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ICLR, 2021, Vol. 21, No. 1.

"THIS CONTENT IS NOT AVAILABLE IN YOUR COUNTRY" A GENERAL SUMMARY ON GEO-BLOCKING IN AND OUTSIDE THE EUROPEAN UNION[1]

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HAMUĽÁK, Ondrej; KISS, Lilla Nóra; GÁBRIŠ, Tomáš, KOCHARYAN, Hovsep. "This Content is not Available in Your Country" A General Summary on Geo-Blocking in and outside the European Union. *International and Comparative Law Review*, 2021, vol. 21, no. 1, pp. 153–183. DOI: 10.2478/iclr-2021-0006.

Summary: The phenomenon of geo-blocking is one of the new challenges of the digital era. Geo-blocking is a modern form of discrimination that differentiates between consumers on the basis of their geographical location. The phenomenon ultimately affects the situation of the citizen concerned and may also constitute an obstacle to the single market. Digital time has put a number of issues to be resolved on the legislator's table

1 The paper was prepared within the implementation of the project no. 20-27227S "The Advent, Pitfalls and Limits of Digital Sovereignty of the European Union" funded by the Czech Science Foundation (GAČR). The paper is based on the previous introductory analyses of the topic (published as: KISS, Lilla Nóra. A General Summary on Geo-Blocking in the EU. European Studies – the Review of European Law, Economics and Politics, vol. 6, 2019, pp. 95–107) but offers a deeper and wider analyses and more 70% of completely new original text. Authors of recent paper kindly thanks to editorial team of the journal for their consent to use the content in this deeper and comprehensive study.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

in recent years, one of which is the phenomenon of geo-blocking. Already in 2015, the European Commission led by Juncker (2014–2019) adopted the Digital Single Market (DSM) strategy, which marked the European Union's (EU) path towards innovation by creating a new digital dimension of the Single Market. In order to achieve the DSM strategy and the digital objectives, a number of legislative acts have been put in place to address the elements of the DSM and exploit the benefits of technological modernisation. The geo-blocking phenomenon is presented in this study, partly in terms of practical aspects and partly with regard to the geo-blocking regulation. The Ursula von der Leyen-led Commission (2019–2024) identifies "a Europe fit for the digital age" among its six priorities. Among the priorities, the "promotion of a European way of life", must be linked to the digital priorities, as our smart tools and our digital presence are becoming an integral part of our lives – and our common way of life – especially at this time of the COVID-19 pandemic. Innovation has also been accelerated by the current exceptional situation, the health emergency caused by COVID-19, forcing us to work remotely, remote contacts and the constant use of our smart tools. The realisation of digital well-being is therefore also an integral part of our lifestyle. In the intersection of digitalisation and development and the promotion of a common European way of life, we can find a single market in which we can experience a significant aspect of our European way of life – the free movements and cross-border transactions – even through our online presence. The internal market is the dimension for the proper functioning of which the Union institutions can adopt a legislative act. In addition, measures taken to remove barriers and remove obstacles are essential for the functioning of the internal market. Joint action against geo-blocking as an internal market barrier will also play a role in creating digital prosperity by promoting the proper functioning of the internal market by promoting e-commerce and electronic content access. The aim of the study on the one hand is to present issues related to geo-blocking in a brief and descriptive manner from the perspective of the social, economic and legal environment linked to the internal market. On the other hand, the study briefly presents the legal environment of geo-blocking in the USA, Russia, China and Japan.

Keywords: Geo-blocking, digital single market, geo-discrimination, digitalisation, innovative society, digital preparedness.

1 Introduction: the Phenomenon and its Possible Effects

In today's information revolution, the process of technological modernisation, especially digitalisation, has taken on a scale that has led to irreversible changes both in society and in the economy. Online shopping and communication is no longer a novelty for us, most of us are used to it, and we expect them to be smooth. In this process of technological modernisation, the various smart tools (smart phones, computers, tablets etc.), are meaning an integral part of our daily lives (from official administration to leisure activities). Perhaps now, in 2021, in an emergency situation caused by the COVID-19 pandemic, we can become even more aware of how unavoidable our smart tools have become in our lives. In the emergency legal order, many EU Member States have adopted

measures related to distance learning, teleworking and curfews, all of which favour the use of smart tools.[2] Our tools can make our lives easier, make our administration more comfortable and time-efficient, but in some cases they can cause us to wonder by putting us in front of technical difficulties instead of making our lives easier. The latter may be more common if the browser receives our interest with the message "This content is not available in your country", i.e. when the provider restricts or renders the desired online content unavailable given our geographical location. Nowadays, most apps ask for positioning to be enabled for the proper functioning of the program, but we often cut ourselves off from further use of that certain application. Our study presents the abovementioned phenomenon, the geo-blocking, that could be considered as a discriminatory practice affecting our cross-border online activities besides having serious economic[3] impacts.

In the European Union, limiting content on a territorial basis constitutes an obstacle that could have a detrimental effect on the functioning of the internal market. Unjustified geo-blocking segments Member States' markets along national borders and allows certain economic operators to accumulate profits by discriminating consumers. This has been recognised by the EU and, by virtue of its powers relating to the establishment and operation of the internal market in Article 114 TFEU, in the ordinary legislative framework, following a proposal from the European Commission, the European Parliament and the Council of the European Union adopted Regulation No 2018/302[4] (hereinafter referred to as: Geo-blocking Regulation). The Commission's impact assessment[5] carried out prior to the drafting of the Regulation summarises the impact of geo-blocking on economic processes and market mechanisms, and which solutions can be used to counteract any harmful effects. The economic impact of geo-blocking was felt at the time of the introduction of the Digital Single Market Strategy in 2015. According to the impact assessment carried out by the Commission,

2 SZABÓ, Balázs. New tendencies in e-government in the European Union. *Curentul Iuridic*, 2017, vol. 71, No. 4., pp. 90–101.

3 DUCH-BROWN, Néstor, MARTENS, Bertin. *The Economic Impact of Removing GEO-Blocking Restrictions in the EU Digital Single Market (May 24, 2016)*. Institute for Prospective Technological Studies, Joint Research Centre. Digital Economy Working Paper 2016/02. [online]. Available at: <https://ssrn.com/abstract=2783647> Accessed: 15.04.2021.

4 Regulation (EC) No 2018/302 of the European Parliament and of the Council of 28 February 2018 on combating unjustified geo-blocking and other forms of discrimination based on the nationality, residence or place of establishment of the purchaser and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

5 Commission Staff Working Document Executive Summary Of The Impact Assessment Accompanying the document proposal for a Regulation Of The European Parliament And Of The Council on adressing geo-blocking and other forms of discriminiation based on place of residence or establishment or nationality within the Single Market, COM(2016) 289 final, SWD(2016) 173 final. [online]. Available at: <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-accompanying-proposed-regulation-geo-blocking> Accessed: 15.04.2021.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

the problem is that "Customers, in particular consumers, but also small businesses, are increasingly interested in cross-border shopping. However, these consumers and businesses find that traders in other Member States refuse to sell to them or apply different prices as a result of the customer's location that is in another Member State." The Mystery Shopping survey in 2015 showed that "a little more than one third of cross-border purchases were successful (37 %). There are rational reasons to avoid cross-border sales, such as differences in consumer provisions, different VAT rates, difficulties in cross-border transport solutions. However, a number of restrictions, such as restricting or prohibiting access to digital content, can be unjustified and unjustifiable."[6] Given that the impact assessment shows that geo-blocking can be considered harmful to the internal market, following a Commission proposal, the Council and Parliament have adopted the Geo-blocking Regulation.

The Preamble of the Regulation states that the geo-blocking phenomenon constitutes an obstacle to the proper functioning of the internal market. Recital 1 of the Regulation states that "to fully exploit the potential of the internal market, it is not enough to remove only barriers at the state level between Member States. The removal of these barriers may be undermined by private parties which create obstacles which are incompatible with the freedoms of the internal market." The Preamble itself mentions a specific example, which states that "this [geo-blocking] occurs when a trader operating in a Member State blocks or restricts access to his online interface (e.g. its websites and applications) to a buyer wishing to conduct cross-border transactions from another Member State". This paragraph could be considered as a definition for the phenomenon itself: "The practice known as 'geo-blocking'." In the following, we are looking for a more detailed description of the phenomenon, including certain elements of the Geo-blocking Regulation.

