Chapter 4

Geo-Blocking in the European Union and the Maltese Presidency

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Introduction

The Single Market is at the core of the European Union's (EU) integration and economic structure, and can be billed as one of the greatest achievements of post-war Europe. Since its establishment in 1992, the Single Market has guaranteed the free movement of goods, people, services and capital. Over the years, a number of changes have been introduced to facilitate these freedoms even more, allowing consumers and traders to buy and sell freely within the Single Market.

The Single Market has broadened the opportunities for consumers to have wider choice to goods and services across the EU. Consumer choice was further strengthened with the creation of the Internet. More than 250 million Europeans make daily use of the Internet among which 66% of these Internet users ordered goods and services online during the period of 2017.[74] As a result of this, the digital economy is growing seven times as fast as the rest of the economy with much of this growth being fuelled by the Internet.

Seeing this success, the EU saw the need to create a Digital Single Market – an area where free movement of goods and services is also ensured in the digital world. This allows access to online activities under fair competition irrespective of the country of residence of the consumer.[75] The intention of the EU in promoting the Digital Single Market was to bring more benefits to the EU by ensuring its position as a global leader in the digital economy, and providing help for businesses in the EU to grow and succeed worldwide.[76]

This article sets out to explore the phenomenon of geo-blocking practices in the EU's e-Commerce sector. It will seek insight into how these practices are actually impacting the EU's small Member States. It will analyse the action taken by the European Commission (CION) in ending unjustified geo-blocking practices through its adoption of a geo-blocking proposal. Since this proposal was mainly discussed during the Maltese Presidency of the Council, this article will assess the work undertaken by the Maltese Presidency during its mandate of the Presidency of the Council in 2017.

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[74] Eurostat (2017) p. 13.
[75] European Commission (2015) p. 1.
[76] *Ibid.*, p. 3.

Statement of the Problem

The Internet has created new opportunities for international trade.[77] Irrespectively, consumers are still faced with barriers that prevent them from buying goods and services using the online world. This is the case when traders refuse to sell goods online to consumers residing in another country, or decide to change prices depending on the country where consumers reside. This is usually implemented by using a consumer's Internet Protocol (IP) address that provides a rough indication of the consumer's location whenever connecting to the Internet. Thus traders can decide to block consumers from freely accessing online goods and services. Such territorial limitations are known as *geo-blocking* and contribute to the Single Market's fragmentation; Geo-blocking is defined by Kra-Oz "as limiting the user's access to digital content, by the content distributor, based on the user's geographical location."[78] In practice, geo-blocking segments consumers on the basis of their residential location through the recognition of their IP address.

In its Digital Single Market Strategy, the CION made a distinction between what it described as "unjustified" and "justified" geo-blocking. According to the CION, geo-blocking can "sometimes" be justified, especially when traders have to comply with particular legal obligations. However, the CION emphasises that "in many cases online geo-blocking is not justified". The practice of geo-blocking is mostly common in situations where traders apply higher prices or different conditions to consumers depending on their place of residence. As a consequence, such a practice deprives consumers from having access to the best offers, thus discriminating against them in an unjustified manner.[79]

The digital content referred to earlier by Kra-Oz can be of many types, including audio-visual, software, portability of content, or e-Commerce. The most common form of unjustified geo-blocking occurs in the latter, which involves the practice of using electronic means to do business.[80] As defined by the CION, the geo-blocking practice in e-Commerce can occur in three forms, namely:[81]

- Denial of the right to conclude a contract by electronic means via a website;
- Redirecting (re-routing) to other websites of the same commercial organization; or
- Automatic adjustment of the offered transaction terms (including prices) depending on the consumer's location.

[77] Kommerskollegium (2012) p. 1.
[78] Kra-Oz, T. (2017) p. 388.
[79] European Commission (2016a) p. 2-3.
[80] Chaffey, D. (2007) p. XIV
[81] European Commission (2015) p. 21.

Therefore, in order to provide a more focused and coherent study, this article will focus on geo-blocking within the context of unjustified practices in the e-Commerce sector.

