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**REVISITING THE EUROPEAN GEO-DISCRIMINATION
LEGAL FRAMEWORK: ESTONIAN CONSUMER
PERSPECTIVE**

Master's thesis

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I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

The document length is words from the introduction to the end of the conclusion.

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ABSTRACT

Due to the evolving nature of technology and discriminatory practices becoming more complex, anyone could be the victim of online discrimination and not even know it. There is a wide range of topics that are relevant to discussion in the context of online consumer discrimination. This thesis, however, focuses primarily on online consumer discrimination based on nationality or place of residence, also known as geo-discrimination. This master's thesis examines geo-discriminatory trading practices within the Digital Single Market with a specific focus on Estonian consumers. Considering that an average person may have a hard time manoeuvring through all of the EU legal frameworks to figure out which regulation to refer to in the case of geo-discrimination, it is critical to raise awareness of the topic because they are often the most affected. The study includes a thorough literature review and analysis of relevant European directives and laws. It explores key regulations such as Competition Law, Consumer Protection Law, General Data Protection Law, Geo-Blocking Regulation, and Services Directive. Additionally, it investigates Estonian consumer protection, offering policy recommendations and potential solutions to tackle geo-discrimination in online commerce. This research aims to provide consumers, policymakers, academics, and practitioners with a deeper understanding of online consumer discrimination based on nationality. It also provides practical recommendations to address this prevalent issue.

Keywords: online consumer discrimination, consumer differentiation, geo-discrimination, price-discrimination, e-commerce, consumer protection

INTRODUCTION

Over time, internet access and adoption have rapidly increased, leading individuals to dedicate an increasing amount of their time to online interactions. This results in a significant user base, a lot of data, numerous data processors, and a thriving community of digital buyers. By buying online, consumers may be able to select from a wider range of goods and services, thereby taking advantage of more competitive offers, and making more favourable bargains. Additionally, purchases through cross-border e-shops have become popular due to their accessibility and convenience, which makes it possible for comparison shopping and ordering services from anywhere in the world. However, with this increase in online activity comes an increase in the possibility of online discrimination, which can affect a large number of users and digital buyers. As technology evolves and discriminatory practices become more complex, anyone may be subject to online discrimination without even being aware of it. Currently, businesses use machine learning under the umbrella of "artificial intelligence" to leverage large volumes of data (big data)¹. This allows businesses to derive new insights, generate knowledge, and implement informed actions. This allows the optimisation of specific processes and the undertaking of tasks previously considered unattainable².

Over the past few years, the European institutions have focused their efforts on combating online consumer discrimination³ by primarily implementing and strengthening legislative and regulatory measures. Although the EU has adopted many laws and regulations to decrease unlawful consumer discrimination and geo-blocking, it remains a problem in the Digital Single Market with businesses unable to adjust⁴. Consumer protection issues are a shared responsibility between the European Union and its Member States. Consumer protection rules are developed at

¹ Jabłonowska, A., Kuziemski, M., Nowak, A. M., Micklitz, H. W., Pałka, P., & Sartor, G. (2018). Consumer law and artificial intelligence: Challenges to the EU consumer law and policy stemming from the business' use of artificial intelligence-final report of the ARTSY project. EUI Department of Law Research Paper, (2018/11).

² *Ibid.*

³ Schulte-Nölke, H., Zoll, F., Macierzyńska-Franaszczyk, E., Sebastian, S., Charlton, S., Barmscheid, M., & Kubela, M. (2013). Discrimination of 16 Consumers in the Digital Single Market. Studies requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO).

⁴ *Ibid.*

the EU level, but it is the responsibility of the Member States to ensure that EU law is properly and timely implemented⁵. The EU has addressed online consumer discrimination on the basis of geography only to a limited extent. While you can find different legal directives that could be applied to geo-discrimination cases, each one has its limitations, making application more difficult. Despite the fact that similar problems exist across all Member States, each of them must address these issues on its own. This is the main reason why the European Commission has prioritised the Single Market: problems should be covered and harmonised at the EU level⁶.

In addition to, it is crucial to raise consumer's awareness, as it may be difficult for average consumers to determine whether they are being subject to online consumer discrimination, much less detect when it is occurring solely on the basis of geographic region. The process of making consumers more aware of the problems occurring of the Digital Single Market (DSM) will make any information initiatives more comprehensive and effective. Consumer information strengthens consumers' awareness of violations, and increases the probability of identifying obstacles. Consumers need guidelines to understand and protect their own rights. This problem seems to be very relevant for Estonians, as the author has experienced online consumer differentiation by geo-filtering several times before. Estonia, being one of the smallest countries in the EU with a population of 1.365 million people⁷, it is understandable that Estonians may not be the prime target audience for international companies; many online stores may not even be interested in selling the goods to Estonia. As stated in Article 16 of the Charter of Fundamental Rights of the European Union, everyone has "freedom to conduct a business". Despite the fact that there is no special knowledge or degree required, it is imperative to adhere to all of the regulations, which can be extremely challenging, especially without any prior knowledge. Thus, one of the reasons why not all companies may be interested in cross-border trading and are engaging in consumer differentiation can be that the rules which need to be followed can get very complex, be unclear and may differ from country to country.

This research seeks to explore the extent and nature of discrimination in the digital single market, as well as the legal and regulatory frameworks in place to protect consumers from such practices. The study will include an examination of one specific Finnish company and its trading

⁵Šajn, N. (2019). Protecting European consumers. European Parliamentary Research Service. Retrieved from: https://what-europe-does-for-me.eu/data/pdf/focus/focus22_en.pdf

⁶ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Digital Single Market Strategy for Europe

⁷ Retrieved from: <https://www.stat.ee/et/avasta-statistikat/valdkonnad/rahvastik/rahvaarv>

techniques, identifying the options available to Estonian consumers to address the problem and determining the applicable legal framework. By examining the effectiveness of these frameworks and discovering areas for improvement, this research aims to contribute to the ongoing efforts to promote a more inclusive and non-discriminatory Digital Single Market.

Thus, the central question is "to what extent and who protects Estonian consumers from geo-discrimination practices under the law?"

1. DISCRIMINATION IN THE DIGITAL SINGLE MARKET

The digital age has allowed consumers to access goods and services anywhere in the world. As much as the digital single market offers many benefits, including greater prices and wider selection, it also raises concerns about possible consumer discrimination. Consumer discrimination refers to situations where individuals are unlawfully or lawfully disadvantaged on the basis of one or more protected grounds⁸. These grounds, defined in the EU Charter of Fundamental Rights Article 21, include sex, race, colour, ethnic origin, genetic features, language, religion, belief, political or other opinions, membership in a national minority, property, birth, disability, age, or sexual orientation⁹. While every instance of consumer differentiation can be considered unfair and potentially lead to price discrimination, not all of these practices are necessarily illegal. Customers can be offered different prices under the law all the time, for example, companies are allowed to create loyalty programs by giving discounts or offering free products to their clients¹⁰.

In recent years, it has become more evident that business, especially service providers, often limit their activities to a single country or a small group of countries¹¹. This results in consumers feeling excluded from the internal market¹² and unable to take advantage of the free movement of goods within the European Union, possibly leading to frustration. In most cases, businesses claim that discrimination against their clients is not intentional¹³ and could be attributed to an algorithm that considers thousands of data points¹⁴, or simply due to their desire to establish exclusivity in the market, coupled with a lack of awareness of regulations. Although, it is crucial

⁸ Council of Europe, European Court of Human Rights, European Union Agency for Fundamental Rights. (2019). Handbook on European non-discrimination law : 2018 edition, Publications Office of the European Union. <https://data.europa.eu/doi/10.2811/792676>

⁹ Charter of Fundamental Rights of the European Union

¹⁰ Belli, A., O'Rourke, A. M., Carrillat, F. A., Pupovac, L., Melnyk, V., & Napolova, E. (2022). 40 years of loyalty programs: how effective are they? Generalizations from a meta-analysis. *Journal of the Academy of Marketing Science*, 50(1), 147-173.

¹¹ Duch-Brown, N., & Martens, B. (2016). The economic impact of removing geoblocking restrictions in the EU Digital Single Market. Néstor Duch-Brown, Bertin Martens.

¹² Bourreau, M., & De Streel, A. (2018). The regulation of personalised pricing in the digital era.

¹³ Pehrsson, E. (2018). The meaning of the GDPR Article 22. *European Union Law Working Papers*, (31), 37.

¹⁴ Pike, Chris. (2016). Price Discrimination. OECD Competition Papers, 2016, Available at SSRN: <https://ssrn.com/abstract=3481907> or <http://dx.doi.org/10.2139/ssrn.3481907>

that these practices are conducted in an ethical manner and within the bounds of the law. Ultimately, consumers should have the same level of protection and fairness guaranteed online as offline¹⁵. Therefore, companies should disclose their practices to consumers and provide them with transparent information, as some practices can be justified and some unjustified. Consumers should also be informed about how to opt out of price discrimination and be given a clear explanation of how it works. Additionally, companies should be held accountable for any unethical or illegal practices. As mentioned before, one of the most problematic aspects of price discrimination occurring is that consumers may not be aware of it.

1.1. Online price differentiation

We can daily find different businesses using pricing strategies, resulting in consumers paying different prices for the same product, which is leading us to the topic of price differentiation¹⁶. It is important to have an understanding of what constitutes price discrimination, online or offline, in order to examine its legal limitations¹⁷. A simple definition for online price discrimination is “when online retailers differentiate their prices for identical products based on information they have about a customer”¹⁸. A practice like this can also be viewed as „price differentiation“, „personalised pricing“, „algorithmic pricing“ or „geo-pricing“. The term should be viewed neutrally due to its fundamental role in economic analysis even though the word „discrimination“ is traditionally viewed negatively¹⁹.

Price discrimination occurs when a trader sells or offers two similar or identical products with the same marginal cost of production to consumers at different prices²⁰. As an example, „personalised pricing“ has been a very common practice of showing different prices to different people for the same item²¹, for example when purchasing plane tickets or reserving accommodations. Some customers may end up paying significantly more than others for the

¹⁵ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL New Consumer Agenda Strengthening consumer resilience for sustainable recovery

¹⁶ Steppe, R. (2017). Online price discrimination and personal data: A General Data Protection Regulation perspective. *Computer law & security review*, 33(6), 768- 785.

