



Council of the
European Union

Brussels, 30 May 2016
(OR. en)

9611/16

Interinstitutional File:
2016/0152 (COD)

MI 396
TELECOM 104
DIGIT 60
CONSOM 130
IND 116
COMPET 339
ENT 102
POSTES 3
JUSTCIV 155
PI 64
CODEC 772
IA 31

PROPOSAL

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 26 May 2016

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

No. Cion doc.: COM(2016) 289 final

Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL on addressing geo-blocking and other forms of
discrimination based on customers' nationality, place of residence or place
of establishment within the internal market and amending Regulation (EC)
No 2006/2004 and Directive 2009/22/EC

Delegations will find attached document COM(2016) 289 final.

Encl.: COM(2016) 289 final



Brussels, 25.5.2016
COM(2016) 289 final

2016/0152 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

(Text with EEA relevance)

{SWD(2016) 173 final}

{SWD(2016) 174 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

The Digital Single Market Strategy¹ adopted in May 2015 and the Single Market Strategy² adopted in October 2015 announced legislative action to address unjustified geo-blocking and comprehensively fight discrimination based on nationality or place of residence or establishment (in this explanatory memorandum for ease of reference all referred to as "**residence**").

The general objective of this proposal is to give customers better access to goods and services in the Single Market by preventing direct and indirect discrimination by traders artificially segmenting the market based on customers' residence. Customers experience such differences in treatment when purchasing online, but also when travelling to other Member States to buy goods or services.

Despite the implementation of the non-discrimination principle in Article 20(2) of Directive 2006/123/EC³ ("Services Directive"), customers still face refusals to sell and different conditions, when buying goods or services across borders. This is mainly due to uncertainty over what constitutes objective criteria that justify differences in the way traders treat customers. In order to remedy this problem, traders and customers should have more clarity about the situations in which differences in treatment based on residence are not justifiable.

This proposal prohibits the blocking of access to websites and other online interfaces and the rerouting of customers from one country version to another. It furthermore prohibits discrimination against customers in four specific cases of the sale of goods and services and does not allow the circumventing of such a ban on discrimination in passive sales agreements. Both consumers and businesses as end users of goods or services are affected by such practices and should therefore benefit from the rules set out in this proposal. Transactions where goods or services are purchased by a business for resale should, however, be excluded in order to allow traders to set up their distribution systems in compliance with European competition law.

This proposal does not address pricing as such and traders consequently remain free to set their prices in a non-discriminatory manner. Nor does it address dynamic pricing, where traders adapt their offers over time, depending on a number of factors that are not linked to customers' residence.

- **Consistency with existing policy provisions in the policy area**

The country of origin principle under Directive 2000/31/EC⁴ ("the e-Commerce Directive") has enabled traders providing information society services to operate cross-border and to

¹ COM (2015) 192 final.

² COM (2015) 550 final.

³ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

provide their services on the basis of rules applicable in their country of establishment. Furthermore, the Services Directive includes rights for service recipients and seeks to ensure, under Article 20 that service providers established in the Union do not treat customers differently on the basis of their nationality or place of residence, either directly or indirectly. However, Article 20 does not sufficiently address discrimination of customers and has not reduced the legal uncertainty. As a result, it has been difficult to enforce the non-discrimination rule in practice. This proposal ensures, for the avoidance of any doubts, that in the case of conflict with Article 20(2) of the Services Directive, the provisions of this Regulation will prevail.

There are also other provisions banning discrimination, including through denial of access to websites or rerouting, for reasons related to residence, e.g. in the transport sector.⁵

Regarding non-discrimination in the use of payment means, Regulation (EU) No 260/2012 already prohibits traders from requiring bank accounts to be from a certain Member State for a payment to be made. This principle does not exist for other payment means. Regulation (EU) 2015/71 facilitated the use of credit cards by capping interchange fees for card-based payments transactions. Directive (EU) 2015/2366⁶ also paved the way for a fully integrated market for retail payments in the EU. This Regulation goes a step further by preventing traders from applying different payment conditions based on the customer's residence. It is important to remember, however, that traders are free to decide which means of payment they accept vis-à-vis local and foreign customers.

The proposal is compatible with existing Union law on applicable law and jurisdiction⁷.

- **Consistency with other Union policies**

This proposal complements other initiatives under the Digital Single Market and Single Market strategies and aims to create the right conditions for improved access to services for consumers and businesses across the Union.

These initiatives include the proposals for a 'Directive on certain aspects concerning contracts for the supply of digital content'⁸ and for a 'Directive on certain aspects concerning contracts for the online and other distance sales of goods'⁹. These proposals are aimed at achieving full harmonisation in the areas covered. Once adopted, they will further reduce differences in the

⁵ Article 1(a) and Article 4(2) of both Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport and Regulation (EU) No 1177/2010 concerning the rights of passengers when by sea and inland waterway regulate the principle of non-discrimination. Article 23(2) and 16(1) of Regulation (EC) No 1008/2008 on common rules for the operation of air services refer to non-discrimination in air transport.

⁶ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

⁷ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

⁸ COM(2015) 634 final, Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content.

⁹ COM(2015) 635 final, Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods.

consumer protection legislation of Member States, especially in relation to remedies consumers are entitled to in the case of defective goods or digital content.

