

ON PHENOMENON AND EU LEGAL BACKGROUND OF GEO-BLOCKING

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Abstract

All of us might have experienced cases when our devices were not able to access the contents of some webpages. The phrase, "This content is not available in your country" may sound familiar to all. This is not only annoying, but also restricts the free flow of information and content in the internal market, and by this restriction, it discriminates against citizens (consumers) basing on their geographical location. This phenomenon is called geo-blocking. During my research, I raised the question of what is might behind the discrimination. Why discrimination worth it for the service providers and companies? How does geo-blocking affect the economy, the economic interests of market participants, and the rights (such as personal data rights) and interests of consumers? What does all this mean for EU consumers? What special areas could be discovered? The topicality of geo-blocking is indisputable, so my research aims to answer the questions formulated above.

Keywords: geo-blocking, discrimination, economy, shopping, single market

1. The phenomenon of geo-blocking

The concept and exact content of geo-blocking are relatively difficult to define, as discriminatory practices in the digital space are difficult to understand indeed, difficult to list, mainly due to widely covered behaviours. Simply put, geo-blocking is a content-based restriction, a discriminatory practice that prevents, among other things, online shoppers from accessing products or services, or buying products or services through a website available in another Member State. But it can also be "criminal behaviour" to block access to a particular service. In Aikaterini Mavropoulou's view, geo-blocking, in a few words, is all the technical methods that do not allow a user from a certain geographic location to access a website, to buy a product online, or to use an online service. This is something that every person who uses online platforms or shops has experienced at least one time in his/her life.¹ The distinction may be based on the nationality of the buyer, place of residence of the buyer, or the location of the buyer.²

The geo-blocking phenomenon can usually be associated with the digital economy, but there is also an "offline version". Geo-blocking also offers new areas for research into equal treatment and consumer protection. Geo-blocking differentiates between consumers according

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¹ MAVROPOULOU, Aikaterini: *Geo-blocking of the audiovisual services in the EU: an indispensable measure or a barrier to a modern Europe? Tilburg Law School Master'S thesis*, <http://arno.uvt.nl/show.cgi?fid=148183>

² <https://www.consilium.europa.eu/hu/policies/geo-blocking> (downloaded: 23 February 2021.)

to their geographical location, which can only be justified in exceptional cases, as is the case with other restrictions on freedom of movement based on public interest. The justification must also include an examination of the need for the restriction and the proportionality between the disadvantage caused and the objective pursued.

Although the Internet is considered global and borderless, the geo-blocking method has created obstacles to cross-border sales of services and goods. Due to the cross-border nature of digital issues, geo-blocking does not stop at the borders of the European Union; it affects both consumers and companies from all over the world. An EU citizen may be discriminated against on geographical grounds or discriminated against not only in an EU country but also in a third country based on his or her place of residence or establishment.³ In May of 2015, the European Commission launched the Digital Single Market Strategy (“DSMS”)⁴ and geo-blocking emerged as an issue that needed to be solved. Accordingly, the European Parliament and the Council decided to enter into force a new Regulation (EU) 2018/302⁵ (hereinafter referred to as Regulation) which will prohibit the unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence, or place of establishment within the internal market. We must state that the Regulation does not apply to purely internal situations, where all the relevant elements of the transaction are confined within one single Member State. Thus, a cross-border element is necessary to apply the Regulation. However, the Commission decided to exclude the copyright-protected works and services from the scope of the Regulation. Why was there no intention on the part of Member States to include copyright-protected audiovisual works? What are the underlying reasons why companies, and in particular microenterprises and small and medium-sized enterprises (SMEs), apply different general conditions of access?

2. Geo-blocking practices and their effects

There are various possible means⁶ of geo-blocking. For example, when making online purchases, customers from other EU countries might be prevented from accessing one or more country-specific versions of a trader's online store placing an order and having the purchased goods delivered within the trader's delivery area putting an item in their basket or paying with a credit card. The geo-blocking regulation protects consumers who hold citizenship from an EU country or have their place of residence in an EU country. The regulation also protects end-user undertakings if they are based in an EU country and receive a service solely for end-use or purchase goods for end-use.⁷ Eliminating geo-blocking faces several obstacles, such as differing VAT rates, legal requirements, and technical requirements in different Member States, the lack of aftermarket services (e.g. local services), and in the case of digital content, serious

³ KISS, Lilla Nóra: A general summary on Geo-blocking in the EU. *European Studies- The review of European Law, Economics and Politics*, (2019) 96.

