPO Publication

Examination

Grant Publication

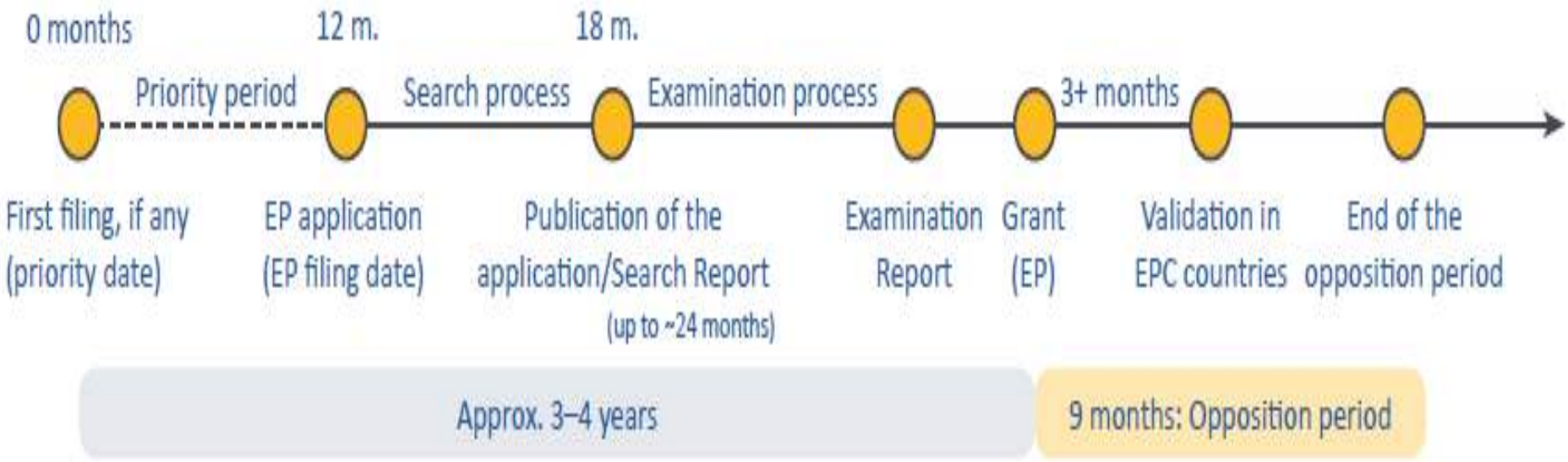
A "bundle" of national rights to be licensed or litigated separately in each member state. Applicant pays for as many states as needed.

Opposition (9 months)

File translations

Validated nationally

What happens after filing of an EP application?



European Patent with Unitary Effect

AVAILABLE ROUTES FOR PATENT PROTECTION

- Third, a patent can be registered at the **international level**, according to the **Patent Cooperation Treaty** (**PCT**) system. This is administered by the World Intellectual Property Organization, and allows users to obtain patent **protection** in **more than 150 countries** by filing a single application in one language & paying a single set of fees.

Applications can be **filed** either through national IP offices, or directly with the WIPO. As a **condition**, the applicant must be a national or resident of a PCT contracting country. A PCT application, what is more, can be filed directly or within the 12 months period from the filing date of a prior application for the same invention.

European Patent with Unitary Effect

- AVAILABLE ROUTES FOR PATENT PROTECTION

- […] On a different additional note, nationals or residents of a country which is party to the **European Patent Convention** may also file their **PCT application** through the European Patent Office (EPO), if permitted by their national laws.

- Although the application has an international character, national laws govern the registration in each territory. Also in this case, hence, the applicant will get a **bundle of national patents** to be **validated** at the national or regional IP offices. This means that PCT applications involve two distinct phases, the international and national ones.

What happens in the international phase of a PCT application?

European Patent with Unitary Effect

- SCOPE OF PATENT PROTECTION

- The exclusive right conferred by a patent allows the patent holder to **prevent others** from making, using, offering for sale, selling or importing a **product** or a **process based** on the patented **invention**, without the prior authorization of the holder.

- On a further ground, the patent holder may allow others to **use** the **invention** on mutually agreed terms, on the basis of a **patent licensing agreement**. The holder may also **sell** the **patent** to someone else, who will then become the new patent owner.

European Patent with Unitary Effect

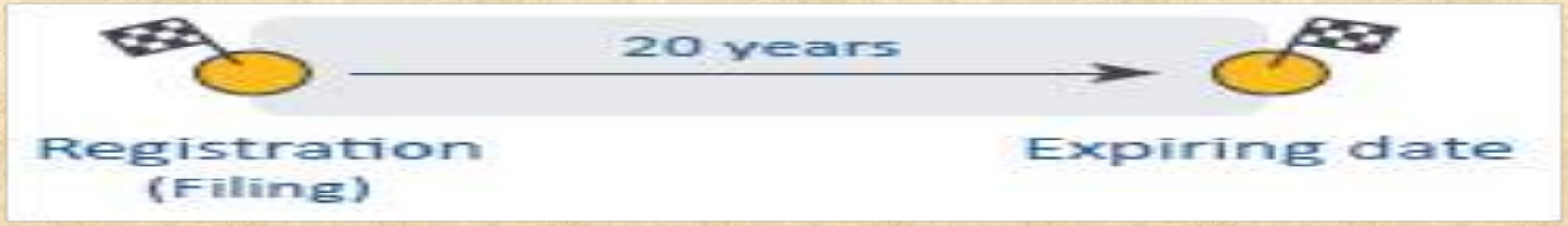
- <u>SCOPE OF PATENT PROTECTION</u>

- Patents are **territorial in nature**. Thus, patent rights are granted and enforceable within the geographical boundaries of the country or region where they are registered.

European Patent with Unitary Effect

- SCOPE OF PATENT PROTECTION

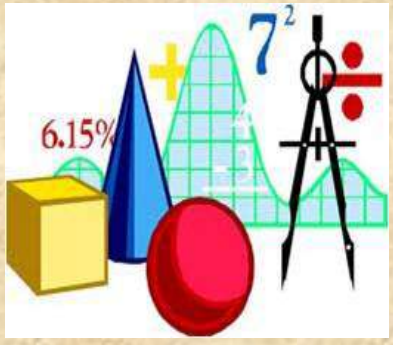
- As to the **duration**, patent protection is usually limited in time. In most countries, it lasts for **20 years** from the date of filing of the patent application. After the **expiration** of the patent, the **protection ends;** this basically means that anyone can commercially exploit the invention without any risk of infringement.



European Patent with Unitary Effect

(GENERALLY) NON-PATENTABLE ITEMS :

- *scientific theories*
- *aesthetic creations*
- *mathematical methods*
- *discoveries of natural substances*
- *commercial methods*
- *methods for medical treatment*
- *plant or animal varieties*
- *inventions contrary to morality/public order*



European Patent with Unitary Effect

PATENTS AND COMPUTER PROGRAMS

Generally, the **patentability** of **software** must be **excluded**, though there is still debate on the matter. A computer program as such cannot usually be considered as a patentable invention. A patent could be granted, under specific circumstances, for a **computer-implemented invention**, where a technical problem is solved in a novel & non-obvious manner. Computer programs may in theory receive **copyright protection**, if they comply with the requirements needed to receive such protection.

European Patent with Unitary Effect

PATENTS AND UTILITY MODELS

A **utility model**, also known as 'petty patent', is an **exclusive right** granted for an invention, which allows its holder to prevent others from commercially using the protected invention without their permission, for a limited period of time.

► utility models can be granted at **national levels only**; they are territorial in nature, so protection (in the EU, between 7 and 10 years) is limited to the country of registration - there is no European or international utility model.

► usually, for an utility model to be granted, **novelty** and **inventive steps** are necessary; however, **conditions may vary** according to the national legislation.

Utility model
Handle shape
Sunblock cover
Design of the car frame (low air resistance)
etc.

Patent
Engine structure
Features of the breaks
Manufacture method of the reinforced glass

Trademarks
Car's brand name
Emblem, etc.

Design
Design of the body (esthetics)
Design of the wheels groove, etc.

European Patent with Unitary Effect

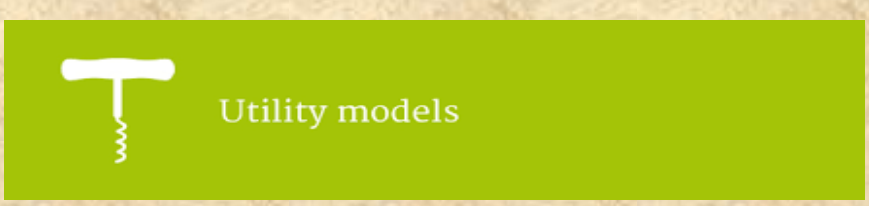
PATENTS AND UTILITY MODELS

The main **differences** between **patents** and **utility models** are the following:

- **requirements** for **utility models** are **less stringent** than those for patents; novelty is always to be met, but the requirement of inventive step is much lower – therefore, protection for utility models is often sought for inventions with a limited inventive step, which may fail under the patentability criteria.
- **term of protection** is **lower** for **utility models** than for patents, and varies from country to country (usually 7-10 years, without possibility to extend or renew).
- **fees** are generally lower for obtaining and maintaining a **utility model.**

European Patent with Unitary Effect

- PATENTS AND UTILITY MODELS
- Depending on the legislation of the countries, it may be possible to **convert** a **patent application into a utility model application**, and vice versa.
- Usually, conversion is requested when the patent application is refused by the relevant IP office for failure to meet the necessary requirements, and the applicant decides to convert the patent application into a utility model application.



- in which way do patents have an impact on innovation ?
- what are the possible routes of registration ?
- how do we distinguish patents from utility models ?

European Patent with Unitary Effect

SUGGESTED READINGS

- EU Commission (IPR Helpdesk), *Your Guide to IP in Europe* (2017)
- EU Commission (IPR Helpdesk), *IPR Chart - European Patent* (2018)
- EU Commission (IPR Helpdesk), *IPR Chart - International Patent Application* (2018)
- European Parliament (Research Service), 'EU Innovation Policy - Part II' (2016)

MODULE II

SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS

(*Lectures XII and XIII*)

European Patent with Unitary Effect

- EARLY PROJECTS FOR A EUROPEAN PATENT
- The **first projects** for a **European patent** date back to the **'60s**, when both the Commission and the Parliament suggested that the creation of a European patent should be pursued as soon as possible. However, it was also thought that such an **initiative** could not be implemented at Community level as the Community did not have specific competence over the matter, and that it should consequently be pursued **outside** of the **EC legal framework**.

European Patent with Unitary Effect

- EARLY PROJECTS FOR A EUROPEAN PATENT

- This eventually led to the signature of the **European Patent Convention - EPC (1973)**. Such convention has established a single procedure for the granting of patents, either by applying at the European Patent Office or directly at a national patent office of a contracting state. Yet, as mentioned before, a **European patent is not a unitary right**; it remains a **national patent subject to national rules**.

European Patent with Unitary Effect

EARLY PROJECTS FOR A EUROPEAN PATENT

The many **steps** made in the **development** of a unitary **European patent** included:

► the signature of a **Convention on the Community Patent** in **1975**; however, not all Member States ratified it, so it never entered into force (due to issues related to the costs of translating patents in all EC languages, and to the uncertainties related to the judicial system for litigation)

► a **Green Paper on the Community Patent** and the patent system in Europe published by the Commission in **1997**; the document suggested the adoption of a Community regulation to develop an effective European patent system

European Patent with Unitary Effect

EARLY PROJECTS FOR A EUROPEAN PATENT

► a **Proposal** for a **Regulation on the Community Patent** adopted in **2000** by the Commission; despite the support of the Parliament, it was rejected at Council level

► a **Public Consultation on the future of patent policy in Europe**, launched by the Commission in **2006**, interpreting the Community patent as a symbol of the Union's commitment to a knowledge and innovation-driven economy

► a **Communication on the patent system in Europe** (**2007**), published by the Commission in order to revitalize the debate on the patent system in a way which encourages Member States to work towards consensus and progress on the issue

European Patent with Unitary Effect

- EARLY PROJECTS FOR A EUROPEAN PATENT

- ► a **new Proposal** for a **Regulation on the Community Patent**, and a **Draft Agreement on the EU Patent Court**, adopted in **2008** by the Council of the EU

- ► an **Impact Assessment** accompanying the reform proposal and prepared by the Commission (2011), which looked into the **problems** related to the **post-grant stage** of patent protection (*e.g*, high costs of translating and publishing patents, costs of renewal of patents, administrative complexity of registering transfers and licenses). *Inter alia*, the impact assessment highlighted the **key role of patents**, which are essential to **innovate** and consequently **boost economic growth**

European Patent with Unitary Effect

EARLY PROJECTS FOR A EUROPEAN PATENT

► a **Regulation of the Parliament and of the Council (2012)** implementing **enhanced cooperation** in the area of the creation of unitary patent protection

(enhanced cooperation is a path granted by EU Treaty to permit the achievement of certain objectives in those circumstances where it would be difficult to involve all the Union states; it requires at least 9 Member States to participate in it - cooperation in the field of unitary patent protection has been supported by 26 countries, excepted Spain and Croatia)

► the **Agreement on a Unified Patent Court (2013)**, introducing a single and specialised patent jurisdiction (the process of ratification is still ongoing)

European Patent with Unitary Effect

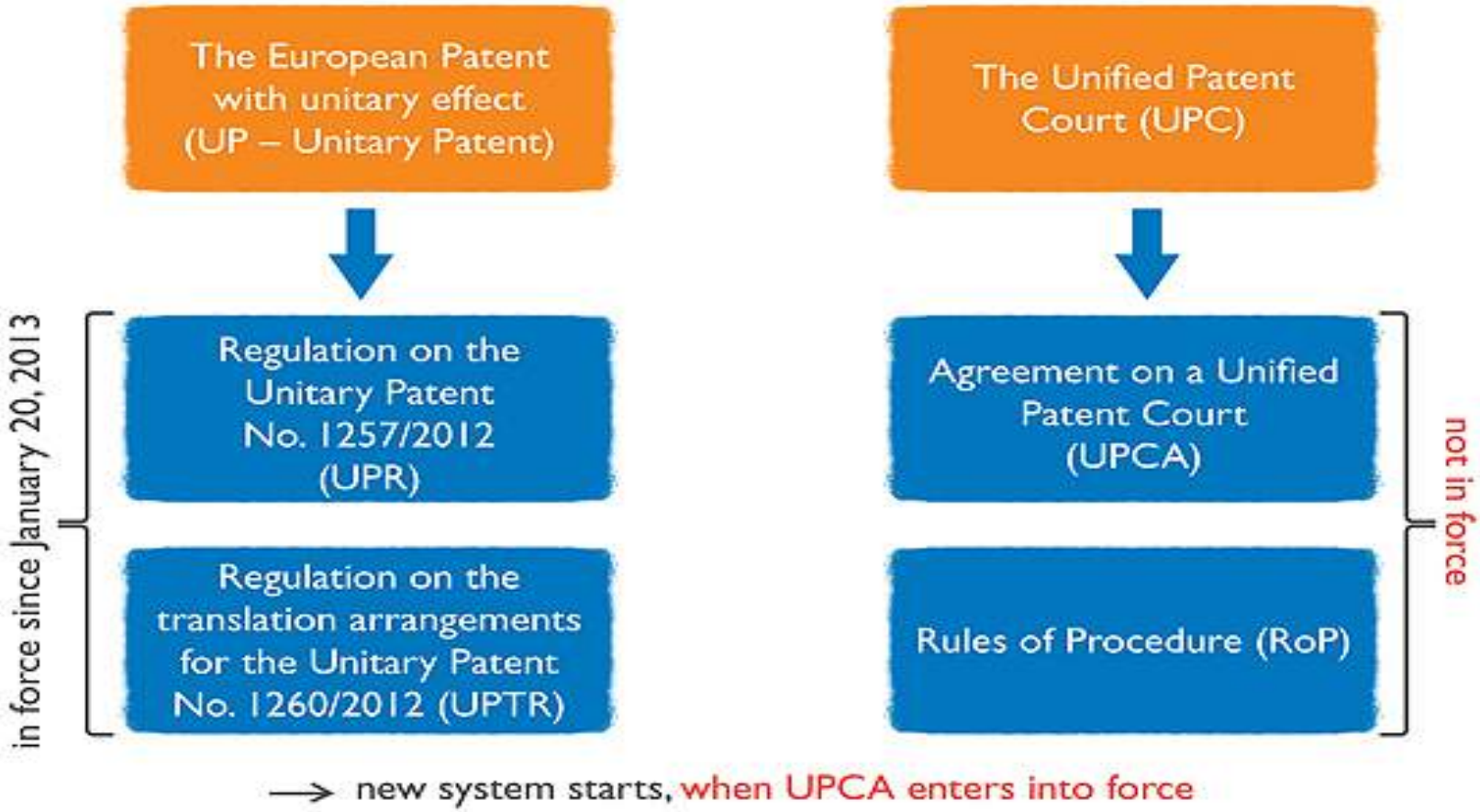
UNITARY PATENT REGIME AND INNOVATION

"The purpose of unitary patent protection is to make innovation cheaper and easier for businesses and inventors everywhere in Europe. It will mean a big reduction in terms of costs and red tape, and provide a stimulus for European innovation. It will be accessible for all companies in the EU, no matter where they are based. It is my deeply held conviction that there is no sustainable economic growth without ***innovation****. And no innovation without efficient intellectual property protection". (Bruxelles, 2011)*

INTERNAL MARKET & SERVICES COMMISSIONER - MICHEL BARNIER

European Patent with Unitary Effect

- UNITARY PATENT REGIME - THE PACKAGE
- In brief, the crucial steps in the development of a **unitary patent protection** in the Union were made in **2012-2013**, when almost all EU countries and EU Parliament agreed on the '**patent package**'. Such legislative initiative included the cited:
  - **Regulation** n. 1257/2012 creating a **European patent with unitary effect**
  - **Regulation** n. 1260/2012 establishing a **language regime** for the unitary patents
  - **Agreement** between EU countries to set up a **Unified Patent Court**


The European Patent with unitary effect (UP – Unitary Patent)
The Unified Patent Court (UPC)
Regulation on the Unitary Patent No. 1257/2012 (UPR)
Agreement on a Unified Patent Court (UPCA)
Regulation on the translation arrangements for the Unitary Patent No. 1260/2012 (UPTR)
Rules of Procedure (RoP)
in force since January 20, 2013
not in force
→ new system starts, when UPCA enters into force

European Patent with Unitary Effect

UNITARY PATENT REGIME - EFFECTS

Under the **unitary patent regime**, it will be possible to obtain a **patent** with **unitary effect** (Reg. 1257/2012), *i.e.* a legal title that will provide **uniform protection** in up to **26 EU countries** on a one-stop-shop basis. Benefits of such a system will include **substantial cost advantages** and reduced administrative burdens. Under the new system, a **Unified Patent Court** will be set, offering a single specialised patent jurisdiction.


lower costs
simplified procedures
Unitary Patent
26 EU member states
Unified Patent Court

Article 1

Subject matter

1. This Regulation implements enhanced cooperation in the area of the creation of unitary patent protection, authorised by Decision 2011/167/EU.

2. This Regulation constitutes a special agreement within the meaning of Article 142 of the Convention on the Grant of European Patents of 5 October 1973, as revised on 17 December 1991 and on 29 November 2000 (hereinafter 'EPC').

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(a) 'Participating Member State' means a Member State which participates in enhanced cooperation in the area of the creation of unitary patent protection by virtue of Decision 2011/167/EU, or by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) of the TFEU, at the time the request for unitary effect as referred to in Article 9 is made;

(b) 'European patent' means a patent granted by the European Patent Office (hereinafter 'EPO') under the rules and procedures laid down in the EPC;

(c) 'European patent with unitary effect' means a European patent which benefits from unitary effect in the participating Member States by virtue of this Regulation;

(d) 'European Patent Register' means the register kept by the EPO under Article 127 of the EPC;

(e) 'Register for unitary patent protection' means the register constituting part of the European Patent Register in which the unitary effect and any limitation, licence, transfer, revocation or lapse of a European patent with unitary effect are registered;

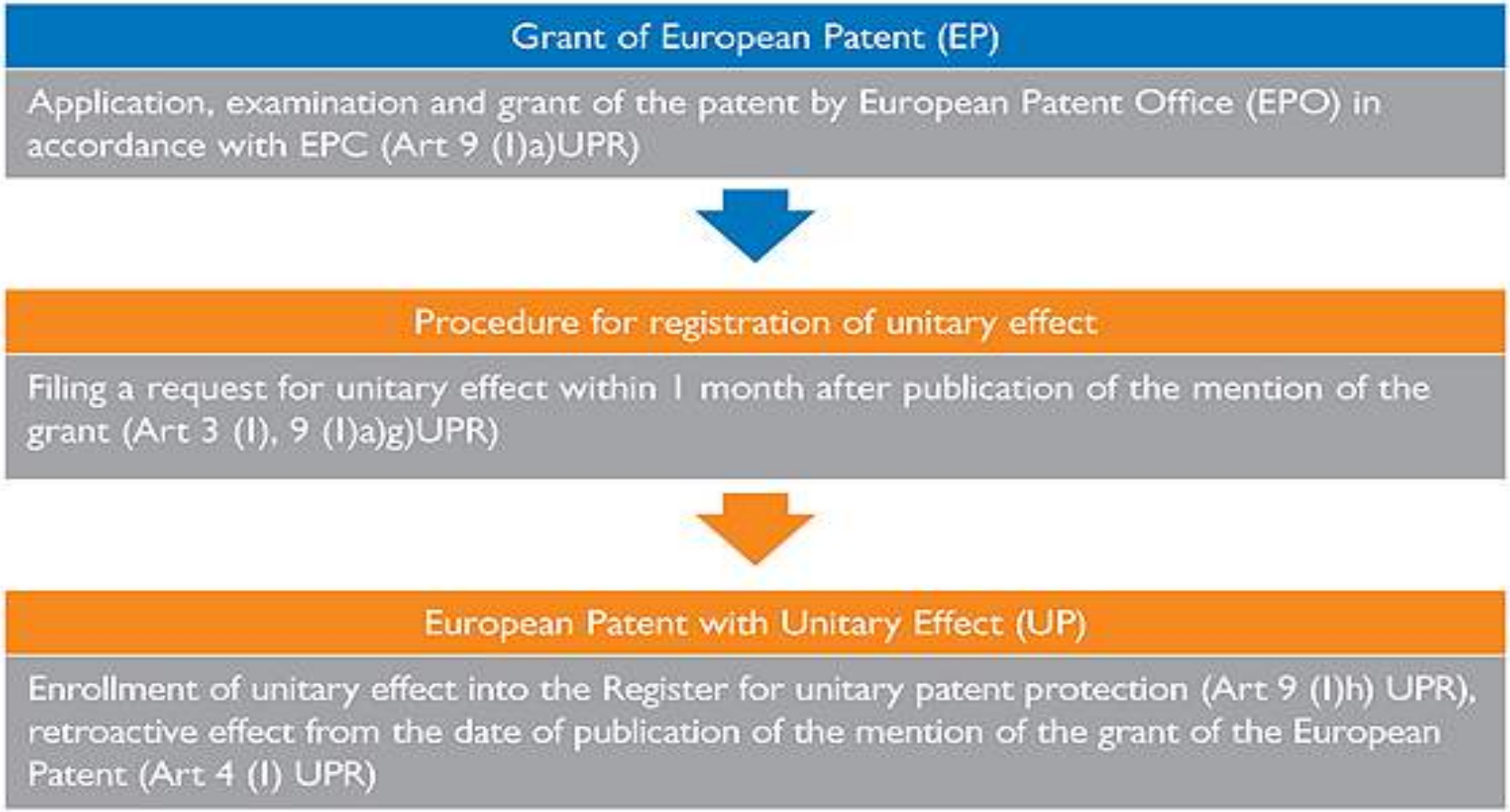
(f) 'European Patent Bulletin' means the periodical publication provided for in Article 129 of the EPC.

European Patent with Unitary Effect

UNITARY PATENT REGIME - EFFECTS

In details, the **Unitary Patent protection** will present the following features :

► inventors (individuals, companies and institutions) will be able to protect their inventions in up to **26 EU countries** by submitting a **single patent application**; after a patent is granted, there will be no need to validate it in each country. Basically, applicants will have to file an application with the EPO the same way as they do today. Once the EPC - European patent is granted, and the mention of the grant is published in the European Patent Bulletin, the patentee can request the EPO to register the unitary effect in the European Patent Register, so that the patent will take effect in 26 EU countries without any additional validation requirement.


Grant of European Patent (EP)
Application, examination and grant of the patent by European Patent Office (EPO) in accordance with EPC (Art 9 (1)a)UPR)
Procedure for registration of unitary effect
Filing a request for unitary effect within 1 month after publication of the mention of the grant (Art 3 (1), 9 (1)a)g)UPR)
European Patent with Unitary Effect (UP)
Enrollment of unitary effect into the Register for unitary patent protection (Art 9 (1)h) UPR), retroactive effect from the date of publication of the mention of the grant of the European Patent (Art 4 (1) UPR)

Article 3

European patent with unitary effect

1. A European patent granted with the same set of claims in respect of all the participating Member States shall benefit from unitary effect in the participating Member States provided that its unitary effect has been registered in the Register for unitary patent protection.

A European patent granted with different sets of claims for different participating Member States shall not benefit from unitary effect.

2. A European patent with unitary effect shall have a unitary character. It shall provide uniform protection and shall have equal effect in all the participating Member States.

It may only be limited, transferred or revoked, or lapse, in respect of all the participating Member States.

It may be licensed in respect of the whole or part of the territories of the participating Member States.

3. The unitary effect of a European patent shall be deemed not to have arisen to the extent that the European patent has been revoked or limited.

Article 4

Date of effect

1. A European patent with unitary effect shall take effect in the participating Member States on the date of publication by the EPO of the mention of the grant of the European patent in the European Patent Bulletin.