Furthermore, the proposal for a "Regulation on cross-border parcel delivery services" aims to enhance price transparency and regulatory oversight in that area. Consumers and small businesses report that problems with parcel delivery services, in particular high prices, prevent them from selling more to or buying more from other Member States. The proposal for a revised "Regulation on Consumer Protection Cooperation" aims to improve co-operation between national consumer protection authorities and provide a stronger cross-border enforcement mechanism for consumer claims. Both of these initiatives are also scheduled for publication on 25 May 2016. The initiative on extending the Single Electronic Mechanism for VAT registration seeks to further simplify cross-border trade by reducing the administrative burden of VAT registration and payment on traders.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The proposal is based on Article 114 TFEU. This Article confers on the EU the power to adopt measures which have as their object the abolishment of the barriers to the free movement of inter alia goods and services. Efforts made to abolish such barriers can be neutralised by obstacles raised by private parties, which segment the internal market along national borders. That is all the more problematic in the context of the internal market in a situation where the relevant laws of the Member States are insufficiently clear, uniform and effective to combat such obstacles. The proposal therefore addresses practices which hamper the free movement of goods and services within the internal market.

• Subsidiarity (for non-exclusive competence)

Access to goods and services on a non-discriminatory basis within the internal market is in essence a cross-border issue. EU intervention is necessary to prevent discrimination based on residence in cross-border commercial transactions. Legislative intervention by Member States is not sufficient to ensure non-discrimination in cross-border situations. In terms of effectiveness, only an EU intervention can ensure that conditions for customers' access to goods and services do not vary across the Union. EU action will ensure greater legal certainty by clarifying the situations in which different treatment on the basis of residence is deemed discriminatory and therefore prohibited.

• Proportionality

The proposal aims to facilitate access to goods and services across the Union and creates, in particular, targeted obligations for traders not to discriminate between customers based on residence in specific circumstances. These obligations do not extend beyond what is necessary to solve the problems identified and are limited to the situations set out in the proposal. The proposal also increases legal certainty for traders by clarifying the existing obligations and specifying when customers should be treated equally in cross-border purchases. Moreover, the proposal does not impose on traders any disproportionate costs. Costs emerging from the proposal consist mostly of one-off adaption costs.

- **Choice of instrument**

While a non-binding instrument such as a recommendation or guidelines could support market developments in this area, the effectiveness of such instrument is expected to be very limited. The Commission guidelines¹⁰ on the application of Article 20(2) Service Directive of 8 June 2012 provide clarification also in specific situations, such as those covered by this proposal. However, Member States have not adapted national laws to provide more concrete rights to customers or stepped up enforcement, nor have traders altered their practice.

For this reason, only a legislative instrument can effectively address the problems identified. A Regulation is preferred, as it is directly applicable in Member States, establishes the same level of obligations for private parties, and enables the uniform application of rules on non-discrimination based on residence across all Member States.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Stakeholder consultations**

A large public consultation was conducted from 24 September to 28 December 2015. Views from consumers, businesses, associations and Member States were sought. 433 replies were received. The results of the public consultation were published and are also contained in the Impact Assessment. Furthermore, in early 2015, the Commission had extensive discussions with stakeholders (consumers, businesses, consumer and business associations and national authorities), including through stakeholders workshops, to assess various possibilities for EU intervention and their impact. On 18 February 2016, the Commission held a workshop in Amsterdam to discuss the outcome of the public consultation and possible ways forward.

The vast majority of consumers experienced geo-blocking or other geographically-based restrictions when shopping in another EU country. The goods and services most affected by geo-blocking are clothing, footwear and accessories, physical media (books), computer hardware and electronics, airplane tickets, car rental, digital content such as streaming services, computer games and software, e-books and MP3s. A majority of consumer and businesses consider that traders should inform customers about sales restrictions. Consumers expressed support for a policy option requiring traders to accept cross-border commercial transactions, however without an obligation for them to deliver. The majority of businesses oppose an obligation to sell and deliver throughout the EU and emphasize the importance of tailoring prices on different national markets, highlighting the need to respect their economic and contractual freedom. A large majority of all respondent groups agree that enforcement of rules and information requirements should be improved.¹¹

- **Collection and use of expertise**

The Commission launched a large mystery shopping survey, which analysed approximately 10,500 websites in the EU and modelled typical cross-border shopping situations. A

¹⁰ SWD(2012) 146 final, Commission Staff Working Document with a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market ('the Services Directive')

¹¹ Synopsis report of the public consultation published here: <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-geoblocking>

Eurobarometer survey from 2016 focusing on business-to-business relations revealed that, as end users of products and services, companies face restrictions similar to those faced by consumers. The Commission has analysed a large number of complaints relating to cross-border shopping and conducted an evaluation of Article 20 of the Services Directive. In May 2015, the Commission launched a competition inquiry into the e-commerce sector, and reported its initial findings on geo-blocking in March 2016.¹² The Commission has also discussed this initiative with Member States in expert groups on the Services and the e-Commerce Directives.

- **Impact assessment**

An impact assessment was carried out for this proposal¹³. On 21 April 2016, the Regulatory Scrutiny Board issued a positive opinion to the resubmitted impact assessment. The comments of the RSB are taken on board in the final Impact Assessment.