⁴ European Commission: Digital Single Market https://ec.europa.eu/commission/priorities/digital-singlemarket_en (downloaded: 3 March 2021)

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R0302&from=EN> (downloaded: 27 February 2021)

⁶ 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 and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (Text with EEA relevance).

⁷ <https://www.bundesnetzagentur.de/EN/Areas/Telecommunications/Companies/Geoblocking/geoblocking-node.html> (downloaded: 27 February 2021)

conflicts of interest concerning copyright, as rightsholders are interested in territorial licensing agreements.⁸ Discrimination on a geographical basis covers several areas, affects the economy, the economic interests of market participants, consumer rights (such as personal data rights) and interests, and may raise copyright and competition issues.

It is an economic problem as it affects the objectives of the single market. Blocking consumer activity on a geographical basis also affects the EU economy and the single market. While this may be good for companies that hinder consumers in the short term, it may, in the long run, lead to a loss of confidence in them, a stagnation (possibly a reduction) in e-shopping propensity, and a reduction in cross-border services and purchases, which will eventually lead to economic losses. It is also in the interest of companies to ensure equal treatment of consumer rights, as this is the only way to build trust⁹. Building trust is a difficult and long process and needs to be actively pursued to maintain it, but its loss can happen in a matter of seconds, so it is especially important to ensure equal treatment and security measures to minimize data protection risks. A loss of confidence can lead to serious economic losses. The nature of trust has necessarily changed with the evolution of consumer behaviour. With the realization of online consumption, the role of trust has increased significantly. One of the reasons for this is that in physical realty transactions, we can see, touch, and possibly try out the products before deciding to purchase them. In addition, most sales could have been made anonymously before the digital age, except for major transactions, for example, real estate or vehicle sales. If the buyer paid in cash, he could remain completely anonymous during the process. In digital societies, this has changed, our personal data is associated with our sales transactions. To make purchases and use the services, we usually must register on the given page or even in the application, during which we provide our basic personal data (name, e-mail address, date of birth - especially if the site requires adulthood to access the content). Then, when we decide to buy, we also must provide our additional data to the service provider (delivery address, billing address, telephone number, bank card details, etc.). Making this information available to an external actor necessarily presupposes trust. It follows that the secure management of consumer data is a vital element in the judgment of online companies, to which their economic success is closely linked. Gaining online trust begins with ensuring transparency about the company, during which it is essential to provide information related to operations and data management.¹⁰ With a geographically based constraint, a given company can lose its carefully built trust, which can have serious economic consequences for it.¹¹

Geo-blocking also affects consumer's rights and financial interests, as companies' profits are higher when they decide where to buy a product instead of the consumer (by restricting their access to products offered in the other Member States), indirectly affecting consumer habits and as a result, their economic situation. On the one hand, influence does not necessarily serve the interests of consumers. While online mechanisms can be for the convenience of consumers, taking advantage of them can even be financially detrimental to them. This is evidenced, for

⁸ KULCSÁR, Andrea: Lehet-e egységes a digitális piac? Területi alapú tartalomkorlátozás az e-kereskedelemben. *Verseny-tükör XII. évfolyam 2016/2. szám* 51.

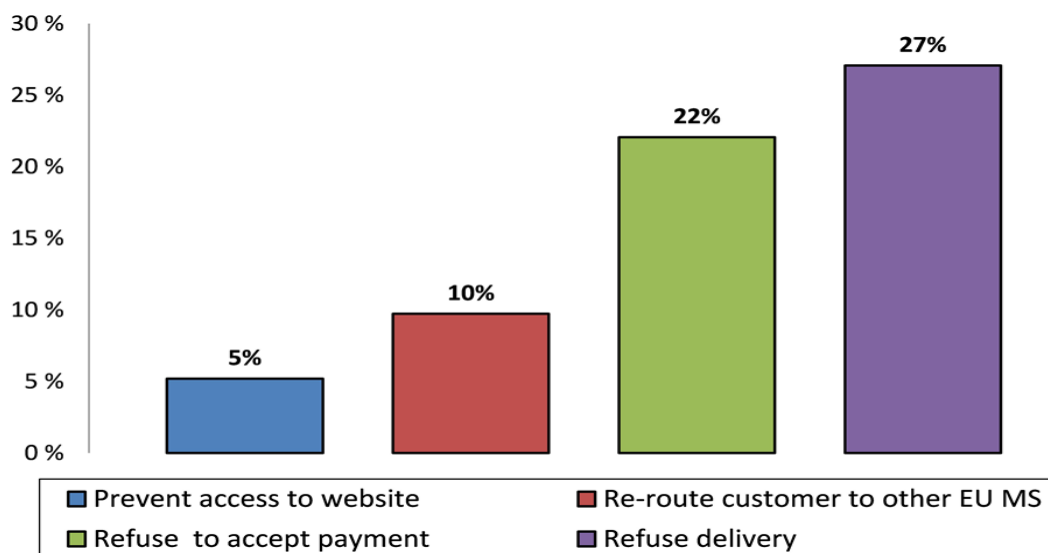
⁹ https://www.huffpost.com/entry/trustthe-new-currency-in-_b_14228792?guccounter=1 (downloaded: 24 March 2021)

