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SPATIAL ASPECTS OF ECOMMERCE IN THE EUROPEAN UNION: PROHIBITIONS TO  
GEO-BLOCK OR TO DISCRIMINATE BASED ON GEOGRAPHIC LOCATION

**Abstract:** Geo-blocking are practices undertaken by sellers using technological means or otherwise, the result of which is to prevent, limit or differentiate the conditions of access to goods and services depending on the country or region of the customer's origin. The Geo-blocking Regulation prohibits unjustified geo-blocking and other forms of discriminating practices based on the customers' nationality, place of residence or place of establishment within the internal market. The Regulation covers three main types of practices: a) blocking or limiting access or automatically redirecting the user to another version of an online interface, b) applying different conditions of sale for the goods or services, and c) applying different payment conditions, based on the buyer's location or nationality. The Regulation is to be applied in the Member States, and they took different approach to it . This paper aims to present the current legal framework as well as required changes to ensure it effectiveness and increase its impact on the internal market.

**Keywords:** geo-blocking, e-commerce, audio-visual services, geographical discrimination

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## Introduction

Geo-blocking is understood to include practices undertaken by sellers using technological means or otherwise, the result of which is to prevent, limit or differentiate the conditions of access to goods and services depending on the country or region the customer's origin. Along with the expansion of the e-commerce industry, online sellers began to massively block or limit access to their websites for customers from outside a specific country or region to which they directed their products or services, or to automatically redirect their customers to a language version of the store designed for the country or region of the consumer's residence. That actions usually consisted in presenting the customer with a different offer, usually less favourable in terms of product or price. A well-known example of geo-blocking was the sale of admission tickets by Disneyland. The Paris amusement park redirected customers from Germany or Italy to, respectively, the German or Italian version of the website, where the prices of the admission tickets were even as much as 15% higher than the prices of the same tickets offered to the French or Belgians (Disneyland Paris faces pricing probe, BBC News, 2015). In other situations, access to the online stores' website was not blocked or limited, but other discriminatory practices were applied. For example, online retailers used different payment terms, which often made it impossible for foreign customers to effectively place and process an order (Mystery shopping survey on territorial restrictions and geo-blocking, 2016).

Following surveys, open consultations and debates, the EU legislator has deemed geo-blocking practices as a threat to the possibility to fully benefit from the potential of the EU internal market (Analysis of part of the public consultation on geo-blocking, 2016) and decided to adopt Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 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 ("the Geo-blocking Regulation"). The Geo-blocking Regulation applies from 3 December 2018 (Article 11(1)).

The scope of the geo-blocking practices was assessed in the surveys commissioned by the European Commission (Mystery shopping survey on territorial restrictions and geo-blocking, 2016 and Mystery Shopping Survey on territorial restrictions and geo-blocking, 2020). The prevalence of geo-blocking was measured on the basis of the indicator which was the success of purchase meaning that no geo-blocking practices prevented the mysterious shopper from purchasing the good or service. The initial survey carried out before the adoption of the Geo-blocking Regulation (in December 2015) showed that 64,9 % of the purchases on average were unsuccessful due to retailers using geo-blocking practices, whereas the most affected sectors were electrical household appliances, electronics and computer hardware, computer games and software. The results of the survey carried out in 2019 do not differ significantly from the initial ones: 64,4% of all purchase attempts did not end up successfully. That time, the three most affected sectors included electrical household appliances, electronic equipment and computer hardware as well as clothes and sports goods. The survey of

2019 did not cover computer games and software. The results of both surveys show that there is still a lot of room for improvement. The results of the surveys are presented in the table below.

Table 1. The success of purchase in different sectors

Year	Sector 1	Sector 2	Sector 3	Sector 4	Sector 5	Sector 6	Sector 7
2015	62,3%	65,1%	37,5%	32,2%	33,7%	23,2%	13,8%
2019	67,5%	60,9%	38%	36,7%	31,2%	21,3%	15,5%
Change	↑	↓	↑	↑	↓	↓	↑

Sector 1: online reservations of offline leisure; Sector 2: travel services; Sector 3: books, magazines and newspapers; Sector 4: cosmetics and healthcare products; Sector 5: clothes and sports goods, Sector 6: electronic equipment and computer hardware; Sector 7: Electrical household appliances.

