

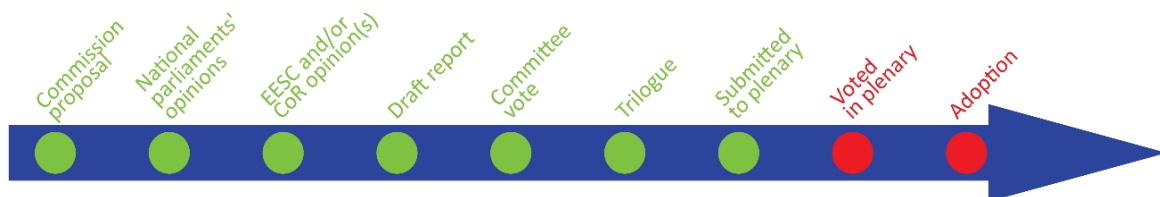
# Geo-blocking and discrimination among customers in the EU

## OVERVIEW

Geo-blocking practices commonly restrict cross-border sales of tangible goods as well as of electronically supplied services and electronically delivered content services in the EU. In May 2016, the European Commission proposed a new regulation that prohibits online sellers of tangible goods, and of some types of electronically supplied services, from discriminating among customers based on their nationality or place of residence within the European Union. In November 2017, after protracted negotiations, the co-legislators agreed to ban some types of unjustified geo-blocking practices. However, the ban will not apply initially to content and services protected under copyright (for instance, e-books and downloads of music and audiovisual content). At the request of the Parliament, a review clause has been introduced which requires the Commission to re-examine the situation two years after the entry into force of the regulation.

**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**

<i>Committee responsible:</i>	Internal Market and Consumer Protection (IMCO)	COM(2016) 289 25.5.2016
<i>Rapporteur:</i>	Róża Gräfin von Thun und Hohenstein (EPP, Poland)	2016/0152 (COD)
<i>Shadow rapporteurs:</i>	Virginie Rozière (S&D, France), Anneleen Van Bossuyt (ECR, Belgium), Dita Charanzová (ALDE, Czech Republic), Dennis de Jong (GUE/NGL, the Netherlands), Julia Reda (Greens/EFA, Germany), Marco Zullo (EFDD, Italy), Marcus Pretzell (ENF, Germany)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	First-reading vote in plenary	



## Introduction

On 25 May 2016, the European Commission proposed a new [regulation](#) to prevent traders from discriminating between online customers based on their nationality, place of residence or place of establishment within the internal market. The aim of the proposal is to ban online and offline trading practices when they result in such discrimination, in order to avoid an artificial segmentation of the single market and give customers (i.e. individuals and companies) better cross-border access to goods and services in the Union.

## Existing situation

### Geo-blocking

[Geo-blocking](#) usually refers to discriminatory practices that prevent online customers from accessing and purchasing a product or a service from a website based in another Member State, automatically re-route them to a local site, and refuse delivery or payment based on the location or place of residence of the user. As a result, consumers face different selling conditions for products or services purchased online on the basis, for instance, of their IP address, their postal address or the country of issue of their credit card. These practices which limit cross-border trade in the internal market and result in geographical market segmentation have long been a [concern](#) for consumer protection, competition and copyright laws.

### e-Commerce package

On 25 May 2016, in line with the [Digital Single Market strategy](#), the Commission presented an e-commerce package including a [regulation on cross-border parcel delivery services](#), a set of rules on [consumer protection cooperation](#) and [unfair commercial practices](#), and a [regulation on geo-blocking and other forms of discrimination](#) to ensure better access for consumers and businesses to digital goods and services across Europe.<sup>1</sup> The Commission proposed to address the undesirable effects of geo-blocking on cross border e-commerce in the EU and identified three main instances 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;
- customers are also often prevented from buying **electronically supplied services** (i.e. cloud computing) or are restricted in accessing **electronically supplied content offered online** (i.e. music, e-books or audiovisual);
- finally, even if customers are allowed to receive a good or a service, they are sometimes charged **prices** which differ from those applied to domestic customers (e.g. when renting a car in a country different from where the trader operates).