2 What Is Geo-Blocking?

Geo-blocking is an impact on the market, mainly a digital phenomenon, a discriminatory trading practice that can influence buyers' decisions on purchases. At the same time, geo-blocking is standard for legal compliance, just to list only a few important aspects of the phenomenon. Therefore, its objective evaluation depends on the criteria for which it is assessed. We look at the issue on the basis of EU law, the internal market and the interests of customers.

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

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

2.1. The meaning of geo-blocking

Geo-blocking alone means obstruction and blockage, which does not allow customers to access content, thereby affecting online commerce and economy. As stated in Article 1 of the Preamble of the Geo-blocking Regulation, this happens when a trader in a Member State (or from third countries) blocks or restricts access to its online interface to a customer located in another Member State given its geographical location. In this sense, geo-blocking is an activity which results in geo-discrimination. Discrimination may be justified or justifiable by an objective criteria of public interest, or unjustifiable. The Geo-blocking Regulation seeks to counter unjustified restrictions, similarly to the cases where the EU acts for harmonising the internal market and enable the free movements without any obstructions. However, it does not explicitly address what can be considered as "justified" discrimination. Indirectly, Article 1(1) refers to Article 20(2) of Directive 2006/123/EC (the Services Directive), which stipulates, in the context of non-discrimination, that Member States do not preclude divergences of the conditions of use in so far as it is directly justified by objective criteria. Therefore, discrimination is permitted if it is directly justified by at least one objective criterion. In addition, the Regulation lays down in Article 1 the cases to which the Regulation does not apply. As with internal market legislation, the Geo-blocking Regulation does not apply to purely national transactions. That means that similarly to other internal market legislation, the Regulation is applicable when a cross-border element occurs. This does not mean that, geo-blocking within a Member State could not be achieved by a trader who is not providing access to its online interface to the customer's located in that Member State. However, a case like that does not fall under the scope of the Regulation because all the relevant elements take place inside a State (so there are no cross-border elements). The Regulation excludes from its scope the activities[7] referred to in

7 Directive 2006/123/EC Article 2 (2):
This Directive shall not apply to the following activities:
(a) non-economic services of general interest;
(b) financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2006/48/EC;
(c) electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC;
(d) services in the field of transport, including port services, falling within the scope of Title V of the Treaty;
(e) services of temporary work agencies;
(f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;
(g) audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting;
(h) gambling activities which involve wagering a stake with pecuniary value in games of

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

Article 2(2) of the Services Directive (Directive 2006/123/EC) and the applicable rules in the field of taxation, as well as the rules applicable in the field of copyright and related rights, in particular those laid down in Article 22 of the Directive 2001/29/EC of the European Parliament and of the Council.[8]

The exclusion of territorial licensing of copyrighted audiovisual works from the Geo-blocking Regulation raises a number of questions in our view. Contrary to taxation issues and the above exceptions (provided for in the Services Directive), copyrighted audiovisual works do not relate to sovereignty issues. Why audiovisual works should be excluded from the scope of the Regulation? Why did the Member States lack the intention to incorporate copyright-protected audiovisual works into the Regulation?[9] By this implicit exclusion, some geo-discriminative actions continue to exist without legal consequences. Considering that audiovisual content is subject to different prices in the Member States (mostly based on their economic development and income rates), we can understand that the interests of the Member States in this matter are not identical. There are more economically developed Member States than e.g. Hungary and other Central-European and Eastern-European states, where significantly higher prices can be charged, while there are less developed economies where the same conditions would lead to discrimination against consumers.[10] So, in our view,

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chance, including lotteries, gambling in casinos and betting transactions;
(i) activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty;
(j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;
(k) private security services;
(l) services provided by notaries and bailiffs, who are appointed by an official act of government.

8 *Europe's Geoblocking Decision: What You Need to Know*. [online]. Available at: <https://www.bloomberg.com/news/articles/2016-05-25/europe-s-geoblocking-decision-what-you-need-to-know> Accessed: 15.04.2021.

9 VEZZOSO, Simonetta. *Geo-blocking of Audio-visual Services in the EU: Gone with the Wind?* [online]. Available at: <https://www.competitionpolicyinternational.com/geo-blocking-of-audio-visual-services-in-the-eu-gone-with-the-wind/> Accessed: 15.04.2021.

10 For example, in the spring of 2020, SPOTIFY provides premium subscriptions at different prices, which is based on the user's country of origin to ensure different treatment. In Hungary, the premium subscription fee is EUR 4.99/month, the family package is EUR 7.99/month, while the student premium is only EUR 2.49/month. Only one type of premium invoice is available in Romania, with a monthly price of EUR 5. Same services are available in Germany, France and Luxembourg at double prices (EUR 9.99/month per person, EUR 14.99/month per family, EUR 4,99/month per student). In Denmark, a duo pack can also be purchased for two persons, which are not available in all Member States. In Malta, the premium alone is EUR 6.99/month, while the family package is EUR 10.99/month, and there is no student discount. In Estonia, the same prices apply as in Malta, but the difference is that student discounts are available and the service is EUR 3,49/month. [online]. Available at: <www.spotify.com/hu/premium> Accessed: 15.04.2021.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

excluding audiovisual content could be interpreted as a kind of positive geo-discrimination that is based on objective criteria of comparability of income rates (and their differences). We agree with this distinction, which can be found in audiovisual services, because we consider it justified by the significant economic differences between the consumers of "older" and "younger" Member States. In our opinion, it would be unfair to apply the same prices for these audiovisual services in all Member States. The revision of the Regulation, which the Regulation itself imposed as binding two years after its entry into force, may lead to the inclusion of audiovisual services in the regulation.[11] The Commission indeed undertook launch a stakeholder dialogue with the audiovisual sector in order to discuss concrete ways to foster the circulation of, and improve consumers' access to audiovisual content across the EU. At the moment, however, we believe that in this case the principle of equal treatment could and even should lead to inequality, unless the most favourable prices will be generalised across the EU. However, we see little chance of this latter "generalising" solution. Thus, actual harmonisation or unification of audiovisual provisions may not be in the interest of the Member States yet.

The Regulation therefore specifies which cases it excludes from its scope rather than positively recording actual activities and behaviours. The definition of the scope in a negative way also demonstrates that the definition of the concept is extremely complex, because it sets out diverse and feasible behaviours. The Preamble records several practical cases that help to understand the phenomenon through examples.

Furthermore, the precise description of the phenomenon is being complicated by the fact that Article 2 of that Regulation itself does not contain the definition of terms "content" or "content limitation/geo-blocking". However, it records the definition of the online interface in point 16 of Article 2 as follows: "any software operated by or on behalf of the trader, including websites or parts thereof and apps, including mobile application's[12], intended to provide customers with access to the goods or services of the trader in order to conduct transactions in respect of these goods and services."[13] So geo-blocking actually means that, given the customer's geographical location, the trader prohibits or restricts access

11 Within two years after the entry into force of the new rules, the Commission had to carry out a first evaluation of their impact on the internal market. The Commission included in its evaluation an assessment of the scope of the rules. This included possible application of the new rules to certain electronically supplied services which offer copyright-protected content such as music, e-books, software and online games, as well as of services in sectors such as transport and audio-visual. The Report (.pdf) was adopted on 30 November 2020. It is available at: <https://ec.europa.eu/digital-single-market/en/geo-blocking> Accessed: 15.04.2021.

12 SZABÓ, Balázs. New tendencies in e-government in the European Union. *Curentul Iuridic*, 2017, vol. 71, No. 4., pp. 68–80.

13 KISS, Lilla Nóra. A general summary on Geo-blocking in the EU. *European Studies – The Review of European Law, Economics and Politics,* 2019, vol. 6, pp. 92–105.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

to his online interface. The "content" is, in our view, a narrower term than the "online interface". Dogmatic and regulatory weakness is that the terms "content" and "geo-blocking" are not defined in the Regulation, but these terms appear on several parts of the title and of the Preamble. The lack of a precise definition of legislation and cases excluded from the scope of the Regulation show the limited plausibility of geo-blocking rules in the language of the law.