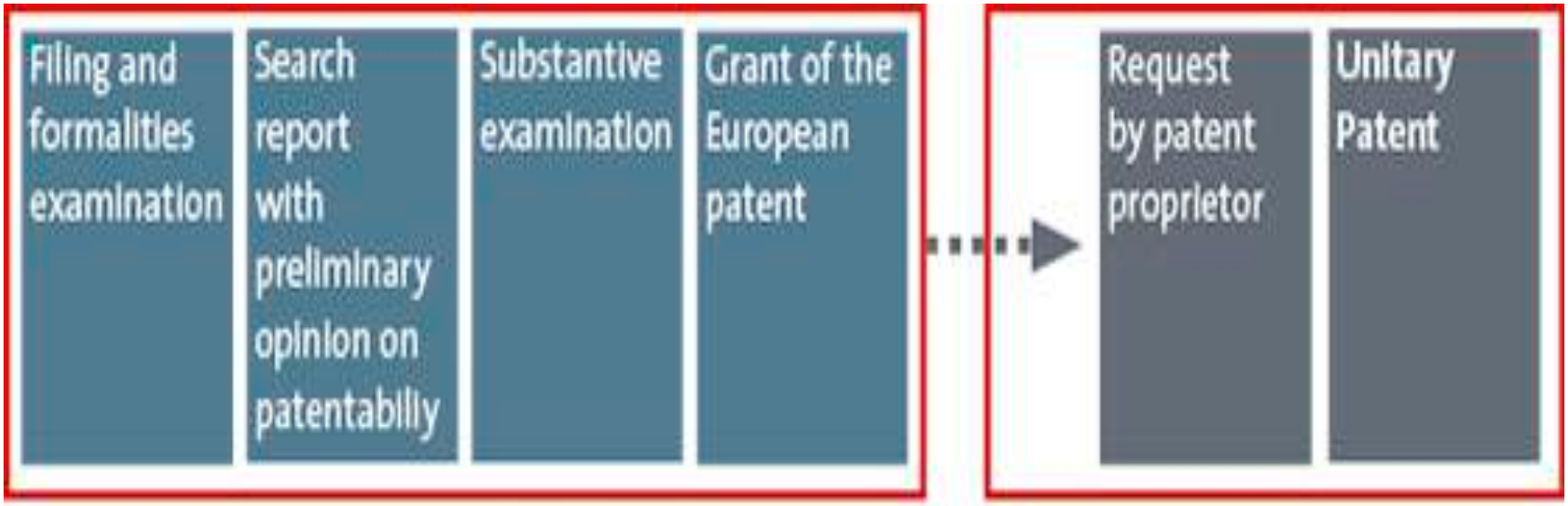
2. The participating Member States shall take the necessary measures to ensure that, where the unitary effect of a European patent has been registered and extends to their territory, that European patent is deemed not to have taken effect as a national patent in their territory on the date of publication of the mention of the grant in the European Patent Bulletin.

European Patent with Unitary Effect

- UNITARY PATENT REGIME - EFFECTS

- ► the unitary patent system will not affect the EPO's daily search – examination – granting procedures. It will not replace the existing routes for protecting patents in Europe either. It will instead be an **additional option**, together with the existing national patent system and the classic European patent system

- ► to implement the new system, therefore, the EPO will take on a number of new tasks. For instance, the EPO will provide a new **Register for Unitary Patent Protection** that will include legal status information concerning unitary patents, with reference to licensing, transfer, limitation, lapse or revocation. Transfers and licences will hence be registered centrally at the EPO; there will be no need to prepare multiple parallel registrations for national patent registers



Same grant procedure as for the classical European patent

Separate post-grant procedure for the Unitary Patent

The Unitary patent - basic concepts

- A supranational patent
- A post-grant option for EPO patents with many benefits
- The Unitary patent does not need national validation in participating EU countries
- Automatic translations will be used for information.

Europäisches Patentamt
European Patent Office
Office européen des brevets

European patent

Unitary effect

European Patent with Unitary Effect

UNITARY PATENT REGIME - EFFECTS

► the new European patent **system** will become **simpler** and **less expensive** for inventors – for instance, costly translation requirements (needed only during the transitional period) will be reduced; renewal patent fees and other administrative costs will be lower in comparison to those under the European Patent Convention - EPC system (up to 80% lower), thus making the new European patent system more competitive *versus* other IPRs-intensive systems such as the U.S. and Japan

European Patent with Unitary Effect

- <u>UNITARY PATENT REGIME - EFFECTS</u>

- ► specifically, there will be **no fees** for the **filing** and **examination** of the request for unitary effect or registration of a Unitary Patent; for EU-based SMEs, natural persons, universities and public research organizations, a **new compensation scheme** (managed by EPO) will cover **costs related** to the **translation** of the patent application if it was filed in an official EU language other than English, French or German; unitary patents will also not be subject to the currently fragmented renewal fees systems, but there will only be one annual renewal fee – procedure – currency – deadline, paid to EPO; all post-grant **administration** will be **managed centrally** by EPO, further reducing costs & administrative workloads

	Now	When Unitary Patents comes in force
Application/Extension to all member states	36 000 EUR	5000 – 6000 EUR
Patent renewal for first 10 years	29 500 EUR	4685 EUR
Patent renewal for 20 years	159 000 EUR	35 555 EUR

Source: www.epo.org

Article 11

Renewal fees

1. Renewal fees for European patents with unitary effect and additional fees for their late payment shall be paid to the European Patent Organisation by the patent proprietor. Those fees shall be due in respect of the years following the year in which the mention of the grant of the European patent which benefits from unitary effect is published in the European Patent Bulletin.

2. A European patent with unitary effect shall lapse if a renewal fee and, where applicable, any additional fee have not been paid in due time.

3. Renewal fees which fall due after receipt of the statement referred to in Article 8(1) shall be reduced.

Article 12

Level of renewal fees

1. Renewal fees for European patents with unitary effect shall be:

(a) progressive throughout the term of the unitary patent protection;

(b) sufficient to cover all costs associated with the grant of the European patent and the administration of the unitary patent protection; and

(c) sufficient, together with the fees to be paid to the European Patent Organisation during the pre-grant stage, to ensure a balanced budget of the European Patent Organisation.

2. The level of the renewal fees shall be set, taking into account, among others, the situation of specific entities such as small and medium-sized enterprises, with the aim of:

(a) facilitating innovation and fostering the competitiveness of European businesses;

(b) reflecting the size of the market covered by the patent; and

(c) being similar to the level of the national renewal fees for an average European patent taking effect in the participating Member States at the time the level of the renewal fees is first set.

3. In order to attain the objectives set out in this Chapter, the level of renewal fees shall be set at a level that:

(a) is equivalent to the level of the renewal fee to be paid for the average geographical coverage of current European patents;

(b) reflects the renewal rate of current European patents; and

(c) reflects the number of requests for unitary effect.

European Patent with Unitary Effect

UNITARY PATENT REGIME - EFFECTS

► the **broader and less expensive protection** given by a unitary patent also means that **inventions** will be **more valuable**; in the past, many inventors used to patent their inventions only in a few countries, due to the prohibitive costs of the system – this situation made inventions less valuable as the lack of protection in other countries increased the risk for those inventions to be copied more easily

► research, development and investment in **innovation** will thus be **encouraged,** with the ultimate consequence of an **increased growth** in the European Union

Article 5

Uniform protection

1. The European patent with unitary effect shall confer on its proprietor the right to prevent any third party from committing acts against which that patent provides protection throughout the territories of the participating Member States in which it has unitary effect, subject to applicable limitations.

2. The scope of that right and its limitations shall be uniform in all participating Member States in which the patent has unitary effect.

3. The acts against which the patent provides protection referred to in paragraph 1 and the applicable limitations shall be those defined by the law applied to European patents with unitary effect in the participating Member State whose national law is applicable to the European patent with unitary effect as an object of property in accordance with Article 7.

4. In its report referred to in Article 16(1), the Commission shall evaluate the functioning of the applicable limitations and shall, where necessary, make appropriate proposals.

European Patent with Unitary Effect

UNITARY PATENT REGIME - EFFECTS

► once the unitary regime enters into force, **patent applicants** may also **choose** between various **combinations** of **classic European patents** and **unitary patents** :

i) for instance, a **unitary patent** providing protection in the 26 EU Member States taking part in the unitary patent scheme, together with

ii) a **classic European patent** with effect in one or more EPC contracting states which do not participate in the unitary scheme (Spain, Croatia, Norway, Iceland, Switzerland etc) or which have not yet ratified the Unified Patent Court Agreement

European Patent with Unitary Effect

- UNIFIED PATENT COURT
- The **Unified Patent Court (UPC)** will be **competent** to handle disputes (on infringement and validity) concerning both **unitary patents** and current **classical European patents**. As a single specialised patent court, the UPC will benefit from local and regional presence around the European Union. Parties will be able to get a **high quality decision** for all countries where the patent is valid

European Patent with Unitary Effect

- UNIFIED PATENT COURT

- In other words, the reform will bring a **unified litigation system**. This is a big advantage in comparison to the previous system, based on multi-forum litigation where firms may have to litigate in parallel in all countries where the European patent is validated. The previous system finally resulted in higher costs, substantial complexity and legal insecurity. A Unified Patent Court will consequently facilitate the development of a **consistent jurisprudence**, and will increase **legal certainty**

PART I

GENERAL AND INSTITUTIONAL PROVISIONS

CHAPTER I

General provisions

Article 1

Unified Patent Court

A Unified Patent Court for the settlement of disputes relating to European patents and European patents with unitary effect is hereby established.

The Unified Patent Court shall be a court common to the Contracting Member States and thus subject to the same obligations under Union law as any national court of the Contracting Member States.

Article 3

Scope of application

This Agreement shall apply to any:

(a) European patent with unitary effect;

(b) supplementary protection certificate issued for a product protected by a patent;

(c) European patent which has not yet lapsed at the date of entry into force of this Agreement or was granted after that date, without prejudice to Article 83; and

(d) European patent application which is pending at the date of entry into force of this Agreement or which is filed after that date, without prejudice to Article 83.

European Patent with Unitary Effect

- UNIFIED PATENT COURT

- To sum up, the **Unified Patent Court** (an international court) will :
  - ▫ represent an **effective forum** for enforcing and challenging patents in Europe
  - ▫ stop the need for **litigation** in different countries
  - ▫ boost **legal certainty** through harmonised case law on validity & infringement
  - ▫ offer simpler and more efficient **judicial procedures**
  - ▫ harmonise substantive **patent law** on scope of patents and infringement remedies

European Patent with Unitary Effect

- <u>UNIFIED PATENT COURT</u>

- ▫ represent - for patent owners - a better option for **enforcement** of **valid patents**, with Europe-wide effects of decisions, injunctions and damages (but the Unitary Patent Court will not have jurisdiction over national patents – litigation over the latter will continue before national courts; moreover, owners of European patents may decide to opt out from the UPC's competence during a transitional period)

- ▫ provide – for third parties and the public – a **central revocation action**, separate from the EPO's opposition procedure, at any time during the life of the patent

European Patent with Unitary Effect

UNIFIED PATENT COURT

In relation to the **UPC's specific and exclusive competences**, these include :

- ► actions for actual or threatened infringements and related defences
- ► actions for declaration of non-infringement
- ► actions for provisional and protective measures and injunctions
- ► actions for revocation
- ► counterclaims for revocation

European Patent with Unitary Effect

UNIFIED PATENT COURT

The **Unified Patent Court** will comprise legally & technically qualified judges :

- a *Court of First Instance* (with a central division, and local & regional divisions)
- a *Court of Appeal* (located in Luxembourg)
- a *Registry* (based in Luxembourg)

UPC Structure

European Patent with Unitary Effect

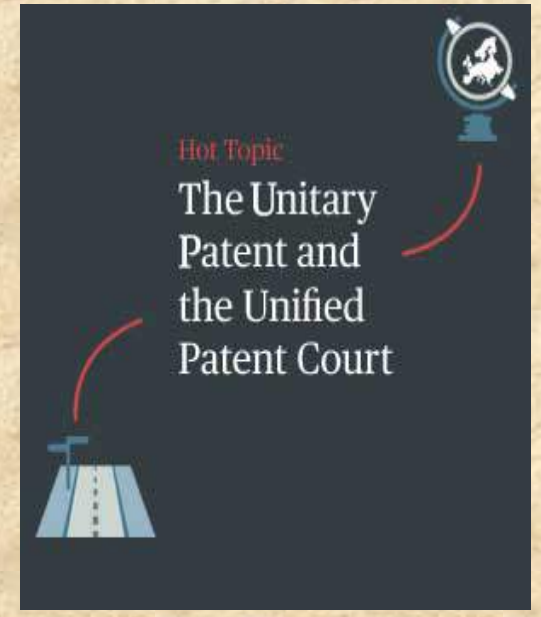
- UNITARY PATENT REGIME - START DATE

- The **start** of the new system is currently expected for the **first half** of **2019;** the EU regulations establishing the unitary patent system entered into force in 2013, but they will only apply from the date of entry into force of the UPC Agreement (it must be ratified by at least 13 states, including France Germany and the UK)

European Patent with Unitary Effect

UNITARY PATENT REGIME - COVERAGE

Unitary patent may be **requested** for any European patent granted on or after the date of entry into force of the **Unified Patent Court Agreement**. Unitary patents may not cover all participating Member States as long as some of them may still have to ratify the Agreement when it enters into force. Thus, there may be **different generations** of **patents** with different territorial scope



European Patent with Unitary Effect

UNITARY PATENT REGIME - COVERAGE

Interestingly, the **coverage** of a given generation of **unitary patents** will **remain** the **same** for their entire duration, regardless of any subsequent ratifications of the Union Patent Court Agreement after the date of registration of the unitary effect – this simply means that there will be no extension of the territorial scope of unitary patents caused by later ratifications

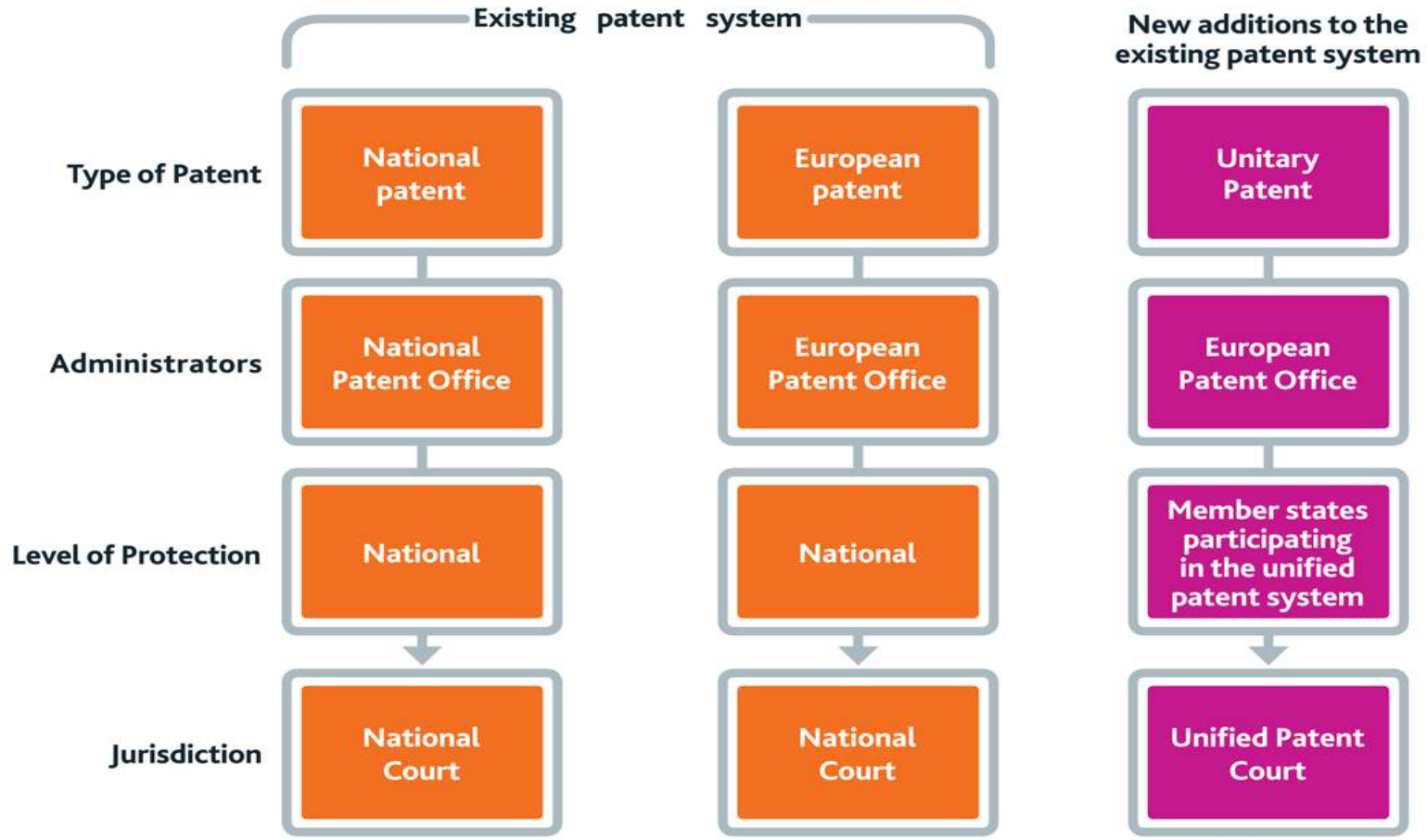
European Patent with Unitary Effect

- <u>UNITARY PATENT REGIME & BREXIT</u>
- As the EPO has also noted, the forthcoming **BREXIT**
- may have an **impact** on the **Unitary Patent system**.
- In case the United Kingdom withdraws from the EU,
- the **regulations** introducing the unitary patent reform
- will consequently **cease to produce any effect** there.

European Patent with Unitary Effect

- UNITARY PATENT REGIME & BREXIT
- Nevertheless, **appropriate solutions** may be found in order to ensure patent protection in the UK for unitary patent proprietors. A possibility, based on a political decision of the EU institutes member states and UK, would be to make UK participation in the unitary patent system legally possible on a long term basis on the ground of specific *ad hoc* agreements.

Patent system in Europe



- how does the registration of a unitary patent work ?
- which are the main advantages of a unitary patent regime ?
- what will the benefits be of having a unified patent court ?

European Patent with Unitary Effect

SUGGESTED READINGS

- EU Parliament and Council of the EU, Regulation n. 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection [2012] O.J. L 361
- Council of the EU, Regulation n. 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangement [2012] O.J. L 361
- Agreement on a Unified Patent Court, introducing a single and specialised patent jurisdiction [2013] O.J. C 175

MODULE II

SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS

(*Lecture XIV*)

The Trade Secrets Directive

- TRADE SECRETS - RELEVANCE

- Firms, inventors and researchers constantly **develop information and knowledge** which are **commercially valuable**, and which can help them to **perform faster** and **better** in the **marketplace**. This may be achieved for instance through decades of experience, costly and lengthy research processes, or rapid bursts of creativity. The outcome of such dynamics may *inter alia* consist of new manufacturing processes, improved recipes, information on potential clients etc.

The Trade Secrets Directive

- TRADE SECRETS - RELEVANCE

- Large and small players in all economic fields may strategically **protect** such **information and knowledge** by relying on **trade secrets,** and thus turn their innovative ideas into growth competitiveness and jobs. Above all, **SMEs** and **start-ups** rely on trade secrets on a more intensive basis than larger firms, in light of the fact that they do not have sufficient resources to seek, obtain and manage a portfolio of IPRs (*eg*, patents), and enter into costly litigation over IP infringement.

The Trade Secrets Directive

TRADE SECRETS AND IPRS

Trade secrets are **not IPRs**, but they are complementary to IPRs. They are used in the **creative process** leading to **innovation** and to the **creation** of **IPRs**. Therefore, trade secrets are at the basis of patents (a new invention), trade marks (a new branded product), copyright (a new work). Trade secrets are also **used** in relation to **commercially valuable information** for which there is no IP protection, but for which investments and research are required, and which are important for innovation performance (*e.g*, a new business idea, a new recipe, a new marketing study).

The Trade Secrets Directive

TRADE SECRETS - MEANING AND SCOPE

Basically, a **trade secret** consists of any **confidential business information** providing a **competitive advantage** to an **enterprise**. A wide variety of information could be protected as trade secrets :

- ► know-how
- ► technical knowledge (which could be patentable – *e.g.*, manufacturing process)
- ► business & commercial information (*e.g.*, list of customers, business plans)

The Trade Secrets Directive

- <u>TRADE SECRETS - MEANING AND SCOPE</u>

- The **information**, what is more, may have :

- ∞ a **strategic and long-term relevance**
- (*e.g.*, a recipe or chemical compound)

- ∞ or a **more short-lived relevance** (for instance, the outcome of a marketing study, or the name price and launch date of a new product or a new service offered)

The Trade Secrets Directive

TRADE SECRETS - MEANING AND SCOPE

There are **no specific administrative and procedural requirements** for a trade secret to be protected. Yet, certain **conditions** concerning the characteristics of the information must be met. In particular, the **information** must :

- be **secret** (*i.e.*, not generally known)
- has **commercial value** due to its secrecy
- and has been further **subject** to reasonable **measures** to maintain its secrecy

The Trade Secrets Directive

- TRADE SECRETS - MEANING AND SCOPE

- Such **reasonable measures**, which should be implemented by the person in control of the information, may include :

- ○ **storing** confidential information safely

- ○ **signing** non-disclosure or confidentiality agreements (where trade secrets must be discussed with the commercial counterparty)

- ○ **including** non-disclosure or confidentiality clauses within agreements, where the exchange of confidential information is very likely and/or necessary

The Trade Secrets Directive

- TRADE SECRETS - PROTECTION

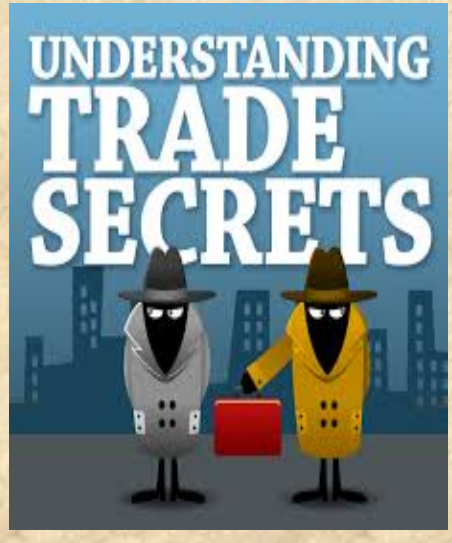
- **No proprietary** or **exclusive rights** over the information are conferred by trade secrets. Nevertheless, if the information is disclosed by someone who was under a confidentiality obligation, such a disclosure would amount to a **breach of contract** and the trade secret owner may benefit from the related contractual remedies.

- On a further ground, protection under **unfair competition laws** – available in the EU and in different European states - may apply in case a person obtains the information by dishonest means (*e.g.,* through espionage).

The Trade Secrets Directive

TRADE SECRETS - PROTECTION

In brief, trade secrets **protection** seeks to ensure that such information remains secret (and firms' competitiveness protected), and also identifies remedies against those who disclose it without authorization. Trade secrets do not have a precise limited term of protection. They are protected for an **unlimited period of time**, as long as the conditions for the information to be considered as a trade secret are met.



The Trade Secrets Directive

- TRADE SECRETS - PROTECTION

- **Protection against dishonest conduct** is all the more important for European undertakings which are increasingly exposed to misappropriation of trade secrets. According to surveys, 20% of European companies have been victims of trade secret misappropriation at least once in the last ten years; and 40% of European firms find that the risk of trade secret **misappropriation** has raised during the same period of time. This may be caused by **several factors**, such as intense global competition, increased used of ICT technologies, recourse to external consultants. The **fragmentation** of the **national laws** on the protection of trade secrets may impair firms' ability to build cross-border networks of collaborative research. In the EU, for instance, protection was not harmonised, giving rise to uncertainty.

The Trade Secrets Directive

- <u>EU DIRECTIVE ON TRADE SECRETS</u>
- In 2016, following a proposal from the EU Commission, the Parliament and the Council adopted a **Directive** (2016/943) which standardizes the existing diverging national laws in EU countries on the **protection** against the unlawful acquisition, use and disclosure of **trade secrets**. Such Directive in brief addresses the risk of losses faced by EU companies due to the misappropriation of trade secrets.

The Trade Secrets Directive

EU DIRECTIVE ON TRADE SECRETS

Above all, the EU Trade Secrets Directive :

► **harmonizes** the **definition** of trade secrets according to the existing internationally binding standards (to avoid obstacles in the EU single market)

► **defines** the **unlawful acquisition** (theft, hacking, espionage etc), **use or disclosure** (breach of a contractual duty, breach of a confidentiality agreement etc)

► **specifies** that **reverse engineering** & **parallel innovation** must be guaranteed, due to the fact that trade secrets cannot be considered as a form of exclusive IPRs

Article 2

Definitions

For the purposes of this Directive, the following definitions apply:

(1) 'trade secret' means information which meets all of the following requirements:

(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) it has commercial value because it is secret;

(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;

(2) 'trade secret holder' means any natural or legal person lawfully controlling a trade secret;

(3) 'infringer' means any natural or legal person who has unlawfully acquired, used or disclosed a trade secret;

(4) 'infringing goods' means goods, the design, characteristics, functioning, production process or marketing of which significantly benefits from trade secrets unlawfully acquired, used or disclosed.

Article 3

Lawful acquisition, use and disclosure of trade secrets

1. The acquisition of a trade secret shall be considered lawful when the trade secret is obtained by any of the following means:

(a) independent discovery or creation;

(b) observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret;

(c) exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices;

(d) any other practice which, under the circumstances, is in conformity with honest commercial practices.

