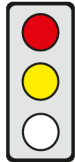


KEY ISSUES

Objective of the Regulation: Geo-blocking and other types of discrimination based on nationality, place of residence and place of establishment will be banned in order to improve cross-border access to goods and services.

Affected parties: Traders of goods and services to private and commercial end-users, consumers.



Pro: The ban on discrimination in relation to the cross-border sale of goods will, in exceptional cases, lead to customers buying more across borders.

Contra: (1) The ban on discrimination applicable to online services and services which are not provided electronically will bring down prices in some Member States but increase them in others.

(2) There are doubts about the EUs legislative competence because the Regulation creates new legislation rather than harmonising existing national provisions.

(3) The legal uncertainty for suppliers about whether they are subject to the consumer protection law applicable in the customer's Member State, is disproportionate.

CONTENT

Title

Proposal COM(2016) 289 of 25 May 2016 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.

Brief Summary

► Context and objectives

- When trying to buy online in other EU countries, customers are sometimes
 - unable to visit the foreign webshop,
 - are able to visit the foreign webshop but cannot buy goods, e.g. because the supplier does not deliver abroad or does not accept payment cards from banks based in other countries.
 Such discrimination based on nationality, place of residence or place of establishment – hereinafter: "discrimination" – in relation to cross-border online shopping is known as "geo-blocking [SWD(2016) 70, p. 17].
- An additional form of discrimination exists in that customers in other EU countries are subject to different terms and conditions, and in particular different prices, from those applicable to local customers.
- The Services Directive (2006/123/EC) aims to prevent "discrimination" in relation to services where the discrimination is not objectively justified (Art. 20 (2) in conjunction with Recital 95 of the Services Directive). According to the Commission, "discrimination" is
 - justified where it is based on "objective reasons" such as different rates of value added tax, transport costs or divergent national consumer protection law,
 - unjustified where it is based on "commercial reasons".
- According to the Commission, the ban on discrimination in the Services Directive is not adequately enforced. The Commission therefore proposes to clarify the law by way of this Regulation.
- This Regulation prohibits
 - geo-blocking,
 - discriminatory terms and conditions in three specific cases and
 - discriminatory payment conditions.

► Material and geographical scope

- The Regulation applies to end-users – consumers and businesses whose place of residence or establishment is in the EU – ("customers") but not to intermediaries.
- The Regulation applies to traders from the EU and third countries (Recital 13).
- The Regulation applies where traders supply goods or services in a Member State,
 - which is not the customer's place of residence or establishment or
 - of which the customer is not a national.