¹⁷ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

¹⁸ Borgesius, F. Z. (2019). Algorithmic decision-making, price discrimination, and European non-discrimination law. *European Business Law Review (Forthcoming)*.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Hannak, A., Soeller, G., Lazer, D., Mislove, A., & Wilson, C. (2014, November). Measuring price discrimination and steering on e-commerce web sites. In Proceedings of the 2014 conference on internet measurement conference (pp. 305-318).

same product or service, which can be controversial and be unfair.²² Regularly used promotional tools, such as coupons, price discounts, occupation-based discounts, retail incentives, student and gender-based discounts, bonus packs, as well as free samples, are regularly used to maximise revenue across industries²³. These promotional tools are also considered a part of price discrimination as they differentiate between customers. Hence, customer differentiation was initially used in physical stores, but with the advancement of technology, it has shifted to the internet. As the digital revolution has ushered in the age of Big Data, which is able to generate a massive volume of digital data in everyday lives via online interactions has made using promo-tools online easier²⁴. Therefore, price differentiation and consumer discrimination have become easier²⁵. Consumer profiles can be created based on a number of factors, including their location, device used, past purchases or behaviours online, or, more commonly, a combination of these factors, which allow suppliers or sellers to offer tailored prices based on differences between consumer profiles²⁶.

Price discrimination can traditionally be distinguished into three categories²⁷:

- *first-degree* price discrimination;
- *second-degree* price discrimination, and
- *third-degree* price discrimination.

First-degree price discrimination occurs when a product is sold at the exact maximum price²⁸ that each customer is willing to pay for the product, also known as personalised pricing²⁹. For the first degree price discrimination, commonly referred to as „perfect“ price discrimination, the company needs full information concerning consumer preferences³⁰. This concept used to be extremely rare in practice, but with the rise of "big data" offering insights into individual

²² Bourreau, M., & De Streel, A. (2018). The regulation of personalised pricing in the digital era.

²³ Ndubisi, N. O. (2005). Gender differences in customer behavioural responses to sales promotion. *Asia Pacific Management Review*, 10(3), 175-185.

²⁴ Townley, C., Morrison, E., & Yeung, K. (2017). Big data and personalized price discrimination in EU competition law. *Yearbook of European Law*, 36, 683-748.

²⁵ See: Hannak, A., Soeller, G., Lazer, D., Mislove, A., & Wilson, C. (2014, November). Measuring price discrimination and steering on e-commerce web sites. In Proceedings of the 2014 conference on internet measurement conference (pp. 305-318).

²⁶ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1

²⁷ Aguirre, I. (2009). Chapter 1: Monopoly II. Notes on Microeconomic Theory IV.

²⁸ Hannak, A., Soeller, G., Lazer, D., Mislove, A., & Wilson, C. (2014, November). Measuring price discrimination and steering on e-commerce web sites. In Proceedings of the 2014 conference on internet measurement conference (pp. 305-318).

²⁹ Bergemann, D., Brooks, B., & Morris, S. (2015). The limits of price discrimination. *American Economic Review*, 105(3), 921-57.

³⁰ Aguirre, I. (2009). Chapter 1: Monopoly II. Notes on Microeconomic Theory IV.

behaviour, has made it more widely adopted and accepted by consumers³¹. Data is helping to estimate what people are willing to pay more easily, so personalised pricing has become more common³². The process can benefit both customers and traders, as retailers can charge higher prices to more likely buyers, while offering lower prices to less likely buyers.

As an example, Amazon sold DVDs at different prices to different people in 2000, which caused many people to react angrily and raise the issue of fairness³³, resulting in an amount of frustration that resulted in Amazon claiming it was a test and refunding customers who paid a higher price³⁴. Yet in 2012, an Oregon newspaper reported that consumers were once again finding that the prices charged for items on Amazon.com were highly variable, with one consumer placing a set of Mahjong tiles in her shopping basket offering \$54.99 for them. After a few minutes, the price of the item in her basket had risen to \$79.99, and upon clearing the cart and trying the item again, the price returned to \$59.99³⁵.

Second-degree price discrimination involves offering lower prices to specific groups of consumers, achieved through bulk purchasing, which is also known as non-linear pricing³⁶. Each customer faces the same price catalogue, but prices are affected by the quantity purchased³⁷. As a result of the choice being made by the consumer and not by the seller, the discrimination is not direct³⁸. It is the consumers' decision whether to take part in such an offer.

Third-degree price discrimination sets different prices for different groups of consumers based on consumer's characteristics³⁹. The company receives an exogenous signal that enables it to classify consumers into different groups, such as students, seniors etc⁴⁰. Third-degree discrimination is the most common form of price discrimination and is widely practiced. Online,

³¹Hannak, A., Soeller, G., Lazer, D., Mislove, A., & Wilson, C. (2014, November). Measuring price discrimination and steering on e-commerce web sites. In Proceedings of the 2014 conference on internet measurement conference (pp. 305-318).

³² Shiller, B. R. (2013). First degree price discrimination using big data (p. 32). Brandeis Univ., Department of Economics.

³³ Townley, C., Morrison, E., & Yeung, K. (2017). Big data and personalized price discrimination in EU competition law. *Yearbook of European Law*, 36, 683-748.

³⁴ Ward, M. (2000). Amazon's old customers' pay more?. URL <http://news.bbc.co.uk/1/hi/business/914691.stm>.

³⁵ *Ibid.*

³⁶ Bergemann, D., Brooks, B., & Morris, S. (2015). The limits of price discrimination. *American Economic Review*, 105(3), 921-57.

³⁷ Aguirre, I. (2009). Chapter 1: Monopoly II. Notes on Microeconomic Theory IV.

³⁸ Pike, C. (2016). Price Discrimination. OECD Competition Papers, 2016, Available at SSRN: <https://ssrn.com/abstract=3481907> or <http://dx.doi.org/10.2139/ssrn.3481907>

³⁹ *Ibid.*

⁴⁰ Aguirre, I. (2009). Chapter 1: Monopoly II. Notes on Microeconomic Theory IV.

this consumer differentiation can be achieved by utilising a customer's cookie, IP address, or user log-in information to identify⁴¹. However, online profile can be much more detailed, allowing for more refined price discrimination. Consequently, online third-degree price discrimination can, at least in theory, approach the seller's ideal of perfect or first-degree price discrimination, where all consumer surplus is extracted to the benefit of the seller⁴². One specific technique with tracking ability used in digital mapping and analysis to distinguish consumers by collecting geographic data about its customer⁴³ is geo-filtering, which can be very useful tool for the trader to intentionally discriminate based on location. It allows traders or developers to refine consumers by specific geographic boundaries, such as countries or cities.

Moreover, it is essential also to tackle commercial practices that ignore consumers' right to make an informed choice, abuse their behavioral biases, or distort their decision-making ability⁴⁴. These practices can include the use of 'dark' patterns, certain personalisation practices often based on profiling, hidden advertising, fraud, false or misleading information and manipulated consumer reviews⁴⁵.

The previous section discussed different price discrimination practices, which are primarily executed through promo-tools, but there are more possibilities. This can also be done with the help of cookies, IP addresses and geo-filtering, not always personalised per user, but filtered per country. This paper is focusing consumer differentiation based on the consumer's location or nationality; thus, when delving into the subject of consumer discrimination based on location, it is crucial to address geo-blocking.

1.2. Geo-blocking as a global phenomenon

With the increasing capabilities of big data, the potential for online discrimination based on consumer location has also grown⁴⁶. The term "geo-blocking" refers to the practice of blocking

⁴¹ Zuiderveen Borgesius, F., & Poort, J. (2017). Online price discrimination and EU data privacy law. *Journal of consumer policy*, 40, 347-366.

⁴² Zuiderveen Borgesius, F., & Poort, J. (2017). Online price discrimination and EU data privacy law. *Journal of consumer policy*, 40, 347-366.

⁴³ Bar-Gill, O. (2018). Algorithmic price discrimination: When demand is a function of both preferences and (mis) perceptions. Forthcoming, *University of Chicago Law Review*, 86, 18-32.

⁴⁴ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL New Consumer Agenda Strengthening consumer resilience for sustainable recovery

⁴⁵ *Ibid.*

⁴⁶ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

or restricting access to an online interface, such as a website, for customers from another Member State wishing to conduct cross-border transactions⁴⁷. As a result, it may not only affect the individuals involved, but could also impede the ultimate objective of the EU's digital single market by restricting consumers from fully utilising the benefits of free movement of goods within the European Union. This limitation creates a barrier that hinders the achievement of the Digital Single Market's purpose.

There are three common types of market unfair practices, which differentiate between different consumers using the Digital Single Market: simple refusal to sell, automatic re-routing, and unjustified diversifying of sale conditions⁴⁸.

Firstly, virtual stores may simply refuse to allow consumers with IP-addresses from certain countries to purchase online⁴⁹, which means that a foreign consumer is not able to order at a certain online shop⁵⁰. Usually, a refusal to sell occurs during one of the stages of placing an order. A consumer often discovers that placing an order is impossible, because it requires an address in a specific country. It should be noted that the seller may not always be directly responsible for the refusal to sell, it may come from manufacturers, who impose discriminatory practises on their distributors⁵¹.

The second strategy consists of using automatic re-location and directing the consumer to another e-shop without the consumer's consent or the website is entirely unavailable⁵². A consumer, who experiences these practices may feel frustrated as they are excluded from the internal market, or potentially discriminated against because of their location or nationality.

⁴⁷ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

⁴⁸ Schulte-Nölke, H., Zoll, F., Macierzyńska-Franaszczyk, E., Sebastian, S., Charlton, S., Barmscheid, M., & Kubela, M. (2013). Discrimination of Consumers in the Digital Single Market. *Studies requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO)*.

⁴⁹ Schulte-Nölke, H., Zoll, F., Macierzyńska-Franaszczyk, E., Sebastian, S., Charlton, S., Barmscheid, M., & Kubela, M. (2013). Discrimination of Consumers in the Digital Single Market. *Studies requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO)*.

⁵⁰ Bourreau, M., & De Streel, A. (2018). The regulation of personalised pricing in the digital era.

⁵¹ Schulte-Nölke, H., Zoll, F., Macierzyńska-Franaszczyk, E., Sebastian, S., Charlton, S., Barmscheid, M., & Kubela, M. (2013). Discrimination of Consumers in the Digital Single Market. *Studies requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO)*.

⁵² *Ibid.*

The last common market practice involves accepting orders from particular groups of consumers or countries under different terms and conditions⁵³. For example, consumers ordering from abroad often face higher delivery costs, which are often significantly higher than those for domestic orders.

The author has experienced a similar situation with Swedish online shop Y.com, which sells various brands and the author was looking at the Danish interior brand Z, when all of the sudden the brand was gone from the website like it was never there. After the incident, the author sent the e-mail to Y.com and their response was *“From now on Z is only available in a few countries on Y.com (Sweden, Denmark, Norway and Finland). If you are trying to place an order from another country, the item will automatically disappear from the cart, as this brand is not available in that country. Please kindly note that the brands on Y.com decide which countries their products are available in and this is not a decision that Y.com takes. Please kindly note that this has nothing to do with discrimination, this has to do with customs and taxes.”* It was frustrating because Estonian consumers could still buy products from this brand but only directly from their own website and warehouse in Denmark. Although, the product prices and the delivery costs were higher. Therefore, it can be assumed that the brand Z is imposing discriminatory practices on Y.com without any objective reason.

