

Geoblocking in EU Law

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Andrus Ansip

Vice-President EU Commission

- *"Deep in my heart, I hate geoblocking. It is old-fashioned and it is not fair. We do not have to use these instruments in the 21st century".*

Digital single market

- Single market is one of the fundamental objectives of EU.
- That is true to traditional markets but also to digital one.
- To maintain the internal market, as an area without internal frontiers in which the free movement of goods and services is ensured, it is not sufficient to abolish State barriers alone.
- Such abolition can be undermined by private parties putting in place obstacles inconsistent with internal market freedoms.

EU Digital market

- Such practices are an important factor contributing to the relatively low level of cross-border transactions within the Union in digital markets.
- At present, only 15% of Europeans buy products from online shops based in another EU country.

Geoblocking as private compartmentation practice

- Geo-blocking is a discriminatory practice that prevents online customers from accessing and purchasing products or services from a website based in another member state.
- That occurs where traders operating in one Member State block or limit access – including redirection - to their online interfaces, customers from other Member States wishing to engage in cross-border transactions.

Technical means of recognition of the nationality or state of residence or establishment are

- the IP address used when accessing an online interface (Webpage or App),
- the address submitted for the delivery of goods
- the choice of language made or
- the Member State where the customer's payment instrument has been issued.

The goods and services most affected by geo-blocking are

- clothing,
- footwear and accessories,
- physical media (books),
- computer hardware and electronics,
- airplane tickets,
- car rental,
- digital content such as streaming services,
- computer games and software,
- e-books and MP3s.

The prohibition of discrimination on grounds of nationality is an EU general principle

- The prohibition of discrimination on grounds of nationality, which covers also indirect discrimination, is a general principle of Union law laid down in
 - Article 18 Treaty on the Functioning of the European Union (TFEU) and
 - Article 21(2) of the EU Charter of fundamental rights,
 - as well as in the specific provisions related to internal market freedoms, in particular Directive 2006/123/EC.

Directive 2006/123/EC

- Pursuant its Article 20.2 Member States are to ensure that service providers established in the Union do not treat recipients of services differently on the basis of their nationality or place of residence.
- according to this provision Member States shall ensure that
 - the general conditions of access to a service do not contain discriminatory provisions relating to the nationality or place of residence of the recipient,
 - without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.
- Application of the non-discrimination principle as specified in this Article depends on a case-by-case assessment of the trader's practices.
- That Article remains applicable to situations don't covered by the Geo-blocking Regulation.

Sky UK TV case

Commission Decision of 7th March 2019

Negative Commitments of conduct for future license of films to the Hollywood content enterprises and Sky

- Not (re)introduce contractual obligations that prevent the pay-TV broadcasters from providing cross-border passive sales to consumers that are located in the EEA but outside of the broadcasters' licensed territory (no "Broadcaster Obligation");
- Not (re)introduce contractual obligations that require the studios to prevent other pay-TV broadcasters located in the EEA from providing passive sales to consumers located in the licensed territory (no "Studio Obligation");
- Not seek to enforce or bring an action before a court or tribunal for the violation of a Broadcaster Obligation and/or Studio Obligation, as applicable, in an existing agreement licensing its output for pay-TV.
- Not enforce or honour any Broadcaster Obligation and/or Studio Obligation in an existing agreement licensing its output for pay-TV.

EU Geoblocking regulation

- On 27th February 2018, the Council adopted the Regulation (EU) 2018/302 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 (OJEU L60, 3rd March 2018, p. 1) EEA Relevant.
- The Regulation take effect nine months after its publication the 3rd December 2018.
- Article 6 applies from a later date than the other provisions of the regulation, namely 23rd March 2020 (24 months after the date of entry into force),
 - with regard to provisions of B2B agreements that are concluded before 2nd March 2018 and
 - are compliant with the relevant rules of EU and national competition law.
- Insofar as this Regulation conflicts with the provisions of Directive 2006/123/EC, this Regulation should prevail.

Advantages

- The Regulation prevents traders from discriminating in the specific situations covered, without the need to carry on a case-by-case assessment of the trader's practice, and thus
 - provides legal certainty and
 - improves enforceability.

