

Geo-blocking prohibition for online sales in Europe

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In Europe, the distance sales market is increasingly expanding, albeit with some differences between one country and another. In this article, we will review the prohibition of geo-blocking practices and related forms of geographic discrimination in the light of Regulation (EU) 2018/302 entered into force at the end of the last year.

Geo-blocking

According to EU legislation, geo-blocking occurs where “...traders operating in one Member State block or limit access to their online interfaces, such as websites and apps, by customers from other Member States wishing to engage in cross-border transactions. It also occurs when certain traders apply different general conditions of access to their goods and services with respect to such customers from other Member States, both online and offline. Although such different treatment might, in some cases, be objectively justified, in other cases, some traders’ practices deny or limit access to goods or services by customers wishing to engage in cross-border transactions, or some traders apply in this regard different general conditions of access, which are not objectively justified” (Recital No 1, Regulation (EU) 2018/302 of 28/02/2018¹).

The initial ‘neutral’ approach of the EU Commission

At first, after analytically analyzing such business practice, the EU Commission took an attitude that could be defined as ‘open-ended’. It is worth mentioning, in fact, that on 10 May 2017, the Commission released the final report on its two-year inquiry into the e-commerce sector (the Report ²), that focused its attention on the most sold online products (including consumer electronics, appliances, video games, software and media items). Incidentally, the inquiry builds on the **Digital Single Market Strategy** document of the European Union aimed primarily, according to the Commission, at “... making the EU’s single market fit for the digital age – tearing down regulatory walls and moving from 28 national markets to a single one. This could bring EUR 415 billion a year to our economy and lead to the creation of hundreds of thousands of new jobs”.

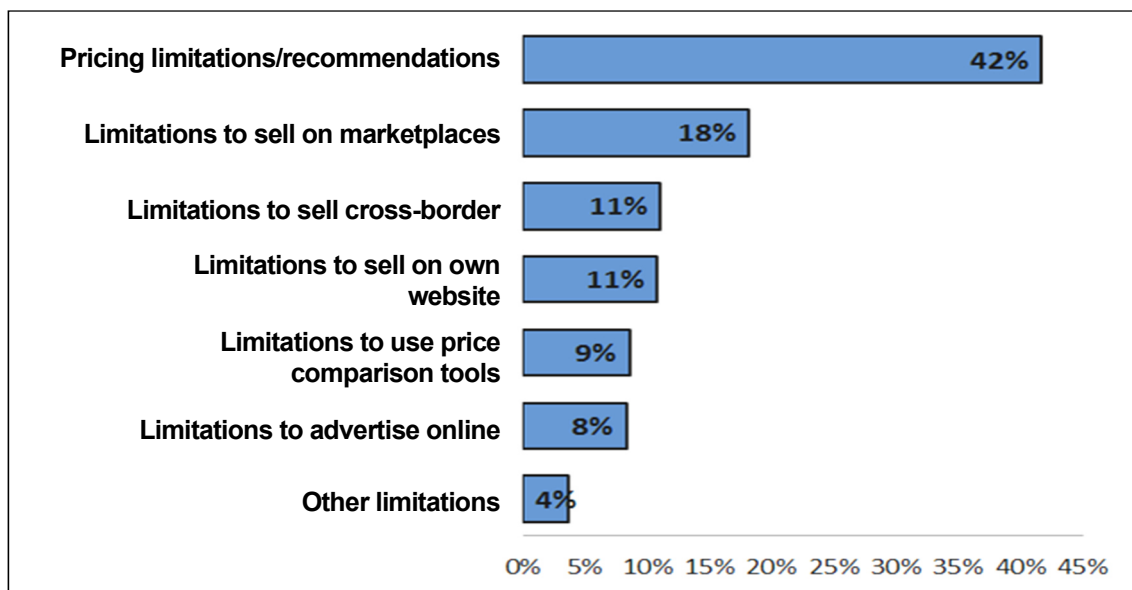
Table 1 below shows the main vertical limitations laid down in the contracts and emerged as a result of the sector inquiry conducted on a panel of economic operators from all EU countries. In this Table, limitations are shown in descending order by percentage incidence, regardless of whether they are lawful or not.

