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Geoblocking and the EU online gambling market: a reality check

Last year, the European Commission ('EC') published a proposed Regulation on geoblocking aimed at ending unjustified geoblocking practices in the EU ('Draft Regulation'). The Draft Regulation has been welcomed by Digital Single Market proponents. However, the Draft Regulation expressly excludes remote gambling activities from its scope: in line with the principle of subsidiarity, EU Member States will remain free to carry on imposing 'justified' geographically-based restrictions on remote gambling offers that they consider to be illegal. In this context, Dr Malcolm Falzon and Dr Emma Grech of Camilleri Preziosi Advocates re-evaluate the current realities of geoblocking and the manner in which this phenomenon continues to affect the online gambling industry in Europe.

The EC's views on geoblocking

In simple terms, 'geoblocking' is a catch-all that gathers within its remit various measures used to limit a person's access to the internet based on that person's geographical location (such as blocking cross border access to websites and the provision of different prices depending on a customer's nationality, country of residence or location). On 25 May 2016, the EC announced the 'Draft Regulation'¹, which, as part of its wider set of Digital Single Market ('DSM') initiatives, is designed to ban 'unjustified' geoblocking across EU Member States. Its prospective adoption is expected to diminish the artificial segmentation of the internal market, eliminating discrimination based on a customer's location in trans-border commercial transactions, thereby reinforcing the DSM objective.

The exclusion of remote gambling: a tribute to tradition

The Draft Regulation, however, does not find 'across-the-board' applicability: as anticipated, and in mirroring the approach taken in the Services Directive², online gambling activities have been expressly excluded from the scope of the Draft Regulation³, symptomatic of the view that, as noted more than two decades ago by the Court of Justice of the EU ('CJEU'),

gambling is a 'peculiar' activity meriting state-by-state regulatory treatment⁴.

The principle of subsidiarity has, over the years, vested Member States with a wide margin of discretion in deciding how to regulate remote gambling. In so doing, many have chosen to endorse geoblocking in order to - as critics would have it - 'ring-fence' their markets. The reality of today's EU remote gambling industry is that Member States may impose 'justifiable' limitations on the fundamental freedoms of the internal market (with specific emphasis, in this context, on the freedom to provide services and the freedom of establishment). The EU law experience has taught us that 'justifiable' trade restrictions may be split into two categories⁵: (i) *ex lege* justifications deriving from the Treaty on the Functioning of the European Union ('TFEU'), that is, the exhaustive grounds of public policy, public security or public health; and (ii) additional derogations to the aforesaid freedoms, emanating from CJEU rulings, for reasons of overriding general interest (including the protection of consumers, the prevention of fraud and the preservation of public order). National rules introduced by Member States for the purpose (or

having the effect) of barring market access must, demonstrably: (i) be non-discriminatory; (ii) justified by imperative requirements in the general interest; (iii) suitable for securing the attainment of the objective pursued; and (iv) not go beyond what is necessary to attain it⁶. The Draft Regulation, therefore, sanctions geographically-based restrictions where these are, in theory, 'justified' in terms of EU law⁷.

The matter, however, becomes more complex when observed from a practical lens. In brief, typical geoblocking methods endorsed by Member States in order to prevent unauthorised online gambling offers are classified by the European Commission as follows⁸:

- Domain name service ('DNS') filtering: a DNS filtering mechanism seeks to ensure that potential customers are prevented from gambling on unauthorised pre-listed sites or are redirected to another website on the basis of a pre-defined list of internet addresses (e.g. from a .com site to a .country site);
- Internet protocol ('IP') blocking: IP blocking prevents the connection between a website and one or more IP addresses. Every device linked to the

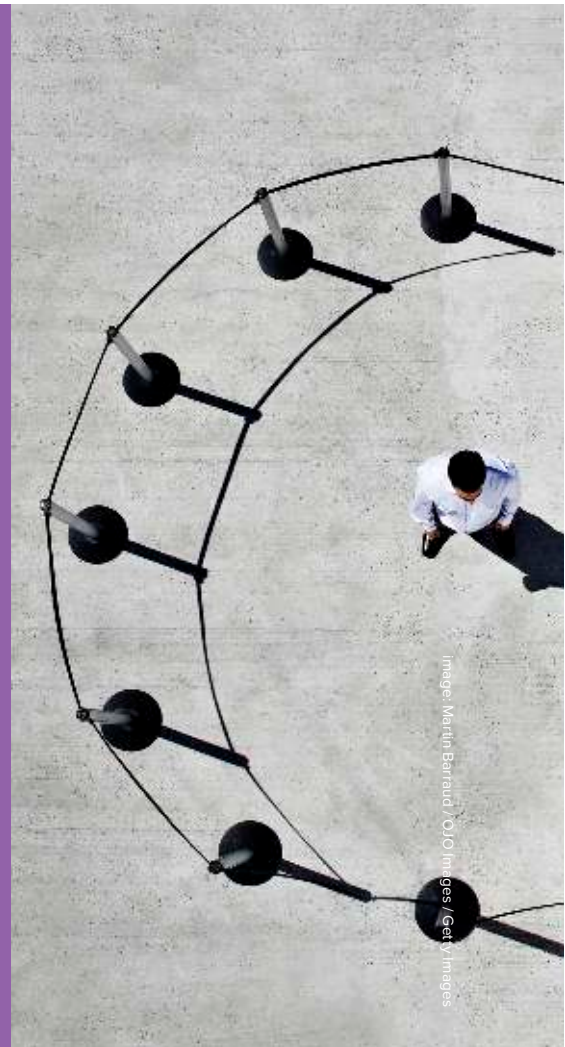


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internet has a unique IP address; and

- Payment blocking: a merchant category code ('MCC') is a four-digit number assigned to a business by MasterCard or VISA. Online gambling websites are assigned the 7995 MCC and financial and credit institutions may be requested to block credit card payments to/from these websites⁹.