The final impact assessment examines five scenarios and comes to the following conclusions: The option concerning increasing increase transparency (option 1) was considered, but will not achieve the objective on its own. Increased transparency plus a ban on blocking website access to website (option 2), combined with the consent-based solution banning of automatic rerouting was considered advantageous but it would address only a small part of the problem. The preferred option (option 3) is to combine these two elements with the definition of certain specific situations in which geo-discrimination cannot be justified (for goods, if there is no cross-border delivery by the trader; for electronically supplied services; and for services received outside the customer's Member State). Another option consisted in setting up an additional list of justifications in order to elaborate the principles of Article 20(2) of the Services Directive (option 4), but that was discarded because of its complexity. The last option (option 5), which would require traders to ship tangible goods cross-border, was discarded because it would impose disproportionate costs on businesses.

- **Regulatory fitness and simplification**

The proposal applies to both traders and customers, i.e. consumers and businesses as end users. These categories include small and medium-sized enterprises (SMEs) and also micro-enterprises. Exempting these companies from the rules could undermine the effectiveness of the measure, as the majority of online trade in the Union is conducted by SMEs, including microenterprises in the Union.

The proposal will have positive effects on competitiveness by improving access to goods and services within the internal market for consumers and businesses. Regarding international trade, traders established in third countries are only within the scope of the Regulation to the extent they sell (or intend to sell) goods or services to customers in the Union.

The proposal concerns the offline and online environment, taking account of new technological developments where relevant, and is "digital and internet ready".

¹² Initial findings published here:

http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

¹³ SWD(2016)173 and SWD(2016)174.

- **Fundamental rights**

The proposal respects in particular Articles 16 ('freedom to conduct a business') and 17 ('right to property') of the Charter of Fundamental Rights of the European Union. Traders are already subject to existing non-discrimination provisions under EU law. Traders can continue to decide where and when they offer their goods or services to customers. Their freedom to refuse a sales request or to apply different conditions is limited only in line with the non-discrimination provisions of this Regulation. All other reasons not to sell or to apply different conditions remain available to traders, e.g. if the product is not on stock anymore.

4. BUDGETARY IMPLICATIONS

The proposal has no impact on the European Union budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Regulation provides for the Commission to carry out periodic reviews of the impact of the proposal.

The Commission will monitor how the Regulation is applied by the market participants across the Union in order to ensure a consistent approach. It will also focus on the effects of the rules.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 specifies the subject matter and the scope of the proposed Regulation. The material scope of the proposal is aligned with that of Directive 2006/123/EC to the extent possible in order to ensure consistency and maximum legal certainty for traders and customers. This means that, inter alia, non-economic services of general interest, transport services, audio-visual services, gambling activities, healthcare services and certain social services are excluded from the scope of this Regulation. The territorial scope is designed to equally include traders established in the EU and those established in third countries but selling or seeking to sell goods and services to customers in the Union. Article 1 also provides certainty to traders that compliance with this Regulation as such does not mean that the trader is directing his or her activities to a certain Member State for the purposes of Regulation (EC) 593/2008¹⁴ and Regulation (EU) No 1215/2012¹⁵, which regulate matters related to applicable law and jurisdiction.

Article 2 contains the relevant definitions.

Article 3 establishes the obligations on traders not to prevent access to their online interfaces on the basis of customers' residence. It also requires the customer's consent for rerouting and requires traders to keep the version of the online interfaces that the customer sought to access before having been rerouted easily accessible. The trader is exempted from these obligations

¹⁴ Regulation (EC) No 593/2008 on the law applicable to contractual obligations.

¹⁵ Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

where the access restrictions or rerouting are required by law. In these exceptional cases the trader has to provide a clear justification.

Article 4 sets out three specific situations under which discrimination of customers based on residence is prohibited. The first situation concerns the selling of physical goods when the trader is not involved in the delivery of the product to the Member State of the customer. The second situation concerns the provision of electronically supplied services, other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter. The third situation applies to services, which are provided by the trader in a Member State different from that of the customer's Member State of residence.

Article 5 lays down non-discrimination rules specifically in the context of payments. This rule provides that, in certain cases, traders cannot reject or otherwise discriminate with regards to payment instruments (such as credit or debit cards).

Article 6 provides that agreements with traders containing passive sales restrictions which would lead to violations of the rules set out in this Regulation are automatically void. It is designed to avoid circumvention of those rules by contractual means.

Article 7 is concerned with enforcement by Member States' authorities.

Article 8 requires Member States to designate one or more bodies providing practical assistance to consumers in relation to disputes resulting from this Regulation.

Article 9 is concerned with periodic reviews of the application of the Regulation by the Commission. Here it is specified that the first evaluation should assess, in particular, whether the prohibition of discrimination set out in Article 4(1)(b) should be extended to electronically supplied services, 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 territories.

Article 10 provides for two amendments of existing instruments relating specifically to the protection of consumers, namely Regulation (EC) No 2006/2004 and Directive 2009/22/EC. This would mean that this Regulation is added in the Annexes of those legal acts so that it can also be enforced by way of the measures provided in the Consumer Protection Cooperation Regulation as well as the Injunctions Directive.