Source: Mystery Shopping Survey on territorial restrictions and geo-blocking, 2020

This paper discusses the current legal framework of the Geo-blocking Regulation, enforcement of the Regulation in chosen European countries (Poland and Germany), as well as recent developments relating to fighting geo-blocking practices and some changes to the Geo-blocking Regulation aimed at making it more effective.

### **Requirements of the Geo-blocking Regulation**

With the entry into force of the provisions on the prohibition of geo-blocking, every customer in the European Economic Area (European Union, Norway, Iceland and Liechtenstein) has the right to expect that they will make purchases from any seller (called “trader” in the Geo-blocking Regulation) operating in the EEA under the same commercial conditions as local customer, located in the country of the trader’s seat (Article 4(1) of the Geo-blocking Regulation). However, the prohibition against geo-blocking or discrimination on the basis of the customers’ nationality, place of residence or place of establishment does not mean that the trader must deliver the goods to a country where it does not operate (Article 4(1)(a) of the Geo-blocking Regulation). Further, it does not mean that a trader is under an obligation to comply with non-contractual national legal requirements relating to the respective goods and services, as applicable in the customer’s Member State, or to inform customers about such requirements (Article 4(3) of the Geo-blocking Regulation). Similarly, it does not mean that the trader, on the grounds of following the prohibitions alone, will be considered to be directing activities to the consumer’s Member State, which is important for the determination of jurisdiction over consumer contracts (Article 1(6) of the Geo-blocking Regulation). Those explicit provisions dispel many doubts which rise among traders, and fall into a lawyer’s day-to-day practice. The traders seeking legal advice, often express their concerns that they are not able to have their terms and conditions

analyzed under the consumer protection requirements of all EU countries and they want to know if the failure to do so involves a risk.

The obligation for the traders to apply non-discriminatory access conditions to goods and services means in practice that they cannot use technological solutions that would deny or limit access to their websites to users from another EU country (Article 3(1) of the Geo-blocking Regulation). Technological solutions that prevent access to websites or mobile applications interface may, in particular, include determining the customer's physical location and monitoring the same using the IP address or coordinates obtained via the global satellite navigation system (Geo-blocking Regulation, Recital 18 of the Preamble).

Also, traders may not automatically redirect their visitors to a version of their website different from the one the visitors were originally trying to access, unless the visitor, or customer, expressly consents to such a redirection. Even if the customers have consented to being redirected, the version of the trader's web interface that the customer initially tried to access must remain readily available to them (Article 3(2) of the Geo-blocking Regulation).

The prohibition on the application of different terms and conditions also concerns the terms of payment transactions made by customers from other Member States, provided that (a) the payment transaction is made through an electronic transaction by credit transfer, direct debit or a card-based payment instrument within the same payment brand and category; (b) authentication requirements are fulfilled; and (c) the payment transactions are in a currency that the trader accepts (Article 5(1) of the Geo-Blocking Regulation). The prohibition, however, does not prevent the trader from requesting charges for the use of a card-based payment instrument, provided that such charges have been introduced in the law of the Member State to which the trader's operation is subject, and the charges do not exceed the direct costs borne by the trader for the use of the payment instrument (Article 5(3) of the Geo-blocking Regulation).

The prohibition to geo-block is not absolute. It does not apply to justified practices but the Geo-blocking Regulation does not clearly define when geo-blocking practices may be justified which raises concerns described later while discussing the areas for the improvement. Further, the Regulation contains exceptions with respect to the goods and services covered by it, as it does not apply to services related to copyright protected content or works in an intangible form (e.g. streaming music or e-books) (Article 4(1)(b)), or to services indicated in Article(2)(2) of Directive 2001/29/EC i.e. financial, audio-visual, transport, health and social services (Article 1(3) of the Geo-blocking Regulation) which is also often a source of controversy.

### **Enforcement of the Geo-blocking Regulation in Poland and Germany, recent developments on the EU-level**

The above-described requirements of the Geo-blocking Regulation are directly applicable in all EU Member States, without the need to implement them. However, in accordance with the Geo-blocking Directive, Member States must take actions to ensure

an effective enforcement of the provisions of the Geo-blocking Regulation. Pursuant to Article 7, Member States have to designate a body or bodies responsible for an adequate and effective enforcement of the Regulation, and to lay down and implement the rules setting out measures triggered upon infringement of provisions of the Regulation. Further, Member States have to 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 (Article 8 of the Geo-blocking Regulation).

