

# Regulation on Unjustified Geoblocking: A Hardly-Existing Market Facing a Hardly-Existing Challenge?<sup>1</sup>

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*The article presents a hypothesis that the scope of the regulation on unjustified geoblocking and its provisions address the challenges which had been previously identified under the term geoblocking to only a very limited extent. It can be interpreted as the result of the semantic shift concerning what is understood as geoblocking, which can be observed in European Union documents, leading to the exclusion of copyright protected content from the scope of the regulation. The article shows this process and the consequences of adopting such a limited approach towards geographic discrimination within the digital single market for the provisions of the regulation on unjustified geoblocking. Moreover, the article presents the alternative to the anti-geoblocking regulation, namely the provisions of the regulation on cross-border portability of online content services in the internal market. It shows how the concept of portability may actually create borders in the digital single market instead of removing them. The article concludes with a section which focuses on considering whether a regulation on geoblocking might be perceived as a tool to combat hardly-existing obstacles to a hardly-existing European digital single market.*

*Keywords: geoblocking, portability of digital content, digital single market*

## 1. Introduction

The presence of the term ‘geoblocking’, or ‘geo-blocking’ – as both forms appear in the European Union documents and legal acts – can be quite easily traced back. It emerged no sooner than in a 2012 Communication from the Commission *On content in the Digital Single Market*,<sup>2</sup> only to disappear for three years, and return in a number of documents in 2015. Since then, it seems to have paved its way through the EU law. The number of EU documents which mention the term ‘geo-blocking’ peaked in 2016, with 51 acts mentioning it.<sup>3</sup> In the same year unjustified geoblocking achieved a status of a phenomenon which was proposed to be regulated by what, two years later, became the regulation 2018/302 on unjustified geoblocking (hereinafter the regulation on unjustified geoblocking).<sup>4</sup>

The concept of implementing a regulation on unjustified geoblocking may be perceived as the acknowledgment of the significance of avoiding discrimination on the basis of nationality in the Internet within the EU. However, even though geoblocking certainly became an inherent element of discourse surrounding the realization of the digital single market for Europe, the actual understanding of this term in EU law is still debatable. On the one hand, from the legal perspective, it has

<sup>1</sup> The research was financially supported by the grant for young researchers on the Faculty of Law and Administration of the University of Warsaw.

<sup>2</sup> European Commission, *Communication from the Commission. On content in the Digital Single Market*, COM/2012/0789 final.

<sup>3</sup> Calculation on the basis of eur-lex.europa.eu repository.

<sup>4</sup> EP and Council Regulation 2018/302, OJ 2018 L 60/1.

to be noted that the regulation itself does not define geoblocking. Therefore, its precise meaning has to be interpreted from the provisions of the regulation. On the other hand, from the perspective of the common understanding of this term, geoblocking practices usually refer to the situation when a customer cannot access certain content due to the copyrights related restrictions.

The clash between these two perspectives on the meaning of the term geoblocking could be illustrated by a brief promo-video realised as a part of the campaign promoting the regulation on unjustified geoblocking. It was meant to present obstacles which are experienced by the customers trying to purchase goods from other member states. The MEP and rapporteur on the geoblocking regulation, Róża Thun, prepared and published a video showing a customer trying to purchase a ring. Every click on a website is answered with a pop-up window. The information on the screen says that the price is higher for the customer from his country, that access to the website and the payment method are unavailable from his location etc.<sup>5</sup> Finally, the customer somehow manages to order a ring. However, he is forced to pick up his order in other member state, due to delivery limitations. The MEP comments: ‘This is exactly this infelicitous geo-blocking’. In the light of what is the usage of the term geoblocking in its common understanding, it seems reasonable to ask: but is it, really?