This article will also look at unjustified geo-blocking practices from an EU-level perspective mainly focusing on the work done on geo-blocking by the 2017 Maltese Presidency of the Council of the EU. The Maltese Presidency had six main priorities on its agenda with the second priority focusing on the Single Market. The aim was to work to "fully exploit the Single Market and develop the Digital Single Market ... and improving protection and access to services for consumers."[82] A number of concrete objectives fell within this second priority, with one concrete objectives solely focusing on "making progress towards ensuring that consumers seeking to buy products and services in another EU country, be it online or in person, are not discriminated against based on nationality or country of residency in terms of access to prices, sales or payment conditions (geo-blocking)."[83]

Digital Globalisation vs. Geo-graphical Filtering

The Internet has connected the world more than ever before.[84] As explained by Berners-Lee *et al*. the Internet has managed to create a powerful new tool for humanity that facilitates the finding, integration and sharing of information.[85] This increase in integration of flows of data and information is defined by Lund and Manyika as digital globalisation.[86] While digital globalisation may be seen as an opportunity to develop an integrated digital world, Crenshaw and Robison point out that digital globalisation is threatened by various obstacles. Such obstacles include the requirements of data localisation, market restrictions, and geographical discrimination. This may threaten the disruption of the flow of data globally, thus leading to an increase in costs for business and consequently consumer harm.[87]

The impact of digital globalisation on businesses and on consumers is of major importance since consumer use of the Internet is growing substantially.[88] Consumers are nowadays searching for and buying goods and services online from businesses operating across borders. According to Meltzer, this is providing traders with the possibility of selling goods online, participating in international trade and becoming involved within the global economy in new ways.[89] However Zittrain and Palfrey point out that the rise

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[82] Government of Malta (2016) p. 3.
[83] *Ibid*.
[84] Manyika, J. *et al*. (2016) p. 1.
[85] Berners-Lee, T. *et al.* (2006) p. 769.
[86] Lund, S. and Manyika, J. (2017) p. 5.
[87] Crenshaw, E. and Robison, K. (2006) p. 191.
[88] Meltzer, J. (2016) p. 6.
[89] Meltzer, J. (2015) p. 97.

of digital globalisation "puts pressure on the strategy of control".[90] This refers to the idea of controlling the information environment within the borders of different countries.[91] This therefore creates complexity among different geographically-situated countries, traders and consumers, resulting primarily in the blocking of access to information as the basic form of control.[92]

Blocking access to information over the Internet by enabling distributers to correctly identify the geographical location of Internet users with great accuracy, is defined by various scholars as *geographical filtering*. This is usually achieved through the filtering of Internet traffic over a proxy server.[93] It can be argued that geographical filtering is contradictory to the concept of digital globalisation as it primarily blocks the integration of flows of data and information. This therefore acts as a barrier to the widening of digital globalisation.

Geographical filtering was initially created in order to enhance security, to tailor advertising based on the customer's location, or to provide the best suited content for consumers.[94] However, today geographical filtering has become more complex and has led to the creation of barriers in an "otherwise borderless environment".[95] Therefore, this has created a situation where whenever users try to access a geographically filtered site, their access is denied.[96]

This geo-blocking situation is even more relevant in the Single Market since the Single Market's main aim is to remove barriers to the movement of services, goods, labour and capital amongst all EU Member States.[97] Thus, Pelkmans points out that, regardless of the Single Market's aim of creating a community with no borders and barriers, the problem of market segmentation created by geo-blocking is still acting as an obstacle for online traders and consumers to practise the freedoms of goods and services.[98] As a result, Bauer and Erixon emphasise how geo-blocking is leaving a negative impact on the EU as it is creating "fragmentation" within the whole Union which goes beyond the Single Market's main aim.[99]

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[90] Zittrain, J. and Palfrey, P. (2008) p. 32.
[91] *Ibid.* p. 31.
[92] Kerr, J. (2014) p. 4.
[93] This refers to a server that clients connect to in order to request some kind of service including web page and connection.
[94] Young, B. (2014) p. 2.
[95] Duch-Brown, N. and Martens, B. (2016) p. 3.
[96] Young, B. (2014) p. 2.
[97] Martens, B. (2013) p. 2.
[98] Pelkmans, J. (2016) p. 3.
[99] Bauer, M. and Erixon, F. (2016) p. 17.

In their technical report, Duch-Brown and Martens examine the impact[100] of removing geo-blocking restrictions in the EU and conclude that both consumers and traders are being impacted negatively by geo-blocking, and both would gain if these restrictions were removed. The report also points out that small Member States suffer the most from geo-blocking as consumer choice is limited in such countries and price competition is lower due to the limited size in market. Therefore the removal of geo-blocking restrictions would be of particular benefit to small EU Member States.[101]

