

Geoblocking and discrimination on grounds of nationality in EU Law under Regulation 2018/302. Prof. Dr. Juan Ignacio Ruiz Peris (UVEG).

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Summary: 1. Geoblocking and Single Market. 2. Some questions about Geoblocking. 3. The prohibition of discrimination and the geoblocking. 4. EU geoblocking regulation application. 5. Website access. 6. Discriminatory redirection or rerouting. 7. Core prohibitions. 8. Passive and active sales. 9. Payment transactions. 10. EU and national action. 11. Judicial competence in Geoblocking cases. 12. Reviewing the effectiveness of Regulation 2018/302. 13. Some Spanish bibliography.

1. Geoblocking and Single Market.

Geoblocking is a discriminatory practice that prevents online customers from accessing and purchasing products or services from a website based in another member state

That occurs where traders operating in one Member State block or limit access including redirection to their online interfaces, customers from other Member States wishing to engage in cross border transactions.

Single market is one of the fundamental objectives of EU. That is true to traditional markets but also to digital ones. To maintain the internal market, as an area without internal frontiers in which the free movement of goods and services is ensured, it is not sufficient to abolish State barriers alone.

Such abolition can be undermined by private parties putting in place obstacles inconsistent with internal market freedoms.

Geoblocking practices are an important factor contributing to the relatively low level of cross border transactions within the Union in digital markets

At present, only 15 of Europeans buy products from online shops based in another EU country.

2. Some questions about Geoblocking.

The more common technical means of recognition of the nationality or state of residence or establishment are the IP address used when accessing an online interface (Webpage or App), the address submitted for the delivery of goods, the choice of language made or the Member State where the customer's payment instrument has been issued.

The goods and services most affected by geo blocking are clothing, footwear and accessories, physical media (books), computer hardware and electronics, airplane tickets, car rental, digital content such as streaming services, computer games and software e books and MP3s.

3. The prohibition of discrimination and the geoblocking.

The prohibition of discrimination on grounds of nationality, which covers also indirect discrimination, is a general principle of Union law laid down in Article 18 Treaty on the Functioning of the European Union and Article 21 2 of the EU Charter of fundamental rights, as well as in the specific provisions related to internal market freedoms, in particular Directive 2006/123/EC.

Pursuant the Article 20. 2 of the Directive Directive 2006/123/EC Member States are to ensure that service providers established in the Union do not treat recipients of services differently on the basis of their nationality or place of residence.

According to this provision Member States shall ensure that the general conditions of access to a service do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria

Application of the non discrimination principle as specified in this Article depends on a case by case assessment of the trader's practices.

That Article remains applicable to situations don't covered by the Geo blocking Regulation

The conducts prohibited by the regulation are, discriminatory negative of sale, discriminatory limitations, discriminatory conditions in general and in relationship with conditions of access, including prices, discriminatory redirection and discrimination on payment means.

4. EU geoblocking regulation application.

On 27 th February 2018 the Council adopted the Regulation 2018/302 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 (OJEU L 60 3 rd March 2018 p 1 EEA Relevant.

The Regulation take effect nine months after its publication the 3 rd December 2018. Article 6 applies from a later date than the other provisions of the regulation, namely 23 rd March 2020, 24 months after the date of entry into force, with regard to provisions of B 2 B agreements that are concluded before 2nd March 2018 and are compliant with the relevant rules of EU and national competition law.

Insofar as this Regulation conflicts with the provisions of Directive 2006 /123 /EC this Regulation should prevail.

In order to the exclusions, purely national restrictions are excluded. Regulation does not apply to purely internal situations, where all the relevant elements of the transaction are confined within one single

Member State (art 1.2.) and not more to microenterprises, notion that includes traders who fall under a national VAT exemption.