As can be seen, the main limitations refer to **price maintenance** (42%) (to which is likely to be associated the abuse of tools for comparing prices: 9%), to **sales on online marketplaces** (18%), to **limitations on cross-border sales** (11%), largely identified with the practice of geo-blocking.

¹ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018

² https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_it.pdf

Table 1



Different types of geo-blocking




The Report highlights that three different geo-blocking measures emerged during the inquiry, with which operators prevent the conclusion of cross-border sales:

- (1) **refusal to supply** goods across borders or accept cross-border payments (which represents the most widespread system);
- (2) **prevent access** to their website or other platform (online interface) to ‘foreign’ consumers;
- (3) **automatic rerouting** of ‘foreign’ consumers to other websites dedicated to other Member States.

Table 2

Cross-border sales limitations: geo-blocking

The Report refers to three different **geo-blocking** measures with which operators prevent the conclusion of cross-border sales:

- (1) **refusal to supply goods across borders or accept cross-border payments** (which is the most widespread system); 
- (2) **access prevention to their website** to ‘foreign’ consumers; 
- (2) **automatic rerouting of ‘foreign’ consumers** to other websites dedicated to other Member States. 

According to the replies to the questionnaires sent by the Commission to retailers that participated in the sector inquiry, the Report states that:

36% do not do not sell cross-border for at least one of the relevant product categories;

38% collect information on the location of the customer in order to implement geo-blocking measures if necessary;

11% report to being subject to contractual limitations on cross-border sales.

Despite so, only a limited proportion (4%) of retailers supply all product categories in only one Member State, while all others distributed them in at least 21 Member States.

Commission's conclusions on geo-blocking, published in its Report of 10/05/2017

According to the Commission, the above described geo-blocking practices are lawful **solely and exclusively when they are the result of unilateral decisions by non-dominant undertakings, while they are unlawful pursuant to Article 101 TFEU when they involve a concerted practice between operators**, such as in the case of a contractual limitation between manufacturer and authorized retailers.

In addition, in the case of a **selective distribution network, geo-blocking agreements which are unlawful per se, do not benefit from the block exemption provided for in Regulation (EU) 330/2010** examined above, since, in this case, authorized retailers must still be free **(i)** to sell to end-users wherever they are located and **(ii)** meet unsolicited requests for goods from locations outside their contract territory (so-called 'passive sales').

Regulation (EU) 2018/302 and the ban on geo-blocking

This Commission's position, which we defined as 'open-ended', was however abandoned following the entry into force of Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018, whose "... *purpose is to contribute to the proper functioning of the internal market by preventing unjustified geo-blocking and other forms of discrimination based, directly or indirectly, on the customers' nationality, place of residence or place of establishment, including by further clarifying certain situations where different treatment cannot be justified under Article 20(2) of Directive 2006/123/EC*"³.

In fact, the aforesaid regulation, which is designed to protect the 'customer', understood both as a consumer and as a business, establishes an 'across the board' prohibition on discrimination based on nationality, place of residence or place of establishment both with reference to geo-blocking (Article 3) and any other discriminatory practice based on the same elements (Article 4 and 5) as follows:

Prohibition to block or limit access to online interfaces (Article 3)

³ Article 20(2) of Directive 2006/123/EC on services in the internal market: "*Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria*".

- “1. A trader shall not, through the use of technological measures or otherwise, block or limit a customer's access to the trader's online interface for reasons related to the customer's nationality, place of residence or place of establishment.
2. A trader shall not, for reasons related to a customer's nationality, place of residence or place of establishment, redirect that customer to a version of the trader's online interface that is different from the online interface to which the customer initially sought access (...).”

Access to goods or services (Article 4)

1. “A trader shall not apply different general conditions of access to goods or services, for reasons related to a customer's nationality, place of residence or place of establishment, where the customer seeks to... buy goods or receive services”.

