COMPETITION & ANTITRUST - EUROPEAN UNION

New Geo-blocking Regulation: game changer or tinkering at edges for online sales?

August 09 2018 | Contributed by Baker McKenzie LLP

Calls to end geo-blocking have grown more audible since the start of the European Commission mandate in 2014 and the introduction of its digital single market strategy. But does the reality live up to the rhetoric? This update examines the practical impact of the new Geo-blocking Regulation.

Background

Many retailers do not sell cross border. Instead, they may:

- refuse delivery to foreign consumers;
- decline non-domestic payment cards; and
- automatically re-route foreign consumers to websites customised for the consumer's home country, rather than letting them view goods and prices on other country-facing websites.

Moreover, surveys have shown that most online content providers geo-block users located in other EU member states – consumers are simply unable to buy from certain e-commerce websites unless they are local to the trader.

The European Commission has sought to attack geo-blocking practices through the following parallel initiatives:

- its geo-blocking and cross-border portability of online content regulations, which aim to restrict the circumstances in which suppliers may geo-block consumers in other EU member states; and
- the e-commerce sector inquiry, initiated in May 2015, which investigated whether geo-blocking clauses in vertical agreements could breach competition law. In February 2017 the commission opened separate investigations into holiday accommodation, video games and consumer electronics for practices that may be unlawful under Article 101 of the Treaty of Functioning of the European Union (TFEU). Additional investigations followed in June 2017 against clothing brands and merchandise licensors.

Scope

The Geo-blocking Regulation sets out certain situations where treating consumers differently is unjustifiable (eg, online and offline sales of goods and services, including situations where these two channels are integrated). The regulation applies only to transactions that have a cross-border element (eg, a Belgian consumer wanting to buy a product or service in Germany) and not to purely 'internal' situations where all of the transaction's relevant elements are confined within a single EU member state. The regulation also applies in a business-to-business context, provided that the purchasing business buys a product or service for end use (ie, rather than resale, renting or subcontracting).

Excluded services

Transport services, retail financial services and audiovisual services fall outside the scope of the Geo-blocking Regulation. Addressing geo-blocking practices in the audiovisual sector would require a circumvention of the territorial (national) scope of copyright – a core principle under EU copyright law. Territorial licensing is inherent to the functioning of the financing, promotion and sale of films in the audiovisual sector. Online television services, films and streamed sports also currently fall outside the regulation's scope; however, this will be reviewed in two years' time.

Services offering non-audiovisual copyrighted content (eg, e-books, online music and software) fall within the scope of the regulation, but are subject to the prohibition on blocking or limiting access to online interfaces based on the consumer's:

- nationality;
- place of residence; or
- place of establishment.

For example, a Belgian consumer should be allowed access to the German version of an app store, but there is no obligation to allow that consumer to purchase music from that store in the same way that a German consumer would. This exception will also be reviewed in two years' time.

What is prohibited?

The Geo-blocking Regulation sets out specific situations where traders' decisions to discriminate based on nationality, place of residence or place of establishment are unjustified (unless required by law):

- Access to websites and apps – traders are prohibited from:
  - blocking or limiting consumers' access to the trader's online interface using technological measures such as location; or
  - redirecting consumers without their explicit consent to a version of the trader's online interface that is different from the online interface to which the consumer initially sought access.

  This prohibition does not cover purely informative websites where consumers cannot access an online shop. For example, a trader would be permitted to reroute a Belgian consumer away from a French-facing website to a purely informative Belgian website with no e-commerce activity.

- Access to goods or services – traders must allow consumers full and equal access to goods and services on the same general conditions (including price and delivery conditions) regardless of their nationality, place of residence or place of establishment in the following scenarios:
  - sales of goods (eg, household appliances, electronics and clothes) without delivery. For example, if a Belgian consumer finds a good deal for a coffee machine on an Italian website, they are entitled to order the item and collect it at the trader's premises or organise delivery themselves;
  - electronically supplied services which do not require physical delivery (eg, cloud services, data warehousing services, website hosting, providing firewalls, use of search engines and internet directories). For example, a Belgian consumer who wants to buy hosting services from a Spanish company must be able to access and buy the service without having to pay additional fees or a different price compared to a Spanish consumer; and
  - services other than electronically supplied services in a physical location within a territory of an EU member state where the trader operates (eg, hotel accommodation, sports events, car rentals, music festivals or leisure park tickets). For example, a Belgian

consumer wants to attend a concert in Paris and finds a reduced ticket on a German website. The discounted price should be available for the Belgian consumer just as it would be for a German consumer.

- Payment means – subject to conditions,(1) traders need not change the range of acceptable payment methods; however, they must not discriminate based on the country in which a credit or debit card is issued. For example, if a trader accepts Maestro cards from France, it should also accept Maestro cards from Belgium.