The [global value of European online trade](#) is estimated at **€230 billion**. But, according to the Commission, recent [investigations](#) show geo-blocking practices are relatively widespread in the EU. As a result, [according](#) to the Commission, **today, two in three cross-border shopping attempts in the EU fail**. Other studies argue that restrictions to cross-border trade strongly affects small and medium-sized companies (SMEs). According to a [2016 Cross-border E-commerce barometer](#) from Ecommerce Europe, while **65% of European internet users** shop online, **only 16% of SMEs sell online** and only **7.5% sell online across borders**.

### The current legal framework

A number of pieces of EU legislation are today applicable to cross-border online sales, including the [Services Directive](#), [the e-Commerce Directive](#), the [Consumer Rights](#)

[Directive](#) and the EU competition law rules enshrined in [Article 101 of the Treaty on the Functioning of the European Union \(TFEU\)](#). However, only the Services Directive and the competition law framework contain provisions expressly addressing discrimination based on nationality or place or residence or establishment.

### *Article 20(2) of the Services Directive*

Direct discrimination (based on nationality) or indirect discrimination (e.g. based on place or residence or establishment) is contrary to EU law, which enshrines a general principle of non-discrimination according to which people in the same situation should not be treated differently unless this can be justified.<sup>2</sup> Article 20(2) of the [Services Directive](#) is the centrepiece of secondary EU legislation against discriminatory practices concerning freedom of goods and services in the single market. Article 20(2) obliges Member States to ensure that companies do not treat customers differently based on their place of residence or establishment or nationality, unless there are objective justifications to do so (e.g. additional costs incurred because of the distance involved or the technical characteristics of the provision of the service).

### *EU competition law framework on vertical agreements*

Agreements between firms which discriminate amongst customers are also prohibited pursuant to [Article 101 TFEU](#) in some circumstances. Under the [Block Exemption Regulation](#) and the [Guidelines on Vertical Restraints](#), a differentiation is generally drawn between 'active sales' (i.e. actively approaching individual customers) and 'passive sales' (i.e. responding to unsolicited requests from individual customers). Accordingly, restrictions on [passive sales](#) (i.e. preventing distributors making passive sales outside the territory and the group of customers they originally serve) are regarded as hard-core restrictions (or restriction by object) which by their nature infringe EU competition rules without needing to demonstrate that they actually have anti-competitive effects.

### **Limits of the current legal framework**

The current legal framework (both the Services Directive and the competition-law tools) has proved to be difficult to apply in practice. Despite the Commission issuing [guidance on the application of Article 20\(2\)](#) in 2012, some [studies](#) have concluded that this provision is misconceived and unclear on many aspects and needs to be repealed or amended. With regard to competition rules, although restrictions of passive sales are generally prohibited, [studies](#) have shown that consumers continue to face a lack of information and lack effective redress mechanisms. Therefore legislative action is needed to complement competition law intervention.

### **Preparation of the proposal**

The Commission conducted an [impact assessment](#) for the proposed geo-blocking regulation as well as various consumer surveys and studies<sup>3</sup> which show that cross-border online transactions are often limited by a range of commercial practices used by online sellers discriminating among their customers (natural persons or companies) based on their nationality, place of residence or place of establishment.

In parallel, the Commission has launched a [Competition Sector Inquiry](#) into the e-commerce sector in order to investigate, inter alia, whether geo-blocking restrictions infringe EU competition law ([Articles 101](#) and [102 TFEU](#)) in 2015. On 18 March 2016, the Commission published its [initial findings](#) of the sector inquiry showing that geo-blocking is widespread in the EU. The final report is scheduled for the first quarter of 2017.

## The changes the proposal would bring

### Scope and objectives of the proposal

The general objective of the proposed regulation is to give customers (individuals or companies) better access to goods and services in the single market. To that end, the Commission's proposal aims at preventing traders from implementing direct and indirect discrimination based on their customer's nationality, place of residence or place of establishment in the context of cross-border commercial transactions in the EU.