The video illustrates a problem which seems to have appeared between the first time the term geoblocking emerged in EU documents, and the moment in which the regulation on geoblocking was adopted: what seems to have disappeared in the process of regulating unjustified geo-blocking is the initial – and still the common – meaning of this term. It is hard to say if the customer from the video is actually satisfied with the fact that he managed to order the selected item, or is dissatisfied with the fact that he has to drive to another member state to pick it up. However, as the video certainly shows, a semantic shift has emerged in terms of understanding what geoblocking practices are. Between the first appearance of the term in EU documents and the adoption of the regulation of unjustified geoblocking, the process of defining practices of geographical discrimination seems to lead to the removal from the scope of their definition the feature most commonly associated with geoblocking issue, namely the access to digital copyright protected content.

In the article I present a hypothesis that the scope of the adopted regulation and its provisions only to a very limited extent address the challenges which had been previously identified as geoblocking. For this reason, their impact on the creation of the digital single market seems to be questionable. In order to present my argument, in the second section of the text, I show how the meaning of the term geoblocking has been changed and what are the consequences of adopting an approach such as the one implemented in the regulation on geoblocking. In the second section I present the scope of the obligations which were implemented in the regulation on unjustified geoblocking. In the third section, I attempt to present the regulation 2017/1128 on cross-border portability of online content services in the internal market (hereinafter the regulation on cross-border portability)<sup>6</sup> as an alternative means to approach geoblocking practices. I will illustrate how the solution adopted in this regulation may actually create borders in the digital single market, instead of removing them. The article ends with a concluding section in which I try to consider whether a regulation on geoblocking might be perceived as a tool to combat hardly-existing obstacles in the hardly-existing European digital single market.

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<sup>5</sup> Róża Thun, ‘Zakupy w internecie - Róża Thun #geoblokowaNIE’ (Youtube, 11 December 2016) <https://www.youtube.com/watch?v=rPgc8qy6muU> (30 November 2018).

<sup>6</sup> EP and Council Regulation 2017/1128, OJ 2017 L 168/1.

## 2. Geoblocking: Meaning Lost While Regulating?

This section of the article aims to present the process in EU documents and law, by which the initial meaning of the term ‘geoblocking’ has changed. When it first appeared in the Commission’s communication *On content in the Digital Single Market*, it was used as an example of practices which impede cross-border access to content and the portability of services. The examples which were directly mentioned in the Communication were cloud-computing, cloud-stored content and services linked to these technologies. Moreover, the Communication referred to licensing and its territorial character:

*‘Both multi-territory and single territory licensing is possible, depending on the sector, the service provider and the rights holder. However, distribution of content is often limited to one or a few Member States (e.g. using geo-blocking), with service providers (online platforms) or rights holders electing to impose cross-border sales restrictions’.*<sup>7</sup>

The term geoblocking appears in the Communication as a description of set of tools which are used in order to limit the distribution of content. Evoking geoblocking in the context of territorial licensing indicated its link to copyright protected works. It seems reasonable: intuitively and on the basis of an average internet-user experience, geoblocking practices occur when searching for foreign content on Youtube. The communication names online platforms as service providers and rights holders as subjects responsible for imposing geographical restrictions. This stresses the perspective which was initially adopted on the phenomenon of geoblocking as linked to the customer’s experience of limited accessibility of creative content.

However, this intuitive meaning of geoblocking was changed when the Commission put e-commerce under scrutiny by, among others, ordering research which was supposed to define the forms and scale of geoblocking in the digital single market. Research was summed up by a study almost 200 pages-long; *Mystery shopping survey on territorial restrictions and geo-blocking in the European Digital Single Market*.<sup>8</sup> The report refers to copyrights once, as the authors claim that: ‘Since geo-blocking in digitally delivered media content can usually be justified by copyright, the study focused only on tangible goods and online services to be used offline’.<sup>9</sup>

Taking into consideration the fact that initially geoblocking is mentioned in strict relation to delivering digital content and to territorial licensing, it seems suspicious to up front resign from the analysis which would actually consider these aspects of the phenomenon. Technically, as presented in the next section, the challenges of conflicting interests between the rights holders and consumers in terms of limiting access to copyright protected content were addressed by a separate regulation on cross-border portability (analysed below). It does not change the fact, that focus on tangible goods and services available offline seems to be not an obvious choice when conducting preliminary research on geoblocking, which was supposed to support creating an evidence-based regulation.