Article 11 deals with entry into force and application.

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹⁶,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) In order to realise the objective of ensuring good functioning of the internal market, as an area without internal frontiers in which the free movement of inter alia goods and services is ensured, it is not sufficient to abolish, as between Member States, only State barriers. Such abolition can be undermined by private parties putting in place obstacles inconsistent with internal market freedoms. That occurs where traders operating in one Member State block or limit the access to their online interfaces, such as websites and apps, of customers from other Member States wishing to engage in cross-border commercial transactions (a practice known as geo-blocking). It also occurs through other actions by certain traders involving the application of different general conditions of access to their goods and services with respect to such customers from other Member States, both online and offline. Whereas there may sometimes be objective justifications for such differential treatment, in other cases traders deny consumers wishing to engage in cross-border commercial transactions access to goods or services, or apply different conditions in this regard, for purely commercial reasons.
- (2) In this manner certain traders artificially segment the internal market along internal frontiers and hamper the free movement of goods and services, thus restricting the

¹⁶ OJ C [...], [...], p. [...].

rights of customers and preventing them from benefitting from a wider choice and optimal conditions. Such discriminatory practices are an important factor contributing to the relatively low level of cross-border commercial transactions within the Union, including in the sector of electronic commerce, which prevents the full growth potential of the internal market from being realised. Clarifying in which situations there can be no justification for differential treatment of this kind should bring clarity and legal certainty for all participants in cross-border transactions and should ensure that rules on non-discrimination can be effectively applied and enforced across the internal market.

- (3) Pursuant to Article 20 of Directive 2006/123/EC of the European Parliament and of the Council¹⁷, Member States are to ensure that service providers established in the Union do not treat recipients of services differently on the basis of their nationality or place of residence. However, that provision has not been fully effective in combatting discrimination and it has not sufficiently reduced legal uncertainty, particularly because of the possibility to justify the differences in treatment for which it allows and the corresponding difficulties in enforcing it in practice. Moreover, geo-blocking and other forms of discrimination based on nationality, place of residence or place of establishment can also arise as a consequence of actions by traders established in third countries, which fall outside the scope of that Directive.
- (4) For the purposes of ensuring the good functioning of the internal market, the targeted measures set out in this Regulation, which provide for a clear, uniform and effective set of rules on a selected number of issues, are therefore required.
- (5) This Regulation aims at preventing discrimination based on customers' nationality, place of residence or place of establishment, including geo-blocking, in cross-border commercial transactions between traders and customers relating to the sales of goods and the provision of services within the Union. It seeks to address direct as well as indirect discrimination, thus also covering unjustified differences of treatment on the basis of other distinguishing criteria which lead to the same result as the application of criteria directly based on customers' nationality, place of residence or place of establishment. Such other criteria can be applied, in particular, on the basis of information indicating the physical location of customers, such as the IP address used when accessing an online interface, the address submitted for the delivery of goods, the choice language made or the Member State where the customer's payment instrument has been issued.
- (6) Considering that some regulatory and administrative barriers for traders have been removed across the Union in certain services sectors as a result of the implementation of Directive 2006/123/EC, in terms of material scope, consistency should be ensured between this Regulation and Directive 2006/123/EC. As a consequence, the provisions of this Regulation should apply *inter alia* to non-audio-visual electronically supplied services, the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, subject however to the specific exclusion provided for in Article 4 and the subsequent evaluation of that exclusion as provided for in Article 9. Audio-visual services, including services the main feature of

¹⁷ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).

which is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licenses, are excluded from the scope of this Regulation. Access to retail financial services, including payment services, should therefore also be excluded, notwithstanding the provisions of this Regulation regarding non-discrimination in payments.

- (7) Discrimination can also occur in relation to services in the field of transport, in particular with respect to the sales of tickets for the transport of passengers. However, in that regard Regulation (EC) No 1008/2008 of the European Parliament and of the Council¹⁸, Regulation (EU) No 1177/2010 of the European Parliament and of the Council¹⁹ and Regulation (EU) No 181/2011 of the European Parliament and of the Council²⁰ already contain broad prohibitions of discriminations covering all discriminatory practices that the present Regulation seeks to address. Furthermore, it is intended that Regulation (EC) No 1371/2007 of the European Parliament and of the Council²¹ will be amended to that effect in near future. Therefore, and in order to ensure consistency with the scope of application of Directive 2006/123/EC, services in the field of transport should remain outside the scope of this Regulation.
- (8) This Regulation should be without prejudice to the rules applicable in the field of taxation, given that the Treaty on the Functioning of the European Union (TFEU) provides specific base for action at Union level as regards taxation matters.
- (9) Pursuant to Regulation (EC) No 593/2008 of the European Parliament and of the Council²², the choice of law applicable to contracts between a consumer and a professional who pursues his or her commercial or professional activities in the country where the consumer has his or her habitual residence or, by any means, directs such activities to that country or to several countries including that country, may not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law of the country where the consumer has his or her habitual residence. Pursuant to Regulation (EU) 1215/2012 of the European Parliament and of the Council²³, in matters related to a contract between a consumer and a professional who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, a consumer may bring proceedings against the other party in the courts

¹⁸ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3).

¹⁹ Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ L 334, 17.12.2010, p. 1).