However, it is generally identified that geo-blocking can have a objective justification⁵⁴ and be necessary for specific reasons, such as copyright and licensing restrictions, VAT regulations, consumer protection laws, and other divergent national rules. Geo-blocking might be necessary to ensure that people in one country don't access copyrighted content or use licensed services meant for another country. For example, preventing access to movies or TV shows in a region where the rights haven't been secured. These kinds of restrictions can mainly affect short-term migrants and travellers, who have subscribed to online content services in their country of residence and are not able to access the same service when moving to another Member State⁵⁵ (for example, Netflix and iTunes⁵⁶). In addition to, some countries have higher consumer

⁵³ *Ibid.*

⁵⁴ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

⁵⁵ Mazziotti, G. (2015). Is geo-blocking a real cause for concern in Europe?. EUI Department of Law Research Paper, (2015/43).

⁵⁶ Roy, A., & Marsoof, A. (2017). Geo-Blocking, VPNs and Injunctions“. European Intellectual Property Review, 39(11), 672-680.

protection laws, and geo-blocking may be used to comply with these regulations, such as limiting the sale of products that don't meet specific safety standards.

In 2017, the author experienced justified geo-blocking while visiting Shanghai, China. There was no access to Facebook, Instagram, Whatsapp, Youtube, or Google, therefore, Whatsapp had to be replaced with WeChat, and Google had to be replaced with Yahoo. Disappointment arises as consumers quickly develop familiarity and loyalty to certain apps. Moreover, this necessitates that the other party, with whom communication is essential, also undergoes the process of downloading the corresponding apps.

On the other hand, unjustified geo-blocking practices may have discriminatory effects and can intentionally disadvantage consumers, particularly when blocking access based on location, without any associated Intellectual Property Rights or copyright issues that might necessitate such restrictions. The survey by the European Commission in 2015 confirmed that 45% of responding companies and business associations acknowledged implementing geo-blocking practices in the course of their business⁵⁷. When geo-blocking is used as discriminatory practice, it may result in charging higher prices.



The author has personally encountered consumer inequity and price discrimination through the use of geo-filtering techniques employed by the internationally recognised Finnish brand X. The brand operates two distinct websites, xxx.com and xxx.fi, where prices can vary significantly. Notably, sales prices are often more favourable on the Finnish website, xxx.fi, and it's not uncommon for discounts to be exclusive to xxx.fi, not available on xxx.com. The author has

⁵⁷ Simonelli, F. (2016). *Combatting Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and other Forms of Geo-Discrimination*.

been watching this pricing strategy closely since 2021. It has been straightforward to observe, as consumers can easily access both websites and see the price differences. However, it's worth noting that only consumers with a Finnish delivery address can order from the Finnish website xxx.fi. The terms and conditions do not mention anything about price differentiation, suggesting there is no objective reason. Therefore, it can be assumed that consumers, except Finnish consumers, are targeted for online consumer discrimination based on nationality or location.

In conclusion, geo-blocking and geo-filtering can raise different obstacles across the European Markets and in the Digital Single Market. While it might be justified in certain instances, it is important to regulate such trading techniques at the EU level to curb prohibited trading practices. This is the main reason why the EU has taken measures to address geo-blocking and other forms of discrimination in the digital single market, with the aim of promoting a more open, competitive, and non-discriminatory market for consumers. The Geo-blocking Regulation, which has been applicable across the EU since 2018, will be discussed more briefly in Chapter 2.4.2.

2. ANALYSIS OF THE EU NON-DISCRIMINATION FRAMEWORK

A handbook on European non-discrimination law (2018) provides a very clear definition: „*The aim of non-discrimination law is to allow all individuals an equal and fair prospect to access opportunities available in a society*“⁵⁸. The EU's anti-discrimination framework seeks to ensure equal treatment and opportunities for all individuals, regardless of personal characteristics, as the principle of non-discrimination underpins the enjoyment of all human rights⁵⁹. This means that individuals or groups of individuals which are in comparable situations should always be treated the same and should never be treated less favourably simply because of certain characteristics, such as gender, age, race, ethnicity, religion or sexual orientation⁶⁰. Consumers and businesses, especially small and medium-sized enterprises, show an increasing interest in shopping across the EU as 68% of internet users in the EU shopped online in 2017⁶¹.

Over the past few years, European institutions have focused their efforts on combating discrimination against customers based on nationality or place of residence⁶². Although the EU has adopted many laws and regulations to decrease unlawful consumer discrimination and geo-blocking, it remains a problem in the digital single market. EU businesses claim that they do not discriminate consumers on purpose, and they mainly rely on Competition Law and often they do not understand other regulations well enough⁶³. However, traders frequently still refuse, without any objective reason, to sell or supply to customers from another Member State or to offer equally advantageous prices in comparison with local clients⁶⁴. The lack of awareness and a

⁵⁸ Liddell, R., O’Flaherty, M. (2018). Handbook on European non-discrimination law. European Union Agency for Fundamental Rights.

⁵⁹ *Ibid.*

⁶⁰ Retrieved from: <https://eur-lex.europa.eu/EN/legal-content/glossary/non-discrimination-the-principle-of.html>

⁶¹ European Commission. Questions and answers relating to the Regulation 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 (“Geo-blocking Regulation”)

⁶² Schulte-Nölke, H., Zoll, F., Macierzyńska-Franaszczyk, E., Sebastian, S., Charlton, S., Barmscheid, M., & Kubela, M. (2013). Discrimination of 16 Consumers in the Digital Single Market. Studies requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO).

⁶³ *Ibid.*

⁶⁴ Roy, A., & Marsoof, A. (2017). Geo-Blocking, VPNs and Injunctions“. European Intellectual Property Review, 39(11), 672-680

clear definition of what constitutes unlawful discrimination makes it difficult for businesses to comply with the regulations, and some businesses may unintentionally violate them. Even though the EU has implemented various frameworks and made efforts to tackle discrimination in e-commerce, consumers still face challenges.

2.1. Competition Law

While discussing geo-discriminatory trading practices, European Competition Law is often the first legal framework that is thought of. It is based on the Treaty on the Functioning of the European Union (TFEU). The general principles of the Treaty prohibits discrimination based on nationality, including indirect forms based on place of residence or place of establishment⁶⁵. However, in the case of price discrimination, only two articles, namely Article 101 and Article 102 of the TFEU, can be identified as potentially applicable to geo-discrimination.

Article 102 prohibits the abuse of a dominant position within the European internal market, and Article 101 prohibits collusion, among other acts, which are unlikely to have any desirable effect in the case of online price discrimination⁶⁶.

The first hurdle would be to establish the dominant position of the firm or undertaking, without which there can be no abuse⁶⁷. It should be noted that not many businesses have a dominant position in the market. The finding of a dominant position has been relatively rare, as it has been stated to signify “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition.”⁶⁸ In short, there needs to be “substantial market power” within a relevant market⁶⁹. If this bar were met, the next analysis would be whether the dominant firm abused its position under Article 102(a) for unfair pricing or under Article 102(c) for discriminatory pricing.

⁶⁵ Consolidated version of the Treaty on the Functioning of the European Union (TFEU) Article 18

⁶⁶ Townley, C., Morrison, E., & Yeung, K. (2017). Big data and personalized price discrimination in EU competition law. *Yearbook of European Law*, 36, 683-748.

⁶⁷ Consolidated version of the Treaty on the Functioning of the European Union (TFEU) Article 102

⁶⁸ Townley, C., Morrison, E., & Yeung, K. (2017). Big data and personalized price discrimination in EU competition law. *Yearbook of European Law*, 36, 683-748.

⁶⁹ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

According to Article 102(a) of the TFEU, abuse can be found when a dominant firm is “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.”⁷⁰ Prices that do not have a reasonable relation to the value or cost of the goods or services provided have been found to be abusive⁷¹.

Article 102(c) directly addresses price discrimination, although there are difficulties in its application to the typical online variety that consumers experience. Abuse may be found under this provision when a dominant firm applies “dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.” For Article 102(c) to be applicable, certain factors must be met⁷²⁷³. However, detecting online price discrimination is difficult, and uncovering exactly why users received different offers may not currently be possible.

There are thus several major hurdles to overcome for an online price discrimination claim to be successful under EU competition law. The largest issue is likely to be the requirement that the company occupy a dominant position in the market⁷⁴. Moreover, there is considerable ambiguity in the case law concerning matters relating directly to how online price discrimination might be examined under competition law⁷⁵.

Consumer welfare (including inter-personal effects) should be the primary substantive goal of EU competition law (with the single market initiative) and corrective fairness relevant as a secondary goal⁷⁶.

In conclusion, it may be difficult for a consumer to utilise competition law when dealing with business-to-consumer geo-discriminatory practices, more precisely referring to TFEU Articles 101 or 102, as it requires that specific factors must be met. Therefore, while analysing the Finnish dining brand X case, TFEU, the most relevant Article 102 may not still be the best fit, as

⁷⁰ Consolidated version of the Treaty on the Functioning of the European Union Article 102(a)

⁷¹ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

⁷² Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

⁷³ See: C-525/16 - Meo - Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência. According to the MEO ruling, "competitive disadvantage" falls under Article 102(c).

⁷⁴ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

⁷⁵ Townley, C., Morrison, E., & Yeung, K. (2017). Big data and personalized price discrimination in EU competition law. *Yearbook of European Law*, 36, 683-748.

⁷⁶ Townley, C., Morrison, E., & Yeung, K. (2017). Big data and personalized price discrimination in EU competition law. *Yearbook of European Law*, 36, 683-748.

the question of whether brand X has market power and could be considered a dominant firm under TFEU can be highly disputable.

2.2. Consumer Protection Law

Consumer protection law may also have a significant impact on online price discrimination. Certain aspects of consumer protection law may make it more amenable to dealing with online price discrimination cases than previously analysed Competition Law, because it applies more precisely to business-to-consumer transactions and does not have to overcome certain hurdles, such as a finding of market power in abuse of dominance cases⁷⁷. EU law instruments may also be relevant to analysing the book from different perspectives (e.g., the GDPR, which will also be taken in consideration when analysing potential unlawful data collection practices).⁷⁸

The EU has implemented a number of directives aimed at protecting consumers over time. Among them are the Consumer Rights Directive 2011/83/EU (CRD), the Unfair Commercial Practices Directive 2005/29/EC (UCPD), and the Unfair Contract Terms Directive 93/13/EEC (UCTD), all of which may apply to alleged infringement involving online price discrimination to varying extents⁷⁹.

The Consumer Rights Directive⁸⁰ (CRD) came into force in 2014 and introduced a number of important changes to consumer protection. It aligns and harmonises consumer rules, such as those on the information consumers should receive before purchasing goods, services, or digital content, and on their right to cancel online purchases. It harmonised many protections across the region, such as mandating a 14-day return period for goods bought online, banning pre-checking boxes online that result in higher prices upon checkout, and requiring the total cost of a purchase including any fees to be displayed to a buyer⁸¹. While price discrimination isn't specifically addressed in the Directive, provisions like these will undoubtedly aid consumers, and certain

⁷⁷ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

⁷⁸ Lopes, M. L. E. C. (2023). Drawing the Thin Line Between Fair and Unfair Commercial Practices: Selected Case Studies from The Choice Factory.

