

Geo-blocking: new rules for traders

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Businesses that offer goods or services in the EU have until December 2018 to review their trading terms, digital offerings, and logistics and distribution networks to ensure that they are not engaging in unjustified geoblocking. In this article we look at some of the key areas covered by the EU's new Geoblocking Regulation, together with actions businesses can take now to prepare for its implementation.

Regulation (EU) 2018/302 on addressing unjustified geoblocking (the "Regulation") will apply with direct effect in all EU member states from 3 December 2018. It aims to prevent unjustified geoblocking and other forms of discrimination based on a customer's nationality, place of residence or place of establishment within the EU (*see box "What is geoblocking and why does it happen?"*).

The Regulation is a key part of the EU's digital single market strategy (see: [A digital single market: the European Commission unveils its strategy](#)). Boosting cross-border e-commerce is one of the main objectives of the digital single market, and discriminatory practices such as geoblocking are, in the view of the European Commission (the "Commission"), an important factor contributing to the relatively low level of cross-border transactions within the EU. It is part of a wider e-commerce package which also includes legislative proposals on cross-border parcel delivery services and the strengthening of consumer rights.

What is geo-blocking and why does it happen?

Geoblocking occurs when traders operating in one country block or limit access to their online interfaces, such as websites and apps, by customers from other countries. However, the Regulation is not limited to geo-discrimination in the online world. It applies whenever traders apply different general conditions of access to their goods and services for reasons relating to customers' nationality, residence or establishment within the EU.

There are many reasons why companies, particularly SMEs, apply different conditions of access. Concerns around divergent legal environments, taxation, delivery costs and language requirements can all add to a trader's unwillingness to sell to customers from other EU member states. There may also be commercial gain in artificially segmenting the EU market. The Regulation therefore attempts to recognise the legitimate concerns of traders while banning unjustified discriminatory practices.

What does the Regulation cover?

The main areas covered by the Regulation include:

- Access to online interfaces.
- Access to goods and services.
- Non-discrimination related to payment.
- Agreements on passive sales.

The Regulation is only concerned with cross-border transactions between traders and EU customers, involving general, rather than individually negotiated, terms, and contains a number of exemptions.

Online interfaces

Traders must not, whether by using technological measures or otherwise, block or limit a customer's access to the trader's websites, apps or other online interfaces on the basis of the customer's nationality, place of residence or place of establishment. The relatively common practice of redirecting customers to a local website will now require the customer's explicit consent. Consent will be valid for subsequent visits by that same customer, although they can withdraw it at any time, and that customer must still have access to the version of the website or app that they initially sought.

Traders can still block, limit access or redirect where this is necessary to comply with law and provided that they explain to customers why it is necessary.

Goods and services

The Regulation identifies three specific situations where there can be no justification for applying different conditions of access to goods or services for reasons related to a customer's nationality, residence or establishment (sometimes called the "shop like a local" principle). These are where the customer seeks to:

- Buy goods from a trader who offers delivery or collection of those goods in a member state. There is, however, no obligation on the trader to deliver to the customer's home member state. For example, a French customer buying a television who finds the best deal on a Spanish website can order the product from the .es site and collect it at the trader's premises (like any Spanish customers) but

cannot require delivery to his home in France if the trader does not normally deliver there.

- Receive electronically supplied services from the trader, for example, cloud or data warehousing services, website hosting or the provision of firewalls. This may prove very useful for customers, enabling them to shop around the EU for the best deal for their services without any of the physical delivery restrictions which face goods. However, it may also create challenges for traders who currently operate different pricing models for these services around the EU.
- Receive services in a physical location within a member state where the trader operates, for example, hotel accommodation, sports events, car rental and entrance tickets for music festivals or leisure parks.

Traders will also need to consider how to manage any bundled goods and services which incorporate any goods or services in the categories described above, as the Regulation will apply to that whole bundle.

The rules around access to goods and services do not mean that a trader must comply with non-contractual legal requirements, such as packaging rules, in a customer's member state, or supply goods or services which are not legal to sell in that member state. There is also no obligation to harmonise prices, offers or access terms across member states, where these are based on factors unrelated to customer nationality, residence or establishment.

Payments

While traders can accept whatever payment means they want, the Regulation prevents geo-discrimination within those payment means. Traders cannot, therefore, discriminate between card-based electronic transactions (within the same card brand and category) which are in a currency that the trader accepts and where the authentication requirements are fulfilled. For

example, a trader cannot discriminate based on which member state a credit or debit card was issued, but does not need to accept a credit card payment just because it accepts debit cards of the same brand.

