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Cross-border online sales restrictions and geo-blocking in the European Union. The new regulation is making steady progress

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1. Introduction

Cross-border online transactions are often limited by a variety of commercial actions put in place by online sellers that discriminate among their customers based on their nationality, place of residence or place of establishment. These are called geo-blocking practices.

A Commission survey¹ found that geo-blocking practices were identified in 63% of all websites assessed and that less than 40% of websites allowed cross-border customers to complete a purchase.

Geo-blocking encompasses commercial practices whereby online providers prevent users from accessing and purchasing a good or a service from a website if they are located in a Member State other than that of the provider. Geo-blocking includes the automatic re-routing of users to another website of the same or a different service provider, based in the same Member State of the user, and the delivery or payment refusal based on the location or place of residence of the user².

Geo-blocking practices can be put in place as a result of a unilateral business decision of a retailer that does not want to sell cross-border. They may also result from a contractual obligation that does not allow a retailer to sell cross-border to users outside of an allocated territory, as well as from commercial pressure.

These practices limit cross-border trade in the internal market and result in geographical market segmentation, raising issues of consumer protection, competition and copyright law.

2. The legal framework

Cross-border online sales are currently regulated at the EU level in several aspects: amongst others, by the Services Directive³, the e-Commerce Directive⁴, the Consumer Rights Directive⁵ and the EU competition law rules enshrined in Article 101 of the Treaty on the Functioning of the European Union (TFEU). However, the specific issue of discrimination based on nationality or place or

¹ See the following [LINK](#).

² Commission Staff Working Document, *Geo-blocking practices in e-commerce. Issue paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition*, 18.03.2016, SWD(2016) 70 final, pag. 17. The document is available at the following [LINK](#).

³ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006.

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.07.2000.

⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011.

residence or establishment is addressed only by the Services Directive and as part of the competition law framework.

In particular, Article 20(2) of the Services Directive⁶ states that “... *Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria...*”. On the competition law side, agreements between undertakings that discriminate among customers are prohibited pursuant to Article 101 TFEU. Specifically, restrictions on passive sales, such as preventing distributors from making passive sales outside the territory and/or group of customers they contractually serve, are considered as restrictions by object (hard-core restrictions) that infringe competition rules by their nature, and thus do not require a demonstration of their anti-competitive effects⁷.

3. The e-commerce sector inquiry

In May 2015, the European Commission launched a sector inquiry into e-commerce, as part of the Digital Single Market strategy⁸. The purpose of the inquiry was to gain more market knowledge in order to better understand the nature, prevalence and effects of the barriers that hinder cross-border e-commerce and furthermore to assess them in the light of EU antitrust law. In particular, the inquiry focused on potential barriers to cross-border online trade in certain industry sectors where e-commerce is most widespread, such as electronics, clothing, shoes and digital content. These barriers may include contractual restrictions in distribution agreements that prevent retailers from selling goods or services purchased online or cross-border to customers located in another EU country.

In March 2016, the Commission published its initial findings⁹, showing that geo-blocking practices are in fact widely resorted to in e-commerce across the EU. They consist mainly of contractual barriers preventing consumers from shopping online across EU borders, but can also result from unilateral decisions by companies not to sell abroad. Agreements between suppliers and distributors that

⁶ See also: Commission Staff Working Document, *With a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market ('the Services Directive')*, 08.06.2012, SWD(2012) 146 final, available at the following [LINK](#).

⁷ See also: *The Geo-Blocking Proposal: Internal Market, Competition Law and Regulatory Aspects*, Study for the IMCO Committee of the European Parliament, January 2017, pag. 13 ff. The document is available at the following [LINK](#).

⁸ The creation of a Digital Single Market is one of the priorities of the Juncker Commission and aims at guaranteeing the free movement of goods, persons, services, capital and data is guaranteed. The Digital Single Market strategy has identified and proposed actions to address a number of public (i.e. regulatory) barriers that hinder cross-border e-commerce, so that consumers and businesses have better access to online goods and services across Europe. See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, 06.05.2015, COM(2015) 192 final, available at the following [LINK](#).

⁹ See footnote 2.

restrict competition in the Single Market need to be assessed on a case-by-case basis, while unilateral business decisions by non-dominant companies not to sell abroad fall outside the scope of EU competition law.

On 15 September 2016, the Commission published a Preliminary Report on the e-commerce sector inquiry¹⁰. The Preliminary Report provides an overview of the main competition-relevant market trends identified in the e-commerce sector inquiry and furthermore identifies the practices that may lead to competition concerns.

The Final Report¹¹ was adopted on 10 May 2017 and sets out the definitive findings of the e-commerce sector inquiry, taking into account the views and comments submitted by stakeholders. The Report is divided into two separate sections: the first section covers e-commerce of consumer goods, while the second focuses on e-commerce of digital content.

With regard to consumer goods, the Report highlights that:

- a large proportion of manufacturers decided over the last ten years to sell their products directly to consumers through their own online retail shops, thereby competing increasingly with their distributors;
- there is an increased use of selective distribution systems, where the products can only be sold by pre-selected authorised dealers, allowing manufacturers to better control their distribution networks, in particular, in terms of the quality of distribution but also price;
- there is an increased use of contractual restrictions to better control product distribution. Depending on the business model and strategy, such restrictions may take various forms, such as pricing restrictions and maintenance, marketplace (platform) bans, restrictions on the use of price comparison tools and exclusion of pure online players from distribution networks.

