
URÍA MENÉNDEZ

Regulation (EU) 2018/302 on geo-blocking

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1. Introduction

From 3 December 2018, the new Regulation 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC ("**Regulation on Geo-blocking**"), is applicable.

Geo-blocking is the use of various technological tools to limit access to online interfaces or to offer different commercial conditions to customers depending on the location from which they connect to a provider's website.

The Regulation on Geo-blocking is part of the European Union's digital single market strategy and aims to remove unjustified geographic blocking and filtering as well as other forms of discrimination based on customers' nationality or place of residence or, in the case of customers residing in other Member States, their place of establishment. In short, the Regulation on Geo-blocking introduces a series of new obligations which directly affect cross-border e-commerce within the European Union.

In so doing, the Regulation on Geo-blocking bridges the gap left by competition rules in safeguarding the internal market. Indeed, Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**") do not provide a complete response to geographical blocking and filtering, as for them to apply they require that those actions occur within the framework of an agreement or a concerted practice or the abuse of a dominant position.

On top of that, the application of competition rules in the field of restrictions on parallel trade in the European Union has been characterised by the recognition of justifications that seek to achieve a balance of interests between the functioning of certain business models and an absolute realisation of the internal market. The possibility of replicating this in the application of the Regulation on Geo-blocking could be explored.

2. Scope

The Regulation on Geo-blocking applies to cross-border services provided electronically within the European Union. In other words, it applies to those services provided through the internet that, due to their nature, may be provided in an automated manner, with minimal human intervention and using information technology.

The Regulation on Geo-Blocking does not apply to:

- a) purely internal transactions within one single Member State;
- b) non-economic services of general interest;
- c) financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice;
- d) electronic communications services and networks;
- e) services in the field of transport, including port services, falling within the scope of Title V of the TFEU;
- f) services of temporary work agencies;
- g) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;
- h) audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting, as well as the services which main characteristic is the provision of access to sports transmissions that are provided on the basis of exclusive territorial licences;
- i) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions;
- j) activities which are connected with the exercise of official authority;

- k) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;
- l) private security services;
- m) services provided by notaries and bailiffs, who are appointed by an official act of government.

It is also important to note that the Regulation on Geo-blocking must be interpreted without prejudice to rules applicable in the field of taxation. Likewise, the application of the Regulation will not affect the regulations on copyright and related rights, the application of which is essentially a national matter.

3. Key elements of the Regulation on Geo-blocking

3.1. ACCESS TO ONLINE INTERFACES

The Regulation on Geo-blocking prevents traders from blocking or limiting access to their online interfaces for reasons related to the nationality, place of residence or place of establishment of the customer.

Thus, in principle, traders may not prevent a customer accessing, or redirect a customer to, an online interface that is different from that to which the customer initially sought access (even if the trader has established a different interface, specific to the customer's location), unless the customer has explicitly consented to such redirection.

Notwithstanding the foregoing, in the event of redirection with the customer's explicit consent, the version of the trader's online interface to which the customer initially sought access must remain easily accessible to that customer.

The trader may save the customer's historical preferences on redirection for subsequent accesses without it being necessary to obtain the customer's explicit consent again. Nevertheless, in those cases, the trader should bear in mind the applicable regulations on data protection and cookies.

In any case, it is important to highlight that the prohibition of discrimination with respect to access to online interfaces does not impose an obligation on the trader to engage in transactions with customers.

3.2. ACCESS TO GOODS AND SERVICES

Under the Regulation on Geo-blocking, traders may not apply different general conditions of access to goods or services for reasons related to a customer's nationality, place of residence or place of establishment, when the customer seeks to:

- a) purchase goods that are delivered in a Member State to which the trader offers delivery under the trader's general conditions of access, or that are collected at a location agreed upon

between the trader and the customer in a Member State in which the trader offers such an option in the general conditions of access.

- b) receive electronically supplied services from the trader, other than those which main feature is the provision of access to and use of copyright protected works or other protected subject matter (including the selling of copyright protected works or other protected subject matter in an intangible form [e.g. streaming of audiovisual content or e-books])¹ and allow its use;
- c) receive services from a trader, other than electronically supplied services, in a physical location within the territory of a Member State where the trader operates.

These prohibitions do not prevent traders from offering general conditions of access, including net sale prices, to customers in a specific territory or to specific groups of customers on a non-discriminatory basis.

Mere compliance with the prohibition on discrimination related to the access to goods and services does not, in itself, mean that a trader is under an obligation to comply with non-contractual national legal requirements applicable to the goods and services in the Member State of the customer where the trader did not originally offer the goods.

With regard to the sale of books (in physical format), Article 4 of the Regulation on Geo-blocking expressly indicates that the prohibition on discrimination related to the access to goods or services shall not prevent traders from applying different prices to customers in certain territories in so far as they are required to do so under the laws of Member States in accordance with Union law.

