



**Ligue Internationale du Droit de la Concurrence – (LIDC)
RESEARCH NOTE**

Date: [●] October 2018
Re: **Geo-blocking work stream**

Link to the [Regulation](#).

This research note considers the practical implications of the Geo-blocking Regulation (“**the Regulation**”) for businesses, with reference to the following questions:

- What are the practical implications of the Regulation for businesses?
 - What constitutes ‘objectively justified’ geo-blocking (Article 5(2))?
 - The copyright exemption: what does it mean in practice (Article 4 (1)(b))? Should it be reversed (Article 9 (2))?
 - Does the Regulation conflict any national laws – for example consumer protection?
 - Sanctions.
 - Any other relevant issues (*Brexit and the US point of view*).
-

What are the practical implications of the Regulation for businesses?

From 3 December 2018, the Regulation will apply to both online and offline sales of goods and services, but for businesses online sales are where the most impact will be noticed.

The Regulation applies to all traders operating within the EU. A trader is any natural or legal person who is acting for purposes relating to trade or business.

The Regulation will impact both business-to-business and business-to-consumer trade where the consumers are nationals of a Member State or have their place of residence in one.



Copyright protected works, financial, transport, healthcare, social and audio-visual services are currently exempt, although this will be subject to review in 2020.¹ However, Recital (10) to the Regulation suggests that if goods or services that fall within the scope of Regulation are bundled with goods or services that fall outside the scope of the Regulation, there is potential for the entire bundle to fall within the Regulation: the relevant trader should either comply with the Regulation as regards the whole bundle, or at least offer, on an individual basis, services that fall within the scope of the Regulation, if those services are offered to customers by the same trader on an individual basis.

Price differentiation is not prohibited and there is no requirement for harmonisation of price or sale conditions in different countries. However, there does need to be a justification for doing so – such as national legislation preventing it.

The practical impact of the Regulation on businesses may be somewhat less onerous than the General Data Protection Regulation 2016/679 (“GDPR”). Article 25 of the GDPR contains an explicit requirement that both the design and default settings of technical and organisational measures put in place to handle personal data are GDPR compliant. The Regulation does not contain any similar anti- circumvention provision.

Website set-up

Businesses will have to consider the set-up of their websites to ensure compliance. This will also include any apps that are used for transactions. Businesses do not have to develop new apps for each particular EU country, however, foreign nationals should be able to access the app that a business does have.

Traders are not able to block or limit customer access to their online interface due to nationality, place of residence or IP address.

Websites will no longer be allowed to automatically redirect to a local site. For instance, if a French customer types in the web address of an Italian website, the trader will no longer be able to redirect that customer to the local website without prior consent. Explicit consent is required from customers to redirect. It must also be possible for customers to withdraw this consent at any time.

There is no requirement to offer one single shopfront nor to provide delivery to locations that are not already offered. If a foreign customer wants to purchase from a local website, they will have to arrange their own delivery or pick up the goods they are purchasing. A business is only obliged to deliver the goods to a location within a country they offer delivery.

¹ Article 4(1)(b) of the Regulation outlines the goods and services where different “general conditions” cannot be applied for reasons related to customer’s nationality, place of residence or place of establishment, but carves out copyrighted digital media.



Businesses can continue to have sales or promotions on one website – but it must apply to anyone purchasing from that website.

These requirements do not apply where blocking or re-directing is necessary to ensure compliance with legal requirements (either in EU law or the law of a Member State), although a customer must be given an explanation.

Any order forms should be able to be completed by all EU customers, e.g. for addresses and phone numbers, provisions need to be made to be able to fill in details in different formats.

Businesses should also be cautious about being regarded as targeting particular countries now that they cannot refuse to sell to anyone. This is something that independent legal advice should be taken on if businesses have particular concerns, for example about setting up telephone numbers in certain territories.

Terms and conditions / distribution agreements

Businesses will need to check their terms and conditions and distribution agreements to not discriminate due to location, nationality or place of residence.

Traders will need to consider whether their logistics and distribution agreements are fit for purpose if they are geared to specific countries.

