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#### NOTE

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

## I. INTRODUCTION

1. On 25 May 2016, the Commission submitted a proposal accompanied by an impact assessment, for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (2016/0152(COD)). The text, which is based on Article 114 of the Treaty, was presented as part of the "e-commerce package" containing also legislative proposals on cooperation between consumer protection authorities and cross-border parcel delivery services.

2. In the European Parliament, this proposal was referred to the Internal Market and Consumer Protection (IMCO) Committee which appointed Ms. Rosza Thun und Hohenstein (EPP/PL) as rapporteur. The IMCO Committee voted its report in April 2017.

## II. STATE OF PLAY

3. On 28 November 2016 the Council (Competitiveness) agreed a general approach<sup>1</sup> and mandated the Presidency to begin negotiations with the European Parliament with a view to reaching an agreement in first reading. The EP amendments were examined by the Working Party on Competitiveness and Growth on 3 May 2017.
4. The first informal trilogue was held on 18 May 2016 and on 7 June Coreper gave the Presidency a revised mandate for the second informal trilogue which was held on 13 June. At this trilogue the EP and the Presidency assisted by the Commission further clarified some issues and also identified the main outstanding political elements including possible compromises. The Presidency debriefed COREPER about the outcome of the second trilogue on 14 June 2017.
5. On the basis of the second trilogue and a technical meeting with the European Parliament and Commission organised on 14 June, the Presidency presented on 7 June a compromise text to the Working Party (attachés). Taking into account the delegations' comments as well as a further informal technical meeting organised on 21 June, the Presidency elaborated a global compromise text, as set out in document 10337/17. The Presidency is asking Coreper for a revised mandate to negotiate with the Parliament in the third informal trilogue of 21 June 2017, on the basis of this new compromise text.

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<sup>1</sup> 14663/16

### III. REVISED MANDATE

6. Delegations will find in the 4th column of document 10337/17 an overall compromise package suggested by the Presidency with a view to reaching a preliminary agreement with the EP at the forthcoming trilogue. The Presidency invites delegations to focus on the three main issues highlighted below which have been identified by both the EP and the Presidency as the building blocks for reaching an agreement. In this respect it should be noted that the Presidency proposals have to be seen as a package since they represent a delicate and fine balance of the different interests. Furthermore, the Presidency would like to draw the attention that the compromise package also contains compromise proposals on other politically less sensitive issues.
7. The key political issues are:
  - a) **Scope - applicable law (see in particular Article 1, paragraph 5, Article 4, paragraph 1b (new) and recital 21a)**

With regards the politically sensitive question of applicable law, the EP would like to give further assurances to traders, in particular in the post-contractual phase. To this end, the Presidency proposes to add the text to article 1 paragraph 5, to address the instances when the trader provides information and assistance to the consumer, when this takes place subsequent to the conclusion of the contract resulting from the trader's compliance with this Regulation. In this context article 4 paragraph 1b (new) as well as recital 21a have also been amended. The proposed text under article 1 paragraph 5 is practically identical to the text presented to COREPER on the 7 June, in which the Commission and the Council Legal Services, upon the request of delegations, clarified that this text does not impinge upon the Rome 1 and the Brussels 1 Regulations, since it pertains to the post-contractual phase.

- b) **"Electronically supplied services the main feature of which is the provision of access to and use of copyright-protected works or other protected subject matter" (see in particular Article 4 paragraph 1 (ba), Article 9, paragraph 2, Article 11, paragraph 3 and recital 19a)**

At the second trilogue and the subsequent technical meetings it became clear that the inclusion of non-audio-visual copyright content services is a "must" for the EP to strike a deal. Furthermore, the Commission favoured such approach since a recent study conducted by the Joint Research Centres<sup>2</sup> provides more facts and evidence of this product category. Knowing about the political sensitivity of such inclusion for some delegations, the Presidency proposes to include non-audio-visual copyright content services, that is, e-books, games or software with the exception of music, and this after a transitional period of two years after the entry into force of this Regulation. The Presidency believes that such transitional regime would give the industry sufficient time to adapt and would not have a detrimental effect on consumers. Moreover, the Presidency would like to stress that music is explicitly not included as the inclusion would only concern e-books, games or software.

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<sup>2</sup> see <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc106520.pdf>

c) **Agreements on passive sales (see in particular Article 6 and recital 26)**

On "Agreements on passive sales" the EP follows the Commission proposal, so that all contractual agreements imposing on traders an obligation not to engage in passive sales should be considered as violating the non-discrimination obligation and be considered automatically void. The Council on the other hand agreed on a text to keep the exemptions permitted by Union competition law, so that, in situations where the traders are bound by an agreement with their supplier requiring them to restrict their passive sales in accordance with Regulation (EU) No 330/2010, the obligations to traders established by the geo-blocking proposal shall not apply. Given that the two positions are diametrically opposed, the Presidency proposes to delete this article. However, in recital 26 it is made clear that this Regulation, and in particular its provisions on access to goods or services, should not affect agreements restricting active sales within the meaning of Regulation (EU) No 330/2010.

#### **IV. CONCLUSION**

8. The Presidency invites Member States to be as flexible as possible with a view to agreeing to an overall compromise at the third informal trilogue with the European Parliament on the basis of the compromise package set out in the forth column of the document 10337/17.
9. COREPER is invited to agree to all the elements of the Presidency compromise text as set out in 10337/17 as the mandate for the Presidency in view of the third informal trilogue with the European Parliament.

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