### Key provisions of the draft regulation

#### *Legal basis*

The Commission proposes to rely on [Article 114 TFEU](#) – which confers on the EU the power to adopt measures which have as their object the establishment and functioning of the internal market – as the legal basis for the regulation.<sup>4</sup> The Commission explains that the current legal framework (Article 20 Services Directive) has proved not very effective. A regulation applicable directly in all Member States would guarantee a quick and uniform implementation of the non-discrimination rules and take precedence over Article 20 of the Services Directive.

#### *Goods and services falling within the scope of the regulation*

The proposed legislation covers online and offline sales of tangible goods and as well online digital services. The regulation would therefore apply to *sales of tangible goods* (e.g. clothing, footwear and accessories) *sales of electronically delivered non-audiovisual content services* including some that are subject to copyright protection. (e.g. e-books, music, online games) and *sales of electronically supplied services* (e.g. cloud services, data warehousing, website hosting, remote system administration, installation of filters, firewalls, banner-blockers).

#### *Goods and services excluded from the scope of the regulation*

Some activities too specific or too sensitive and already subject to particular consumer protection rules are excluded from the material scope of the geo-blocking regulation in order to ensure consistency with the scope of the Services Directive and provide legal certainty for traders and customers (See article 1(3) and recital 6).

The draft regulation does not concern [non-economic services of general interest](#). Similarly, [healthcare services and other social services](#) are also excluded from the scope of the regulation with the 2011 Patients' Rights Directive applicable instead. The proposed legislation is also not applicable to discrimination occurring in relation to services in the field of [transport](#) since several texts already protect passengers travelling by air, sea, bus and coach transport, while a proposal is in preparation concerning passengers travelling by train. Furthermore, national regulatory frameworks still govern and sometimes restrict the cross-border provisions of [online gambling activities](#) given the strong public concerns involved and such services therefore do not fall within the scope of the draft regulation. Finally, electronic communications services and networks, and financial services and other specific services, provided for instance by notaries, are also excluded.

Furthermore, the draft geo-blocking regulation also excludes from its scope [audiovisual and radio broadcasting services](#) – including broadcasts of sports events – since those services fall under the [Audiovisual Media Services Directive and the Satellite and Cable Directive](#), both of which are currently under review. This exclusion will be reviewed two years after the entry into force of the regulation. However, the proposed [portability](#)

[regulation](#), which is already being discussed by the EP and the Council, would require suppliers of audiovisual services to provide their customers with access to copyrighted content when they are temporarily resident in another Member State.<sup>5</sup> Furthermore, the Commission has announced that it will make proposals before the end of 2016 on copyright reform, aimed at allowing subscribers to digital content services to access their services in any EU country.

Addressing the geo-blocking practices that affect the audiovisual and radio broadcasting services would arguably require limiting the effects of the **territoriality of copyright** (enshrined in [Article 5 of the Berne Convention](#) and confirmed as a core principle of EU copyright law by the 2005 [Lagardère](#) ruling of the Court of Justice of the European Union (CJEU)) which means that each Member State grants and recognises copyright protection in its own territory by virtue of national legislation. The [financing of film and television](#) productions – largely based on cultural and linguistic preferences – and the licensing of [broadcast sports](#) often depends on selling distribution rights to national distributors, based on **exclusive rights of exploitation in a specific territory**.

Finally, transactions where goods or services are purchased by a business for [resale](#) are excluded from the scope of the regulation as they are governed by specific rules under European competition law (e.g. selective and exclusive distribution, allowing manufacturers to select retailers, are generally allowed).

### *Prohibition of discrimination for e-commerce website access*

[Article 3](#) of the draft regulation would prohibit traders from blocking access to their online interfaces to customers in another Member State for reasons related to their nationality, place of residence or establishment. Automatically re-routing customers to a different version of the online interface is prohibited as well, unless the customer gives their explicit consent before the re-routing occurs. This obligation applies to all e-commerce websites, i.e. those proposing sales of tangible goods (e.g. clothing, footwear, print books) and those proposing electronic services (e.g. cloud computing, webhosting). To that effect, traders are subject to an obligation of transparency, i.e. they must inform the customer and provide adequate justification.