2. The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.

The Trade Secrets Directive

- EU DIRECTIVE ON TRADE SECRETS

- On further notes, the **Directive harmonises** the **civil** (not criminal) **means** through which firms facing trade secret misappropriation can obtain protection, such as :

- ○ **blocking** the **illegitimate use** and disclosure of misappropriated trade secrets

- ○ **removing** from the market **goods** manufactured on the basis of a trade secret illegally obtained

- ○ **getting compensation** for the damages caused by the unlawful use or disclosure of the misappropriated trade secret

Article 10

Provisional and precautionary measures

1. Member States shall ensure that the competent judicial authorities may, at the request of the trade secret holder, order any of the following provisional and precautionary measures against the alleged infringer:

(a) the cessation of or, as the case may be, the prohibition of the use or disclosure of the trade secret on a provisional basis;

(b) the prohibition of the production, offering, placing on the market or use of infringing goods, or the importation, export or storage of infringing goods for those purposes;

(c) the seizure or delivery up of the suspected infringing goods, including imported goods, so as to prevent their entry into, or circulation on, the market.

2. Member States shall ensure that the judicial authorities may, as an alternative to the measures referred to in paragraph 1, make the continuation of the alleged unlawful use of a trade secret subject to the lodging of guarantees intended to ensure the compensation of the trade secret holder. Disclosure of a trade secret in return for the lodging of guarantees shall not be allowed.

The Trade Secrets Directive

- EU DIRECTIVE ON TRADE SECRETS
- The **freedom of expression** and the **right of information** are **not impacted** by the Directive. This means that **journalists** remain **free** to **investigate** and publish news on firms' practices and business affairs. Even if a trade secret is misappropriated, the Directive establishes a specific safeguard to preserve the freedom of expression and the right to information, which are protected by the EU Charter of Fundamental Rights. The safeguard arises if the divulgation of the trade secret obtained by, or passed to journalists, occurred through the use of unlawful means (*eg* breach of law or breach of contract).

The Trade Secrets Directive

- EU DIRECTIVE ON TRADE SECRETS

- ► interestingly, the **Directive does not remove** the **legal obligations** on firms to **reveal information** for **public policy goals** (public health, environment, consumer safety etc). Thus, the public interest prevails over private interest in such matters. This also means that the Directive does not allow firms to hide information that they are obliged to disclose to regulatory authorities or to the public at large

- ► moreover, the **Directive does not alter** and **does not have** any **impact** on those **regulations** establishing the **right** of **citizens** to have **access** to **documents** in the possession of public authorities, including documents submitted by third parties such as firms and business organisations

The Trade Secrets Directive

EU DIRECTIVE ON TRADE SECRETS

► finally, the **Directive** expressly **safeguards** those who, acting in the public interest, **divulge** a **trade secret** in order to **reveal** a **misconduct**, **wrongdoing** or **illegal activity**. Such a safeguard applies if the trade secret was acquired or passed to the whistle-blower through the use of unlawful means (*e.g.*, breach of law or contract). On the other side, if no illicit conduct occurs, the disclosure of the trade secret is out of the scope of the Directive and therefore no safeguard is needed

Article 5

Exceptions

Member States shall ensure that an application for the measures, procedures and remedies provided for in this Directive is dismissed where the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:

(a) for exercising the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media;

(b) for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest;

(c) disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise;

(d) for the purpose of protecting a legitimate interest recognised by Union or national law.

The Trade Secrets Directive

EU DIRECTIVE ON TRADE SECRETS

To sum up, according to the Directive, **Member States have to** :

■ **offer** trade-secret holders strong civil law protection against the unlawful acquisition, use or disclosure of their confidential business information

■ **implement** in the national laws corrective measures (including damages) to redress misappropriation and misuse of trade secrets

■ **implement** in the national laws measures to preserve the confidentiality of trade secrets in the course of legal proceedings

The Trade Secrets Directive

- EU DIRECTIVE ON TRADE SECRETS

- Overall, the Directive builds a **common**, **clear** and **balanced legal framework** which should discourage unfair competition and dishonest behaviours. It should also **encourage collaborative innovation** and the **sharing of valuable know-how**, to the benefit of a more competitive and economically stronger Union.

- what is the relation between trade secrets and innovation ?
- which are the characteristics of trade secrets ? are they IPRs ?
- what are the safeguards in relation to trade secret protection ?

The Trade Secrets Directive

SUGGESTED READINGS

- EU Parliament and Council of the EU, Directive n. 2016/943 on the protection of undisclosed know how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] O.J. L 157
- EU Commission (IPR Helpdesk), *Your Guide to IP in Europe* (2017)
- European Parliament (Research Service), 'EU Innovation Policy - Part II' (2016)

MODULE III

THE INTERNAL MARKET AND THE DIGITAL ECONOMY

(*Lecture XV*)

409

Internet: e-commerce protection

- THE DIGITAL SINGLE MARKET

- The result of the rapidly advancing technological industry coupled with the gravity of the need to address consumer issues arising from lack of regulation in the digital sector have led to the expeditious implementation of the EU Digital Single Market Strategy. This policy is today considered by the EU Commission as one of its top 10 political priorities because it is strongly believed that the completion of same can help the EU take a leading position as a world leader in the digital economy.
- The Digital Single Market can be defined as "a *market in which the free movement of persons, services and capital is ensured and where individuals and business can seamlessly access and engage in online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence"*.

Internet: e-commerce protection

- <u>THE DIGITAL SINGLE MARKET</u>

- Three pillars represent the foundation of the
- Digital Single Market Strategy:

- 1) **Access**: providing easier access for consumers and businesses to digital goods and services across Europe;
- 2) **Environment**: creating favorable conditions and a level playing field for digital networks and innovative services to flourish;
- 3) **Economy and Society**: maximizing the growth potential of the digital economy.

Internet: e-commerce protection

- THE DIGITAL SINGLE MARKET: E-COMMERCE

- Based off of these pillars, various objectives were taken, such as: implementing geo-blocking legislation to boost the e-commerce market in the EU; lowering the cost of cross-border parcel deliveries and making same more efficient; modernizing the EU copyright rules; updating EU audiovisual rules and creating a level playing field for comparable digital sources; combatting the use of illegal online content and protecting the most vulnerable users; increasing online consumers protections; creating an effective EU cyber deterrence and criminal law response to better protect European citizens, businesses and public institutions; creating clear rules in the European digital market allowing the free flow of non-personal data; ensuring everyone in the EU has the best possible internet connection; adapting e-Privacy rules to the new digital environment.

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- <u>THE DIGITAL SINGLE MARKET: E-COMMERCE</u>

- The purpose of this Module is to give the reader a general overview of the most relevant EU legislations (or legislative proposals), both adopted before or in connection with the Digital Single Market Strategy, specifically dedicated to some fundamental aspects of the digital economy, such as platforms (with particular regard to e-Commerce) and data, and that have significant impact on:

- **(i) boosting online consumer confidence and protection** (i.e. e-Commerce Directive 2000/31/EC; Consumer Rights Directive 2011/83/EU; Unfair Commercial Practices Directive 2005/29/EC);

- **(ii) reinforcing trust and security in digital services** and in the handling of personal data (i.e. e-Privacy Directive 2002/58/CE; General Data Protection Regulation 2016/679/EU);

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- <u>THE DIGITAL SINGLE MARKET: E-COMMERCE</u>

- (iii) **ending unjustified cross-border barriers** and generally create a more advantageous environment for businesses to trade across borders (i.e. Geo-blocking Regulation 2018/302/UE);
- (iv) **promoting cross-border access to online content** (i.e. Regulation 2017/1128/EU on cross-border portability of online content services); and
- (v) **creating a level playing field between market players** in the audiovisual sector and, generally, promoting fairness and transparency for business users of online intermediation services (i.e. Audiovisual Media Services Directive 2018/1808/EU; Online Platforms Regulation 2019/1150/EU).

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- E-COMMERCE DIRECTIVE: OBJECTIVE AND SCOPE

- The central EU legislation regulating e-Commerce is Directive 2000/31/EC (the "**e-Commerce Directive**") the purpose of which is to remove obstacles in cross-border online services in the EU and provide legal certainty to businesses and citizens operating in the digital economy, consequently establishing a legal framework for information society services.

- The **application** of the e-Commerce Directive on the digital economy is **broad**, covering both B2C and B2B transactions as well as services provided free of charge to the recipient, i.e. funded by advertising and sponsorship. However, one should note that the directive does not apply to traditional radio broadcasting, television broadcasting, and most legal and gambling services.

Article 1

Objective and scope

1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

[...]

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- E-COMMERCE DIRECTIVE: KEY PRINCIPLES

- The key principles provided for by the E-Commerce Directive are:
- 1) the **freedom to provide** information society
- services (art. 3); and
- 2) the **freedom of establishment** (art. 4) of
- information society service providers within
- the EU territory.

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- E-COMMERCE DIRECTIVE: KEY PRINCIPLES

- The freedom to provide information society services across the EU Member States is provided by the **internal market clause** (art. 3), which also ensures that providers of online services are subject to the law of the Member State in which they are established and not the law of the Member States where the service is accessible.

- Member States may not restrict the freedom to provide information society services **except** in the event such measures are **necessary** for public policy, protection of public health, public security, consumer protection, and the measures are **proportionate** to achieve such objectives.

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- E-COMMERCE DIRECTIVE: KEY PRINCIPLES

- In this event, a Member State that intends to take measures derogating from the internal market clause should notify both the EU Commission and Member State of establishment of such measures before taking the measures in question.

- Once the EU Commission examines the compatibility of the notified measures with EU law, in the event such measures are considered incompatible, the EU Commission will ask the Member State to refrain from taking such measures or immediately put an end to the measures taken so far.

Article 3

Internal market

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

[...]

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- E-COMMERCE DIRECTIVE: KEY PRINCIPLES

- As mentioned, under Article 4, the e-Commerce Directive also provides for the **freedom of establishment** of information society service providers within the EU territory. To achieve this objective, Member States shall ensure that the activity of information society service providers may not be subject to prior authorization or any other requirement having equivalent effect.

- Together, these two principles set forth by the internal market clause, contribute to ensure and promote cross-border digital trade, and enhance competition between information society service providers.

Article 4

Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

[...]

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- E-COMMERCE DIRECTIVE: MAIN PROVISIONS

- To safeguard consumer protection and strive a more trustworthy internet, the e-Commerce Directive also establishes harmonized rules in the following areas:
- 1) **transparency** and **information** requirements
- for online service providers (art. 5);
- 2) **commercial communications** (art. 6);
- 3) **electronic contracts** (art. 9 *et seq.*); and
- 4) **limitations of liability** of intermediary
- service providers (art. 12 *et seq.*).

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- <u>E-COMMERCE DIRECTIVE: MAIN PROVISIONS</u>

- With regard to point 1), the **general information requirements** under the directive are mainly dedicated to provide the consumer with the right to easily access the most relevant information regarding the identification of the service provider (i.e. name, geographic address, e-mail, trade register number, etc.) including supervisory authorities, if any, and specific information regarding service providers that are regulated professions.

Article 5

General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;

(b) the geographic address at which the service provider is established;

(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;

(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:

— any professional body or similar institution with which the service provider is registered,

— the professional title and the Member State where it has been granted,

— a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (2).

[...]

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- E-COMMERCE DIRECTIVE: MAIN PROVISIONS

- As regards point 2), the e-Commerce Directive also provides for certain information requirements of **commercial communications** in order to strengthen consumer protection in such sector.

- Under the directive, commercial communications are defined as *any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession* (please note that not all information allowing direct access to the activity falls under the definition of commercial communications - e.g. domain name or email address - as well as any communication relating to the goods, services or images compiled in an independent manner).

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- E-COMMERCE DIRECTIVE: MAIN PROVISIONS

- Particularly, when making a commercial communication, the Information Service Providers (the "**ISPs**") shall ensure that one should be able to clearly identify:

- **(i)** commercial communications; and

- **(ii)** the person on whose behalf the commercial communication is made. Commercial communication that include promotional offers, competition, or games, shall also be clearly identifiable as such.

Article 6

Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

(a) the commercial communication shall be clearly identifiable as such;

(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;

(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

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E-COMMERCE DIRECTIVE: MAIN PROVISIONS

- As regards point 3), the e-Commerce Directive not only enhances e-Commerce activity and bolster consumer protection, but also provides that Member States shall ensure their legal systems allow **contracts to be concluded by electronic means** (art. 9). Therefore, any legal requirements applicable to the contractual process shall neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

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- E-COMMERCE DIRECTIVE: MAIN PROVISIONS

- In furtherance of the transparency theme of this directive, Article 10 of the e-Commerce Directive requires the service provider to give certain additional information **clearly**, **comprehensibly**, **unambiguously,** and **prior to a service recipient placing an order**, such material including: different technical steps to follow to conclude the contract; language offered for the conclusion of the contract; etc.).

Article 10

Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

(c) the technical means for identifying and correcting input errors prior to the placing of the order;

(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

[...]

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- <u>E-COMMERCE DIRECTIVE: MAIN PROVISIONS</u>

- Finally, as regards point 4), the e-Commerce Directive aims to also regulate **liability of intermediary service providers** for the purpose of eliminating distortions of competitions and enhancing the development of cross-border services.

- The harmonization of national provisions concerning liability of ISPs acting as intermediaries represents another important step for the advancement of the digital economy: in fact, due in part to the relative ease in which individuals can perform various activities through the internet, numerous of legal problems may arise regarding liability from internet usage, which only harmonized legislation can better regulate, prevent and counter illegal conduct of such.

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- E-COMMERCE DIRECTIVE: MAIN PROVISIONS

- Taking into account the various types of legal violations that can occur through the use of on-line facilities (for example: dissemination of copyright work, illegal or harmful content, misrepresentations, incorrect or false information, etc.), as well as the impossibility for an ISP to control all of the information passing through its network, the e-Commerce Directive has set such harmonized liability regulation beginning with the **principle** that ISPs may be held liable if they have some form of "control" over the information.

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- E-COMMERCE DIRECTIVE: MAIN PROVISIONS

- Another principle grounded in the liability regime of ISPs consists of the adoption of the so called *horizontal approach*, which constitutes a regulatory approach that provides a regulation applicable to any infringement, regardless of the area of law.

- Particularly, the directive provides for a generally applicable system of specific liability exemptions on the basis of the activity carried out by ISPs, specifically: (i) **mere conduit** (art. 12); (ii) **caching** (art. 13); and (iii) **hosting** (art. 14).

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- E-COMMERCE DIRECTIVE: MERE CONDUIT

- Article 12 of the e-Commerce Directive, expressly takes into account two types of mere conduit activities:

- 1) transmission in a communication network of information provided by a recipient of the service; and
- 2) provision of internet access.

- The peculiarity of such activities is that the ISP's role is passive, in that it acts merely as a "**carrier**" of data provided by third parties through its network.

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- <u>E-COMMERCE DIRECTIVE: MERE CONDUIT</u>

- Those activities include the automatic, intermediate and transient storage of information transmitted, in so far as the storage takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than reasonably necessary for the transmission.

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- <u>E-COMMERCE DIRECTIVE: MERE CONDUIT</u>

- When a mere conduit activity is performed, the e-Commerce Directive grants the ISP an **objective exemption** as long as the ISP:

- (a) does not initiate the transmission (i.e. the provider does not take the decision to carry out the transmission);
- (b) does not select the receiver of the transmission (i.e. when the ISP selects receivers as an automatic response to the request of the user initiating the transmission);
- (c) does not select or modify the information contained in the transmission.

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- E-COMMERCE DIRECTIVE: CACHING

- The second liability exemption provided by the directive refers to caching activities. Such activities, in general, can be defined as services that aim to avoid saturating the internet with the repetitive high demand of certain material, by locating high demand data on remote servers and then storing copies of the material on local servers.

- Under Article 13, the e-Commerce Directive provides also for **exemptions** with respect to caching services as long as they consist of the automatic, intermediate, and temporary storage of data in local servers by ISPs.

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E-COMMERCE DIRECTIVE: CACHING

- Particularly, ISPs cannot be held liable when they perform such caching activities on the condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

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- E-COMMERCE DIRECTIVE: HOSTING

- Finally, under Article 14, the e-Commerce Directive also provides for **an exemption** for hosting services, that can be defined as services that provide offers to individuals, companies, and organizations to rent space and incorporate any kind of data on that space.

- Such exemption shall not apply when recipients of the service act under the authority or control of the provider.

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- E-COMMERCE DIRECTIVE: HOSTING

- The e-Commerce Directive states that ISPs will not be held liable for performing these hosting services as long as:

- 1) the provider does not have actual knowledge of the illegal activity or information and, as regarding claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

- 2) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

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- E-COMMERCE DIRECTIVE: NO MONITORING

- That said, the directive purposely safeguards service providers from the obligation to check and control all information that flows through their networks because such obligation would be nearly impossible for ISPs to perform or in any case it would place overwhelming economic hardship on ISPs. Taking this intention into account, Article 15 provides that Member States shall not impose a general obligation on providers to monitor the information they transmit or store when they are performing one of the services of mere conduit, caching or hosting.
- However, pursuant to the second paragraph of Article 15, ISPs are **obliged to communicate** to the competent authorities in the case of suspected illegal activities.

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- E-COMMERCE DIRECTIVE: CODES OF CONDUCT AND OUT-OF-COURT SETTLEMENT

- Lastly, Chapter III of the e-Commerce Directive is dedicated to encouraging voluntary and coordinated actions implementing the directive through codes of conduct (art. 16) and, in the event of disagreement between an information society service provider and the recipient of the service, promoting the recourse to out-of-court schemes for dispute settlement (art. 17) as well as ensuring national enforcement (art. 18).

Article 17

Out-of-court dispute settlement

1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

Article 18

Court actions

1. Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

[...]

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- CONSUMER RIGHTS DIRECTIVE
- Another basic regulatory act that applies to e-commerce is the Directive 2011/83/EU on consumer rights (the "**CRD**").
- The CRD regulates, *inter alia,* certain aspects of **distance contracts** and further distinguishes between sales contracts, service contracts and contracts for the **supply of online digital content**.

Article 1

Subject matter

The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders.

A Definition

(5) 'sales contract' means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services;

(6) 'service contract' means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof;

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- CONSUMER RIGHTS DIRECTIVE: DISTANCE CONTRACTS

- Taking into account such definitions, before analyzing the contracts for the supply of online digital content, it is initially necessary to analyze the CRD regime applicable to **distance contracts**.

- Accordingly, **distance contracts** is defined as *any contract concluded between the trader and the consumer under an organized distance sales or service provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication* (i.e. mail order, Internet) *up to and including the time at which the contract is concluded*.

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- CONSUMER RIGHTS DIRECTIVE: DISTANCE CONTRACTS
- Such definition also includes any combination of the different means of distance communication (i.e. between website and phone).
- However, the CRD applies insofar the distance contract is concluded under an organized distance sales or service-provision scheme (for example, through the use of **online platforms**), that is to say that the trader is not subject to the CRD if it concludes **only on an exceptional bases** such distance contracts.
- With regard to the e-Commerce legal framework, the aim of such directive is unquestionably to provide consumers across the entire EU territory with strong rights and protections when concluding contracts by means of distance communication, especially with respect to ISPs.

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- CONSUMER RIGHTS DIRECTIVE: DISTANCE CONTRACTS

- In this respect, the CRD has set forth various consumer-friendly provisions, that may be summarized as follows:
- 1) **general information requirements** applying, *inter alia*, to distance contracts (art. 6);
- 2) **formal requirements** specifically applying to distance contracts (art. 8); and
- 3) detailed rules regarding consumer's **right of withdrawal** from, *inter alia*, distance contracts (art. 9 – 16).

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- CONSUMER RIGHTS DIRECTIVE: DISTANCE CONTRACTS

- With regard to **information and formal requirements**, the CRD has provided the following regime:

- **(a)** the trader shall provide the consumer with certain information, listed under Article 6 of the CRD in a **clear and comprehensible manner** and **before** the consumer is bound by a distance contract or any corresponding offer;
- **(b)** the trader may take into account the specific needs of consumers (i.e. in case of infirmity or age), notwithstanding that such specific needs should not lead to different levels of consumer protection;

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- CONSUMER RIGHTS DIRECTIVE: DISTANCE CONTRACTS

- **(c)** in the event a distance contract is concluded by **electronic means**, the information listed under Article 6 as well as those listed under Article 8, shall be made available to the consumer *in a way appropriate to the means of distance communication used in plain and intelligible language. In so far as that information is provided on a durable medium, it shall be legible* (art. 8, par. 1);
- **(d)** in the event of point (c) - and in case such distance contract places the consumer under an obligation to pay - the trader shall make the consumer aware in a **clear and prominent manner**, and **directly before** the consumer places his order, of specific information (analyzed in the slides below);

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- CONSUMER RIGHTS DIRECTIVE: DISTANCE CONTRACTS

- **(e)** all information required under the CRD is **in addition** to any other information provided under the e-Commerce Directive (art. 6, par. 8), such as the information on the trader's trade or other public register, its VAT number, relevant professional bodies, measures taken to avoid conflicts of interest and relevant supervisory authorities, as well as the technical steps to conclude the contract and information about promotional offers;
- **(f)** if a provision of the e-Commerce Directive on the "*content and the manner in which the information is to be provided*" conflicts with a provision of the CRD, the **provision of the CRD prevails**;

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- CONSUMER RIGHTS DIRECTIVE: DISTANCE CONTRACTS

- **(g)** the CRD is without prejudice to the application of the information requirements under other EU legislation, such as:
- - Regulation (EU) 2016/679, on the protection of personal data;
- - ePrivacy Directive 2002/58/EC on privacy and electronic communication;
- - Directive 2010/13/EU for audiovisual services.
- In fact, such regulations – that will be further analyzed – are particularly relevant in online sales and, therefore, are definitely part of the e-Commerce legal framework.

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- CONSUMER RIGHTS DIRECTIVE: GENERAL INFORMATION REQUIREMENTS

- Taking into account this framework, it is now necessary to analyze the **general information** traders must provide according to Article 6 of the CRD:
- 1) main characteristics of products and any restricting condition concerning the offer: such information shall be detailed and must be provided depending on the complexity of the product;
- 2) identity and contact details of the trader: such information shall be provided in order to enable consumers to contact the trader quickly and communicate with him efficiently and, specifically, include the trader's trading name, geographical address of establishment or, if not applicable, the place of business, telephone number, fax and e-mail address;

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- CONSUMER RIGHTS DIRECTIVE: GENERAL INFORMATION REQUIREMENTS

- 3) price: such information shall provide the total price of the goods or services inclusive of taxes, all additional freight, delivery or postal charges and any other costs. If such price and charges cannot be reasonably calculated in advance, such information shall provide the manner in which the price is to be calculated and the fact that such additional charges may be payable (in the event in which the contract has an indeterminate duration or contains a subscription, the total price shall also mean the total monthly costs);

- 4) payment and delivery: such information shall be on arrangements for payment, delivery, performance, time by which the trader undertakes to deliver the goods or to perform the service, and, finally – though not mandatory - the trader's complaint handling policy);

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- CONSUMER RIGHTS DIRECTIVE: GENERAL INFORMATION REQUIREMENTS

- 5) duration and termination of the contract: such information shall in particular include applicable charges and termination procedures, including the prior notice period and means by which the termination should be notified;
- 6) out-of-court redress mechanisms: such information should include the possibility of having recourse to an out-of-court complaint and redress mechanism - which the trader is subject to - and the methods for having access such recourse.
- 7) guarantees: such information shall specify that under EU law the trader is liable for any lack of conformity that becomes apparent within of 2 years from delivery of the goods and that national laws may give consumers additional rights;

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CONSUMER RIGHTS DIRECTIVE: GENERAL INFORMATION REQUIREMENTS

- 8) after-sale services: such information should be granted only if the respective additional benefits are actually offered. In such case, the trader shall provide consumers with specific information about such services and in particular explain where the service will be performed and who bears the cost of transport;
- 9) right of withdrawal: such information should be provided in the event such right exists and should be about the conditions, time limit and procedures for exercising such right.
- Although such information requirements apply to any type of contract, one must note that, in the e-commerce framework, such information acquires a determining value in order to protect consumers because they strongly contribute to make the consumers aware of each key aspect of the e-commerce transaction and, finally, they prevent abuses or even frauds made by traders.

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- CONSUMER RIGHTS DIRECTIVE: FORMAL REQUIREMENTS

- However, as anticipated, the EU Institutions were aware that such information requirements had to be integrated with additional legislation when dealing with distance contracts concluded by **electronic means**, in which additional and specific risks for consumers arise. While the CRD does not define *electronic means*, in view of the explanation provided in Recital 39, this term should be interpreted as referring to **contracts concluded through websites**.

Whereas:

(39) It is important to ensure for distance contracts concluded through websites that the consumer is able to fully read and understand the main elements of the contract before placing his order. To that end, provision should be made in this Directive for those elements to be displayed in the close vicinity of the confirmation requested for placing the order. It is also important to ensure that, in such situations, the consumer is able to determine the moment at which he assumes the obligation to pay the trader. Therefore, the consumer's attention should specifically be drawn, through an unambiguous formulation, to the fact that placing the order entails the obligation to pay the trader.

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- CONSUMER RIGHTS DIRECTIVE: FORMAL REQUIREMENTS

- Therefore, one could interpret that the CRD provides for **formal requirements** applying to distance contracts concluded by electronic means, which should be viewed in the context of national rules transposing the provisions of the e-Commerce Directive, which apply if the contract falls under the definition of an "information society service" (i.e. any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services).

- As mentioned, the **specific regime applying to distance contracts concluded by electronic means** requires that all information provided for under Articles 6 and 8 shall be made available to the consumer in a way appropriate for the means of distance communications used in plain and intelligible language. In so far as that information is provided on a durable medium, the language shall be legible.

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- CONSUMER RIGHTS DIRECTIVE: FORMAL REQUIREMENTS

- Further, for the purpose of providing online consumers **stronger protection** by requiring that certain information should be presented in a way that the online consumer can actually see and read it before placing the order without being obliged to navigate away from the page used to place the order, the CRD specifically provides that the following information shall be made available to the consumer **directly before** the latter places his order:
- **(a)** the main characteristics of the service of the product;
- **(b)** the total price;
- **(c)** the duration of the contract and the conditions for terminating it;
- **(d)** where applicable, the minimum duration of the consumer's obligations under the contract.