Price and sale restrictions
The Geo-blocking Regulation does not prohibit traders from offering different prices on websites that target different consumer groups – rather, it obliges them to make these prices accessible to all EU consumers.

Similarly, traders may offer promotions on websites that target a specific country; however, they must give all EU consumers access to these promotions. Traders may also differentiate as to the conditions (including prices) under which they offer goods purchased via their brick-and-mortar shops compared to purchases via their e-commerce websites.

The regulation does not oblige traders to sell, establish pick-up points for or deliver their goods. Consumers may still order the products and traders cannot refuse those orders on grounds of nationality, but delivery arrangements are the consumer's responsibility.

Competition law

Banning unilateral conduct in the absence of market power
In its e-commerce sector inquiry, the European Commission concluded that the majority of geo-blocking measures put in place by traders were the result of unilateral business decisions. EU competition law generally avoids regulating unilateral business decisions. This might arise only where a company has a dominant market position and the unilateral actions constitute an abuse restricting competition. The regulation aims to close that gap by addressing situations where traders unilaterally decide to discriminate on the basis of a consumer's nationality, place of residence or place of establishment.

Interplay with the Vertical Block Exemption Regulation
Under EU competition law, every supplier must generally permit resellers to use the Internet to sell products.(2) Internet sales are considered a form of 'passive' sale which resellers cannot be prevented from doing.(3) Agreements by which suppliers restrict resellers making internet sales are generally anti-competitive. This would include suppliers requiring the reseller to:

- deny access to a website;
- engage in automatic rerouting; or
- terminate a transaction due to the use of a foreign credit card.

The Geo-blocking Regulation acts in parallel to EU competition law and states that agreements which require traders to restrict passive sales are void. However, the regulation goes further than competition law. In rare cases, a ban on passive sales is lawful under EU competition law – for example, where an exclusive distributor has committed substantial investments to start up or develop a new market; restrictions on passive sales by other distributors into its territory (or to such a consumer group) which are necessary for the distributor to recoup those investments generally fall outside the scope of Article 101(1) of the TFEU during the first two years of sales.(4)

What penalties apply?

The Geo-blocking Regulation does not provide for specific penalties. EU member states may determine appropriate measures for non-compliant traders.

The regulation requires member states to identify specific bodies that will be responsible for:

- monitoring compliance and enforcement; and
- providing practical assistance to consumers in case of disputes with traders.

This practical assistance also includes proposing a standardised form for consumers to file complaints.

Despite no unified structure on enforcement to secure compliance, the European Commission's recently presented New Deal for Consumers aims to facilitate, among other things, cross-border enforcement mechanisms for consumer claims. Under the proposed rules, consumer organisations could bring collective class-style actions on behalf of consumers for breach of EU legislation (including the Geo-blocking Regulation) and fines for consumer law infringements would be up to 4% of a trader's turnover for serious cross-border breaches.

Any contractual restrictions contrary to the non-discrimination obligations set out in the regulation will be automatically invalid.

Timing

The Geo-block Regulation will apply from 3 December 2018. However, provisions on passive sales will apply from 23 March 2020 to agreements concluded before 2 March 2020 that comply with Article 101 of the TFEU.

Summary

The practical impact of the new Geo-blocking Regulation may be summarised as follows:

- Traders must not discriminate against consumers based on nationality or residence – consumers must be allowed to view offerings and shop like local consumers. Therefore, a Belgian consumer should be able to buy goods and services from a French website on the same terms and conditions as a French consumer.
- Traders are not obliged to change existing delivery areas – traders are not required to ship across the European Union if they would not ordinarily do so – rather, they must ensure that all EU consumers are treated equally. Therefore, if a trader delivers in France, a Belgian consumer must also be able to order delivery to a French address, but the trader need not deliver to a Belgian address if it would not ordinarily do so.
- Traders are not obliged to harmonise EU prices, but price arbitrage becomes more likely – traders need not harmonise prices across the European Union; however, consumers will be able to compare prices in a trader's different country-facing web pages and seek to buy from the cheapest. Therefore, if a Belgian-facing page has cheaper prices than a French-facing page, a French consumer may order from the former. This is particularly true for locally or electronically delivered services (eg, hotel accommodation or consumer relationship management software delivered as a service). However, practical disadvantages may still apply to this cross-border trade, particularly in terms of deliveries. A Belgian entity operating a Belgian-facing site and delivering only to Belgium under its general terms and conditions may still lawfully refuse to deliver to France, even if a French entity operating the French-facing site would be able to do so.
- The regulation goes further than antitrust laws – it does not oust the application of competition law, but applies in parallel. The regulation is notably stricter than competition rules in prohibiting geo-blocking practices, even where the supplier does not have a dominant position and acts unilaterally rather than pursuant to an agreement. However, the commission is aggressively applying competition law in practice to cases where it finds suppliers have unlawfully restricted resellers' online sales. Decisions and penalties are expected shortly across a range of electronic and branded goods.