With respect to digital content, the Commission's Report first notes that the availability of licences from content copyright holders is essential for digital content providers and is a key factor that determines the level of competition in the market. Various different factors determine the availability of rights for online distribution of content, such as the (technological, territorial and temporal) scope of the rights as defined in the licencing agreements between right holders and digital content providers, the duration of such agreements and the widespread use of exclusivity clauses (which, however, is not a competition problem as such).

One of the key findings of the sector inquiry is that almost 60% of digital content providers who participated in the inquiry have contractually agreed to "geo-block" with right holders, thus preventing consumers from purchasing consumer goods

¹⁰ Commission Staff Working Document, *Preliminary Report on the E-commerce Sector Inquiry*, 15.09.2016, SWD(2016) 312 final, available at the following [LINK](#).

¹¹ Report from the Commission to the Council and the European Parliament, *Final report on the E-commerce Sector Inquiry*, 10.05.2017, COM(2017) 229 final. The document is available at the following [LINK](#).

and accessing digital content online from other EU Member States. Geo-blocking practices may be justified for objective reasons, such as to deal with VAT issues or certain public interest legal issues.

4. The e-commerce package: focus on the regulation on geo-blocking and other forms of discrimination

On 25 May 2016, in line with the Digital Single Market strategy, the Commission presented an e-commerce package that includes a proposed regulation on cross-border parcel delivery services¹², a set of rules on consumer protection cooperation¹³ and unfair commercial practices¹⁴, and a proposed regulation on geo-blocking and other forms of discrimination¹⁵ to ensure better access for consumers and businesses to digital goods and services across Europe.

In its impact assessment accompanying the proposal for a regulation on geo-blocking and other forms of discrimination¹⁶, the Commission identified the following main cases of unjustified restrictions:

- customers are sometimes prevented from buying online physical goods in another Member State even if they are willing to pick up the product in the country of the trader or arrange themselves for the cross-border part of the delivery;
- customers are often prevented from buying services (i.e. cloud computing) electronically or are restricted in accessing electronically supplied content offered online (i.e. music, e-books or audio-visual);
- customers moving to another country to receive the service at the location where the trader operates are sometimes charged prices which differ from those applied to domestic customers, such as when staying at a hotel, renting a car, attending a sport event or shopping in a cross-border region.

¹² European Commission, *Proposal for a Regulation of the European Parliament and of the Council on cross-border parcel delivery services*, 25.05.2016, COM (2016) 285 final. The document is available at the following [LINK](#).

¹³ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws*, 25.05.2016, COM(2016) 283 final, available at the following [LINK](#).

¹⁴ Commission Staff Working Document, *Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices*, 25.05.2016, SWD(2016) 163 final, available at the following [LINK](#).

¹⁵ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC*, 25.05.2016, COM(2016) 289 final, available at the following [LINK](#).

¹⁶ Commission Staff Working Document, *Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on place of residence or establishment or nationality within the Single Market*, 25.05.2016, SWD(2016) 173 final, available at the following [LINK](#).

The new regulation will prohibit the blocking of access to websites and other online interfaces and the re-routing of customers from one country to another. Moreover, it will prohibit discrimination against customers in specific cases of sale of goods and services (i.e. sale of goods without physical delivery, sale of electronically supplied services, sale of services provided in a specific physical location) and will not allow the circumventing of such bans on discrimination in passive sales agreements. Transactions where goods or services are purchased by a business for resale should, however, be excluded in order to allow traders to set up their own distribution systems in compliance with European competition law¹⁷.

The draft regulation does not address pricing as such, and traders are consequently free to set their prices in a non-discriminatory manner. Moreover, certain activities, which are too specific or too sensitive and already subject to particular consumer protection rules will be excluded from the material scope of the geo-blocking regulation¹⁸.

On 25 April 2017, the European Parliament authorised the commencement of three-way talks (trilogues) with the Council and the Commission, with a view to reaching an agreement on the final legislation.

On 20 November 2017, the Parliament, the Council and the Commission reached a provisional agreement on the draft regulation: as proposed by the Commission, digital copyrighted content, such as e-books, music or video games, was kept out of the scope of the regulation for the time being. However, Parliament's negotiators achieved an ambitious "review clause" making it clear that the Commission must assess, within two years after the entry into force of the regulation, not only whether to extend its scope to non-audio-visual copyrighted content, but also to carefully analyse whether additional sectors, such as audio-visual and transport services, should be included within the regulation's scope instead.

The provisional agreement still needs to be confirmed by the EU Member States' ambassadors and by Parliament's Internal Market Committee. The draft regulation will then be put to a vote by the full Parliament in an upcoming plenary session and formally approved by the EU Council of Ministers.

¹⁷ See Recital 12 of the proposed regulation.

¹⁸ Article 1(3) of the proposed regulation states that the activities referred to in Article 2(2) of the Services Directive do not fall within its scope. These activities include: non-economic services of general interest; financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice; services in the field of transport; healthcare services; audiovisual services; gambling activities.