In Poland, the effective enforcement of the Geo-blocking Regulation is ensured by provisions added to the Act of 16 February 2008 on Competition and Consumer Protection, which entered into force on 17 September 2019. Pursuant to Article 29 sec. 2a thereof, the President of the Office for Competition and Consumer Protection is responsible for the enforcement of the Geo-blocking Regulation. The infringement of the prohibition against geo-blocking or discrimination based on a geographical location may constitute an infringement of collective consumer interests within the meaning of Article 24 of the Act on Competition and Consumer Protection. In case of infringement of collective consumer interests, the Office may initiate proceedings and impose financial penalties of up to 10% of the company's previous year's turnover. The infringement of the aforementioned prohibitions may also restrict competition, and a such become subject to the anti-trust proceedings, which may in turn result in the President of the Office imposing the same financial penalty. The contact point for the out-of-court resolution of consumer disputes and the online consumer dispute resolution system operating at the President of the Office also performs the tasks referred to in Article 8 of Regulation 2018/302 (Article 32a sec. 2a of the Act ). No decisions of the President of the Office concerning geo-blocking were found in the search engine available on the Website of the Office for Competition and Consumer Protection, and there is no public information concerning such decisions, either.

Unlike in Poland, the German enforcement body, within the meaning of Article 7 of the Geo-blocking Regulation, is Bundesnetzagentur (Federal Network Agency), a regulatory authority in the field of telecommunications, digitalization, electricity and gas, post and rail (Website of Federal Network Agency, § 116 of the German Telecommunications Law). The Telecommunications Law provides that the Federal Network Agency may impose a financial penalty of up to EUR 300,000 on traders infringing the prohibitions laid down in the Geo-blocking Regulation (§ 149 sec. 1d and sec. 2(3) of the German Telecommunications Law), which in many cases will be significantly lower than the maximum penalty provided for under Polish law (up to 10% of the company's previous year's turnover). In accordance with the information of the President of the Federal Network Agency of 3 February 2020, many complaints about geo-blocking received by the Federal Network Agency involved orders for electrical appliances, clothing, and e-books. However, consumers also encounter difficulties with cross-border orders in other areas, for example in the automotive trade, sports equipment trade, cosmetics, tobacco products, food, amusement parks or web hosting. A good half of the complaints came from German customers, approximately a third came

from other EU customers, with the rest being lodged by customers outside of the EU. Eight of those cases required administrative assistance from a foreign geo-blocking authority. Two thirds of the justified complaints has already been closed. Numerous cases have been resolved in cooperation with the providers and a legally compliant solution was often promptly found without the Federal Network Agency having to take further measures (Federal Network Agency supports consumers with cross-border purchases within the EU, 2020). No publicly available information has been found regarding Federal Network Agency decisions imposing financial penalties.

In January 2021, the European Commission fined Valve, owner of the online PC gaming platform “Steam”, and five publishers: Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax with EUR 7.8 million for geo-blocking practices. Within the anti-trust proceedings, it was found that Valve and the publishers restricted cross-border sales of certain PC video games based on geographical location of users within the European Economic Area. The geo-blocking practices took form of agreements and/or concerted practices between Valve and each of the five PC video game publishers which prevented some of the video games from being activated outside certain EU countries (including Poland), as well as licensing or distribution agreements concluded bilaterally between some video game publishers and some of their respective PC video games distributors in the EEA (other than Valve), the agreements containing clauses which restricted cross-border (passive) sales of some PC video games within some EEA countries (Antitrust: Commission fines Valve and five publishers of PC video games, 2021). All the decisions were issued as part of antitrust proceedings held pursuant to Article 101 of the Treaty on the Functioning of the European Union, and Article 53 of the Agreement on the European Economic Area prohibits agreements between companies that prevent, restrict or distort competition within the European Single Market. No actions against the platform owner and publishers could have been taken on the basis of the Geo-blocking Regulation, as the provisions of the Regulation do not affect the rules applicable in the field of copyright and neighbouring rights.

### **Some areas for the improvement of the Geo-blocking Regulation**

The Geo-blocking Regulation provides for a review of the provisions of the Regulation by 23 March 2020 and every five years thereafter, which should help adjusting the provisions to the current shape of and situation on the e-commerce market. While reviewing the Regulation, the European Commission takes into account the overall impact of the Regulation on the internal market and cross-border e-commerce, including but not limited to the potential additional administrative and financial burden for traders that could stem from the existence of different applicable regulatory consumer contract law regimes. That report may be a starting point for a proposal for an amendment of the Regulation (Article 9 of the Geo-blocking Regulation).