The phenomenon of geo-blocking and problems arising around that are generally related to the digital economy, but an "offline version" is also co-existing. This is set out in Preamble 1 of the Regulation itself. Geo-blocking also occurs when "certain traders apply different general conditions of access to their goods and services with respect to such customers from other Member States, both online and offline".

2.2. Geo-blocking as a global phenomenon

Once the concept is understood, it is also appropriate to mention its global nature. It is thereby not a new phenomenon – it was used in a way as a practice within non-democratic regimes and was labeled as censorship – specifically with regard to "geo-blocking" of information transmission.[14] Currently it is countries such as China, Iran, Saudi Arabia, Tunis, Myanmar (Burma), North Korea, Uzbekistan and many others that apply this sort of censorship in the cyberspace. The geo-blocking phenomenon is hence not a European issue or problem.

Moreover, due to the cross-border nature of digital issues, geo-blocking does not stop within or at the borders of the European Union. Legislation adopted in this context by the EU can therefore have extraterritorial effect, since only those products and services could enter into the internal market from third countries that respect the EU standards and ensure the equal treatment of consumers and customers. The same as valid for the Digital Single Market, too. With regard to the functions of EU-level rules, such as the geo-blocking regulation discussed here, they aim is to create equal treatment between consumers in the EU. Some of the legislation has extraterritorial effect, perhaps the best-known example is the General Data Protection Regulation 2016/679/EU (the GDPR Regulation).[15]

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14 The origin of the term comes from Roman Republic and later Roman Empire, where in the 5th Century BC the office of a censor was established with the task to assess the number of population and to acknowledge rights and obligations of citizens according to their assessed property (taxes, military service). Personal behaviour in private as well as in public was also assessed by the censors with a possible punishment, e.g., exclusion from the Senate.

15 See: GARRELFS, Alexander. *GDPR Top Ten #3: Extraterritorial applicability of the GDPR: Explaining the territorial scope of the GDPR and the situations in which its obligations apply outside the European Union*. [online]. Available at: <https://www2.deloitte.com/ch/en/pages/risk/articles/gdpr-extraterritorial-applicability.html> Accessed: 15.04.2021. See alsoIMRAN, Ahmad. Extraterritorial Scope of GDPR: Do Businesses Outside the EU Need to Comply? [online]. Available at: <https://www.americanbar.org/groups/business_law/publications/blt/2018/04/01_speirs/> Accessed: 15.04.2021.

Published by Palacký University Olomouc, Czech Republic, 2021.
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In connection with the phenomenon of geo-blocking, extraterritoriality means that a given content or service must be made available to a Hungarian customer, such as a German, Swedish, French, or Maltese, in the same way, and the access cannot be unduly restricted or impeded in view of the place of residence or nationality of the consumer. The Geo-blocking Regulation has extraterritorial effect. At the end of Preamble Article 4, the Regulation states that unjustified geo-blocking and other forms of discrimination on grounds of nationality, residence or place of establishment may also take place as a result of the activities of traders established in third countries that are not covered by that Directive. Therefore, if a trader from a third country wants to provide services in the EU, it must comply with the Regulation. Next, we summarise the legal problems related to geo-discrimination.

2.3. Geo-blocking as a discriminatory exercise

In addition to the new term for the digital economy, geo-blocking also provides new areas for investigations relating to equal treatment and consumer protection. Geo-blocking distinguishes between consumers in view of their geographical situation (geo-discrimination), which can only be justified in exceptional cases, where the caused limitation is necessary and proportionate to an objective public policy, public security, public health, environmental protection, public morality linked to the free movements. The free movement of digital goods and content is an integral part of the Digital Single Market Strategy, a new aspect of the single market, which has been one of the EU's primary interests since the early 2000s (e.g. eEurope strategy).[16] This trend is followed by the current European Commission led by Ursula von der Leyen, set up in December 2019. As mentioned above, the Commission has identified the digital goals as a priority to be achieved in this five-year institutional cycle. In our view, it is extraordinary and forward-looking that, in addition to the concept of a "Europe fit for the digital age"[17], the new Commission's portfolio includes the promotion of an economy that works for the people and the promotion of the European way of life.[18] The cohesive interpretation of these priorities makes it possible to give new colours to EU citizenship and to digital well-being. Out of the six priorities of the Commission, these three are particularly relevant for the present study, since EU action against geo-blocking can improve the situation

16 CHOCHIA, Arnil, KERIKMÄE, Tanel: Digital Single Market as an Element in EU-Georgian Cooperation. *Baltic Journal of European Studies,* 2018, Vol. 8, Issue 2, pp. 3–6.

17 See: PATÓ, Viktória Lilla. *Újabb mérföldkőhöz érkezett az Európai Bizottság a Digitális Európa felé vezető úton*. [online]. Available at: <https://eustrat.uni-nke.hu/hirek/2020/12/16/ujabb-merfoldkohoz-erkezett-az-europai-bizottsag-a-digitalis-europa-fele-vezeto-uton> Accessed: 15.04.2021.

18 See: KISS, Lilla Nóra, – SZIEBIG, Orsolya Johanna. *European Way of Life: Making an omelette without breaking the eggs?* [online]. Available at: <https://www.constitutionaldiscourse.com/post/lilla-n%C3%B3ra-kiss-orsolya-johanna-sziebig-european-way-of-life-making-an-omelette-without-breaking> Accessed: 15.04.2021.

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ISSN (print): 1213-8770; ISSN (online): 2464-6601

of consumers and thus also play a role in promoting a European way of life,[19] while being prominent in achieving the Digital Age Europe. While the Regulation was put forward in the previous Commission cycle, it may be revised and possibly amended in this institutional term. It can be linked to the third priority mentioned above, the people-driven economy, by contributing to the improvement of lifestyles, standards of living and the promotion of cross-border online transactions by removing barriers to access to certain contents. This will also help to promote and ensure equal treatment of customers/consumers on online interfaces. Equal treatment should also take place in terms of data protection and access to digital goods and services, which could be a key tool for tackling geo-blocking in order to ensure legal compliance. According to Article 3 of the Preamble of the Geo-blocking Regulation, it should be taken into account that the reason for this phenomenon is due to a number of differences between Member States' legislation. The Regulation mentions those discrepancies that lead to different national standards or a lack of mutual recognition or harmonisation at EU level and still constitute significant barriers to cross-border trade. According to the Regulation, these barriers continue to lead to fragmentation of the internal market and often result in geo-blocking applied by the trader. Thus, the phenomenon is not caused by malicious traders, but is a consequence of the regulatory environment. Therefore, in our view, effective legal action against geo-blocking can not only improve the functioning of the internal market through harmonisation, but also serve as a mean of compliance, and "matchability" in the digital dimension, which could lead to further conclusions in the long term.

2.4. On the personal scope of the Geo-blocking Regulation and on discrimination on the basis of residence

In our view, geo-blocking – under which we mean the different treatment of buyers on the basis of their nationality, place of residence or place of residence[20] – results in geo-discrimination. It is important to clarify some concepts in order to understand exactly whom we can understand as consumers, customers, buyers and traders. These concepts determine who falls within the personal scope of the Regulation and who does not.

Consumers, as defined in the Regulation, are natural persons acting for purposes other than commercial, industrial, crafts and professional activities. Thus, when a natural person acts for private purposes, he/she would be considered to

19 KISS, Lilla Nóra, SZIEBIG, Orsolya Johanna. Le mode de vie européen dans l'ombre du Covid-19: perspectives hongroises, In PAULIAT, Hélène, NADAUD, Séverine(eds). *La crise de la COVID-19: comment maintenir l'action publique?* Limoges: LexisNexis, 2020, pp. 261–267.