Non-discrimination for reasons related to payment (Article 5)

1. “A trader shall not, within the range of means of payment accepted by the trader, apply, for reasons related to a customer's nationality, place of residence or place of establishment, the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument within the Union, different conditions for a payment transaction...” where the payment transaction is made by electronic transfer, the authentication requirements are met and payment transactions are made in a currency that the trader accepts.

In all of the above cases, the Regulation does not affect certain exceptions (e.g., the validity of agreements on passive or active sales in selective distribution networks) and certain exceptions to exceptions (e.g., the invalidity of legal provisions in the agreements which, with regard to passive sales pursuant to Regulation (EU) No 330/2010, impose on traders the obligation to act in violation of the prohibitions referred to in Articles 3, 4 and 5 of Regulation (EU) 2018/302).

Enforcement of the geo-blochking prohibition and other prohibited practices falling under the competence of the AGCM

Article 6 of the ‘European Law 2018’ (Law 37/2019) introduces the new paragraphs 9-bis and 9-ter to Article 144-bis of the Italian Consumer Code on “*Administrative and jurisdictional protection*”.

Paragraph 9-bis refers to the **competence of the AGCM** (Italian Competition Authority), identified as the national authority in charge of supervising and prosecuting practices prohibited by Regulation (EU) 2018/302, as provided for in Article 7 of the same Regulation⁴.

In this capacity, the AGCM:

- must cooperate with other authorities from other Member States responsible for the enforcement of Regulation (EU) 2018/302 (as established by Regulation (EC) No 2006/2004, to which reference is made to);

⁴ Pursuant to Article 7.1. “Each Member State shall designate a body or bodies responsible for adequate and effective enforcement of this Regulation”.

- enjoys the same powers, including sanctioning powers, conferred to it by the Consumer Code (Article 27, paragraphs 2 to 5) in the case of unfair commercial practices. This results, among other things, into the possibility of imposing “... *a pecuniary administrative sanction from EUR 5,000 to EUR 5,000,000, taking into account the seriousness and duration of the violation*”.

Role of the European Consumer Centres Network (ECC-Net)

Paragraph 9-ter added to Article 144-bis of the Consumer Code also states that “***The National centre of the European consumer network (ECC-Net) has been designated as the competent body for providing assistance to consumers in the event of a dispute between a consumer and a trader pursuant to Article 8 of Regulation (EU) 2018/302***”.

As stated on its website (<https://www.ecc-netitalia.it/it/>), the ECC-Net “... *is the national contact point of the European Consumer Centres network (ECC-Net), co-financed by the European Commission and national governments with the aim of providing advice to European consumers on their rights and assist them in the event of disputes arising during the cross-border purchase of goods and services. There is a European Consumer Centre in every EU Member State, as well as in Norway and Iceland, which provide free assistance to solve consumer problems in cooperation with the other centres of the network*”. In this capacity, the Italian ECC (with offices in Rome and Bolzano) provides free advice and support to any Italian consumer and receives via the internet complaints from consumers relating to unlawful practices by traders in Italy or abroad, with reference to infringements of Regulation (EU) 2018/302 (<https://www.ecc-netitalia.it/en/complaint-form>). in fact: “***The ECC provides practical assistance to consumers in the event that they are denied, without a justified reason, the right to make a purchase online on the seller’s website on the grounds that they reside in a different EU country or because the purchase is made with a credit card issued by an institution based in a country other than that of the seller***”.

In such cases, “... *where appropriate, ex officio or upon notification, the ECC contacts the service provider in order to obtain compliance with European and national regulations relating to the aforesaid prohibition of discrimination... If after these initiatives compliance with the prohibition cannot be obtained, the European Consumer Centre for Italy sends a documented report to the Competition Authority, which can take action by exercising the powers provided for in Article 27 of the cited Code referred to in Legislative Decree No 206 of 2005 and subsequent amendments*” (Article 30(1.bis) of Legislative Decree No 59 of 26/03/2010, referred to in paragraph 9-ter of Article 144-bis of the Consumer Code).

