



## Competition Law Association

British Group of the  
Ligue Internationale du Droit de la Concurrence  
(International League for Competition Law)

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### **Webinar: E-Commerce/Geo-blocking in UK, France & Switzerland**

**Speakers:** Omblin Ancelin, David Mamane and Noel Watson-Doig

**Date:** 29 January 2019

**1. Noel Watson-Doig, Bristows – The EU’s Geo-blocking Regulation: overview and practical issues**

- 1.1 The Regulation is part of the Commission’s wider digital market strategy which seeks to prevent the segmentation of national markets and discrimination on national grounds. The Regulation is technically a consumer protection initiative but deals with an area not currently covered by competition law.
- 1.2 Geo-blocking is where a trader prevents customers in another Member State accessing a website or finalising transactions. Traders must not block a customer’s access based on nationality, residence or IP address unless ‘objectively justified’. This term is not defined. A trader must not redirect a customer from a website on account of their location without their permission. Where permission is given, it must be easy for the customer to return to the original website.
- 1.3 The Regulation does not cover copyright material. This is highly controversial and demonstrates how hard it is to harmonise copyright law at national level. Financial services, transport and healthcare are also excluded. Regarding transport, it is likely cruises will not be covered by the Regulation as they are not considered a point-to-point service. There will be a mandatory review in 2020 to re-assess whether copyright should be included.
- 1.4 There are a number of practical considerations. As discussed above, traders cannot block customers accessing their websites based on their place of residence. Traders must therefore sell to all Member States. However they are not required to provide a delivery service. The Regulation only covers general terms and conditions, meaning that individually negotiated terms are not covered. General terms and conditions should therefore be reviewed to ensure they do not discriminate on a location basis.
- 1.5 Traders are free to accept any form of payment, but again cannot discriminate in how payments are made. SME’s have voiced concerns over the administrative burden of having to comply with local tax laws. However, SMEs are excluded from the rules on non-discrimination if they qualify under a national VAT exemption threshold.
- 1.6 There is no requirement for traders to comply with local laws in a different Member State on, for example, labelling. However, traders will need to follow local consumer protections rules in locations where they are pursuing a commercial activity.

- 1.7 There are several options for how the Regulation will be effected by Brexit whilst the outcome continues to be unclear:
  - 1.7.1 No deal – the Regulation will be part of UK law. However, the UK will be unable to geo-block consumers from different Member States. UK consumers conversely will not be protected by the Regulation so EU traders could geo-block UK consumers. In this scenario the Regulation is likely to be repealed by UK government.
  - 1.7.2 Deal – the Regulation will continue to apply during any implementation period. However, post-2020 the position is uncertain and will depend on the future trade relationship between the UK and EU.

## **2. Omblin Ancelin, Simmons & Simmons (Paris) – Interplay between EU Geo-blocking Regulation and Competition Law**

- 2.1 Internet sales are considered a form of passive sales under EU Competition law
- 2.2 The Guidelines on Vertical Agreements consider restrictions to passive sales as hard core restrictions. The US clothing brand Guess was fined almost €40m by the Commission in December 2018 for the restriction of cross border sales in contravention of ART 101 TFEU.
- 2.3 EU Competition law only applies to geo-blocking measures to block passive sales:
  - (i) adopted unilaterally, by a dominant firm; or
  - (ii) decided by two independent firms.
- 2.4 The Geo-blocking Regulation closes a gap about passive sales over the internet by catching unilateral decisions to adopt geo-blocking measures by non-dominant traders.
- 2.5 Geo-blocking Regulation acts in parallel to EU Competition law. If a trader has taken a unilateral decision to implement passive sales restrictions, even if lawful under competition law, it must withdraw them immediately if this amounts to geo-blocking covered by the Regulation.
- 2.6 There is a transition period until 23 March 2020 for traders to assess whether any exempted passive sales restrictions they have agreed prior to 2 March 2018 are in compliance with the Geo-blocking Regulation.

## **3. David Mamane, Schellenberg Wittmer - Geo-blocking in Switzerland**

- 3.1 The Regulation applies to any trader, irrespective of their commercial base (i.e. regardless of whether they are established in the EU or in a non-EU country), provided they operate in the EU. Being merely accessible in one Member State is not likely to be sufficient. However, if a trader is directing its activities to one or more Member States of the EU or EEA, e.g. by offering goods or services into a Member State through use of local language, currency or use of international phone numbers this is likely to be caught by the Regulation. Theoretically traders could try to avoid triggering the Regulation by making a negative declaration on their website, however this is not a complete defence (i.e. this offer is limited to customers in Switzerland).

- 3.2 There will be limited investigation and enforcement possibility against Swiss traders; it will be hard to enforce the Regulation against small companies with a presence outside the EEA.
- 3.3 Geo-blocking does not apply to Swiss customers who will be governed by Swiss competition law. This contains similar provisions to Articles 101 and 102 TFEU. Therefore the restriction of passive sales from any country outside of Switzerland can trigger competition law infringement in Switzerland. There is political pressure on the Swiss competition authority to police this due to the fluctuating exchange rate i.e. where the Euro drops against the Swiss Franc but products are not sold to Swiss customers at lower prices.
- 3.4 Swiss competition law can regulate all EU distribution agreements that contain a geo-blocking obligation. Any form of prohibition of direct or indirect imports could trigger Swiss competition law. E.g. if there are clauses in Swiss-EU agreements which hinder parallel imports into Switzerland.
- 3.5 Switzerland is currently considering the implementation of the 'fair price initiative' designed to ensure non-discriminatory purchasing. Companies established in Switzerland, regarded as "relatively dominant", would be unable to prevent Swiss customers from purchasing goods in a country of their choice for the prices charged in that country.
- 3.6 The Swiss government has rejected measures against geo-blocking arguing that a bilateral agreement with the EU would be needed to enforce such rules. It is believed the non-discriminatory online purchasing can be protected through the Lugano Convention.