

# Regulating for Globalization

Trade, Labor and EU Law Perspectives

## Geo-blocking and discrimination in European e-commerce: another brick off the wall

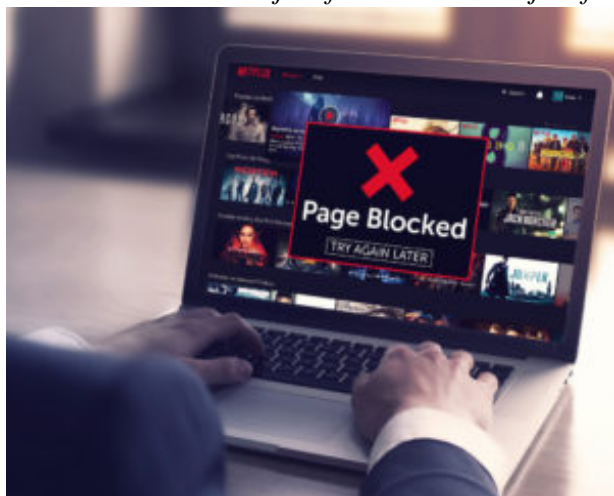
Marco D'Ostuni, Marianna Meriani (Cleary Gottlieb) · Monday, May 7th, 2018



While barriers to close down national boundaries are being raised again worldwide, EU institutions keep fighting unjustified geo-blocking and online cross-border stops to trade. [Regulation No. 2018/302](#) (“Geo-blocking Regulation”) bans unjustified geo-blocking and other forms of territorial discrimination that prevent consumers from freely buying on online platforms. The Regulation was adopted on February 28, 2018 and entered into force on March 22, 2018. However, traders have time until December 3, 2018 to adapt to the new rules. Territorial limits to European e-commerce are still allowed to the extent they pursue legitimate goals. Law practitioners, judges and enforcers will face the usual task of discerning when a practice is objectively justifiable.

## 1. Geo-blocking and other territorial restrictions in online transactions

Geo-blocking refers to technical measures through which online sellers prevent access to their website or digital interface to buyers located in Member States other than those where the sellers are seated. A straight condemnation of geo-blocking would be troublesome as geo-blocking comes in two versions. The *'justified'* and the *'unjustified'*.



The new rules target discrimination among buyers on the basis of nationality, country of establishment, residence or location. Territorial discriminations that fence off online buyers without any legitimate purpose are unjustified geo-blocking.

The ban also hits any other form of territorial restrictions which indirectly lead to the same discriminatory effect. Outlawed practices can include blocking buyers' access to online platforms or suppressing their ability to complete an order from outside a Member State. Similarly, applying different prices or selling conditions based on the customer's nationality, residence or place of establishment is unlawful.

These blocks can be triggered by the IP address, the postal address for the order, the Member State where the buyer's credit card is registered for payments. As a result, buyers cannot take advantage of price differences between Member States.

But geo-blocking can also serve positive ends, like acting as a law enforcement tool on the web. Through geo-blocking, local legislations preventing access to online content or services available worldwide can be enforced locally. This could be done without undue spill-over impact on access in other countries with more permissive rules. Blocking user access from selected foreign countries enables providers to circulate contents only in countries where they are legally accessible, without exposing themselves to legal consequences in other States.

One could also think about the right to oblivion. In compliance with data protection rules, website providers can grant online users' requests to erase content in a single State by geo-blocking access from there. But access to the same content from other countries where the request for oblivion does not or cannot apply remains possible. Without geo-blocking, the website provider would be obliged to globally remove the content.

Moreover, thanks to geo-blocking content licensors can adapt the licences' geographical scope and price to customer needs. Territorially-limited licenses are cheaper than global ones, but need adequate protection against worldwide free online circulation.

In exclusively prohibiting *unjustified* geo-blocking and discriminatory practices, the new regulation recognizes the useful purpose of online territorial delimitations. In some cases, they could be instrumental to the pursuit of public policies or other legitimate justifications.

## 2. The path towards the Geo-blocking Regulation

The European Commission extensively enforces antitrust law against conduct impeding cross-border choices of buyers. But antitrust prohibitions could only hit agreements or unilateral conduct by dominant companies. They do not address autonomous choices to geo-block or discriminate by companies with less market power. This led the European Commission to focus on new rules for online sales. In 2015, the Commission launched a [public consultation on electronic commerce](#). It found that retailers responding to the consultation did not sell cross-border as much as they could. In May 2015, in its [Digital Single Market Strategy for Europe](#), the Commission envisaged enacting new legislation to ban unjustified geo-blocking.

In December 2015, the Commission also proposed to enhance cross-border portability. The proposal led to the adoption of the [Regulation on cross-border portability](#) of online content services in 2017. This was a separate but related issue: subscribers to online content services (such as music, games, films or sports events) in one European country could not access the service when they were temporarily in other European countries. The 2017 Regulation has established that consumers must be allowed access to online content in the Member State of subscription and where they are temporarily located. The consumption of copyright-protected content is still deemed to occur in the country of subscription, despite including a mandatory service of cross-border portability.

