European Commission’s Legislative Proposal on Unjustified Geo-Blocking

Tuesday, June 21, 2016

On 25 May 2016, the European Commission ("Commission") unveiled a package of measures in the context of its Digital Single Market ("DSM") Strategy for the European Union ("EU") that included four legislative proposals designed to boost e-commerce in the EU by tackling unjustified geo-blocking, cross-border parcel delivery, consumer protection and EU audiovisual rules.

Overall the package is more cautious than might have been expected given some of the rhetoric a year or so ago. The Commission appears to be concerned about interfering unduly with existing market structures and practices, and possibly also about the perpetually difficult interaction between intellectual property and competition law.

One consequence of the package may be that ongoing competition investigations and sector inquiries could have more impact on markets in the short-term than legislation.

Certain aspects of this package will be discussed in three separate notes. This note focuses on the Commission’s legislative proposals on geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market (the “Proposed Regulation”). The second note addresses the Commission’s proposals relating to online platforms, and the third the Commission’s proposed revisions to the Audiovisual Media Services Directive (“AVMS”).

I. The Role of a Legislative Proposal on Geo-Blocking Practices

Geo-blocking is the practice of restricting access to online content based on someone’s location. When Vice-President Ansip launched the Commission’s DSM Strategy in May 2015, geo-blocking was already a contentious issue. Some Commissioners had pushed for ambitious legislation, while others and some Member States were reluctant to regulate.

Geo-blocking practices may sometimes flow from legal obligations (e.g., when an online distributor of music does not hold the rights for certain Member States). The DSM Strategy questions the legitimacy of some of these obligations, and several proposed initiatives target limited aspects of this legislation on digital contracts, regulation on parcel delivery and reform of copyright rules.

Separately, the Commission published a proposed regulation aimed at so-called “unjustified” geo-blocking, where online traders put restrictions on trade purely for commercial reasons, segmenting national markets. Such restrictions arise when online traders implement technical measures to prevent access to their websites from other Member States or to re-route consumers to local websites offering different products, prices or terms. The proposed regulation also bans other forms of discrimination based on customer nationality, place of residence or place of establishment in the internal market, including measures preventing consumers from purchasing products or services (e.g., refusal to deliver to, or receive payment from, cross-border customers), or enabling automatic application of different sales conditions on the basis of location.

II. Scope of the Proposed Regulation
Excluded services - Perhaps the most significant aspect of the Proposed Regulation is the exclusions.

It does not apply to audiovisual services. There is a specific framework for such content in the AVMS Directive and the Satellite and Cable Directive, both of which are currently under review. In addition, DG Competition is investigating geo-blocking in relation to films in the context of its ongoing Pay-TV investigation (see, below).

Nor does it apply to non-audiovisual works protected by copyright, such as e-books, music, software and games. The Commission recognises that including these services could enhance consumer benefits and that their exclusion results in a difference of treatment between the sale of the same content in physical form and in their digital equivalent (books vs. e-books, CD vs. digital music, etc.). Despite this, the Commission excluded these services from the equal treatment obligation in view of the complex legal issues their inclusion may raise, particularly given ongoing developments in multi-territorial licensing. This exclusion will however be reviewed by the Commission two years after the entry into force of the Regulation (Article 9).

Finally it does not apply to a number of activities already covered by sector-specific legislation or which are not easily traded across border. This list mirrors Article 2(2) of the Services Directive, including inter alia, financial and transport services.

Cross-border sales - The Proposed Regulation covers the sale of goods and services in the EU where either (1) the seller is located in a different Member State than the customer or (2) the seller and customer are in the same Member State but the customer is not a national of this Member State and/or is not permanently residing/established in the Member State.

EU and non-EU traders - The Proposed Regulation applies whether or not the seller is established in the EU. This is a significant change to Article 20 of Directive 2006/123/EC (the “Services Directive”), which only applies to companies established in the EU.

Consumers and businesses – The Proposed Regulation covers goods and services sold to consumers and business end-users (but not the purchase of goods and services by businesses for resale).

III. Key principles of the Proposed Regulation

The Proposed Regulation aims to prevent direct or indirect discrimination on the basis of nationality, place of residence or place of establishment against customers trying to buy products and services from other EU Member States. This includes differences in treatment based on information indicating the location of customers, such as their IP addresses, delivery addresses, or languages chosen.

A. The non-discrimination obligations

Access to online interfaces - Article 3 would prohibit traders from blocking or limiting access to their online interfaces (e.g., websites or mobile applications) on the basis of the customer’s nationality, place of residence or establishment. It would also prohibit automatic re-direction to another version of their online interfaces, without the prior explicit consent of the customer. If the customer consents to re-routing, the version of the website he/she was initially targeting must remain accessible. These prohibitions do not apply when the restrictions are required by national or EU law (e.g., prohibition of display of specific content in certain Member States).

The Commission does not provide any explanation of the way in which a customer’s consent should be obtained. This may weaken the effects of the prohibition of automatic re-routing. However, under the Consumer Rights Directive, expression of consent by means of a pre-ticked box or accepting the general terms and conditions is likely to be insufficient. The requirements under the Proposed Regulation may be similar, but this is not yet clear.