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- CONSUMER RIGHTS DIRECTIVE: FORMAL REQUIREMENTS

- Another objective set by the CRD is that the trader shall ensure that the consumer, when placing his order, explicitly **acknowledges that the order implies an obligation to pay**. Therefore, the button used to place the order on the website must be clearly labeled (the button can be designed in different ways as long as it gives a clear message about the obligation to pay).

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- CONSUMER RIGHTS DIRECTIVE: FORMAL REQUIREMENTS
- In the event a **contract is concluded by means of distance communication** allowing limited time or space to display the information, the CRD provides that in such cases the trader must provide, **before the placing of the order**, the same information required for distance contracts concluded through electronic means and, in addition: **(i)** the identity of the trader; **(ii)** the right of withdrawal; and **(iii)** the minimum duration of the consumer's obligation under the contract (this requirement is not expressly provided by the CRD but the EU Commission has specified that it should also be included).
- This information must also be provided in the event the trader has customized the content and presentation of its trading website for mobile devices with small screens; the remaining pre-contractual information required under Article 6 could, in such case, be available through hyperlink.

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- CONSUMER RIGHTS DIRECTIVE: CONTRACT CONFIRMATION

- Finally, the CRD regulates the **confirmation phase of the contract**. The trader shall provide the consumer with a confirmation of the contract including all the information required under Article 6 unless it has already been provided on a **durable medium** (such as in a mail order catalogue, SMS or e-mail, before the contract was concluded).

- What does «*durable medium*» mean? The definition of such term was examined by the CGUE in case C-49/11 *Content Services Ltd*. In such case the Court concluded that a mere provision of information on a website does not constitute a durable medium, however can qualify as durable media if they meet certain requirements (i.e. its content cannot be unilaterally changed for an adequate period by the seller).

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CONSUMER RIGHTS DIRECTIVE: CONTRACT CONFIRMATION

- The CRD requires that such confirmation must be sent *within a reasonable time after the conclusion of the distance contract,* **and at the latest, at the time of delivery of the goods and before the performance of the service begins**.

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- CONSUMER RIGHTS DIRECTIVE: RIGHT OF WITHDRAWAL
- Another important section of the CRD is the **right of withdrawal**, that is granted to the consumers unless the exceptions set forth in Article 16 apply. Under Article 9, the consumer has a period of 14 calendar days to exercise his or her right of withdrawal, *inter alia*, in distance contracts without giving reason and without incurring any costs other than those provided under the CRD.

- If the trader has not provided a notice of the right to withdrawal the directive **extends this right a period of 12 months** (art. 10). The period of notice starts from:
- (a) the day of the conclusion of the contract, in cases of, including but not limited to, service contracts and contracts for online digital content not supplied on a tangible medium; or
- (b) the day of the receipt of goods, in cases of sale contracts.

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- CONSUMER RIGHTS DIRECTIVE: RIGHT OF WITHDRAWAL

- Although the consumer is able to withdraw using either a **model form** provided by the trader or **any other unequivocal and explicit statements** of withdrawal made by the consumer to the trader, the burden of proof regarding the exercise of the right of withdrawal within the period falls on him/her.

- Articles 13 and 14 set forth the trader's and consumer's obligations in the event of withdrawal, respectively. Under Article 13, the trader must reimburse the consumer without undue delay, using the same means of payment as the initial transaction, not later than 14 days from the day on which the trader was informed of the consumer's decision to withdraw.

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- <u>CONSUMER RIGHTS DIRECTIVE: RIGHT OF WITHDRAWAL</u>

- Article 14 sets forth the following obligations of the consumer in the event of withdrawal:
  - - the consumer bears the burden of sending back goods, unless the trader has offered to collect them;
  - - The consumer bears the burden of the direct cost of returning goods, unless otherwise agreed;
  - - Goods shall be returned without undue delay and no later than 14 days from the day of communication of withdrawal to the trader;
  - - Consumer shall be liable for any diminished value of goods resulting from consumer's handling of them beyond that which is necessary to establish their nature, characteristics and functioning (however consumer is not liable if trader failed to provide notice of the right of withdrawal to consumer)
  - - In cases of contracts of services, the consumer shall pay the trader a proportionate amount for services already provided up until the time consumer informs trader of consumer's election to exercise the right of withdrawal.

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- CONSUMER RIGHTS DIRECTIVE: RIGHT OF WITHDRAWAL

- Finally, Article 16 provides for a list of situations where the application of the right to withdrawal is denied (**exceptions**), such as: **(i)** where service contracts have been fully performed with consumer's prior express consent and with consumer's acknowledgment of losing the right to withdrawal upon the completion of performance; **(ii)** where consumer has made specifications or clearly personalized requests regarding the goods; and **(iii)** in the case of supply of digital services not supplied on a tangible medium, if the performance has begun with the consumer's prior express consent and the consumer acknowledged the subsequent loss of his/her right of withdrawal.

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- CONSUMER RIGHTS DIRECTIVE: ONLINE DIGITAL PRODUCTS

- As anticipated, the CRD introduces a distinct category of **contracts for digital content**, that is not expressly defined, **not supplied on a tangible medium** and which Recital 19 neither classifies as sales contracts nor services contracts. However, as we will later analyze, the EU Institutions are proposing a definition of contracts for digital content not supplied on a tangible medium.
- Though no definition exists for contracts for digital content, the CRD expressly provides a definition of **Digital Content** as data which are produced and supplied in digital form, for example, computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means (Recital 19).

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- CONSUMER RIGHTS DIRECTIVE: ONLINE DIGITAL PRODUCTS

- With regard to such a unique category of contract, the CRD provides a specific regime with respect to the following profiles:

- 1) the application of the CRD;
- 2) the consumers' right of withdrawal;
- 3) the confirmation of the contract; and
- 4) the information requirements.

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- CONSUMER RIGHTS DIRECTIVE: ONLINE DIGITAL PRODUCTS

- First, with regard to CRD's application, one should note that contracts for online digital content are subject to the CRD **even if they do not involve the payment of a price by the consumer**. With such provision, the CRD's application extends to online digital products, however, since the CRD applies to contracts concluded between consumers and traders, it should not apply to online digital content which is merely broadcasted information on the internet that needs no express conclusion of a contract.

- Thus, it follows that access to or download from a website should not be considered a contract for the purposes of the CRD.

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- <u>CONSUMER RIGHTS DIRECTIVE: ONLINE DIGITAL PRODUCTS</u>

- Contracts for online digital content also have distinguishable characteristics regarding the **right of withdrawal** because of the instantaneous nature of the contracts. The legislator decided to regulate these types of contracts applying the same principles already in force with respect to sealed tangible data carriers (CDs and DVDs) - in that consumers are granted the right of withdrawal for 14 days unless they unseal the packaging of the i.e CDs or DVDs – such that **consumers are not granted with the right of withdrawal once they test the digital content** (i.e. start of downloading or streaming a video).

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- CONSUMER RIGHTS DIRECTIVE: ONLINE DIGITAL PRODUCTS

- Further taking into account the immediate nature of these contracts, the CRD also requires the trader to provide consumers with confirmation by e-mail **immediately before the digital content is supplied** (i.e. before the streaming or download starts).

- Finally, in addition to the information requirements applying to all contracts, contracts for digital content must fulfill additional information requirements regarding:

- (a) **functionality** of digital content (i.e. ways in which digital content can be used, for instance for the tracking of consumer behavior, etc.);

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CONSUMER RIGHTS DIRECTIVE: ONLINE DIGITAL PRODUCTS

- (b) **interoperability** of digital content (i.e. description of the information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operating system, etc.); and
- (c) where the digital product includes optional additional and built-in purchases (i.e. *apps* that include *in-app* purchases), information that such additional purchasing options may be offered, before acquiring the product.

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- Before going over the other EU regulations in force and applicable to e-commerce that heavily contribute to consumer protection, one must note that the adoption of the proposal of a Directive, dated 11.04.2018, amending, inter alia, Directive 2005/29/EC and CRD regarding stricter enforcement and modernization of EU consumer protection rules (the "**Directive Proposal**") has recently been under discussion in EU Institutions.

- The EU Commission presented a communication to the Directive Proposal called New Deal for Consumers (the "**NDC**") to the EU Parliament and Council with the purpose of better adapting consumer rules of the online world, which has developed considerably in recent years.

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- The scope of such EU Commission's intervention was summarized by First Vice-President Tiemmermans who said that:

- "*Today's New Deal is about delivering a fairer Single Market that benefits consumers and businesses. We introduce a European collective redress right for when groups of consumers have suffered harm, like we have seen in the recent past, with proper safeguards so there can be no misuse. Consumers will know who they are buying from online, and when sellers have paid to appear in search results. The majority of traders who play fair will see burden lifted. The handful of traders who deliberately abuse European consumers' trust will be sanctioned with tougher fines.*"

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- The main objectives set out by the NDC are:

- (A) **Strengthening consumer rights online**:
- - when searching online, consumers will have to be clearly informed when a search result is being paid for by a trader;
- - market participants will have to inform the consumers about the main parameters determining the ranking of the results;
- - extension of the right of withdrawal to "free" digital services for which consumers provide their personal data, but do not pay for such services with money (i.e. cloud storage services; e-mail accounts).

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- (B) **Giving consumers the tools to enforce their rights and get compensation**:
- - it will be possible for a qualified entity such as a consumer organization to seek redress at the EU level, such as compensation, replacement or repair, on behalf of a group of consumers that have been harmed by an illegal commercial practice;
- - the right to claim individual remedies will be ensured to consumers in all Member States, when they are affected by unfair commercial practices;

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- (C) **Introducing effective penalties for violations of EU consumer law**:
- - providing the national authorities with the power to impose effective, proportionate and dissuasive penalties in a coordinated manner;
- - for widespread infringements that affect consumers in several EU Member States, the available maximum fine will be 4% of the trader's annual turnover in each respective Member State (the Member States are free to introduce higher maximum fines);

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- (D) **Tackling dual quality of consumer products**:
- **-** updating the Unfair Commercial Practices Directive in order to make explicit that national authorities can assess and address misleading commercial practices involving the marketing of products as being identical in several EU countries, if their composition or characteristics are significantly different;

- (E) **Improved conditions for businesses**:
- - removal of unnecessary burdens for businesses (i.e. traders will no longer have to reimburse the consumers before actually receiving the returned goods).

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- The Directive Proposal moves parallel with the NDC, and specifically provides for amendments both to Directive 2005/29/EC (on unfair commercial practices) and to the CRD. We will further analyze the **proposed amendments regarding the CRD**, while analyzing the proposed amendments regarding Directive 2005/29/EC in the following Lecture.

- First, the Directive Proposal formulates a series of **new definitions**, which align with those provided under the Digital Content Directive (2019/770/EU), in order to broaden the Proposal's application to digital services and online marketplaces.

Article 2

Amendments to Directive 2011/83/EU

Directive 2011/83/EU is amended as follows:

(1) Article 2 is amended as follows:

(a) The following point (4a) is inserted:

'(4a) 'personal data' means personal data as defined in Article 4(1) of Regulation (EU) 2016/679;'

(b) Point (6) is replaced by the following:

'(6) 'service contract' means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof. Reference to 'services' also includes 'digital services' and reference to 'service contract' also includes 'digital service contract';

(c) Point (11) is replaced by the following:

'(11) 'digital content' means data which are produced and supplied in digital form, including video files, audio files, applications, digital games and any other software';

(d) The following points are added:

'(16) 'contract for the supply of digital content which is not supplied on tangible medium' means a contract under which a trader supplies or undertakes to supply specific digital content to the consumer and the consumer pays or undertakes to pay the price thereof. This also includes contracts where the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for the purpose of supplying the digital content, or for the trader to comply with legal requirements to which the trader is subject, and the trader does not process this data for any other purpose;

(17) 'digital service' means (a) a service allowing the consumer the creation, processing or storage of, or access to, data in digital form; or (b) a service allowing the sharing of or any other interaction with data in digital form uploaded or created by the consumer and other users of that service, including video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media.

(18) 'digital service contract' means a contract under which a trader supplies or undertakes to supply a digital service to the consumer and the consumer pays or undertakes to pay the price thereof. This also includes contracts where the

consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for the purpose of supplying the digital service, or for the trader to comply with legal requirements to which the trader is subject, and the trader does not process this data for any other purpose;

(19) 'online marketplace' means a service provider which allows consumers to conclude online contracts with traders and consumers on the online marketplace's online interface;

(20) 'online interface' means online interface as defined in point (16) of Article 2 of Regulation (EU) 2018/302'

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- In light of such definitions, one must note that the Directive Proposal extends the application of the CRD to all digital services for which consumers provide personal data without monetary payment, such as cloud storage, social media and e-mail accounts.

- One of the major developments brought by the Directive Proposal would be that consumer's rights provided under the CRD (i.e. information requirements and right of withdrawal) would also be **applicable to consumers who benefit from digital services by giving their personal data without making any payment for such digital services**.

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- However, such legal framework would not apply in situations where the provided data are **processed by the trader for legal purposes**, or where they are processed by the trader for **the purpose of providing the digital content or the digital service**.
- For consistency, the Directive Proposal provides for amendments to Articles 5 and 6 of the CRD with the purpose of adding, among other information requirements provided therein, information regarding the interoperability and functionality to the category of "digital services".
- In order to enhance flexibility in communication between traders and consumers, the Directive Proposal, if adopted, would introduce the possibility for professionals to use other means of communication as an alternative to the traditional e-mail address and remove faxing from the list of possible means of communication.

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- As mentioned, the Directive Proposal also deals with contracts concluded in online marketplaces. In particular, if adopted, under Article 6 bis, the proposal requires traders to provide the consumer with the following additional information requirements:
- 1) the obligation to **indicate the main parameters** to determine the classification of offers;
- 2) the duty to specify **if contracts would be subject to EU law on consumer obligations and rights**, if the third party offering the product is a trader;
- 3) the obligation to indicate the **liable trader** as a way to ensure, in relation to the contract, the application of consumer rights stemming from EU consumer protection law, if the contract is concluded with a trader.

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- The Proposal Directive also aims to amend Article 8 of the CRD by specifying that the formal requirement for distance contracts concerning the obligation for traders to obtain the express consent of the consumer for the immediate provision of services is **applicable only to those services provided to offset payment** and, therefore, **only in such cases where the trader requires consumer's express consent**.

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- As mentioned, in order to **improve business conditions**, the Directive Proposal also provides for amendments to the obligation of the trader in the event of withdrawal (Article 13 of the CRD), and specifically:
- (a) the elimination of the obligation for the trader to reimburse the consumer before he or she received back the returned goods. This elimination thus provides the trader with the right to withhold the refund until he or she can physically check the alleged nonconforming goods;
- (b) the introduction of the requirement for the trader to fulfill his or her obligations and exercise his or her rights under Regulation (EU) 2016/679 and Directive 2019/770 concerning personal data and digital content other than personal data, uploaded or created by the consumer while using the digital content or digital service provided by the trader.

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- <u>RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION</u>

- The Directive Proposal provides for the elimination of the consumer's right to return goods which have been handled beyond the extent necessary to establish their nature, characteristics and functioning.

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- RECENT EU INTERVENTIONS ON E-COMMERCE PROTECTION

- Finally, the Directive Proposal also provides for a **different penalty regime**, aligned to the one set out under the Directive 2005/29/EC (on unfair commercial practices), that consists of the **(i)** introduction of a list of criteria that the national authorities of the Member States would be asked to take into account, such as the nature, gravity, duration, or temporal effects of the trader's infringement actions, to mitigate or remedy the damage suffered by consumers, as well as the number of consumers affected, including those in other Member States, and **(ii)** imposition of penalties in cases of widespread infringements within an EU, for a minimum amount of 4% of the trader's annual turnover in the Member State or Member States concerned.

(10) Article 24 is replaced by the following:

'Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

2. Member States shall ensure that, when deciding on whether to impose a penalty and on its level, the administrative authorities or courts shall give due regard to the following criteria where relevant:

(a) the nature, gravity and duration or temporal effects of the infringement;

(b) the number of consumers affected, including those in other Member State(s);

(c) any action taken by the trader to mitigate or remedy the damage suffered by consumers;

(d) where appropriate, the intentional or negligent character of the infringement;

(e) any previous infringements by the trader;

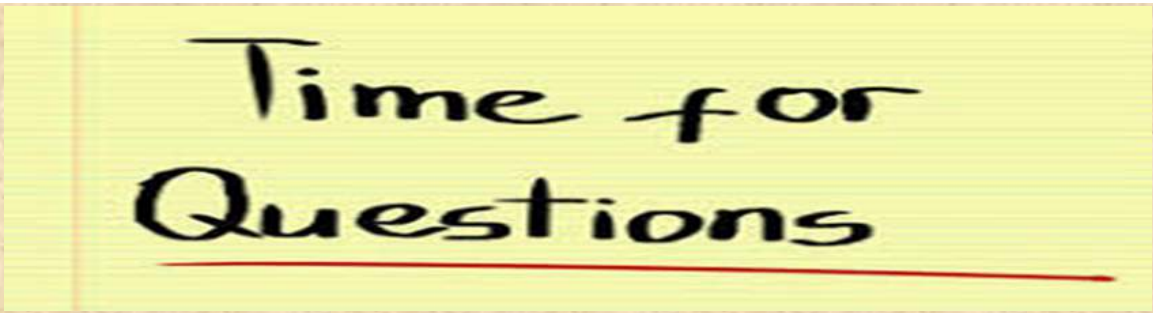
(f) the financial benefits gained or losses avoided by the trader due to the infringement;

(g) any other aggravating or mitigating factor applicable to the circumstances of the case.

3. Where the penalty to be imposed is a fine, the infringing trader's annual turnover and net profits as well as any fines imposed for the same or other infringements of this Directive in other Member States shall also be taken into account in the determination of its amount.

4. Member States shall ensure that the penalties for widespread infringements and widespread infringements with a Union dimension within the meaning of Regulation (EU) No 2017/2934 include the possibility to impose fines, the maximum amount of which shall be at least 4% of the trader's annual turnover in the Member State or Member States concerned.

[...]



- **How does the system of specific liability exemptions under the E-Commerce Directive works?**
- **How are the contracts for digital content specifically regulated under the CRD?**
- **What are the main novelties under the Directive Proposal?**

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SUGGESTED READINGS

- e-Commerce Directive 2000/31/EC;
- Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce, P. A. Baistrocchi, 2003;
- Consumer Rights Directive 2011/83/EU;
- Guidance Document concerning Directive 2011/83/EU, DG Justice, European Commission, June 2014;
- EU Commission communication "New Deal" for consumers, COM(2018) 183 final;
- Directive proposal COM (2018) 185 final.

MODULE III

THE INTERNAL MARKET AND THE DIGITAL ECONOMY

(*Lecture XVI*)

Unfair Commercial Practices in the Digital Economy

- <u>UNFAIR COMMERCIAL PRACTICES DIRECTIVE: SCOPE</u>

- Directive 2005/29/EC concerning unfair business-to-consumer commercial practices (the "**UCPD**") contributes to the proper functioning of the internal market by prohibiting unfair commercial practices and, therefore, boosting fairness in the market ensuring that consumers are not misled or exposed to aggressive marketing.

- This directive, jointly with the legislations analyzed insofar, constitutes a significant piece of legislation also regarding the digital economy.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: SCOPE

- Indeed, the UCPD has a broad scope applying to **all commercial practices except business-to-business** (B2B), that harm consumer's economic interests which occur **before** (i.e. during advertising or marketing), **during** or **after** a business-to-consumer online (and offline) transaction has taken place and which **harm consumer's economic interests** more generally.
- Therefore, the UCPD applies regardless of the channel, medium or device used to implement a business-to-consumer commercial practice and aims to ensure that "online and offline consumers" are not misled or exposed to aggressive marketing and that commercial claims made by traders targeting consumers in the EU are clear, accurate and substantiated.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: SCOPE

- The UCPD plays a key "**safety net**" role in preventing and combating unfair commercial practices as a result of its gap filling and complementary characteristics with respect to other EU legislation, particularly in the online sector where new risks and legislative holes constantly arise.

- Although – as previously described – the CRD and e-Commerce Directive jointly provide a strong set of consumer protection provisions, various commercial practices can still be carried out by online operators **which do not fall under such legal framework, but may fall under the application of the UCPD**.

Unfair Commercial Practices in the Digital Economy

- <u>UNFAIR COMMERCIAL PRACTICES DIRECTIVE: SCOPE</u>

- The UCPD's safety net aspect allows for a **general higher uniform standard of consumer protection across all sectors** due to its structure encompassing not just certain commercial practices that are considered unfair in all circumstances but also certain commercial practices that, after a case-by-case assessment, may be considered unfair.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: ONLINE PLATFORMS

- Analyzing the UCPD with regard to the digital economy, the new phenomenon of **online platforms** must be explained as online platforms play a key role in such sector having changed consumers behaviors as well as traditional ways of making businesses.
- Online platforms can be understood as a method of organizing digital markets that allows two group of users (suppliers and customers) to meet. By providing infrastructure and enabling interactions between suppliers and users for the immediate provision of goods, services, digital content and information online, the development of online platforms have opened tremendous amounts of opportunities in the market.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: ONLINE PLATFORMS

- Such opportunities are strictly linked to the ability of online platforms to operate across various business models, one should note that their functionality ranges from merely allowing users to look for information supplied by third parties to facilitating, often against remuneration, contractual transactions between third party traders and consumers, to advertising and selling different kinds of products and services, including digital content.
- Amongst other, online platforms may even operate as marketplaces where users must first conclude a contract with the platform to subsequently be able to conclude contracts between themselves; depending on the circumstances, online platforms may also qualify as ISPs.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: ONLINE PLATFORMS

- Some concrete examples of online platform business models can be the following: search engines (e.g. Google, Yahoo!); social media (e.g. Facebook, Twitter); user review tools (e.g. Tripadvisor); collaborative economy platforms (e.g. Airbnb, Uber, BlaBlaCar); E-commerce platforms (marketplaces) (e.g. Zalando, Amazon, Alibaba, Ebay); app stores (e.g. Apple App Store, Google Play, Amazon App Store); collective buying websites (e.g. Groupon).

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: ONLINE PLATFORMS

- The variety of online platform business models evidences how the growth of the digital economy runs parallel to the ability to easily perform unfair commercial practices and thus make users subject to the risks therefrom.

- For example, misleading presentations of products, failure to fully inform about traders or payment settings, insufficient consent by consumers for purchases, hidden marketing, and fake user reviews, are only a few of the problems that have been detected over the past years.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: ONLINE PLATFORMS

- Notwithstanding the importance of online platforms in the digital economy, it may be surprising that the term "platform" is not defined under the UCPD. However, due to the UCPD's technological neutrality described under paragraph before, the definition of the term "platform" would not have any impact on its application extent.

- Therefore, the **general legal framework provided under the UCPD also applies to online platforms**, which shall be subject to its provisions as long as: **(i)** they can be qualified as "traders" under Article 2, lett. (b), of the UCPD ; and **(ii)** the transaction put in place by the latter falls under the category of B2C transactions (Article 2, lett. (d), of the UCPD), towards users (suppliers and recipients) who qualify as "consumers" within the meaning of Article 2, lett. (a), of the UCPD.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: ONLINE PLATFORMS

- It then follows that if such an online platform meets the above two criteria, it will be subject to the UCPD and its **commercial practices may be considered unfair if they**: **(i)** fall under the "black list" (Annex I of the UCPD); **(ii)** perform a "misleading action or omission" (Articles 6 and 7 of the UCPD); **(iii)** perform an "aggressive practice" (Articles 8 and 9 of the UCPD); or **(iv)** act contrary to the requirements of "professional diligence" (Article 5, par. 2 of the UCPD).

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: BLACK LIST

- The first step in verifying whether an online platform's commercial practice is unfair is to determine **if its practice falls under the "blacklisted" commercial practices**, provided under Annex I of the UCPD. The main purpose of Annex I of the UCPD is to provide greater legal certainty by listing out commercial practices that are considered unfair in all circumstances and, therefore, are prohibited.

- For clarification, the qualification of an unfair commercial practice that falls under the black list is objective.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: BLACK LIST
- And this is because throughout this blacklist the directive aims to allow enforcers, traders, marketing professionals and customers to be able to easily identify practices that are deemed ex se as unfair and therefore respond more rapidly.

Example

- For instance, if it can be proved that a trader has carried out a blacklisted commercial practice, national enforcers are permitted to take actions in order to sanction such trader, and this without previously being obliged to carry out any case-by-case test (i.e. assessing the likely impact of the practice on the average consumer's economic behavior).

Unfair Commercial Practices in the Digital Economy

- <u>UNFAIR COMMERCIAL PRACTICES DIRECTIVE: BLACK LIST</u>

- Another typical example of an online commercial practice that could be qualified as a black listed commercial practice is when search engines fail to disclose paid placement within search results. Particularly, this conduct can be found to violate the requirement to clearly distinguish editorial content from advertising content, which is expressly provided under No. 11 of Annex I, which expressly bans the use of "*editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)*".

Unfair Commercial Practices in the Digital Economy

- <u>UNFAIR COMMERCIAL PRACTICES DIRECTIVE: MISLEADING COMMERCIAL PRACTICES</u>

- If an online platform commercial practice does not fall under the blacklist, it may still be subject to Articles 6 and 8 of the UCPD that require an assessment dedicated to evaluate if the **practice is unfair for constituting a misleading action or omission.**

Unfair Commercial Practices in the Digital Economy

- <u>UNFAIR COMMERCIAL PRACTICES DIRECTIVE: MISLEADING COMMERCIAL PRACTICES</u>

- <u>First</u>, when assessing if a commercial practice constitutes as a **misleading action**, one must verify if the practice is specifically capable of deceiving the average consumer by considering a wide range of elements, including:
- **(i)** the existence of the product;
- **(ii)** its main characteristics (i.e. its composition, method of manufacture, geographical or commercial origin, the risks and results to be expected from its use);
- **(iii)** the price or the manner in which the price is calculated or the existence of a specific price advantage; and
- **(iv)** the nature, attributes and rights of the trader.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: MISLEADING COMMERCIAL PRACTICES

- In addition, during such evaluation, one must also assess if the commercial practice causes or is likely to cause the average consumer to take a transactional decision that he or she would not have taken otherwise, and if the practice involves confusing marketing or non-compliance by the trader with respect to commitments contained in codes of conduct by which the trader has undertaken to be bound.