Exclusions

- Purely national restrictions
 - Regulation does not apply to purely internal situations, where all the relevant elements of the transaction are confined within one single Member State (art. 1.2).
- Microenterprises
 - Traders who fall under a national VAT exemption.
- Services excluded*

Services excluded

- Audio-visual
- Some ways to distribution non audiovisual copyright works*
 - Access to and Use of copyright protected content, or
 - Selling of copyright protected works in an intangible form, such as
 - music streaming services,
 - e-books,
 - online games and
 - software.
- Financial services
 - without prejudice to Article 5 of the Regulation regarding non-discrimination for reasons related to payments.
- Transport
 - However travel packages and linked travel arrangements are covered by the Regulation.
- Healthcare and Social services

Bund services

- where the trader provides goods or services subject to the Regulation combined with services that do not fall within the scope of the Regulation the whole bundle will be subject to the rules of the Regulation.

*Non-audiovisual content services that are protected by copyright

- The provision of non-audiovisual copyright protected content services **is not subject** to the Regulation's prohibition
 - of applying different general conditions of access on the basis of a customer's nationality, residence or establishment,
 - including the refusal to provide such services to customers from other Member States in the specific cases listed in Article 4.
- These services, moreover, **remain subject** to all other than Article 4 provisions of the Geo-blocking Regulation.*

***Non-audiovisual content services that are protected by copyright subjected to Regulation**

- The trader is subject to the prohibition to block or limit access to online interfaces on the basis of the customer's residence.
- The trader is prevented from discriminating against the electronic payment means on this basis.

*Example

- A company in Romania that distributes software protected by copyright in several Member States,
 - can still be able to refuse to sell these services in certain other Member States, in view of limitations on the required copyright held.
 - However, in the Member States where the company offers its software services, it will not be able to discriminate based on payment means.

Regular review clause

- 23rd March 2020 the Commission will carry out a first evaluation of the regulation impact on the internal market.
- This first evaluation should concentrate on assessing the possible extension of the prohibition of different general conditions of access to the use of non audiovisual copyright protected works, provided that the trader has the requisite rights for the relevant territories.
 - downloadable music,
 - e-books,
 - software and
 - online games including gambling services.
- It should also analyze whether the scope of this Regulation should be extended to services falling outside the scope of Directive 2006/123/EC.

Conducts prohibited by the regulation

- Discriminatory negative of sale
- Discriminatory limitations
- Discriminatory conditions in general conditions of acces, including prices
- Discriminatory redirection
- Discrimination on payement means

Not discriminatory differentiation

- Not discriminatory price differentiation is not prohibited.
- It is possible a justified differentiation for causes as
 - divergent legal environments in particular in consumer, labeling and environmental laws
 - taxation and fiscal issues,
 - delivery costs or
 - language requirements.
- Therefore traders will be free to offer different general conditions, including prices, to different groups of customers and to target certain groups of customers or in specific territories such as
 - offers for young people or for consumers as opposed to professionals or
 - offers linked to national or local festivities.

Website access

- General Rule
 - Traders will not be allowed to block or limit customers' access to their online interface for reasons of nationality or place of residence.
- Exception
 - EU legal prohibition or national prohibition according with EU Law.
 - In this case a clear explanation will have to be provided if a trader blocks or limits access or redirects customers to a different version of the online interface.

Discriminatory redirection or rerouting

- Traders operate sometimes different versions of their online interfaces, targeting customers from different Member States.
 - In general redirecting customers from one version of the online interface to another version without their explicit consent is prohibited (art. 3.2).
 - Once the customer's explicit consent has been given that explicit consent should be deemed to be valid for all subsequent visits of the same customer to the same online interface whatever
 - It is possible for the customer to withdraw such consent at any point in time.
 - All versions of the online interface remain easily accessible to the customer at all times.
 - In certain cases(art. 3.3) the prohibition shall not apply
 - 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
 - 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.
 - The explanation shall be given in the language of the online interface that the customer initially sought to access.

Core prohibitions*

- In three situations, any differences in the treatment of customers cannot be objectively justified and
- any kind of different treatment is prohibited as discriminatory (art. 4.1)
- with exemption of this related with de observance of a specific provision laid down in Union law, or in the laws of Member States in accordance with Union law (art. 4.5)

***For goods including online sale of physical books, DVDs and CDs.**

- that are either
 - delivered in a member state to which the trader offers delivery according its general conditions of access or
 - collected at a location agreed with the customer in a MS where the trader offers this option, according its general conditions of access.

***For services other than electronically supplied services, received by customer in a physical location within the territory of a Member State where the trader operates, such as**

- Hotel accommodation and car rental or
- entrance tickets for music festivals, sport events or leisure parks, whether the seller may be qualified as a trader.