¹⁰ For more information about trust in shopping and the psychology of shopping, see: Lee Hao Suan Samuel – M. S. Balaji – Khong Kok Wei: An Investigation of Online Shopping Experience on Trust and Behavioral Intentions, *Journal of Internet Commerce*, 2015, 14:2, 233-254, DOI: 10.1080/15332861.2015.1028250

¹¹ KISS, Lilla Nóra: "This content is not available in your country" avagy gondolatok a geo-blocking jelenségről az uniós jogi környezetben. Available at: (<https://infojog.hu/dr-kiss-lilla-nora-this-content-is-not-available-in-your-country-avagy-gondolatok-a-geo-blocking-jelensegerol-az-unios-jogi-kornyezetben-2020-2-75-e-kulons/>) (downloaded: 24 March 2021)

example, by point 9 of the Commission Communication on e-commerce, which showed that 13 of the 27 Member States, testers were able to find a cross-border offer in at least half of the product searches that was at least 10% cheaper than the best domestic offer. By restricting access to certain sellers, foreign websites, companies restrict consumer choice, thereby manipulating consumers' free, unaffected choices, which cannot be justified by EU law. Lack of information or misinformation can also influence consumer decisions. On the other hand, the restriction on consumer decision-making is based on their geographical location, which qualifies as personal data. According to Article 4 (1) of the General Data Protection Regulation (EU) 2016/679 (GDPR), the concept of personal data includes the place of residence of the person. Furthermore, Article 5 of the GDPR Regulation states that personal data must be processed in a lawful, fair, and transparent manner, which includes the explicit consent of the data owner.¹² This leads to the responsibility of various search engines that transmit our location data without asking our permission.¹³

The following chart of the preliminary report on the e-commerce sector inquiry published by the Commission on 16 May 2016 shows the measures taken by retailers (as a percentage) based on the information collected for geo-blocking:



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If retailers do not sell cross-border even only for the certain Member States, they may take the following geographical blocking measures to reject cross-border purchase applications:

- refusal to serve abroad is the most common form of refusal to sell cross-border (27%),
- refuse to accept foreign payment methods, which is in second place with 22%,
- the customer is automatically redirected to a website targeting another Member State, which is already the case (10%), or

¹² MAKSÓ, Bianka: Adatvédelmi kihívások a digitális gazdaságban. (szerk. Miskolczi, Bodnár Péter) XII. Jogász Doktoranduszok Országos Szakmai Találkozója, Budapest, Magyarország: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, (2018) 242–251.

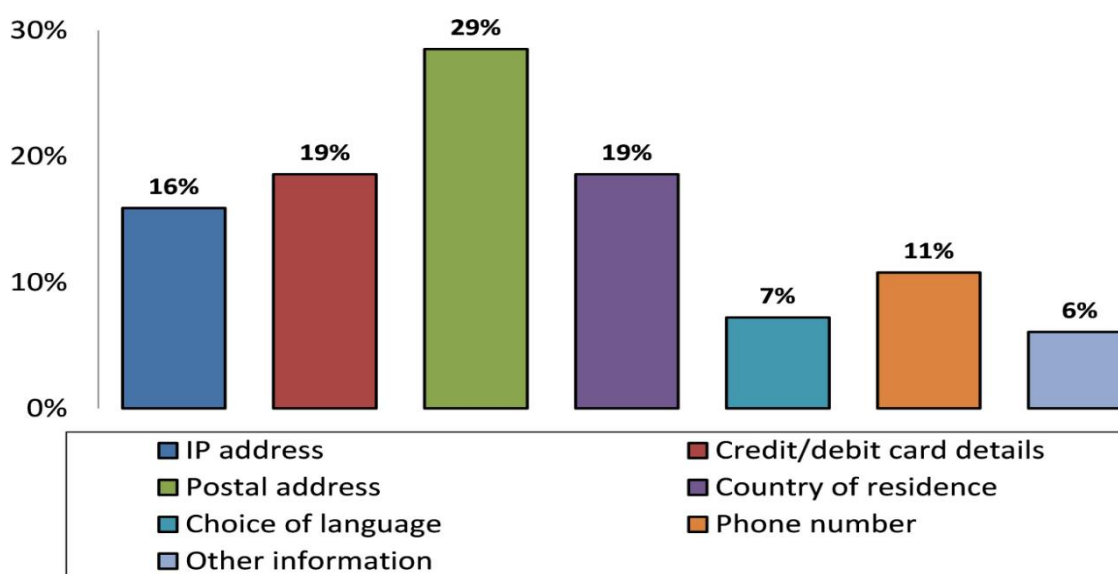
¹³ KISS, Lilla Nóra: A general summary on Geo-blocking in the EU. *European Studies- The review of European Law, Economics and Politics*, (2019) 97–98.