What have been subjected to the research were the practices, which have become a new meaning of the term ‘geoblocking’. Firstly, the denial of access to a website to which the customer sought an access when shopping online. Secondly, automatic re-routing, when a customer is without his or her consent redirected to another version of the website. Thirdly, changing the terms and conditions which refer to the transaction on the basis of the customers location. Last but not least, changing prices depending on the customer’s location. Those categories have been translated into a research issues, namely practices related to access (including denial of access and automated rerouting), reg-

<sup>7</sup> European Commission, *Communication from the Commission. On content in the Digital Single Market*, COM/2012/0789 final.

<sup>8</sup> GfK Belgium PS for European Commission, *Mystery shopping survey on territorial restrictions and geo-blocking in the European Digital Single Market. Final Report*, Luxembourg 2016.

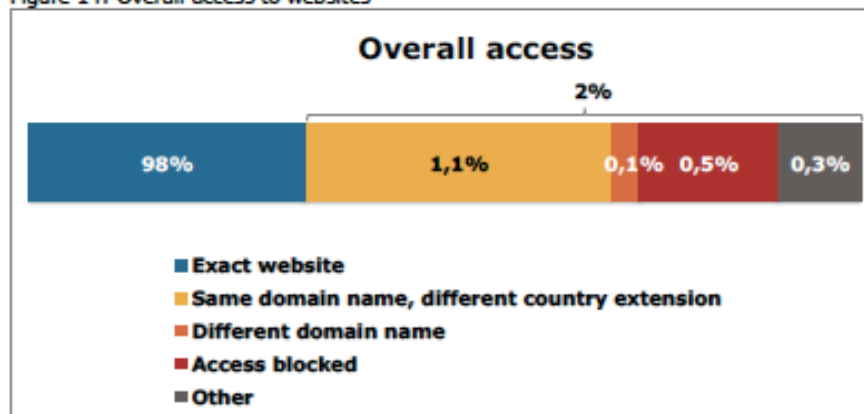
<sup>9</sup> *Ibid.*, p. 9.

istration, delivery and payment. Such distinctions between the subsequent steps which take place during the transaction seem to be problematic, as e.g. problems with registration were often caused by providing a delivery address in a foreign country. Therefore, it seems not obvious whether they should be classified as a separate issue, or maybe a challenge which results from the limited number of countries to which a retailer sales his or her goods. However, the classification introduced in the report is the one which has been repeated in the report from the European Commission’s sector inquiry into e-commerce:

*‘However, it is frequently not possible for consumers to make cross-border online purchases because retailers refuse to sell to customers abroad, for example by blocking access to websites, re-routing customers to websites targeting other Member States or by simply refusing to deliver cross-border or to accept cross-border payments. These measures are known as “geo-blocking”’.*<sup>10</sup>

What is also striking in the report – except for the way that geoblocking was defined and therefore, what was subjected to the research – is how collected data is presented. The charts are often structured as though they were meant to exaggerate the presence of discriminatory geoblocking practices ongoing on the internal market. The chart below illustrates a peculiar choice considering the scale which has been implemented for data visualization. Even though the overall result of the survey, which relates to access to websites, indicate that not more than 2% of websites could not have been instantly accessed by users from the locations indicated by the researchers<sup>11</sup>, a disproportionately long part of the chart represents this result. When screening the report, one may get an impression, that collected data unambiguously show dramatic level of unjustified discrimination of customers from other member states on a European digital market.

Figure 14: Overall access to websites



Source: Q11 - Please RIGHT CLICK on the website link and open it in a new **INCOGNITO** tab. If you are not sure how to open an incognito tab, please refer to the briefing instructions. When you clicked on this link, were you sent to the exact website? N = 10537, weighted data

Print screen from the GfK Belgium PS for European Commission,

*Mystery shopping survey on territorial restrictions and geo-blocking in the European Digital Single Market. Final Report, Luxembourg 2016, p. 48*

Moreover, if one was to trust if not the charts, but the numbers presented in the above-described mystery-shopping survey, we may be disappointed with the actual frequency of some of what is described as geoblocking practices. Over 98% of the websites could be accessed without any sub-

<sup>10</sup> European Commission, *Report from the Commission to the Council and the European Parliament. Final report on the E-commerce Sector Inquiry*, Brussels, 2017, COM (2017) 229 final, p. 12.

