PROPOSED LEGISLATION COULD EXTEND GEOBLOCKING RESTRICTIONS TO TRADERS' UNILATERAL CONDUCT

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BACKGROUND AND CONTEXT

On 28 November, the Council of the EU ('**Council**') reached an agreement ('**Common Position**') on the draft Regulation intended to ban "unjustified" geo-blocking and other discriminatory practices that prevent end user customers from accessing and purchasing products or certain types of services online from traders in other EU Member States.

This legislative initiative was presented in May 2016 by the European Commission ('**Commission**'), with the intention of preventing vendors in one EU country from refusing to sell to consumers in another (here, the full original text and here an initial analysis).

The Common Position will now serve as a starting point for negotiations with the EU Parliament under the EU's ordinary legislative procedure.

For the most part, the new proposed rules are focused on tackling **unilateral** measures taken by traders which prevent potential customers from accessing their websites because of their nationality, place of residence or place of establishment. Typically, unilateral geoblocking currently does not raise concerns under EU competition law. Accordingly, whilst the future content of the draft Regulation remains unclear, traders should be aware that there is a possibility of currently lawful conduct becoming unlawful in future.

In addition, somewhat incongruously, the proposed text also attempts to navigate into the issue of contractual geo-blocking, which is a key focus area for national competition authorities and of the Commission's e-commerce Sector Inquiry, the preliminary findings of which we considered here. The Regulation could thus potentially risk creating further uncertainty for businesses in the area of online resale restrictions unless the overlaps are properly addressed.

Other concerns

Positions remain less clear on the other "legislative branch", the Parliament. Three different Committees are working together to submit their amendments to the one responsible for fixing the Parliament's position (the Internal Market and Consumer Protection Committee or '**IMCO**'). The IMCO Rapporteur on the matter, Ms. Róża Gräfin von Thun und Honenstein, responded to the Ministers' agreement of November 18 describing such a deal

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as "premature". She also criticised the text for lacking legal clarity in several aspects; a criticism that other colleagues repeatedly shared, and which should be translated in amendments to the text. The debate relates also to the possible inclusion of other goods and services within the new Regulation, as some consider its proposed scope to be too narrow: some in Parliament would like social and health, as well as transport services to be included; others are focused on a battle to extend the geoblocking ban to content protected by copyright.

Negotiations among both Institutions are expected to start once Parliament has voted and fixed its position, that is, at the start of 2017.

TACKLING UNILATERAL GEOBLOCKING MEASURES

The proposed new Regulation is intended to boost e-commerce in the EU by removing discrimination for consumers and companies on access to prices, sales or payment conditions when buying products and certain services from another EU country. In particular, the draft current text prohibits traders from taking the following unilateral actions for reasons related to potential customers' nationality, place of residence or place of establishment:

- Blocking or limiting foreign customers' access to their websites, using technological means or otherwise (such as technologies which track a customer's physical location);
- Redirecting customers to a different version of the trader's website unless the customer has given explicit consent to such redirection and the trader has provided a clear explanation;
- Applying different general conditions of access to goods or services in a number of specified situations in which differential treatment is not considered justified, including where the trader sells goods and the goods are delivered to a Member State to which the trader offers delivery or are collected at a location agreed upon between the trader and the customer in a Member State in which the trader offers such option; or
- Applying different payment conditions for customers in different Member States (albeit that retailers are not under an obligation to accept certain brands or types of card-based payment instruments).

At the same time, the Common Position provides that a trader would **not**, among other things:

- Be obliged to engage in commercial transactions with customers or to deliver goods cross-border to other Member States where it does not otherwise offer such delivery option under its general conditions. This would seem to possibly undermine somewhat the value in allowing customers to access a website if they are unable to then purchase from it in practice, thus it will be interesting to observe how this rule develops through the parliamentary debates; or
- Be prevented from offering different conditions (including different prices) between Member States or within a Member State, or from offering targeted offers to different Member States, as long as customers are treated in a non-discriminatory manner, regardless of their nationality, place of residence or place of establishment, where a customer wishes to benefit from such offers and terms and conditions.

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INTERACTION WITH EU COMPETITION LAW PRINCIPLES REGARDING CONTRACTUAL GEOBLOCKING

Under current EU and national competition law, it is permissible for a retailer to decide **unilaterally** not to allow access to its website or to sell to customers outside of the country where it is based.

The draft proposed new rules thus should not change this from a competition law perspective, but would make it unlawful to take certain unilateral measures under the regulatory rules. In other words, businesses should be aware that they could face a significant additional layer of regulation and that previously lawful conduct (under competition law) may become unlawful in future.

In addition, the draft Regulation veers into certain **contractually agreed** restrictions covered and enforced by the European competition authorities, possibly creating uncertainty as to how the current geoblocking rules under EU competition law (which themselves are in a state of flux) might be interpreted or be applied in future. This has been an issue of concern raised by several Member States and it thus remains to be seen how such concerns will be addressed.

WHAT K&L GATES CAN DO FOR YOUR BUSINESS

Our Antitrust, Competition and Trade Regulation team has extensive experience advising suppliers of branded products on the online distribution of their products in Europe, including in particular on exclusive and selective distribution models and e-commerce restrictions. We regularly assist clients in a wide range of sectors to best achieve their commercial objectives whilst minimising their legal risk, including evaluating, designing or refining distribution models, updating agreements, preparing distribution criteria, and implementing and monitoring effective online resale strategies.

In parallel, our European Regulatory and Public Policy team in Brussels is closely following this and other legislative developments, in particular those relating to the EU's Digital Single Market. We regularly advise on developments which may affect businesses operating in Europe, and we are ready to advocate their interests during the legislative process before European law-makers.

If you would like to discuss the potential impact of the Regulation on your business or the possibility of providing input on the legislative process, we would be happy to assist.

KEY CONTACTS



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