In May 2016, the Commission presented a [revised proposal](#) to eliminate unjustified geo-blocking. It clarified that geo-blocking was permitted when necessary “*to ensure compliance with a legal requirement in Union law or in the laws of Member States*”. For instance, territorial blocking could be justified when authorized by European or national laws in compliance with copyright rules. This proposal led to the adoption of the Geo-blocking Regulation.

## 3. The Geo-blocking Regulation

### a. Purposes

The Geo-blocking Regulation aims at giving European consumers better access to goods and services in the European digital market. It does so by preventing direct and indirect discrimination by traders. To “*realize the full potential of the internal market*”, any unjustified geo-blocking and discriminations based on consumers’ nationality, country of establishment or residence during economic transactions should be avoided.

### b. Access to digital interfaces and online payments

Under Articles 3 and 5 of the Regulation:

- traders must not block or limit customers’ access to online interfaces on the basis of their nationality, place of residence or establishment. Also, they must not automatically redirect customers to a different online platform from the one to which the buyer initially sought access;
- traders cannot impose different conditions for a payment transaction if it is made via an electronic transfer (by credit, direct debit or a card-based payment instrument), in a currency

accepted by the trader, and the authentication requirements for payment services established by the Second Payment Services Directive are fulfilled.

There are exceptions.

The Geo-blocking Regulation authorises:

- restrictions to access online interfaces when the buyer “*explicitly consented*” to redirection. In such a case, the original website has simply to remain easily accessible to the consumer. Similarly, restrictions that permit the trader to comply with European or national laws to which its activities are subject are accepted;
- different online payment conditions, if justified by objective reasons. The trader may also charge for the use of a card-based payment when interchange fees are not regulated by existing European laws. The trader may delay the delivery of purchased goods or the provision of services until it receives payment confirmation. Compliance with national laws is not recognized as a general reason for exemption.

#### **c. Sales of goods and services**

Article 4 of the Regulation bans unjustified discrimination in access to goods and services in three specific scenarios:

- physical goods should be sold to any customer in the internal market. Traders must not apply different conditions based on customer nationality, place of residence or establishment. However, they are not required to deliver goods across borders if they have stated in their general terms and conditions that they only deliver domestically;
- electronically supplied services not based on copyright should be accessible to customers throughout the European Union. We refer, for example, to cloud services, data warehousing services and website hosting;
- services provided in a specific physical location other than electronically supplied services should be equally available to any customer in the internal market. These services include hotel accommodation, sports events, car rental and entrance tickets for music festivals or leisure parks. For instance, car rentals should not apply different prices or conditions to EU tourists than those applied to locals.

These rules do not prevent traders from making different non-discriminatory offers to groups of customers located in specific territories.

#### **d. Passive sales**

Obligations on traders not to engage in passive sales with certain customers are generally considered to restrict competition. Save for exceptional circumstances, these restrictions are not exempted under Regulation No. 330/2010. The Geo-Blocking Regulation makes the ban absolute with respect to unjustified discriminations. Any clauses to that effect are automatically void.

With respect to agreements concluded before March 2, 2018, in compliance with competition law, the ban set forth by the Geo-Blocking Regulation will apply from March 23, 2020.

#### **e. And media services?**

Territorial licenses may still be geo-blocked when copyright or other intellectual property rights come into play. In fact, the Geo-Blocking Regulation accepts the supremacy of copyright law. It does so by expressly stating that its provisions do not affect the application of copyright rules (Article 1, para. 5).

The Geo-Blocking Regulation does not regulate online access to digital media (such as YouTube, Netflix, Spotify and other media providers). Services exclusively related to access to, and use of, copyright-protected digital content or to selling of copyright-protected works in an intangible form are outside its scope of application. Therefore, services like music streaming services, e-books and online games are only subject to sectoral copyright restrictions.

#### **f. Review and enforcement rules**

The Commission included a review clause in the Geo-Blocking Regulation (Article 9). By March 23, 2020, and then every five years, the Commission will present an evaluation on the impact of the Regulation. This evaluation may also propose necessary amendments. The Geo-Blocking Regulation points to possible revisions of the rules applying to electronically supplied services involving copyright-protected works or similar forms of protection.

Moreover, under the Geo-Blocking Regulation, Member States must designate bodies responsible for assisting consumers in disputes arising between a consumer and a trader. This assumes that individual harm from cross-border discriminations is usually too small to trigger private actions by the concerned customers. Therefore, decentralisation of powers to national authorities is the selected tool to ensure adequate public enforcement.

### **4. Conclusion**

Even though online sales are growing, traders all too frequently refuse to sell their goods or to provide equally advantageous offers to customers located in another Member State. These practices jeopardize the realization of the full potential of the European digital single market. The Geo-blocking Regulation is an important part of the efforts by the European institutions to ban discrimination against customers within the European Union. The new rules try to strike a balance between justified and unjustified boundaries to cross-border e-commerce. Two years from now, the review process will help us to tell whether their scope of application is too narrow and what their impact will be on online sales and the economy in general.

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