The Impact of Geo-Blocking on EU Member States

This research was conducted in order examine the impact of geo-blocking practices on consumers purchasing goods and services in other Member States. It sought insight into how these practices are actually impacting the EU's small Member States with particular focus on Malta. In order to have a comprehensive understanding of this argument, Malta's case study will be seen in the light of other small EU Member States by comparing the impact that geo-blocking is having on countries like Cyprus, Luxembourg and Slovenia. Cyprus is a small island similar to Malta and is geographically situated away from the larger Member States on the periphery of the EU. Comparison with Cyprus will therefore help the researcher establish any similarities between the two countries since they both have similar characteristics given the size of their population,[102] geographical position, and that both are islands. On the other hand, while Luxembourg is considered as a small State,[103] it is surrounded by some of the large EU Member States, thus creating a contrast between Malta, which is geographically more distant from most of the larger Member States. Finally, Slovenia provides an interesting comparison since its population[104] is larger than the other mentioned Member States but it still seems to be highly impacted by geo-blocking.[105]

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[100] Duch-Brown and Martens used a database on sales of four electronics products (smartphones, tablets, laptops and desktop computers) in 10 EU countries. The database contained information on prices, sales volumes and product characteristics. They firstly estimated a consumer demand model with product differentiation to capture preferences and substitution patterns. They secondly added an oligopolistic supply side to recover marginal costs and profits. They thirdly performed a series of simulations to analyse the equilibrium described by the data and some counterfactuals where they recreated a world without geo-blocking. They fourthly computed the welfare effects of removing geo-blocking in terms of consumer and producer surplus. They finally extrapolated the results of these four product categories to all e-commerce and the 28 EU states.

[101] Duch-Brown, N. and Martens, B. (2016) p. 18.

[102] Cyprus has a population of 1.17 million inhabitants.

[103] Luxembourg has a population of 589,972 inhabitants.

[104] Slovenia has a population of 2,065 million inhabitants.

[105] According to the European Commission's Staff Working Document on geo-blocking practices in e-Commerce, 63% of EU traders do not sell cross-border in at least one product category in Slovenia.

The research was based on a qualitative case study structure and adopted an inductive approach. This study generated primary data from twelve semi-structured interviews conducted with selected international and local trade and consumer organisations. The interview sample consisted of seven consumer organisations and four trader organisations from local, other Member States and EU wide representative bodies, and one Member of the European Parliament currently involved in the European Parliament Committee tackling geo-blocking (IMCO Committee). Most of the interviewed persons participating in this study were directors, legal officers or heads of policy. The local trade sector was represented by the Malta Business Bureau (MBB), Malta Chamber of Commerce, Enterprise and Industry and the Malta Communications Authority (MCA), while the EU business sector was represented by European e-Commerce and Omni-Channel Trade Association (EMOTA). On the other hand, the local consumer sector was represented by the European Consumer Centre, Consumers' Association, and Malta Competition and Consumer Affairs Authority (MCCAA), while the EU consumer sector was represented by the Bureau Européen des Unions de Consommateurs (BEUC), Union Luxembourgeoise des Consommateurs (ULC), Cyprus Consumers' Association (CCA) and Slovene Consumer's Association (SCA). The study also made use of secondary sources which complemented the data generated from the interviews.

Through the conducted research, a number of views emerged on the impact of geo-blocking on EU Member States. In the first instance it was noted how the idea of having a completely integrated Single Market must first be completely supported by the individual EU Member States, since one cannot expect the removal of geo-blocking practices if Member States do not perceive the importance of having a unified Single Market.

This geo-blocking situation is especially present in Malta. According to the 2015 Eurostat data, 44% of Maltese consumers made cross-border transactions over the Internet. This is a relatively high rate of online purchases when compared to the rate of larger EU Member States such as Italy (11%), Germany (13%) and France (21%).[106] However, even though Malta is ranked as the country with the second highest number of purchases of goods over the Internet, interviewees reported that geo-blocking is having a big impact on Maltese consumers. Seeing this situation at a local level, the Maltese Presidency saw the need to focus on geo-blocking as one of its main priority objectives.

This issue is even more challenging when looking at it from a trader's perspective. Contrary to what consumer organisations believe, trader organisations seem to view geo-blocking practice as an unimportant situation

[106] European Commission (2016b) p. 8.

that barely impacts consumers in Malta. So who is actually correct? The reality attests that, according to the study held by the European Parliament's Internal Market and Consumer Protection (IMCO) Committee on "Combating Consumer Discrimination in the Digital Single Market", Malta is classified as one of the countries mostly affected by geo-blocking practices. According to this study, more than 30% of Maltese consumers were exposed to geo-blocking practices in 2016.[107] This obviously questions the views expressed by trader organisations, as it can be clearly affirmed that the geo-blocking situation in Malta is not mere "hype", but is actually a reality that needs to be tackled in short order.

