



Application of The EU Geo-Blocking Regulation: A Ban to Online Sales Discrimination on the Basis of the Customer's Nationality or Location

Abstract: This Article analyzes the EU Geo-Blocking Regulation and the ensuing prohibition of online sales discrimination practices, based on customers' nationality, place of residence or of establishment. Prohibiting geo-blocking is one of the pillars of the EU Digital Single Market Strategy. Businesses trading online should comply accordingly. The Article examines the Regulation's object, scope, main obligations, aspects of non-discrimination related to payment means and passive sales provisions, and discusses the e-commerce sector inquiry of the European Commission and the issuing of a relevant Ministerial Decision in Greece which designates competent enforcement bodies.

Recent Regulation (EU) 2018/302¹ addresses unjustified online sales

¹ 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

discrimination based on customers' nationality, place of residence or place of establishment within the internal market. It applies to all traders², including online marketplaces, operating within the Union, in connection to transactions relating to the sales of goods or the provision of services within the Union.

In particular, some customers are not able to buy goods and services online from traders located in a different Member State

the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (herein: the 'Geo-blocking Regulation' or the 'Regulation'). The Regulation is part of the e-commerce package, together with legislation on cross-border parcel delivery services, applicable since 22 May 2018, and a law to strengthen enforcement of consumers' rights, which will apply from 17 January 2020.

² Trader is defined as any natural or legal person, privately or publicly owned, who is acting, including through any other person acting in the name or on behalf of the trader, for purposes relating to the trade, business, craft or profession of the trader.

at the same conditions as locals, because of their nationality, residence or establishment. Online retailers may prevent customers to access and purchase goods or services cross-border by imposing restrictions to consumers on the basis of their nationality, place of residence or location by virtue of restrictions such as blocking access to websites across borders / re-routing customers to local websites if the customer has not given prior consent; making it impossible to complete an online order, purchase goods or download content when accessing a website from abroad; denying delivery across border; applying different prices and conditions depending on nationality, residence or location of the customer (through geo-localizing methods); refusing to accept cross-border payment, etc. Hence, practices hindering access to websites from other Member States (geo-discrimination), are prohibited on the basis of the Regulation.

Unjustified geo-blocking consists in discrimination between EU customers based on market segmentation along national borders, in order to increase profits to the detriment of consumers and the single market prerogative. Geo-blocking and other geographically-based restrictions limit the possibility for consumers and businesses to benefit from the advantages of online commerce and cross-border sales.

The Regulation aims to give consumers wider and easier access to products and services cross-border in the framework of the EU digital single market strategy and counter market fragmentation. Thus, on the basis of the Regulation, consumers in a member state buying products abroad, online, will, in principle, have the right to be treated like local consumers and take advantage of best prices, sales, offers and conditions.

The Regulation entered into force on 22.3.2018 in all EU Member States and applies from 3.12.2018. The Commission will carry out a first evaluation of the Regulation by 23 March 2020. In particular, the Commission will assess the scope of the Regulation, including its possible application to certain electronically supplied services which offer copyright-protected content (downloadable music, e-books, software, online games and services in sectors such as transport and audio-visual) which currently do not fall within its scope.

In practice, since 3.12.2018, traders selling online need to be compliant with the Regulation, and must not discriminate against online customers based in other EU Member States, but must ensure that the same terms apply to customers from other Member States. They should make sure that their terms and conditions are streamlined with the requirements of the Regulation, and that any of the above restrictions blocking or limiting customers' access are removed or justified (if applicable). The same applies with regard to payment requirements and distribution and logistics policies and operations. The Regulation concerns businesses that sell online goods and services to EU countries and across the borders of the Member States (it does not refer to internal transactions within a Member State).

This Regulation follows the e-commerce sector inquiry of the European Commission (2015)³. Among other important findings, according to the sector inquiry, 12% of the consumer goods retailers selling online reported contractual restraints in cross-border sales. The Sector inquiry found that only 37% of websites actually allowed cross-border customers to reach the final step

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http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

before completing the purchase by entering payment details. In the era of digital transformation of the economy and the industry, only 15% of European citizens shop online cross-border, and only 7% of SMEs sell cross-border (Digital scoreboard 2016 of the European Commission).