¹⁴ Commission Staff Working Document: *Preliminary Report on the E-commerce Sector Inquiry*. Brussels, 2016. 09.15. 122.

Available at: https://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf (downloaded: 11 February 2021)

- prevent the customer from accessing the website (5%).

These measures can be implemented by retailers unilaterally or as a result of an agreement with their suppliers. Retailers typically collect different types of information about the location of customers. They do this for a variety of reasons, including shipping goods or checking the legality of orders. Retailers themselves were asked if they collected any location-related information from their (potential) customers (such as IP address, credit, or debit card details) for geo-blocking purposes. In the EU, 38% of respondents collect such data for geographical restriction.



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To implement geo-blocking, retailers collect various information about the customer, the percentages of which are shown in the chart above. The information most collected by respondents for geo-blocking purposes is the customer's mailing address, followed by the customer's credit or debit card information, country of residence, IP address, phone number, language choice, and finally other information.¹⁶ Service providers and webshops often choose to limit their sales area because high shipping costs to other countries would increase their prices so much that they would be unable to provide them at marketable prices. There are various underlying reasons why companies, and in particular microenterprises and small and medium-sized enterprises, apply different general conditions of access. Taxation, consumer protection, and product safety rules also vary from country to country and must be complied with in all cases. For example, if a small Hungarian company, which produces organic food wants to sell its products on the markets of other countries, it must comply with different food

¹⁵ Commission Staff Working Document: *Preliminary Report on the E-commerce Sector Inquiry*. Brussels, 2016. 09.15. 122.

Available at: https://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf (downloaded: 11 February 2021)

¹⁶ Commission Staff Working Document: *Preliminary Report on the E-commerce Sector Inquiry*. Brussels, 15 September 2016. 122. Available at: https://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf pp. 121. (downloaded: 10 February 2021)

safety regulations in each country (for example, the maximum permitted levels of each ingredient may differ). It, therefore, seems easier for the company to operate exclusively in the Hungarian market.¹⁷

Discrimination can also occur concerning services in the field of transport, in particular, concerning the sales of tickets for the transport of passengers.¹⁸ For example, an online trader allows payment by credit card, but only for customers from the trader's country of origin. There is no payment option for international customers. In a judgment in 2018, in the C-28/18, *Verein für Konsumenteninformation v Deutsche Bahn AG* case¹⁹, the Court decided that the option to pay by SEPA direct debit cannot be subject to a condition of residence in the national territory, because these kinds of a clause which require residency in a certain state to use a kind of paying method are not respecting the equal treatment of EU consumers. Thus, such a contractual clause is contrary to EU law. In points 35-36 of the judgement, the Court reflected on the Geo-blocking Regulation, even if the case started earlier than the act entered into force.²⁰