20 PERESZTEGI-NAGY, Imola – lecture held on 19 October 20219 at ELTE EU Business Law course. See more on the webpage of the European Commission. [online]. Available at: <https://ec.europa.eu/digital-single-market/en/faq/geo-blocking-faq> Accessed: 15.04.2021.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

be a consumer. If the natural person acts for other purposes than private (e.g. business), he/she is a trader under the terms of the Regulation. The term of the trader is also defined by the Regulation, but it is broader than the consumer, since the trader can be a natural person and also a legal person. In contrast, legal person cannot be considered a consumer under any circumstances. The Regulation also defines a very broad range of legal entities. According to that, any natural person or legal person, whether it is privately or publicly owned, acting for purposes relating to the commercial, industrial, craft or professional activities of the trader, including any person acting on behalf of or for the benefit of the trader is a legal entity. The Regulation, however, is inconsistent with the definition of the term contractor, since it partly covers the term "entrepreneur" with the category of buyer, but does not specify what (whom) it means exactly. The buyer may be a consumer (i.e. a natural person acting for a non-professional purpose) and an undertaking established in a Member State who purchases or uses goods or services within the Union for the sole purpose of end-use. The discrimination therefore affects both consumers and businesses when buying goods and services for their own use. In cases covering solely professional purposes, natural persons and undertakings cannot be considered as consumers.

Interestingly, although the Regulation indirectly defines the phenomenon of geo-blocking in the Preamble, the direct definition of geo-blocking is missing. The reason behind that gap is maybe the fact that the concept should be interpreted in a very broad sense. It covers several behaviours, and its direct definition provided for in the Regulation would allow for narrower interpretation. The title of the Regulation contains its function and therefore certain conceptual elements of geo-blocking. The title includes that the Regulation is "to counter unjustified geo-blocking and other forms of discrimination based on the nationality, place of residence or place of establishment of the buyer within the internal market". This essentially includes the main conceptual elements of geo-blocking, since they are unjustified geo-blocking, or other forms of discrimination based on the nationality, place of residence or place of establishment of the buyer. In addition, due to the nature of the phenomenon, EU citizens may also be affected by geo-discrimination when they are residing in third countries. In addition to the place of residence, EU citizens may also be discriminated in their current place of residence, which may raise further questions of legal interest (e.g. a practical comparison with GDPR and its effects).

Geo-blocking is therefore a form of discrimination, which is rather a result of certain activities or omissions than a mean of discrimination. According to Aikaterini Mavropoulou, geo-blocking is a technology that does not allow a user from a particular geographical location to access a website, buy a product online or use an online service.[21] To us, geo-blocking is more than a technological phe-

21 MAVROPOULOU, Aikaterini. *Geo-blocking of the audiovisual services in the EU: an indispensable measure or a barrier to a modern Europe?* Tilburg Law School Master's Thesis.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

nomenon. Of course, geo-blocking is a technological method of discrimination, which results in a breach of the requirement of equal treatment of the customers, on the basis of certain data, namely their whereabouts. Geo-blocking refers to practices that are mainly used by online traders and which result in refusal to access their own content and interface.

The real legal dilemma is between the restriction and/or exclusion of access to a content, on the basis of the customers' residence.[22] The information about a personal location is a personal data. Therefore, the place of residence of the customers is personal data, on the basis of which no EU citizen could be discriminated. Providing the access to contents based on the residence could take European citizens into several treatment-dimensions. As a result, citizens staying in some "preferred" Member States could become "more valuable" than citizens residing in other "less-preferred" Member States. The condition of preference is based on the trader's perspective. Discrimination on the basis of residence is therefore based on personal data which is enshrined in the General Data Protection Regulation as a legal subject to be protected (Article 4(1) of the GDPR).[23] Article 5 of the GDPR states that personal data must be processed in a legal, fair and transparent manner, which includes the explicit permission of the data owner.[24] This leads to the responsibility of various search engines (or companies operating them), which transmit our location data without our consent, and thus facilitate discriminating us.[25]

Moreover, discrimination based on place of residence or place of establishment of the buyer can also serve as a proxy for discrimination based on nationality – it can namely be considered a hidden, indirect discrimination based on nationality, since it is far more probable that the residents of a specific country will be nationals of the country they reside in. Cases of indirect discrimination can therefore be justifiable under specific circumstances, which, however, need

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[online]. Available at: <http://arno.uvt.nl/show.cgi?fid=148183> Accessed: 15.04.2021.

22 KISS, Lilla Nóra: „This content is not available in your country" – avagy gondolatok a geo-blocking jelenségéről az uniós jogi környezetben, *Infokommunikáció és Jog,* 2020/2 (75) E-különszám: 75. pp. 1–10. Available at: <https://infojog.hu/dr-kiss-lilla-nora-this-content-is-not-available-in-your-country-avagy-gondolatok-a-geo-blocking-jelensegerol-az-unios-jogi-kornyezetben-2020-2-75-e-kulons/> Accessed: 15.04.2021, 10 p. (2021)

23 MAKSÓ, Bianka. Concepts and Rules in the General Data Protection Regulation. In KÉKESI, Tamás (ed). *MultiScience – XXXI. microCAD International Multidisciplinary Scientific Conference*. Miskolc: Miskolci Egyetem, 2017, pp. 1–7. [online]. Available at: <http://www.uni-miskolc.hu/~microcad/publikaciok/2017/e2/E2_2_Makso_Bianka.pdf> Accessed: 15.04.2021.

24 MAKSÓ, Bianka. Adatvédelmi kihívások a digitális gazdaságban, In MISKOLCZI, Bodnár Péter (ed). *XII. Jogász Doktoranduszok Országos Szakmai Találkozója*. Budapest: Károli Gáspár Református Egyetem Állam – és Jogtudományi Kar, 2018, pp. 242–251.

25 NYMAN-METCALF, Katrin, PAPAGEORGIOU, Ioannis F. The European Union Digital Single Market—Challenges and Impact for the EU Neighbourhood States. *Baltic Journal of European Studies,* 2018, Vol. 8, Issue 2, pp. 7–23.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

to be carefully worded and assessed. An example of justifiable indirect discrimination based on nationality (officially labelled as discrimination based on the place of residence) might thereby be found in audiovisual services, as argued supra, because one can consider it justified by the significant economic differences between the consumers of "older" and "younger" Member States. This would mean offering the same treatment to those who are in a different position and situation. Thereby both the European Convention on Human Rights (ECHR) and EU law acknowledge that discrimination may result not only from treating people in similar situations differently, but also from offering the same treatment to people who are in different situations.[26] The latter is labelled "indirect" discrimination because it is not the treatment that differs but rather the effects of that treatment. The effects are thereby connected to a seemingly neutral criterion, rule or practice, such as that of place of residence. Still, this apparently neutral criterion, provision or practice, puts a group of persons at a particular disadvantage compared with other persons. The European Court of Human Rights (ECtHR) has drawn on this definition of indirect discrimination in some of its judgments (e.g. D.H. and Others v. the Czech Republic [GC] (No. 57325/00), 13 November 2007, para. 184; ECtHR, Opuz v. Turkey (No. 33401/02), 9 June 2009, para. 183;), stating that "a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group".[27]

Taking an EU example, albeit from a somewhat different area, namely that of football, the issue of discrimination on the basis of nationality became topical since FIFA proposed a rule for the composition of football teams referred to as 6+5. The 6+5 rule, respectively in case of UEFA a similar rule called the rule of domestic players (home grown players rule) both required clubs to build teams out of players who were brought up in the national playgrounds. Still, while the FIFA 6+5 rule required that the team has at least six players who are nationals of the State in which the club is established and thus spoke of nationality which was a clear and direct discrimination, in case of UEFA rule, the player is considered home-grown if aged between 15 and 21 years he spent at least three years in a club operating within the relevant State. This is not saying explicitly that these players have to hold the nationality of that State. Hence, it is not a direct discrimination of the kind as it was in the case of the 6+5 rule proposed by FIFA (or the earlier 3 + 2 rule[28] refused by the Court of Justice of the European Union

26 *Handbook on European non-discrimination law*. Luxembourg: European Union Agency for Fundamental Rights, 2010, p. 29. [online]. Available at: <https://fra.europa.eu/sites/default/files/fra_uploads/1510-fra-case-law-handbook_en.pdf> Accessed: 15.04.2021.

27 Ibid.

28 The FIFA 3 + 2 rule meant that maximum of three players could be fielded as foreigners and two players had to play under the national association jurisdiction for at least 5 years continuously, of which at least three years as juniors. ARNECKE SIEBOLD, Chambers. *Legal aspects of sport in the European Union. A status-report within the scope of the project "Sport in Europe – social, political, organisational, legal transparency in Europe"*, pp. 18–19.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

(CJEU) in the Bosman case, C-415/93). Rather, this is a case of indirect discrimination, which could be justifiable by the fact that it is intended to encourage the education of young talents and to encourage clubs to train young players.[29] In the light of the decision in the case of Bernard (C-325/08), which also stressed the need to motivate clubs to educate young players, it could seem that this indirect discrimination might be accepted by the CJ EU. Thereby, it is a discrimination based primarily on the element of residence – similarly as it is the case with geo-blocking rules.