- The Regulation does not apply to
 - the field of taxation or
 - those services excluded from the Services Directive; that includes, in particular, services in the fields of finance, healthcare, transport, electronic communications and gambling as well as audio-visual services such as films (Art. 2 (2) 2006/123/EC).
- ▶ **Ban on geo-blocking (Art. 3)**
 - Traders are not permitted to block or limit customers' access to their goods and services ("online interface") on the basis of nationality, place of residence or place of establishment of the customer (Art. 3 (1)).
 - Traders are not permitted to redirect customers from one online interface to another one, which is specific to one country, without the customer's consent. Following consent to redirection, the interface which the customer originally accessed must remain "easily" accessible (Art. 3 (2)).
 - Limiting access or redirecting customers is permitted where it is required under national or EU law - e.g. protection of minors. The customer must be given a "clear" justification of this (Art. 3 (3) and (4)).
- ▶ **Discrimination in "general conditions" prohibited in three cases**
 - Differing "general conditions" – that includes, in particular, sale price, contractual terms and delivery conditions – based on the customer's nationality, place of residence or establishment are prohibited ("shop like a local") subject to the following conditions:
 - Case 1: The trader does not have to send the goods abroad e.g. because the customer is organising its own transport of the goods to another EU country (Art. 4 (1) (a)).
 - Case 2: The trader provides electronic services such as cloud services so that physical transport to another EU country is not necessary. Copyright protected works are excluded from the ban (Art. 4 (1) (b)).
 - Case 3: The trader provides non-electronic services in a Member State of which the customer is not a national, and in which the customer does not have his place of residence or establishment, e.g. while staying in a hotel (Art. 4 (1) (c)).
 - The bans on discrimination do not apply to
 - individually negotiated contractual conditions (Art. 2 (d)),
 - small businesses that are exempt from value added tax (Art. 4 (2)),
 - books which are subject to a national fixed price agreement (Art. (3)), and
 - goods and services that are banned from sale in the customer's Member State (Art. 4 (3)).
 - "Dynamic pricing" whereby traders adjust their prices based on various factors, remains permitted provided these factors are not related to the customer's place of residence.
- ▶ **Ban on discrimination in relation to payment conditions**
 - Traders are free to accept only certain means of payment such as bank transfer or a specific payment brand.
 - Where the trader accepts electronic payment by way of a bank transfer, direct debit or card - e.g. VISA or Mastercard - this must apply to all EU customers (Art. 5 (1)) irrespective of
 - their nationality, place of residence or establishment,
 - location of the payment account within the EU and
 - origin of the card within the EU.
- ▶ **Ban on avoidance**
 - Agreements between traders and their suppliers requiring traders to use general conditions or payment conditions in respect of "passive sales", in violation of the Regulation - such as a ban on transactions with parties from other EU countries - are void.
 - Passive sales transactions are those which take effect on the customer's initiative, i.e. where the trader does not approach the customer individually. This includes simply operating an online shop.
- ▶ **Different general and payment conditions applicable on country-specific websites**
 - Traders can continue to differentiate the range of goods according to the individual Member States and apply different general and payment conditions provided they operate country-specific websites (Recitals 15 and 17).
- ▶ **Impact on applicable national law and jurisdiction**
 - Where a trader "directs" its online sales website to other EU countries
 - under the "Rome I" Regulation [(EC) No. 593/2008] the applicable consumer protection law is that of the customer's place of residence, and
 - under the "Brussels Ia" Regulation [(EU) No. 1215/2012] jurisdiction is also that of the customer's place of residence if he so wishes.
 - Transactions with parties from other EU countries which come into being because a trader complies with the prohibitions on discrimination contained in the Regulation, should not automatically be construed as implying that he "directs" his activities to the consumer's Member State (Art. 1 (5), Recital 10).

Statement on Subsidiarity by the Commission

According to the Commission, only EU measures can effectively prevent varying conditions on access to goods and services.

Policy Context

The proposal for a Regulation is part of the Commission's online trade package of May 2016 and supplements the proposals for a Directive on contract law for the supply of digital content [COM(2015) 634; see [cepPolicyBrief](#)] and on guarantee law for online sales of goods [COM(2015) 635; see [cepPolicyBrief](#)].

Legislative Procedure

25 May 2016	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	Growth/ Communications Networks, Content & Technology
Leading Committee of the EP:	Internal Market and Consumer Protection, Rapporteur: Róza Gräfin von Thun und Hohenstein (EPP)
Leading Federal Ministry:	Economic Affairs and Energy
Committees of the German Bundestag:	Economic Affairs and Energy (leading); Digital Agenda; EU Affairs; Legal Affairs and Consumer Protection
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The freedom to conduct a business and contractual freedom are two essential ordoliberal principles of the market economy. Prohibitions on geo-blocking and discrimination restrict both the trader's freedom to conduct a business and his contractual freedom. The Commission's justification that geo-blocking and discrimination are unjustified because or insofar as they are based on "commercial reasons", is unconvincing because price differences based on "commercial reasons" reflect differences in the intensity of competition or a variation in a willingness to pay on the part of the customer. They are therefore an important signal to potential traders on whether to enter a market.

Impact on Efficiency and Individual Freedom of Choice

The ban on geo-blocking alone will have virtually no effect because geo-blocking is predominantly used by traders offering audio-visual services which do not fall within the scope of the Regulation. Traders falling within the scope of the Regulation who currently practise geo-blocking will in future have to open their websites to people in other EU countries. This is the main requirement for ensuring that bans on discrimination are effective. Otherwise customers will not be able to access the websites in order to buy goods or services at conditions applicable locally.

The ban on discrimination in relation to the cross-border sale of goods (Case 1) will, in exceptional cases, lead to customers buying more across borders. Generally, however, this will not be the case because the hurdle of organising one's own transport is high.