Overview of standard business practices

Territorial restrictions

Practice	Regulation	Competition law
	No – this is prohibited. The German trader must	

Prices

Practice	R

Can a German trader refuse to sell its products to French consumers?	sell to French consumers as it would to German consumers; however, it is not obliged to deliver to France if it does not normally do so. The French consumer would need to arrange delivery or to pick up from a German delivery address. (5)	Refusal to deal is unregulated by EU competition law, except in exceptional circumstances where the supplier is in a dominant market position.
Can a supplier require that a German trader does not sell products into France?	No – this is prohibited. (6)	Generally, this is not permitted by EU competition law. The only exception would be if the French distributor is an exclusive distributor. In that case, the supplier can require the German trader not to actively resell into France. A restriction on active sales means that promotion or targeted marketing efforts in France can be prohibited. However, the reseller cannot be prevented from fulfilling unsolicited orders (a passive sale). A supplier restricting passive sales is a serious violation of EU law for which large fines have been imposed. There are only very narrow exceptions to this rule for new product launches (see Paragraph 61 of the Guidelines on Vertical Restraints), which requires careful legal analysis as to its applicability.
Can the trader redirect French consumers to the French website when they sought to access the German website?	No – this is prohibited, unless the consumer has consented.(7)	This is unregulated by EU competition law with regard to non-dominant companies. In exceptional circumstances, it could be unlawful for a company in a dominant market position if this is used to segment the EU internal market (eg, to preserve price differences between countries).
Can a supplier require that a German trader redirects French consumers to the French website when they sought to access the German website?	No – this is prohibited. (8)	This is not generally permitted by EU competition law where it results in a restriction on passive sales (eg, where the German website contains lower prices, so the restriction requires the consumer to pay higher prices from the French website).

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Can a supplier require that a German trader offers a special discount on its German website?	This is the reg special be avai consun

Regulation was significantly watered down with respect to the obligations imposed on traders. In terms of competition law, the regulation is more practically relevant when it comes to restricting unilateral conduct.

Traders offering products or services in the European Union which are covered by the regulation should assess whether their practices are compliant using the following criteria:

- What is the company policy on blocking access to online interfaces (eg, websites and apps) on the basis of nationality or place of residence?
- Can consumers from one EU member state use access terms (including price) on parts of the website aimed at another member state or are they automatically re-routed consumers to country-specific websites without prior consent?
- Are prices and product offerings adapted automatically based on the consumer's IP address?
- Are there any legal restrictions that prevent the company from selling to another EU member state?
- Does the trader accept different means of payment depending on the consumer's country?

- Does the company provide suitable forms which allow for billing and contact details to be completed for all EU member states (eg, is there a limitation in the drop-down list of countries or telephone codes)?

For further information on this topic please contact Bill Batchelor or Aliki Benmayor at Baker & McKenzie by telephone (+32 2 639 36 11) or email (bill.batchelor@bakermckenzie.com or aliki.benmayor@bakermckenzie.com). The Baker & McKenzie website can be accessed at www.bakermckenzie.com.

Endnotes

(1) Specifically, if:

- the payment transaction is made through an electronic transaction by credit transfer, direct debit or a card-based payment instrument within the same payment brand and category that the trader accepts;
- the authentication requirements pursuant to the EU Payment Services Directive are fulfilled; and
- the payments are in a currency that the trader accepts.

(2) Vertical Block Exemption Regulation, para 52; *Pierre Fabre Dermo-Cosmétique* (Case C-439/09) para 47. In *Coty Germany* the European Court of Justice confirmed that third-party platform restrictions in selective distribution systems for luxury or technically complex goods are not a hardcore restraint, provided that a number of criteria are fulfilled.

(3) 'Passive sales' means responding to unsolicited requests from individual consumers, including delivery of goods or services to such consumers, while 'active sales' means actively approaching individual consumers (eg, by direct mail, including sending unsolicited emails or visits), a specific consumer group or consumers in a specific territory through advertisement in media, on the Internet or other promotions specifically targeted at that consumer group or targeted at consumers in that territory.

(4) Guidelines on Vertical Restraints, para 61.

(5) Recital 28, Article 4, Geo-blocking Regulation.

(6) Recital 34, Article 6, Geo-blocking Regulation.

(7) Recitals 20 and 21, Article 3, Geo-blocking Regulation.

(8) Recital 34, Article 6, Geo-blocking Regulation.

(9) Recital 27, Geo-blocking Regulation.

(10) Recitals 23 and 28, Article 4, Geo-blocking Regulation.

(11) Recital 32, Article 5, Geo-blocking Regulation.

(12) Recital 34, Article 6, Geo-blocking Regulation.

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AUTHORS

Bill Batchelor

Aliki Benmayor