

European Commission Issues Findings on Geo-Blocking and the Digital Single Market

Skadden

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On 10 May 2017, two years after launching its e-commerce sector inquiry on 6 May 2015, the European Commission published its final report (Final Report) on the inquiry. The inquiry was opened in the framework of the Commission's broader Digital Single Market strategy, which was aimed at facilitating the identification by the Commission of barriers that EU citizens face when accessing goods and services online across borders. The Final Report highlights what the Commission identifies as manufacturers' attempts to exercise greater control over the distribution of their products.

According to the Commission, this trend manifests itself through three different strategies: (i) selling directly to customers via online retail shops, and thus competing with traditional distributors; (ii) employing selective distribution systems, whereby products may only be sold by certain authorized sellers; and (iii) inserting contractual restrictions to limit product distribution, which include restrictions on pricing, the use of price comparison tools or the use of online tools generally.

The focus of the Commission's legislative and enforcement initiatives — even prior to the issuance of its Final Report — has been “geo-blocking”. The Commission uses the term “geo-blocking” to refer to practices whereby retailers and service providers prevent customers from purchasing consumer goods or accessing digital content services because of the customers' location or country of residence. In other instances, providers offer different terms and conditions depending on the location of the customer, a practice qualified as “geo-filtering” by the Commission. Although not strictly limited to e-commerce, these practices go to the heart of what the Commission has identified as the Digital Single Market.

In March 2016, the Commission published an issues paper on geo-blocking practices in e-commerce. In May 2016, the Commission also issued a proposal for a regulation on geo-blocking, prohibiting “discrimination based, directly or indirectly, on the nationality, place of residence or temporary location of consumers' in the EU”. The draft regulation targets general terms, conditions and other information set and applied by traders in order to provide access to goods or services to consumers. These general conditions concern, *inter alia*, prices, payment conditions and delivery conditions. For example, the nondiscrimination principle restricts traders from redirecting consumers — without their explicit consent — to versions of their online interface that are different from the online interface to which the consumers initially sought access.

The current version of the draft regulation does not prevent traders from applying different conditions of general access to consumers in different locations, provided that the conditions are not applied for reasons related to nationality, place of residence or temporary location. The proposed regulation also does not apply to audiovisual services, including the provision of access to broadcasts of sports events, and thus would not affect the Commission's cross-border access-to-pay-TV investigation into the practices of media studios and conglomerates such as NBC Universal, SKY (UK), Sony Pictures and The Walt Disney Company, which started in 2012.

The Commission's proposal is currently under review by the European Parliament and the Council. Interinstitutional negotiations were held in April 2017, and a final compromise on the amendments to the initial proposal is currently awaiting a parliamentary vote in plenary session.

The main amendments proposed by the European Parliament at committee level appear to be aimed at restricting the overall scope of the proposed regulation. For example, the word “customer” was replaced with that of “consumer” in an attempt to limit the applica-

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bility of the proposed regulation to B2C situations. Nevertheless, the amendments to the Commission's proposal also increased the substantive protections afforded to EU consumers, as wording was added to ensure that online marketplaces provide "full and equal access" to all consumers, who should also be offered the possibility to download and access any version of the mobile application that a trader operates in one or more Member States.

As a regulation, this piece of EU legislation will not require transposition into the national laws of the Member States. It is expected to enter into force six months after publication in the Official Journal. However, for electronically supplied services that are not related to copyright-protected content, the entry into force is specifically set for 1 July 2018.

In addition to its legislative efforts, the Commission — by way of its Directorate General for Competition (DG Comp) — opened investigations in February into three sectors related to

potential geo-blocking practices that violate Article 101 of the Treaty on the Functioning of the EU restricting collusive agreements. The Commission is investigating possible geo-blocking in the video games, consumer electronics and holiday accommodation sectors. These investigations are not strictly related to e-commerce and investigate barriers to intra-EU trade, regardless of the means or channels used, on the basis of violations of EU competition law. Once the draft regulation enters into effect, restrictions of trade based on location or nationality of the consumer will be prohibited regardless of whether competition laws are deemed to be violated.

It remains to be seen what impact Brexit will have on parallel trade into the U.K. With the U.K. withdrawing from the single market, this may provide greater scope for limiting parallel trade from EU/EEA countries.

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