2.5. The "Conflict of laws": The Economic interests of traders vs the consumers' rights to non-discrimination

The phenomenon of geo-blocking from the lawyers' perspective is rather reflected in the economic interest of market participants versus the rights of customers to their personal data debate and right to equal treatment (as conflicts between two apparent counterpoles), than in technical matters.[30] The question is whether the elimination of the phenomenon adversely affecting the internal market by means of a regulation (or minimising its effects) can strike a balance between the two apparent counterpoles. It is apparent, since, in fact, it is in the long-term interest of market participants to ensure equal access to customers, otherwise trust in market mechanisms may be undermined by the traders. This is not desirable at the moment when the number of online shopping and e-commerce transactions is continuously increasing in the EU.

Consumer-driven attitudes have come to a new dimension in the digital age, which must be taken into account by companies providing online services in particular – if they want to stay on the market in the long term. The nature of trust[31] has necessarily changed as consumer behaviour changes. As consumption is realised in the online space, the role of trust has increased,[32] in our view.

[online]. Available at: <http://www.sport-in-europe.eu/images/stories/PDFFiles/jean%20monnet%20projekt_legal%20aspects_final_1201.pdf> Accessed: 15.04.2021.

29 *The EU and Sport: Background and Context. Accompanying document to the White Paper on Sport*, p. 13. [online]. Available at: <https://op.europa.eu/sk/publication-detail/-/publication/de82f02c-c791-4817-8a50-b3d8bae1bddc/language-en> Accessed: 15.04.2021.

30 See: KISS, Lilla Nóra. „THIS CONTENT IS NOT AVAILABLE IN YOUR COUNTRY" – avagy gondolatok a geo-blocking jelenségéről az uniós jogi környezetben. *Infokommunikáció és Jog*, 2020, 75, 2, pp. 1–10. [online]. Available at: <https://infojog.hu/dr-kiss-lilla-nora-this-content-is-not-available-in-your-country-avagy-gondolatok-a-geo-blocking-jelensegerol-az-unios-jogi-kornyezetben-2020-2-75-e-kulons/> Accessed: 15.04.2021.

31 See: LEE HAO SUAN, Samuel, BALAJI, M. S., KHONG, Kok Wei. An Investigation of Online Shopping Experience on Trust and Behavioral Intentions. *Journal of Internet Commerce*, 2015, 14, 2, pp. 233–254.

32 Statistics show that "68 % of Internet users in the EU purchased online online in 2017; Almost 7 out of 10 internet users chose online purchases in 2018; However, traders often continue to refuse to sell to consumers from another Member State without objective reasons or to provide the same favourable prices as those granted to local customers. Only 37 % of websites allow consumers from another Member State to accurately reach the

One possible reason for this is that, in transactions in physical reality, we have the opportunity to look at, touch products, try on them before making a decision on their purchase. On the other hand, most purchases (sales) were made anonymously before the digital age, except for major transactions such as real estate or vehicle purchases. If the customer paid cash for a small movable item, the process could remain completely anonymous. Thus, in the case of a personally managed cash transactions, it is more difficult to obtain the customer's data, and to profile his/her spending habits, or use direct marketing techniques. In the digital societies, the anonymous transaction process has changed. Our personal data (name, bank card payment data, billing address, shipping address etc.) are associated with our sales transactions.

In fact, the purchase is subject to additional conditions, for example, in order to use the services, we usually have to register on the given page or application in advance. During the registration we provide basic personal data (name, e-mail address, place and date of birth, etc.). Then, when we decide to buy a product, we will provide additional data to the service provider (bank-related data, shipping address, who is going to take over the package if we are not available, etc.). The disclosure of these personal data and making it available to an external actor necessarily assumes trust in the system. It follows that the safe management of customer data is an essential element in the perception[33] of online companies, which is inherently linked to their economic success. The provision of information about the operation of the interface and the management of data to customers, in our view, contributes greatly to the maintenance of online trust.[34]

2.6. On certain geo-blocking related CJEU decisions

Some of the effects of this phenomenon (discrimination, economic impact) have become visible to more and more institutions. In particular, recent case law

content until the final step, until the order is confirmed. Overall, the share of e-purchasers among Internet users is increasing, with the highest rate being found in the age groups 16–24 and 25–54 (all 73 %). The share of e-shoppers in the EU varies significantly from 26 % of Romanian Internet users to 87 % of the UK.

The economic aspect of e-commerce is developing. E-purchasing habits are widespread, thanks to time and cost-effectiveness. "Most purchases (at least one third of e-shoppers), clothing and sports items (64 %), reservations for travel and holiday accommodations (53 %), third purchases of household items (45 %), online event ticket purchases (39 %) and relatively frequent purchases of books, magazines and newspapers (32 %). Fewer than five e-shoppers have purchased telecommunications services (20 %), computer hardware (17 %), medicines (14 %) and e-learning materials (7 %). Taken from lecture slides by PERESZTEGI-NAGY, Imola.

33 PWC: 9 reasons reputation is becoming a currency, available summary on Digital Fitness application.

34 In the digital age, trust (among others) is, according to the PWC, "new currency" for companies. See the memo published in the PWC application in April 2020. (Not available now). See also: <Https://www.huffpost.com/entry/trustthe-new-currency-in-_b_14228792?guccounter=1> Accessed: 15.04.2021.

of the CJEU shows that geo-blocking cannot be ignored. The CJEU addressed, inter alia, issues related to intellectual property rights. In Case C-403/08 Football Association Premier League and Others[35], the Court stated that "Union law precludes a system of authorisations for the broadcasting of football matches which grants broadcasting organisations territorial exclusivity per Member State and prohibits television viewers from viewing these programmes in other Member States through a decrypting card". This 2011 judgment shows that geo-blocking was an existing phenomenon long before the DSM strategy and the Geo-blocking Regulation were drafted, and the CJEU examined the case without naming the phenomenon as geo-blocking. The Court considered the restriction to be unjustified. The Court examined the discriminatory effect of the system of authorisations and found that the requirement of equal treatment was infringed on a territorial basis.

In Case C-28/18 Verein für Konsumenteninformation v Deutsche Bahn AG,[36] the CJEU concluded that the possibility of payment by direct debit card cannot depend on the conditions of residence in the national territory, since such clauses, which require the use of a method of payment in a certain State, do not respect the equal treatment of EU consumers. Thus, such contractual clause is contrary to EU law. In paragraphs 35 to 36 of the judgment, the CJEU reflects the spirit of the Geo-blocking Regulation, even though the case started before the Regulation had entered into force. The geo-blocking phenomenon will now become increasingly common at the level of law enforcement at Member State level and, in our view, an increasing number of interpretative questions are going to be requested by the national courts before the CJEU in preliminary ruling proceedings.

3 How Geo-Blocking Works in Non-EU States?

In order to understand the system of geo-blocking working in the law-enforcement practice of non-EU states, the authors felt it appropriate to pay attention, first, to the practices of the following countries: USA, Russia, China and Japan. This choice is not accidental; each of the above countries has its own special and specific approach to the legal regulation concerning geo-blocking, which will be discussed in more detail below.

3.1 USA

The main legal act governing copyright protection in the field of digital media and technology, as well as legal relations concerning geo-blocking in the United States is the Digital Millennium Copyright Act (hereinafter referred to as the

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

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

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

DMCA),[37] that, in its turn, complements U.S. copyright law in the light of modern technological advances in the field of copying and distributing information, restricting individual users to have access to copyrighted content and increasing legal liability for copyright infringement through the use of Internet technologies and for unfair access and use of such content. In particular, such restrictions include "zone locking" of copyrighted content, which restricts access to certain copyrighted content for those Internet users who are physically located outside the geographical area that is allowed to view such content. At the same time, the copyright holders have an unlimited right to control and determine the place and time of the permissible broadcast of such content. Of course, a special place should be given to the case law in understanding of the legal essence, nature and character of geo-blocking legal enforcement, which is not surprising for U.S. legal reality.