Object

Geo-blocking refers to commercial practices used by online sellers that result in the denial of access to websites from other Member States⁴. The Regulation also seeks to cover unjustified indirect discrimination, e.g. on the basis of information indicating the physical location of customers, such as the IP address used when accessing an online interface, the address submitted for the delivery of goods, the choice of language made or the Member State where the customer's payment instrument has been issued.

According to the Regulation, traders should not prevent customers from having full and equal access to online interfaces, including in the form of mobile applications, based on their nationality, place of residence or place of establishment. Technological measures to prevent such access comprise technologies used to determine the physical location of the customer, including the tracking by means of an IP address or coordinates obtained through a global navigation satellite system. To comply with the Regulation, traders should not design their online interface, or apply technological means, in a way that would, in practice, not allow customers from other Member States to complete their orders.

⁴ For practical examples / guidance, scope of the Regulation see European Commission's Questions & Answers on the Geo-blocking Regulation in the context of e-commerce <https://ec.europa.eu/digital-single-market/en/news/geo-blocking-regulation-questions-and-answers>.

Scope

The Regulation applies in principle to both business-to-consumer (B2C) and to business-to-business (B2B) transactions, to the extent that the latter take place on the basis of general conditions of access (i.e. they are not individually negotiated) and the transaction is for the sole purpose of end use (without the intention to re-sell, process, subcontract, etc). Restrictions on passive sales applying to sales to customers who intend to resell the goods (not end users), do not fall within the scope of the Regulation but will need to be assessed under competition law⁵.

⁵ Very recently, in the beginning of April, the European Commission sent Statements of Objections (SO) to Valve owner of the "Steam" video game distribution platform, and five videogame publishers (Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax) on geo-blocking of PC video games (See Press Release: http://europa.eu/rapid/press-release_IP-19-2010_en.htm and under case numbers AT.40413 (Focus Home), AT.40414 (Koch Media), AT.40420 (ZeniMax), AT.40422 (Bandai Namco), and AT.40424 (Capcom) on the Commission's competition website). According to the SO, these companies prevented consumers from purchasing videogames cross-border from other Member States, in breach of EU competition rules. Valve digitally distributes PC video games from each of the five PC video game publishers concerned by the investigation. It provides publishers with "activation keys" which are required for consumers to play PC games bought on channels other than Steam. After the purchase of certain PC games, users must confirm their activation key on Steam to authenticate the game and be able to play. According to the SO, Valve and the five PC video game publishers entered into bilateral agreements to prevent consumers from purchasing and using PC video games acquired elsewhere than in their country of residence (geo-blocking), infringing EU antitrust rules.

In particular, according to the SO, Valve and the five PC video game publishers agreed to use geo-blocked activation keys to prevent cross-border sales, including in response to unsolicited consumer requests (so-called "passive sales") of PC video games from several Member States, thus potentially precluding consumers from buying cheaper games from other Member States. Further, according to the SO, Bandai Namco, Focus Home, Koch Media and ZeniMax, infringed EU antitrust rules by including

The Regulation does not apply to the activities referred to in Article 2(2) of Directive 2006/123/EC (among others, non-economic services of general interest, financial services, transport services, healthcare services, audiovisual services, gambling activities, services provided by notaries and bailiffs).

It is also noted that in certain cases, blocking or limiting access, or redirection without the customer's consent for reasons related to the customer's nationality, place of residence or of establishment may be necessary to ensure compliance with a legal requirement laid down in EU or national law (e.g. prohibiting the display of specific content in certain Member States), and in these cases traders shall be able to comply with this requirement, insofar as this is necessary for that reason.

The prohibition of discrimination does not create an obligation for the trader to engage in transactions with customers (obligation to sell). Furthermore, the Regulation does not introduce an obligation to deliver across the EU.