One can argue with some conviction that a similar situation does exist in other small Member States. This situation in Malta can be compared to other 'small' countries within the EU that are also negatively impacted by geo-blocking. Luxembourg tops the list of most online purchases made out of all EU countries with 68% of individuals making cross-border purchases over the Internet. Conversely, although the study's interviewees emphasised the importance of e-Commerce in both Cyprus and Slovenia, the Eurostat survey showed that only 20% and 17% of Cypriots and Slovenes respectively purchase cross-border over the Internet.[108] Additionally Luxembourg, Slovenia and Cyprus are also ranked amongst the Member States most impacted by geo-blocking practices[109] with Slovenia and Cyprus having a low rate of cross-border purchases. In such situations, Cypriot and Slovene consumers may be reluctant to buy online goods because of the constant geographical blocking in their regard.

So why are small Member States mostly impacted by geo-blocking practices? Small Member States are generally the countries suffering from less choice and limited internal demand, which makes these states less attractive for traders operating from other Member States.[110] Considering this, interviewees mentioned two main reasons why small Member States are mostly impacted by geo-blocking, namely, small market size of a state, coupled with the periphery location of the state.

The "small and periphery state syndrome" is the most obvious, yet more complex issue that small States are constantly facing. Panke explains how small States face "structural disadvantages" when compared to the larger

[107] http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587315/IPOL_STU(2016)587315_EN.pdf Simonelli, F. (2016) p. 14.

[108] European Commission (2016b) p. 8.

[109] http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587315/IPOL_STU(2016)587315_EN.pdf Simonelli, F. (2016) p. 14.

[110] *Ibid.* http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587315/IPOL_STU(2016)587315_EN.pdf

States due to limited financial and economic capacities.[111] It therefore comes as no surprise that geo-blocking practices affect "consumers from smaller and peripheral Member States to a greater extent".[112] Island states, in particular, face this problem to a greater degree since such countries have no land borders and traders have to cope with greater logistical issues.

Interestingly, however, this study notes how interviewees had two contrasting views as to why they believe their countries are being faced with geo-blocking. On one hand, the interviewees from Malta and Cyprus blame the size of their country and their peripheral isolation with no land borders for complicating the situation for traders from other Member States selling goods in these countries. On the other hand, because Slovenia[113] and Luxembourg are practically land-locked countries surrounded by larger Member States, it is more viable for traders to sell goods and services elsewhere. This contradictory situation leads to the conclusion that the peripheral positioning of a country is not the real cause of geo-blocking, but rather the smallness of the state embeds the true problem.

This argument tied to the small size of a country can thus contribute to other aspects that are conducive to geo-blocking in so far as small Member States are concerned. A small country will most likely have a small domestic market when compared to larger States, which makes it impossible to benefit from economies of scale.[114] This will create a situation of higher unit cost of goods and services when compared to the bigger Member States. Additionally, the small size of a country's domestic market will also constrain competition. Due to their small domestic markets, a number of these countries are generally "undiversified in their production".[115] Therefore traders might not see any potential in a small State but instead opt for selling goods cross-border to larger Member States.

The study has therefore concluded that small Member States are the countries mostly impacted by geo-blocking practices. This problem has been reflected in the Maltese Presidency's decision to focus on geo-blocking as one of its main priorities.

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[111] Panke D (2008) p. 3-5.

[112] Simonelli, F. (2016) http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587315/IPOL_STU(2016)587315_EN.pdf p. 14.

[113] Slovenia has a small coastline but otherwise has land borders with Austria, Croatia, Italy and Hungary.

[114] This occurs when more units of goods and services are produced on a bigger scale with less costs of input.

[115] Commonwealth/World Bank (2000) p. 11.

Geo-Blocking Proposal and Discussions during the Maltese Presidency

Efforts have been made by various Member States to raise consumer awareness on price discrimination and geo-blocking practices.[116] However up to the date of the writing of this article, no Member State has changed its national rules and practices as a follow-up to these efforts. Additionally, all interviewees claimed that no national legislation tackling geo-blocking practices has been put into place in Malta, Cyprus, Slovenia or Luxembourg. However, according to CION, Malta is the only country out of all the Member States that has issued its own guidance on discrimination. Nevertheless, this has not had any noticeable results. The CION therefore decided to act in order to end unjustified geo-blocking practices and ultimately eliminate discrimination amongst EU consumers.

