

Electronic Retailing Association Europe

UPDATE ERA EUROPE
DECEMBER 2017

REGULATION ON UNJUSTIFIED GEO-BLOCKING

INFORMATION AND IMPACT ASSESSMENT OF THE ELECTRONIC RETAILING ASSOCIATION EUROPE (DRAFT) THE ASSOCIATION FOR THE MULTI-CHANNEL HOME SHOPPING INDUSTRY

ERA Europe Update on Regulation on unjustified geo-blocking : new rules by end of 2018
Sellers will have an obligation to accept sales to non-domestic consumers as these orders are delivered locally

Introduction

On 20 November the EU Parliament, Commission and Council reached a deal on the geo-blocking Regulation. This Regulation aims at preventing discrimination based on customers' nationality, place of residence or place of establishment, including geo-blocking, in cross-border commercial transactions between a trader and a customer relating to the sales of goods and the provision of services within the Union. The Regulation will apply to offline and online trades and is addressed to the sellers' online interfaces, such as websites and apps, which are either

- blocking customers from other Member States wishing to engage in cross-border commercial transactions (a practice known as geo-blocking)
- or discriminating through other actions involving the application of different general conditions of access to their goods and services with respect to such customers from other Member States, both online and offline. Such other criteria can be applied, in particular, on the basis of information indicating the physical location of customers, such as the IP address used when accessing an online interface, the address submitted for the delivery of goods, the choice language made or the Member State where the customer's payment instrument has been issued.

These actions are not permissible under the Regulation if they are not "justified" meaning that most likely by the end of 2018 sellers will have an obligation to accept sales to non-domestic consumers as long as these orders are delivered locally. Other provisions will include an obligation for businesses to sell to other businesses (as long as the products are for internal use

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CONTACT INFORMATION: Dr. Julian Oberndörfer, <mailto:gov@era-europe.eu> or +49 (8151) 55 66 480

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only), an obligation to obtain consent for automatic re-routing and an implied obligation to apply the consumer's rules. The seller should have, in principle, the possibility not to accept sales for justified reasons. It remains to be clarified what types of reasons could be considered as justified when refusing to serve a certain group of consumers.

Scope of the Regulation

The Regulation covers the sale of all products and some services (with the exception of copyrighted materials). It applies to B2C sales and to B2B sales, as long as the products are not purchased for re-sale, rental, etc.

The obligations on online or offline sellers of goods and services within the Union

The obligation imposed on ERA members selling online or offline goods are:

- Accept sales from non-domestic customers – including businesses.
- Provide equal access to terms and conditions, including price.
- Unbundle products and services: Where a trader offers a bundle of several services combined together or a bundle of goods combined with services and one or more of those services would, if offered on an individual basis, fall within the scope of the obligations laid down in this Regulation while another service or services would not, that trader should either comply with the prohibitions set in this Regulation as regards the whole bundle, or at least offer on an individual basis services that fall within the scope of this Regulation, if those services are offered to customers by the same trader on an individual basis. Where a trader provides a service and/or good on an individual basis outside a bundle, he or she should remain free to decide the price he or she applies to such a service/good outside a bundle in so far as he or she does not apply different pricing for reasons related to nationality or place of residence or place of establishment.
- The Regulation cannot restrict the application of the 1999 Guarantees Directive or the 2011 Consumer Rights Directive, which do not mention any geographical limitation to their scope. It is not clear if this means that consumers can ask for the return at the seller's expense of goods that have been moved in a different country than the one where they were delivered by the seller – or that the repair takes place in the consumer's country regardless of whether or not the seller has a repair contract for that territory.

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- The Regulation requires sellers to collect consent when automatically re-routing to a different version of a site and to keep the version originally sought by the consumer easily available.
- When blocking access to a product/site they should provide a clear explanation in the language of the site originally searched by the user.
- Websites have to be cross-border ready. It will no longer be allowed for websites to block sales by not allowing the input of addresses, bank details or other form input specific to the consumer's market.

Only another 24 months from the entry of force of the Regulation for Distribution restrictions to passive cross-border sale.

Existing selective distribution restrictions to passive cross-border sales will only be valid for another 24 months from the entry into force of the Regulation but new distribution restrictions to cross-border sales, conflicting with the requirements of this Regulation, will no longer be possible.

Exemptions and safeguards for sellers

However, there are –for ERA Europe members- important safeguards included in the Regulation.

- In principle, as long as the seller is not targeting the consumer's market actively, the rules applicable in the seller's jurisdiction will apply, including concerning consumer protection, taxation, labelling, etc. The same would apply if the seller provides assistance or additional services following the sale, it should not be considered as targeting the consumer – triggering the application of the consumer's rules. Please note that his interpretation is disputed by many experts, claiming that as long as the consumer can have access to the offer, it is seen as targeting and by default it is required that the seller does not deprive the consumer of their protection standards.
- While sellers have to ensure equal access to price, terms and conditions and offers, they are at the same time allowed to make specific targeted offers to specific groups.
- Sellers are not required to deliver cross-border.
- Sellers are not required to enter into contracts for cross-border payment services – but cannot discriminate once a brand of payment service was offered locally.
- Sellers can refuse delivery until the initiation of the payment is confirmed.

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Timeline / entry of force of the Regulation

When will the Regulation apply? Most probably November 2018. The Regulation will directly apply as of 9 months from its entry into force, with the exception of Article 6 on selective distribution which will be implemented at a later date (24 months after entry of force)

Please note that copyrighted content was removed from the scope.

A revision is foreseen two years following the application – including on the “in particular the potential additional administrative and financial burden for traders stemming from the existence of different applicable regulatory consumer contract law regimes.

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