



Council of the
European Union

Brussels, 21 November 2016
(OR. en)

14662/16

Interinstitutional File:
2016/0152 (COD)

MI 738
TELECOM 244
DIGIT 136
CONSUM 287
IND 249
COMPET 604
ENT 213
POSTES 19
JUSTCIV 304
PI 138
CODEC 1697

NOTE

From: Presidency
To: Council

No. prev. doc.: 9611/16 MI 396 TELECOM 104 DIGIT 60 CONSUM 130 IND 116
COMPET 339 ENT 102 POSTES 3 JUSTCIV 155 PI 64 CODEC 772 IA 31

Subject: Proposal for a Regulation of the European Parliament and of the Council on addressing **unjustified** geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC
- General approach

I. INTRODUCTION

1. On 25 May 2016, the Commission submitted a proposal for a Regulation on addressing unjustified geo-blocking and other forms of discrimination based on place of residence or establishment, or nationality within the Single Market. The draft Regulation, which is based on article 114 of the Treaty, was presented together with legislative proposals on cross-border parcel delivery services¹ and a revision of the Consumer Protection Cooperation Regulation² with the objective to deliver on both the Digital Single Market and Single Market strategies.

¹ See 9706/16.

² See 9565/16.

2. The key objective of the proposal is to ensure that customers -consumers and companies- seeking to buy products and services in another Member State, be it online or in person (offline), are not discriminated unjustifiably against in terms of access to prices, sales or payment conditions. The proposal prohibits also the blocking of access to websites and other online interfaces by traders and the rerouting of customers from one Member State version to another.
3. On 10 June 2016, the Council decided to consult the Economic and Social Committee, which adopted its opinion on 19 October 2016³.
4. In the European Parliament this proposal was referred to the Internal Market and Consumer Protection (IMCO) Committee which appointed on 17 June 2016 Ms. Roza Graefin von Thun und Hohenstein (PPE/PL) as rapporteur. The IMCO committee has not yet voted its report.

II. WORK CONDUCTED WITHIN THE COUNCIL

5. The examination of the proposal by the Working Party on Competitiveness and Growth started in June 2016 and has since continued with the objective to reach a general approach at the COMPET Council end of November 2016.
6. The Commission`s impact assessment was examined during the first Working Party meetings. In particular, the methods, criteria and options identified by the Commission in its impact assessment were discussed. Generally, delegations welcomed the work carried out by the Commission, however it was pointed out that more specific data and evidence would be desirable to know better the impact of the different policy options.
7. There is general support of the Member States for the objectives of the proposal, i.e. the fostering of a truly integrated Single Market by banning unjustified online and offline trading practices which discriminate customers (consumers and companies) on the basis of their nationality, place of residence or place of establishment and thus enhances cross-border e-commerce.

³ Opinion of the European Economic and Social Committee (rapporteur Mr Joost van Iersel (NL/Group I)) - INT/797 of 19/10/2016.

8. In the course of negotiations at Working Party level the text has evolved considerably in the light of the comments made by delegations. In particular it has been agreed to amend the title of the Regulation to cover *unjustified* geo-blocking to reflect the fact that discrimination may in some cases be objectively justified.

The Presidency compromise text as set out in document 13744/16 was discussed at the Permanent Representatives Committee (COREPER) on 18 November 2016. From this examination it emerged that a majority of delegations can now accept the Presidency compromise, and at the end of the debate the Chair concluded that the compromise would be submitted to the Competitiveness Council on 28 November 2016, with a view to reaching an agreement by qualified majority on a general approach.

The revised compromise text as it stands following the COREPER on 18 November 2016, is set out in document 14663/16.

III. MAIN ELEMENTS OF THE REVISED PRESIDENCY COMPROMISE

9. Based on the discussions at COREPER the Presidency wishes to highlight Article 1 (scope and objective), Article 4 (access to goods or services) and Article 6 (passive sales) as the main elements of its compromise package:

a) Scope and objective (Recitals 5a, 7a, and Article 1)

During the examination of the proposal it became apparent that the provisions on scope of the Regulation should be formulated as clearly as possible in order to provide legal certainty for traders and customers alike. Furthermore it was stressed that these provisions should exclude any ambiguity in order to be easy to comply with and to enforce.

The proposal touches upon a number of pieces of Union legislation which are applicable to cross-border sales, in particular Union law concerning judicial cooperation in civil matters governed by the Rome I and Brussels I Regulations. In this respect the compromise specifies that the sole compliance with the provisions of this regulation shall not be considered as directing the trader's activities to the Member State where the consumer has the habitual residence or domicile.

It has also been made clear that this Regulation does not apply to purely internal situations, where all the relevant elements of the transaction are confined within one single Member State. Furthermore, the Presidency compromise also covers the sales of packaged services.

b) Access to goods or services (Recitals 19, 29 and Article 4)

Following the principle that foreign customers should have access to the same terms and conditions as local customers, the text in Article 4 identifies three specific trading situations in which the trader must not discriminate between customers with regard to the general terms and conditions – including prices – they offer for selling goods or services. The Presidency compromise specifies that copyright protected works and other protected subject matter in an intangible form, such as e-books or online music are excluded from the obligation to sell.

c) Passive sales (Recital 26 and Article 6)

The Presidency compromise aims to clarify the relationship of the geo-blocking proposal with Union competition law. The starting point, to provide legal certainty, is an objective shared by all delegations. The compromise is based on the Commission approach that agreements on passive sales (i.e. sales where the trader does not actively solicit the customer's business) which are not in accordance with Article 101 TFEU and with Regulation (EU) No 330/2010, violate the provisions of the geo-blocking Regulation and should be hence null and void. However, the Presidency compromise provides for the possibility that the provisions of the geo-blocking Regulation should not be applicable when an agreement restricting passive sales is in accordance with Article 101 TFEU and with Regulation (EU) No 330/2010.

IV. CONCLUSION

11. The Presidency considers that the text as set out in document 14663/16 represents a balanced compromise between the views expressed by delegations. The Council is invited to agree to reach a general approach on this basis at the Competitiveness Council on 28 November 2016.
-