- In such cases the commercial practices **could be considered unfair for constituting a misleading action**, however, one should note that an evaluation has to be carried out on the bases of the UCPD policy, under which the content of the information, the manner in which the information is presented, and the degree of impact of consumer responses must all be taken into account.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: MISLEADING COMMERCIAL PRACTICES

- An example in which Article 6 of the UCPD may apply include conduct that can be performed by comparison tools that qualify as traders. Particularly, if a comparison tool engages in any commercial communication directly connected with the promotion, sale, or supply of a product to consumers, the tool is required to ensure that the information provided by the platform itself does not create confusion with any products, trademarks, trade names or other distinguishing marks of a competitor.

Example

Unfair Commercial Practices in the Digital Economy

- <u>UNFAIR COMMERCIAL PRACTICES DIRECTIVE: MISLEADING COMMERCIAL PRACTICES</u>

- As regards the UCPD assessment of whether a commercial practice constitutes as a **misleading omission**, it has to be noted that the directive establishes several ways to undertake this evaluation.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: MISLEADING COMMERCIAL PRACTICES

- **Firstly**, trader compliance with the obligation, under UCPD art. 7, par. 1, to provide consumers "material information" (which is all information the average consumer needs in order to make an informed purchasing decision) must be verified.
- In this respect, one should note that in the event a trader performs a commercial communication – including advertising or marketing – it will be required to provide also certain additional "material information" that are even more specific than the information requirements set forth by the UCPD. Failure of the trader to provide material information would lead to **qualify the commercial practice as unfair because of such omission**.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: MISLEADING COMMERCIAL PRACTICES

- Additionally, a commercial practice may constitute a misleading omission as long as it likely causes the average consumer to take a transactional decision he or she would not have taken otherwise, and if: (i) it provides the material information "in an unclear, unintelligible, ambiguous or untimely manner"; (ii) its commercial intent cannot be identified.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: MISLEADING COMMERCIAL PRACTICES

- The difficulty in verifying unfair commercial practices in the event of **trader's lack of action** is even more complicated under the UCPD regime that, parallel with the provision of the CRD, specifically requires that such verification shall take into account also two elements:
- **(i)** the limits of space and time of the communication medium used; and
- **(ii)** any measures taken by the trader to make the information available to consumers by other means.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: MISLEADING COMMERCIAL PRACTICES

- In the context of misleading omissions, a specific commercial practice that is specifically regulated by the UCPD is the **invitation to purchase**.

- With regard to such practice, the UCPD, under Article 7, par. 4, lists a number of **information requirements** which are considered material information. In other words, if not already apparent from the context, the UCPD requires that, when an invitation to purchase is made, consumers shall be provided with certain information.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: MISLEADING COMMERCIAL PRACTICES

- An example of online commercial practice that may be subject to Article 7 of the UCPD is when a search engine includes lists of search results based on relevant criteria linked to the level of payment they receive from third party traders and, consequently, hides the commercial intent.

Example

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: AGGRESSIVE COMMERCIAL PRACTICES

- A further hypothesis for which a commercial practice can be prohibited under the UCPD is when it is considered "**aggressive**".

- The **prohibition** of aggressive commercial practices aims to prevent traders from adopting selling techniques which limit the consumer's freedom of choice or conduct with regard to the product, and thereby distorting their economic behavior.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: AGGRESSIVE COMMERCIAL PRACTICES

- A **commercial practice shall be deemed aggressive** if, at the marketing stage or during or after a transaction has taken place, it:

- "*by harassment, coercion, including the use of physical force, or undue influence, significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise*".

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: PROFESSIONAL DILIGENCE

- Finally, the UCPD also considers a commercial practice as unfair if it falls under the application of the **general clause** provided under **Article 5, par. 2**, of the UCPD, which works as a self-standing criterion.

- This represents a key provision that broadens the application extent of the UCPD also to emerging online (and offline) commercial practices by ensuring that any unfair commercial practice not caught by other provisions of the same directive can still be penalized.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: PROFESSIONAL DILIGENCE

- In particular, **two cumulative criteria** for assessing whether a commercial practice should be deemed unfair are set:
- **(a)** if it is contrary to the requirements of professional diligence, and
- **(b)** if it materially distorts or is likely to materially distort the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers".

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE: PROFESSIONAL DILIGENCE

- Consequently, when it is verified that an online platform provider qualifying as a "trader" performs a commercial practice with the characteristics of the above points (a) and (b), it will definitely be subject to Article 5, par. 2, of the UCPD and, therefore, such commercial practice will be considered unfair.

Unfair Commercial Practices in the Digital Economy

- <u>UNFAIR COMMERCIAL PRACTICES DIRECTIVE: PROFESSIONAL DILIGENCE</u>

Example

- For example, Article 5, par. 2, of the UCPD may apply when an online platforms does not make clear that some costs of their services are optional and, consequently, mislead consumers regarding their decision to purchase additional services.
- These, practices that contravene these principles could, depending on the circumstances be considered contrary to the requirements of professional diligence, not be considered constituting a misleading action or omission, but still Article 5, par. 2, of the UCPD may apply.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE AMENDMENTS PROPOSAL

- Given the above general legal framework of the UCPD, as anticipated in the previous lecture, it has to be noted that the **Directive Proposal** also provides for certain **amendments to the UCPD**.
- In brief:
- **First**, the Directive Proposal, if adopted, would introduce a significant novelty aiming to empower victims of unfair commercial practices to **take action against traders** to solve problems created by the latters.
- This would be pursued through the insertion of a new Article 11a in the UCPD that requires Member States to ensure that certain specific types of contractual and non-contractual remedies for breaches to UCPD are available to consumers under their national law.

Unfair Commercial Practices in the Digital Economy

UNFAIR COMMERCIAL PRACTICES DIRECTIVE AMENDMENTS PROPOSAL

- **A second novelty** that the adoption of the Directive Proposal would bring is the provision of **strengthened rules on penalties**.
- In particular, a list of common, non-exhaustive criteria for assessing the gravity of infringements (except for minor ones) would be introduced under Article 13 of the UCPD. As a result, enforcement authorities would be required to take these criteria into account when deciding whether to impose penalties and on their level: if the penalty to be imposed is a fine, the authority would be required to take into account, when setting the amount of it, the infringing trader's turnover, net profit as well as any fine imposed for the same infringement in other Member States.

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE AMENDMENTS PROPOSAL

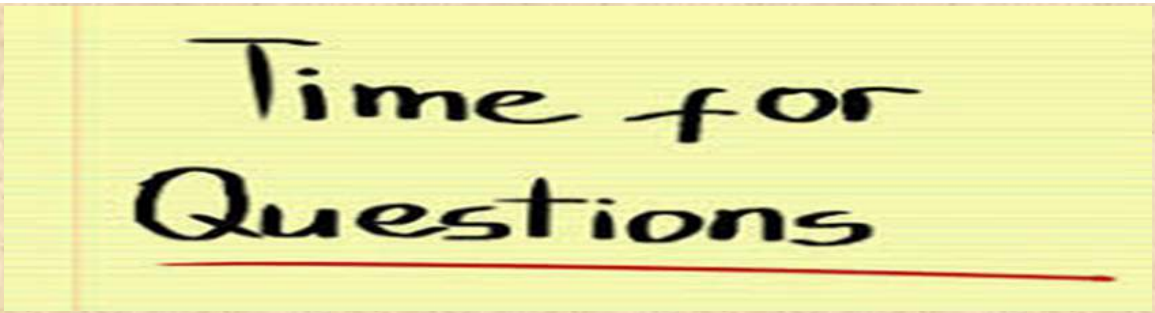
- **Other main novelties** that may occur if the Directive Proposal is adopted consist in the clarification of the application of existing rules of the UCPD regarding both **hidden advertising** and **misleading advertising** of "**dual quality" products**.

- As regard **hidden advertising**, the novelty is that No. 11 of Annex I is replaced by the following: "*Using editorial content in the media, or providing information to a consumer's online search query, to promote a product where a trader has paid for the promotion without making that clear in the content or search results or by images or sounds clearly identifiable by the consumer (advertorial; paid placement or paid inclusion)*".

Unfair Commercial Practices in the Digital Economy

- UNFAIR COMMERCIAL PRACTICES DIRECTIVE AMENDMENTS PROPOSAL

- In conclusion, as regards "**dual quality" products**, the Directive Proposal provides that a commercial practice involving the marketing of a product as being identical to the same product marketed in several other Member States, where those products have significantly different composition or characteristics causing or likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, is a misleading commercial practice which competent authorities should assess and address on a case by case basis



- **What does it mean that the UCPD plays a safety net role?**
- **When an online platforms may be subject to the UCPD? What has to be assessed in order to verify if it has constituted a misleading omission?**
- **What is the professional diligence under the UCPD ?**

Unfair Commercial Practices in the Digital Economy

SUGGESTED READINGS

- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

- Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices.

SEMINARS

Geo-blocking Regulation and Content Portability Regulation

- THE GEO-BLOCKING REGULATION: SCOPE

- The Geo-blocking Regulation (No. 302/2018) was adopted on 27 February 2018 and has been enforceable in the Member States since 3 December 2018. The regulation undoubtedly represents one of the most relevant EU interventions aiming to provide easier access in the Digital Single Market by removing barriers to online cross-border transactions.

Geo-blocking Regulation and Content Portability Regulation

- THE GEO-BLOCKING REGULATION: SCOPE

- In particular, the EU Geo-blocking Regulation aims to prevent **unjustified discrimination** of clients based, directly or indirectly, on the customers' nationality, place of residence or place of establishment in the internal market.

- The regulation applies to all companies (including online platforms) that sell goods or services within the EU territory, including companies who have no legal office in the EU territory.

Geo-blocking Regulation and Content Portability Regulation

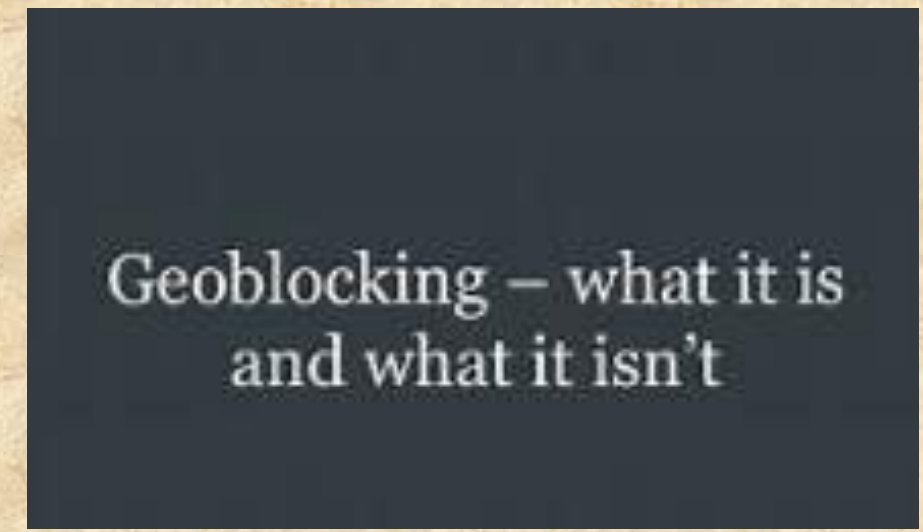
- <u>THE GEO-BLOCKING REGULATION: SCOPE</u>

- Specifically, the regulation applies both to *online* and *offline* sales:
- **(a)** to **end-consumers**: therefore, it does not apply to the B2B transaction unless the business purchases the product as an end consumer;
- **(b)** having a **cross-border nature** within the EU: therefore, it does not apply to eventual restrictions taking place between territorial areas of the same Member State.

Geo-blocking Regulation and Content Portability Regulation

- THE GEO-BLOCKING REGULATION: SCOPE

- The regulation also **does not apply** to
- sales made to:



- **(i)** consumers that are not EU citizens,
- or that are not EU residents; and

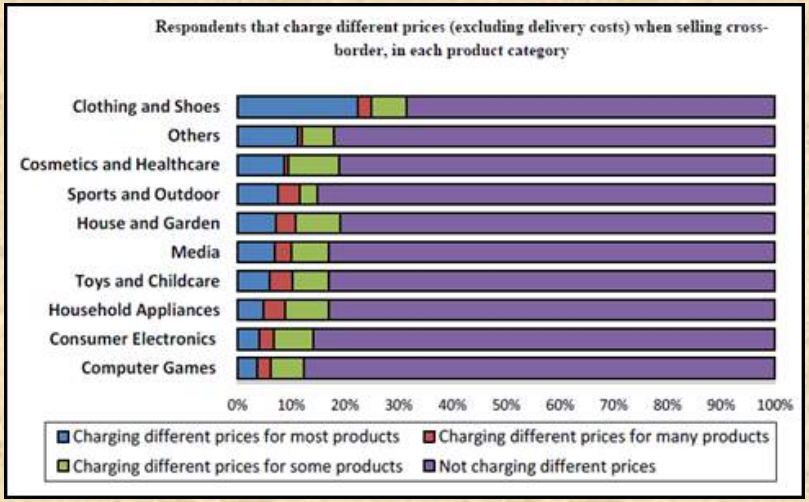
- **(ii)** companies established in the EU that receive goods and/or services outside the EU territory.

Geo-blocking Regulation and Content Portability Regulation

- THE GEO-BLOCKING REGULATION: SCOPE

From a competitive point of view, the regulation takes into consideration two interconnected problems:

- lack of trasparency or obstacols for access to online offers;
- price differentials on a geographical bases.



Geo-blocking Regulation and Content Portability Regulation

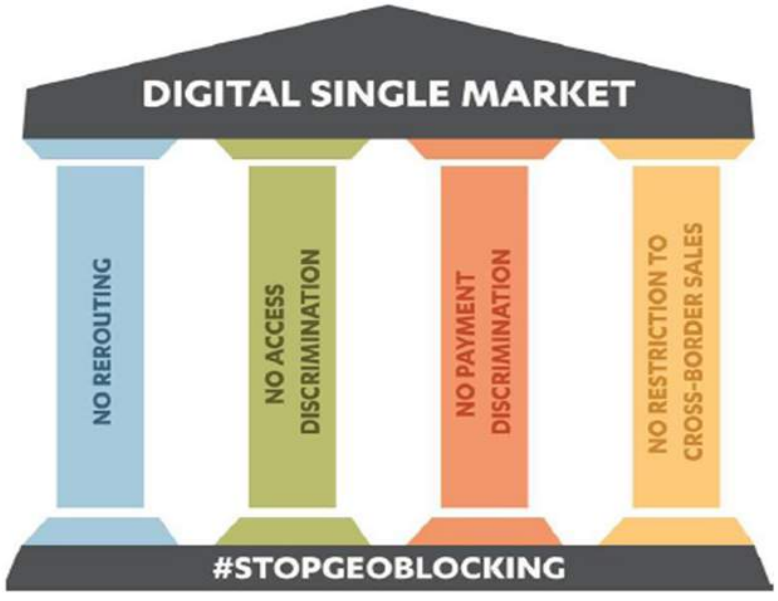
- THE GEO-BLOCKING REGULATION: SCOPE

Taking into account such problems, the regulation expressly regulates **3 typologies** of geo-blocking practises:

A. restrictions to the **access** to web sites (art. 3);

B. restrictions to the **conclusion of contracts** related to *online* goods and services (art. 4);

C. restrictions to the use of **means of payment** (art. 5).



Geo-blocking Regulation and Content Portability Regulation

- THE GEO-BLOCKING REGULATION: RESTRICTION TO THE ACCESS TO WEBSITES

- The Geo-blocking Regulation, under Article 3, provides that a company shall not, for reasons related to customer's nationality, place of residence, or place of establishment:
- **(a) block or limit** a customer's access to the company's online interfaces;
- **(b) redirect** the customer, without the customer's previous and explicit consent, to a version of the company's online interface that is different from the online interface to which the customer initially sought access, which was specifically targeted for customers of a particular nationality, place of residence or establishment.

Article 3

Access to online interfaces

1. A trader shall not, through the use of technological measures or otherwise, block or limit a customer's access to the trader's online interface for reasons related to the customer's nationality, place of residence or place of establishment.

2. A trader shall not, for reasons related to a customer's nationality, place of residence or place of establishment, redirect that customer to a version of the trader's online interface that is different from the online interface to which the customer initially sought access, by virtue of its layout, use of language or other characteristics that make it specific to customers with a particular nationality, place of residence or place of establishment, unless the customer has explicitly consented to such redirection.

In the event of redirection with the customer's explicit consent, the version of the trader's online interface to which the customer initially sought access shall remain easily accessible to that customer.

3. The prohibitions set out in paragraphs 1 and 2 shall not apply where the blocking or limitation of access, or the redirection is necessary in order to ensure compliance with a legal requirement laid down in Union law, or in the laws of a Member State in accordance with Union law, to which the trader's activities are subject.

In such instances, the trader shall provide a clear and specific explanation to customers regarding the reasons why the blocking or limitation of access, or the redirection is necessary in order to ensure such compliance. That explanation shall be given in the language of the online interface that the customer initially sought to access.

Geo-blocking Regulation and Content Portability Regulation

- THE GEO-BLOCKING REGULATION: RESTRICTION TO THE CONCLUSION OF CONTRACTS

- Under Article 4, the Geo-blocking Regulation also provides for the prohibition of unequal treatment in **3 specific cases**:

- 1) goods are delivered or collected in a EU State, in which the seller offers the delivery in the general conditions of access;

- 2) provision of purely *online* services (e.g. *cloud* services);

- 3) provision of services in a specific area within a territory of a EU State (e.g. car rental).

Article 4

Access to goods or services

1. A trader shall not apply different general conditions of access to goods or services, for reasons related to a customer's nationality, place of residence or place of establishment, where the customer seeks to:

(a) buy goods from a trader and either those goods are delivered to a location in a Member State to which the trader offers delivery in the general conditions of access or those goods are collected at a location agreed upon between the trader and the customer in a Member State in which the trader offers such an option in the general conditions of access;

(b) receive electronically supplied services from the trader, other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form;

(c) receive services from a trader, other than electronically supplied services, in a physical location within the territory of a Member State where the trader operates.

2. The prohibition set out in paragraph 1 shall not prevent traders from offering general conditions of access, including net sale prices, which differ between Member States or within a Member State and which are offered to customers on a specific territory or to specific groups of customers on a non-discriminatory basis.

3. Mere compliance with the prohibition set out in paragraph 1 does not, in itself, mean that a trader is under an obligation to comply with non-contractual national legal requirements relating to the respective goods and services of the Member State of the customer or to inform customers about those requirements.

[...]

Geo-blocking Regulation and Content Portability Regulation

- THE GEO-BLOCKING REGULATION: RESTRICTION TO THE CONCLUSION OF CONTRACTS

- Such restrictions do not oblige companies to sell and apply price standardization in all EU States and it is therefore possible to make specific offers/promotions for certain EU territories through different websites. To the extent companies make offers to certain groups of clients, such offers must be made on non-discriminatory basis.

Geo-blocking Regulation and Content Portability Regulation

THE GEO-BLOCKING REGULATION: RESTRICTION TO THE USE OF MEANS OF PAYMENT

With regard to the restriction on the use of means of payment provided with respect to Article 5, one should note that the regulation does not impact the freedom of companies to freely choose which means of payment to accept. However, companies **may not apply different conditions for a payment transaction** if:

(a) the payment is made with a electronic transaction by credit transfer, direct debit or a card-based payment instrument;

(b) authentication requirements are fulfilled pursuant to PSD2 Directive; **and**

(c) the payment transactions are in a currency that the company accepts.

Article 5

Non-discrimination for reasons related to payment

1. A trader shall not, within the range of means of payment accepted by the trader, apply, for reasons related to a customer's nationality, place of residence or place of establishment, the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument within the Union, different conditions for a payment transaction, where:

(a) the payment transaction is made through an electronic transaction by credit transfer, direct debit or a card-based payment instrument within the same payment brand and category;

(b) authentication requirements are fulfilled pursuant to Directive (EU) 2015/2366; and

(c) the payment transactions are in a currency that the trader accepts.

2. Where justified by objective reasons, the prohibition set out in paragraph 1 shall not prevent the trader from withholding the delivery of the goods or the provision of the service, until the trader has received confirmation that the payment transaction has been properly initiated.

[...]

Geo-blocking Regulation and Content Portability Regulation

- <u>THE GEO-BLOCKING REGULATION: ENFORCEMENT</u>

- Finally, the Geo-blocking Regulation requires **designated authorities of each Member State** to carry out enforcement of the Geo-blocking Regulation.

- Therefore, the **enforcement of this regulation is national** and will take place in accordance with **national measures** (which must, according to the regulation, be effective, proportionate and dissuasive) that will be implemented by the respective authorities.

Article 7

Enforcement

1. Each Member State shall designate a body or bodies responsible for adequate and effective enforcement of this Regulation.

2. Member States shall lay down the rules setting out the measures applicable to infringements of the provisions of this Regulation and shall ensure that they are implemented. The measures provided for shall be effective, proportionate and dissuasive.

3. The measures referred to in paragraph 2 shall be communicated to the Commission and made publicly available on the Commission's website.

Geo-blocking Regulation and Content Portability Regulation

- THE CONTENT PORTABILITY REGULATION: SCOPE

- Another piece of legislation that can be considered in conjunction with the Digital Single Market Strategy is Regulation (2017/1128/EU) on cross-border portability of online content services in the internal market (the "**Portability Regulation**").

- The main scope of the Portability Regulation is to broaden access to online content services for travelers in the EU in order to enable individuals to fully use their online subscriptions for films, sports events, eBooks, video games and music services when travelling within the EU territory, in the same way they access them at home.

Geo-blocking Regulation and Content Portability Regulation

- THE CONTENT PORTABILITY REGULATION: SCOPE

- In detail, the regulation applies to **(i)** audiovisual media services (or services of which the main feature is providing access to, and use of, copyrighted works, other protected contents, or transmissions of broadcasting organizations, whether in a linear or non-linear mode), **(ii)** which are portable, (meaning they are accessible by subscribers regardless of their physical presence in a specific place), **(iii)** lawfully provided (meaning not provided in violation of the proprietary rights over the contents of the service, nor of other third-party rights), **(iv)** through the internet, **(v)** on a payment basis, **(vi)** to consumers who reside in a Member State, and **(vii)** who are temporarily present in another Member State.

Geo-blocking Regulation and Content Portability Regulation

- THE CONTENT PORTABILITY REGULATION: SCOPE

- One of the most relevant peculiarities of such regulation is that **it applies to contracts concluded both before and after the effective date of the regulation**.

- However, the regulation **application extent** is also **circumscribed**: indeed, it neither applies to providers offering these services on a free basis (but they can opt into the Portability Regulation) nor to "mere intermediaries" in the delivery of online content services, such as ISPs (i.e. YouTube) and operators providing the previously mentioned content solely in an ancillary manner.

Geo-blocking Regulation and Content Portability Regulation

- THE CONTENT PORTABILITY REGULATION: SCOPE

- As the main objective of the regulation is removing national borders in relation to accessing digital services, consequently, this could eliminate the scope of granting absolute and exclusive territorial licenses of rights to online content in each Member State. In this respect, the Portability Regulation may have a crucial impact on markets that rely on granting exclusive and absolute territorial licenses (e.g. production and distribution/communication to the public of cinematographic and, more generally, so-called "premium" audio-visual works) in order to maximize profit and cover high production costs

Article 1

Subject matter and scope

1. This Regulation introduces a common approach in the Union to the cross-border portability of online content services, by ensuring that subscribers to portable online content services which are lawfully provided in their Member State of residence can access and use those services when temporarily present in a Member State other than their Member State of residence.

2. This Regulation shall not apply to the field of taxation.

Geo-blocking Regulation and Content Portability Regulation

- THE CONTENT PORTABILITY REGULATION: MAIN PROVISIONS

- Under Article 3, the Portability Regulation expressly provides that the service must be provided to **subscribers temporarily present** in a Member State other than the one of subscriber's residence in the same way and with the same contents available as their **Member State of residence**, and without any additional charges.

- In addition, the provider shall not take any action to reduce the quality of delivery of the online content service when providing such service.

Article 2

Definitions

For the purposes of this Regulation, the following definitions apply:

(1) 'subscriber' means any consumer who, on the basis of a contract for the provision of an online content service with a provider whether against payment of money or without such payment, is entitled to access and use such service in the Member State of residence;

[...]

(3) 'Member State of residence' means the Member State, determined on the basis of Article 5, where the subscriber has his or her actual and stable residence;

(4) 'temporarily present in a Member State' means being present in a Member State other than the Member State of residence for a limited period of time;

[...]

Geo-blocking Regulation and Content Portability Regulation

- THE CONTENT PORTABILITY REGULATION: MAIN PROVISIONS

- A critical aspect of the Portability Regulation regards the "**mini country of origin principle**" based on the *fictio iuris*, according to which the reception of portable services in another Member State of temporary residence is deemed to have occurred in the Member State in which the consumer is authorized to receive the services.

- Therefore, derogation is clearly **linked to the temporary presence** in another Member State.

Geo-blocking Regulation and Content Portability Regulation

- THE CONTENT PORTABILITY REGULATION: MAIN PROVISIONS

- In the light of such principle, Article 5 of the Portability Regulation requires, as a **precondition** to concluding a contract for an online content service as well as to renew it, the **subscriber's residence verification**. This must be carried out by using at least two of the eleven verification criteria listed under Article 5 (i.e. identify card; debit or credit card number; billing address; etc.). In the event such verification is impossible to perform (i.e. in case of the subscriber's refusal to submit his/her data), the regulation expressly prohibits the subscriber to access the service across borders.