The trader remains free to define the geographical area in which to provide delivery services, but cannot discriminate

contractual export restrictions in their agreements with a number of distributors other than Valve. The latter were prevented from selling the relevant PC games outside the allocated territories, thus consumers may have been prevented from purchasing PC video games sold by these distributors either on physical media or through downloads. On the basis of the SO, these business practices partitioned markets according to national borders and restricted passive sales to consumers, denying European consumers the benefits of the EU's Digital Single Market to shop around for the most attractive offer, in breach of Article 101 TFEU. This investigation is a stand-alone procedure, independent of but following up on some of the issues identified in the Commission's competition sector inquiry on e-commerce.

against a foreign customer wanting to buy a good under the same conditions as a local ("shop-like-a-local").

Moreover, the Regulation does not regulate or harmonise price levels as such and traders remain free to set different prices on websites targeting different customer groups. Traders are not prohibited 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. However, in those situations, traders should always treat their customers in a non-discriminatory manner, regardless of their nationality or the place of residence or of establishment.

The application of general conditions of access that differ for other reasons, for example membership of a certain association, is not precluded, provided that such reasons are unrelated to nationality, place of residence or of establishment.

Moreover, traders are free to offer, 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.

Under the Regulation, traders are free to have sales, promotions or other types of price campaigns on their selected e-commerce websites, as long as they act in a non-discriminatory way. However, these websites should be accessible to all EU customers and EU customers should be able to purchase goods or services under the same conditions as nationals of the Member State of the trader, including net prices. The Regulation does not address dynamic pricing, where offers are adapted over time, but depending on factors

unrelated to nationality, residence or establishment.

The Regulation does not, in itself, entail an obligation for a trader to comply with national legal requirements relating to the respective goods and services of the Member State of the customer, such as labelling or sector-specific requirements, or to inform customers about those requirements. Thus, the Regulation does not, in itself, oblige traders to adapt their goods to the needs of another national market, to provide manuals, instructions and other product information in a particular language. At the same time, it does not affect other EU rules that the trader may be subject to and that might contain relevant consumer protection requirements.

Overview of main obligations

The Regulation provides for an obligation to traders to treat EU customers in the same manner when they are in the same situation, regardless of their nationality, place of residence or place of establishment⁶. In particular:

Article 3 of the Regulation - Access to online interfaces / websites

Article 3 of the Regulation prohibits the blocking of access to websites and re-routing without the customer's prior

⁶ The prohibition of discrimination on grounds of nationality is a general principle of Union law laid down in Article 18 TFEU. As far as the provision of services is concerned, that general principle is specified in Article 20 par. 2 of the Services Directive (Directive 2006/123/EC), according to which Member States shall ensure that the general conditions of access to a service do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, unless those differences are directly justified by objective criteria. In the situations covered by the Geo-blocking Regulation, the specific provisions contained therein will prevail over Article 20(2) of the Services Directive.

consent. Customers are thus enabled to access different national websites, which leads to enhanced price transparency and competition. This provision also applies to non-audio-visual services supplied electronically, such as e-books, music, games and software. By virtue of the Geo-blocking Regulation, redirection or re-routing of the consumer requires the customer's explicit consent, whereas, even if the customer gives consent to the redirection, the original version he sought to visit should remain accessible.

The above prohibitions shall not apply where the blocking or limitation of access, or the redirection is necessary in order to ensure compliance with European or EU compliant national legislation to which the trader's activities are subject. However, in such instances, the trader shall provide a clear and specific explanation to customers regarding the reasons why the blocking or limitation of access, or the redirection is necessary in order to ensure such compliance.

Article 4 of the Regulation – general conditions of access categories

Article 4 of the Regulation refers to certain situations where any differences in the treatment of customers through the application of general conditions of access cannot be objectively justified. Such discrimination is prohibited: In these cases there can be no justified reason for geo-blocking or other forms of discrimination based on nationality, residence or establishment and customers from another Member State should have the same access and possibility to acquire goods and services as a local customer.

These situations where a trader shall not apply different general conditions of access to goods or services, for reasons related to

a customer's nationality, place of residence or of establishment, are the following:

a) Sale of goods without physical delivery outside the area served by the trader (where the customer wants to order the product and collect it at the trader's premises or organise delivery himself to his home).