***For electronically supplied services not protected by copyright**

- Because in this case, no physical delivery is required, as the services are being supplied electronically, such as
 - cloud services,
 - data warehousing services,
 - web hosting and
 - the provision of firewalls,
 - use of search engines, and internet directories,
 - website supply,
 - distance maintenance of programmes and equipment,
 - remote systems administration.

Subjects

- The regulation apply to all undertakings selling on line including online marketplaces, operating within the Union, regardless of whether a trader is established in a Member State or in a third country, because the effects for customers and on the internal market are the same, regardless of whether a trader is established in a Member State or in a third country.
- The regulation protect consumers but also in some cases undertakings, inter alia microenterprises and SMEs, whether the purchase is for end use only, regardless of whether the customer concerned is present, permanently or on a temporary basis in a Member State.

Distribution channels and distribution schemes

- Distribution channels:
 - The regulation doesn't preclude the freedom of traders to offer, on a non-discriminatory basis, different conditions, including different prices in different points of sale, such as shops and websites.
- Distribution schemes:
 - In case of selective and exclusive distribution the regulation doesn't oppose to non-discriminatory practices of traders limiting transactions or repetitive transactions, in order to prevent undertakings from purchasing quantities exceeding their internal needs, taking due account of the size of the undertakings.

Passive and active sales (art. 6)

- Passive sales:
 - Sales responding to unsolicited customer requests.
 - Provisions of agreements imposing obligations on traders, in respect of passive sales within the meaning of Regulation (EU) No 330/2010, to act in violation of the discriminatory prohibitions laid down in Regulation 2018/302 - articles 3, 4 and 5 - **shall be automatically void.**
 - The delayed application of Article 6 – 23rd March 2020 - ensures that companies had sufficient time to adapt their distribution agreements.
- Active sales:
 - Sales obtained through actively approaching individual customers by marketing conducts.
 - The Geo-blocking Regulation does not affect agreements restricting active sales within the meaning of the Vertical Block Exemption Regulation.
 - However, such a restriction could be unlawful under EU competition rules

Payment transactions (art. 5)

- Traders are not allowed to apply different **payment conditions** for customers in relation to payment methods for reasons of nationality, place of residence or place of establishment whether
 - 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 accepted by the trader if national;
 - authentication requirements are fulfilled pursuant to Directive (EU) 2015/2366; and
 - the payment transactions are in a currency that the trader accepts.
- But the trader may
 - Whithold 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.
 - Request charges for the use of a card- based payment instrument
 - for which interchange fees are not regulated under EU regulations,
 - with the limit of the direct costs borne by the trader for the use of the payment instrument.

National authority or jurisdiction, injunction and sanctions (art. 7)

- Member States shall designate one or more bodies - courts or administrative authorities - to be responsible for taking effective action to ensure compliance with this Regulation.
 - Hungary: Government Office for Pest County
 - Regulation foresee also cross-border cooperation among competent authorities for generalized breach from 17th January 2020
- Those bodies should have the necessary powers to order the trader to comply with this Regulation.
 - The Geo-blocking is included in the list of acts covered by the Injunctions Directive 2009/22/EC (Annex I amended by art. 10 Regulation 2018/302).
- Member States should also ensure that effective, proportionate and dissuasive measures can be taken against traders in the event of any breach of the Regulation.
 - This measures may be one ore more of the following: administrative or court injunctions, damages, criminal or administrative penalties, lump-sums, attending the importance and extension of the conduct ((individual or mass infringement) and the nature of the customer (consumer or enterprise).
 - Hungary:
 - Amendment of bill T/7922 on Consumer Protection
 - Act CLV of 1997 on Consumer Protection

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Which courts have jurisdiction in case of disputes?

- This is governed by the Brussels I Regulation which establishes that, in matters related to a contract concluded between a consumer and
 - a person who pursues professional activities in the Member State of the consumer or who directs his or her activities to that Member State,
 - a consumer may bring proceedings against the trader in the courts of the Member State where the consumer is domiciled whereas
 - proceedings may be brought against the consumer only in those courts.
 - If the trader does not pursue professional activities in the Member State of the consumer or does not direct his/her activities to that Member State, and a consumer initiates a purchase
 - each party can sue the other party in the Member State of the other party's domicile or
 - for contractual matters: in the courts in the place where the contractual obligation in question is performed,
 - for the sale of goods, the place where the goods were delivered or should have been delivered.

Assistance (art. 8)

- Each Member State shall designate a body or bodies responsible for providing practical assistance to consumers in the case of a dispute between a consumer and a trader arising from the application of the Regulation.
- Hungary:
 - The European Consumer Centre Hungary



Nagyon köszönöm