One of the most interesting cases from the U.S. judicial practice in this framework is the case of Plixer Intl. v. Scrutinizer GmbH,[38] where the court considered the question of whether foreign companies, such as Scrutinizer GmbH as a German company, can be prosecuted in the U.S. federal court for violating the use of trademark rights and providing business services on the Internet on such a basis. According to the circumstances of the case, when providing web services to software development companies to create software through a website that has global access, Scrutinizer GmbH specifically targeted the provision of such services to the U.S. customers. Taking into account the above circumstances, the Court held that the use of geo-blocking undoubtedly has to do with the defendant's intention not to serve the United States. In doing so, the Court rejected Scrutinizer's argument that its U.S. contacts were solely the result of unilateral actions by its customers because Scrutinizer GmbH knew that it was serving U.S. customers through its globally accessible website. In this context, Ramón G. Vela Córdova, analyzing the above-mentioned case, notes that the court, when making its decision, took into account, first of all, the fact that "(...) Scrutinizer has "minimum contacts" with the U.S. because its website is available in the U.S., it did nothing to prevent U.S. persons from using its services (not even using a disclaimer), it had continuous sales in the U.S., and it derived substantial income from such sales."[39] In addition, the court also did not take into account the defendant's arguments that geo-blocking is not relevant to the case under consideration, since it is an "imperfect" and "developing" technology. Commenting on the above case, M. Trimble states that: "A failure to geoblock alone would not have been suffi-

37 The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

38 Plixer International, Inc. v. Scrutinizer GMBH, No. 18-1195 (1st Cir. 2018). [online]. Available at: < https://law.justia.com/cases/federal/appellate-courts/ca1/18-1195/18-1195-2018-09-13.html> Accessed: 15.04.2021.

39 CÓRDOVA, Ramón G. Vela. *First Circuit Scrutinizes Jurisdiction in SCRUTINIZER Trademark Case*, September 14, 2018. [online]. Available at: <http://www.velacordova.com/pripblog/2018/9/14/first-circuit-scrutinizes-jurisdiction-in-scrutinizer-trademark-case> Accessed: 15.04.2021.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

cient for personal jurisdiction in Plixer; the facts in the case regarding Scrutinizer's contacts with the United States would have justified the exercise of personal jurisdiction over the German defendant even without the defendant's failure to geoblock. Nevertheless, the court chose to address the issue of geoblocking, and the decision is additional evidence that courts are weary of arguments that geoblocking is infeasible, imperfect, or costly, when many or even most Internet actors do check their users' location and frequently collect and utilize that location information"[40]. In turn, the experts explain that: "This is still a developing area of personal jurisdiction law without clear guidance from the U.S. Supreme Court, and non-U.S. companies should carefully consider whether and how their online commerce might subject them to U.S. litigation. (...) non-U.S. companies should take note of Plixer's potentially sweeping conclusion: a company with no physical ties to the U.S. whatsoever could be hauled into a U.S. court based solely on rather modest web-based sales. The Internet and e-commerce have revolutionized the ways in which companies can do business all over the world, opening up markets in ways that were unthinkable in the analog past. (...)"[41].

In its turn, in the case of Triple Up Ltd. v. Youku Tudou, Inc.[42] the plaintiff (the Triple Up Ltd.), which is a company incorporated in the Seychelles and owned the exclusive rights to broadcast three Taiwanese films in the United States, filed a copyright infringement lawsuit against Chinese company Youku Tudou Inc for damages. Basing its approach on the judicial precedents of GTE New Media Services Inc. v. BellSouth Corp and Cf. Bristol-Myers Squibb Co. v. Superior Court of California, the Court held that just the fact of accessing to the website cannot be considered as sufficient to establish the minimum contacts necessary to exercise personal jurisdiction over a foreign legal entity based solely on the virtual presence of that legal entity in the United States. The Court, citing the judicial precedent of Walden v. Fiore, specified that "Personal jurisdiction will exist if Youku "purposefully directed [its] activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities," (...), or Youku's "suit-related conduct" otherwise created a "substantial connection with the [United States]"[43].

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40 TRIMBLE, Marketa. *The Necessity of Geoblocking in the Age of (Almost) Unavoidable Geolocation (Guest Blog Post),* September 25, 2018. [online]. Available at: <https://blog.ericgoldman.org/archives/2018/09/the-necessity-of-geoblocking-in-the-age-of-almost-unavoidable-geolocation-guest-blog-post.htm> Accessed: 15.04.2021.

41 Available at: <https://www.gibsondunn.com/wp-content/uploads/2018/09/us-court-of-appeals-allows-specific-personal-jurisdiction-over-german-web-services-firm-with-no-physical-us-presence.pdf> Accessed: 15.04.2021.

42 TRIPLE UP LIMITED v. YOUKU TUDOU INC., No. 1:2016cv00159 – Document 15 (D.D.C. 2017). [online]. Available at: <https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2016cv00159/176639/15/> Accessed: 15.04.2021. See also: <https://www.leagle.com/decision/infco20180718133> Accessed: 15.04.2021.

43 Ibid.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

Analyzing the case of Triple Up Ltd. v. Youku Tudou, Inc., Perry J. Viscounty, Jennifer L. Barry and others believe that "Prospective plaintiffs must assert strong factual bases specifically related to the alleged claims that support the foreign entity's contacts within the United States as a whole and/or the "effects" of the entity's actions within the United States. Finally, in the light of these jurisdictional hurdles, prospective plaintiffs also should consider employing strategies within the foreign entity's home country to stop the potentially infringing conduct"[44].

Thereby, this is certainly an echo and ongoing evolution of the long-term debate taking place in the common law world on jurisdiction in the cyberspace. The milestones in the development of this concept were the Dow Jones vs. Gutnick case,[45] preferring as a decisive factor the place, where the information is downloaded from the Internet, and later a case of Zippo Mfr. Co. vs. Zippo Dot Com case, discerning between active, passive (not establishing the jurisdiction) and interactive websites.[46] An EU equivalent of these debates is the proble of a commercial activity "being directed towards" a specific Member State and consumers from that Member state.[47] The broadest possible interpretation is thereby applied with respect to criminal jurisdiction, where any slightest link with the territory ansd interests of a state may serve as a ground for establishing the criminal jurisdiction of its courts.

3.2 Russia

The Article 15.1 of the Russian Federal Act No. 149-ФЗ on 27.07.2006 (as amended on 30.12.2020) "On Information, Information Technologies and Information Protection"[48] establishes a mechanism for blocking Internet content,

44 VISCOUNTY, Perry J., BARRY, Jennifer L. and others. Chinese Website Operator Dismissed From Copyright Infringement Suit In United States. *Intellectual Property Technology Law Journal*, 2017, Vol. 29, No. 6. [online]. Available at: <https://www.lw.com/thoughtLeadership/chinese-website-operator-dismissed-from-copyright-infringement-suit-in-united-states> Accessed: 15.04.2021.

45 POLČÁK, Radim, ŠKOP, Martin, MACEK, Jakub. *Normativní systémy v kyberprostoru (*úvod *do studia).* Brno: Masarykova univerzita, 2005, p. 31. Cf. *Statement of Minnesota Attorney General on Internet Jurisdiction*. [online]. Available at: <http://cyber.law.harvard.edu/ilaw/Jurisdiction/Minnesota_Full.html> Accessed: 15.04.2021.

46 POLČÁK, Radim, ŠKOP, Martin, MACEK, Jakub. *Normativní systémy v kyberprostoru (*úvod *do studia).* Brno: Masarykova univerzita, 2005, p. 31. Cf. High Court of Australia, *Dow Jones and Company Inc v Gutnick [2002].* [online]. Available at: <http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html> Accessed: 15.04.2021. See also: *Zippo Mfr. Co. v. Zippo Dot Com, Inc.* [online]. Available at: <http://cyber.law.harvard.edu/metaschool/fisher/domain/dncases/zippo.htm> Accessed: 15.04.2021.

