

EU Adopts Ban On Unjustified Geo-Blocking

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On 27 February 2018, the European Union (EU) adopted the EU geo-blocking regulation (the Regulation), which will enter into force by the end of the year. The Regulation prohibits unjustified geo-blocking, and other forms of discrimination, based on customers' nationality, place of residence, or place of establishment. The Regulation is particularly relevant to all businesses selling online in different EU Member States, whether or not they are located in the EU. Before the end of the year, businesses should carefully review their online interface mechanisms, terms and conditions, payment mechanisms, and distribution agreements to assess whether unjustified geo-blocking practices are in place, and, if necessary, adjust their terms and sales organization to ensure compliance with the Regulation.

What is geo-blocking?

Geo-blocking refers to practices where traders offering services in one EU Member State block or limit access to their online interfaces, such as websites and apps, by customers from other EU Member States wishing to engage in cross-border transactions. Geo-blocking also occurs when traders apply different general conditions based on geo-factors, such as nationality, place of residence, or temporary location. Geo-blocking can occur as a result of a trader's unilateral decision, but also pursuant to clauses in a bilateral agreement (distribution agreement).

Combating geo-blocking is central to the EU's Digital Single Market (DSM) strategy. The concern is that geo-blocking potentially limits online shopping and cross-border trade, and leads to undesirable geographical market segmentation. The European Commission's (EC's) final e-commerce sector inquiry report identified the widespread use of geo-blocking, highlighting that 38% of responding retailers selling consumer goods and 68% of responding digital content providers implement geo-blocking measures.

What does the Regulation cover?

Online interfaces

Traders must not block or limit a customer's access to the trader's online interface (website, mobile app, etc.) for reasons related to the customer's nationality, place of residence, or place of establishment. Traders must also refrain from automatic redirecting to affiliates located in the customer's territory without the customer's consent. The bans do not apply if geo-blocking is necessary to ensure compliance with legal requirements.

Access to goods or services

Traders must not apply different trading conditions (including net sale prices) for reasons related to a customer's nationality, place of residence, or place of establishment in three specific scenarios if a customer seeks to:

- Buy goods from a trader who under its general conditions offers delivery to a Member State or collection by customers in a Member State.
- Receive electronically supplied services from a trader (such as cloud services, data warehousing services, website hosting and the provision of firewalls, use of search engines, and internet directories).
- Receive services other than electronically supplied services in a Member State where the trader operates (such as hotel accommodation, sports events, car rental, and entrance tickets for music festivals or leisure parks).

There are some important carve-outs from the geo-blocking ban.

- Electronically supplied services offering copyrighted content are excluded from the Regulation. For this reason, the Regulation does not affect online

television, films, e-books, music, online games, and streamed sports. However, the EC will first evaluate the Regulation's impact two years after its entry into force, to assess a possible extension of the new rules to electronically supplied services offering copyrighted content.

- Traders are not forced to deliver goods across borders. A trader that in its general terms and conditions has established that it only delivers domestically can continue to do so. Customers from other Member States can order the goods, but they will have to pick up the goods in the trader's Member State (if the trader offers a pick-up option), or provide a delivery address in the trader's Member State.
- There is no requirement to offer a single EU shopfront. Traders are not precluded from offering goods or services in different Member States, or to certain groups of customers, by means of targeted offers and differing general conditions of access, including through the setting-up of country-specific online interfaces.
- Traders are not precluded from offering, on a non-discriminatory basis, different conditions, including different prices, in different points of sale, such as shops and websites, or to make specific offers only to a specific territory within a Member State. However, they cannot prevent consumers in other Member States from availing themselves of these offers.

Payment

Traders must not discriminate against customers by refusing certain transactions, or by applying different conditions or payment, for reasons related to customers' nationality, place of residence, place of establishment, the location of the payment account, the place of establishment of the payment service provider, or the place of issue of the payment instrument. This obligation is subject to certain limitations, such as that the payment transaction is made through an electronic transaction, strong customer authentication is available, and the payment transactions are in a currency that the trader accepts.

Passive sales

Passive sales clauses (for example, in distribution agreements) requiring traders not to respond to unsolicited demand from consumers in other Member States will be automatically void and unenforceable. While passive sales restrictions will often infringe EU competition law in any event, the Regulation renders the prohibition of

passive sales absolute — irrespective of the trader's market position. The relevant article of the Regulation relating to passive sales (Article 6) will apply 24 months from the Regulation's date of entry into force.

Scope

The Regulation's scope is aligned with that of the Services Directive.^[i] However, if conflicts arise, the rules of the Regulation prevail. The Regulation aims to clarify the non-discrimination obligations in Article 20 of the Services Directive. For this reason, a number of important service industries are excluded from the Regulation's scope, including financial, transport, electronic communication, healthcare, audio-visual, and broadcasting services.

The Regulation covers B2B transactions, but only if a consumer or business receives a service or purchases a good for the sole purpose of end use.

Entry into force

The Regulation will be published in the EU's official journal before the end of March 2018, and will take effect nine months after its publication.

The bigger picture

The Regulation forms part of the EU's wider DSM strategy. EU legislators are also introducing a broader e-commerce package, which includes a multitude of legislative initiatives. These include a new regulation on the portability of digital services across the EU, which will come into force on 1 April 2018. Under this new regulation, consumers who paid for online content services in their home country will be able to access these services when visiting another EU country. Other proposals include more transparent and affordable cross-border parcel deliveries, and the modernization of value-added tax rules for e-commerce.

In parallel to its legislative initiatives, the EC has challenged geo-blocking measures under the EU competition rules (Articles 101 and 102 TFEU). The EC has launched a number of individual antitrust investigations in the consumer electronics, video game, hotel industry, clothing, and licensed merchandise sectors, as well as into the licensing and distribution practices of movie studios. Some of these enforcement actions target copyrighted content, and thus may reach beyond the Regulation's scope.

[i] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

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