²⁰ Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 on the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ L 55, 28.2.2011, p. 1).

²¹ Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315, 3.12.2007, p. 14).

²² Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

²³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

of the Member State where he is domiciled and proceedings may be brought against the consumer only in those courts.

- (10) This Regulation should not affect acts of Union law concerning judicial cooperation in civil matters, notably the provisions on the law applicable to contractual obligations and on jurisdiction set out in Regulations (EC) No 593/2008 of the European Parliament and of the Council²⁴ and (EU) 1215/2012 of the European Parliament and of the Council²⁵, including the application of those acts and provisions in individual cases. In particular, the mere fact that a trader acts in accordance with the provisions of this Regulation should not be construed as implying that he directs his activities to the consumer's Member State for the purpose of such application.
- (11) The discriminatory practices that this Regulation seeks to address typically take place through general terms, conditions and other information set and applied by or on behalf of the trader concerned, as a precondition for obtaining access to the goods or services in question, and that are made available to the public at large. Such general conditions of access include *inter alia* prices, payment conditions and delivery conditions. They can be made available to the public at large by or on behalf of the trader through various means, such as information published in advertisements, on websites or pre-contractual or contractual documentation. Such conditions apply in the absence of an individually negotiated agreement to the contrary entered into directly between the trader and the customer. Terms and conditions that are individually negotiated between the trader and the customers should not be considered general conditions of access for the purposes of this Regulation.
- (12) Both consumers and undertakings should be safeguarded from discrimination for reasons related to their nationality, place of residence or place of establishment when acting as customers for the purposes of this Regulation. However, that protection should not extend to customers purchasing a good or a service for resale, because it would affect widely used distribution schemes between undertakings in a business to business context, such as selective and exclusive distribution, which generally allow for manufacturers to select their retailers, subject to compliance with the rules on competition.
- (13) The effects for customers and on the internal market of discriminatory treatment in connection to commercial transactions relating to the sales of goods or the provision of services within the Union are the same, regardless of whether a trader is established in a Member State or in a third country. Therefore, and with a view to ensuring that competing traders are subject to the same requirements in this regard, the measures set out in this Regulation should apply equally to all traders operating within the Union.
- (14) In order to increase the possibility for customers to access information related to the sales of goods and the provision of services on the internal market and to increase transparency, including with respect to prices, traders should not, through the use of technological measures or otherwise, prevent customers from having full and equal

²⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

²⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

access to online interfaces on the basis of their nationality, place of residence or place of establishment. Such technological measures can encompass, in particular, any technologies used to determine the physical location of the customer, including the tracking of that by means of IP address, coordinates obtained through a global navigation satellite system or data related to a payment transaction. However, that prohibition of discrimination with respect to access to online interfaces should not be understood as creating an obligation for the trader to engage in commercial transactions with customers.

- (15) Certain traders operate different versions of their online interfaces, targeting customers from different Member States. While this should remain possible, redirecting a customer from one version of the online interface to another version without his or her explicit consent should be prohibited. All versions of the online interface should remain easily accessible to the customer at all times.
- (16) In certain cases, blocking, limiting of access or redirection without the customer's consent to an alternative version of an online interface for reasons related to the customer's nationality, place or residence or place of establishment might be necessary in order to ensure compliance with a legal requirement in Union law or in the laws of Member States in accordance with Union law. Such laws can limit customers' access to certain goods or services, for instance by prohibiting the display of specific content in certain Member States. Traders should not be prevented from complying with such requirements and thus be able to block, limit the access or redirect certain customers or customers in certain territories to an online interface, insofar as that is necessary for that reason.
- (17) In a number of specific situations, any differences in the treatment of customers through the application of general conditions of access, including outright refusals to sell goods or to provide services, for reasons related to the customers' nationality, place of residence or place of establishment cannot be objectively justified. In those situations, all such discrimination should be prohibited and customers should consequently be entitled, under the specific conditions laid down in this Regulation, to engage in commercial transactions under the same conditions as a local customer and have full and equal access to any of the different goods or services offered irrespective of their nationality, place of residence or place of establishment. Where necessary, traders should therefore take measures to ensure compliance with that prohibition of discrimination if otherwise the customers concerned would be precluded from having such full and equal access. However, the prohibition applicable in those situations should not be understood as precluding traders from directing their activities at different Member States or certain groups of customers with targeted offers and differing terms and conditions, including through the setting-up of country-specific online interfaces.
- (18) The first of those situations is where the trader sells goods and there is no cross-border delivery of those goods by or on behalf of the trader to the Member State where the customer resides. In that situation the customer should be able to purchase goods, under exactly the same conditions, including price and conditions relating to the delivery of the goods, as similar customers who are residents of the Member State of the trader. That may mean that a foreign customer will have to pick up the good in that Member State, or in a different Member State to which the trader delivers. In this

situation, there is no need to register for value added tax ("VAT") in the Member State of the customer, nor arrange for the cross-border delivery of goods.