47 Joined Cases C-585/08 and C-144/09 Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller. ECLI:EU:C:2010:740.

48 Федеральный закон от 27.07.2006 N 149-ФЗ (ред. от 30.12.2020) "Об информации, информационных технологиях и о защите информации". [online]. Available at: <http://www.consultant.ru/document/cons_doc_LAW_61798/38c8ea666d27d9dc12b078c556e316e90248f551/> Accessed: 15.04.2021.

which is understood as a system of legally regulated organizational and technical measures designed to restrict access to certain information distributed on the Internet. In particular, the Act provides that in order to restrict access to sites on the Internet containing information the distribution of which is prohibited in Russia, a single automated information system "Unified register of domain names, site page pointers on the Internet" and network addresses that allow identifying sites on the Internet containing information the distribution of which is prohibited in the Russian Federation (hereinafter – "the Unified Register") is created. This includes domain names and/or page pointers of websites on the Internet that contain information the distribution of which is prohibited in the Russian Federation, as well as network addresses that allow to identify websites on the Internet that contain such information. The Article 15.1. of the Act allows to block access to the network resources containing malicious content, such as, for example, child pornography, drug propaganda, suicide, the sale of alcoholic beverages, betting and gambling, etc. Moreover, this provision is also amended by other types of content distributed on the Internet, such as, for example, objects of copyright and related rights which violate the exclusive rights of their holders; extremist materials and incitement to riot, etc. The relevant provisions on the conditions and procedure for blocking the relevant web resources were amended to the Act, as a result of which it not only significantly expanded, but also changed its role, turning it from a Framework Act serving mainly the departmental or scientific interests of individuals into the basic Act governing the regulation of the Internet.

The above-mentioned Act also permits to include other categories of information in the Unified Register, the distribution of which is prohibited in the Russian Federation, in case if it is recognized as such by the court. The judicial practice shows that the most common example is decisions on blocking access to information of an extremist nature. Although the courts are quite restrictive about the possibility of extending the Article 15.1 to illegal content of other types, which can be shown on the example of the case No. 33-8713 / 2014,[49] where the Moscow Regional Court ruled that the information that is false or discredits the honor, dignity or business reputation of citizens or organizations is not covered by the scope of Article 15.1 of the Law, and Internet websites that disseminate such information cannot be blocked through the Unified Register.

Of course, one can ask on which blocking methods are used in the Russian law-enforcement practice? The answer is that there are several methods of blocking the unlawful internet-content. Firstly, the blocking a website on the Internet that contains prohibited information is possible by domain name or network address (IP address). It is necessary to note, that the blocking by IP address is

49 Апелляционное определение СК по гражданским делам Московского областного суда от 21 апреля 2014 г. по делу N 33-8713/2014. [online]. Available at: <http://base.garant.ru/125667145/> Accessed: 15.04.2021.

the simplest from a technical point of view and requires minimal costs for its implementation by communication service providers. However, it is easily circumvented by changing the IP address of the banned resource and also involves significant risks of blocking websites of bona fide users that are hosted on the same IP address as the banned site. Secondly, it is also possible to block a specific website page on the Internet by its index (URL). As for URL blocking, it has the highest degree of targeting and a low threshold for excessive blocking, but it does not work for secure (encrypted) traffic, and also requires the use of expensive equipment that allows to analyze the contents of transmitted data packets. In this regard, not every telecom operator can use it. It is not considered as a good option because the use of such systems negatively affects the speed of the communication network. Finally, the third option is blocking through DNS domain name servers, that blocks the entire site, including pages of other users and (or) a network of next-level domains. However, it is also has its shortcomings and may also contain resources belonging to bona fide users. This method of blocking is also quite easy to get around by creating a mirror (copy) of the blocked site on another domain. Besides, it should be noted that neither Article 15.1 of the Act nor its by-laws define the implementation technology or the procedure for choosing of the above-mentioned blocking methods. In fact, the analysis of the blocking methods of managing access to Internet resources and recommendations for their use prepared by the Federal Service for Supervision of Communications, Information Technology and Mass Media (Roskomnadzor) are used as a reference point.[50]

As one can see, there is not any absolutely effective method of blocking specified in the Act: the recognition of the limitations of access to a resource by IP-address is a very crude method of blocking Internet sites, since it hits a huge number of bona fide Internet resources. In its turn, the recognition of non-block protected traffic is also an inappropriate method of blocking, because it devalues the business apps and other protected personal data. According to Roskomnadzor, the most optimal method of blocking is "blocking with preliminary allocation by IP addresses and further filtering by URL (IP + URL)".[51]

3.3 China

It is believed that the Chinese system of blocking illegal and malicious Internet content, compared to other countries, is more complex.[52] It should be noted that the Chinese Government began its policy of Internet censorship and the Great Firewall since 1997, when the Chinese National People's Congress passed a

50 See Анализ существующих методов управления доступом к интернет-ресурсам и рекомендации по их применению. [online]. Available at: <http://rkn.gov.ru/docs/Analysys_and_recommendations_comments_fin.pdf> Accessed: 15.04.2021.

51 Ibid.

52 Available at: <https://web.archive.org/web/20170815063930/http://ireport.cnn.com/docs/DOC-1255127> Accessed: 15.04.2021.

legislative act called the Temporary Regulation for the Management of Computer Information Network International Connection. The main purpose of the adoption of such a law was to criminalize "cybercrime", which meant, firstly, crimes directed against computer networks, and, secondly, crimes committed through computer networks. Within the latter category of cybercrime, crimes such as illegal distribution of pornographic materials, usurpation of "state secrets", usage of the Internet to disseminate information deemed to be "harmful to public order, social stability, and Chinese morality" are prescribed. In the future, on the basis of the above-mentioned regulation as well as in order to develop the Internet-blocking policy, The State Council Order No. 292 (hereinafter – the Order)[53] was adopted, which prohibits Chinese websites from linking to foreign media sites or distributing news from such sites without prior approval. At the same time, only those Internet media-publishers who have received the appropriate license from the state information services and the Information Agency of the State Council have the right to distribute media-news in Internet. In this context, the Order provides that all Internet-content providers shall be legally responsible for ensuring the requirements of the legality of any information distributed through the services they provide, in conditions where public officials should have the right of full access to any information, even if such information is considered confidential to such Internet-content providers. It is necessary to add, that the Chinese legislation on Internet censorship still continues to be amended with new legal provisions. For example, in 2020, due to the existing controversy over a new outbreak of Covid-19, The Provisions on the Governance of the Online Information Content Ecosystem[54] came into force, dividing Internet content in this context into the following three categories:

- illegal content, which includes any information that is connected to "dissemination of rumors", "disrupting economic or social order", "subverting the national regime", and "destroying national unity".
- negative content, which includes any information containing "sensationalizing headlines" and any "other content with a negative impact to the online information ecosystem".
- encouraged content, which includes any information that "spreading and explaining Party doctrine", "spreading economic and social achievement" and "other positive and wholesome content".

53 See Decree No. 292 of the State Council of the People's Republic of China. The Measures for the Management of Internet Information Services was passed by the Thirty-First Meeting of the Standing Committee of the State Council and are hereby promulgated for implementation. September 25, 2000. [online]. Available at: <https://www.tandfonline.com/doi/abs/10.2753/CLG0009-4609430504> Accessed: 15.04.2021.

54 The Provisions on Ecological Governance of Network Information Content, as deliberated and adopted at the executive meeting of the Cyberspace Administration of China, are hereby issued and shall come into force on March 1, 2020. See: <https://wilmap.law.stanford.edu/entries/provisions-governance-online-information-content-ecosystem> Accessed: 15.04.2021.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

The Chinese Government itself justifies this approach of the implementation of the right to Internet-content blocking by saying that this policy is related to the implementation of the states right to "Internet sovereignty" as an integral part of the state sovereignty, which will allow to "prohibit the spread of information that contains content subverting state power, undermining national unity [or] infringing upon national honor and interests."[55] Although according to the scholars of the UC Davis and the University of New Mexico, the Internet-censorship in China is "a „panopticon" that encourages self-censorship through the perception that users are being watched, rather than a true firewall"[56]. Of course, one cannot disagree with this view, since the obligation to censor the unlawful and negative Internet-content in a natural way creates a frightening effect for Internet service providers, and in this regard, such companies often even censor their own messages in order to avoid possible legal and economic liability. Moreover, the law provides for legal liability of an Internet service provider even if its users violate the requirements of the law, in connection with which service providers have assumed the burden of editing the content of their users. In this framework many major Internet platforms, at the request of the Chinese Government, even have developed sophisticated self-censorship mechanisms by investing powerful artificial intelligence algorithms to control and block illegal online content in accordance with the law.