Access to goods and services - Article 4 prohibits differentiated treatment in relation to the sale of goods and provision of services in three specific situations:

- Sale of products not delivered in the Member State of the customer (g., the customer is willing to pick up the product in the seller’s Member State).
- Sale of electronically supplied services such as cloud services, data warehousing and website hosting. This provision is, however, limited in two ways. First, its application is delayed until mid-2018 in order to enable service providers to adapt. Second, services providing access to and use of (non-audiovisual) copyright-protected works or other protected subject-matter are excluded.
- Sale of services provided in a specific location chosen by the trader (g., concert tickets, hotel accommodations, car rental).

Non-discrimination related to payment - While online companies are free to choose the means of payment they
accept, Article 5 prevents them from applying different conditions of payment on the basis of the location of payment, the place of establishment of the payment service provider or the place of issue of the payment instrument.

B. A balanced approach towards the freedom of traders

This proposal illustrates the Commission’s reluctance to limit companies’ contractual freedom and impose unnecessarily burden and costly obligations (particularly on SMEs).

The Proposed Regulation does not create an obligation to sell; rather it prohibits discrimination between customers on the basis of nationality, place of residence or establishment. Similarly, traders will not have to deliver their products to the customer’s location if they do not already provide this service. However, they will need to give consumers the option to pick up products from a delivery point in the trader’s country.

Article 4 does not prevent companies from directing their activities at different Member States and/or customers through targeted offers or the set-up of country-specific websites. Traders are free to set different prices on websites targeting different Member States for example, as long as customers are free to choose the website from which they purchase, and they must be able to do so under the same conditions as nationals.

In any event, the Proposed Regulation does not intend to regulate or harmonise prices across the EU. The Commission made it clear that the proposal does not address pricing issues. First, traders are allowed to apply different prices in so far as they are required to do so under the laws of Member States, in accordance with EU law. Article 4.3 expressly mentions the existence of book price regulations in a number of Member States, for example. Second, the Proposed Regulation does not address so-called “dynamic pricing”, i.e., where traders adapt their offers over time, depending on a number of factors that are not linked to the customer’s nationality, place of residence or establishment. Such factors include competitor pricing, supply and demand, the customer’s browsing history, his/her operating system, and previous purchases/visits to the website. As explained in its Impact Assessment, the Commission did “not examine variables other than the country of residence or establishment and nationality of the customer used by companies in their pricing decisions. The reason is that only the latter is a point of reference assessing the equal treatment principle under the Treaty.”

IV. Relationship between the Proposed Regulation and EU Competition Law

A. Role of competition law in relation to geo-blocking

Commenting on the initial findings of the Commission’s e-commerce sector inquiry, Commissioner Vestager confirmed that “some of that geo-blocking is the result of restrictions in agreements between suppliers and distributors.” In these situations, competition law may be a useful tool to address geo-blocking restrictions but these restrictions need to be assessed on a case-by-case basis. In contrast, Commissioner Vestager confirmed that “[w]here a non-dominant company decides unilaterally not to sell abroad, that is not an issue for competition law.” This underlies the legislative proposal targeted at unilateral geo-blocking practices.

The ongoing Pay-TV investigation illustrates the role played by competition law in relation to geo-blocking restrictions. In January 2014, DG Competition opened an investigation into clauses in licensing agreements between Hollywood film studios and Pay-TV operators preventing the latter from providing services, both online and via satellite, in response to unsolicited requests from viewers located in other Member States (i.e., passive sales) or to existing subscribers who work or travel abroad. This investigation follows the European Court of Justice (“ECJ”) judgment in Murphy, where the ECJ found that (i) the grant of exclusive licences is not as such contrary to Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) but that (ii) the additional restriction on the supply of decoding devices to customers (television viewers) in other EU Member States constitutes a restriction of competition ‘by object’, as it prohibits broadcasters from effecting cross-border provision of those services. The scope of the Murphy judgment remains unclear, however, in regard to its potential application to online content.

The Commission’s approach in the Pay-TV investigation seems to be based on a broad interpretation of Murphy, whereby exclusive territorial licensing is justifiable but absolute territorial protection is not. In its Statement of Objections to Sky UK and six Hollywood studios of July 2015, the Commission took the preliminary view that the clauses grant “absolute territorial exclusivity” to broadcasters, thereby eliminating cross-border competition between Pay-TV broadcasters and partitioning the internal market. Moreover, “in the absence of convincing justification, the clauses would constitute a serious violation of EU rules that prohibit anticompetitive agreements.” The Commission is now seeking feedback on the commitments proposed by Paramount Pictures in April 2016 to address its competition concerns, including a commitment to cease blocking distributors from making unsolicited sales of Paramount content cross-border in the EU. The other companies under investigation have not offered commitments.
This investigation will set out DG Competition’s view on geo-blocking in relation to films, which will be a welcome development in light of the exclusion of audiovisual services from the scope of the Proposed Regulation.

B. A tougher approach to restrictions on passive sales

Recital 26 of the Proposed Regulation states that “[t]his Regulation should not affect the application of the rules on competition, and in particular Articles 101 and 102 TFEU”. However, Article 6 of the Proposed Regulation will change EU competition rules currently applicable to vertical agreements. It states that “[a]greements imposing […] obligations, in respect of passive sales, to act in violation of the Regulation would automatically be void”.

Regulation 330/2010 on vertical agreements permits, restrictions on passive sales in certain circumstances. While such circumstances are limited, Article 6, as currently drafted, differs. The Commission seems to admit this when it states in Recital 26 that “[e]ven when they are not caught by Article 101 TFEU, in the context of the application of this Regulation, they disrupt the proper functioning of the internal market and they may be used to circumvent the provisions of this regulation.”

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