

THE GEOBLOCKING REGULATION - WHAT BUSINESSES NEED TO KNOW

The so-called Geoblocking Regulation (*full title- Regulation (EU) 2018/302 of the European Parliament and the Council 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*) was published on 28 February 2018.

The new EU law will apply from 3 December 2018. This article summarises in very brief form what the Regulation covers, what it definitely means for businesses, areas of uncertainty and what to do next.

WHAT THE REGULATION COVERS

As suggested by the title the Regulation seeks to address discrimination within the EU based on customer location. The changes in the law are part of a wider programme of reform by the EU under its Digital Single Market Strategy which was launched in May 2015.

While its restrictions on geoblocking gives the Regulation its title, it is not confined to that area. It touches on much the same areas as the underappreciated Services Directive 2006/123/EC, which as the recitals to the Geoblocking Regulation acknowledge "has not sufficiently reduced legal certainty".

So does the Geoblocking Regulation do better than the Directive in terms of reducing uncertainty? As set out below uncertainty for businesses remain, but it is nonetheless likely to have pretty widespread impacts for all businesses that sell their goods or services across a number of member states.

WHAT IT DEFINITELY MEANS FOR BUSINESSES

The key provisions of the Regulation, subject to the exceptions below, are as follows:

- If your business is selling online in a number of EU member states then you cannot prevent a customer or consumer in one member state from using your website in another member state (a.k.a 'geoblocking'). Customers can choose whether to follow redirects and their preferences should be remembered (subject to data privacy considerations).
- Whether selling off-line or online, conditions of access to goods or services should not be different across EU member states on the basis of nationality, residence or place of establishment.
- If your business does not deliver to a customer's member state, you must make products available for delivery or for a customer to collect but you are not obliged to set up pick-up points if these are not offered in the home territory or deliver to other member states where you were not previously doing so.
- The sale of electronically supplied services, for example cloud services and data warehouse

services, should be available on the same conditions to customers across the EU.

- Services provided “at the trader's premises” for example hotels, car hire and music events should have the same conditions for customers from other member states as domestic customers.

Exceptions and clarifications to the above obligations exist. In particular:

- The Regulation and accompanying guidance makes it clear that there is no need to harmonise prices. Differential prices can exist, they just cannot amount to discrimination based on nationality.
- While the Regulation applies to B2B as well as B2C, it does not apply to goods sold for resale or modification (i.e. it only applies to goods or services for end use)
- It does not apply to services in the field of transport, retail financial services (although payment means e.g. use of credit cards are covered), audio-visual services and non-audiovisual copyright protected content services (both of which are subject to separate measures).
- It does not apply to entities other than traders i.e. non business use or services of general economic interest

AREAS OF UNCERTAINTY

The Regulation is in many respects uncertain, a few of the issues to consider are as follows:

- Enforcement. As with any regulation the level and nature of any enforcement activity will determine the extent of its application and the level of compliance. It therefore remains to be seen whether it is overlooked, much as the Services Directive was (which seems unlikely) or whether there will be an active enforcement and litigation environment based on the Regulation.
- At what point does differential pricing become problematic? The Regulation and guidance repeatedly states that differential pricing is acceptable while discrimination on the grounds of nationality is not. That is fine as a proposition but the boundaries between differential and discriminatory pricing is not a

bright line with, one suspect, plenty of room for disagreement (and therefore risk) around how to distinguish between the two.

- The practical effect of the Regulation is likely to be widespread. The Regulation does not formally require businesses to actively sell to any particular member state. But businesses that rely on exclusive distributors in a member state may be forced to make product available to customers who would otherwise purchase from the distributor. That might in practice undermine or require renegotiation of such business models.
- Legality of sales. The Regulation is clear that mere compliance with the non-discrimination requirement does not place on the business a requirement to abide by laws of other member states (for example labelling laws). Nor does the Regulation require access to a territory where such access would be illegal, although it does require an explanation in such circumstances. That is fine in theory but in practice one might anticipate complications. Will it present challenges in proving that businesses have in fact complied with labelling requirements in the event of complications involving products? The duty to explain appears to require knowledge of the legal position in member states where a business has no intention of selling a product?
- Potential for a change to scope. The Regulation contains a statement from the Commission that the Regulation will be reviewed after two years. As such its ongoing scope is uncertain and it appears from the statement that its application will be extended.
- For the UK, the impact of Brexit will need to be considered. At the very least UK traders operating in the EU would still need to continue to comply with the regulations.

NEXT STEPS

In light of the Regulation that is due to come into force Businesses should:

- assess in-scope products and services and review how they are sold to ensure that no discrimination is taking place and that they can be made available in the way envisaged

by the Regulation.

- Consider the effect in respect of exclusive distribution arrangements in particular.
- Monitor messages from the regulators in respect of enforcement and guidance.

FIND OUT MORE

For further information about any of the issues raised in this guide, please contact:



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