3.4 Japan

In Japanese law the application of the policy of geo-blocking remains unresolved and ambiguous, and still requires the development and application of timely measures to combat such an illegal and widespread phenomenon as Internet piracy. It should be noted that the lack of a unified approach to geo-blocking policy is due to the fact that Article 21 of the Constitution of Japan declares that: "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated".[57] This provision is further reflected in Article 4 of the Telecommunications Business Act, according to which: "(1) The secrecy of communications being handled by a telecommunications carrier shall not be violated; (2) Any person engaged in the telecommunications business shall, while in office, maintain the secrets of others that have come to be known with respect to communications being handled by the telecommunications carrier. The same shall apply even after this person's

55 See BRISTOW, Michael. *China defends internet censorship.* [online]. Available at: <http://news.bbc.co.uk/2/hi/8727647.stm> Accessed: 15.04.2021. See also: <http://www.china.org.cn/government/whitepaper/node_7093508.htm> Accessed: 15.04.2021.

56 China's Eye On The Internet. *ScienceDaily*, 12 September 2007. [online]. Available at: <www.sciencedaily.com/releases/2007/09/070911202441.htm> Accessed: 15.04.2021.

57 The Constitution of Japan. [online]. Available at: <https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html> Accessed: 15.04.2021.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

retirement from office".[58] Taking into account the existing legal problems and at the same time realizing the serious consequences of Internet piracy, the Japanese legislature, in order to tighten copyright control, adopted a revised Act on combating online piracy.[59] This law is aimed at prohibiting the illegal downloading of various academic and literary texts, Japanese manga, magazines, audio- and videoclips, as well as other copyrighted Internet content. It should be noted that such a policy for the Japanese legislator was a forced measure, since the number of various pirate sites increased, whose users had open access to copyrighted Internet content, subsequently causing the authors of such content to suffer millions of dollars in losses. Although the law has tightened its control over copyright protection, it also allows for the exclusion of legal liability for so-called "minor offenses" and "special instances" on the Internet, for example, in the case of downloading only two or three pages from a novel or academic texts containing several hundred pages. Despite the fact that the Act prohibits the illegal use of the Internet content protected by copyright, legal loopholes still remain. Firstly, this is due to the fact that many operators of pirate sites use servers abroad, where the Act will not be able to work properly and effectively; secondly, the law cannot allow the implementation of a policy of blocking sites, since this will require access to subscriber data, which in turn will be considered as a violation of the confidentiality of communication. It is the latter circumstance that remains one of the most problematic in Japan's copyright protection legislation, although some experts tend to believe that it is the site blocking policy that can serve as the "only effective way to prevent massive online infringement in a borderless internet".[60]

4. Closing Remarks

From the point of view of EU law development, it is laudable that the EU has adopted the Geo-blocking Regulation within the framework of the DSM. It is considered justified and up-to-date that the Regulation introduced a review clause two years after its entry into force. This review has been slightly postponed by the COVID-19 pandemic, but still the report was made public recently – in November 2020. Due to the virus, the digital sphere has received more attention than before, so the revision building on the review will certainly take into account significantly more experience and good practices to be shared than previously expected. During the follow-up review, we specifically recommend

58 Telecommunications Business Act Law number: Act No. 86 of 1984. [online]. Available at: <https://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Resources/laws/TBL/TBL-index.html> Accessed: 15.04.2021.

59 MAXWELL, Andy. *Japanese Government Approves New Bill to Criminalize Manga Piracy*. [online]. Available at: <https://torrentfreak.com/japanese-government-approves-new-bill-to-criminalize-manga-piracy-200311/> Accessed: 15.04.2021.

60 See STEPHENS, Hugh. *Site Blocking in Japan—A Call for Action.* November, 2017. [online]. Available at: <https://hughstephensblog.net/2017/11/20/site-blocking-in-japan-a-call-for-action/> Accessed: 15.04.2021.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

expanding the definition of the terms used by the Regulation, such as e.g. the definition of "content", "content restriction" and "business", and to clarify the already defined concepts.

At the same time, the legislation seeks to approximate Member States' legislation in order to make the functioning of the internal market more efficient, to ensure compliance with the legal behaviour of businesses and to resolve certain problems arising from the apparent conflict of consumer residence as personal data and the apparent opposite of the economic interests of traders. In our personal experience, a number of obstacles have been removed, and we meet less and less often with the inscription "This content is not available in your country".

The phenomenon of geo-blocking is global. The scope of the Regulation is extraterritorial, but it is only a one-way solution. We understand that traders from third countries who wish to provide services on their interfaces in the EU must give access to all EU citizens regardless of their location. However, there is no such restriction for third countries outside the EU within the Regulation. This is obvious as the EU cannot adopt legislation for third states, thus the only solution is to adopt extraterritorial laws within the EU.

Although the Regulation was adopted in the previous Commission cycle, it also fits well with the priorities of the current Commission's programme, namely to promote a European way of life and to the concepts of a Europe fit for the digital age, complemented by human-centred economy and society. Therefore, in our opinion, great emphasis will be placed on conducting the review of the Regulation.

The Commission's priorities highlight the economic and human importance of consumers. Geo-blocking, as one of the new forms of discrimination, may be least noticeable, but more significant. It does not distinguish buyers on the basis of their place of origin, but on the basis of their whereabouts.

To sum up, in our view, the EU is in an advanced situation regarding the legal readiness for the digital era compared to other actors, such as the USA,[61] the Russian Federation or China, or other supranational organizations, such as the Eurasian Economic Union (EAEU). In addition, the level of protection ensured in consumer rights and IP law is higher in the EU than in the abovementioned countries and organizations. Moreover, the EU Commission introduced the concept of promoting our European way of life, which is strongly interlinked to the digital readiness and skills among other areas aiming at upgrading the EU citizens to a common ground. This raises attention to the importance of the equal treatment of consumers, regardless of their location.

61 See: TRIMBLE, Marketa. *Geoblocking, Technical Standards And The Law*. [online]. Available at: <https://pdfs.semanticscholar.org/4aba/7b51ac63ae3de8775bda97cee6f4860faf8c.pdf> Accessed: 15.04.2021.

There is still a lot to do in the next periods; however, different economic levels also should be respected in this framework. Until the economic advantages – such as the application of varying prices –on the basis the location of consumers, e.g., in the field of audiovisual services are higher than the disadvantage of the unification, we accept that unification is not necessary. The reason behind the distinguishment is the difference between the social and financial circumstances of the consumers residing in different Member States and not their location. Unequal should not be treated equally, but rather notice should be taken of their unequal status, which should be compensated for. The location is a circumstance that builds on the presumption that countries of lower-income rates may deserve lower prices for the same services than those countries where the salaries are significantly higher. Of course, the issue is complicated as it would be hard to link this issue with monetary aspects as the EU has no common minimum wage, and the social questions belong to the competence of the Member States. Nevertheless, we assume that the reason for altering prices originates in the market demand that strongly interrelates with the salaries of the consumers in the respective states.

Still, we presume and expect the fast development of the legal field of geo-blocking as the technology develops quickly. The legal framework should follow it, or – it would be better – to keep the pace with that of digital (r)evolution. The CJEU might answer more and more cases related to geo-blocking; therefore, the case-law also has a great chance to evolve; by that, the legislation may also fasten up.

On the one hand, it is a paradox that the EU as a generator of the single market intends to abolish all the obstacles from the way of the free movement and, at the same time, the consumers' interest sometimes is not to be treated equally (e.g., in the audiovisual aspects) in order to discriminate positively those who are in significantly different situation.

The coin in this case has more than "two sides". All the interests should be harmonized on the basis of economic development and social progress, besides respecting individual rights, too. It is a notoriety that socio-economic contexts predate and influence the actual anchoring and enforcement of human rights. The role of the CJEU might be beneficial in search of proportionality and in the elaboration of checks and balances of this field.

The role of third countries is also an interesting question related to geo-blocking. How can both the geo-discrimination be abolished and the consumers be still protected, at the same time?

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Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601