Geo-blocking and other restrictions based on nationality, place of residence, or place of the establishment can be justified or unjustified. If they are based on businesses incurring significant extra complications and costs, for example, because of the existence of additional regulatory or other obstacles for cross-border sales, they are likely to be considered justified where they are proportionate. Otherwise, they constitute "*unjustified geo-blocking and other types of geo-discrimination*". Three specific situations described below can be considered unjustified: (1) When foreign customers are prevented from buying a physical good even if they are willing to pick up the product in the country of the trader or arrange for the cross-border part of the delivery. (2) When foreign customers are prevented from buying electronically supplied services, such as cloud services, even though delivery costs cannot be an argument for not selling cross-border and the taxation implications of cross-border sales have already been subject to the facilitation mechanism of the VAT mini-one stop since the beginning of 2015. (3) When customers move to another country to receive the service at the location where the trader operates, they are sometimes charged prices that differ from those applied to domestic customers, such as when staying at a hotel, going to a sporting event, or renting a car in a cross-border region. When the differences in treatment are thus based on objective and actual additional complications and extra costs for the seller and they are proportionate thereto, they may be justified. The complications of having to deal with many different national legal and tax systems represent a real obstacle for companies trying to trade cross-border both on and offline. For instance, differences in national consumer laws may be a reason for refusing cross-border sales in a business-to-consumer context, technical specifications or rules on labelling and selling arrangements may also differ depending on where in the EU the trader has expressly chosen to supply products. They may require the trader to adapt their products and packaging accordingly, in particular concerning linguistic versioning. Beyond these obvious objective differences, even the uncertainty as to whether the trader should apply foreign law or not may be an underlying reason. The lack of possibilities to arrange good after-sales services can also be a reason for traders to deny cross-border sales or lack of affordable, high-quality delivery services are consistently cited amongst the top reasons mentioned by both e-retailers and consumers for not engaging in cross-border e-commerce. Companies may refuse to sell to residents of other Member States because of legislation forcing them to do so, or companies

¹⁷ Határokon átnyúló online vásárlások korlátozása. *Infojegyzet* 2018/16, 2.

¹⁸ Regulation (EU) 2018/302 paragraph 9

¹⁹ C-28/18., *Verein für Konsumenteninformation v Deutsche Bahn AG* case, ECLI:EU:C:2019:673.

²⁰ KISS, Lilla Nóra: A general summary on Geo-blocking in the EU. *European Studies- The review of European Law, Economics and Politics*, (2019) 102

may in specific circumstances refuse to sell to residents of other Member States based on lawful (vertical) agreements. For online content services, companies may in some cases only hold the rights (licences) for the use of copyright-protected content for a specific territory, which prevents them from providing such services to all Member States.²¹

3. Exemptions from the scope of the Regulation

Audiovisual services, including services the principal purpose of which is the provision of access to broadcasts of sports events, and which are provided based on exclusive territorial licenses, are excluded from the scope of this Regulation.²²

The rightsholders of individual sports competitions and sports events sell sports broadcasting rights to media companies for a significant amount of royalties. To maximize the number of royalties, rightsholders use different methods. One such method is that the sports clubs participating in each sports competition do not sell the sports broadcasting rights they own, individually, but entrust their sale to the sports association organizing the sports competition for collective sale. Thus, sports broadcasting rights have much greater value, and united sports clubs are put in a better negotiating and bargaining position vis-à-vis potential buying media companies. The other method of adding value –which is more interesting to us in this case– is the exclusive sale of sports broadcasting rights. In this case, only the licensed media service provider has the broadcasting rights to the sporting event in the defined geographical area, duration, and platform. The Court of Justice of the European Union (CJEU) has also addressed the issue of geo-blocking in sports broadcasting. In *C-403/08, Football Association Premier League and Others* case the CJEU expressed that “*A system of licences for the broadcasting of football matches which grants broadcasters territorial exclusivity on a Member State basis and which prohibits television viewers from watching the broadcasts with a decoder card in the other Member States is contrary to EU law*”.²³ In this case, the Court examined the discriminatory effect of the licensing system and found that the requirement of equal treatment had been infringed by discriminating on a territorial basis.

Often, content providers restrict access to a particular location, mainly due to licensing, copyright, price discrimination, or blocking of illegal content. Many organizations use geo-blocking to categorize the world into market segments. Entertainment companies like Amazon, Netflix, Spotify, and Hulu²⁴ make the access point content-specific. This is achieved by setting different offers for their products and increasing their overall profits by dealing with each region separately, rather than developing a single policy around the world. Geographical discrimination also means that online retailers may charge different fees in different markets based on geographic regions. For example, Spotify applies to alter prices based on the origin country of the users. In Hungary, a premium account costs 4.99 EUR/month, a family pack is 7.99 EUR/month, while a student premium account is only 2.49 EUR/month. In Romania, only one type of premium account is available, which costs 5 EUR/month. The same services in Germany or France and Luxembourg cost double (9.99 EUR / month for a person, 14.99 EUR/

²¹ European Commission: Commission Staff Working Document Executive Summary Of The Impact Assessment, Accompanying the document proposal for a Regulation Of The European Parliament And Of The Council on addressing geo-blocking and other forms of discrimination based on place of residence or establishment or nationality within the Single Market {COM(2016) 289 final} {SWD(2016) 173 final} 12-16

²² Regulation (EU) 2018/302 paragraph 8

²³ C-403/08, *Football Association Premier League and Others* case, ECLI:EU:C:2011:631.

