
The New EU Geo-Blocking Regulation

DECEMBER 3, 2018

“Geo-blocking” is the practice whereby traders operating in a country block or limit access to their online interfaces, such as websites or apps, by customers from other countries wishing to engage in cross-border transactions. This may be for a variety of reasons, including where groups seek to organise sales by their subsidiaries with a national focus, or a particular language focus.

However, **as from today, December 3, 2018**, the EU [Geo-blocking Regulation](#), Regulation 2018/302 (the “GBR”) *bans unjustified geo-blocking and other forms of discrimination based on the customer’s nationality, place of residence or establishment within the European Union (“EU”)*. If not done already, businesses should therefore review their online sales terms and conditions and their distribution agreements, insofar as they apply to the EU, to see if they need to change their practices.

This alert provides an overview of the GBR’s *main consequences* for business. Further practical guidance may be found in the European Commission’s (“EC”) extensive [Q&As](#), which were issued in September 2018.

Background

The GBR is part of the *EU Digital Single Market Strategy*, which aims to abolish residual barriers to cross-border online sales within the EU. The EC’s [2017 E-Commerce Final Report](#) stated that almost 40% of retailers selling goods in the EU collect information on the location of the customer in order to implement geo-blocking measures. Geo-blocking often takes the form of a refusal to deliver goods to customers in other EU countries, or a refusal to accept payments from such customers (see our [e-commerce client alert](#)). The GBR is a reaction to those findings, which are considered by the EU to be contrary to the EU Single Market.

GBR Scope

- **Where?** The GBR applies to all businesses offering goods or services to customers in the EU, *regardless of whether they are established in the EU or in a non-EU country* (although

the GBR does not apply where a transaction is just within one Member State).

- **Who?** The GBR applies to “customers”. This includes (i) consumers and (ii) EU-based companies that make purchases from online sellers (including online marketplaces) in another EU country *for the sole purpose of end use. For example, the GBR applies where a company buys furniture to decorate its showroom, not where it buys furniture for resale purposes.*
- **What?** The GBR prohibits *discrimination based directly or indirectly on customers’ nationality, place of residence or place of establishment in the EU.* Discrimination may arise from geo-blocking, conditions of access, means of payment and distribution agreements.

The GBR does not apply to activities that are excluded from the EU [Services Directive](#), notably services in the field of finance, electronic communications and networks, transport and audio-visual services.

The provision of online services which are copyright protected, such as audio-visual services for sports events based on exclusive territorial licences, are also not subject to the GBR access rules. (Art. 1(5) and Recital 8) The EC will re-evaluate this limitation by March 2020 (Art. 9(2) GBR).

Unjustified Geo-blocking Practices

The GBR prohibits a company from *blocking or limiting customers’ access to its online interface (e.g. a website or an app) for reasons related to their nationality, place of residence or establishment* (Art. 3(1) GBR). For example, a company could not prevent a customer living in France from accessing its German website, without explicit prior consent from the customer.

The GBR also prohibits companies from *redirecting customers to another version of their online interface than the one to which customers initially sought access, unless companies obtain customers’ explicit consent to do so* (Art. 3(2) GBR). For example, a company could not redirect a French customer seeking to access its German website to its French website.

Still, the prohibition of discrimination with respect to access to online interfaces does not create an obligation to engage in transactions with customers (Recital 18 GBR).

The prohibition of geo-blocking measures also does not apply where they are justified, such as where measures may be necessary to ensure compliance with EU law or with an EU country’s law (Art. 3(3) GBR and see Art. 4(2)-(5) GBR).

Discriminatory Conditions of Access

Companies cannot apply *different general conditions of access to goods or services (including price, payment and delivery conditions to customers) from another EU country compared to customers from their own EU country*, where customers seek to:

- Buy goods which are either to be delivered to a location in an EU country to which the

company offers delivery in its general conditions of access; or which are to be collected in a place agreed by both parties in an EU country pursuant to the seller's general conditions (Art. 4(1)(a) GBR). Importantly therefore, companies are not required to deliver their products abroad, or to set up pick up points in other EU countries, but only to apply their general conditions of access consistently, allowing a 'foreign' customer to purchase the goods and take delivery as a 'local' customer could. (Q&As, pp.7-8 and 20)

- Receive online services not protected by copyright (e.g., cloud services, data warehousing or website hosting) (Art. 4(1)(b) GBR). The key point is again that the 'foreign' customer should be able to do so on 'local' conditions and not on different prices. (Q&As, p.8)
- Receive services supplied in a physical location where a trader operates (e.g., hotel accommodation, sports events, car rental and entrance tickets for music festivals or theme parks) ((Art. 4(1)(c) GBR). (Q&As, p.8)

Discriminatory Means of Payment

Companies are free to decide which means of payment they wish to accept. However, once this choice has been made, companies cannot apply different conditions for a payment transaction to customers based on their nationality, place of residence or 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 EU (Art. 5 GBR).

For example, as explained in the Q&As, imagine that a Romanian company used to accept debit cards of a given brand only if they were issued in Romania and refused payments made with a debit card from the same brand issued in another EU country. This is now prohibited by the GBR. However, if the company's policy in general is not to accept credit cards of that brand, regardless of where they are issued, then that policy can still be maintained. (Q&As, p.28)

Distribution Agreements – The GBR and EU Competition law

Companies cannot require their distributors to implement geo-blocking practices, to apply discriminatory conditions of access to goods or services, or to apply discriminatory practices related to payment. If a distribution agreement includes provisions with such restrictions regarding passive sales, i.e. sales in response to unsolicited orders (such as where customers visit a website on their own initiative) these provisions are automatically void (Art. 6(2) GBR).

For example, a Spanish retailer cannot be prohibited by its French supplier from serving French customers who found the retailer's Spanish website through an internet search and wish to make a purchase through the Spanish website (see the Q&As, p. 30).

Enforcement

It is up to each EU country to designate the enforcement bodies and the sanctions that they will impose for infringements of the GBR (Art. 7 GBR). For example, in Germany, under the amended

Telecommunications Act, the Federal Networks Agency will be responsible for enforcing the GBR, while the Federal Cartel Office remains competent to review competition law aspects of distribution agreements. Fines for non-compliance with the GBR can be up to €300,000. There can also be penalty payments until a company brings its practices into line with the GBR rules.

Brexit. The implications of Brexit on Geo-blocking depend on whether a Brexit agreement is reached, an issue currently before the UK and EU Parliaments: Both the [EC](#) and the [UK](#) have issued guidance on the implications:

- **If there is a deal:** The [November Draft Brexit Withdrawal Agreement](#) provides that the UK will have to abide by all EU rules until the end of the transition period, that is December 31, 2020, or possibly later if the EU and the UK agree to extend that period. So, the GBR would apply in the UK, as in any other EU country until that date if the Draft Withdrawal Agreement is approved by the UK and European Parliaments. What would happen thereafter in the UK would depend on whether there is any specific provision on this in any future Brexit trade agreement (applying after the transitional period).
- **If there is no deal:** The UK version of the GBR will cease to have effect in the UK. Traders *in the UK* would not be prevented from discriminating between EU and UK customers therefore and *vice-versa*, traders *in the EU* will also not have to comply with the GBR as regards UK customers.
- **However, after Brexit, whether or not there is a deal**, companies established in the UK will still have to comply with the GBR *when selling in the EU*, since it applies to all businesses operating within the EU regardless of their place of establishment. So, if operating in the EU, they will not be able to discriminate between customers in different EU Member States.

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