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## New Geo-Blocking Regulation...now in force

The Geo-Blocking Regulation (EU) 2018/302 ("**Regulation**"), which addresses unjustified on-line sales discrimination based on a customer's nationality, place of residence or place of establishment, is now applicable across the EU. The Regulation entered into force on 3 December 2018 and aims to remove existing barriers to cross-border trade and allow consumers to purchase goods and services from businesses established in different Member States on the same terms to nationals of their own Member State. Therefore, online sellers in the EU, regardless of where they are established, will need to ensure that their online sales terms and conditions, including methods of payments, as well as distribution agreements do not discriminate against online customers on the basis of their nationality, place of residence or place of establishment.

Combating geo-blocking has been high on the European Commission's ("**EC**") agenda since the completion of the E-Commerce Sector Inquiry, which was swiftly followed by a number of investigations into unlawful geo-blocking practices as part of distribution policies of clothing brands and merchandise providers.

### What is Geo-Blocking?

Geo-blocking involves blocking or limiting access by traders to their online interfaces, which include any software (such as a website and mobile applications operated by the trader in order to provide consumers with access to its goods or services), on the basis of "geo-factors", namely a customer's nationality or geographical location.

An example of such practice would involve a French customer, located next to the German border, willing to rent a car from a company operating in the EU, and being re-routed to that company's French website every time when trying to access the German website to compare the offers.

Likewise, it would cover other practices where a retailer does not sell cross border, such as where the retailer refuses delivery to foreign consumers or declines non-domestic payment cards.

These practices have the effect of creating artificial borders within the EU, where certain consumers are unable to access certain products or services that other EU consumers enjoy, against the single market principle.

Therefore, traders must not discriminate against consumers based on nationality, place of residence or place of establishment – consumers must be allowed to view offerings and shop like local consumers.

After an initial two year period, it is intended that there will be a review of the legislation in 2020, to establish the effect and success of the Regulation.

### Scope of the Regulation

The Regulation specifically applies to cross-border transactions between traders and customers (e.g. a Spanish consumer wanting to buy a product or service in Portugal). It does not cover purely internal transactions which are confined to a single EU Member State.

Within the meaning of the Regulation, a trader is any natural or legal person who is acting for purposes relating to the trade, business, craft or profession of the trader. Importantly, the trader does not have to be established in the EU for the Regulation to apply, but simply has to offer its goods or services within the EU territory. Therefore, companies established in third countries also fall within the remit of the Regulation when selling their products in the EU.

A customer can either be a consumer, who is an EU citizen or a national of a third country but has a place of residence in the EU, or a company established in the EU. However, the Regulation does not cover consumers purchasing goods or services for subsequent resale, transformation, processing, renting or subcontracting. The Regulation therefore relates to business-to-consumer (B2C) and business-to-business (B2B) transactions.

The Regulation currently does not apply to audio-visual, transport, retail financial and healthcare services. Further, electronically supplied services offering copyrighted content (e.g. e-books, online music/TV and software) are also excluded from the Regulation. These limitations on the scope of the Regulation will be reconsidered by the European Commission by March 2020.

### What is Prohibited by the Regulation?

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

#### ***A. Ban on blocking or limiting access to or forced redirection away from an online interface for geo-related factors***

The Regulation expressly prohibits a situation whereby a trader blocks or limits a customer's access to its website, app or other platform (online interface) on grounds of nationality, place of residence or place of establishment. Similarly, when a trader is active in several EU Member States and has set up a number of websites accordingly, a customer cannot be automatically re-routed to another website, which specifically targets that customer on the basis of geo-factors alone. The explicit consent of the consumer must be sought first.

Note that this prohibition does not cover purely informative online interfaces/websites where there is no e-commerce activity.

#### ***B. Ban on applying different general conditions of access to goods and services on the basis of a customer's nationality or geographical location (whether physically or electronically delivered)***

The Regulation prevents traders from restricting access to goods and services on the basis of geo-factors. Specifically, a trader is obliged to apply the same terms and conditions for access to a customer who is a national of a Member State which is different from the Member State where the trader provides the services or offers its goods (whether delivered or made available for collection).

The Regulation stipulates three scenarios where it will not be allowed to geo-discriminate on users' terms and conditions:

- For the sale of goods without delivery. For example, a Belgian consumer finds a great deal for a state of the art music system on a Bulgarian website, they are entitled to order the item and collect it at the trader's premises or organise delivery themselves.