⁷⁹ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

⁸⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance

⁸¹ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

ones, such as the 14-day return period, may mitigate the negative effects of price discrimination online.

Also, there is a clear disparity between the vision of vulnerability in EU policy reports and the more rigid class-based definition of the UCPD. The policy reports offer a more sophisticated version of vulnerability, employing the latest research and in line with empirical evidence. By contrast, the legal definition enshrined in the UCPD is lagging behind. What is arguably a widely accepted conceptualisation of consumer vulnerability as a state, finds its limits in the law.⁸²

On the other hand, the Unfair Commercial Practices Directive (UCPD) may appear at first glance to have more direct applicability to online price discrimination. The Unfair Commercial Practices Directive (UCPD) is a European Union directive that came into force in 2005. It aims to protect consumers from unfair commercial practices. The UCPD specifically applies to business-to-consumer relationships and prohibits unfair commercial practices harming consumers' economic interests⁸³.

The UCPD emerges as the only legal instrument that uses the concept of the 'average consumer' at a systemic level. Famously, it defines a practice as unfair if "it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers."⁸⁴

Under the UCPD, a commercial practice is unfair if: (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers⁸⁵.

⁸² Kaprou, E. (2019). The current legal definition of vulnerable consumers in the UCPD: benefits and limitations of a focus on personal attributes?

⁸³ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

⁸⁴ Galli, F. (2021). Online Behavioural Advertising and Unfair Manipulation between the GDPR and the UCPD. *Algorithmic Governance and Governance of Algorithms: Legal and Ethical Challenges*, 109-135.

⁸⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')

However, it is unlikely that online price discrimination per se would violate the UCPD. In regards to dynamic pricing, price discrimination, and personalised pricing, the Commission has stated that traders are free to determine pricing under the UCPD so long as they “duly inform consumers about the prices or how they are calculated.”⁸⁶ Assuming consumers would need to be informed about how prices are calculated where online price discrimination is used, the practice would not be considered “aggressive” under the UCPD, and it would unlikely be considered a “misleading action” where a buyer would be “deceived” as to “the price or the manner in which the price is calculated.”⁸⁷

Although they are two different directives, the UCPD and the CRD are connected. While the UCPD focuses on outlawing unfair economic practices, the CRD concentrates on giving consumers information and remedies. The two instructions may occasionally overlap. For instance, under the UCPD, an online business may be in violation of both the CRD and the unfair commercial practice laws if it employs price discrimination to deceive customers. All things considered, the UCPD and the CRD offer a solid framework for shielding customers against deceptive business activities, such as pricing discrimination online.

Additionally, there could also be a plausible general claim under the Unfair Contract Terms Directive (UCTD), once again assuming consumers are not informed as to how prices are calculated. This provision could apply to online price discrimination if it were considered to materially distort the economic behaviour of the average consumer. Even if online price discrimination were deemed to appreciably impair a consumer’s ability to make an informed decision, which is unlikely because, in most cases, a consumer could check prices against other sites, it would be difficult to show that it caused the consumer to make a transactional decision he or she otherwise would not have⁸⁸.

The UCPD applies to all commercial practices, including online price discrimination. Under the UCPD, a commercial practice is unfair if:

- It is contrary to the requirements of professional diligence. This means that the commercial practice must be honest, decent, and ethical.

⁸⁶ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

⁸⁷ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

⁸⁸ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

- It materially distorts or is likely to distort the economic behaviour of the average consumer. This means that the commercial practice must be likely to mislead or deceive consumers.

Moreover, the maximum harmonisation aspect is clear in the UCPD, *inter alia*, from article 4 of the UCPD, namely the internal market clause, which states that MS have not restricted the freedom of services or of goods "for reasons falling within the field approximated by this Directive". This means that the mandatory requirements have to be implemented as such and therefore MS had to repeal the rules that were in contrast with the UCPD. At the same time the UCPD presents exceptions to the maximum harmonisations (for instance in relation to "rules on the health and safety aspects of products"⁸⁹).

Therefore, there currently appears to be little direct applicability of consumer protection law to online price discrimination. Current regulation has some potential for addressing the practice, albeit in a limited manner, but it has little evidence of being used. As for courts, the case law on consumer protection followed the rapid evolution of the underlying instruments noted above, and thus there is a relatively small body of case law from which to predict how online price discrimination may be considered under the current framework. Some specific areas that overlap with consumer protection law, such as price discrimination based on place of residence covered by the Services in the Internal Market Directive are likely more effective, but clearly only in certain scenarios⁹⁰.

The UCPD is an ambitious strategic project of the EU dealing with unfair commercial practices under the auspices of the consumer protection law branch, while attempting to achieve objectives of consumer protection as well as competition protection in the sense of the protection of European integration, based on the single internal market. It might be suggested that after a long period of an excessive focus on competition (anti monopoly and antitrust) law, the EU appears to start to truly care about the daily operation of the single internal market while keeping consumers in mind.⁹¹

⁸⁹ Ruggiero, M. A. (2017). *Unfair Commercial Practices, Consumer and Internal Market Protection: A Comparative Study*. Masters Thesis), Wageningen University & Research, Law and Governance Group, 2017. Available at: <http://edepot.wur.nl/414071>.

⁹⁰ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

⁹¹ Pelikánová, R. M. (2019). The Analysis of the case law of the Court of Justice of the EU on unfair commercial practices. *Acta academica*, 19(1), 47-58.

Much remains to be seen as to how online price discrimination may be further addressed by regulators and courts regarding consumer protection law. Authorities have indicated that online price discrimination or more specifically personalised pricing falls within the scope of consumer protection and should be regulated more specifically⁹².

2.3. General Data Protection Regulation

Another area that may potentially be able to limit online geo-discrimination is Data Protection Law. The Regulation (EU) 2016/679⁹³, also known as the General Data Protection Regulation (GDPR), is based on Article 16 TFEU and contains various provisions with relevance to online price discrimination.

In the context of EU law, the right to data protection is not only recognised as a fundamental right in the Charter of Fundamental Rights of the European Union's Article 8, but is also enshrined in Article 16 TFEU, which was introduced in the Lisbon Treaty as the new legal basis for the adoption of secondary data protection legislation⁹⁴.

In order to protect the fundamental right to data protection in the EU, data protection law gives data subjects control over their personal data and restricts how their data is collected and used⁹⁵. Traders usually collect personal data from individuals to personalise prices and engage in price discrimination⁹⁶. The General Data Protection Regulation relies heavily on transparency to determine where users' information will be shared, what data will be collected, and how it will be used⁹⁷.

The GDPR lays down a number of obligations that controllers and processors have to comply with⁹⁸. A controller is the person or organisation who determines the purposes and means of the

⁹² Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

⁹³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing of Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1

⁹⁴ Graef, I. (2017). Algorithms and fairness: What role for competition law in targeting price discrimination towards ends consumers. *Colum. J. Eur. L.*, 24, 541.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Spindler, G., & Schmechel, P. (2016). Personal data and encryption in the European general data protection regulation. *J. Intell. Prop. Info. Tech. & Elec. Com. L.*, 7, 163.

⁹⁸ Graef, I. (2017). Algorithms and fairness: What role for competition law in targeting price discrimination towards ends consumers. *Colum. J. Eur. L.*, 24, 541.

processing of personal data⁹⁹. The processor is the natural or legal person who processes personal data on behalf of the controller¹⁰⁰.

The GDPR is not transposed into national law, but forms a part of it automatically. By applying this, Member States will be able to reduce conceptual differences among themselves and ultimately eliminate differences of opinion surrounding the minimum or maximum harmonisation character¹⁰¹. Businesses operating in the European Union must comply with GDPR to avoid fines, failure to comply with the Data Protections can have serious consequences. A violation of the Data Protection Law can result in harsh penalties, including prosecution and repercussions for the businesses¹⁰². Depending on which provision is violated, fines can reach up to either €20 million or 4% of the worldwide annual revenue of the preceding financial year, whichever is higher¹⁰³.

Whereas the Regulation (EU) 2018/302 on “geo-blocking” has been proposed to eliminate online discrimination on the basis of nationality and residence, the GDPR likewise contains provisions relevant to discriminatory pricing in the digital age¹⁰⁴. In addition, the General Data Protection Regulation can affect price discrimination based on the processing of personal data online. When it comes to online price discrimination, it is very important to know the purpose of the data controller’s legitimate interests.

As online price discrimination typically involves the processing of personal data¹⁰⁵, EU data protection law applies; the personal data must thus be processed “lawfully, fairly and in a transparent manner.”¹⁰⁶

The GDPR covers all personal data processed wholly or partly by automatic means¹⁰⁷. Personal data is thereby defined as (i) any information (ii) relating to (iii) an identified or identifiable (iv)

⁹⁹ The The General Data Protection Regulation Article 4(7)

¹⁰⁰ The General Data Protection Regulation Article 4(8)

¹⁰¹ Steppe, R. (2017). Online price discrimination and personal data: A General Data Protection Regulation perspective. *Computer law & security review*, 33(6), 768- 785.

¹⁰² Steppe, R. (2017). Online price discrimination and personal data: A General Data Protection Regulation perspective. *Computer law & security review*, 33(6), 768- 785.

¹⁰³ Article 83(4)-(5) of the General Data Protection Regulation

¹⁰⁴ Steppe, R. (2017). Online price discrimination and personal data: A General Data Protection Regulation perspective. *Computer law & security review*, 33(6), 768- 785.

¹⁰⁵ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1

¹⁰⁶ Article 5(1)(a) of the General Data Protection Regulation.

¹⁰⁷ Steppe, R. (2017). Online price discrimination and personal data: A General Data Protection Regulation perspective. *Computer law & security review*, 33(6), 768- 785.

natural person, regardless of the nationality or place of residence of the person¹⁰⁸. These elements are usually applied to discriminatory pricing practices.

In addition, courts have given a broad interpretation to what constitutes personal information. The CJEU stated in *Scarlet Extended v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL*¹⁰⁹ that “IP addresses” constitute personal data, and in *Patrick Breyer v. Bundesrepublik Deutschland*¹¹⁰ that even „dynamic or static IP addresses“ may constitute personal data.

It is also important to mention ePrivacy Directive¹¹¹, known as Directive 2002/58/EC which was adopted on July 12, 2002 by the European Union and later amended by Directive 2009/136/EC. This directive complements the GDPR and was implemented to regulate the processing of personal data and the protection of privacy in the electronic communications sector within the European Union and it applies when cookies are used, which is common practice in personalisation. A sufficient level of transparency is achieved when the ePrivacy Directive and GDPR are combined¹¹². Despite not addressing discrimination specifically, the ePrivacy Directive contains provisions related to processing personal data, consent requirements, and cookies. Protecting individuals' privacy in electronic communications is the primary purpose of these provisions.