<sup>11</sup> As explained in the report, the command to open the website in an incognito tab was a precautionous measure to block any other sources of the customer’s location identification except the location indicated by IP number selected through the VPN usage.

stantial problems,<sup>12</sup> 92% of websites do not require the user to register prior to purchase,<sup>13</sup> 5% of the websites showed higher price for cross-border purchases prior to the registration, and 13% of the websites showed higher prices for cross-border purchases after the registration.<sup>14</sup> What appears to be the most common and simultaneously serious problem are delivery restrictions: 26.4% of pages did not offer delivery except within the country of the retailer.<sup>15</sup>

It shows that the way of presenting the outcomes of the research is not irrelevant. Especially in this case, the impact of the study on the shape of regulation on unjustified geoblocking is very clear. The approach adopted in regulation on unjustified geoblocking strongly resembles the conclusions of the study *Mystery shopping survey on territorial restrictions and geo-blocking in the European Digital Single Market* as it addresses discrimination in regard to access to interfaces (Art. 3), certain elements of discriminatory practices in regard to access to goods and services (Art. 4) and discrimination for reasons related to payment (Art. 5). While not providing the legal definition of geoblocking, its scope illustrates what is understood by this term. Interestingly, it mentions copyright protected works, as a potential subject of broadening the scope of regulation on unjustified geoblocking due to a planned review which is supposed to take place by 23 March 2020.

It may be noted that the meaning of the term ‘geoblocking’ on the one hand is understood as a broader range of situations than it seemed initially. According to the regulation on unjustified geoblocking it includes practices which may occur in e-commerce considering both goods and services. Due to the inclusion in the regulation provision on the obligatory review in regard to a possible broadening of the scope of the regulation to the services, the main purpose of which is, providing an access to copyright protected works, it seems that the initial meaning of the term is not entirely lost. On the other hand, it must be stressed that the term has not been initially used to describe the practices, which it does now. Already by 2013, a study *Discrimination of Consumers in the Digital Single Market* described: ‘three practices which discriminate against groups of consumers are common: refusal to sell, automatic re-routing, and the unjustified application of different terms and conditions’.<sup>16</sup> However, they were not described as geoblocking. Still, the regulation on unjustified geoblocking may have a very limited impact on those phenomena as well as on the retailers’ willingness to participate in cross-border e-commerce: from the perspective of the entrepreneur, it seems not to facilitate conducting business on international scale. It actually imposes more obligations for traders who would like to open their economic activities to customers from other member states, which are described in detail in the following section.

### 3. The Missing Pieces in the Regulation’s on Unjustified Geoblocking Provisions

The actual scope of customers’ rights (or: sellers’ obligations) which are implemented in the regulation on unjustified geoblocking is quite limited. Firstly, according to Art. 3 of the regulation on unjustified geoblocking, the trader is obliged to ensure that the customer is not blocked in terms of accessing the website of the retailer and that the customer is offered access to the version of the website that he or she was seeking access to (no automatic re-routing).<sup>17</sup> This means that *e.g.* when a customer from Slovakia wants to access the German version of the website, there should occur no automatic re-routing to the Slovakian version.

Secondly, as stated in Art. 4 of the regulation, the retailer should not apply different general conditions of access to goods or services, for reasons related to a customer’s nationality, place of resi-

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<sup>12</sup> GfK Belgium PS for European Commission 2016, p. 48.

<sup>13</sup> *Ibid.*, p. 77.

<sup>14</sup> *Ibid.*, p. 102.

<sup>15</sup> *Ibid.*, p. 113.