- (19) The second situation is where the trader provides electronically supplied services, other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, such as cloud services, data warehousing services, website hosting and the provision of firewalls. In this case, no physical delivery is required, as the services are being supplied electronically. The trader can declare and pay VAT in a simplified manner in accordance with the rules on VAT Mini-One-Stop-Shop (MOSS) set out in Council Implementing Regulation (EU) No 282/2011²⁶.
- (20) Finally, in the situation where the trader provides services and those services are received by the customer in the premises of or at a location chosen by the trader and different from the Member State of which the customer is a national or in which the customer has his or her place of residence or place of establishment, the application of different general conditions of access for reasons related to such criteria should not be justified either. Those situations concern, as the case may be, the provision of services such as hotel accommodation, sport events, car rental, and entry tickets to music festivals or leisure parks. In those situations, the trader does not have to register for VAT in another Member State nor arrange for cross-border delivery of goods.
- (21) In all those situations, by virtue of the provisions on the law applicable to contractual obligations and on jurisdiction set out in Regulations (EC) No 593/2008 and (EU) 1215/2012, where a trader does not pursue his activities in the Member State of the consumer or does not direct his activities there, or where the customer is not a consumer, compliance with this Regulation does not imply any additional costs for the trader associated with jurisdiction or differences in applicable law. Where, in contrast, a trader does pursue his activities in the consumer's Member State or does direct his activities there, the trader has manifested its intention to establish commercial relations with consumers from that Member State and thus been able to take account of any such costs.
- (22) Traders falling under the special scheme provided in Chapter 1 of Title XII of Council Directive 2006/112/EC²⁷ are not required to pay VAT. For those traders, when providing electronically supplied services, the prohibition of applying different general conditions of access for reasons related to the nationality, place of residence or place of establishment of the customer would imply a requirement to register **in order to account** for VAT of other Member States and might entail additional costs, which would be a disproportionate burden, considering the size and characteristics of the traders concerned. Therefore, those traders should be exempted from that prohibition for such time as such a scheme is applicable.
- (23) In all those situations, traders may in some cases be prevented from selling goods or providing services to certain customers or to customers in certain territories, for

²⁶ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 77, 23.3.2011, p. 1).

²⁷ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1–118)

reasons related to the nationality, place of residence or place of establishment of the customer, as a consequence of a specific prohibition or a requirement laid down in Union law or in the laws of Member States in accordance with Union law. Laws of Member States may also require, in accordance with Union law, traders to respect certain rules on the pricing of books. Traders should not be prevented from complying with such laws in as far as necessary.

- (24) Under Union law, traders are in principle free to decide which means of payment they wish to accept, including payment brands. However, once this choice has been made, in view of the existing legal framework for payment services, there are no reasons for traders to discriminate customers within the Union by refusing certain commercial transactions, or by otherwise applying certain different conditions of payment in respect of those transactions, for reasons related to the nationality, place of residence or place of establishment of the customer. In this particular context, such unjustified unequal treatment for reasons related to 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 should be expressly prohibited as well. It should be further recalled that Regulation (EU) No 260/2012 already prohibits all payees, including traders, from requiring bank accounts to be located in a certain Member State for a payment in euro to be accepted.
- (25) Directive 2015/2366/EU of the European Parliament and of the Council²⁸ introduced strict security requirements for the initiation and processing of electronic payments, which reduced the risk of fraud for all new and more traditional means of payment, especially online payments. Payment service providers are obliged to apply so-called strong customer authentication, an authentication process that validates the identity of the user of a payment service or of the payment transaction. For remote transactions, such as online payments, the security requirements go even further, requiring a dynamic link to the amount of the transaction and the account of the payee, to further protect the user by minimising the risks in case of mistakes or fraudulent attacks. As a result of these provisions, the risk of payment fraud in national and cross-border purchases is brought to an equal level and should not be used as an argument to refuse or discriminate any commercial transactions within the Union.
- (26) This Regulation should not affect the application of the rules on competition, and in particular Articles 101 and 102 TFEU. Agreements imposing on traders obligations not to engage in passive sales within the meaning of Commission Regulation (EU) No 330/2010²⁹ to certain customers or to customers in certain territories are generally considered restrictive of competition and cannot normally be exempted from the prohibition laid down in Article 101(1) TFEU. Even when they are not caught by Article 101 TFEU, in the context of the application of this Regulation, they disrupt the proper functioning of the internal market and they may be used to circumvent the provisions of this Regulation. The relevant provisions of such agreements and of other

²⁸ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35–127).

²⁹ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1).

agreements in respect of passive sales requiring the trader to act in violation of this Regulation should therefore be automatically void. However, this Regulation, and in particular its provisions on access to goods or services, should not affect agreements restricting active sales within the meaning of Regulation (EU) No 330/2010.