Article 5

Verification of the Member State of residence

1. At the conclusion and upon the renewal of a contract for the provision of an online content service provided against payment of money, the provider shall verify the Member State of residence of the subscriber by using not more than two of the following means of verification and shall ensure that the means used are reasonable, proportionate and effective:

(a) an identity card, electronic means of identification, in particular those falling under the electronic identification schemes notified in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council ([1]), or any other valid identity document confirming the subscriber's Member State of residence;

(b) payment details such as the bank account or credit or debit card number of the subscriber;

(c) the place of installation of a set top box, a decoder or a similar device used for supply of services to the subscriber;

(d) the payment by the subscriber of a licence fee for other services provided in the Member State, such as public service broadcasting;

(e) an internet or telephone service supply contract or any similar type of contract linking the subscriber to the Member State;

(f) registration on local electoral rolls, if the information concerned is publicly available;

(g) payment of local taxes, if the information concerned is publicly available;

(h) a utility bill of the subscriber linking the subscriber to the Member State;

(i) the billing address or the postal address of the subscriber;

(j) a declaration by the subscriber confirming the subscriber's address in the Member State;

(k) an internet protocol (IP) address check, to identify the Member State where the subscriber accesses the online content service.

The means of verification under points (i) to (k) shall only be used in combination with one of the means of verification under points (a) to (h), unless the postal address under point (i) is included in a publicly available official register.

[...]

Geo-blocking Regulation and Content Portability Regulation

- THE CONTENT PORTABILITY REGULATION: MAIN PROVISIONS

- Finally, Articles 7 and 9 of the Portability Regulation regulate the impact of portability on contractual relationships between online content providers, right-holders and consumers.

- On one hand, Article 7 renders contractual provisions contrary to EU portability unenforceable, irrespective of the law applicable to the contract (which basically means that parties cannot avoid the regulation applying to their agreements by specifying a non-EU contractual law). While on the other hand, Article 9 of the Portability Regulation shall also apply to contracts concluded before the date of its application if those contracts and rights are relevant for the cross-border portability of an online content service provided after that date.

- **■ Which are the typologies of geo-blocking practices regulated by the Geo-blocking Regulation ? In which case it provides for the prohibition of unequal treatment?**
- **■ What are the requisites of a payment transaction to which the companies can not apply different conditions ?**
- **■ What is the *fictio iuris* under the Portability Regulation ?**

Geo-blocking Regulation and Content Portability Regulation

SUGGESTED READINGS

- Regulation (EU) 2018/302 of the European Parliament and of the Council on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market.

- Regulation (EU) 2017/1128 of the European Parliament and of the Council on cross-border portability of online content services in the internal market.

SEMINAR

Data Protection Rules

- OVERVIEW
- The pervasive technological, economic and social changes have tangibly influenced the way we use electronic communications and electronic communications equipment and, amongst other, have significantly influenced how our personal data are accessed, processed and used. Today, techniques such as machine learning make businesses able to make use of personal data on an unprecedented scale taking competitive advantages, for instance, by carrying out their activities on the basis of the output of the processing of the data they collected, thus acting more efficiently.

- Consequently, **collecting data have become more and more important for businesses**, that increased sharing them through (cross-border) flows and transfers in order to get the more data they could or data already processed. As a result, data have acquired a significant economic value over the years, such as, recently, to be qualified from some experts as the petrol of our age.

Data Protection Rules

OVERVIEW

Although the collection and process of data bring various advantages, both to consumers (i.e. receiving dedicated offers, better services, etc.) and businesses (i.e. easier and faster identification of potential consumers, set strategies on the basis of the output of the data processed, etc.), **several risks of illegal collection and processing arise when those activities are carried out, in particular with regard to personal data**.

Data Protection Rules

- LEGAL FRAMEWORK
- Taking this into consideration, since its foundation, the Digital Single Market Strategy has been aiming to **increase trust and security of digital services** and the EU Institutions have been very active on such issues. Indeed, only one year after the publishing of the Digital Single Market Strategy, the regulation (EU) 2016/679 (the "**GDPR**") was adopted.

- The GDPR establishes a strong, coherent and fully harmonized data protection framework in the EU and represents a milestone in the achievement of a further protection of data, in comparison to the previous EU legislation on the issue, that comprised the Data Protection Directive (the "**DPD**"), replaced by the GDPR, and Directive 2002/58/EC (the "**ePrivacy Directive**"), which, as opposite, is still applicable.

Data Protection Rules

- LEGAL FRAMEWORK

- However, after the adoption of such regulation, the EU legislative work did not stop and the EU Commission have recently adopted a regulation proposal (the "**Regulation Proposal**") for replacing the ePrivacy Directive, aiming to:

- **(i)** enhance the protection of privacy for users of electronic communication services,

- **(ii)** ensure a level playing field for all market players, and

- **(iii)** provide a legal action consistent with the GDPR.

Data Protection Rules

- <u>GDPR: SCOPE AND DEFINITIONS</u>

- The GDPR replaced the DPD, which attempted to set out rules for data processing, however was infeasible to enforce or comply with likely due to the lack of knowledge in the field of technology, and particularly the speed at which the field would grow at the time the directive was passed.

- The GDPR, instead, is based on more realistic and updated understandings of data protection, security, transfer, and content. The GDPR thus intends to "*facilitate the free flow of personal data in the Digital Single Market and reduce the administrative burden on businesses that have faced inconsistencies in their data protection compliance obligations from one Member State to the next*".

Data Protection Rules

- GDPR: SCOPE AND DEFINITIONS

- To sum up, the regulation aims to govern the **processing of personal data**, give effect to the European recognized fundamental human right to privacy and harmonize data protection laws across the EU, and these aims have changed EU's obligations and views of personal data, as well as had a global impact on the largest data hubs in the world by adjusting their view of the treatment of personal data.

- For all these reasons, the **GDPR represents a pivotal piece of legislation effecting the Digital Single Market** and the internal economy within the EU, causing EU and non EU-based companies to align with the EU's views of fundamental rights such as the right to privacy. In particular, the scope of the GDPR can be classified as one of the most wide ranging legislation passed by the EU, as it **applies whenever personal data is processed**, and imposes controls on such data outside the EU including companies that have no physical presence in Europe

Data Protection Rules

- <u>GDPR: SCOPE AND DEFINITIONS</u>

- For the better understanding of the GDPR scope it is firstly needed to briefly go through the most relevant definition provided under the same, such as "personal data", "processing", "identifiable natural person", "data controller" and "data processor" .

- **Personal data** refers to "*any information relating to an identified or identifiable natural person, or a data subject*";

- **Identifiable natural person** is "*one who can be identified, directly or indirectly particularly by reference to an identifier i.e. name, location data, other factor specific to the identity of that person*";

Data Protection Rules

- GDPR: SCOPE AND DEFINITIONS
- **Processing** refers to "*any operation or set of operations performed on personal data, whether or not processed by automatic means, such as collection, recording, organization, structuring, storage, adaption, alteration, or otherwise making available, combining or destroying*";
- **Data controller** refers to *"any natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data"; and, finally,*
- **Data processor** means *"any person, natural or juristic, who processes the data on behalf of the data controller".*

Data Protection Rules

- GDPR: SCOPE AND DEFINITIONS

- The GDPR's scope can be distinguished between its **material and territorial scope**.

- With regard to the **material scope**, the regulation applies to "*the processing of personal data wholly or partly by automated means*" as well as in limited circumstances non-automated means. Therefore, any information relating to an identified or identifiable natural person wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system falls into the scope of the GDPR. The overall extent of the GDPR is although limited by several exemptions (i.e. household exemption) pursuant to Article 2, par. 2, of the GDPR.

Data Protection Rules

- GDPR: SCOPE AND DEFINITIONS

- Regarding the **territorial scope**, the GDPR applies every time the activities of an establishment of a controller or a processor are located within the EU, regardless of whether the processing takes place in the EU or not. The GDPR apply even if the personal data relating to EU data subjects is processed by controllers who are not established in the EU in the event they:

- **(i)** offer goods or services to data subjects of the EU (and it does not matter if no payment was requested), or

- **(ii)** monitor the behavior of data subjects within the EU.

Data Protection Rules

- GDPR: SCOPE AND DEFINITIONS

- Finally, a peculiar scope of the GDPR can be identified in connection with the **processing of special categories of data** (that is to say, the data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, or the processing of genetic data).

- Such processing also fall within the scope of, the GDPR that, specifically, foresees an "*ad hoc*" regime under which, unless an exception applies (that will be further analyzed under paragraph 5.2.4), any processing of personal data of a special category is prohibited.

Data Protection Rules

- GDPR: PRINCIPLES
- The regulation provides various **key principles** boosting data protection, that apply transversally to the whole processing of data, and that consist in the following principles:

- 1. **lawfulness**: personal data shall be processed fairly, lawfully and in a transparent manner;

- 2. **purpose limitation**: personal data shall be collected for specified, explicit and legitimate purposes;

- 3. **data minimization**: personal data shall be adequate, relevant and limited to what is necessary in relation to the purpose or purposes for which it is processed;

Data Protection Rules

- GDPR: PRINCIPLES

4. **accuracy**: personal data shall be accurate and, where necessary, kept up to date. If inaccurate it should be erased or updated;

5. **storage limitation**: personal data shall not be kept in a form which permits identification of data subjects for longer than is necessary for the purposes for which it is processed;

6. **integrity and confidentiality**: personal data shall be processed in a manner that ensures appropriate security. Appropriate technical and organizational measures shall be taken against unauthorized or unlawful processing, and against accidental loss, destruction, or damage;

7. **accountability**: businesses are placed with the burden of prove to demonstrate their compliance with the GDPR provisions.

Data Protection Rules

GDPR: PRINCIPLES

To summarize, data have to be collected for specified, explicit and legitimate purposes, they have to be processed in a lawful, transparent and fair way, that does not exceed the purposes of the processing itself, and, in addition, have to be maintained in a form that allows the identification for the purposes for which they were processed.

Data Protection Rules

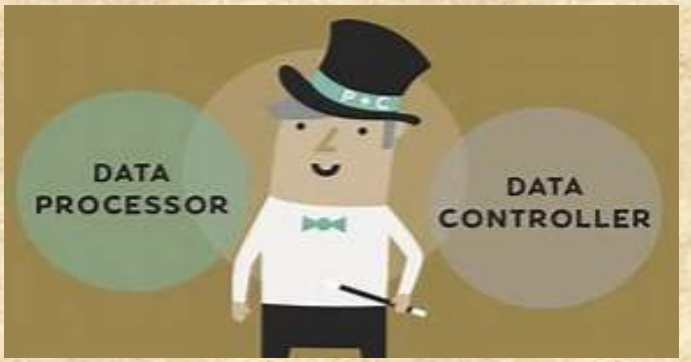
- GDPR: SUBJECTS OF DATA PROCESSING

- The data processing defined and regulated under the GDPR inevitably requires the involvement of various actors that, for the sole purpose of a better description, can be divided into two categories, **active and passive subjects**.

- Within the first category, **data controllers**, **processors** and their **representatives** should be considered.
- As the definitions of data controller and processor were already given, it has now to be noted that the **data controller** represents the legal or natural person that is in charge of the decisions on the purposes and means of the data processing. It decides on aims of the processing, its purposes and on the safety policies.

Data Protection Rules

- GDPR: SUBJECTS OF DATA PROCESSING



- Data controller can be held liable within the limits of their own responsibility for damages caused in the event of an infringement of the GDPR and, in the event a joint data controller or a data processer is appointed, such responsibility is shared with those. Given this general rule, however, the GDPR also obliges those subjects to sign a free-form agreement to determine their respective responsibilities, that is not directly accessible to the public.

Data Protection Rules

- GDPR: SUBJECTS OF DATA PROCESSING

- Another active subject is the **data processor.**

- Such subject is in a subordinate positions to the data controller and, once appointed by the latter, must **act in compliance with its directions and instructions**. Therefore, the data processor principal task is to process personal data on behalf of the data controller **while ensuring the GDPR compliance**.

Data Protection Rules

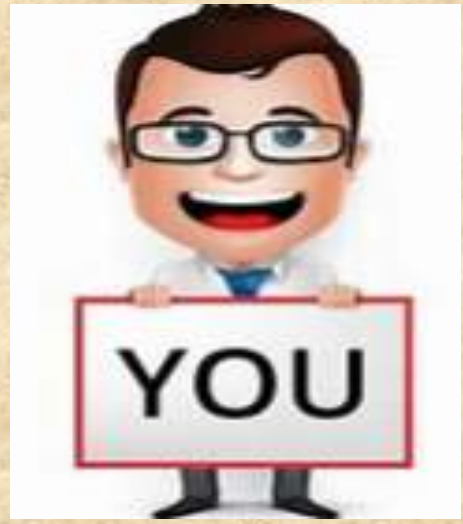
- GDPR: SUBJECTS OF DATA PROCESSING

- In cases of a GDPR infringement, the data processor shares its responsibility with the controller within the limits of its violations or failures to fulfill the obligation infringed. Data processor have full responsibility only in the cases of open violation of the guidance that were given by the controller.

- In addition to those subjects, GDPR also regulates another type of active subject that is the data controller' or data subject' **employee**. This employees are prohibited from processing personal data of which they have access to, except if so instructed by the controller or processor or if they are so required by EU or Member State law.

Data Protection Rules

GDPR: SUBJECTS OF DATA PROCESSING



On the other hand, the **passive subjects** in the data processing are the **data subjects**, that were already defined, and the right of which will be further analyzed. However, when taking into account this category, it has to be noted that GDPR does not apply to the processing of data of deceased persons.

Data Protection Rules

- <u>GDPR: SUBJECTS OF DATA PROCESSING</u>

- In conclusion, the last subject that plays an important role in the processing of personal data is the Data Protection Officer (the "**DPO**").
- This subject represents a **third category acting specifically for ensuring the GDPR compliance of the data processing**. Indeed, the DPO, once appointed, both supervises the compliance with the GDPR of the internal activity of the company of the data controller or processor and provides advices to guarantee their compliance with the GDPR, thus representing one of the pillars of the principle of accountability.

Data Protection Rules

- GDPR: SUBJECTS OF DATA PROCESSING

- The DPO is usually a natural person who generally already work at the dependency of the controller, but he or she may even be an external subject.

- The DPO is generally **appointed** by the controller or the processor and such appointment is considered compulsory under some specific circumstances such as when courts act under their judicial capacity, when large-scale interests are monitored or large-scale sensitive or judicial data are assessed.

Data Protection Rules

- GDPR: SUBJECTS OF DATA PROCESSING

- A very peculiar characteristic of DPOs is that, if they were appointed by the data controller or the data processor, **they cannot be directly sanctioned or fired** for their activities by them because, on such issues, they do not depend on the instructions or directives of his principal but, as said, their task is only to ensure the GDPR compliance of the data processing.

Data Protection Rules

- GDPR: LEGAL BASIS FOR PROCESSING DATA

- On the basis of principles of **lawfulness**, the GDPR provides a strong restriction to the data processing, that is considered lawful as long as certain specific conditions are met.
- Particularly, pursuant to Article 6, the GDPR requires for the lawful processing of data that at least one of the following conditions apply: **(i)** the data subject has given his or her consent; **(ii)** it is necessary for the performance of a contract to which the data subject is a party; **(iii)** it is necessary for being compliant with legal obligations to which the controller is subject; or **(iv)** it is necessary for the protection of legal, public or legitimate interests.

Data Protection Rules

- GDPR: LEGAL BASIS FOR PROCESSING DATA

- As regards the data processing based on the "**legitimate interest**", one should note that this category represents a very broad legal base for data processing. Indeed, for instance, the legal base of legitimate interest could apply in various cases, such as:
- - Recital 47: processing for direct marketing purposes or preventing fraud;
- - Recital 48: transmission of personal data within a group of undertakings for internal administrative purposes, including client and employee data;
- - Recital 49: processing for the purposes of ensuring network and information security, including preventing unauthorized access to electronic communications networks and stopping damage to computer and electronic communication systems.

Data Protection Rules

- GDPR: LEGAL BASIS FOR PROCESSING DATA

- However, this category is partially limited by the fact that the "legitimate interest" will not be considered as valid criteria if it is overridden by interests or fundamental rights and freedoms of the data subject, unless the processing is carried out by public authorities in the performance of their duties.

Data Protection Rules

- GDPR: LEGAL BASIS FOR PROCESSING DATA

- In addition to the legitimate interest legal base, also the **data subject consent** deserves a short analyzes as it represents the most used mechanism for justifying the processing of personal data.

- This condition may be easily extorted in the digital world and the GDPR precisely objective in such respect is specifically to prevent from such abuses, requiring that "*consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment*".

Data Protection Rules

- GDPR: LEGAL BASIS FOR PROCESSING DATA

- When the legal condition of the processing is consent, the GDPR provides specific obligations to data controllers that "*shall be able to demonstrate that the data subject has consented to processing of his or her personal data*".

- If the data subject's consent is given in the context of a written declaration which also concerns other matters, the GDPR further requires that "*the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language*".

Data Protection Rules

- GDPR: LEGAL BASIS FOR PROCESSING DATA

- A deep intervention in this respect was made by **Article 29 Working Party**, which elaborated GDPR **consent guidelines** where it stated that the consent could be validly obtained as long as, as minimum requirements, the following information is provided to the data subject giving his or her consent: **(i)** the controller's identity; **(ii)** the purpose of each of the processing operations for which consent is sought; **(iii)** what data will be collected and used; **(iv)** the existence of the right to withdraw consent; **(v)** information about the use of the data for automated decision-making; and **(vi)** on the possible risks of data transfers due to absence of an adequacy decision and of appropriate safeguards.

Data Protection Rules

- GDPR: LEGAL BASIS FOR PROCESSING DATA

- When the consent is validly obtained, however, **it could always be subject to the data subject right to withdraw his or her consent**. Indeed, the GDPR provides data subjects with such right and specifically requires that it shall be easy to be exercised in the same manner it is giving consent.

Data Protection Rules

- GDPR: LEGAL BASIS FOR PROCESSING DATA

- The legal framework outlined insofar does not apply when a **personal data of a special category is processed**. In such case, the GDPR provides an "ad hoc" regime wherein processing is only permitted if both one of the conditions provided under Article 6 of the GDPR is met, and at least one of the following conditions is satisfied:
- **(i)** the data subject has given explicit consent;
- **(ii)** processing is necessary to protect the vital interests of the data subject;
- **(iii)** processing relates to data deliberately made public by the data subject;
- **(iv)** processing is necessary for legal reasons or for the administration of justice;
- **(v)** processing is necessary for reasons of "substantial public interest";

Data Protection Rules

- GDPR: LEGAL BASIS FOR PROCESSING DATA

- **(vi)** processing is necessary to establish or defend a legal claim;
- **(vii)** processing is necessary for the upkeep of public archives or registers, albeit with safeguards for privacy.

- In the light of the legal basis for processing data above, account has to be taken with regard to **international transfers of data**, that is to say every conduct aiming to transfer outside EU territory data.

Data Protection Rules

- GDPR: LEGAL BASIS FOR PROCESSING DATA

- This aspect is very important and has to be analyzed jointly with the legal conditions for processing data because if data can be easily moved to "data haven" (with fewer or no restrictions), some of the rights deriving from such legal framework, as well as all other rights under the GDPR, would not be enforcable and GDPR provisions would result futile.
- Taking this into consideration, the GDPR counters such situations **considering transfer of data lawful in two situations**: first, if the EU Commission considers adequate the country's legal regime where data will be transferred. Secondly, when the controller is based in a non-EU Member State to which are transferred data contractually guarantees that it will uphold, within its organization, a level of data protection that is similar to the GDPR, including all the material and procedural safeguards.

Data Protection Rules

- <u>GDPR: DATA SUBJECT RIGHTS</u>

- GDPR establishes several provisions regulating
- the relationship between data controllers and
- data subjects, aiming in particular to provide
- **stronger rights** to the latters in the world of the
- digital economy.

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- This set of provisions are provided under **Chapter III** of the GDPR, which disciplines the rights of data subjects many of which – but not all – are new and, for such reason, it is considered useful describe such rights distinguishing the "**continuing rights**" – that is to say the rights that were already granted to data subjects under the DPD and that were inserted also in the GDPR – and the "**new rights**" – provided for the first time to data subjects through the implementation of the GDPR to data subjects

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- On one hand, the "**continuing rights**" data subjects are granted can be summarized with the following rights:
- **(i)** the right of access;
- **(ii)** the right of rectification;
- **(iii)** the right to object; and
- **(iv)** rights restricting automated decision making and profiling.

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- As regards the **right of access**, such right provides the data subject the possibility to access to his or her personal data and, therefore, also the right to receive information on how his or her data are processed. As it will be analyzed, this right is strictly linked to the right to information, recently introduced by the GDPR.

- The right of access helps individuals to understand how and why the data controllers and processors are using their data, and check that they are doing it lawfully. Moreover, under such provision data subjects are granted the right to receive, for free and in a "commonly used electronic form", a copy of their data in the event they make such request using electronic means.

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- The right of access is however not always enforcable, because a number of exceptions apply, and is in practice more often used in specialized contexts, such as employment tribunals, or by journalists, than by "ordinary" users.

- A general limit to the right to access is represented by the rights and freedom of other users, thus representing a guarantee for all the users that seem to be essential in the digital framework where thousands of data are processed.

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- The second "continuing right" is the **right of rectification** which is also strictly connected with the right of access. As a result of this, data subjects are granted an additional incisive right, that implies both the correction of incorrect information and the integration of the incomplete ones.

- Another right that falls under the current category is the **right to oppose/object** to data processing, that grants data subjects with the specific right to oppose, both against private and public subjects, to their data being processed, thus having similar effects of the right of withdrawal in the context of the data subject consent, but with a wider application because the exercise of such right is not subordinated to the right to consent.

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- Finally, the last data subject's right under this category is the **right to restrict automated decision making and profiling**.
- Under such right, data subjects can deny to be subject to a decision with legal effect, which "significantly affects" the same, based solely on the automated processing of data.
- This, however, cannot always be exercised because of various limitations: firstly, such right applies only when the processing has been carried out solely by automated means; secondly, the decision must have legal or significant effects; thirdly, such right does not apply when the processing data was lawful, on the basis that it was necessary for entering a contract, or if it was authorized by law or on the explicit consent of the data subject.

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- In addition to all the rights above, on the other hand, the GDPR provides **new rights** to data subjects, that can be summarized as:
- **(i)** the right to information or "fair processing information";
- **(ii)** the right to erasure;
- **(iii)** the right to data portability; and
- **(iv)** right of consent of the data subject.

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- With regard to the **rights of information of "fair processing information"**, the GDPR requires, with the first one, that information have to be directly given to data subjects when they are directly collected from them. The second provides for the possibility to give information to data subjects subsequently, when information are collected by another data controller.

- Collectively, these rights imply the right of data subjects to understand and regulate the level of circulation of their data, its purposes, the names of the responsible subjects, the ways to exercise their powers, such as the right to deny consent and to oppose to the processing.

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- Another relevant new right set forth by the GDPR is the **right of erasure**. This has a very broad extent under the GDPR, which states that it applies to all data controllers and not just search engines, as the right to be forgotten was initially configured.
- The right of erasure specifically grant the data subject the possibility to ask for and obtain the erasure of certain personal data, but this can be enforced only in determined cases, such as the exhaustion of the purposes of the data processing and the unlawfulness of the processing.
- As a consequence of its exercise, the erasure of personal data implies the elimination of all the links circulating on the network that contain the data that is requested to be erased.

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- Besides the above, as previously said, the **right of portability** also represents a revolutionary right.
- The peculiarity of such right is that, in certain ways, it goes beyond the right of access because it requires data controllers to provide data subjects with information in a structured, commonly used and machine readable form so that it may be transferred by the data subject to another data controller without hindrance.
- This represents only a way to exercise this right, that, moreover, can also be exercised by the data subjects requiring data controllers to transmit their data directly to another controller, where this operation is technically feasible for the data controller.

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- The right of portability has a circumscribed application extent: first, it applies to personal data (i) which are processed by automated means, (ii) which the data subject has provided to the controller, and (iii) only where the basis for the processing is consent or the fulfilment of a contract or steps preparatory to a contract.

- Secondly, it must be exercised without prejudice to the rights of other individuals and, in this respect, some exemptions are provided such as where this would adversely affect trade secrets or intellectual properties rights.

Data Protection Rules

- GDPR: DATA SUBJECT RIGHTS

- In conclusion, the last "new right" provided under the GDPR is the **right of consent** of the data subject.
- This right foresees allows data subjects to give their consent to the processing of data, providing that such consent has to be freely given, specific, informed and unambiguous.
- Consequently, one should note that such provision sets some requirements for data controllers that must provide data subjects their requests for consent in a manner which they are clearly distinguishable from the other matters, in an intelligible and easily accessible form, and also using clear and plain language if they are given in the context of a written declaration.

Data Protection Rules

- GDPR: PRIVACY BY DESIGN AND PRIVACY BY DEFAULT. SECURITY OF PERSONAL DATA

- The legal framework outlined insofar reveals that the GDPR is very attentive to provide stronger user's protection: the provisions of certain legal conditions for a lawful data processing, the granting of various rights in favor of data subjects and the figure of the DPO are emblematic examples of this.
- However, another key aspect of the regulation that strongly contributes to provide stronger consumer protection is undoubtedly the **principle of accountability**. As anticipated, with this principle the regulation sets forth a "risk-based" system, under which businesses are placed with the burden of prove to demonstrate their compliance with the GDPR provisions, where, as said, DPOs play a crucial role.

Data Protection Rules

- GDPR: PRIVACY BY DESIGN AND PRIVACY BY DEFAULT. SECURITY OF PERSONAL DATA

- As a consequence, data controllers shall take a proactive behavior in order to guarantee their compliance with the GDPR provisions at any time of the processing of data.
- In this respect, the GDPR has elaborated **two criteria "privacy by default" and "privacy by design"** which, in general, broaden the "accountability" scope because they place data controllers with the obligation to comply with the GDPR at any time of the processing of data.