To sum up, in order to comply with the GDPR, customers need to be informed about the purposes for which their personal data will be processed¹¹³. The ePrivacy Directive also requires information about tracking cookies, and consent is required. Online price discrimination often relies on automated decision-making, which would require additional information under the GDPR¹¹⁴.

The General Data Protection Regulation was written to be independent of technological realities of the present day in order to address underlying principles that do not change even as the data sector continues to innovate. As a result, much of the language of Article 22 and related

¹⁰⁸ European Parliament. (2018). The Regulation (EU) 2016/679 (General Data Protection Regulation)

¹⁰⁹ Case C-70/10, *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL (SABAM)*, 2011 E.C.R. I-11959

¹¹⁰ Case C-582/14, *Breyer v. Bundesrepublik Deutschland*, 2016 E.C.R. 779

¹¹¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

¹¹² Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

provisions in the GDPR are vague. In the short term, this design may require substantial interpretation by the courts and EU institutions, although it will likely prolong the GDPR's shelf life¹¹⁵. The GDPR grants the data subject a toolbox of rights and principles relevant to online price discrimination, which fosters a climate of reflection and responsibility¹¹⁶.

In conclusion, the importance of data privacy will only grow. Despite recent regulations and attempts to reduce the amount of data organisations can collect, it remains the most valuable asset. We live in very interesting times, we will see how General Data Protection Regulation and other rules concerning the protection of personal data are going to evolve even more in the near future.

When analysing the Finnish dining brand X- since consumers must choose the website manually, the General Data Protection Directive is not the best fit to refer to. Due to the lack of cookie information, it can be assumed that the company does not use personal data for discrimination purposes directly. As a result of IP address identification and discriminatory practices, it is possible to assume that the IP address is at the root of the discriminatory practices.

2.4. Non-Discrimination Provisions

Over the course of its development, anti-discrimination law in the EU has evolved to include several secondary legal measures with different scopes and application areas¹¹⁷. The EU has tried to tackle directly discrimination by issuing various non-discrimination provisions, such as The Racial Equality Directive (2000/43/EC), The Employment Equality Directive (2000/78/EC), The Gender Equality Directive (2006/54/EC), and The Gender Goods and Services Directive (2004/113/EC). However, under these non-discrimination directives, the protected categories are explicitly defined and prohibited, and therefore, they do not directly apply to online geo-discrimination issues.

¹¹⁵ Pehrsson, E. (2018). European Union Law Working Papers.

¹¹⁶ Steppe, R. (2017). Online price discrimination and personal data: A General Data Protection Regulation

¹¹⁷ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1

Nevertheless, there can be found two main secondary legislations that prohibit directly discrimination based on nationality or place of residence directly, which are the Services in the Internal Market Directive (2006/123/EC)¹¹⁸ and the Geo-Blocking Regulation (302/2018)¹¹⁹.

2.4.1. Services in the Internal Market Directive

The Services in the Internal Market Directive (2006/123/EC)¹²⁰ was created to eliminate barriers to the establishment and development of service providers in EU Member States and to facilitate the free movement of services between Member States. In the Services Directive, Article 20 is the most relevant provision regarding non-discrimination, stating that service providers established in the Union must not discriminate against customers based on their nationality or place of residence, either directly or indirectly.

Although, the name of the Directive implies that it is only about services, in practice, a service may also include goods, regardless of whether the transaction occurs offline or over the Internet. As an example, this applies to the distribution of goods (transport, wholesale, retail, after-sale services) as well as to the performance of a service activity, whether the good is used as an equipment component or integral part of the service (for example, construction products used by builders)¹²¹.

However, service providers and even enforcement authorities have argued that the sale of retail goods is not covered by the Directive¹²². Customers still face refusals to sell and different conditions when buying goods and services across borders, despite the implementation of the Service Directive¹²³. This is mainly due to uncertainty over what constitutes objective criteria that justify differences in traders' treatment of customers¹²⁴. To remedy this problem, traders and customers should have more clarity about situations in which differences in treatment based on

¹¹⁸ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

¹¹⁹ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 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 Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC

¹²⁰ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, 2006 O.J. (L 376) 37

¹²¹ European Commission. HANDBOOK ON THE IMPLEMENTATION OF THE SERVICES DIRECTIVE

¹²² Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

¹²³ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

¹²⁴ *Ibid.*

residence are not justifiable. This clarity should include clear rules and regulations that prohibit traders from treating customers differently based solely on their residence. These rules should be enforced by regulators to ensure that customers are treated fairly and equitably.

Stronger enforcement of the Directive and its expansion to the sale of goods could possibly prevent geographic online price discrimination.¹²⁵

2.4.2. Geo-blocking Regulation

The Geo-blocking Regulation (EU Regulation 2018/302)¹²⁶ has applied across the European Union since 2018, which prohibits unjustified discrimination of customers (consumers and undertakings purchasing as end users) shopping online, purely based on their nationality, place of residence or place of establishment¹²⁷.

It ensures that customers' nationality, place of residence or place of establishment cannot be used to refuse access to an online shop or to a service provided online and consumed offline in the EU, including where this discrimination is related to means of payment¹²⁸. The goal of the Regulation was to increase opportunities for consumers and businesses to buy across borders: consumers should be able to „shop like a local“ anywhere in the EU¹²⁹. Geo-blocking alone means obstruction and blockage, which does not allow customers to access content, thereby affecting online commerce and economy¹³⁰.

Geo-blocking, by nature, contradicts the goal of establishing a fully functioning Digital Single Market and may violate Article 18 of the TFEU¹³¹, which prohibits discrimination based on nationality. However, in the current EU framework, certain types of geo-blocking may be justified on legal grounds¹³².

¹²⁵ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

¹²⁶ The European Parliament. (2018). Regulation (EU) 2018/302 of The European Parliament and of The Council.

¹²⁷ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on the first short-term review of the Geo-blocking Regulation

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Hamulák, O., Kiss, L. N., Gábriš, T., & Kocharyan, H. (2021). “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*, 21(1), 153-183.

¹³¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union

¹³² Simonelli, F. (2016). *Combatting Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and other Forms of Geo-Discrimination.*

Unjustified geo-blocking practices are based on purely commercial reasons and mainly aim to engage in price discrimination strategies or influence competition¹³³, customers are discriminated to increase profits at the expense of foreign customers¹³⁴. Such practices can result from either unilateral decisions by online traders or contractual obligations (vertical agreements between suppliers and distributors) forbidding traders to sell cross-border¹³⁵¹³⁶.

Justified geo-blocking practices are the cases whereby traders do not sell cross border:

- (1) as a result of legal obligations descending from EU and (most likely) national rules (e.g. copyright law, rules on advertising, rules on certain prohibited products/services such as tobacco, alcohol and gambling, protection of minors)¹³⁷; or
- (2) when they would incur disproportionate adaptation costs due to regulatory constraints (e.g. VAT rules, tax systems, consumer law, contract law, labelling requirements) and other obstacles to cross-border sales (e.g. quality and costs of delivery services)¹³⁸.

The Geo-blocking Regulation (EU Regulation 2018/302) applied since 2018 across the European Union, which aims to stop the practices of geo-blocking and geo-discrimination¹³⁹. Regulation (EU) 2018/302 is addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market of the EU¹⁴⁰.

The regulation was enacted to address online sales discrimination in the provision of goods and services¹⁴¹ “based, directly or indirectly, on the customers’ nationality, place of residence or place of establishment.¹⁴²” It was also intended to clarify “certain situations where different treatment cannot be justified under Article 20(2)” of the Services in the Internal Market

¹³³ Simonelli, F. (2016). *Combatting Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and other Forms of Geo-Discrimination*.

¹³⁴ Mazziotti, G. (2015). *Is geo-blocking a real cause for concern in Europe?*. EUI Department of Law Research Paper, (2015/43).“

¹³⁵ Simonelli, F. (2016). *Combatting Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and other Forms of Geo-Discrimination*.

¹³⁶ For example, in 2020, the European Commission fined the Spanish hotel group Meliá for creating price discriminations for consumers of different EU Member States and issued a fine of €6.678m.

¹³⁷ Simonelli, F. (2016). *Combatting Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and other Forms of Geo-Discrimination*.

¹³⁸ Simonelli, F. (2016). *Combatting Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and other Forms of Geo-Discrimination*.

¹³⁹ The European Parliament. (2018). Regulation (EU) 2018/302 of The European Parliament and of The Council.

¹⁴⁰ The European Parliament. (2018). Regulation (EU) 2018/302 of The European Parliament and of The Council.

¹⁴¹ Sears, A. M. (2019). *The limits of online price discrimination in Europe*. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

¹⁴² The European Parliament. (2018). Regulation (EU) 2018/302 of The European Parliament and of The Council.

Directive, as the provision “has not been fully effective in combating discrimination and it has not sufficiently reduced legal uncertainty.” Under the Regulation, geo-blocking occurs, where traders block or limit access to their online interfaces from customers in other member states, or when “traders apply different general conditions of access to their goods and services” to customers from other member states, both online and offline¹⁴³.

The Geo-blocking Regulation aims to provide for more opportunities to consumers and businesses within the EU's internal market¹⁴⁴. In particular, it addresses the problem of (potential) customers not being able to buy goods and services from traders located in a different Member State for reasons related to their nationality, place of residence or place of establishment, hence discriminating them when they try to access the best offers, prices or sales conditions compared to nationals or residents of the traders' Member State¹⁴⁵.

The geo-blocking regulation defines three specific situations of unjustified geo-blocking¹⁴⁶:

1. the sale of good without physical delivery;
2. the sale of electronically supplied services and
3. the sale of services provided in a specific physical location.

An example of the sale of goods without physical delivery is when a customer wants to buy something and finds the best deal abroad. The customer will be entitled to order the product and collect it at the trader's premises or organise the delivery himself¹⁴⁷.

An example of the sale of electronically supplied services is when a customer wants to buy hosting services for her website from the company abroad. Customer will now have access to the

¹⁴³ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

¹⁴⁴ Roy, A., & Marsoof, A. (2017). Geo-Blocking, VPNs and Injunctions". *European Intellectual Property Review*, 39(11), 672-680.

¹⁴⁵ European Commission. Questions and answers relating to the Regulation 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 (“Geo-blocking Regulation”)

¹⁴⁶ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 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 Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC

¹⁴⁷ European Commission. Questions and answers relating to the Regulation 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 (“Geo-blocking Regulation”)

service, can register and buy this service without having to pay additional fees compared to country's own citizens¹⁴⁸.

Lastly, the example about the sale of services provided in a specific physical location is when a customer visits a theme park abroad and wishes to take advantage of a family discount on the price of the entry tickets¹⁴⁹.

However, the Regulation does not mandate a complete harmonisation of prices¹⁵⁰. There may be different prices, offers, and conditions offered to customers in certain scenarios, as long as it is not discriminatory. For example, an organisation may charge a different price in its physical stores than on its website. As the Regulation has only been applicable for a short period of time, the extent to which it resolves the legal uncertainty of the Services in the Internal Market Directive remains to be seen¹⁵¹.