There also a list of relevant services excluded as:

- a) audio visual,
- b) some ways to distribution non audiovisual copyright works as access to and use of copyright protected content, or selling of copyright protected works in an intangible form such as music streaming services, e books, online games and software.
The provision of non audiovisual copyright protected content services is not subject to the Regulation's prohibition of applying different general conditions of access on the basis of a customer's nationality, residence or establishment including the refusal to provide such services to customers from other Member States in the specific cases listed in Article 4. These services, moreover, remain subject to all other than Article 4 provisions of the Geo blocking Regulation, so the trader is subject to the prohibition to block or limit access to online interfaces on the basis of the customer's residence and the trader is prevented from discriminating against the electronic payment means on this basis.
- c) Financial services, without prejudice to Article 5 of the Regulation regarding non discrimination for reasons related to payments.
- d) Transport, however travel packages and linked travel arrangements are covered by the Regulation.
- e) Healthcare and Social services.

In the case of bundle services where the trader provides goods or services subject to the Regulation combined with services that do not fall within the scope of the Regulation the whole bundle will be subject to the rules of the Regulation.

The Regulation prevents traders from discriminating in the specific situations covered, without the need to carry on a case by case assessment of the trader's practice and thus, provides legal certainty and improves enforceability.

Not discriminatory differentiation is not prohibited in particular not discriminatory price differentiation is not prohibited.

It is possible a justified differentiation for causes as divergent legal environments in particular in consumer, labeling and environmental laws, taxation and fiscal issues, delivery costs or language requirements.

Therefore, traders will be free to offer different general conditions, including prices, to different groups of customers and to target certain groups of customers or in specific territories such as offers for young people or for consumers as opposed to professionals or offers linked to national or local festivities.

The regulation applies to all undertakings selling on line including online marketplaces, operating within the Union, regardless of whether a trader is established in a Member State or in a third country because the effects for customers and on the internal market are the same, regardless of whether a trader is established in a Member State or in a third country

The regulation protects consumers but also in some cases undertakings inter alia microenterprises and SMEs, whether the purchase is for end use only regardless of whether the customer concerned is present, permanently or on a temporary basis in a Member State.

The regulation doesn't preclude the freedom of traders to offer, on a non discriminatory basis, different conditions, including different prices in different points of sale, such as shops and websites. In case of selective and exclusive distribution the regulation doesn't oppose to non discriminatory practices of traders limiting transactions or repetitive transactions, in order to prevent undertakings from purchasing quantities exceeding their internal needs, taking due account of the size of the undertakings.

5. Website access.

The General Rule is that traders will not be allowed to block or limit customers' access to their online interface for reasons of nationality or place of residence, with the exception of EU legal prohibition or national prohibition according with EU L aw.

In this case a clear explanation will have to be provided if a trader blocks or limits access or redirects customers to a different version of the online interface.

6. Discriminatory redirection or rerouting.

Traders operate sometimes different versions of their online interfaces, targeting customers from different Member States.

In general redirecting customers from one version of the online interface to another version without their explicit consent is prohibited (art. 3.2).

Once the customer's explicit consent has been given that explicit consent should be deemed to be valid for all subsequent visits of the same customer to the same online interface whatever,

It is possible for the customer to withdraw such consent at any point in time.

All versions of the online interface shall remain easily accessible to the customer at all times.

In certain cases (art. 3.3) the prohibition shall not apply 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

In such instances, the trader shall provide a clear and specific explanation to customers regarding the reasons why the blocking or limitation of access, or the redirection is necessary in order to ensure such compliance

The explanation shall be given in the language of the online interface that the customer initially sought to access.

7. Core prohibitions.

In three situations, any differences in the treatment of customers cannot be objectively justified and any kind of different treatment is prohibited as discriminatory (art. 4.1) with exemption of this related with de observance of a specific provision laid down in Union law, or in the laws of Member States in accordance with Union law (art. 4.5).

That happens for goods and services including electronically supplied services not protected by copyright.

For goods including online sale of physical books, DVDs and CDs, that are either delivered in a member state to which the trader offers delivery according its general conditions of access or collected at a location agreed with the customer in a MS where the trader offers this option, according its general conditions of access.

For services other than electronically supplied services, received by customer in a physical location within the territory of a Member State where the trader operates, such as hotel accommodation and car rental or entrance tickets for music festivals, sport events or leisure parks, whether the seller may be qualified as a trader.

For electronically supplied services not protected by copyright. Because in this case, no physical delivery is required, as the services are being supplied electronically, such as cloud services, data warehousing services, web hosting and the provision of firewalls, use of search engines, and internet directories, website supply, distance maintenance of programs and equipment, remote systems administration.