- For electronically supplied services which do not require physical delivery (i.e. cloud, data warehousing, website hosting, providing firewalls, use of search engines and internet directories). For example, an Italian consumer who wants to buy cloud services from a Polish company must be able to access and buy the service without having to pay additional fees or a different price compared to an Italian consumer.
- Where the customer receives non-electronically supplied services from the trader in the same Member State where the trader operates (e.g. hotel accommodation, concert or leisure park tickets, car rental services). For instance, a Dutch consumer wants to attend a concert in Madrid and finds a reduced ticket on a French website. The discounted price should be available for the Dutch consumer as it would be for the French consumer.

#### ***C. Ban on discriminating against means of payment for reasons related to geo-factors***

By virtue of the Regulation, traders remain free to accept whatever means of payment they wish. However, traders are not allowed to apply different conditions for a payment transaction on the basis of (i) a customer's nationality, place of residence or place of establishment, (ii) the location of the payment account, (iii) the place of establishment of the payment service provider, or (iv) the place of issue of the payment instrument within the EU.

### Price and Sale restrictions

Traders are not obliged to harmonise EU prices. Indeed, traders can offer different prices on websites that target different consumer groups. However, consumers will be able to compare prices in a trader's different country-facing web pages and seek to buy the cheapest. Therefore, if a Spanish-facing page has cheaper prices than a French-facing page, a French consumer may order from the former.

Likewise, traders may differentiate as to the conditions, including price, under which they offer goods purchased via their brick-and-mortar shops compared to purchases via their e-commerce websites.

Traders are also not obliged to change existing delivery areas – they are not required to ship across the EU if they would not ordinarily do so. Rather, they must ensure that all EU consumers are treated equally. Therefore, if a trader delivers in Spain, a French consumer must also be able to order delivery to the Spanish address, but the trader need not deliver to a French address if it would not ordinarily do so. Consumers may order the products and traders cannot refuse those orders on grounds of

nationality, but delivery arrangements are the consumer's responsibility.

### Parallel Application of the Regulation to Competition Law

The Regulation does not supersede the application of competition law, but rather operates in parallel. Importantly, however, the Regulation is stricter than competition rules to a certain extent. For instance, the Regulation prohibits geo-blocking practices, even where the supplier does not have a dominant position and acts unilaterally rather than pursuant to an agreement (which is when competition law tends to primarily apply).

Although the Regulation does not affect agreements restricting active sales (i.e. actively approaching individual customers or potential customers to make sales) which are allowed under the EU competition rules, as laid down in the EU Verticals Block Exemption Regulation ("**VBE**"), it does prevent passive sales (especially as of 23 March 2020, which ensure that these types of clauses will always be automatically void).

In effect, a trader is not allowed to sell goods or services to a customer outside his allocated territory when approached directly by the customer (i.e. unsolicited requests). Specifically, the Regulation makes it clear that when a passive sales restriction violates the Regulation, the Regulation takes precedence over the VBE and renders the restriction automatically void.

In rare cases passive sales bans are lawful under the VBE where an exclusive distributor has committed substantial investments to start up or develop a new market; such that restrictions on passive sales by other distributors into its territory (or customer group), which are necessary for the distributor to recoup those investments, is permitted during the first two years of sales. This will no longer be the case post March 2020 given the Regulation will prevail.

### Enforcement Cases

In addition to the introduction of the Regulation, it is clear that the EC is prepared to enforce its competition rules against companies it considers engage in unlawful geo-blocking practices (as was seen when the EC launched cases against distribution practices involving clothing brands and merchandise suppliers).

#### **A. Video games, hotel price discrimination and consumer electronics manufacturers (the Pioneer case)**

On 2 February 2017, the EC opened three investigations into suspected anticompetitive practices in the e-commerce sector.

The first case concerned bilateral agreements concluded between Valve Corporation, owner of the Steam game distribution platform, and five PC video game publishers, Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax. According to the EC, the investigation concerns geo-blocking practices, whereby companies prevent consumers from purchasing PC video games by reason of the consumer's location or country of residence. The investigation focuses on whether the agreements in question require or have required the use of activation keys for the purpose of geo-blocking. In particular, the EC is interested in an "activation key" which can grant access to a purchased game only to consumers in a particular EU Member State (for example the Czech Republic or Poland).