### *Prohibition of discrimination for cross-border sales of goods and services*

When buying online, foreign customers should have access to the same terms and conditions as local customers irrespective of their nationality, place of residence or establishment. [Article 4](#) of the draft regulation therefore identifies three specific trading situations in which traders must not discriminate between customers in the general terms and conditions – including prices – they offer for selling goods or services:<sup>6</sup>

- the trader sells goods which are not delivered cross-border to the Member State of the customer by or on behalf of the trader (the customer is entitled to delivery in the country of the trader in the same way as local customers);
- the trader provides electronically supplied services like cloud computing and webhosting which do not concern copyright protected works; and
- services (such as concerts tickets, car rental, summer accommodation) are supplied in a physical location in a Member State which is not the customer's Member State of residence.

Traders nonetheless remain allowed to differentiate their offers and target their activities to specific Member States or certain groups of customers.

While **non-audiovisual electronically supplied services protected by copyright (such as e-books, online games and music)** fall within the scope of the proposed regulation (with

audiovisual services excluded), the Commission proposed to **exempt such services from the obligation to be offered on the same terms and conditions to foreign and local consumers** (Article 4). The Commission will [review](#) this exception two years after the entry into force of the regulation. Furthermore, application of this **obligation to other electronically supplied services (e.g. cloud computing, web hosting) would be delayed to mid-2018** in order to give enough time to services providers to adapt their online business to the changes.

#### *Prohibition of discrimination regarding conditions of payment*

[Article 5](#) of the draft regulation states that – while traders remain free to choose their preferred payment methods – they cannot reject or otherwise discriminate against their customers throughout the EU with regard to payment conditions (provided it concerns an electronic payment with authentication and in a currency agreed upon) based on their nationality, place of residence, or establishment.

#### *Exemptions from the non-discrimination principles*

In order to [comply with national or EU laws](#), traders may depart from the non-discrimination obligations and block access to specific content, limit or re-direct customers without their consent to an alternative version of an online website. In that way, traders may discriminate on prices between customers in order to respect national rules on the pricing of books.

In addition, [small businesses](#) which fall under a certain VAT threshold (as defined in Chapter 1 of Title XII of the [VAT Directive](#)) are exempted from implementing the non-discrimination obligations when they are providing electronically supplied services. These less stringent rules will benefit SMEs usually exempted from VAT under national rules.

#### *Obligation not to restrict passive sales*

[Article 6](#) of the draft regulation provides that all contractual agreements imposing on traders an obligation not to engage in passive sales should be considered as violating the non-discrimination obligations and be considered automatically void. This is necessary in order to avoid the rules of the proposed regulation from being circumvented through contractual arrangements. Furthermore, the new rule applies to all firms, dominant or not dominant. It therefore complements EU competition law rules (applicable only to dominant firms) as regards the treatment of passive sales and vertical restraints under EU law.

#### *Assistance to consumers and enforcement*

[Article 7](#) and [Article 8](#) require Member States to designate one or more bodies to monitor and ensure compliance with the geo-blocking regulation and to provide assistance to consumers for any disputes arising from the application of the proposed legislation.<sup>7</sup>

#### *Territorial scope*

The non-discrimination rules enshrined in the geo-blocking regulation are imposed on all traders offering goods and services for sale in the EU. This means that traders established in non-EU countries but providing their services within the Single Market are subject to the same obligations.

## Stakeholders' views

*This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.*

### Consumers

[BEUC](#) has long called on the Commission to complement the Services Directive with specific legislative instruments to address geo-blocking in the e-commerce sector and to

ensure that all Member States adopt appropriate sanctions. While BEUC agreed that access to audiovisual content must be tackled under the forthcoming European Copyright Framework reform they stressed that there is no reason for exempting online services concerning [non-audiovisual content](#) (such as e-books, online games and music) from the obligation to offer the same terms and conditions to foreign and local consumers – especially when consumers are willing to pay for legal offers.

### **Traders, content and services providers**

The [European Small Business Alliance](#) (ESBA), representing small firms and the self-employed, criticised the requirement for small businesses trading online to register for VAT in all countries they sell to and warned about the unclear administrative implications (e.g. disputes, legal regime applicable, language issues).