In particular, if a customer buys goods, which the trader does not deliver to the customer's Member State, such customers are entitled to delivery in the Member State where the trader offers delivery in the same way as local customers.

In that situation the customer should be able to purchase goods, under exactly the same conditions, including price and conditions relating to the delivery of the goods, as similar customers who are residents of or are established in the Member State in which the goods are delivered or in which the goods are collected. That could mean that foreign customers will have to pick up the goods in that Member State, or in a different Member State to which the trader delivers, or arrange, by their own private means, the cross-border delivery of the goods.

b) Sale of electronically supplied services

When customers want to access and buy an electronically supplied service (such as cloud services, data warehousing or website hosting, provision of firewalls, use of search engines and internet directories) from a trader established in another Member State, they are entitled to do so in the same way as local customers. The customers may register and buy online as local customers, without additional fees or other discriminatory conditions.

In this case, no physical delivery is required, as the services are being supplied electronically.

c) Sale of services provided in a specific physical location

In this case, a customer buys a service that is supplied on the trader's premises or in a physical location where the trader operates, and the premises (or location) are in another Member State than in that of the customer. This situation covers services such as concert tickets, hotel accommodation, sports events, entrance tickets for leisure parks and car hire. In this case, the customer is entitled to be treated in the same way as nationals of the country of the trader. Customers from other Member States shall be able to take advantage of any discount or beneficial condition available for the customers of the Member State of such location.

In the above categories of Article 4, geo-blocking or other forms of geographically-based differential treatment are only possible in the case where an EU or national legal requirement obliges the trader to block access to the goods or services offered.

For online services related to non-audiovisual works protected by copyright (e-books, video games, music, software), the non-discrimination provision does not (yet) apply under the Regulation.

The above prohibitions of Article 4 do not prevent traders from offering general conditions of access, including net sale prices, which differ between Member States or within a Member State and which are offered, on a non-discriminatory basis, to customers on a specific territory or to specific groups of customers.

Furthermore, this provision does not entail, in itself, an obligation for the trader to comply with non-contractual national legal requirements relating to the respective goods and services of the Member State of the customer or to inform customers about those requirements.

Article 5 of the Regulation - Non-discrimination for reasons related to payment

The Regulation expressly prohibits discrimination within the range of the means of payment traders accept. At the same time, traders remain free to decide which means of payment they wish to accept. However, once this choice has been made, traders should not discriminate against customers within the Union by refusing certain transactions, or by otherwise applying certain different conditions of payment for those transactions, for reasons related to customers' nationality, place of residence or place of establishment⁷.

Article 5 covers situations where differential treatment is a result of the customer's nationality, place of residence or of establishment, the location of the payment account, the place of establishment of the payment services provider or the place of issue of the payment instrument. Discriminatory treatment is prohibited if:

- payments are made by means of electronic transactions by credit transfer, direct debit or a card-based payment instrument within the same brand and category;
- authentication requirements are fulfilled;

⁷ Regulation (EU) No 260/2012 of the European Parliament and of the Council already prohibits all payees, including traders, from requiring bank accounts to be located in a certain Member State for a payment in euro to be accepted.

- the payments are in a currency that the trader accepts.

The above prohibition does not prevent the trader from withholding the delivery of the goods or the provision of the service until the trader has received confirmation that the payment transaction has been properly initiated, *where justified by objective reasons*.

This provision should be read against the background of the 2012 single euro payments area (SEPA) Regulation EU 260/2012, which provides that, when shopping abroad, consumers can use their debit card to make payments in euro as they would in their home country.