Data Protection Rules

- GDPR: PRIVACY BY DESIGN AND PRIVACY BY DEFAULT. SECURITY OF PERSONAL DATA

- Specifically, with the expression of **"privacy by design"**, the EU legislator requires data controllers to ensure data protection during every phase of the data processing, including its design. For the sake of clarity, under such criteria it is required that data controllers must adopt technical and organizational measures to give effective implementation to the GDPR provisions regarding data protection and, therefore, ensuring data subjects' rights. And these have to be implemented both when data controllers determine the means for the data processing and when they process data.

Data Protection Rules

- GDPR: PRIVACY BY DESIGN AND PRIVACY BY DEFAULT. SECURITY OF PERSONAL DATA

- In addition, such criteria implies also that data controllers must pay attention to which measures implement because they would not be considered in compliance with the GDPR when applying standardize measures for different type of processing. Indeed, in this respect, as it is further analyzed, the GDPR specifically requires data controllers and processor to implement measures taking into account, inter alia, the nature, scope and context of data processing.

Data Protection Rules

- GDPR: PRIVACY BY DESIGN AND PRIVACY BY DEFAULT. SECURITY OF PERSONAL DATA

- As regards the criteria of **"privacy by default"** under which data protection shall be ensured by default, thus implying that any assessment that data controllers have to make on data protection must be made before processing data.
- As a consequence of this, data controllers must make a previous assessment of the complete situation and adopt an approach that must apply to any phase of the data processing, and which also must be demonstrable. For instance, amongst other, data controllers may decide to adopt the pseudonymisation of personal data, maximize the transparency of the purposes of the processing, etc.

Data Protection Rules

- GDPR: PRIVACY BY DESIGN AND PRIVACY BY DEFAULT. SECURITY OF PERSONAL DATA

- In the light of the above general criteria, it follows that the GDPR does not only provide data subjects with certain specific rights, but it also provides for several specific obligations to data controllers and data processors. In this respect, one of the main obligations that **data controllers and data processor must comply with** is the following:

- "*Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organizational measures to ensure a level of security appropriate to the risk, including inter alia as …*

Data Protection Rules

- GDPR: PRIVACY BY DESIGN AND PRIVACY BY DEFAULT. SECURITY OF PERSONAL DATA

- *...appropriate: (a) the pseudonymisation and encryption of personal data; (b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services; (c) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident; (d) a process for regularly testing, assessing and evaluating the effectiveness of technical and organizational measures for ensuring the security of the processing*" (Article 31, par. 1 of the GDPR).

- Under this provision it is specifically required data controllers and data processors must ensuring a level of security appropriate to the risk of the data processing.

Data Protection Rules

- GDPR: PRIVACY BY DESIGN AND PRIVACY BY DEFAULT. SECURITY OF PERSONAL DATA

- Finally, another main obligation that GDPR places to data controllers derives from a specific breach notification regime in the event an infringement of the GDPR occurs, which leads to a personal data breach, defined under the GDPR as "*a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed*".

Data Protection Rules

- GDPR: PRIVACY BY DESIGN AND PRIVACY BY DEFAULT. SECURITY OF PERSONAL DATA

- In brief, this above regime is provided under Article 33 and 34 of the GDPR and applies as follows.
- First, data processors are obliged to notify the data controller/or data processors, without undue delay after becoming aware of any data breach.
- Secondly, data controllers have the obligation to notify the supervisory authority without undue delay and, where feasible, not later than 72 hours after becoming aware of it, except in the event the breach is unlikely to result in a risk to the rights and freedoms of natural persons.

Data Protection Rules

- GDPR: PRIVACY BY DESIGN AND PRIVACY BY DEFAULT. SECURITY OF PERSONAL DATA

- Finally, only if the breach is likely to result in a high risk to the rights and freedoms of natural persons, the data controller must communicate a personal data breach to the data subject without undue delay.

- Failure to meet the above requirements exposes the companies to an administrative fine of up to Euro 10,000,000 or in case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year, whichever is higher.

Data Protection Rules

- GDPR: SUPERVISING AUTHORITIES AND ENFORCEMENT

- In conclusion, it is necessary to briefly analyze the **data protection authorities**, which are the subjects provided with the competence for the performance of the tasks set forth by the GDPR on their national territory.

- While carrying out their activities, the GDPR expressly provides that the lead supervisory authority (that is to say the one acting in the territory where the data are processed) shall cooperate with other "concerned" supervisory authorities in order to exchange information and work together for preventing or tackling data breaches.

Data Protection Rules

- GDPR: SUPERVISING AUTHORITIES AND ENFORCEMENT

- The tasks of these authorities are listed under Article 57 of the GDPR, which includes a general clause providing that the list can be fulfilled by any other task related to the protection of personal data.

- Therefore, supervisory authorities must do anything that might reasonably be necessary to protect personal data.

Data Protection Rules

- GDPR: SUPERVISING AUTHORITIES AND ENFORCEMENT

- The **powers** of supervisory authorities are instead listed under Article 58 of the GDPR, which is an open list, that the Member States can add. Generally, such powers can be divided into **(i)** investigative powers, **(ii)** corrective powers, and **(iii)** authorization and advisory powers.

- In addition to those powers, one should note that each supervisory authority must also draw up an annual report on its activities, which may include a list of types of infringement notified and types of measures taken in accordance with its corrective powers.

Data Protection Rules

- GDPR: SUPERVISING AUTHORITIES AND ENFORCEMENT

- The exercise of such powers, however, must be subject to appropriate safeguards, including **effective judicial remedy and due process**.

- First, when data subjects' personal data are processed in a way that does not comply with the GDPR, data subjects whose data are processed must be provided with a specific right to lodge a complaint with supervisory authorities and the latter must inform those data subjects of the progress and outcome of the investigations. In such case, data subjects must also be provided with an effective judicial remedy where the supervisory authority fails to deal with a complaint or fails to inform the data subject within three months of the progress or outcome of his or her complaint.

Data Protection Rules

- GDPR: SUPERVISING AUTHORITIES AND ENFORCEMENT

- Secondly, data subjects whose rights have been infringed must be provided also with the right to an effective judicial remedy against both the data controller or processor responsible for the alleged breach and certain acts and decision of supervisory authorities.

- In addition to the above, if damages derive from a data breach or, in any case, a GDPR infringement, data subjects shall have the right to claim for compensation (that aims to recover pecuniary and not pecuniary losses) both the controller or the processor. In such case, if more controllers or processor are involved, all of them shall be held liable for the entire damage (save the regime of share responsibility explained above).

Data Protection Rules

- GDPR: SUPERVISING AUTHORITIES AND ENFORCEMENT

- Along with such legal framework, also the **public enforcement** is regulated under the GDPR, that has strongly intensified and increased the maximum administrative fines that undertakings or companies may be subject to after a case by case decision. Particularly, infringements of certain provisions could lead to the application to companies of administrative **fines up to Euro 20,000,000** or, in the case of undertakings, **up to the 4% of their global turnover**, whichever is higher. For other types of infringements other administrative **fines** are set to companies **up to Euro 10,000,000** or, in the case of undertakings, **up to the 2% of their global turnover**, whichever is higher.

Data Protection Rules

- <u>ePRIVACY DIRECTIVE: SCOPE AND DEFINITIONS</u>

- The ePrivacy Directive, jointly with the GDPR, constitutes the current general legal framework aiming to protect data. Indeed, the overarching aim of the ePrivacy Directive is to ensure the protection of fundamental rights and freedoms of the public when they make use of electronic communication networks.

- In this respect, it has to be noted that scope of this directive is specifically regulated under its Article 3, that states that the ePrivacy Directive applies to "*the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the Community, including public communications networks supporting data collection and identification devices*".

Data Protection Rules

- ePRIVACY DIRECTIVE: SCOPE AND DEFINITIONS

- Therefore, ePrivacy Directive applies only if each of the following conditions are met: **(i)** there is an electronic communications service; **(ii)** this service is offered over an electronic communications network; **(iii)** the service and network are publicly available; and **(iv)** the service and network are offered in the EU.

- It follows that providers of **electronic communication services** as well as **website operators** (e.g. for cookies) or other **businesses** (e.g. for direct marketing) are **subject** to the **directive**.

Data Protection Rules

- ePRIVACY DIRECTIVE: SCOPE AND DEFINITIONS

- The activities which do not meet all of the above conditions are generally out of scope of the ePrivacy Directive.
- However, taking into account the *lex generalis-lex specialis* relationship with the GDPR, it has to be noted that an activity that is or is not subject to the ePrivacy Directive can still be subject to the GDPR, as long as the processing falls under its provisions (therefore, as the case may be, the GDPR can be the only applicable regulation or can be applied jointly with the ePrivacy Directive provisions that complement and particularize it).

Data Protection Rules

- ePRIVACY DIRECTIVE: SCOPE AND DEFINITIONS

- For the purposes of the ePrivacy Directive, amongst other, two definitions have to be taken into account.
- First, the definition of "**user**", that is the subject around whom the legislation has been configured, has to be intended as "*any natural person using a publicly available electronic communications service, both for private or business purposes*".
- Secondly, the definition of "**traffic data**", which represents the main activity around which the legislation has been implemented, has to be also aware. Particularly, traffic data means "*any data processed for the transmission of a communication on an electronic network or for its billing*".

Data Protection Rules

- ePRIVACY DIRECTIVE: SCOPE AND DEFINITIONS

- Finally, the definition of "**communication**", that means "*any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information*".

Data Protection Rules

- ePRIVACY DIRECTIVE: KEY PROVISIONS

- In the light of the above, it should be noted that the directive provides **two general obligations**.

- The first general obligation addresses providers of electronic communications services that must provide **security of services**. This obligation also includes the duty to inform subscribers whenever there is a particular risk, such as a virus or other malware attack.

Data Protection Rules

- ePRIVACY DIRECTIVE: KEY PROVISIONS

- The second general obligation regards the **maintenance of the confidentiality of information**. In this respect, the directive expressly prohibits:
- **(i)** listening, tapping, storage or other kinds of interception or surveillance of communication and "related traffic", unless users have given their consent or certain conditions set forth by the same directive are fulfilled; and
- **(ii)** the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user in the event the subscriber or user concerned was not provided with clear and comprehensive information under the GDPR, inter alia, about the purposes of the processing, and is offered the right to refuse such processing by the data controller

Data Protection Rules

- ePRIVACY DIRECTIVE: KEY PROVISIONS

- Furthermore, the directive requires various specific obligations for providers of electronic communication services.

- Firstly, such providers must **erase data** or make them anonymous when they are no longer required for communication or billing purposes, except if the subscriber has given consent for another use. However, data may be retained upon a user's consent for marketing and value-added services but, for all the previous uses, data subjects must be informed why and for how long the data is being processed.

Data Protection Rules

- ePRIVACY DIRECTIVE: KEY PROVISIONS

- Secondly, specific rights are granted to users where presentation of calling line identification is offered. On one hand, calling user must be granted with the possibility, using a simple means, free of charge, and on a per-line basis, to **prevent the presentation of the calling line identification.**

- On the other hand, called user must be provided with the possibility, using a simple means and free of charge, to **prevent the presentation of the calling line identification of incoming calls**.

Data Protection Rules

- ePRIVACY DIRECTIVE: KEY PROVISIONS

- In addition, where presentation of calling line identification is offered and where the calling line identification is presented prior to the call being established, the provider of electronic communication services must offer the called subscriber the possibility, using a simple means, of **rejecting incoming calls where the presentation of the calling line identification has been prevented by the calling user or subscriber**.

- Finally, where presentation of connected line identification is offered, the service provider must offer the called subscriber the possibility, using a simple means and free of charge, of **preventing the presentation of the connected line identification to the calling user.**

Data Protection Rules

- ePRIVACY DIRECTIVE: KEY PROVISIONS

- In connection with the issue of calling line identification, the ePrivacy Directive sets forth **two exceptions** to the application of the above legal framework, that is exempted:

- **(a)** upon application of a subscriber requesting for the tracing of malicious or nuisance calls, on a temporary basis;

- **(b)** for organizations dealing with emergency calls and recognized as such by a Member State, including law enforcement agencies, ambulance services and fire brigades, for the purpose of responding to such calls, on a per-line basis.

Data Protection Rules

- ePRIVACY DIRECTIVE: KEY PROVISIONS

- Thirdly, the directive specifically provides that data relating to location of users other than traffic data can be processed as long as such data is **anonymised**, and if users have **given their consent**, or for the provision of **value-added services.**

Data Protection Rules

- ePRIVACY DIRECTIVE: KEY PROVISIONS

- Moreover, some issues regarding **directories** of **subscribers** are expressly regulated.

- In particular, subscribers must be informed, free of charge and before they are included in the directory, about the purposes of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.

Data Protection Rules

- ePRIVACY DIRECTIVE: KEY PROVISIONS

- In addition, subscribers must have to opportunity to determine whether their personal data are included in a public directory, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data.

- Finally, as a way to guarantee the free movement of goods within EU, and of terminals or other electronic devices, the directive requires Member States not to impose any mandatory requirement for specific technical features that could prevent them from entering in the market.

Data Protection Rules

- ePRIVACY REGULATION: OVERVIEW

- As said, amendments to the ePrivacy Directive are today under discussion in the EU Institutions, that are currently examining the Regulation Proposal.

- The need to modify the ePrivacy Directive legal framework increased over the past years, in which both the technology framework (i.e. numerous advancements) and the legal framework (i.e. adoption of the GDPR) changed. The first necessities arisen in year 2015, in which the EU Commission organized a series of workshops with stakeholders and ran an online public consultation in April 2015, that ended with the publishing of a report.

Data Protection Rules

- ePRIVACY REGULATION: OVERVIEW

- This report revealed that the ePrivacy Directive had not been kept updated with the developments occurred in the technological sector, leading to a void of protection of communications transmitted by new services. For example, some new activities and/or services developed in the recent years, such as broadcasting services which are intended for a potentially unlimited audience, are not subject to the ePrivacy Directive application.

- ePRIVACY REGULATION: OVERVIEW

- In addition, the report outlined also that the unclear drafting of certain provisions of the ePrivacy Directive and its ambiguity in some legal concepts have generated a disharmonized pattern. For example, the report gives evidence that the provisions of Article 4 of the ePrivacy Directive leaves areas of uncertainty, such as the ones on the type of security risks that are covered by the obligation to inform subscribers and on the possible mitigating measures to be adopted in such cases. This has led to a wide range and varying degrees of interpretation.

Data Protection Rules

- <u>ePRIVACY REGULATION: OVERVIEW</u>

- Without the pretense to describe all the results of the report, it has to be noted that it inspired and led to the drafting of the Regulation Proposal. The idea behind the need to replace the ePrivacy Directive with a regulation was influenced by the path used for the revision of the DPD with the introduction of the GDPR.

- First, the most evident novelty that the adoption of the Regulation Proposal would cause consists in providing a **legal framework directly applicable to EU Member States**, without any need of transposition because of its nature of regulation.

Data Protection Rules

- ePRIVACY REGULATION: OVERVIEW

- Moreover, the Regulation Proposal, if adopted, would also have a **broader material** and **territorial scope** than the ePrivacy Directive.

- As regards to the **material scope**, the proposal would apply to several area of the Digital Single Market such as marketing, e-Commerce, activity of call centers and online advertising . In addition, the proposal would also apply to "Over-the-Top services" (i.e. Voice over IP, messaging services and web-based e-mail services), that are the activities that are based on the provision of applications and contents to the users through the use of internet protocol and the traditional connection, thus offering a final service directly to the customer and may eventually store data into clouds.

Data Protection Rules

- ePRIVACY REGULATION: OVERVIEW

- As regards the **territorial scope**, the proposal would apply when electronic communication services are provided to end-users in the EU, and when they are used, as well as to the protection of information related to the terminal equipment of end-users located in the EU, whether or not the provider of the service is established in the EU.

Data Protection Rules

- ePRIVACY REGULATION: OVERVIEW

- As said, the Regulation Proposal is purpose is for replacing the ePrivacy Directive, aiming to configure a legal framework aligned to the GDPR provisions. A confirmation of this purpose is that the proposal, on the one hand, recalls all the GDPR definitions (i.e. consent) and, on the other hand, makes reference to the GDPR on issues such as supervisory authorities, enforcement and individuals remedies and liabilities are taken into account (therefore, except some specific provisions, such issues will be regulated by the GDPR).

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- However, the Regulation Proposal also directly provides new definitions, such as of **electronic communications data**, **content or metadata**, as well as definition of **electronic mail** and **direct marketing communications**, **voice to voice calls** and **automated calling and communication systems**.

- In addition, one should note that other definitions are given also through the referencing to the Directive Establishing the European Electronic Communication Code ("**DEEECD**").

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- The DEEECD expressly provides, inter alia, the definition of "**electronic communications service**" as means "*a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services: (a) 'internet access service' as defined in point (2) of the second paragraph of Article 2 of Regulation (EU) 2015/2120; (b) interpersonal communications service; and (c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting*".

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- In addition to the above, the main novelties that would be brought by the adoption of the Regulation Proposal can be summarized as follows:
- **(a)** it would ensure that new players providers providing electronic communications services (i.e. Whastapp) will be guaranteed the same level of confidentiality of communication as traditional operators;
- **(b)** it would apply stronger rules to all people and businesses in the EU, that should create a common field of protection for them;
- **(c)** it would guarantee a higher level of privacy for communication content and metadata.

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- Those novelties are mainly provided in two Chapters of the proposal: (a) **Chapter II**, which contains provisions aiming to protect electronic communications of natural and legal persons and information stored in their terminal equipment; and (b) **Chapter III** provides a common set of natural and legal person's rights to control electronic communications.

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- Analyzing in detail **Chapter II**, firstly, it has to be noted that the confidentiality of electronic communications is set. Indeed, under Article 5, the Regulation Proposal expressly states that "*Any interference with electronic communications data, such as by listening, tapping, storing, monitoring, scanning or other kinds of interception, surveillance or processing of electronic communications data, by persons other than the end-users, shall be prohibited, except when permitted by this Regulation*".

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- In such respect, two cases in which providers of electronic communications networks and services may process electronic communications data are set, and particularly:
- **(a)** if it is necessary to achieve the transmission of the communication, for the duration necessary for that purpose; or
- **(b)** if it is necessary to maintain or restore the security of electronic communications networks and services, or detect technical faults and/or errors in the transmission of electronic communications, for the duration necessary for that purpose.

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS
- Certain conditions are also set in the event an electronic communications services provider intends to process electronic communications regarding **both metadata** or **content**. As regards the conditions for the processing of electronic communications **metadata**, those are:
- **(a)** if it is necessary to meet mandatory quality of service requirements;
- **(b)** if it is necessary for billing, calculating interconnection payments, detecting or stopping fraudulent, or abusive use of, or subscription to, electronic communications services; or
- **(c)** if the end-user concerned has given his or her consent to the processing of his or her communications metadata for one or more specified purposes , including for the provision of specific services to such end-users, provided that the purpose or purposes concerned could not be fulfilled by processing information that is made anonymous.

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- When electronic communications metadata are no longer needed for the purpose of the transmission of a communication shall be erased are made anonymous. As opposite, where the processing of electronic communications metadata takes place for the purpose of billing the relevant metadata, such data may be kept until the end of the period during which a bill may lawfully be challenged or a payment may be pursued in accordance with national law.

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- As regards the conditions for the processing of electronic communications **content**, those are:
- **(a)** for the sole purpose of the provision of a specific service to an end-user, if the end-user or end-users concerned have given their consent to the processing of his or her electronic communications content and the provision of that service cannot be fulfilled without the processing of such content; or
- **(b)** if all end-users concerned have given their consent to the processing of their electronic communications content for one or more specified purposes that cannot be fulfilled by processing information that is made anonymous, and the provider has consulted the supervisory authority.

Data Protection Rules

ePRIVACY REGULATION: KEY PROVISIONS

- In this respect, one should note that the proposal provides that the provider of the electronic communications service **shall erase electronic communications content** or **make that data anonymous** after receipt of electronic communication content by the intended recipient or recipients.

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- Other key provisions under Chapter II are set in order to **prohibit some activities** that service providers of electronic communication may carry out and that are deemed not to be lawful. Particularly, these prohibited activities are:
- **(i)** the use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, including their software and hardware, other than by the end-user concerned, and
- **(ii)** the collection of information emitted by terminal equipment to enable it to connect to another device and/or to network equipment.

- However, it has to be noted that those prohibition are not fully mandatory because some exceptions are provided in both cases.

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- Finally, Chapter II of the proposal also contains provisions regarding **information and options for privacy settings**.

- Indeed, Article 10 expressly states that "*software placed on the market permitting electronic communications, including the retrieval and presentation of information on the internet, shall offer the option to prevent third parties from storing information on the terminal equipment of an end-user or processing information already stored on that equipment". In addition, it is also required that "upon installation, the software shall inform the end-user about the privacy settings options and, to continue with the installation, require the end-user to consent to a setting*".

Data Protection Rules

ePRIVACY REGULATION: KEY PROVISIONS

As regards **Chapter III** of the proposal, as said, it contains various provisions that would provide several natural and legal persons' rights to control electronic communications.

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- Firstly, where presentation of the calling and connected line identification is offered in accordance with DEEECD, the proposal would require providers of publicly available number-based interpersonal communications services to provide the following information:

- **a.** the calling end-user with the possibility of preventing the presentation of the calling line identification on a per call, per connection or permanent basis;

- **b.** the called end-user with the possibility of preventing the presentation of the calling line identification of incoming calls;

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS
- **c.** the called end-user with the possibility of rejecting incoming calls where the presentation of the calling line identification has been prevented by the calling end-user;
- **d.** the called end-user with the possibility of preventing the presentation of the connected line identification to the calling end-user.

As the ePrivacy Directive requires, the Regulation Proposal would require that all above information must be provided to end-users by simple means and free of charge and also some **exceptions** to presentation and restriction of calling and connected line identification are set (i.e. organizations dealing with emergency communications, including public safety answering points, for the purpose of responding to such communications).

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- Another matter regulated by Chapter III of the proposal concerns **publicly available directories**.
- In this respect, the proposal would require providers of publicly available directories to obtain the consent of end-users who are natural persons to include their personal data in the directory and, consequently, to obtain consent from these end-users for inclusion of data per category of personal data, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory.
- In addition, providers of such services would be also required to give end-users who are natural persons the means to verify, correct and delete such data.

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- **Unsolicited communications** are also regulated under Chapter III of the Regulation Proposal.
- In particular, if adopted, the regulation would prohibit natural or legal persons to use electronic communications services for the purposes of sending direct marketing communications to end-users, who are natural persons, unless they have given their consent.
- In this respect, it has to be noted that the service provider would also be required to inform end-users of the marketing nature of the communication and the identity of the legal or natural person on behalf of whom the communication is transmitted and to provide the necessary information for recipients to exercise their right to withdraw their consent, in an easy manner, to receiving further marketing communications.

Data Protection Rules

- ePRIVACY REGULATION: KEY PROVISIONS

- In addition to the above, when placing **direct marketing calls**, such providers shall also present the identity of a line on which they can be contacted, or present a specific code/or prefix identifying the fact that the call is a marketing call.

- In conclusion, the Regulation Proposal aims to provide **obligation to information of risks on communication services**. Particularly, in the case of a particular risk that may compromise the security of networks and electronic communications services, the proposal would require the provider of an electronic communications service to inform end-users of such risk and, where the risk lies outside the scope of the measures to be taken by the service provider, inform end-users of any possible remedies, including an indication of the likely costs involved.

- **Which are the legal basis for a lawful data processing under the GDPR?**
- **What are the two main obligation provided under the ePrivacy Directive?**
- **In which terms the ePrivacy Regulation proposal differs from the ePrivacy Directive?**

Data Protection Rules

SUGGESTED READINGS

- DIRECTIVE 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.

- Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

- Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC.

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Digital Media and Digital Infrastructures

- AUDIOVISUAL MEDIA SERVICES: LEGAL FRAMEWORK
- The growing number of television broadcasters in Europe and the broadcasting of cross-borders television programmes has led to the implementation of dedicated legislation aiming to introduce in such sector common minimum standards within European territory.
- The first legislation in this respect was the television without frontiers directive, which was replaced, in 2010, by the audiovisual media service directive. The aim of the audiovisual media service directive was to create a common regulatory framework for audiovisual services, to introduce common rules on TV advertising in order to increase funding for audiovisual content and to facilitate access to services for people with visual and hearing disabilities.

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- <u>AUDIOVISUAL MEDIA SERVICES: LEGAL FRAMEWORK</u>

- In recent years, however, the impact of the digital economy has changed the market framework of the audiovisual media services, that are now largely distributed on smartphones and tablets while the distribution of TV and radio broadcasting is decreasing. In addition, the audiovisual media services market has also changed due to the increasing relevance that online platforms are acquiring in the market.

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- AUDIOVISUAL MEDIA SERVICES: LEGAL FRAMEWORK

- Taking this into consideration, as part of the Digital Single Market Strategy, the EU legislator has recently adopted the Directive No. 2018/808 amending the audiovisual media services directive (the "**Audiovisual Media Services Directive**" or "**AMSD**") in order to adapt the latter legislation to the new distribution models arising out from the digital economy and to regulate the role of content providers and online platforms for video sharing in the audiovisual media services market.

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- AUDIOVISUAL MEDIA SERVICES: SCOPE

- The general scope of this directive is however limited by its provisions that expressly exclude its application to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.