Regardless of the present non-discrimination principle in Article 20(2) of the Services Directive,[117] European consumers are still facing different conditions when buying goods or services over the Internet. Therefore, on the 25th May 2016, the CION launched a proposal on addressing geo-blocking in the EU.[118] This proposal aims at prohibiting "the blocking of access to websites and other online interfaces and the rerouting of customers from one country version to another".[119] The proposal, however, does not address pricing, since traders are left at liberty to set their own prices.

Discussions on this draft Regulation were initiated during the 2016 second rotation of the Presidency of the Council of the EU led by the Slovak Presidency. By the end of 2016, the Council had adopted its negotiating position on the draft Regulation. This dossier was then taken on by the Maltese Presidency during the first half-year mandate of the Presidency of the Council in 2017. During this period, the Maltese Presidency prioritised this dossier and aimed at finalising negotiations on the geo-blocking proposal.

Considering that geo-blocking became one of the most debatable topics of the CION's Digital Single Market initiative, this was not an easy task for the Maltese Presidency. Although progress moved fast, a final agreement could not be reached by the Council and the European Parliament on the final text of the draft Regulation by the end of the Maltese Presidency. Thus, the Council and the Parliament resumed trilogue negotiations under the Estonian Presidency. On 29th November 2017, the EU Member States approved the informal agreement reached by the Council and the European Parliament on the final text of the regulation.

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[116] European Commission (2016a) p. 22.
[117] Directive 2006/123/EC of the European Parliament and of the Council of 12th December 2006 on services in the internal market.
[118] European Commission (2016c).
[119] European Commission (2016c) p. 2.

Several points of disagreement arose between the European Parliament and the Council during the Maltese Presidency term. The first main disagreement was related to the inclusion of the scope of non-audio-visual copyright related services in the draft Regulation, such as music streaming and e-books. The CION's proposed draft Regulation did not include audio-visual and electronic communications services; however, there was no unanimity on some of the proposals contained in this draft Regulation. Hence, the European Parliament, on one hand, was in favour of the inclusion of non-audio-visual copyright related services, while on the other hand, the Council was insisting on not factoring these services within the scope of the draft Regulation.

The second major disagreement was related to the relationship of the draft Regulation with competition law. While the European Parliament wanted the draft Regulation to take priority over selective distribution agreements,[120] the Council wanted competition rules to take precedence. These disagreements prolonged the process of achieving an agreement and finalising the draft Regulation. Therefore, the Maltese Presidency did not fulfil its aim of finalising negotiations on the geo-blocking proposal during the term of its presidency.

The final agreed text of the Regulation was however achieved under the Estonian Presidency. The approved text prohibits online traders from discriminating between consumers within the EU based on their place of residence. However, the rules will only apply in three narrowly-defined situations. In the first instance it will apply when traders refuse to sell based on the consumer's country of residence but the Regulation does not impose an obligation to deliver goods. Secondly, it will apply when traders provide electronically supplied services such as cloud services and data warehousing. However, services consisting of the provision of copyright-protected content are excluded from the Regulation. Finally, it will apply when traders provide services that are supplied in a country different to that of the consumer. Additionally, the final agreed text annuls any obligations imposed on traders in relation to the priority over selective distribution agreements since this is generally considered anticompetitive and would infringe EU competition rules.

Therefore, the Regulation was formally adopted by the European Parliament and the Council and was published in the Official Journal of the EU in February 2018. This will enter into force by the end of 2018.

Conclusion

This study set out to explore the phenomenon of unjustified geo-blocking practices on consumers purchasing goods and services in other Member

[120] This refers to the restriction of the number of authorised distributors.

States. It sought insight into how these practices are actually impacting the EU's small Member States and how these practices are contributing to the fragmentation of the Single Market. Additionally, by providing an insight of the proposed Regulation on the elimination of unjustified geo-blocking practices, this article provided an analysis of the work done by the Maltese Presidency of the Council of the EU during the first six months of 2017.

Irrespective of the effort put by the Maltese Presidency to reach an agreement in this area, the Regulation was ultimately finalised under the Estonian Presidency. However, although this proposed Regulation is a step forward in terms of limiting geo-blocking practices, there still seems to be areas that remained out of the scope of the finalised Regulation. This includes the exemption of the audio-visual service which will still allow consumers to be geo-blocked out of certain sites.

For Malta, the EU's smallest country, its first chance of taking on the rotating presidency of the Council of the EU was overall quite successful. Tasked with leading discussions on such an important dossier on geo-blocking, Malta managed to push this Regulation forward, even though it failed to strike a compromise between the Council, Commission and Parliament.

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