Geo-blocking and the conflict of laws: ships that pass in the night?

On 25 May 2016, the European Commission presented its long-awaited proposal for a regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market (COM[2016] 289 final).

In the Commission's words, "[t]he general objective of this proposal is to give customers better access to goods and services in the Single Market by preventing direct and indirect discrimination by traders artificially segmenting the market based on customers' residence. Customers experience such differences in treatment when purchasing online, but also when travelling to other Member States to buy goods or services. Despite the implementation of the non-discrimination principle in Article 20(2) of Directive 2006/123/EC 3 ("Services Directive"), customers still face refusals to sell and different conditions, when buying goods or services across borders. This is mainly due to uncertainty over what constitutes objective criteria that justify differences in the way traders treat customers. In order to remedy this problem, traders and customers should have more clarity about the situations in which differences in treatment based on residence are not justifiable. This proposal prohibits the blocking of access to websites and other online interfaces and the rerouting of customers from one country version to another. It furthermore prohibits discrimination against customers in four specific cases of the sale of goods and services and does not allow the circumventing of such a ban on discrimination in passive sales agreements. Both consumers and businesses as end users of goods or services are affected by such practices and should therefore benefit from the rules set out in this proposal. Transactions where goods or services are purchased by a business for resale should, however, be excluded in order to allow traders to set up their distribution systems in compliance with European competition law."

From a conflicts perspective, the question that is most interesting is how the prevention of geo-blocking and similar techniques will relate to the "directed-activity"-criterion that the European legislature has used both in the Rome I Regulation (Article 6(1)(b)) and in the Brussels I (recast) Regulation (Article 17(1)(c)). In a series of cases starting with the *Alpenhof* decision of 2011

(ECLI:EU:C:2010:740) the CJEU has developed a formula for determining the direction of a trader's activity by focusing on its subjective intention to deliver goods or services to consumers in a certain country, i.e. that it "should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them." If standard techniques of geo-blocking or the use of different sets of general conditions of access to their goods or services are now banned as discriminatory, how will this affect the test developed by the CJEU; in other word, is it reasonable to infer that a trader has actually been "minded to conclude a contract" and consented to being sued in the state of the consumer's domicile if the trader has no legal option *not* to offer goods or services to the customer? The drafters have noticed this obvious problem and inserted a pertinent clause into Article 1 no. 5 of the proposal, which reads:

"This Regulation shall not affect acts of Union law concerning judicial cooperation in civil matters. Compliance with this Regulation shall not be construed as implying that a trader directs his or her activities to the Member State where the consumer has the habitual residence or domicile within the meaning of point (b) of Article 6(1) of Regulation (EC) No 593/2008 and point (c) of Article 17(1) of Regulation (EU) 1215/2012."

In light of the highly controversial experience with similar reservations – it suffices to think of Article 1(4) of the E-Commerce Directive (2000/31/EC) or Recital 10 of the recently withdrawn CESL proposal (COM[2011]635 final) –, I have doubts whether the separation between the two areas of law will work as smoothly as the Commission seems to imagine: if a trader is legally *coerced* to serve consumers in a certain state, any test aimed at determining his or her "state of mind" to do so necessarily becomes moot – which, on the other hand, may be a good opportunity for the CJEU to rethink its frequently criticized approach. Considering the (non-)treatment of Recitals 24 and 25 of the Rome I Regulation in *Emrek* (ECLI:EU:C:2013:666), however, I am inclined not too expect much deference from the Court to interpretative guidance provided by the European legislators…