[EDiMA](#), the association representing online platforms, warns that the proposed legislation will increase administrative and financial burdens on European businesses, particularly SMEs and start-ups, and pointed at some risks of inconsistencies given the patchwork of legislation currently under revision (including in the field of consumer protection) in parallel to the geo-blocking regulation.

[EUROCHAMBRES](#), the Association of European Chambers of Commerce and Industry, while welcoming a proposal which respects the right of contractual freedom, calls for more ambitious reform to address at EU level the differing VAT, national consumer protection regimes, and licensing requirements.

[Ecommerce Europe](#), an association representing companies selling goods and services online to consumers in the EU, argues that the draft legislation imposes on online merchants an obligation to sell to any customer in the EU but not to deliver everywhere, leaving customers and retailers with legal uncertainty about the applicable law. Ecommerce Europe warns that the rule according to which, under the draft regulation, the applicable law depends on whether a retailer is actively selling to a consumer country (i.e. active sale) or whether a consumer purchases a good or a service from a country not directly targeted by the merchant (i.e. passive sale for which the law of the country of the trader would apply) may conflict with the rules applicable under the [Rome I Regulation](#). Ecommerce Europe calls on EU legislators for guidance and clarification in order to avoid confusion and legal uncertainty. [Ecommerce Europe](#) suggests that, for instance, the place of delivery should be considered as the place of reference for consumer protection rules and product safety requirements.

### **Authors and rights-holders**

[IMPALA](#), (the independent music companies' association) supported the rationale for excluding services providing access to or use of copyright-protected content, and believes the review will confirm exclusion since in their view extending the geo-blocking regulation to copyright related services would have negative effects, including for cultural diversity.

The [Federation of European Publishers](#) and the [European & International Booksellers Federation](#) supported the draft text which exempts e-book sellers from the obligation to provide their products on a non-discriminatory basis in the EU – subject to a review clause – and called for in-depth analysis of the consequences of introducing non-discrimination principles in this nascent market.

A 2016 [study from Oxera](#) commissioned by an audiovisual industry group argues there will be an **overall negative impact on the audiovisual industry ecosystem in Europe induced by cross-border access measures**, with significant consumer welfare losses (up to €4.5 billion per

annum) and as well as a **reduction in content production** (up to 35% for some types of content) in the medium to long term. A 2016 [study from Analysis Mason](#) commissioned by The Sports Rights Owners Coalition argues that **banning geo-blocking and mandating cross-border access could in particular lead to unintended consequences and have negative outcomes** on the quality, price and diversity of **sports audiovisual content services** available to EU consumers.

## Academic views

### Positive effects of geo-blocking and audiovisual industry

If geo-blocking practices affect the development of the digital single market, one issue being debated is to what extent geo-blocking can also be beneficial especially for the audiovisual industry. In this way, Mazzioti stresses that territorial restrictions ensured by geo-blocking are designed to stop online content suppliers and consumers from infringing copyrights through accessing unauthorised works, and allow rights-holders to discriminate on price in order to match demand from different customer groups in the EU.<sup>8</sup> By contrast, Marcus and Petropoulos have concluded that substantial benefits could result from a prohibition on geo-blocking of audiovisual content and for some types of non-audiovisual digital content services such as e-books and other e-publications.<sup>9</sup>

### Conflict between the geo-blocking regulation and EU rules concerning judicial cooperation in civil matters

Despite article 1(5) stating the two areas of law should remain separate, it is not clear how the draft geo-blocking regulation will apply in parallel to the EU rules concerning judicial cooperation in civil matters as set out in the [Rome I Regulation](#) and in the [Brussels I Regulation](#). On the basis of the two Regulations, the CJEU has developed a test to determine where a trader's activity takes place in the EU (i.e. the 'directed-activity' criterion). Scholars have [stressed](#) that the identification of the consumer's habitual residence or domicile under the draft legislation might conflict with the determination of where the trader's activity takes place under EU law concerning judicial cooperation in civil matters (including the rules protecting consumers). Clarifying the draft legislation in this respect is essential to avoid confusion with regard to different consumer protection rules applicable.