<sup>16</sup> European Union, *Discrimination of Consumers in the Digital Single Market*, 2013, IP/A/IMCO/ST/2013-03, p. 27.

<sup>17</sup> EP and Council Regulation 2018/302, OJ 2018 L 60/1, Art. 3.



dence or place of establishment in three cases enumerated in the regulation: (1) when the customer seeks to buy goods from a trader and those goods are delivered to the customer's location or goods are collected at a location on which both sides of the transaction agreed upon on the basis of the general conditions of access; (2) in cases of providing electronically supplied services except for the services which main feature is provision of access to, and use of, copyright protected works. Such scope of the regulation excludes copyright protected content, which makes it hard to understand what kind of electronically supplied services may be actually subjected to the regulation.<sup>18</sup>

Finally, the third case included in the regulation on unjustified geoblocking is the provision of services other than electronically supplied services on the territory of a trader's member state.<sup>19</sup> Thirdly, traders are obliged to ensure equal access to the methods of payment for the customers, without any discrimination depending on their nationality, place of residence or place of establishment. However, the seller may decide upon in which currencies he or she accepts the payments.<sup>20</sup>

When confronted with the results of the mystery shopping study presented above, the provision of the regulation seems to address hardly-existing challenges. Firstly, blocking the access to websites and re-routing practices occurred in less than 2% of situations. Secondly, the differentiation of the general conditions of access to goods and services – concerning mostly the price of goods or services – was identified in 5% (prior to registration) and 13% (after the registration) of cases. However, as the regulation allows offering different general conditions of access, including net sale prices, for the customers from different member states on a non-discriminatory basis,<sup>21</sup> its impact on those practices may be limited. The differentiation would have to be examined on a case-by-case basis in order to determine whether it can be justified by *e.g.* varying legal conditions between the member states.

It is too soon to try to determine the impact of the regulation on unjustified geoblocking on cross-border e-commerce in the EU. However, what can be drawn from the analysis presented above are the areas which are excluded from even the possible impact of adopting this legal act. Focus on goods and services which are not linked to copyright protected works is an effect of a shift which occurred in terms of understanding what geoblocking practices actually are. According to the adopted approach, it is rather about the customer trying to purchase an item, than about the customer trying to watch a Youtube video. The question which I try to answer in the next section is whether such an approach has been complemented by the adoption of other means which could facilitate access to copyright protected content across the EU: which seems to have been the initial goal of combating geoblocking on the European digital single market.

#### **4. Do the Best Intentions in Digital Single Market Go Awry? Traps of Portability**

The reasons for presenting the links between geoblocking practices and the regulation on cross-border portability are the following: as presented above, the regulation on unjustified geoblocking does not fully address the challenges resulting from the territoriality of the copyrights regime as an obstacle for creating the European digital single market. However, the regulation on cross-border portability provides, to a certain extent, a solution which may be perceived as a way for the re-interpretation of territoriality. Therefore, it may serve as a tool for coping with geographic discrimination in terms of providing services which offer an access to copyright protected works. Therefore, it deserves to be included in the analysis as an alternative means for combating limited access to content of copyright protected works throughout Europe.

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<sup>18</sup> The candidates seem to be *e.g.* hosting services or electronic communication services.

<sup>19</sup> EP and Council Regulation 2018/302, OJ 2018 L 60I/1, Art. 4.

<sup>20</sup> EP and Council Regulation 2018/302, OJ 2018 L 60I/1, Art. 5.

<sup>21</sup> *Ibid.*, Art. 4.