²⁴ FINGAS, Jon: *Hulu attempts to block international viewers who use VPNs* (26 May 2014.) Available at: <https://www.engadget.com/2014-04-26-hulu-blocks-vpns.html> (downloaded: 28 February 2021)

month for a family, and 4.99 EUR / month for a student). In Denmark, it is also possible to purchase a duo-pack, for two persons, which is not available in all Member States. In Malta, the premium account for a single person is 6.99 EUR/ month, while the family pack is 10.99 EUR/ month and there are no other options as the student discount. In Estonia, the same prices are applicable as in Malta, but the difference is that student discount is available, the service costs 3.49 EUR/ month for students.²⁵

4. Conclusion

To sum it up, in my opinion, the Geo-blocking Regulation was necessary, and as technology advances, it will be essential to continuously supplement it, as more and more areas may emerge, for which it will be equally important to prevent and eliminate discrimination on a geographical basis. The legislation seeks to approximate the laws of the Member States to make the internal market work more efficiently, to ensure compliance with business law, and to resolve certain problems arising from the apparent conflict of economic interests of consumers and traders. With this Regulation, several barriers have been broken down, and we are less and less likely to see the phrase “This content is not available in your country”.²⁶

To the question posed in the introduction, I hope now it is understandable how and why companies, microenterprises, and small and medium-sized enterprises, apply different general conditions of access. Listed briefly, divergent legal environments, the legal uncertainty involved, the associated risks as regards the applicable consumer protection laws, the environmental or labelling laws, taxation and fiscal issues, delivery costs, or language requirements, can contribute to traders' unwillingness to engage in commercial relations with customers from other Member States. I hope I have also answered some part of why the Commission decided to exclude the copyright-protected works and services from the scope of the Regulation. This exclusion may leave some geo-discrimination unintended. Given that audiovisual content is subject to different prices in the Member States –as we could see from the example of Spotify– we can understand that the interests of the Member States in this area are not the same and difficult to reconcile. There are more economically developed Member States where significantly higher prices can be charged, while there are Member States that are economically less developed where the application of the same conditions would lead to discrimination against consumers. Partly I agree with this distinction between audiovisual services because I consider it to be justified by the significant economic differences between consumers. In my opinion, it would be unfair to apply the same prices in Hungary as in Germany, France, or Luxembourg. It is possible that the revision of the Regulation, which was made mandatory by the Regulation itself two years after its entered into force, may include the inclusion of audiovisual services in the Regulation and that prices will be the same throughout the EU. At the moment, however, in these kinds of cases, the principle of equal treatment could lead to inequality, unless the best prices are generalized across the EU. Thus, harmonization or standardization in this area may not (yet) be in the interest of the Member States.²⁷ The

²⁵ Spotify official webpage, see the prices for each country: <https://www.spotify.com/hu/select-your-country/>. These data were collected by Lilla Nóra Kiss.

²⁶ KISS, Lilla Nóra: “This content is not available in your country” avagy gondolatok a geo-blocking jelenségről az uniós jogi környezetben. Available at: (<https://infojog.hu/dr-kiss-lilla-nora-this-content-is-not-available-in-your-country-avagy-gondolatok-a-geo-blocking-jelensegerol-az-unios-jogi-kornyezetben-2020-2-75-e-kulons/>) (downloaded: 24 March 2021)

²⁷ KISS, Lilla Nóra: “This content is not available in your country” avagy... op. cit.

Regulation said itself, that it should be regularly evaluated to propose amendments where they are necessary. It also mentions the possible extension of the prohibition of different general conditions of access to electronically supplied services, including those the main feature of which is the provision of access to and use of copyright-protected works or other protected subject matter, provided that the trader has the requisite rights for the relevant territories²⁸ as we saw it in the case of rightsholders of individual sports competitions and sports events. I did not find any relevant information on the revision of the regulation on the websites of the European Union, so I inquired at Europe Direct customer service. At the time of writing, Europe Direct was unable to provide relevant information on the review.

²⁸ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018