Determining whether or not variants of these measures are in line with EU law principles is a largely political endeavour, and, just as with the wider ambit of remote gaming regulation, regulators across mainland Europe have so far not reached common ground.

The Malta Gaming Authority (the 'MGA') has elected to refrain from imposing geoblocking restrictions, upholding that such measures are unnecessarily restrictive and risk running afoul of the fundamental freedoms - a stance complementary to Malta's open-market approach to remote gambling¹⁰. Markedly, the MGA has been known to champion the rights of operators to provide their services across Member States (testimony to this was Malta's partial success, in 2006, against the IP blocking of MGA-licensed websites by the Italian AAMS). However, Malta's position is the exception: several Member States have adopted restricted licensing regimes, treating geoblocking as a tool by which they can protect the sanctity of their cocooned markets. In Europe, the gambling frameworks of Member States such as Italy, France, Belgium and Denmark entertain the notion of geoblocking. Regulatory developments in the Czech Republic also promise the implementation of geoblocking measures in 2017.

(Justified) geoblocking: more harm than good?

Even if considered 'justified' in the specific circumstances, geoblocking has, in a remote gaming context, come under fire for reasons other than its questionable position within the ambit of EU law and the principles it promotes.

The association of European Internet Services Providers Associations ('EuroISPA') has expressed the view that DNS blocking poses security risks, is pricey in terms of monitoring and, as shall be explained below, presents

significant side effects¹¹. The efficacy of this measure is dubious given that, for instance, operators of affected sites are able to operate alternative DNS servers for their users¹² and IP blocking can be overcome via the implementation of virtual private network tunnelling¹³. As pointed out by the European Gaming and Betting Association ('EGBA'), there is also the possibility that, because most websites share IP addresses, IP blocking would generate economic disadvantages for the entire e-commerce industry¹⁴: for example, the blocking of an IP address could also block legitimate websites that are not the target of the blocking. Payment blocking can also be circumvented through the implementation of digital wallets, for instance¹⁵.

Additionally, geoblocking may have a number of inadvertent consequences on the online gambling market. For instance, consumers of Member States advocating such measures are channelled towards operators that continue to operate despite the ban, effectively augmenting underground activity at the expense of consumer protection. It is especially disconcerting to think that geoblocking risks compromising internet security, and, as a result, player protection: the very thing this tool was purportedly designed to protect.

An opaque way forward

It is pertinent to ask whether, rather than resorting to restrictive geographically-based measures, consumer protection would be best preserved via internationally competitive regulation which steers players away from black market offers. The reality, however, is that it is unlikely that geoblocking within the online gambling industry will be cast aside any time soon. Most Member States have, on the contrary, taken a keen liking to it.

Discussions with the European Parliament on the way forward for the Draft Regulation's adoption are expected to come to a close this year. The final stages of the EU legislative process could serve as a wake-up call, prompting further investigations by industry bodies into the legality and effectiveness of geoblocking in the remote gaming context (and perhaps, of course, blowing wind in the sails of promoters of a harmonised industry, which - although

now largely accepted by market proponents as a political impossibility - appears to be at the core of the EGBA's stand against geoblocking)¹⁶. Until then, it will be up to the Member States to gauge the consequences of their actions, and, in a world becoming increasingly globalised by the internet and mobile technology, the geoblocking space will continue to be an interesting one to watch.

1. Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.
2. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.
3. The Draft Regulation, Article 1.
4. C-275/92 *Her Majesty's Customs and Excise v. Gerhart Schindler and Jorg Schindler* [1994] ECR I-01039 para 60.
5. C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-07633 para 55.
6. C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 para 37.
7. European Commission, 'Impact Assessment accompanying the Draft Regulation' (European Commission, 2016) 4 <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-accompanying-proposed-regulation-geo-blocking>, accessed on 25 January 2017.
8. European Commission, 'Green Paper on On-line Gambling in the Internal Market SEC (European Commission, 2011) 321 Final,' 34-35.
9. European Gaming and Betting Association, 'Financial and ISP Blocking Factsheet' (European Commission, 2012) 2.
10. In accordance with the Remote Gaming Regulations (Subsidiary Legislation 438.04 of the Laws of Malta), an operator will not necessarily require a licence issued by the MGA in order to operate in or from Malta, but may do so if it is in possession of an equivalent authorisation granted by the competent authority of an EEA Member State or any other jurisdiction approved by the MGA.
11. EuroISPA, 'Public Consultation on the Green Paper on Online Gambling in the Internal Market' (EuroISPA, 2011) 3 <http://www.jogoremoto.pt/docs/extra/keNhfM.pdf>, accessed 24 January 2017.
12. Ibid.
13. EuroISPA (n 11).
14. EGBA, 'Financial and ISP Blocking Factsheet' (EGBA, 2017) http://www.egba.eu/media/FACTSHEET_FINANCIALISPBLOCKINGS.pdf, accessed 24 January 2017.
15. Francis Merlin, 'The effect of illegal sites on the French online gaming market' (iGaming Monaco, 2011).
16. EGBA's response to the European Commission's Public Consultation on the Draft Regulation (EGBA, 2015) <http://www.egba.eu/media/EGBA-Answer-geoblocking.pdf>, accessed 25 January 2017.