- (27) Member States should designate one or more bodies responsible for taking effective action to monitor and to secure compliance with the provision of this Regulation. Member States should also ensure that effective, proportionate and dissuasive penalties can be imposed on traders in the event of any breach of this Regulation.
- (28) Consumers should be in the position to receive assistance from responsible authorities facilitating the resolution of conflicts with traders, arising from the application of this Regulation, including by way of a uniform complaint form.
- (29) This Regulation should be regularly evaluated, with a view to proposing amendments where necessary. The first evaluation should concentrate, in particular, on the possible extension of the prohibition of Article 4(1)(b) to electronically supplied services, 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 territories.
- (30) With a view to facilitating the effective enforcement of the rules laid down in this Regulation, the mechanisms to ensure cross-border cooperation among competent authorities provided for in Regulation (EC) No 2006/2004 of the European Parliament and of the Council³⁰ should also be available in relation to those rules. However, as Regulation (EC) No 2006/2004 only applies with respect to laws that protect consumers' interests, those measures should be available only when the customer is a consumer. Regulation (EC) No 2006/2004 should therefore be amended accordingly.
- (31) In order to allow for the bringing of actions for injunctions aimed at the protection of the collective interests of consumers with respect to acts contrary to this Regulation in accordance with Directive 2009/22/EC of the European Parliament and of the Council³¹, that Directive should also be amended, so as to include a reference to this Regulation in its Annex I.
- (32) Traders, public authorities and other interested parties should have sufficient time to adapt to, and ensure compliance with, the provisions of this Regulation. In light of the particular characteristics of electronically supplied services, other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, it is appropriate to apply the prohibition of Article 4(1)(b) only from a later date with respect to the provision of those services.
- (33) In order to achieve the objective of effectively addressing direct and indirect discrimination based on the nationality, place of residence or place of establishment of customers, it is appropriate to adopt a Regulation, which directly applies in all

³⁰ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (OJ L 364, 9.12.2004, p. 1).

³¹ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110, 1.5.2009, p. 30).

Member States. This is necessary in order to guarantee the uniform application of the non-discrimination rules across the Union and their entering into force at the same time. Only a Regulation ensures the degree of clarity, uniformity and legal certainty which is necessary in order to enable customers to fully benefit from those rules.

- (34) Since the objective of this Regulation, namely the prevention of direct and indirect discrimination based on nationality, place of residence or place of establishment of customers, including geo-blocking, in commercial transactions with traders within the Union, cannot be sufficiently achieved by Member States, due to the cross-border nature of the problem and the insufficient clarity of the existing legal framework, but can rather, by reason of its scale and potential effect on trade in the internal market be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (35) This Regulation respects fundamental rights and observes the principle recognised in the Charter of Fundamental Rights of the European Union. In particular this Regulation seeks to ensure full respect of Articles 16 and 17 thereof,

HAVE ADOPTED THIS REGULATION:

Article 1

Objective and scope

1. This Regulation seeks to contribute to the proper functioning of the internal market by preventing discrimination based, directly or indirectly, on the nationality, place of residence or place of establishment of customers.
2. This Regulation applies to the following situations:
 - (a) where the trader sells goods, provides services, or seeks to do so, in a Member State other than the Member State in which the customer has the place of residence or the place of establishment;
 - (b) where the trader sells goods, provides services, or seeks to do so, in the same Member State as the one in which the customer has the place of residence or place of establishment, but the customer is a national of another Member State;
 - (c) where the trader sells goods or provides services, or seeks to do so, in a Member State in which the customer is temporarily located without residing in that Member State or having the place of establishment in that Member State.
3. This Regulation does not apply to the activities referred to in Article 2(2) of Directive 2006/123/EC.
4. This Regulation shall be without prejudice to the rules applicable to the field of taxation.

5. This Regulation shall not affect acts of Union law concerning judicial cooperation in civil matters. Compliance with this Regulation shall not be construed as implying that a trader directs his or her activities to the Member State where the consumer has the habitual residence or domicile within the meaning of point (b) of Article 6(1) of Regulation (EC) No 593/2008 and point (c) of Article 17(1) of Regulation (EU) 1215/2012.
6. Insofar as the provisions of this Regulation conflict with the provisions of Article 20(2) of Directive 2006/123/EC, the provisions of this Regulation shall prevail.

Article 2

Definitions

For the purposes of this Regulation, the definitions set out in Article 7 of Implementing Regulation (EU) No 282/2011, Article 2(10), (20) and (30) of Regulation (EU) 2015/751 of the European Parliament and Council³² and Article 4(8), (9), (11), (12), (14), (23), (24) and (30) of Directive (EU) 2015/2366 shall apply.

The following definitions shall also apply:

- (b) 'consumer' means any natural person who is acting for purposes which are outside his or her trade, business, craft or profession;
- (c) 'customer' means a consumer who, or an undertaking which, is a national of a Member State or has his or her place of residence or place of establishment in a Member State, and intends to purchase or purchases a good or a service within the Union, other than for resale;
- (d) 'general conditions of access' means all terms, conditions and other information, including sale prices, regulating the access of customers to goods or services offered for sale by a trader, which are set, applied and made available to the public at large by or on behalf of the trader and which apply in the absence of an individually negotiated agreement between the trader and the customer;
- (e) 'goods' means any tangible movable item, with the exception of items sold by way of execution or otherwise by authority of law; water, gas and electricity shall be considered as goods within the meaning of this Regulation where they are put up for sale in a limited volume or a set quantity;
- (f) 'online interface' means any software, including a website and applications, operated by or on behalf of a trader, which serves to give customers access to the trader's goods or services with a view to engaging in a commercial transaction with respect to those goods or services;
- (g) 'service' means any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 of the Treaty;

³² Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (OJ L 123, 19.5.2015, p. 1).

- (h) 'trader' means any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his or her name or on his or her behalf, for purposes relating to his or her trade, business, craft or profession.