### Geo-blocking and passive sales of online-content based services

The draft regulation prohibits all contractual agreements imposing on traders an obligation not to engage in passive sales, i.e. unsolicited requests coming from consumers located in a geographical area different from one where the online service is advertised and licensed. But the implementation of this obligation raises some questions. Mazziotti stresses that passive sales have a broader impact on the market in a web-based environment than in the physical world.<sup>10</sup> Therefore, prohibiting contractual provisions which ban passive sales, as proposed in the draft geo-blocking regulation, may erode the principle of territoriality, especially in the audiovisual and sports sectors and lead to a restructuring of those markets.<sup>11</sup> Ibáñez Colomo warns that this approach is grounded in an expansive interpretation of Article 101 and of CJEU case law (such as the *Murphy* ruling according to which an absolute territorial protection would be unlawful) which remains difficult to reconcile with well-established EU law principles.<sup>12</sup> The on-going antitrust pay TV investigation is expected to shed some light on the legal grounds for extending the principles of the *Murphy* case to online transmissions.

According to the interpretation of a large part of the legal doctrine, in its [Murphy](#) ruling (2011), the CJEU has set the **principle that an absolute territorial protection granted to licensees**



**would be unlawful under EU law.** However, this ruling concerns the sales of decoding devices and it is debated whether the principle can be extended to online services. The [antitrust proceedings](#) against the major US studios for their licensing practices initiated by the European Commission in 2014 are expected to clarify this issue. The Commission sent a [formal statement of objections](#) for a breach of Article 101 TFEU highlighting concerns relating to **contractual clauses in bilateral agreements** between six major film studios and Sky UK in July 2015. According to the Commission [initial views](#), the **absolute territorial exclusivity** stemming from the licensing agreements **is an unlawful restriction of competition in so far as it extends to unsolicited requests (or 'passive sales') for Sky's pay-tv services by consumers located outside the territory covered by Sky's licence.**

### Geo-blocking and forthcoming copyright reform

While the draft regulation is silent on this issue (with audiovisual outside its scope), scholars have provided some analysis of the changes required in EU copyright law.<sup>13</sup>

Ibáñez Colomo stresses that cross-border access to digital content will not be achieved through competition law alone and that it is necessary to further harmonise national copyright regimes to extend the 'country of origin' principle to online transmission.<sup>14</sup> Under this scenario, a service provider would only have to obtain a licence from the Member State where the copyright work occurs (country of origin) in order to make available the copyrighted work in the EU.

Mazziotti calls on policy-makers to improve the conditions of cross-border access to creative works such as audiovisual, while respecting the principle of territoriality of copyright which still underpins audiovisual markets. He proposes to codify the conditions under which content-owners should remain free to license their works on a country-by-country basis without infringing EU law by way of a soft law initiative or preferably by way of a new legislative measure which would enact a list of exemptions indicating the circumstances under which territorial licensing of online rights would still be compatible with the logic of the Digital Single Market.<sup>15</sup>

Poiares Maduro, Monti and Coelho call on the co-legislators to address geo-blocking for copyrighted content. They suggest that such practices should be forbidden unless traders can show they are legally prohibited from making the service available in the Member State where the buyer is located or, alternatively, propose to enshrine in EU law a type of digital exhaustion, whereby a trader downloading content in one Member State is then entitled to make that copy available to a buyer in another Member State.<sup>16</sup>

## Legislative process

### European Parliament position

The proposal [on Geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market](#) was published on 25 May 2016. It was initially referred to the Internal Market and Consumer Protection (IMCO) Committee on 9 June 2016, which on 17 June 2016, appointed Róża Gräfin von Thun und Hohenstein (EPP, Poland) as rapporteur. On 25 April 2017, the IMCO Committee approved the [report](#) from rapporteur Róża Thun including a number of significant amendments to the Commission's proposal.

Regarding the scope of the proposal, the committee proposed, inter alia, to extend the ban on geo-blocking to cover electronically supplied services such as e-books, e-music, games and software (but not audiovisual services), even though these are protected by copyright, if the trader has the right or a licence to use such content for the countries concerned. Furthermore, the EP asked the Commission to assess, within three years of

the regulation's entry into force, whether audiovisual services, as well as sectors such as financial, transport, and healthcare services should be covered in the future.