The second case concerns hotel price discrimination where the EC is investigating agreements regarding hotel accommodation concluded between the largest European tour operators on the one hand (Kuoni, REWE, Thomas Cook, TUI) and hotels on the other hand (Meliá Hotels). According to the EC, the agreements in question may contain clauses which discriminate between customers on the basis on their nationality or country of residence.

The *Pioneer* case, which was opened as part of the EC's investigation into consumer electronics manufacturers, resulted in a significant fine being imposed on a company for fixing online resale prices for its products (e.g. home theatre products, iPod speakers, hi-fi products, etc.). Although *Pioneer* was not a typical geo-blocking case *per se*, according to the EC *Pioneer* also limited the ability of its retailers to sell cross-border to consumers in other Member States in order to sustain different resale prices in different Member States, for example by blocking orders of retailers who sold cross-border.

#### **B. Distribution practices in the clothing industry**

In June 2017, the EC launched a formal antitrust investigation into the distribution agreements and practices of clothing manufacturer and retailer Guess. The EC is investigating whether Guess illegally restricts authorised retailers from selling cross-border to consumers or retailers within the EU Single Market. It is understood that the company is in the final stages of a negotiated settlement with EU enforcers and that a fine of between €37 million and €40.6 million may be imposed to put an end to the investigation.

## Enforcement in the UK

Under the Regulation, each EU Member State has the obligation to designate the enforcement bodies and sanctions that will be imposed for infringements of the Regulation in its home country.

It has been confirmed that the Competition and Markets Authority ("**CMA**") will be responsible for adequate and effective enforcement of the Regulation in the UK (transposed into UK law pursuant to the Geo-Blocking (Enforcement) Regulations 2018).

The CMA will have the power to apply for court orders against, or accept undertakings from, traders requiring them to bring an infringing behaviour to a stop. Consumers who suffer loss as a result of a trader breaking the Regulation will also be able to bring a claim directly against that trader in relation to that loss. There is no provision currently for the imposition of any fines on traders who infringe the rules.

It remains to be seen how robust the CMA's enforcement of the rules will be in the geo-blocking area. However, as the EC is already imposing significant fines for distribution agreements which breach competition law, companies might wish to review their distribution agreements thoroughly to ensure they are not in violation of the rules.

## Brexit

In light of Brexit, the EU Withdrawal Agreement provides for a transition period until the end of December 2020. If the Withdrawal Agreement is adopted by the UK Parliament, the Regulation will remain in force in the UK until the end of the transition period (i.e. until 31 December 2020 or potentially even longer, if the extension of the transition period is negotiated and agreed).

The UK government has officially stated that in the event of a no deal Brexit scenario, the Regulation will cease to have effect under UK law and that the prohibition of UK companies discriminating between customers located in the EU and the UK will cease to apply.

However, the Regulation will continue to apply in the EU and as a result, UK traders offering goods or services to customers based in the EU will have to continue to comply with the Regulation as regards their treatment of customers from different EU Member States after the UK leaves the EU.

## Next Steps for businesses

As the new geo-blocking rules are now in force since 3 December 2018, to the extent businesses have not yet done so, they should take active steps to review sales terms and conditions of their websites, apps or other services, as well as their distribution agreements to ensure compliance with the new EU geo-blocking rules and assess if they need to change their practices. In particular, traders selling to the EU must ensure that they apply the same terms and conditions to all customers, regardless of their nationality or location.

After Brexit, UK businesses and traders who wish to continue selling their goods and services into the EU will need to continue to comply with the Regulation, to the extent that it prohibits discrimination as between customers in different EU countries. However, businesses and traders who are already compliant with the Regulation prior to the UK exit from the EU should not need to take any further action to comply with the Regulation after Brexit.

## Contact us

If you would like any further information, or if a brief discussion on any of the issues arising in this briefing would be helpful, please do not hesitate to get in touch.



### Marta Isabel Garcia

**Partner, Competition**

T: +44 20 7809 2141

E: [marta.garcia@shlegal.com](mailto:marta.garcia@shlegal.com)



### Alicja Dijakiewicz-Kocon

**Associate, Competition**

T: +44 20 7809 2212

E: [alicja.dijakiewicz-kocon@shlegal.com](mailto:alicja.dijakiewicz-kocon@shlegal.com)