Article 3

Access to online interfaces

1. Traders shall not, through the use of technological measures or otherwise, block or limit customers' access to their online interface for reasons related to the nationality, place of residence or place of establishment of the customer.
2. Traders shall not, for reasons related to the nationality, place of residence or place of establishment of the customer, redirect customers to a version of their online interface that is different from the online interface which the customer originally sought to access, by virtue of its layout, use of language or other characteristics that make it specific to customers with a particular nationality, place of residence or place of establishment, unless the customer gives his or her explicit consent prior to such redirection.

In the event of such redirection with the customer's explicit consent, the original version of the online interface shall remain easily accessible for that customer.

3. The prohibitions set out in paragraphs 1 and 2 shall not apply where the blocking, limitation of access or redirection with respect to certain customers or to customers in certain territories is necessary in order to ensure compliance with a legal requirement in Union law or in the laws of Member States in accordance with Union law.
4. Where a trader blocks or limits access of customers to an online interface or redirects customers to a different version of the online interface in compliance with paragraph 4, the trader shall provide a clear justification. That justification shall be given in the language of the online interface that the customer originally sought to access.

Article 4

Access to goods or services

1. Traders shall not apply different general conditions of access to their goods or services, for reasons related to the nationality, place of residence or place of establishment of the customer, in the following situations:
 - (a) where the trader sells goods and those goods are not delivered cross-border to the Member State of the customer by the trader or on his or her behalf;
 - (b) where the trader provides electronically supplied services, other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter;

- (c) where the trader provides services, other than those covered by point (b), and those services are supplied to the customer in the premises of the trader or in a physical location where the trader operates, in a Member State other than that of which the customer is a national or in which the customer has the place of residence or the place of establishment.
2. The prohibition set out in point (b) of paragraph 1 shall not apply to traders that are exempted from VAT on the basis of the provisions of Chapter 1 of Title XII of Directive 2006/112/EC.
 3. The prohibition set out in paragraph 1 shall not apply in so far as a specific provision laid down in Union law or in the laws of Member States in accordance with Union law prevents the trader from selling the goods or providing the services to certain customers or to customers in certain territories

With respect to sales of books, the prohibition set out in paragraph 1 shall not preclude traders from applying different prices to customers in certain territories in so far as they are required to do so under the laws of Member States in accordance with Union law.

Article 5

Non-discrimination for reasons related to payment

1. Traders shall not, for reasons related to the nationality, place of residence or place of establishment of the customer, 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, apply different conditions of payment for any sales of goods or provision of services, where:
 - (a) those payments are made through electronic transactions by credit transfer, direct debit or a card-based payment instrument within the same payment brand;
 - (b) the payee can request strong customer authentication by the payer pursuant to the Directive (EU) 2015/2366; and
 - (c) the payments are in a currency that the payee accepts.
2. The prohibition set out in paragraph 1 shall not preclude traders' possibility to request charges for the use of a card-based payment instrument for which interchanges fees are not regulated under Chapter II of Regulation (EU) 2015/751 and for those payment services to which Regulation (EU) No 260/2012 does not apply. Those charges shall not exceed the costs borne by the trader for the use of the payment instrument.

Article 6

Agreements on passive sales

Agreements imposing on traders obligations, in respect of passive sales, to act in violation of this Regulation shall be automatically void.

Article 7

Enforcement by Member State authorities

1. Each Member State shall designate a body or bodies responsible for the enforcement of this Regulation. Member States shall ensure that adequate and effective means exist with the body or bodies designated in order to enforce compliance with this Regulation.
2. Member States shall lay down the rules on the penalties applicable for infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

Article 8

Assistance to consumers

1. Each Member State shall confer responsibility for providing practical assistance to consumers to a body or bodies in case of a dispute between a consumer and a trader arising from the application of this Regulation. Each Member State shall designate a body or bodies responsible for that task.
2. The bodies referred to in paragraph 1 shall offer consumers a uniform model form to file complaints to the bodies referred to in paragraph 1 and in Article 7(1). The Commission shall assist those bodies in developing this model form.

Article 9

Review clause

1. By [*date: two years after the entry into force of this Regulation*] and every five years thereafter, the Commission shall report on the evaluation of this Regulation to the European Parliament, the Council and the European Economic and Social Committee. That report shall, where necessary, be accompanied by a proposal for an amendment of this Regulation, in light of legal, technical and economic developments.
2. The first evaluation referred to in paragraph 1 shall be carried out, in particular, with a view to assessing whether the prohibition of Article 4(1)(b) should also apply to electronically supplied services, 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 territories.

Article 10

Amendments to Regulation (EC) No 2006/2004 and Directive 2009/22/EC

1. In the Annex to Regulation (EC) No 2006/2004 the following point *[number]* is added: "[number] [full title of this Regulation] (OJ L XX, XX.XX.Year, p. X), only when the customer is a consumer within the meaning of Article 2(3) of Regulation No XXXX/Year."
2. In Annex I to Directive 2009/22/EC the following point *[number]* is added: "[number] [full title of this Regulation] (OJ L XX, XX.XX.Year, p. X)."

Article 11

Final provisions

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from *[date: six months following the day of its publication]*.

However, point (b) of Article 4(1) shall apply from 1 July 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President