The EP also wanted to clarify in the text that the prohibition of geo-blocking does not prevent a trader from applying different general conditions in different Member States for a specific territory or group of consumers, and to limit the scope of the regulation to consumers (businesses would not be concerned except in case of dual purpose contracts with a limited trade focus).

### **Council position**

The Council agreed on its position on the Commission proposal on 28 November 2016, amending the Commission's text in order to reflect, inter alia, that the regulation would not apply to purely domestic situations, should comply with other EU legislation applicable to cross-border situations, in particular the Rome I and Brussels I Regulations, and also with copyright rules (in this respect the Council agreed with the Commission to exclude certain activities such as audiovisual services from the scope of the regulation). Furthermore, the Council wanted to clarify that traders will be free to have different commercial offers for specific territories or groups of customers, and that the regulation will not apply in specific cases where competition law rules apply to passive sales (i.e. unsolicited requests coming from consumers located in a geographical area different from that in which the online service is advertised and licensed).

### **Compromise text**

Interinstitutional negotiations resulted in a trilogue [agreement](#) between the co-legislators in November 2017. The main points of the agreed text are as follows:

*Ban on unjustified geo-blocking practices.* According to the final text, traders are prohibited from blocking or limiting access to online interfaces and from re-routing customers to a different website without their consent for reasons related to the nationality, place of residence or place of establishment of the customer (Article 3). Furthermore, geo-blocking practices are banned (i) when customers buy tangible goods (e.g. clothes) online to be delivered or collected at a specific location, (ii) when they receive electronically supplied services (e.g. cloud services, web hosting), or (iii) when they receive a service outside their place of residence (e.g. hotel booking, car rental). In these situations, online sellers cannot discriminate between customers on the basis of their nationality or place of residence, for instance by blocking some customers on the basis of their IP addresses, re-routing customers to a different website without their consent or charging additional fees to customers from different Member States (Article 4 and Article 5).

*Limits.* Online traders will still be able to offer different contractual conditions to different groups of customers. This means in particular that price differentiation will not be prohibited if online traders target specific groups of customers in specific territories. Furthermore, the text clarifies that the new legislation does not impose an obligation to sell and deliver goods cross-border (to another Member State) if the trader does not want to offer such a delivery service to customers. Finally, some forms of geo-blocking may be justified, for example in relation to specific national VAT obligations or different legal requirements.

*Scope of the regulation and copyright.* Some services such as financial, transport, electronic communication and healthcare services are excluded from the scope of the regulation. In addition, the co-legislators agreed that copyrighted digital content such as

e-books, music and video games, as well as audiovisual services (including movies and broadcasts of sport events) should not be subject to the regulation for the time being.

*Review clause.* Negotiators agreed at the request of the Parliament to include a review clause, requiring the Commission to assess, within two years after the entry into force of the regulation (and then every five years), whether to extend the scope of the regulation to all excluded services and in particular to digital content and audiovisual services subject to copyright protection (Article 9).

In a **statement** – which will be published in the Official Journal of the European Union together with the final legislative act – the Commission agreed when conducting the review to 'perform a substantive analysis of the feasibility and potential costs and benefits arising from any changes to the scope of the regulation' in order to re-assess the exclusion of 'electronically supplied services the main feature of which is the provision of access to or use of copyright-protected works' and to 'carefully analyse whether in other sectors, including for services in the field of transport and audiovisual services, any remaining unjustified restrictions based on nationality, place of residence or place of establishment should be eliminated'.

*Passive sales.* The regulation prohibits agreements containing passive sales restrictions (i.e. contractual agreements imposing on traders the obligation not to respond to unsolicited orders) which would otherwise be lawful under competition law (Article 101(2) TFEU). As a result, the geo-blocking regulation will prevail over EU competition rules for this matter and any such provisions will be considered null and void (Article 6).

The Council [endorsed](#) the compromise text on 29 November 2017, which must now be voted in plenary.

### EP supporting analysis

[The Geo-Blocking Proposal: Internal Market, Competition Law and Regulatory Aspects](#), study for Policy Department for Economic and Scientific Policy, European Parliament, Poiarés Maduro M., Monti G., and Coelho G., PE 595.362, January 2017.