3.3. NON-DISCRIMINATION FOR REASONS RELATED TO PAYMENT

The Regulation on Geo-blocking prohibits traders from applying different conditions of payment for reasons related to a customer's nationality, place of residence or place of establishment, the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument within the European Union, where:

¹ This prohibition does not apply to traders that are exempted from VAT under Chapter 1 of Title XII of Directive 2006/112/EC.

- a) 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;
- b) EU authentication requirements are fulfilled; and
- c) the payment transactions are in a currency that the trader accepts.

Where justified, the aforementioned prohibition shall not prevent the trader from withholding the delivery of the goods or the provision of the service until the trader has received confirmation that the payment transaction has been properly initiated.

3.4. AGREEMENTS ON PASSIVE SALES

The Regulation on Geo-blocking aims to correct the limitations inherent to competition rules that, as explained, do not prevent all potentially restrictive trade practices between Member States, but at the same time avoids interfering in the application of those rules. For the purpose of guaranteeing that balance, the Regulation on Geo-blocking expressly establishes that its provisions shall not affect the following agreements:

- a) Agreements that restrict active sales within the meaning of competition rules and that do not fall under the scope of Article 101(1) TFEU or are exempt according to Article 101(3) TFEU, regardless of whether they concern transactions that fall under the scope of the Regulation on Geo-blocking (that is, prohibitions on (i) unjustified geo-blocking of access to certain interfaces, (ii) the application of different general conditions of access to goods and services, and (iii) discrimination related to payments).
- b) Agreements that restrict passive sales (that is, sales made in response to customers' spontaneous requests) within the meaning of competition rules and that do not fall under the scope of Article 101(1) TFEU or are exempt according to Article 101(3) TFEU, provided that these passive sales concern transactions falling outside the scope of the Regulation on Geo-blocking. Agreements referring to transactions falling under the scope of the Regulation on Geo-blocking and restricting passive sales shall be considered null and void.

Thus, the general rule is that the solution given by competition rules will prevail, provided that this does not restrict passive sales. These restrictions, which are considered to be particularly serious, render an agreement null when they are contrary to the Regulation on Geo-blocking, even if they are not

prohibited under competition rules, which cannot be used to avoid the application of the Regulation on Geo-blocking.

3.5. ADDITIONAL PROVISIONS

The Regulation on Geo-blocking does not apply to customers purchasing a good or a service for subsequent resale, transformation, processing, renting or subcontracting.

Similarly, the geo-blocking prohibitions do not apply where blocking or redirection is necessary in order to ensure compliance with a legal requirement laid down in Union law, or in the laws of a Member State in accordance with Union law, to which the trader's activities are subject.

Finally, the Regulation on Geo-blocking stipulates that each Member State must designate a body or bodies responsible for monitoring and enforcing compliance with the Regulation, as well as providing practical assistance to consumers that have disputes with traders arising from the application of the Regulation.

The Regulation on Geo-blocking differs from the competition rules by providing that it is the national authorities designated by Member States and the sanction procedure that they establish that will ensure compliance with geo-blocking rules. These national authorities will simply notify the European Commission of the measures taken so that it can publish them on its website. This completely decentralised system differs from the power to enforce Articles 101 and 102 of the TFEU, which is shared between the European Commission and the national competition authorities, who coordinate their actions through the European Competition Network. Therefore, it is probably not possible to expect complete alignment in the application of the Regulation on Geo-blocking in the same way that has been achieved in competition matters.

The recitals of the Regulation on Geo-blocking state that the competent national bodies may be either administrative or judicial bodies. This provision means that competition authorities could be made responsible for applying the geo-blocking rules. Depending on whether or not this happens, there could be a certain tendency to construe the provisions of the Regulation on Geo-blocking based on the same logic as that applied to competition rules, which may eventually lead to a greater propensity to admit the same justifications as those accepted under Articles 101 and 102 of the TFEU to restrict parallel trade in the European Union.

Contact Lawyers

BARCELONA



Montiano Monteagudo

Partner

+34 934165162

montiano.monteagudo@uria.com



Núria Porxas

Counsel

+34 934165162

nuria.porxas@uria.com



Francisco Javier García

Senior associate

President of the Fashion Law commission of the UIA

+34 934165100

javier.garcia@uria.com

MADRID



Antonio Guerra

Partner

+34 915860466

antonio.guerra@uria.com



Leticia López-Lapuente

Counsel

+34 915860131

leticia.lopez-lapuente@uria.com



Nerea Sanjuán

Managing associate

+34 915860754

nerea.sanjuan@uria.com

VALENCIA



Reyes Bermejo

Managing associate

+34 963531779

reyes.bermejo@uria.com

BARCELONA
BILBAO
LISBOA
MADRID
PORTO
VALENCIA
BRUXELLES
FRANKFURT
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NEW YORK
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