Proceedings initiated by antitrust authorities

Proceedings started in September 2019 by the AGCM against Telepass SpA

On the AGCM website (<https://en.agcm.it/en/media/press-releases/2019/9/ANTITRUST-TELEPASS-proceedings-initiated-for-possible-discrimination-towards-consumers>) it is reported that

“... on 18 September 2019, the Authority initiated proceedings against Telepass SpA as the operator would allegedly prevent consumers from paying motorway tolls through direct debit to foreign bank accounts, so-called <Iban discrimination>. In particular, from the information gathered by the Authority (customers’ complaints, websites surveys and information provided by Telepass itself), it would appear that it is not possible to activate the Telepass service if the consumer intends to pay using a foreign bank account, in violation of Regulation (EU) 260/2012, aimed at creating an integrated market for electronic payments in EUR, and Regulation (EU) 302/2018 concerning the so-called geo-blocking. The opening of proceedings was notified to Telepass SpA yesterday, 23 September, during the inspection carried out by the Authority in cooperation with the Special Antitrust Unit of the Guardia di Finanza”.

I would also point out the following two proceedings (one initiated by the EU Commission and the other by the AGCM) concluded during April/July 2018 – therefore, before the entry into force of Regulation (EU) 2018/302 on 3 December 2018 – which are indicative of the attention of the supervisory authorities in this regard.

Pioneer (Case AT.40182) Commission decision of 24/07/2018

According to the Commission, Pioneer Corporation (in agreement with Pioneer Europe and Pioneer GB) developed and implemented a strategy at pan-European level aimed at **preventing retailers from selling cross-border** in order to ensure compliance with local prices, taking measures to control retailers’ resale prices in 12 EEA countries.

The evidence presented against Pioneer was collected through a series of announced inspections carried out by the Commission at Pioneer’s and at its retailers’ premises. The company agreed to cooperate and the Commission granted a 40% reduction in the amount of the fine otherwise imposed (decreased therefore to **EUR 10,173,000**).

CADEL - MCZ - Zanette (Case I813) order No 27142 of 18/04/2018

As regards the Italian Competition Authority (AGCM), the investigation which started in May 2017 against the company CADEL (stoves) for imposing minimum sale prices to its online distributors **and geo-blocking practices**, then extended during July 2017 to Zanette Group SpA and MCZ Group SpA, was concluded in April last year. Cadel Srl, which produces pellet stoves, is a company controlled by MCZ Group that sells throughout Europe and which in turn is a subsidiary of Zanette Group.

Following the complaint by an online distributor received in October 2016, the AGCM opened in May 2017 a preliminary investigation into Cadel Srl, subsequently extended to MCZ Group and Zanette Group, for the **(i) imposition of minimum selling prices** (i.e. price lists with indicated the maximum discount) and **(ii) prohibition of delivering products sold online outside the Italian territory**. The

companies concerned decided to cooperate with the AGCM and on 25 October 2017 submitted the following commitments:

- a) not to set, either directly or indirectly, the **pricing policies operated by retailers (also online)**;
- b) abstain for two years from **recommending or suggesting resale prices**;
- c) **not to constrain the ways of promoting** their products on the Internet, while protecting the safety of consumers and/or Group's brands;
- d) send to their retailers **notices containing the new policies on online sales** that also include a new provision on the validity of the contractual guarantee (i.e. entitlement to the guarantee only if the installation is made, in Italy or abroad, by qualified technicians according to current legislation).

According to the AGCM "... *The commitments submitted by MCZ Group appear suitable to resolve the issue of the anti-competitive practices forming the subject of the investigation. In particular, they are able to facilitate the competitive development of the online distribution channel and restore competition, especially on prices, between distributors of MCZ Group's products, with an ultimate benefit for consumers*".

As a result, the AGCM decided to make these commitments binding and terminate the proceedings without ascertaining the infringement, as envisaged by applicable law in such cases (Article 14-ter(1), Law 287/90).

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