Article 6 of the Regulation - Agreements on passive sales

Article 6 of the Regulation specifically refers to agreements on passive sales in contractual arrangements with suppliers: a supplier cannot contractually prohibit a trader from responding to (unsolicited) customer requests, and such contractual requirements are automatically void to the extent they fall under the Regulation. Traders are free to serve all customers independently of their nationality or place of residence (a trader cannot be prohibited by its supplier from serving customers from other Member States who found the trader's website through an internet search and are willing to make a purchase through this). At the same time, the Geo-blocking Regulation does not affect agreements restricting active sales within the meaning of the Vertical Block Exemption Regulation. Such a restriction could be unlawful under EU competition rules⁸. Active sales

⁸ Article 101 TFEU, Vertical Block Exemption Regulation (Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted

restrictions and passive sales restrictions falling outside the scope of the Regulation but within Regulation EU 330/2010 (VBER) are not affected, whereas passive sales restrictions infringing the Regulation are, automatically void (Article 6 par. 2). According to Article 11 par. 2, Article 6 shall apply to provisions of agreements concluded before 23.3.2018 that are compliant with Article 101 TFEU and with any equivalent rules of national competition law from 23.3.2020.

Enforcement – Issuing of a Ministerial Decision in Greece

According to Article 7 of the Geo-blocking Regulation, Member States must designate one or more bodies for its adequate and effective enforcement.

practices) and Guidelines on Vertical Restraints. It is reminded that under EU competition law, restrictions on passive sales are prohibited as 'hardcore restrictions' and their inclusion in a supply agreement removes the benefit of any automatic exemption. The Guidelines on Vertical Restraints provide that certain restrictions on the use of the internet are dealt with as (re)sales restrictions and that the use by a distributor of a website to sell products is considered a form of passive selling. The Commission thus regards the following as examples of hardcore restrictions of passive selling given the capability of these restrictions to limit the distributor's access to a greater number and variety of customers:

(a) an agreement that the (exclusive) distributor shall prevent customers located in another (exclusive) territory from viewing its website or shall automatically re-route its customers to the manufacturer's or other (exclusive) distributors' websites.

(b) an agreement that the (exclusive) distributor shall terminate consumers' transactions over the internet once their credit card data reveal an address that is not within the distributor's (exclusive) territory;

(c) an agreement that the distributor shall limit its proportion of overall sales made over the internet.

(d) an agreement that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline.

Customers will be entitled to refer alleged infringements of the Regulation to the enforcement bodies designated by the Member States where the rules applicable to the functioning of those bodies so provide.

In Greece, Common Ministerial Decision 18898/13.2.2019⁹ (Gov't Gazette B' 746/5.3.2019) was recently issued¹⁰. It provides (art. 6) that the European Consumer Centre of Greece (ECC-Greece)¹¹ is the contact point for the submission of complaints of consumers residing in Greece regarding disputes with traders residing in another Member State. Further, the Common Ministerial Decision designates as competent authority for finding an infringement of the provisions of the Geo-blocking Regulation, the Directorate of Protection of the Consumer, Directorate General of Commerce and Consumer Protection of the Ministry of Economy and Development. In case an infringement is found to have taken place, the administrative sanction of recommendation to comply, within a specified time-limit, with the decision of the Minister of Economy and Development shall be imposed. If the trader does not comply within this time period, by virtue of a decision of the Minister of Economy and Development, a pecuniary fine in the range of 1.000 € to 10.000 € shall be imposed. In case of customers' disputes with traders,

⁹ The Common Ministerial Decision stipulates (art. 8) that it applies retroactively from 3.12.2018.

¹⁰ Additional measures for the implementation of Regulation 2018/302 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.

¹¹ As from 1-1-2012, ECC-Greece has been operating under the auspices and with the support of the Hellenic Consumer Ombudsman, the Independent Authority of the public sector mandated with the out-of-court consensual settlement of consumer disputes.

the courts shall be competent for the enforcement of the provisions of the Regulation. The above are without prejudice to the provisions of the legislation.

Moreover, according to art. 7 of the Common Ministerial Decision, for the provision of practical help in case of a dispute between a consumer and a trader with regard to the Regulation, the following are appointed: i) ECC-Greece; it shall be the contact point for the online dispute resolution for consumer disputes and for the provision of general information to consumers regarding the means of judicial protection in case of a dispute with service providers; ii) the entities of Alternative Dispute Resolution for Consumers listed in the Register of General Directorate of Consumer Protection¹².

¹² According to Common Ministerial Decision 70330/2015 (Gov't Gaz. 1421/B').

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