¹⁴⁸ European Commission. Questions and answers relating to the Regulation 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 ("Geo-blocking Regulation")

¹⁴⁹ *Ibid.*

¹⁵⁰ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

¹⁵¹ Sears, A. M. (2019). The limits of online price discrimination in Europe. *Colum. Sci. & Tech. L. Rev.*, 21, 1.

3. CONSUMERS' LEGAL OPTIONS

Access to justice is a fundamental human right, recognised in both the European Union¹⁵² and the European Convention on Human Rights¹⁵³. This means that European consumers have the right to access courts and legal procedures to protect their rights and interests. The right to access justice is also recognised as an essential element of the Rule of Law¹⁵⁴, as it ensures that everyone is treated fairly and equally under the law¹⁵⁵.

The right to „access to justice“ is important because it ensures that consumers can enforce their rights and seek remedies for harm caused by a trader whose practices are unfair or discriminatory. Before taking any legal action, a consumer who feels they have been treated unfairly should contact the party involved in the situation. The consumer can either contact the party directly to explain their concerns or seek assistance from a consumer protection agency or legal professional. This will enable them to receive guidance on negotiating a resolution.

Resolving a complaint should always begin with the negotiation phase and trying to reach an agreement with the seller. The other party should have the opportunity to rectify their actions, as discrimination or unfair trading practices may not always be committed intentionally. Based on the outcome, the consumer can determine if they are satisfied with the reasoning and possible resolution or if further action is necessary.

However, taking action as a consumer can be challenging when geo-discrimination practices are applied across borders. While every litigation can be a stressful, expensive, and time-consuming process, it should be noted that pursuing legal action against a trader located outside the European Union may not be viable. This is due to the fact that initiating legal proceedings

¹⁵² Article 47 of the Charter of Fundamental Rights

¹⁵³ Article 6(1) of the European Convention on Human Rights

¹⁵⁴ O'donnell, G. (2004). The quality of democracy: Why the rule of law matters. *Journal of democracy*, 15(4), 32-46.

¹⁵⁵ Article 20 of the Charter of Fundamental Rights

against a trader outside the EU can be a protracted and costly procedure, and also, the outcome is not always guaranteed. It should also be noted that consumers from non-EU countries are generally not protected against unfavourable treatment based on nationality under the European non-discrimination framework¹⁵⁶. The non-discrimination provisions only apply to individuals within the European Union and do not extend to non-EU countries.

Fortunately, the European consumer has several options to take legal action against a trader established inside the EU to resolve the dispute out of court or in court. Considering that this paper explores geo-discrimination between businesses and consumers, the following discussion will examine legal options for consumers against traders based in the EU.

To resolve issues with geo-discriminatory pricing schemes, claimants can take some simple steps to facilitate the resolution process, especially if third parties are involved. The main step would be to identify whether the trading practice is in fact discriminatory¹⁵⁷. As previously discussed in Section 1.1, the difference in price is not always prohibited. It is legal for businesses to use different promotional tools, to offer different price discounts, and to reward their loyal customers¹⁵⁸.

However, if the price had been different if the consumer had been of a different nationality, location, sex, age, or any other protected characteristic, then it would be evident that the less favourable treatment caused the situation, which is prohibited¹⁵⁹. If this is the case, the person that has been discriminated against must gather evidence to support the claim against the trader, which proves that the trading practice is harmful. Taking pictures or recording can be one way to accomplish this. It is important to be able to prove that an individual which can be identified as a „comparator" is not in a similar or comparable situation¹⁶⁰.

Traders must either demonstrate that the prohibited ground does not cause the differential treatment, or show that the differential treatment is related to the prohibited ground, but has an

¹⁵⁶ Hamul'ák, O., Kiss, L. N., Gábriš, T., & Kocharyan, H. (2021). "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*, 21(1), 153-183.

¹⁵⁷ Pike, C. (2016). Price discrimination.

¹⁵⁸ Ndubisi, N. O. (2005). Gender differences in customer behavioural responses to sales promotion. *Asia Pacific Management Review*, 10(3), 175-185.

¹⁵⁹ Liddell, R., O'Flaherty, M. (2018). Handbook on European non-discrimination law. European Union Agency for Fundamental Rights.

¹⁶⁰ Pike, C. (2016). Price discrimination.

objective and reasonable justification¹⁶¹. While still discussing Finnish brand X, the company should also be able to provide a rational and objective justification for its price differentiation practices.

Consumers have multiple legal options available to them if they feel a trader has violated their rights and the desired result is not achieved through negotiation. These include alternative dispute resolution and its mechanisms, online dispute resolution, small claims procedures, consumer protection agencies, and regular court proceedings.

3.1. Consumer Protection in Estonia

Within the European Union, each Member State has a consumer protection agency that is responsible for enforcing consumer protection laws and regulations. In Estonia, various legal acts have been adopted to protect consumer rights, including the Unfair Commercial Practices Directive, Price Indication Directive, Timeshare Directive, Unfair Contract Terms Directive, Consumer Rights Directive, Consumer Sales and Guarantees Directive and Misleading and Comparative Advertising Directive, which are all implemented mainly by the Consumer Protection Act, the Advertising Act and the Law of Obligations Act¹⁶².

Estonia has two separate entities that deal with consumer protection issues- the Consumer Protection and Technical Regulatory Authority and the Consumer Disputes Committee. The Consumer Protection and Technical Regulatory Authority is a government authority within the area of government of the Ministry of Economic Affairs and Communications¹⁶³. The primary duty of the Consumer Protection Board is to protect the rights and interests of consumers and is also responsible for ensuring that businesses comply with consumer protection laws and regulations, as well as providing information and support to consumers who have complaints or concerns about products or services¹⁶⁴. However, the authority does not have to enforce these rights in court. Instead, they may serve as mediators or offer advisory services¹⁶⁵.

¹⁶¹ Pike, C. (2016). Price discrimination.

¹⁶² Retrieved from: <https://e-justice.europa.eu/37165/EN/enforcement?ESTONIA&member=1>

¹⁶³ Article 21(1) of Consumer Protection Act

¹⁶⁴ Article 21(2) of Consumer Protection Act

¹⁶⁵ Retrieved from: <https://e-justice.europa.eu/37165/EN/enforcement?ESTONIA&member=1>

The Consumer Disputes Committee, on the other hand, is an independent dispute resolution body that mediates disputes between consumers and businesses. It provides an alternative to court proceedings for resolving disputes, and its decisions are binding on both parties. The Consumer Disputes Committee can handle disputes involving goods or services purchased by consumers, and can order businesses to provide refunds or other forms of compensation to consumers. The Committee is funded by the Estonian Ministry of Justice and operates under the jurisdiction of the Ministry.

As an EU member country, Estonian consumers have access to the entire EU internal market due to the free movement of goods and services. The rate of Estonian e-shoppers grew from 29 % in 2012 to 77 % in 2022, representing an increase of 47%¹⁶⁶. This has led Estonians to pursue cross-border complaints. While the Consumer Protection and Technical Regulatory Authority, along with the Consumer Disputes Committee, addresses complaints within Estonia, fortunately, Estonians still have various opportunities to protect themselves abroad. Estonian consumers encountering cross-border discrimination have multiple avenues for redress. These options include seeking assistance from ECC-Net, utilising the ODR platform, contacting their national consumer protection authority, seeking legal counsel, and leveraging EU measures designed to facilitate resolution in cross-border disputes. All these possibilities will be discussed below.

3.2. Alternative Dispute Resolution

At the EU level, consumers may want to consider Alternative Dispute Resolution methods before pursuing legal action, which is a collection of procedures and methods designed to allow for the settlement of legal disputes outside of the courts before taking legal action. Although it may seem like a better choice to take legal action when a dispute arises, a process that prioritises problem-solving may be more appropriate and practical than one focused on reaching a decision or judgement¹⁶⁷. Several types of alternative dispute resolution mechanisms can be used to resolve legal disputes. These mechanisms include arbitration, mediation, and other "hybrid"

¹⁶⁶ Retrieved from:

https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals

¹⁶⁷ Blake, S. H., Browne, J., & Sime, S. (2016). A practical approach to alternative dispute resolution. Oxford University Press

processes, such as online dispute resolution mechanisms, in which a neutral third party assists in the resolution of legal disputes instead of formal adjudication processes¹⁶⁸.

These mechanisms have been developed to assist consumers and traders in resolving conflicts, if they were unable to resolve on their own¹⁶⁹. The process offers several advantages over traditional court proceedings, such as accessibility, simplicity, speed, and cost-effectiveness¹⁷⁰, making it a more suitable option for both parties because it offers several benefits over traditional court proceedings.

The European Parliament and the Council of the European Union adopted the ADR Directive¹⁷¹ (Directive 2013/11/EU) on May 21, 2013, which was then transposed into national law by each Member State by 2015. In order to provide a high level of consumer protection throughout the EU, it was set up to help resolve consumer cross-border complaints more effectively¹⁷².

However, the evaluation by the European Commission revealed that cross-border ADR remained at very low levels due to several barriers, such as, traders not always eager to engage in ADR, consumers are often unaware of the cross-border remedies available to them, and there are other practical difficulties, including costs, language barriers, uncertainty about the relevant legislation to apply in a cross-border situation, and a dearth of freely available online processes.¹⁷³ Traders are most likely unaware of the potential benefits of engaging in ADR, such as resolving disputes more quickly, avoiding costly and time-consuming litigation, and preserving the relationship between the parties.

Analysing the limitations that apply to the typical traditional Estonian consumer revealed that according to Estonia's ADR scheme, the limits include the fact that:

¹⁶⁸ Mnookin, R.H. (2002). Alternative Dispute Resolution. In: Newman, P. (eds) *The New Palgrave Dictionary of Economics and the Law*. Palgrave Macmillan, London. 56-60 https://doi.org/10.1007/978-1-349-74173-1_14

¹⁶⁹ Knudsen, L. F., & Bălița, S. (2012). Development of Consumer Cross-border Alternative Dispute Resolution: ADR perspective. In *Proceedings of Scientific Conference on Trends in Economics and Management for the 21st Century*, Brno, Czech Republic, 20-22 September 2012

¹⁷⁰ Biard, A. (2019). Impact of Directive 2013/11/EU on Consumer ADR quality: evidence from France and the UK. *Journal of consumer policy*, 42(1), 109-147.

¹⁷¹ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)

¹⁷² Knudsen, L. F., & Bălița, S. (2012). Development of Consumer Cross-border Alternative Dispute Resolution: ADR perspective. In *Proceedings of Scientific Conference on Trends in Economics and Management for the 21st Century*, Brno, Czech Republic, 20-22 September 2012

¹⁷³ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market

- The Consumer Disputes Committee typically handles disputes involving goods or services with a value of at least EUR 30 (with some exceptions);
- The consumer has a time limit of 3 years to submit a petition to the Consumer Disputes Committee;
- The time limit for referring the dispute to the court is also 3 years¹⁷⁴.