8. Passive and active sales (art. 6)

Passive sales are sales responding to unsolicited customer requests.

Provisions of agreements imposing obligations on traders, in respect of passive sales within the meaning of Regulation (No 330 2010 to act in violation of the discriminatory prohibitions laid down in Regulation 2018 302 articles 3 4 and 5 shall be automatically void.

The delayed application of Article 6 23 rd March 2020 ensured that companies had have sufficient time to adapt their distribution agreements.

Active sales are sales obtained through actively approaching individual customers by marketing conducts

The Geo blocking Regulation does not affect agreements restricting active sales within the meaning of the Vertical Block Exemption Regulation.

However, such a restriction could be unlawful under EU competition rules.

9. Payment transactions (art.5)

Traders are not allowed to apply different payment conditions for customers in relation to payment methods for reasons of nationality, place of residence or place of establishment whether 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 accepted by the trader if national; authentication requirements are fulfilled pursuant to Directive (EU) 2015/2366; and the payment transactions are in a currency that the trader accepts.

But the trader may withhold 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 and request charges for the use of a card based payment instrument for which interchange fees are not regulated under EU regulations, with the limit of the direct costs borne by the trader for the use of the payment instrument.

10. EU and national action.

Since the entry into force of the Regulation Member States have designate one or more bodies courts or administrative authorities to be responsible for taking effective action to ensure compliance with this Regulation. Those bodies should have the necessary powers to order the trader to comply with the EU Regulation. The Geo blocking is included in the list of acts covered by the Injunctions Directive 2009 22 /EC (Annex I amended by art 10 Regulation 2018 302).

Member States enacted also measures that can be taken against traders in the event of any breach of the Regulation, that shall be effective, proportionate and dissuasive.

This measures are one or more of the following: administrative or court injunctions, damages, criminal or administrative penalties, lump sums, attending the importance and extension of the conduct ((individual or mass infringement) and the nature of the customer (consumer or enterprise).

11. Judicial competence in Geoblocking cases .

The judicial competence in Geoblocking cases is governed by the Brussels I Regulation which establishes that, in matters related to a contract concluded between a consumer and a person who pursues professional activities in the Member State of the consumer or who directs his or her activities to that Member State, a consumer may bring proceedings against the trader in the courts of the Member State where the consumer is domiciled whereas proceedings may be brought against the consumer only in those courts.

If the trader does not pursue professional activities in the Member State of the consumer or does not direct his/her activities to that Member State, and a consumer initiates a purchase each party can sue the other party in the Member State of the other party's domicile or for contractual matters: in the courts in the place where the contractual obligation in question is performed, for the sale of goods, the place where the goods were delivered or should have been delivered.

12. Reviewing the effectiveness of Regulation 2018/302.

The regulation includes regular review clause. Before past 23 rd March 2020 the Commission would carry out a first evaluation of the regulation impact on the internal market. This first evaluation should concentrate on assessing the possible extension of the prohibition of different general conditions of access to the use of non audiovisual copyright protected works, provided that the trader has the requisite rights for the relevant territories. So it affects to downloadable music, e books, software and online games including gambling services

It should also analyze whether the scope of this Regulation should be extended to services falling outside the scope of Directive 2006 123 /EC.

Last November 30, 2020, the European Commission published the Report - COM (2020) 766 final - reviewing the effectiveness of Regulation 2018/302 of 28 February on geoblocking (OJEU L 60 I/1 of 2 March), in force since December 3 of that year, which outlaws discrimination of customers, in the field of e-commerce, on the grounds of nationality, residence or establishment of customers within the EU. Although the report, due to its closing date, does not take into account the effects of the pandemic, it notes a clear decrease in geoblocking measures in the EU.

The report also notes that there is no clear basis for the application of the Regulation to the excluded sectors, in particular in the music streaming and audiovisual sector.

13. Some Spanish bibliography.

MARTÍ MOYA, Vanessa, *Geobloqueo y comercio electrónico. Entre libertad de circulación y derecho de la competencia*, Editorial BOE. Colección de Derecho Privado, 2020.