What regulation on cross-border portability does is altering the perspective on the access to copyright protected content in two aspects. Firstly, instead of focusing on ‘geoblocking’ it focuses on ‘portability’. This is a vital shift: subjected to the regulation is not an access to copyright protected works across the EU irrespective of borders, but the access to content to which the customer purchased access in his or her place of residence. As a result – which is the second aspect of the perspective adopted in the regulation on cross-border portability – the provisions lead to change in the understanding of what territoriality is. Instead of being perceived as linked to the territory on which the customer is present at the moment of seeking access to the service, it is linked to the customer’s place of residence. An example of the approach adopted in the regulation may be following: if the customer from Slovenia purchases a subscription to video-on-demand platform in Slovenia, he or she should be allowed to access its content irrespective of the place in which he or she currently is. Therefore, according to the regulation on cross-border portability, the offer presented to the customer during his or her holiday in Italy should be the one to which he or she purchased access in Slovenia. As briefly described in the regulation on cross-border portability:

*‘This Regulation introduces a common approach in the Union to the cross-border portability of online content services, by ensuring that subscribers to portable online content services which are lawfully provided in their Member State of residence can access and use those services when temporarily present in a Member State other than their Member State of residence’.*<sup>22</sup>

The regulation on cross-border portability overturns, to a certain extent, the traditional understanding of territoriality in the copyrights protection regime. However, it does not actually address the issue of geoblocking, as it does not change the fact that territoriality of copyrights may lead to limitation of access to digital content for customers in member states. Moreover, it may be perceived as actually strengthening the borders within the digital single market instead of removing them. The fact that the content to which the customer has access when travelling across the EU remains as if he or she never left his or her country, could be interpreted as a limitation for experiencing the variety of copyright protected works offered in various member states. The underlying assumption that one prefers to use the offer to which one has bought access in his or her place of residence, seem to recreate the boundaries in the digital space, while the goal of the digital single market for Europe strategy was to remove them.

As such, one could wonder if actually the provision of the regulation on cross-border portability does not create space for geoblocking practices in their original meaning strictly linked to copyright protected content. It may cause differentiation of the offer presented to customers in a member state, depending on their nationality, place of residence or place of establishment. If the Slovenian customer from the example described above would like to use the Italian offer of the platform during his holidays, the access to it would be – according to the regulation – blocked. The intention to facilitate the customer’s usage of digital content within the EU became a source of two-edged provisions. On one hand, it changes the understanding of territoriality in terms of copyright protected digital content: individual becomes a ‘carrier’ of a territory. On the other hand, it somehow re-creates national boundaries in the digital space in cases when an individual has physically crossed them.

## 5. Conclusions

In the article I argue that the recently adopted legal acts: the regulation on unjustified geoblocking and regulation on cross-border portability might be perceived as tools to combat hardly-existing obstacles in a hardly-existing European digital single market. By this statement I do not try to sug-

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<sup>22</sup> EP and Council Regulation 2017/1128, OJ 2017 L 168/1, Art. 1.

gest that the borders between the EU member states in digital space do not exist: on the contrary. I claim that their presence remains not having been tackled or maybe having even been strengthened by the adopted regulations, the aim of which was – technically – to remove them. The legal means adopted by the EU and the issues which they address are focused on obstacles which are hardly present in the web, such as, for example, blocking access to certain websites on the basis of customer's nationality, place of residence or place of establishment. Simultaneously, the areas in which the geoblocking practices seem to be the most present, such as services which are focused on providing the access to copyright protected works, are left outside of the scope of regulation.

The fact that the most commonly experienced geographical discrimination has been left outside the regulation is an argument for the second part of my hypothesis: the European single digital market remains a hardly-existing phenomenon. The sources of such a state are not only linked to the uniqueness of the digital sphere, its rapid development and the need to catch up when trying to regulate such a fast-changing environment. They are also linked to the shift which takes place concerning the character of the obstacles which impede intra-EU trade: the digital economy grows in services, whereas the freedom of the services provision in the EU remains chaotic and fragmentary.

The current situation concerning the digital single market reveals a kind of paradox: even though technically new opportunities offered by the development of e-commerce sales channel and new business models should allow the cross-border trade to boost, it seems not to have a major influence on the growth of the European digital market. Even though digital platform businesses are easily scaled-up and their potential lies in the huge number of users, those opportunities are rarely used by the European companies. The question which remains open is whether initiatives such as those described above, concerning unjustified geoblocking and cross-border portability of digital content, anyhow support change in this matter. As I attempted to present in this article: there may be severe doubts as to whether they do.