The Regulation only covers general terms. Terms between a trader and a customer which are individually negotiated are not subject to these rules.

Payment mechanisms

Traders are free to accept any payment means that they decide to, e.g. there is no obligation to accept credit cards. However, there is a ban on discriminating in terms of payment conditions or methods between local and foreign customers.

A trader can charge the customer a fee for the costs related to the use of that means of payment.

Payment mechanisms will need to be checked that they are set up to accept foreign cards going forwards. They cannot automatically decline cards from countries any longer.

Physical goods

Businesses must sell physical goods to customers abroad if they wish to purchase them.

However, as with online sales, there is no requirement to deliver them if a business does not already offer that service. Customers will have to pick them up or provide a delivery address in that member state.



Issues related to VAT

SMEs are particularly concerned with the increased administrative burden resulting from the obligation to comply with national tax laws. In order to help some SMEs, the Regulation specifically exempts from the non-discrimination rules traders that fall under a national exemption VAT threshold.

Logistics issues

Companies are required to meet deliveries from consumers in Member States. The goods may be delivered to any location in a Member State to which the trader offers delivery (Article 4 (1)(a)). This may result in significantly different delivery costs (e.g. Northern to Southern Europe). It is important that companies ensure that their terms and conditions provide sufficient flexibility to charge different delivery costs. However, difference in pricing should be objectively justified to ensure traders do not in effect 'apply different conditions of access' (Article 4 (1)).

Online prescribing and pharmacies

The Regulation does not apply to pharmaceutical products or healthcare services; this is a question the authors of this paper are frequently asked about and one that is not widely understood by businesses.

Article 1(3) excludes those areas also excluded by Article 2(2) of the Services Directive. Article 2(2)(f) of the Services Directive excludes healthcare products and Recital 22 makes clear that this includes those “*healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided*”.

Actions required by businesses

Consider whether geo-blocking is in place on their websites, in terms and conditions or in distribution agreements they are a party to.

Is that geo-blocking covered by this Regulation?

Can it be justified under the Regulation for reasons not related to nationality, place or residence?

If not, businesses will need to modify their website, terms or distribution agreements to comply with the new Regulation.

Consider their obligation in terms of VAT when delivering to other Member States.

Member States are required to designate a body who will be responsible for ensuring compliance with the Regulation, businesses should be aware of who this is in their Member State.



CMA Guidance on the Regulation

The CMA response to the European Commission on geo-blocking and other geographically based restrictions (the “***CMA Guidance***”) has a number of key takeaways outlined below.

Burden on SMEs and micro businesses

There is a concern that the Regulation may place a disproportionate regulatory burden on SMEs and micro businesses that do not generally have the resources of the large multi-nationals to comply with the additional regulatory burdens of the Regulation. As such, the CMA believes that careful consideration is required to ensure that the potential benefits to customers are not outweighed by the burden placed upon SMEs. Additionally, it should be ensured that SMEs are not placed at such a disadvantage that they find it more difficult to compete with the large multi-nationals as a result of the Regulation.²

Home market products

Where website re-routing is no longer permitted, but traders have justifiably decided not to sell a product cross-border, such traders should make clear that such products are intended for their “home” market only. Indeed, this is especially the case where the Unfair Commercial Practices Directive may require this.³

Traders should also make it clear to consumers if a product sold cross-border has certain product features that make such goods / services more suitable for such trader’s “home” market.⁴

What constitutes ‘objectively justified’ geo-blocking (Articles 3(3), 4(5) and 5(2))?

Articles 3(3) and 4(5) allow a trader to geo-block customers in particular Member States where this is necessary to ensure compliance with relevant local or EU law.

Article 5 relates to non-discrimination for reasons related to payment. Article 5(2) allows the withholding of delivery of goods or provision of services until the trader receives confirmation that the payment transaction has been properly initiated, provided this withholding can be objectified by objective reasons.

This withholding comes from requirements in *Directive (EU) (2015/2366)* which sets out strict security requirements for the processing of electronic payments (to reduce the risk of fraud). Payment service providers are obliged to apply an authentication process that validates the identity of the customer. For remote transactions (such as online

² Paragraph 25 of the CMA Guidance.