Traders can still withhold delivery of the goods or services until they have confirmation that the payment has been properly initiated, where there are objective and well-justified reasons to do so.

Passive sales

Passive sales clauses (that is, clauses that contractually prevent goods or services being sold following an unsolicited customer request) which require a trader to breach the Regulation will be automatically void and unenforceable. While, in practice, many of these clauses would already breach competition rules, there were concerns that exemptions may apply in some cases. This requirement, which applies from the later date of 23 March 2020, therefore ensures that clauses of this kind will always be automatically void.

Exemptions

A number of important services are carved out from the scope of the Regulation, including services in the field of transport, retail financial services and audiovisual services. A number of these excluded services are covered by sector-specific EU law or other initiatives under the digital single market strategy which address discrimination. These exclusions also keep the material scope of the Regulation in line with the Services Directive (2006/123/EC), which also tackles geo-discrimination, but which the Commission has acknowledged is perceived as ambiguous and difficult to apply in practice.

There is one exception to this: non-audiovisual copyright-protected content services, such as ebooks, online music, software and video games, are within scope of the Services Directive. However, after extensive lobbying, they are currently excluded from the "shop like a local" principle in the Regulation (see "What does the

Regulation cover?" above). This exclusion will, however, be reviewed two years after the Regulation comes into force.

Who is in scope?

The Regulation imposes obligations on traders and benefits customers.

"Customers" are both consumers and undertakings resident or established in the EU who seek to purchase goods or services in the EU. There was some debate about whether the Regulation should only focus on consumers, but it was decided that consumers and undertakings, particularly SMEs, are often in a similar position. However, to ensure that it does not impact business-to-business distribution schemes, the Regulation does not cover customers purchasing goods or services for subsequent resale, transformation, processing, renting or subcontracting. It does not mandate how traders should check whether customers will be the end user of the goods or services being sold, but states that it is without prejudice to non-discriminatory practices of traders limiting transactions, in order to prevent customers buying quantities that exceed their internal needs.

"Traders" are any natural or legal persons who are acting for purposes relating to that trader's business. This includes acting through another person (who is acting on the trader's behalf). They do not need to be established in the EU, as the Regulation states that the effects for customers, and on the internal market, of discriminatory treatment are the same, regardless of whether a trader is established in a member state or in a third country.

The Regulation will therefore apply to in-scope UK traders after Brexit, despite Teresa May's confirmation on 2 March 2018 that the UK will leave the digital single market as a result of Brexit.

Impact on traders

While the Regulation should benefit EU customers frustrated with not being able to access the best deals, it may not be welcomed by traders who either choose not to trade in certain member states, or who currently benefit from applying different pricing and distribution models across the EU.

It is also slightly unclear how much of a burden the obligations will impose on traders. The Regulation tries to give some comfort. For example, it looks to take VAT compliance into account, and clarifies (regarding applicable consumer protection law) that merely complying with the Regulation will not, of itself, mean that a trader is directing its activities to consumers in a member state. However, it is not yet clear what practical steps traders will need to take to avoid geo-discrimination and what the consequences of selling could be. For example, could some

websites require a complete re-design, and will a trader need to check whether it is legal to sell their goods in a particular member state? The Commission has provided some information on these more practical issues in its Q&A document on the Regulation, although a number of the responses raise as many questions as they answer (<https://ec.europa.eu/digital-single-market/en/news/geo-blocking-regulation-questions-and-answers>).

Ultimately, the type of sanctions imposed by the various member states may determine the level of action taken by traders (see box overpage: Actions for traders and Customers). Despite the Regulation harmonising the EU's rules on geoblocking, member states are free to set their own sanctions provided that these are effective, proportionate and dissuasive. Until these are known, it is difficult to predict the extent to which the new rules will affect trading practices.

Actions for Traders and Customers

Actions for traders

There are some actions traders can take now to prepare, for example they can:

- Check whether their goods or services are within scope.
- Review their online interfaces to ensure that customers can access them and easily complete orders.
- Ensure that blocking or limiting access to online interfaces, or automatic redirection no longer takes place due to geo-discrimination, unless necessary to comply with legal requirements. Where this is necessary, prepare the requisite explanatory information.
- Keep records of redirection consents and collect, store and maintain this data in accordance with any relevant data protection and e-privacy rules.
- Consider implementing procedures to check whether potential customers will be the end users of their goods or services.
- Review the bundling and pricing strategies for their goods and services and the payment and delivery models to ensure that they do not discriminate.
- Review their licensing and distribution arrangements to check whether they contain any passive sales restrictions which could breach the Regulation.

Actions for customers

- Check whether you could access more favourable terms from your supplier based on pricing, terms or promotions offered to other EU customers.

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