

Client Alert

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European Commission Publishes Draft Regulation on Geo-Blocking – Will It Unblock E-Commerce Across the EU?

By **Holger Kastler and Susan McLean**

As part of the Commission's Digital Single Market initiative, the European Commission has published a draft Regulation aimed at preventing traders from discriminating against customers based on nationality or location. The rules will benefit both consumers and businesses that purchase goods or services (excluding resellers) for use within the EU.

The European Commission believes that geo-blocking and discriminatory practices undermine online shopping and cross-border sales within the EU. Despite previous attempts to ban discrimination under previous EU legislation, many retailers continue to block access to their websites to customers located in another Member State or redirect customers to their local website which may offer different goods and services at different prices. Goods and services that tend to be most affected include clothing, books, computer hardware and games, car rental and digital content (e.g., music and videos).

When adopted, the Regulation will apply to all traders (including small and medium-sized enterprises (SMEs) and micro-enterprises) operating in the EU, although small businesses that fall under a national VAT threshold will be exempted from certain provisions. The Regulation will apply to traders established outside the EU to the extent that they sell or intend to sell goods or services to customers in the EU.

So, what are the key aspects of the Regulation that traders need to know?

1. No Discrimination

One of the key planks of the Regulation is that traders should not discriminate against a customer based directly or indirectly on the customer's nationality, place of residence or place of establishment.

This prohibition will apply whether the trader sells (or seeks to sell) goods or services:

- in a Member State other than the Member State in which the customer resides or has its establishment;
- in the same Member State, but the customer is a national of another Member State; or
- in a Member State in which the customer is temporarily located without residing in that Member State or having a place of establishment there.

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2. Access to Online Interfaces

A trader operating an online interface (such as a website or app) will not be permitted, through technology measures or otherwise, to block or limit customers' access for reasons related to the customer's nationality, place of residence or establishment. In addition, a trader will not be permitted to redirect a customer from one website to an alternative website without the customer's consent. Even where a customer consents to the redirection, the customer must be able to access the original website.

3. Access to Goods or Services

Similarly, a trader may not apply different terms and conditions based on a customer's nationality, residence or place of establishment. This ban applies to:

- sales of goods where the trader is based in a different Member State. This may mean a foreign customer has to pick up goods in that Member State or another Member State to which the trader delivers. A trader would not be required to deliver goods cross-border;
- all electronically supplied services (except services which involve providing access to copyright-protected content) (see paragraph 5 below), e.g., cloud services and web hosting; and
- offline services provided at the trader's premises or in a location where the trader operates, where such site is in a different Member State to where the customer is a national, is resident or is established.

4. Non-Discrimination on Payment

A trader must not apply different payment conditions to any sales of goods or provision of services within the EU, subject to certain criteria. However, a trader will still be free to decide which payment means it accepts in terms of local and foreign customers. And the Regulation does not address pricing, so traders will still be free to set prices in a non-discriminatory manner.

5. Exceptions

To the relief of content providers across the EU, copyrighted content is excluded from the scope of the Regulation. This is a departure from the Commission's original plans and means that digital content providers (e.g., providers of audio-visual media, e-books, gaming apps and software) can continue to licence their content on a territorial basis (subject to portability obligations under the draft Regulation on cross-border portability and obligations under the [proposed amendments to the Audiovisual Media Service Directive](#)).

Other exclusions include financial services, transport, gambling and health care. There are also specific exceptions to the discrimination obligations, where required to comply with applicable EU or Member State law (e.g., applicable laws regarding the protection of children), but any such restrictions must be "precisely justified".

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NEXT STEPS

The draft Regulation will now be reviewed by the European Parliament and the Council of the EU and may be subject to changes. The Regulation is currently expected to be in force in 2017 (except that the ban on discrimination in electronically supplied services will only be effective from 1 July 2018). As the proposed law is a Regulation, when it is adopted, it will have effect in all Member States without the need for each Member State to implement the Regulation into national law.

IMPLICATIONS

Traders that will be affected by the new law should start reviewing the technical features of their platforms and their terms and conditions (including payment terms) to identify whether these discriminate against customers based on their nationality, place of residence or place of establishment. Traders should also consider what changes will need to be made to their platforms and terms to ensure compliance with the new law so that, as and when the proposed law is adopted, they will have started to make the necessary preparations.

IMPACT OF BREXIT!

The UK voted to leave the EU on 23 June 2016. However, until the UK government formally provides an Article 50 notice, the UK remains part of the EU and subject to EU law and regulation. Accordingly, if this Regulation comes into force in 2017, it will apply to the UK because it is directly applicable in all EU Member States. Whether or not the law will continue to apply post-Brexit will depend on the Brexit model that the UK government adopts, which is not yet clear. It seems likely that this sort of law is one which the UK government would positively want to encourage – or at least the UK government would need to find some way to agree mutual recognition between the EU and the UK, because if the law doesn't apply to the UK, then it would mean that EU businesses could discriminate against UK customers.

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