³ Paragraph 16 of the CMA Guidance.

⁴ Paragraph 16 of the CMA Guidance.



payments) this goes even further. However, where there are no other means available to reduce the risks of default by customers, including in particular difficulties related to assessing creditworthiness, traders should be allowed to withhold delivery of goods or provision of services until they have received confirmation that the payment transaction has been properly initiated.

There is no definition of objectively justified in the Regulation, but there are indications that the following may also justify differential treatment:

Different legal /national requirements – potentially different national standards, for example in relation to consumer protection or lack of mutual recognition.

Sector-specific legislation (e.g. transport/health/books).

Copyright/other IP rights would be infringed – this is why AVS is currently being excluded.

Redirecting in the context of websites can be justified if it is necessary to ensure compliance with a legal requirement in the Member State they operate in (e.g. where display of a particular content/good is prohibited).

In theory, any other differentiation could technically be justified as long as it is not related to location, nationality or place of residence of the customer.



CMA Guidance on “objectively justified” geo-blocking

- The CMA Guidance provides some guidance as to how “objectively justified” should be interpreted. To this extent, the CMA Guidance points to recital 95 of the Services Directive which states that the justification grounds include the following:
 - additional costs incurred because of the distance involved or the technical characteristics of the service;
 - different market conditions such as higher or lower demand influenced by seasonality, different holiday periods or pricing by different competitors; and
 - extra risk linked to the application of different rules.⁵

The copyright exemption: what does it mean in practice (Article 4 (1)(b))? Should it be reversed (Article 9 (2))?

In practice, the copyright exemption means that digital media (whether streaming or downloading) such as Netflix and Amazon are exempt. It will also not cover games or music.

The portability of some of these services, however, is dealt with under a different Regulation.

This exemption will be reviewed within two years. This is provided for under Article 9(2), particularly because there was a lot of discussion between interested parties about whether this Regulation should apply to these types of services or not.

In some areas it is strongly felt that copyright owners should still be able to prevent people accessing their content which they have not paid for or is not correctly licensed. Copyright protected works have their own characteristics which are different to other goods sold online. However, obviously this goes against the premise of a single digital market. There is currently much work being done on this in other parts of the Digital Single Market (“DSM”) strategy.

In practice, whilst consumers would be happy, this extension is likely to prove difficult to put into practice due to the long-standing practice of licensing by specific territory.

Does the Regulation conflict any national laws – for example consumer protection?

Selling products cross-border may result in a business selling a particular good to someone from a location where that good does not meet the relevant local legal requirements (for example regarding labelling). Under the Regulation, the trader is not under an obligation to check and ensure this. The relevant product rules only need

⁵ Paragraph 7 of the CMA Guidance.



following when a company is pursuing commercial activity in a specific location (e.g. they ship the good in that market). This means that if a trader ships goods to France, and does so ordinarily, consumers from elsewhere in the EU (e.g. Spain) must be able to buy the good delivered in France as if they were French. The trader would not need to comply with the law of the Member State from which the consumer is from (Spain) but would need to comply with the law where the good is shipped (France). In that instance, the French courts would have jurisdiction in case of a challenge based on consumer law.

Sanctions (Article 7)

The Regulation does not indicate specific sanctions, rather Member States are required to adopt their own sanctions for non-compliance with the Regulation.

In the UK, it is likely that the Regulation will be added to the list of community infringements for the purposes of Part 8 Enterprise Act 2002 and all Part 8 enforcers will be able to bring enforcement action to remedy a breach of the Regulation.

Any other relevant issues

Brexit

The Regulation will come into force pre-Brexit (3 December 2018), with the UK expected to leave the EU on 29 March 2019.

Assuming the UK and EU agree a final withdrawal treaty, the Regulation will continue to apply in the UK during the 'implementation period', which is expected to last from 29 March 2019 until 31 December 2020. During the 'implementation' phase it is anticipated that the UK will continue to be treated as a Member State and will continue to comply with EU law.

