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Now that geo-blocking is a thing of the past in the EU, where does this leave UK businesses?

As the 3 December 2018 deadline for online traders to comply with the new EU Geo-blocking Regulation has just passed, we look at what exactly it will mean for UK based businesses, and whether Brexit changes the picture for them.

The single market is one of the key foundations of the European Union, and in recent years, the digital single market has followed suit. The EU Geo-blocking Regulation (EU) 2018/302 is one aspect of a number of measures taken by the EU to develop and promote a digital single market. It is the EU's attempt to ensure that its citizens are able to access the same terms offered by traders of goods and services, irrespective of where they live in the EU. Subject to a number of exemptions, set out in further detail below, the Regulation applies to any business (located within or outside the EU), which sells goods or services to customers based in the EU – whether online, offline or omnichannel (i.e. where online and offline sales are integrated). It does not apply unless there is a cross border element to the transaction.

What is Geo-Blocking?

Geo-blocking is the system used by traders to limit a user's access to goods or services based on their geographic location. In a digital context, this means for example, using a computer's internet protocol ("IP") address to determine a user's geographic location, and then using this information to block a user's access to websites, including goods or services sold via those websites.

What does the Regulation do?

The Regulation seeks to stop the use of geo-blocking within the EU, by prohibiting businesses from blocking access to, or forcing redirection away from, a website simply on the basis of a user's EU nationality or location within the EU. The Regulation also, in broad terms:

- prohibits discrimination against customers purchasing goods or services, which is based solely on their nationality or place of residence; and
- prohibits discrimination against methods of payment based on their place of issue within the EU.

As well as making technical adjustments to remove measures used to block or limit a customer's access to online systems, traders should, to the extent that they have not already done so, check their pricing to ensure that it is consistent across member states (and is not set at different levels based on nationality or location). Additionally traders should ensure that they are in a position, both in respect of their distribution policies, logistics and arrangements, and what they say in their terms and conditions, to sell their goods or services to any EU based customer who wishes to

buy them, and who is prepared to arrange pick up or access them from the trader's member state or existing delivery points. Similarly, whilst traders remain free to choose their preferred method of payment, they cannot reject debit or credit cards simply on the basis of the customer's nationality, location or the place of issue of the card. The key point of the Regulation is to oblige businesses to treat EU customers in the same manner as local customers, irrespective of their nationality, place of residence or place of establishment.



Does the Regulation apply to you?

There are a number of important exceptions which we explained below, but broadly, the Regulation applies to all consumer facing businesses that trade within the European single market. It also applies to traders of goods or services that sell to other businesses exclusively for end use (again, subject to the exceptions below). This means that traders that sell goods or services to businesses without the intention to re-sell, transform, process, rent, or sub-contract such goods or services are caught. Examples of such traders might be those who sell office equipment (e.g. stationary or desk equipment) or IT services (such as cloud storage or web hosting).

What are the exceptions?

The Regulation does not apply to:

- **Services in the field of transport:** This is because existing EU legislation already prohibits discrimination of the type at issue here for three types of transport: air flight tickets, bus and coach transport and waterborne transport. There are also separate laws in place regulating rail passengers' rights and obligations (with more to come.) However, travel packages and linked travel arrangements are covered by the Regulation;

- **Financial services/retail financial services;**
- **Gambling;** and
- **Audiovisual services:** Audiovisual services, including the provision of access to broadcasts of sports events, which are provided on the basis of exclusive territorial licences, are understandably excluded from scope.

The sale of non-audiovisual copyright protected content supplied electronically, such as online television and music streaming, software and e-books, is also excluded (for the time being) from the Regulation's prohibition on discriminating against customers (in this case by preventing their access to such material), solely on the basis of their nationality or location. This allows traders to prevent customers from accessing and downloading, for example, software, on the basis of their nationality or location.

The Regulation is far from comprehensive in its coverage; important areas of online sales, such as music streaming and software, are excluded.

If aspects of the Regulation sound not dissimilar to language used when prohibiting anti-competitive behaviour, that's because there is some cross over: restrictions on passive sales (where a distributor is prevented by his supplier from selling to a customer outside his allocated territory where approached directly by the customer) are not permitted under the Regulation or under EU competition rules. However, the Regulation does not affect restrictions on active sales outside a distributor's territory, to the extent that these are permitted under EU competition rules, as set out in the EU Vertical Agreements Block Exemption Regulation.

Sanctions

The Regulation leaves enforcement and sanctions up to individual member states, giving them the freedom to designate enforcing authorities and to fix penalties for non-compliance. In the UK, the Competition and Markets Authority (**CMA**) has been designated as responsible for enforcement of the Regulation. Failure by a trader to comply may be enforced by the CMA if the breach harms the

collective interests of consumers. In addition, customers are at liberty to bring civil claims against traders for loss or damage suffered in the event of breach of the prohibitions set out earlier in this briefing.

This is not the end of the story for traders: wronged customers also have the option of enforcing the Regulation via the authorities of the member state in which they are based. It is this which could cause practical difficulty for some traders (e.g. having to defend proceedings in other member states and in accordance with their local laws).

Will Brexit make a difference?

If the Withdrawal Agreement is approved, then probably not, at least for the medium term, as UK traders will have to comply with the legislation up until the end of the transition period. The position after the transition period is less clear. Whether the Regulation will continue to take effect will depend on the outcome of negotiations between the UK and the EU.

If the Withdrawal Agreement isn't approved, and there is no deal, the Regulation will, according to a technical notice released in October by the UK Government, fall away for the UK, so that if you are a UK trader with effect from B-(rexit Day), you could prevent EU nationals from accessing your UK website, and UK nationals from accessing your EU facing websites. However, businesses which trade in Europe will still need to comply as

between customers from different member states within the EU.

Will the Regulation make much difference?

Only time will tell whether customers really take advantage of the changes brought about by the Regulation, and whether they are prepared to pick up from a different territory, in order to access the goods they want, where they are unavailable in their own country. Much will of course depend on the nature of the underlying goods or services and their widespread availability. Potentially more advantageous, would be the ability to access online material, however this has been somewhat eroded by the carve out of copyright protected material (such as proprietary software), from the Regulation's prohibition on discriminating for the purpose of access. To a certain extent it is a moot point, as traders who are caught will have to do the hard work to make the necessary adjustments to their processes to ensure that they fall on the right side of the Regulation irrespective of whether or not customers decide to take advantage of the new landscape. The European Commission has released a detailed set of questions and answers for businesses on the Geo-blocking Regulation and how to implement it, which can be found at: <https://ec.europa.eu/digital-single-market/en/news/geo-blocking-regulation-questions-and-answers>.

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