Based on the previously discussed data, it was revealed that there are three main limitations applicable to the typical Estonian consumer, which must be taken into account. The primary regulation for ADR at the European level is Directive 2013/11/EU, which establishes a political framework for addressing issues related to ADR.

Another alternative dispute resolution mechanism involves mediation. Mediation can be described as a process during which disputants work with a third party to resolve conflicts without relying on force or the legal system¹⁷⁵. It is said that the parties may start this process, or a judge may recommend it, issue an order, or mandate it under a European Member State's laws. Disputes with a company, a tradesman, an individual's job, or even a family member can be settled through mediation, both domestically and internationally. Settling through mediation typically takes less time and costs less than going to court¹⁷⁶. Mediation is also defined in the directive 2008/52/EC where It is said, in article 3 point a), that meditation is a term that refers to a structured process in which two or more disputing parties voluntarily try to resolve their differences on their own by working with a natural mediator to help them come to an agreement outside of court¹⁷⁷.

In the third article, point b), the concept of a mediator is also defined. Namely, it has been explained that the mediator refers to a third party whose main task is to conduct the mediation in such a way that the process is efficient, impartiality can be guaranteed, and competence is also guaranteed. It has to be processed that way, regardless of the third party's background in the relevant Member State, as well as how they were asked or appointed to lead the mediation¹⁷⁸.

¹⁷⁴ Retrieved from: https://finance.ec.europa.eu/system/files/2023-04/ee-consumer_en.pdf

¹⁷⁵ Bercovitch, J., Anagnoson, J. T., & Wille, D. L. (1991). Some Conceptual Issues and Empirical Trends in the Study of Successful Mediation in International Relations. *Journal of Peace Research*, 28(1), 7-17. <https://doi.org/10.1177/0022343391028001003>

¹⁷⁶ Retrieved from: <https://e-justice.europa.eu/62/EN/mediation>

¹⁷⁷ Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0052>

¹⁷⁸ Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0052>

In the Mediation Directive, the main goal is to encourage the use of mediation in the member states. For that, the directive has established five basic objectives, which are also presented below:

- Each Member State is required to guarantee high-quality mediation and to promote mediator training;
- Allows judges the authority to call disputing parties to mediation first if they believe it would be suitable in the particular circumstances of the case;
- Stipulates that agreements reached during mediation may be made legally binding upon request from both parties;
- Guarantees that mediation occurs in a private and discreet setting. In the event that the parties to the mediation disagree later, it stipulates that the mediator will not be required to testify in court regarding the proceedings that transpired during the mediation;
- It is ensured that due to the time spent on mediation, the parties do not lose the opportunity to go to court if they wish. In other words, the deadlines for submitting a lawsuit to the court will be abolished for the period when the mediation procedure takes place.

The document "European code of Conduct for mediators" has also been created, which sets guidelines for dealing with mediation. It sets out important guiding principles that mediators could act on and follow. These guidelines are suitable for all mediators involved in any type of mediation in civil and commercial matters. This document includes the following points: 1) competence, appointment and fees of mediators and promotion of their services, 2) independence and impartiality, 3) the mediation agreement, process and settlement and 4) confidentiality ¹⁷⁹.

It is important to take into account the consumer's rights and opportunities in such processes. In order for the consumer to be treated fairly, the European Consumer Center Network (ECC-Net) works to ensure consumer awareness at the European level. The European Consumer Centers (ECCs) share information related to consumer rights, and offer free advice and assistance on cross-border shopping. ECC-Net closely cooperates with other European Union networks and institutions, as well as with other national consumer protection authorities. The goal is to offer consumers living in the European Union, Norway and Iceland better access to the internal market in such a way that their safety is guaranteed. This is achieved by spreading information and

¹⁷⁹ Retrieved from: <https://e-justice.europa.eu/fileDownload.do?id=c0ec51ee-bf0f-4b6b-8cc9-01b305b90d68>

offering help to consumers who may need assistance. ECC-Net offers consumers knowledge that is necessary so that consumers can be aware of their rights and make informed purchase decisions, in addition they also support sustainable consumption. In this study, the nature and operation of ECC-Net has been analysed more thoroughly in Chapter 3.2.2.

The European Online Dispute Resolution (ODR) platform is a platform provided by the European Commission that makes online trading safer and fairer by providing access to high-quality tools that support dispute resolution. This platform is designed to solve consumer problems. On the platform, you can discuss resolution options directly with the trader or arrange for a dispute resolution body to handle your case. This platform is available in all languages of the European Union countries, in addition to Icelandic and Norwegian¹⁸⁰.

The creation of this platform is also reflected in the Regulation (EU) No 524/2013 point 18, where It is stated that the ODR platform must be an interactive website that provides traders and customers with a single point of contact for resolving out-of-court disputes resulting from online transactions. General information about the out-of-court settlement of contractual disputes between retailers and customers resulting from online sales and service contracts would be available via the ODR platform. It should enable traders and customers to file complaints by completing an electronic form that is accessible in all of the Union's official languages and attaching pertinent documentation. It should forward complaints to an ADR body qualified to handle the relevant dispute¹⁸¹. As it turned out before, this has also been taken into account in the created ODR platform, and the platform has been created considering what is stated in the regulation. Thus, the ODR platform was created precisely to solve conveniently emerging problems out of court. This platform is an important and novel approach to dealing with problems in trade.

3.2.1. Estonian Consumer Dispute Committee

According to Article 22 of Consumer Protection Act (CPA), the Consumer Dispute Committee (CDC) is an independent institution, which is competent to settle disputes arising from contracts between consumers and traders if the parties have not been able to settle the disputes by agreement¹⁸². The Committee operates at the Consumer Protection Board within the area of

¹⁸⁰ Retrieved from: <https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks>

¹⁸¹ Retrieved from:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524&qid=1702913759674>

¹⁸² Article 22 of Consumer Protection Act

government of the Ministry of Economic Affairs and Communications and makes decisions independently pursuant to Acts and other legislation¹⁸³. The CDC, Estonian general consumer dispute entity, is solving most of the out-of-court consumer disputes in Estonia. The Committee is competent to resolve consumer disputes arising from a contract between a consumer and a trader, where the parties to the dispute are a consumer resident in Estonia and an entrepreneur registered in Estonia. Cross-border consumer disputes are resolved with the help of the European Consumer Centre. The committee is responsible for resolving disputes between consumers and traders in an out-of-court manner. It consists of independent experts who are appointed by the Minister of Justice and have expertise in various areas related to consumer protection, such as law, economics, and consumer behaviour. When a dispute arises between a consumer and a trader, either party can submit a complaint to the committee, which will then review the case and make a decision based on the evidence presented.

The decisions of the Consumer Dispute Committee are legally binding on the traders involved in the dispute, and consumers can enforce them through the court system if necessary. The committee's decisions are also publicly available on its website, which can help to inform other consumers about their rights and protect them from similar disputes in the future.

Although the Committee stands for consumer rights, it has several limitations. The right to the protection of the state and of the law has been recognised since the Constitution of the Republic of Estonia, in which Article 13 states: “ Everyone has the right to the protection of the state and of the law. The Estonian state shall also protect its citizens abroad.” However, as cross-border complaints are made with the help of the European Consumer Centre, there can be some limitations, which include, potential delays in resolution, varying legal interpretations across jurisdictions, and the fact that involvement is not mandatory, allowing consumers to be left alone with certain issues.

Overall, the Estonian Consumer Dispute Committee plays an important role in ensuring that consumers in Estonia have access to an effective and efficient system for resolving disputes with traders.

¹⁸³ Article 23(1) of Consumer Protection Act

3.2.2. European Consumer Centre Network

The European Consumer Centre Network (EEC-Net) is a network of independently-managed offices co-funded by the European Commission¹⁸⁴. The primary role of ECC-Net is to enhance consumer confidence when engaging in cross-border transactions by providing free information and advice to the public on their rights as consumers, as well as assistance in the resolution of cross-border consumer disputes¹⁸⁵. The 29 European Consumer Centres (ECC-Net) help consumers engage in cross-border transactions more confidently by providing them with free information and advice on their rights and assist them in resolving cross-border consumer complaints¹⁸⁶. When consumers encounter difficulties with traders from another EU country, the ECC-Net can be very helpful. The Consumer Conditions Scoreboard 2017¹⁸⁷ shows that the ECC-Net receives more cross-border complaints than alternative dispute resolution bodies or The European Small Claims Procedure¹⁸⁸.

In May 2022, the ECC-Net conducted an in-depth study among all ECCs on their practical experience with national ADRs in the handling of cross-border disputes. The survey identified the main obstacles European consumers faced when trying to engage in cross-border ADR. There are a number of obstacles to the implementation of ADRs, including a lack of trader engagement and compliance, as well as a lack of consistency in coverage and quality across countries and sectors. Among the problems mentioned most often were language barriers and the difficulty of navigating online procedures¹⁸⁹.

European Consumer Centres listed traders' unwillingness to participate in the dispute resolution procedure or failure to comply with the recommendation given by the ADR entity as the main area for improvement¹⁹⁰. If a trader announces in advance that it does not intend to participate in the process, in many countries it is not expedient to take the dispute concerning this trader to a dispute resolution entity if trader involvement is necessary for the ADR to give an opinion or come to a decision. From the trader's perspective, it should be noted that in many cases they

¹⁸⁴https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/european-consumer-centres-network-ecc-net_en

¹⁸⁵ European Consumer Centres Network. (2019). ECC-Net's Perspective on Geoblocking Regulation (EU) 2018/302

¹⁸⁶ European Consumer Centres Network. (2022). Alternative Dispute Resolution (ADR)

¹⁸⁷ European Commission. (2017). Consumer Conditions Scoreboard

¹⁸⁸ European Consumer Centres Network. (2019). ECC-Net's Perspective on Geoblocking Regulation (EU) 2018/302

¹⁸⁹ European Consumer Centres Network. (2022). Alternative Dispute Resolution (ADR)

¹⁹⁰ European Consumer Centres Network. (2022). Alternative Dispute Resolution (ADR)

refrain from participating in an ADR-procedure because they usually have to pay for the procedure, whereas it is free of charge for the consumer¹⁹¹. If a trader doesn't follow such a result, there are usually no sanctions involved, which may explain the low involvement by the traders. One way to overcome the traders' unwillingness to participate in the dispute resolution procedure would be to operate with only small fees for trader participation to encourage traders to actively engage in ADR. Another way would be to implement consequences for traders which are not participating in ADR such as actively using "name and shame" lists ("negative list") for traders not complying with ADR decisions. Such lists can be an important communication tool for those guiding consumers about whom to engage with¹⁹². It's also worth considering the establishment of positive lists, recognising and commending traders who consistently comply with ADR decisions and actively participate in the resolution process. The "positive" and "negative" list could be a powerful tool to encourage traders to behave responsibly and comply with ADR decisions. It could also help to deter those who do not comply with ADR decisions, as potential customers could use this information to decide whether to engage with them.