[Extending the Scope of the Geo-Blocking Prohibition: An Economic Assessment](#), study for Policy Department for Economic and Scientific Policy, European Parliament, Marcus J. Scott, Petropoulos G., PE 595.364, February 2017

EP Policy Department A Study, [Combatting Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and other Forms of Geo-Discrimination](#), study for Policy Department for Economic and Scientific Policy, European Parliament, Simonelli F., PE 587.315, September 2016

EPRS Briefing [EU copyright reform: revisiting the principle of territoriality](#), Madiaga T., PE 568.348, September 2015.

EPRS At a glance note [Digital Single Market and geo-blocking](#), Madiaga T., PE 557.002, May 2015.

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EPRS Statistical Spotlight, [Cross-border online sales in the EU](#), Claros E. and Madiaga T., July 2016.

### Other sources

[Geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market](#), European Parliament, Legislative Observatory (OEIL).

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Kjølbbye L., Aresu A., Stephanou, S. [The Commission's E-Commerce Sector Inquiry – Analysis of Legal Issues and Suggested Practical Approach](#), *Journal of European Competition Law & Practice*, 2015.

Mazziotti, G. [Is geo-blocking a real cause for concern in Europe?](#), EUI Department of Law Research Paper No 2015/43, 2015.

## Endnotes

- <sup>1</sup> The e-commerce package complements other legislative proposals on [the supply of digital content](#), on [online and other distance sales of goods](#) and on [cross-border portability of content services](#) which the Commission proposed in December 2015, and the [VAT simplification proposal](#).
- <sup>2</sup> See for instance Case 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hamburg-St Annen*. For an overview see P. Craig and G. de Búrca, *EU Law*, 2011, pp. 538-541.
- <sup>3</sup> See Flash Eurobarometer 434, 'B2B Geoblocking', 2016; Flash Eurobarometer 397, '[Consumer attitudes towards cross-border trade and consumer protection](#)', 2015, The [GfK Mystery Shopping Survey on Territorial restrictions and geo-blocking in the European Digital Single Market](#), 2016.
- <sup>4</sup> For more details on this legal basis see: R. Mańko, [EU competence in private law: The Treaty framework for a European private law and challenges for coherence](#), EPRS, European Parliament, January 2015, pp. 5-10.
- <sup>5</sup> See T. Madiaga, [Cross-border portability of online content services](#), EPRS, European Parliament, February 2016.
- <sup>6</sup> Specific terms and conditions individually negotiated between the trader and a customer do not fall under the proposed regulation.
- <sup>7</sup> Note however that the regulation will apply in parallel with existing consumer protection laws such as the 2011 Consumer Rights Directive and the 2006 Consumer Protection Cooperation Regulation (CPC Regulation).
- <sup>8</sup> See G. Mazziotti, [Is geo-blocking a real cause for concern in Europe?](#), EUI Department of Law Research Paper No. 2015/43, 2015, p. 11.
- <sup>9</sup> See J. Scott Marcus and G. Petropoulos, [Extending the Scope of the Geo-Blocking Prohibition: An Economic Assessment](#), study for Policy Department for Economic and Scientific Policy, European Parliament, February 2017.
- <sup>10</sup> See G. Mazziotti, op. cit., p 9.
- <sup>11</sup> Ibid.
- <sup>12</sup> See P. Ibáñez Colomo, [Copyright Licensing and the EU Digital Single Market Strategy](#), LSE Law, Society and Economy Working Papers 19, 2015, p. 15.
- <sup>13</sup> For an overview, see T. Madiaga, [EU copyright reform: revisiting the principle of territoriality](#), EPRS, European Parliament, September 2015.
- <sup>14</sup> See P. Ibáñez Colomo, op. cit., p. 16.
- <sup>15</sup> Ibid.
- <sup>16</sup> See M. Poiães Maduro, G. Monti and G. Coelho, [The Geo-Blocking Proposal: Internal Market, Competition Law and Regulatory Aspects](#), study for Policy Department for Economic and Scientific Policy, European Parliament, January 2017.

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