

ARTICLE

“GEO-BLOCKING”: D DAY-3 WEEKS BEFORE THE GEO-BLOCKING PROHIBITION FOR ONLINE SALES IN EUROPE BECOMES APPLICABLE

Competition, Retail and Consumer Law Commercial and International Contracts IT and Data Protection |
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The EU Regulation 2018/302 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 [1] (the "Regulation") will be applicable on December 3, 2018. It aims to prohibit traders from unjustified geo-blocking in the EU and thus to tackle restrictions on cross-border online transactions. A few weeks before its application, here is a reminder of the main features of the Regulation.

What is geo-blocking?

Geo-blocking is a practice which consists, for a professional exercising his activities in a Member State, to block or limit access to their online interfaces (websites or mobile applications) to customers from other Member states, or to apply to such customers different conditions of access to goods or services offered online (prices, general conditions, etc.), without any objective reason.

These restrictions based on the nationality or place of residence or establishment of the customer are traditionally implemented through the use technological measures or other measures allowing the professional to locate physically the customer via, for example, its IP address, delivery or billing address or the country of issue of its payment method, in order to block the customer's access to some online interfaces or to redirect the customer to other (local) versions of these interfaces.

Who is impacted by this Regulation?

First, this Regulation applies to traders, which means *"any natural person or any legal person, irrespective of whether 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"* [2] (a "Trader").

In addition to this, the Regulation is not limited to the relationship between a Trader and a consumer (B2C) but also applies to the relationship between two professionals (B2B). Indeed, this Regulation is applicable to any customer defined as *"a consumer who is a national of, or has his or her place of residence in, a Member State, or an undertaking which has its place of establishment in a Member State, and receives a service or purchases a good, or seeks to do so, within the Union, for the sole purpose of end use"* [3] (a "Customer").

Thus, B2C and B2B sales are covered as long as the seller is a Trader and the buyer is the end user of the purchased good or service. B2B relationships where customers would purchase a good or a service for subsequent resale, transformation, processing, renting or subcontracting are not in the scope of the Regulation.

Finally, some sales of goods and services are excluded from the scope of the Regulation, such as copyright-protected content, financial services, audiovisual services (covered by the Regulation on cross-border portability in force since 1 April 2018), transport services, health care services and social services.

What does the Regulation provide for?

With regard to **online interface access**, Article 3 of the Regulation prohibits the Trader from:

- blocking or limiting a Customer's access to its online interface for reasons related to the Customer's nationality, place of residence or place of establishment, through the use of technological measures or otherwise;

and

- redirecting the Customer to a version of the Trader's online interface that is different from the online interface to which the Customer initially sought access, for reasons related to the Customer's nationality, place of residence or place of establishment, and in particular due to the Customer's choice of language or other characteristics.

Therefore, starting December 3, a Trader operating a merchant website (Internet or mobile) in a Member State must allow any Customer, including those from another Member State, to access the version of the merchant website such Customer initially wanted to visit. Any blocking of access by the Trader to his merchant website to a Customer from another Member State and any redirection of a Customer to another version of the Trader's merchant website will in principle be prohibited.



However, two exceptions to the above prohibitions exist:

- with regard to redirection, the Trader may redirect the Customer to a version of the Trader's online interface that is different from the online interface to which the Customer initially sought access if the Customer has expressly consented to such redirection. Thus, the prohibition applies only to an automatic redirection. However, the Regulation specifies that, if the Customer has expressly consented to such redirection, the Customer must be able to continue to have easy access to the version of the Trader's online interface to which Customer initially sought access.

and

- regarding the blocking or limitation of access and the automatic redirection, such actions will be possible if they are necessary in order to comply with a legal requirements applicable to the Trader's activities under EU law or the laws of a Member State. In such a case, the Trader is required to provide the Customer with a clear and specific explanation of the reasons why the blocking or limitation of access or the automatic redirection is necessary, in the language of the online interface that the Customer initially sought access.

With regard to **access to goods and services**, Article 4 of the Regulation prohibits the Trader to apply different general conditions (i.e. in particular prices, delivery terms, payment terms, etc.) for reasons related to the Customer's nationality, place of residence or place of establishment. This prohibition is applicable in the following cases:

- the purchase of goods for which delivery is proposed in a Member State or for which the Trader offers a point of collect in a Member State. It is important to note that the Regulation does not require Traders who operate a merchant website in one Member State to deliver to all other Member States. Traders are and will remain free to choose the countries in which they offer to deliver their goods. Nevertheless, if, for example, a French Trader delivers or offers a point of collect option in France only, a Customer from another Member State must be able to purchase the good in question on the Trader's website under the same conditions as Customers residing in France and have it delivered to a French address or pick up his good at the French point of collect that it has selected.
- the provision of electronically supplied services by the Trader (other than access to copyrighted protected works or other protected subject-matter);

and

- the provision of services (other than electronically supplied services) in a physical location within the territory of a Member State where the Trader operates. This includes, for example, hotel accommodation, car rental and leisure activities (including sports and cultural events).

As for the prohibition to restrict access to online interfaces above, this prohibition does not apply if a specific provision of EU law or the laws of a Member State prevents the Trader from selling the goods or providing the services to certain clients or those located in certain territories.

In addition to this, according to the Regulation, this prohibition shall not have the effect of:

- putting the Trader under an obligation to comply with non-contractual 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; or
- preventing Traders from offering general conditions of access (including prices) or offers, which differ between Member States or within a Member State and which are offered to Customers on a specific territory or to specific groups of Customers on a non-discriminatory basis. In such situations, Traders must always ensure that Customers are treated in a non-discriminatory manner when they wish to benefit from these offers and general conditions of access, irrespective of their nationality, place of residence or place of establishment.

Regarding the **means of payment**, Article 5 of the Regulation again prohibits discrimination on grounds of nationality, the place of residence or establishment of the Customer, the location of its payment account, the place of establishment of its payment service provider or the place of issue of its payment instrument within the EU, when payment is made by transfer, direct debit or bank card within the same payment brand, when its authentication is in made in compliance with EU laws and when the payment is made in a currency accepted by the Trader. The Trader is therefore free to decide which payment methods he accepts on his online interface but the payment methods accepted by it must be available and offered on non-discriminatory terms for all Customers accessing the relevant online interface.

Which transposition, which control means, which sanctions?

Being a European regulation, the provisions of the Regulation are directly applicable and do not need national transposition measures. Finally, Article 7 of the Regulation left it to each Member State to designate one or more bodies responsible for the effective enforcement of the Regulation, but also to determine the rules setting out effective, proportionate and dissuasive measures (sanctions) applicable to infringements of the provisions of the Regulation. To date, to our knowledge, France has neither yet designated the competent body (it will probably be the DGCCRF) nor determined a corpus of sanctions applicable in the event of a violation the terms of the Regulations. More to come....



This being said, Traders shall not delay the updating of their commercial websites (Internet and mobile) and shall already begin to work on the above, to be able to comply with the Regulations by December 3, right in the middle of the Christmas shopping season!

[1] The 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

[2] Article 2 paragraph 18

[3] Article 2 paragraph 13