However, it is evident that for many European consumers the access to ADR in a cross-border dispute is not a real possibility today¹⁹³. Not only because of already mentioned lack of ADR coverage or trader engagement, but simply because it is not possible for them to manoeuvre through the ADR complaint handling process¹⁹⁴.

ADRs in the EU should accept more than one language, and English in particular, to allow foreign consumers to effectively apply to services but also to cover foreigners living on their territories. Additionally, consumers should be offered help to tackle language barriers all the way through an ADR procedure from filing the complaint to understanding the decision.

The European Consumer Centre Network in Estonia operates through its dedicated website, <https://consumer.ee/>. However, analysing the website proves challenging due to the limited information available, including the absence of consumer experiences, raising concerns about its trustworthiness. Nevertheless, the main European Consumer Centre Network offers comprehensive information, featuring annual reports, statistics about Estonia, and all the latest relevant news. Strangely, Ecc-Net Estonia does not appear to share this news.

¹⁹¹ European Consumer Centres Network. (2022). Alternative Dispute Resolution (ADR)

¹⁹² European Consumer Centres Network. (2022). Alternative Dispute Resolution (ADR)

¹⁹³ European Consumer Centres Network. (2022). Alternative Dispute Resolution (ADR)

¹⁹⁴ European Consumer Centres Network. (2022). Alternative Dispute Resolution (ADR)

The website provides varied information depending on the chosen language (Estonian or English). While ECC-Net Estonia offers assistance in Estonian and English, consumers speaking other languages may encounter language barriers when seeking help.

A Facebook search for Ecc-Net Estonia's feedback revealed statements such as "the process was very time-consuming" and "got no help," suggesting consumers may face delays or receive no assistance. Although, ECC-Net Estonia can provide valuable advice and assistance to consumers, it lacks the authority to enforce consumer protection laws or make decisions on behalf of consumers. Some disputes may prove too complex for ECC-Net Estonia to handle effectively, prompting consumers to seek assistance from legal professionals with expertise in cross-border disputes.

Resolving a cross-border dispute through ECC-Net Estonia or other channels can be a time-consuming process, potentially frustrating consumers in need of a quick resolution to their problems.

3.3. Judicial Proceedings

The most obvious legal option for consumers to stand up for their rights is to take their case to court. Although, judicial proceedings should always remain the last resort in resolving a problem. In the event of a dispute, an attempt should first be made to negotiate with the trader in order to find a satisfactory solution. When appealing to a foreign court, there are certain national procedural rules to be followed. These vary depending on how a case is referred to court, but their essential purpose is to help you to present the relevant matters of fact and law in a sufficiently clear and complete manner to allow the court to assess the admissibility and the merits of your case. The ways in which a case is referred to court vary from one Member State to another. There are also variations within a Member State depending on the nature and circumstances of the application and the type of court. Referral to some courts for particular types of cases may require you to fill in a form or to assemble a whole file on the case. These variations are explained by the fact that the disputes brought before the courts are also very diverse: by their nature, they may be more or less difficult to resolve. It is very important to ensure that nothing is missing, to facilitate the work of the judge, to allow the other party to defend itself properly and to ensure that the whole procedure goes smoothly. However, every individual can seek assistance from their national consumer protection authority or legal professionals who specialise in cross-border disputes. It is also worth noting that the EU has established several measures to facilitate cross-border disputes, such as the European Small Claims Procedure, which allows consumers to seek redress for small claims in another EU country.

Returning to the topic of discriminatory practices by the Finnish brand X, Estonian consumers can take legal action. However, as the company is located in Finland, the consumer must file a complaint to the Finnish court. As a reminder, legal proceedings are often complex and expensive even in the absence of compensatory damages and often require the assistance of a lawyer. It should be noted again that other options should be considered before pursuing legal action. Although, it is everyone's right to pursue formal legal action and stand for rights. However, it is also important to consider the potential costs of legal action, such as legal fees, and the amount of time that may be required to pursue the case. Additionally, it is necessary to consider the potential outcomes of legal action, such as the potential for an unfavourable outcome or a lengthy legal battle. Although it may seem like a better choice to take legal action

when a dispute arises, a process that prioritises problem-solving may be more appropriate and practical than one focused on reaching a decision or judgement¹⁹⁵

3.4. Recommendations

Based on the analysis throughout this research paper of distinct areas of the European anti-discrimination framework and Estonian legislation regarding online consumer discrimination based on location, several policy recommendations can be made to further strengthen consumer protection and the work of competent authorities. Despite the EU's consumer protection being recognised as one of the strictest, consumers still encounter various challenges, preventing them from fully benefitting from the Digital Single Market. The following recommendations have been made based on the analysis and mapping of problems. Firstly, it is important to educate consumers and raise consumer's awareness, as it may be difficult for average consumers to determine whether they are being subject to online consumer discrimination, much less detect when it is occurring solely on the basis of geographic region.

The process of making consumers more aware of the problems occurring in the DSM and all the prohibited trading practices without diving into an endless pile of laws will make any information initiatives more comprehensive and effective. Consumer information strengthens consumers' awareness of violations, and increases the probability of identifying obstacles. Consumers need guidelines to understand and protect their own right not to be discriminated against in the DSM. This should be made very accessible and convenient for individuals without requiring excessive effort, for example, by using the latest technology.

One potential solution involves the creation of a user-friendly website, where individuals can file complaints, specifically addressing discriminatory practices based on nationality or residence, and ultimately encompassing all forms of discriminatory behavior. While there is already an ODR platform, it has its limitations, as damage must already be caused by the trader. The ODR platform should be enhanced, and the requirements for reporting purchases should be modified to include practices that are prohibited even if consumers have not yet suffered any harm. Another improvement could be to make the website accessible in every language, thereby ensuring accessibility for every consumer across the European Union and its Member States.

¹⁹⁵ Blake, S. H., Browne, J., & Sime, S. (2016). *A practical approach to alternative dispute resolution*. Oxford University Press

This could be achieved by using digital tools, such as Kratt¹⁹⁶, which can also help overcome language barriers by automatically translating to the required language or assisting consumers in filling complaints. Additionally, chatbots can be employed to communicate with consumers 24/7, potentially attracting more users. This, in turn, could increase consumer awareness as it becomes easier to find relevant content.

Secondly, the EU should create a digital tool that can recognise a website's inappropriate behaviour or dark patterns and alert the responsible authorities to investigate if this is the case and take appropriate action. The goal would be to prevent discriminatory practices from happening and end them sooner, while also taking the responsibility off the consumers to be aware and alert of unfair practices. It should not be the consumers' task to discover these dark patterns and constantly report them; instead, consumer protection authorities should have a digital tool that independently analyses every e-shop and alerts when such practices are discovered. Thus, bringing such complaints to public attention when justified and establishing a blacklist of unfair terms that are always prohibited should be introduced and updated regularly¹⁹⁷. This would ultimately promote transparency and accountability among businesses.

Thirdly, all e-shops should prominently disclose their internal market policies, specifically indicating the countries from which they accept orders, whether they have different requirements for various countries, and providing the objective reasons for differentiation. Offering businesses examples of both best and worst practices can prompt them to reconsider their strategies and, consequently, minimise the occurrence of unjustified geo-discriminatory practices.

Furthermore, Member States should adapt all strict consumer protection regulations to national laws and step up enforcement of all antidiscrimination laws in the EU. This is important to ensure an effective antidiscrimination framework. Thus, stricter penalties should be implemented for companies found guilty of employing unjustified discriminatory practices.

¹⁹⁶ See more: <https://www.kratid.ee/mis-on-kratt>

¹⁹⁷ Šajin, N. (2019). Protecting European consumers. European Parliamentary Research Service. Retrieved from: https://what-europe-does-for-me.eu/data/pdf/focus/focus22_en.pdf

Lastly, consumer cross-border ADR resolution would be improved and made more effective if consumers and traders had access to more information, more recourses, and education. There is a need to improve traders' unwillingness to participate in dispute resolution procedures¹⁹⁸.

¹⁹⁸ European Consumer Centres Network. (2022). Alternative Dispute Resolution (ADR)

CONCLUSION

Consumer discrimination has evolved so much in time and is getting only more and more complex. Before there were certain groups being discriminated against, such as race, sex, specific nationalities, or even individuals with specific worldview etc. In today's world, everyone could easily be discriminated against, especially online. In spite of the EU's high level of consumer protection, consumers still face a number of problems¹⁹⁹. One of the reasons is the era of "big data", which has enabled greater potential for price discrimination. Although, it may not be prohibited, some forms of price differentiation are allowed under the law.

On the other hand, it may be difficult for companies to take full advantage of the EU's Internal Market since they must comply with foreign laws, including consumer laws, exposing them to the unknown. Therefore, it may be reasonable for the businesses not to target certain countries. Despite the fact that there is no special knowledge or degree required, it is imperative to adhere to all of the regulations, which can be extremely challenging, especially without any prior knowledge. Therefore, one of the reasons why not all companies may be interested in cross-border trading and are engaging in consumer differentiation can be that the rules which need to be followed can get very complex, be unclear and may differ from country to country.

The EU should create a digital tool that can recognise a website's inappropriate behaviour or dark patterns and alert the responsible authorities to investigate if this is the case and take appropriate action. The goal would be to prevent discriminatory practices from happening and end them sooner, while also taking the responsibility off the consumers to be aware and alert of unfair practices. It should not be the consumers' task to discover these dark patterns and constantly report them; instead, consumer protection authorities should have a digital tool that independently analyses every e-shop and alerts when such practices are discovered.

¹⁹⁹ Šajin, N. (2019). Protecting European consumers. European Parliamentary Research Service. Retrieved from: https://what-europe-does-for-me.eu/data/pdf/focus/focus22_en.pdf

Issuing the problem of unlawful consumer discrimination more widely and establishing clear legal guidelines would help to draw attention to it and thus, increase awareness. Also, by clarifying in which situations differential treatment of this kind cannot be justified, all participants in cross-border transactions will be provided with clarity and legal certainty, while ensuring that internal market rules on nondiscrimination are effectively and effectively enforced²⁰⁰. This will also help to prevent unjustified discrimination which could impede fair and open competition in the internal market. Furthermore, it will ensure that consumers have access to the same goods and services, and that their rights are protected.

Although it may seem like a better choice to take legal action when a dispute arises, a process that prioritises problem-solving may be more appropriate and practical than one focused on reaching a decision or judgement²⁰¹

In conclusion, for the EU to be able to provide a high level of consumer protection across its Member States, all differences in consumer protection within Member States must be eliminated.

²⁰⁰ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

²⁰¹ Blake, S. H., Browne, J., & Sime, S. (2016). A practical approach to alternative dispute resolution. Oxford University Press

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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Digital Single Market Strategy for Europe

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