

EU proposal to ban geo-blocking

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Introduction

The EU recently proposed a Regulation (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0289:FIN>) which, amongst other things, aims at removing so-called “geo-blocking” for online shopping. This article examines the main features of the proposed Regulation.

According to the Commission's press release about a package of proposed new e-commerce consumer protection measures (http://europa.eu/rapid/press-release_IP-16-1887_en.htm),

in the online world, all too often consumers are blocked from accessing offers in other countries for example by re-routing the consumer back to a country-specific website, or asking to pay with a debit or credit card from a certain country. Such discrimination has no place in the [EU] Single Market.”

Under the proposed Regulation the European Commission is seeking to ensure that people looking to buy products and services in another EU country, whether online or in person, are not discriminated against on the grounds of nationality, residence or establishment in terms of access to prices, sales or payment conditions, unless the action is objectively justified for reasons such as VAT or certain public interest legal provisions. It should be emphasised that the proposed Regulation does not create an obligation to sell, nor does it introduce an obligation to deliver across the EU, nor does it regulate or harmonise price levels.

Geo-blocking ban

The total geo-blocking ban focuses on:

- Sales of products without delivery - For example, a Belgian customer wishes to buy a refrigerator and finds the best deal on a German website. The customer will be entitled to order the product and collect it at the trader's premises or organise delivery himself to his home;
- Sales of electronically supplied services - For example, a Bulgarian consumer wishes to buy hosting services for her website from a Spanish company. She will have access to the service, can register and buy this service without having to pay additional fees compared to a Spanish consumer; and,
- Sales of services provided at specific physical locations - For example, an Italian family visits a French theme park and wishes to take advantage of a family discount on the price of the entry tickets. The discounted price will be available for the Italian family.

There are however some exemptions to the geo-blocking ban, for example where a business is legally prohibited from selling goods or providing services to certain customers or in certain countries, for example a prohibition on selling alcohol to non-residents.

Further, for electronically supplied services, for example cloud services, data warehousing, and website hosting, the application of the discrimination prohibition will be delayed until mid-2018 (see below re the expected 2017 adoption date) because of those services' specific characteristics and in order to allow these service providers to prepare for the changes.

Blocking access to websites and automatic re-routing to websites aimed at where a customer is located will also be prohibited. For example, a British customer wants to access an online clothing shop's Italian website. Even though she types in the URL of the Italian version, she gets redirected to the British version. After the entry into force of the Regulation such redirection will require the explicit consent of the user and even if the customer gives consent to the redirection, the original version she sought to visit should remain accessible.

Payment methods non-discrimination

There will also be a non-discrimination obligation in relation to payment methods - businesses will still be able to choose their preferred payment methods, but, discrimination of customers using an accepted payment method based on their nationality, place of residence, or establishment will be prohibited. This does not mean that businesses **will have to accept all national debit cards from other EU countries**. According to the Commission's Q&A about a package of proposed new e-commerce consumer protection measures (http://europa.eu/rapid/press-release_MEMO-16-1896_en.htm):

The proposed Regulation only says that businesses may not discriminate based on the country in which a credit or debit card is issued, but only within a specific payment brand. In practice it means that if a trader accepts Maestro cards from France, they should accept a payment through a Maestro card from Germany too. However, if a trader only accepts cards from a specific payment brand such as Bancontact in Belgium, they would not have to accept German cards which only work within the Girocard payment brand."

Exclusion & Extra-territorial Effect

It should also be pointed out that most of the proposed Regulation does *not* apply to transport, retail financial and audio-visual services as these areas have either already been dealt with or are otherwise being dealt with separately by the EU. Other services such as healthcare are also excluded.

Last but not least, the proposed Regulation has *extra-territorial effect* - it will apply to any website which sells to EU consumers, i.e regardless of the place of administration of the website or location of the seller's business.

Next Steps

The proposed Regulation is short and is anticipated to work its way quickly through the EU legislative pipeline (the European Parliament and the EU Council) - the Commission has announced an expected adoption date of sometime in 2017. Although the UK's Brexit negotiations will no doubt be under way by the time this proposed legislation enters into force (which it will be noted is in the form of a Regulation and which therefore does not require implementation into national law), given the anticipated 2017 adoption date it could well still form part of UK law, and post-Brexit it will have extra-territorial effect on the UK in any event.

There are more general comments on the effects of Brexit on areas like retail in our film and alert here <http://bit.ly/brexfilm>.

The sales and marketing practices of online retailers that use geo-tracking, for example, to determine customer location etc will be significantly affected by this proposed Regulation. Some have also criticised the proposed Regulation as being inadequate, notably in not going far enough, and, as regards the number of carve-outs, so its final form may well be different.

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