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- AUDIOVISUAL MEDIA SERVICES: DEFINITIONS
- For the better understanding of the AMSD's scope, it is firstly needed to briefly go through the most relevant **definition** provided under the same.
- **(a)** First, "audiovisual media service" means: "(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, to the general public, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC; such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph; (ii) audiovisual commercial communication";

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AUDIOVISUAL MEDIA SERVICES: DEFINITIONS

(b) secondly, "video-sharing platform service" means "a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organization of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing";

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- AUDIOVISUAL MEDIA SERVICES: DEFINITIONS
- **(c)** "programme" means "a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider, including feature-length films, video clips, sports events, situation comedies, documentaries, children's programmes and original drama";
- **(d)** "video-sharing platform provider" means "the natural or legal person who provides a video-sharing platform service";
- **(e)** "media service provider" means "the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organized";

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- AUDIOVISUAL MEDIA SERVICES: DEFINITIONS
- **(f)** "audiovisual commercial communication" means "images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity; such images accompany, or are included in, a programme or user-generated video in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement";

- **(g)** "television broadcasting" means "an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule";

- AUDIOVISUAL MEDIA SERVICES: DEFINITIONS

- **(h)** "broadcaster" means "a media service provider of television broadcasts"; and

- **(i)** finally, "on-demand audiovisual media service" means "an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider".

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- AUDIOVISUAL MEDIA SERVICES: KEY PROVISIONS

- Given the above definitions, under Chapter II, the AMSD first establishes some general provisions.

- First, the **applicable jurisdiction** to a media service provider is regulated: in such respect, Article 2 of the AMSD expressly ensures that all audiovisual media services transmitted by media service providers under a Member States' jurisdiction must comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.

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- AUDIOVISUAL MEDIA SERVICES: KEY PROVISIONS
- Particularly, in order to identify the applicable Member State's jurisdiction to a media service provider, the directive sets up the following regime:
- **(a)** if the media service provider has its head office in a Member State and the editorial decisions about the audiovisual media service are taken in the same Member State, the applicable jurisdiction is the one of that Member State;
- **(b)** if the media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, the media service provider will be considered to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates;

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- AUDIOVISUAL MEDIA SERVICES: KEY PROVISIONS
- finally, **(c)** if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, the media service provider will be considered established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State.
- In the event the above regime is not applicable, the AMSD provides **two different residual parameters** that allow to identify the applicable Member State's jurisdiction, that are: **(a)** the use a satellite up-link situated in a Member State, when it is used by the media service providers; and **(b)** the use of satellite capacity appertaining to a Member State, even though no use of a satellite up-link is carried out.

- AUDIOVISUAL MEDIA SERVICES: KEY PROVISIONS

- If no jurisdiction can be determined even using these parameters, the directive finally provides a **residual clause** under which the applicable Member State's jurisdiction will be identified by the Member State in which the media service provider is established within the meaning of Articles 49 to 55 of the Treaty on the Functioning of the European Union.

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- AUDIOVISUAL MEDIA SERVICES: KEY PROVISIONS
- Along with the provisions setting the applicable jurisdiction, the AMSD, in Chapter II, under Article 3, also sets forth the obligation to Member States to **ensure freedom of reception and free retransmission of audiovisual media services** from other Member States. This is a key provision in order to achieve the Digital Single Market Strategy objectives.
- However, such provision may be derogated at the occurrence of some conditions expressly provided under the same directive. Those exemption are, however, without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the media service provider concerned.

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- AUDIOVISUAL MEDIA SERVICES: KEY PROVISIONS

- Lastly, in its second Chapter, the AMSD also provides a key obligation towards Member States that aims to boost European works in the audiovisual media services sector.

- Indeed, it is expressly provided that Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction **secure at least a 30 % share of European works** in their catalogues and ensure prominence of those works.

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- AUDIOVISUAL MEDIA SERVICES: KEY PROVISIONS
- Given the above general provisions, the AMSD then establishes under Chapter III a set of provisions applicable to the audiovisual media services.
- First, in order to **boost transparency**, Article 5 of the AMSD requires that "media service providers under shall make easily, directly and permanently accessible to the recipients of a service at least the following information:
- (a) its name;
- (b) the geographical address at which it is established;

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- AUDIOVISUAL MEDIA SERVICES: KEY PROVISIONS
- (c) the details, including its email address or website, which allow it to be contacted rapidly in a direct and effective manner;
- (d) the Member State having jurisdiction over it and the competent regulatory authorities or bodies or supervisory bodies".
- In addition to those information requirements, the directive also provides that Member States may adopt legislative measures – that must respect fundamental rights and that must be necessary and proportionate and aim to pursue an objective of general interest – under which media service providers under their jurisdiction make accessible information concerning their ownership structure, including the beneficial owners.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS

- Audiovisual services of media service providers are also restricted if they contain any **incitement to violence** or **hatred directed against a group of persons** or a **member of a group**, **nor public provocation to commit a terrorist offence**.

- This aims particularly to set an efficient protection of minors and disable persons that is enforced by Member States that are able to take appropriate measures to ensure that audiovisual media services provided by media service providers under their jurisdiction which may impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS
- In line with the GDPR, the directive also foresees a specific regime for the **collection of minors' data**, that cannot be processed for commercial purposes. With regard to Article 7 of the AMSD, the directive provides that for disabled persons Member States shall adopt proportionate measures in order to progressively make the media services more accessible to such category.
- Member States may also take measures to ensure the appropriate prominence of audiovisual media services of general interest, as well as to ensure that audiovisual media services provided by media service providers are not, without the explicit consent of those providers, overlaid for commercial purposes or modified.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS

- The AMSD also deals with **audiovisual commercial communication** and **audiovisual media services or programmes that are sponsored**.

- With regard to the first category, the directive provides for some requirements that media service providers must comply with:

- (a) audiovisual commercial communication shall be readily recognizable as such and not be surreptitious;

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS
- (b) audiovisual commercial communications shall not use subliminal techniques;
- (c) audiovisual commercial communications shall not: (i) prejudice respect for human dignity; (ii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation; (iii) encourage behavior prejudicial to health or safety; (iv) encourage behavior grossly prejudicial to the protection of the environment;
- (d) all forms of audiovisual commercial communications for cigarettes and other tobacco products, as well as for electronic cigarettes and refill containers shall be prohibited;

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS

- (e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;

- (f) audiovisual commercial communications for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS

- (g) audiovisual commercial communications shall not cause physical, mental or moral detriment to minors , therefore, they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

- If an audiovisual commercial communication fails to comply with the above requirements it will be **considered prohibited under the AMSD**.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS
- As regards the **audiovisual media services or programmes that are sponsored**, the AMSD provides that those shall meet the following requirements: **(a)** their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider; **(b)** they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services; **(c)** viewers shall be clearly informed of the existence of a sponsorship agreement. Sponsored programmes must be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or at the end of the programmes.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS
- In addition to the above, additional **general restrictions** are established by the directive: firstly, audiovisual media services or programmes cannot be sponsored by companies whose principal activity is the **manufacture or sale of cigarettes and other tobacco products**, as well as electronic cigarettes and refill containers; secondly, the sponsorship of audiovisual media services or programmes by companies whose **activities include the manufacture or sale of medicinal products and medical treatment** may promote the name or the image of the company, but not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls; finally, also **news and current affairs programmes** cannot be sponsored, as well as, if prohibited by the Member States, the showing of a sponsorship logo during children's programmes, **documentaries and religious programmes**.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS
- The directive also regulates the product placement by establishing its **prohibition**.
- However, **two exceptions** are provided, by the way of which product placement is allowed:
- **(i)** in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes; and
- **(ii)** where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme.
- Falling to one of these categories does not automatically make product placement lawful. Indeed, specific requirements are required by the directive in order to consider product placement lawful, and specifically:

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS
- (a) their content and organization within a schedule, in the case of television broadcasting, or within a catalogue in the case of on-demand audiovisual media services, shall under no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
- (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
- (c) they shall not give undue prominence to the product in question;
- (d) viewers shall be clearly informed of the existence of product placement by an appropriate identification at the start and at the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS

- As a general protection clause, it has to be noted that, in any event, programmes cannot contain product placement of:
- (a) cigarettes and other tobacco products, as well as electronic cigarettes and refill containers, or product placement from undertakings whose principal activity is the manufacture or sale of those products;
- (b) specific medicinal products or medical treatments available only on prescription in the Member State under whose jurisdiction the media service provider falls.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS
- Chapter V of the directive deals with **exclusive rights** and **short news reports** in television broadcasting and excludes from its application television broadcasts that are intended for local audiences and do not form part of a national network, pursuant to Article 18. Amongst others, the main obligation that is placed to Member States is that they are forced to **guarantee that events** which are regarded by that Member State as being of **major importance** for society **are not broadcasted in an exclusive way** in their territory in order not to deprive a substantial portion of the audience from the access to the service, drawing up a list of the designed events.
- In addition, they also have to guarantee that all the broadcaster established in the Union have a fair, reasonable and non-discriminatory access to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS
- The following Chapter provides specific provisions with regard to the promotion of **distribution and production of television programs** and applies to television broadcasts that are not intended for local audiences and form part of a national network.
- Particularly, where practicable and by appropriate means, it is provided that: (i) broadcasters reserve for European works a majority proportion of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping; and (ii) broadcasters reserve at least 10% of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS

- Chapter VII disciplines **television advertising and teleshopping**.
- Under this Chapter it is firstly provided that television advertising and teleshopping shall be readily recognizable and distinguishable from editorial content and shall be kept quite distinct from other parts of the program by optical and/or acoustic and/or spatial means.
- In addition, it is allowed to have isolated television advertising and teleshopping spots in sports events. However, apart from transmissions of sports events, isolated television advertising and teleshopping spots must remain an exception.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS
- Secondly, under Chapter VII it is also provided that Member States shall ensure the respect of the integrity of the programmes when television advertising or teleshopping are inserted during programmes.
- In such respect, it is particularly provided that television advertising, teleshopping, or both, may interrupt the transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes once for each scheduled period of at least 30 minutes, and the transmission of children's programs once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the program is greater than 30 minutes. In any case, the transmission of teleshopping is not allowed during children's programs and it, jointly with television advertising, shall not be inserted during religious services.

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS
- In addition to the above limitations, the directive also establishes the prohibition of television advertising and teleshopping for alcoholic beverages when:
- (a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;
- (b) it shall not link the consumption of alcohol to enhanced physical performance or to driving;
- (c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success;
- (d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;

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- AUDIOVISUAL MEDIA SERVICES: RESTRICTIONS

- (e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
- (f) it shall not place emphasis on high alcoholic content as being a positive quality of the beverages.

- Also with regard to those television advertising spots and teleshopping spots time limitations are set by the directive.

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- AUDIOVISUAL MEDIA SERVICES: VIDEO-SHARING PLATOFORM SERVICES
- Finally, the AMSD provides for specific provisions dedicated to the **video-sharing platform services**.

- The jurisdiction of a video-sharing platform provider is identified by recalling Article 3, par. 1, of the e-Commerce Directive. If no jurisdiction can be identified pursuant to the previous article, the AMSD considers a video-sharing platform provider established on the territory of a Member State for the if that video-sharing platform provider: (a) has a parent undertaking or a subsidiary undertaking that is established on the territory of that Member State; or (b) is part of a group and another undertaking of that group is established on the territory of that Member State.

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- AUDIOVISUAL MEDIA SERVICES: VIDEO-SHARING PLATOFORM SERVICES

- Residual clauses for determining the jurisdiction of a video-sharing platform provider are set where there are several subsidiary companies, established in different Member States, that generally refer to the territory where the subsidiary first begun its activity, provided that it maintains a stable and effective link with the economy of that Member State.

- Once determined on the basis of the above criteria the jurisdiction of video-sharing platform providers, Member States are placed with the **obligation to establish and maintain an up-to-date list of the video-sharing platform providers established or deemed to be established on their territory**.

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- AUDIOVISUAL MEDIA SERVICES: VIDEO-SHARING PLATOFORM SERVICES
- The AMSD establishes **several and specific obligations** – that are in addition to those provided under the e-Commerce Directive applicable to any ISP – aiming to **protect consumers**.
- Particularly, video- sharing platform providers under a jurisdiction of a Member State must take appropriate measures to protect, inter alia, minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development, and the general public from programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes an activity which is a criminal offence under Union law. In addition, video-sharing platform providers must clearly inform users where programmes and user- generated videos contain audiovisual commercial communications.

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- AUDIOVISUAL MEDIA SERVICES: VIDEO-SHARING PLATOFORM SERVICES
- The **appropriate measures** that video-sharing platform are obliged to take are determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content as well as the general public interest. measures.
- In any case, it is expressly provided that those **measures** must be practicable and proportionate, taking into account the size of the video-sharing platform service and the nature of the service that is provided. Under Article 28b, par. 3, of the AMSD it is provided a full list of measures that Member States may impose on video-sharing platform providers given that Member States may impose measures that are more detailed or stricter than the listed measures.

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- AUDIOVISUAL MEDIA SERVICES: AUTHORITIES AND BODIES
- **Disputes** between users and video-sharing platform providers relating to the application of the above provisions are settled by **out-of-court mechanisms** that are required by the same AMSD. Indeed, it provides that Member States must ensure out-of-court mechanisms that enable such disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law.

Finally, along with establishing provisions regarding national regulatory authorities in this sector, the AMSD also specifically establishes, pursuant to Article 30b, an **european regulator**, namely, the European "Regulators Group for Audiovisual Media Services" ("**ERGA**") that is composed of representatives of the national regulatory authorities or bodies in the field of audiovisual media services with primary responsibility for overseeing audiovisual media services.

- AUDIOVISUAL MEDIA SERVICES: AUTHORITIES AND BODIES

- ERGA has various tasks, and specifically: (a) provide technical expertise to the EU Commission on matters related to audiovisual media services within its competence; (b) exchange experience and best practices on the application of the regulatory framework for audiovisual media services, including on accessibility and media literacy; (c) cooperate and provide its members with the information necessary for the application of the AMSD; (d) give opinions, when requested by the EU Commission, on the technical and factual aspects of some specific issues under the AMSD.

Digital Media and Digital Infrastructures

- ONLINE PLATFORMS REGULATION: SCOPE

- Aspects of the **B2B relationships on online platforms** have also been on the European Commission's agenda since 2016. Particularly, in its Communication on "Online Platforms and the Digital Single Market" the Commission noted that a public consultation revealed that there were various concerns, particularly for SMEs and micro-enterprises, about some trading practices of certain online platforms.

- ONLINE PLATFORMS REGULATION: SCOPE

- Amongst other, the concerns revealed by the public consultation were related, on one hand, to the **terms and conditions** on which business suppliers were granted access to an online platform, that were **generally unfair** (i.e. providing parity clauses or unilateral modifications) and, on the other hand, to certain trading practices that the same online platforms performed (i.e. online platforms usually play a dual role on their network by offering their own products alongside business suppliers).

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- ONLINE PLATFORMS REGULATION: SCOPE

- As a result, EU Commission presented its proposal for a Regulation "on promoting fairness and transparency for business users of online intermediation services" with the objective to ensure a **higher level of transparency in the terms and conditions of online intermediation services**, both generally and with regard to specific terms on specific practices. And this was adopted as No. 2019/1150 on 20 June 2019 (the "**FTReg**").

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- ONLINE PLATFORMS REGULATION: SCOPE

- The FTReg **application extent** is established by its Article 1, par. 2, that states that the regulation applies to:

- "*online intermediation services and online search engines provided, or offered to be provided, to business users and corporate website users, respectively, that have their place of establishment or residence in the Union and that, through those online intermediation services or online search engines, offer goods or services to consumers located in the Union, irrespective of the place of establishment or residence of the providers of those services and irrespective of the law otherwise applicable*".

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- ONLINE PLATFORMS REGULATION: SCOPE

- However, the FTReg's application extent does not reach "*online payment services or online advertising tools or online advertising exchanges, which are not provided with the aim of the facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers*".

- For the sake of clarity, the regulation is specifically dedicated to discipline the position of various subjects operating in the online market, such as, on one side, **providers of online intermediation services** and **business users** of such online intermediations services and, on the other side, **providers of online search engines** and **corporate website users** of such online search engines.

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- ONLINE PLATFORMS REGULATION: DEFINITIONS

- In order to better understand this, some FTReg's **definitions** have to be clarified.

- First, under the regulation "**business user**" means "*any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession*".

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- ONLINE PLATFORMS REGULATION: DEFINITIONS
- Secondly, "**online intermediation services**" means "*services which meet all of the following requirements:*

- *(a) they constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council;*

- *(b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;*

- *(c) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers*".

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- ONLINE PLATFORMS REGULATION: DEFINITIONS

- Thirdly, "**online search engine**" means "*a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found*".
- Finally, "**corporate website user**" means "*any natural or legal person which uses an online interface, meaning any software, including a website or a part thereof and applications, including mobile applications, to offer goods or services to consumers for purposes relating to its trade, business, craft or profession*".

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- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- The discipline of the FTReg aims specifically to ensure fairness and transparency between providers of online intermediation services and online search engines (the "**OP providers**") and their respective users, with a focus on business / corporate users.
- Indeed, with regard consumers, other legislations apply (the most of which was previously analyzed in this paper).

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- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- Therefore, first, the FTReg provides certain **information requirements for OP providers**.
- Under Article 3 of the FTReg "**terms and conditions**" are specifically regulated. In particular, OP providers shall ensure that their terms and conditions:
- **(a)** are drafted in plain and intelligible language;
- **(b)** are easily available to business users at all stages of their commercial relationship with the provider of online intermediation services, including in the pre-contractual stage;

- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- **(c)** set out the grounds for decisions to suspend or terminate or impose any other kind of restriction upon, in whole or in part, the provision of their online intermediation services to business users;
- **(d)** include information on any additional distribution channels and potential affiliate programmes through which providers of online intermediation services might market goods and services offered by business users;
- **(e)** include general information regarding the effects".

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- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- If OP providers intend to amend such terms and conditions, they are obliged to give (at least) a 15 days prior notice before proceeding to the execution of such amendments. Such obligation, however, does not always apply because of some exceptions, that apply where a provider of online intermediation services:

- **(i)** is subject to a legal or regulatory obligation which requires it to change its terms and conditions in a manner which does not allow it to respect such notice period; or

- **(ii)** must exceptionally change its terms and conditions to address an unforeseen and imminent danger related to defending the online intermediation services, consumers or business users from fraud, malware, spam, data breaches or other cybersecurity risks.

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- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- Taking into consideration both the relevance that data have been acquiring over the years and the strong impact of the GDPR, the FTReg requires **additional information** with regard the **terms and conditions** concerning **data**.
- Indeed, firstly, OP providers must include in the terms and conditions also a description of the technical and contractual access, or absence thereof, of business users to any personal data or other data, or both, which business users or consumers provide for the use of the online intermediation services concerned or which are generated through the provision of those services.

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- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- In particular OP providers must ensure business users are informed, *inter alia*, whether the OP provider has access to personal data or other data, or both, which business users or consumers provide for the use of those services or which are generated through the provision of those services, and if so, to which categories of such data and under what conditions; **and** whether a business user has access to personal data or other data, or both, provided by that business user in connection to the business user's use of the online intermediation services concerned or generated through the provision of those services to that business user and the consumers of the business user's goods or services, and if so, to which categories of such data and under what conditions.

ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- Secondly, the FTReg also provides that OP providers must ensure that the **identity of the business users** providing the goods or services on the online intermediation services is **clearly visible**.
- Finally, OP providers must also include in their term and conditions the **main parameters** (that is to say the main parameters, which individually or collectively, are most significant) they use in **determining ranking** and the reasons for their importance with respect to other parameters.

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- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- If OP providers influence rakings against direct or indirect remuneration, this must also be disclosed to business users and corporate website users by describing such possibility and the effects of the remuneration on rakings.
- The disclosure must be provided in an easily and publicly available description, drafted in plain and intelligible language, and kept up to date.
- However, **no disclosure of algorithms** is required, nor any information that, with reasonable certainty, would result in the enabling of deception of consumers or consumer harm through the manipulation of search results.

- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- Furthermore, **additional information requirements** of the OP providers' **terms and conditions** must be provided if OP providers restrict the ability of business users to offer the same goods and services to consumers under **different conditions** through other means than through those services.

- In such cases, OP providers must include the **grounds** (i.e. economic, commercial or legal consideration for those restriction) **for such restriction and make those grounds easily available to the public**.

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- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- If an OP provider or a business users offer to consumers through the OP provider's online intermediation services "**ancillary goods and services**" (including financial products), the OP provider must provide **further information requirements** in its **terms and conditions**.

- These, in particular, consist in the description of the type of ancillary goods and services offered and a description of whether and under which conditions business users are also allowed to offer their own ancillary goods and services through the online intermediation services.

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- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- Finally, other **information requirements** to be included under OP providers' **terms and conditions** are those established under Article 7 of the FTReg.

- Under such provision, OP providers must provide the description of any differentiated treatment (i.e. main economic, commercial or legal consideration for such differentiated treatment) which they give, or might give, in relation to goods or services offered to consumers through their online intermediation services or, as the case may be, online search engines.

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- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- In particular, such description shall cover, "*where applicable any differentiated treatment through specific measures taken by, or the behavior of, the provider of online intermediation services or the provider of the online search engine relating to any of the following: (a) access that the provider, or that the business users or corporate website users which that provider controls, may have to any personal data or other data, or both, which business users, corporate website users or consumers provide for the use of the online intermediation services or the online search engines concerned or which are generated through the provision of those services; (b) ranking or other settings applied by the provider that influence consumer access to goods or services offered through those online intermediation services by other business users or through those online search engines by other corporate website users; ...*

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- ONLINE PLATFORMS REGULATION: TERMS AND CONDITIONS

- *...(c) any direct or indirect remuneration charged for the use of the online intermediation services or online search engines concerned; (d) access to, conditions for, or any direct or indirect remuneration charged for the use of services or functionalities, or technical interfaces, that are relevant to the business user or the corporate website user and that are directly connected or ancillary to utilizing the online intermediation services or online search engines concerned*".

- ONLINE PLATFORMS REGULATION: KEY PROVISIONS

- Given the above, it has to be noted that if an OP provider's terms and conditions, or specific provisions thereof, fail to comply with the legal framework outlined insofar, the FTReg provides a strong **legal sanction under which they will be specifically considered null and void**. This provisions makes such regulation very effective and strongly contributes to boost fairness in B2B relationships on online platforms.

- In this respect another important provision is Article 4 of the FTReg, which specifically regulates the situations in which an OP provider decides to **restrict**, **suspend** or **terminate** the provision of its online intermediation services to a given business user.

- ONLINE PLATFORMS REGULATION: KEY PROVISIONS

- In such cases, the OP provider shall provide the business user concerned, prior to or at the time of the restriction or suspension taking effect, with a **statement of reasons** for that decision on a durable medium. In case of termination, OP provider shall provide the business user concerned at **least 30 days prior** to the termination taking effect, with a statement of reasons for that decision on a durable medium. Some exceptions apply to this provision (i.e. OP provider is subject to a legal obligation which requires to terminate immediately the provision of the service).

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- ONLINE PLATFORMS REGULATION: KEY PROVISIONS

- In the case of **restriction, suspension or termination**, the OP provider shall give the business user the opportunity to clarify the facts and circumstances in the framework of the **internal complaint-handling process**, that is regulated by the same FTReg.
- Where the restriction, suspension or termination is **revoked** by the OP provider, it shall reinstate the business user without undue delay, including providing the business user with any access to personal or other data, or both, that resulted from its use of the relevant online intermediation services prior to the restriction, suspension or termination having taken effect.

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- ONLINE PLATFORMS REGULATION: KEY PROVISIONS

- In the case of **restriction, suspension or termination**, the OP provider shall give the business user the opportunity to clarify the facts and circumstances in the framework of the **internal complaint-handling process**, that is regulated by the same FTReg.
- Where the restriction, suspension or termination is **revoked** by the OP provider, it shall reinstate the business user without undue delay, including providing the business user with any access to personal or other data, or both, that resulted from its use of the relevant online intermediation services prior to the restriction, suspension or termination having taken effect.

- ONLINE PLATFORMS REGULATION: KEY PROVISIONS

- Said that, however, it has to be noted that an OP provider **does not have to provide a statement of reasons** where it is subject to a legal or regulatory obligation not to provide the specific facts or circumstances or the reference to the applicable ground or grounds, or where a provider of online intermediation services can demonstrate that the business user concerned has repeatedly infringed the applicable terms and conditions, resulting in termination of the provision of the whole of the online intermediation services in question.

- ONLINE PLATFORMS REGULATION: KEY PROVISIONS

- Another key provision provided in order to ensure that contractual relations between OP providers and business users are conducted in good faith and based on fair dealing, is Article 8, which requires OP providers to:
- **(a)** not impose retroactive changes to terms and conditions, except when they are required to respect a legal or regulatory obligation or when the retroactive changes are beneficial for the business users;
- **(b)** ensure that their terms and conditions include information on the conditions under which business users can terminate the contractual relationship with the provider of online intermediation services; and

- ONLINE PLATFORMS REGULATION: KEY PROVISIONS

(c) include in their terms and conditions a description of the technical and contractual access, or absence thereof, to the information provided or generated by the business user, which they maintain after the expiry of the contract between the provider of online intermediation services and the business user.

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- ONLINE PLATFORMS REGULATION: KEY PROVISIONS

- In conclusion, FTReg also provides certain **modalities for conflicts resolutions**.
- Under Article 11, the regulation specifically requires OP providers to **provide an internal system for handling the complaints** of their business users. Such system must be easily accessible and free of charge for business users and must ensure handling within a reasonable time frame.
- In addition, it also must be based on the principles of transparency and equal treatment to equivalent situations, and treating complaints in a manner which is proportionate to their importance and complexity. Issues that can be filed by means of such system are listed under the same Article.

- ONLINE PLATFORMS REGULATION: KEY PROVISIONS

- Furthermore, along with the requirement of the provision of an internal system for handling the complaints, under Article 12, the FTReg also establishes that OP providers must **identify in their terms and conditions two or more mediators** with which they are willing to engage to attempt to reach an agreement with business users on the settlement, out of court, of any disputes between the provider and the business user arising in relation to the provision of the online intermediation services concerned.
- Before mediators can be filed complains also that could not be resolved by means of the internal complaint-handling system referred to in Article 11.

- How the applicable jurisdiction to a media service provider is identified?
- What are the main provisions that place restrictions to media service providers in the audiovisual sector?
- Which are the main subjects under the FTReg?
- What terms and condition must include?

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SUGGESTED READINGS

- Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

- Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.