In its first report published on 30 November 2020, the Commission identified positive aspects of the implementation, such as a decrease in the number of cases of

blocking access to or re-routing customers to other websites, as well as good consumer awareness and certain initial positive effects. On the other hand, there have been significant delays in the empowerment of enforcement bodies by most Member States. The Commission dedicated an extensive section of its report to broadening the scope of the Geo-blocking Regulation over copyright-protected content online (Report on the First Short-Term Review of the Geo-blocking Regulation, 2020). Currently, the Geo-blocking Regulation excludes from its scope two main categories of content purchased online: audio-visual content, such as access to broadcasts of sports events provided on the basis of exclusive territorial licenses, and any copyright protected content. The above exclusions from the scope of application of the Geo-blocking Regulation significantly decrease its impact on the internal market. However, in its Report of 30 November 2020, the Commission points out that the extension of the Regulation in the above scope may result in a rise in prices, and that therefore the decision on the extension should be preceded by the assessment of implications for the overall ecosystem and welfare of the sector. Such assessment should take into account the significant impact of Covid-19 pandemic, including the common transition to cyberspace and opportunities the pandemic created for the traders (Gryszczyńska & Szpor, 2020). The next assessment round to be held in the form of dialogue with the stakeholders has been planned for 2022 (Report on the First Short-Term Review of the Geo-blocking Regulation, 2020).

Other areas for improvement of the Geo-blocking Regulation could include specifying the justified cases of geo-blocking, as well as unifying the rules of enforcement of the Geo-blocking Regulation by the Member States. It is essential for the application of the Regulation to define the difference between legitimate and unjustified geo-blocking. Unjustified geo-blocking means that customers are differentiated based on their location in a discriminatory manner. The Geo-blocking Regulation prohibits unjustified geo-blocking practices as treatment of customers should only be based on objective and justified reasons. While the reasons why geo-blocking should be considered unjustified are clearly set out in Articles 3, 4 and 5 of the Geo-blocking Regulation, the situation is more opaque with regard to justified geo-blocking, as the Geo-blocking Regulation does not contain a catalogue of all exceptions that can be considered legitimate reasons for the use of geo-blocking. There are some hints in the preamble to the Geo-blocking Regulation. Admittedly, Recital 2 of the Preamble thereto provides a few examples of the reasons why microenterprises and small and medium-sized enterprises may have different general conditions of access, e.g. divergent regulatory environment, legal uncertainty, risks related to the consumer protection or labelling rules, taxation and fiscal issues, delivery costs or foreign language. Nevertheless, the hints are rather general in nature and they do not give much assistance in the construction of the provisions of the Geo-blocking Regulation (Zoboli, 2019). It seems that guidelines similar to those used in the area of competition law, such as the Commission's Guidelines on Vertical Restraints, would shed more light on situations where geo-blocking and other discriminatory actions could be justified.

Further, the Geo-blocking Regulation leaves it up to Member States to choose how to enforce it, i.e. by laying down rules to set out measures applicable to the infringements of the provisions of the Regulation and designating a body or bodies responsible for adequate and effective enforcement of the same (Art. 7 of the Geo-blocking Regulation). The current state of affairs resulted in Poland and Germany taking different approach to that enforcement and introducing completely different range of financial penalties for the infringement of prohibitions to geo-block or to discriminate (Rothermel & Schulz, 2019). It seems that this effect is to a large extent inconsistent with the internal market, the smooth functioning of which served as a driving force to adopt the Geo-blocking Regulation. The Commission noted the large variation of applicable fines across Member States and the considerable spectrum between the minimum and maximum fines has been in its Report of 30 November 2021, and identified that as requiring further evaluation.

## Conclusions

The Geo-blocking Regulation was adopted as a result of many surveys, open consultations and debates. After three years, some positive aspects of the Geo-blocking Regulation have been identified but the decrease in geo-blocking practices is still not satisfactory. Therefore, the scope of the Geo-blocking Regulation should be reviewed and changed to ensure better effectiveness. While carrying out the required review of the Geo-blocking Regulation in 2020, the Commission took a cautious position, indicating, inter alia, the still unknown impact of the Covid-19 epidemic on the broadly understood e-commerce sector, and expressing the need for further assessment. It is possible that, as a result of the next review, the Geo-blocking Regulation will be amended to the extent discussed in this paper.

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