What happens after the end of the implementation period remains uncertain. The European Union (Withdrawal) Act 2018 makes clear that all EU direct legislation will be enshrined into UK law, so the Regulation will (at least initially) continue to apply to UK traders, who will therefore be unable to geo-block or refuse access to non-UK EU customers.

No deal

In the event of a 'no deal' it is likely that the UK will repeal the Regulations. This will mean that from the UK, EU and third countries would not be prohibited from discriminating between EU customers and UK customers. For instance, a UK trader would be able to offer different terms to a UK customer compared to a French customer.

The Regulations will continue to operate in the EU. Therefore, UK traders making sales in to the EU will have to comply with the Regulations. This means that a UK trader will not be able discriminate between customers in different EU member states, for instance between a French and a German customer.



The Commission has clarified that UK persons will not benefit from the Regulation after the withdrawal date of 30 March 2019,⁶ as there will no longer be reciprocity obligation on EU traders who will be able to geo-block and refuse access to UK customers, as customers are 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*” (Article 2(13)).

Deal

The UK’s proposal for the post Brexit future trading relationships between the UK and the EU indicates its intention to be a free trade area for goods but not services and digital, “*These close arrangements on goods would sit alongside new arrangements for services and digital, recognising that the UK and the EU will not have current levels of access to each other’s markets in the future. This would provide regulatory flexibility that is important for the UK’s services-based economy.*”⁷

Discussion around the applicability of the Regulation in the longer term is likely to be tied in with other consumer-facing aspects of the DSM, such as portability of digital content and the abolition of mobile phone roaming fees within the EU, which raise similar issues in relation to asymmetric rights and obligations between the EU and the UK.

⁶ “European Commission – Notice to Stakeholders” dated 21 March 2018 (“**the Commission Notice**”).

⁷ White Paper, *The Future Relationship Between the United Kingdom and The European Union*, July 2018

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf



- Although the UK will likely move away from the Digital Single Market post-Brexit, the Regulation will continue to impact traders operating in the EU as it will apply to in-scope UK traders operating within the EU post-Brexit.⁸
- This view has been supported by BEIS in a response to the European Scrutiny Committee and the European Commission, but a response from Parliament on this point remains pending.⁹

US viewpoint on the Regulation

The literature does not contain much assessment of the direct impact of the Regulation on businesses located in the US. One potential point of collateral impact is the extent to which, if any, Europe's action in geo-blocking affects US courts in adjudicating geo-blocking cases. However, the most pressing geo-blocking matters before US courts today appear related to copyright infringement of non-audiovisual and audiovisual materials, both of which are excluded from the Regulation (Article 1(5)).

Some commentators have suggested that the exclusion is due to the differences in the copyright laws of the Member States.

The Regulation's criteria for objective justification for discrimination rely on the Directive's criteria, e.g. customer's nationality, place of residence and place of establishment (Article 3 (1)). This is meant to be a case-by-case determination. There is a parallel here in the distinction between "per se" and "rule of reason" assessments in American antitrust jurisprudence. The hope of the Commission, as was the hope of the American courts, appears to be to provide more clarity, including to businesses, and efficiency in determining whether certain discrimination is "objectively justified".

Resolving this ambiguity was a concern raised by the US Chamber of Commerce, a not-for-profit organisation representing businesses, in its response to the Commission survey. While the organisation's objection centred on the potential regulation and/or prohibition of what they deemed "legitimate business practices", including infringement on freedom to contract/business and price, they also raised concerns about the ambiguity of "unjustified" geo-blocking activity. Google expressed similar concerns, among others, in its reply to the same survey saying that "*when reviewing many of the questions in the [survey] about when geo-blocking may or may not be justified, the only possible answer is often 'it depends.'*"

With thanks to the contributors to this paper

⁸ "Geo-blocking: new rules for traders", Practical Law.

⁹ Letter from Lord Prior of Brampton to the Chairman of the European Scrutiny Committee dated 27 June 2017 and the Commission Notice.



Verity Egerton-Doyle, Linklaters LLP

Juliane Guderian, Linklaters LLP

William Huynh, Linklaters LLP

Nathalie Lobel-Lastmann, Competition and Markets Authority

Noel Watson-Doig, Bristows LLP