The ban on discrimination applicable to online services (Case 2) allows foreign customers to make use of such services provided they can overcome any language barriers. This – leaving aside different rates of value added tax – will lead to traders harmonising prices and thus will bring down prices in some Member States but increase them in others.

The ban will increase costs for suppliers of online services who do not yet have any customers in other EU countries because they will have to take account of the generally different rate of value added tax in the customer's country. Such additional costs arise from having to reprogram websites and from charging and paying the value added tax. Payment costs are small, however; suppliers no longer have to register in the customer's country because a "Mini-One-Stop-Shop" (MOSS) where the tax can be paid has been created in all Member States [Regulation (EU) No. 967/2012].

The ban on discrimination for services which are not provided electronically (Case 3) **may result in price rises in some Member States**, for example where hotels increase prices for local customers to the same level as for foreign customers.

The bans on discrimination can be sidestepped because, although they prohibit discrimination based on nationality, **they allow differing general conditions based on the customer's chosen language**.

It is to be welcomed that the Commission does not want to ban dynamic pricing. However, from an ordoliberal perspective, discrimination carried out for "commercial reasons", should not be classed differently to the discrimination banned by the Commission.

The ban on discrimination applicable to payment conditions is a requirement for ensuring that bans on discrimination do not come to nothing. Otherwise traders could use payment conditions to enforce different prices or delivery restrictions. The ban is problematic for traders however. They can no longer insist that customers in other EU countries pay in advance, for example, unless they also apply the same rule to local customers, even though cross-border debt collection is more difficult and expensive than domestic debt collection. Consequently, payment conditions may deteriorate for all customers.

Impact on Growth and Employment

Negligible.

Impact on Europe as a Business Location

Negligible.

Legal Assessment

Legislative Competency

There are doubts about the EU's legislative competence: Under Art. 114 TFEU, the EU can only harmonise existing national legislation for the purpose of promoting the internal market. However, bans on discrimination like those proposed do not exist in any Member State. **The Regulation therefore creates new legislation rather than harmonising existing national provisions.**

Although Art. 114 (1) TFEU also allows the introduction of new private law provisions, their aim must then be to harmonise diverging market conditions which restrict trade in the Member States and arise from existing differences between national laws. The Regulation does not however bring about harmonisation of the relevant national market conditions. Since the reasons for the banned discrimination are existing national differences in e.g. consumer protection or the law on value added tax, by introducing bans on discrimination, the Regulation is aiming at the result rather than the cause of diverging market conditions and thus creates new market conditions instead of harmonising existing ones.

Subsidiarity

Unproblematic.

Proportionality with respect to Member States

Unproblematic.

Compatibility with EU Law in other respects

Interference with the freedom to conduct a business, protected under Art. 16 of the EU Charter of Fundamental Rights (CFR), must be proportionate (Art. 51 (1) CFR). **The legal uncertainty for traders**, arising from the Regulation, **about whether**, by contracting with parties from other EU countries, **they are subject to the consumer protection law applicable in the customer's Member State, is disproportionate.** Despite the wording, that the consumer protection law in the customer's Member State will not apply "automatically", in principle, "Rome I" and "Brussels Ia" remain applicable. Accordingly, a case by case assessment remains necessary. Apart from the obvious cases - such as multilingual websites - it will be difficult, in this regard, to tell whether a business accepts orders from abroad for commercial reasons or in order to comply with the Regulation.

Possible future follow-up measures by the EU

The Commission is already considering extending the ban on discrimination to cover copyright-protected content in the case of general conditions for electronically provided content.

Conclusion

The ban on discrimination in relation to the cross-border sale of goods will, in exceptional cases, lead to customers buying more across borders. The ban on discrimination applicable to online services and services which are not provided electronically will bring down prices in some Member States but increase them in others. The bans on discrimination can be sidestepped because they allow differing general conditions based on the customer's chosen language. There are doubts about the EU's legislative competence because the Regulation creates new legislation rather than harmonising existing national provisions. The legal uncertainty which arises for traders about whether they are subject to the consumer protection law applicable in the customer's Member State, is disproportionate.