EuroCommerce position on the draft Geoblocking Regulation

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KEY MESSAGE

EuroCommerce strongly supports the Single Market and the Digital Single Market.

We also fully support the objective of expanding cross-border business to sales of goods, services and digital content. This is best achieved by businesses willing and able to sell to consumers willing and able to buy.

The draft Geoblocking Regulation proposed in May 2016 is most relevant for services and ultimately digital content. We are not totally convinced of its value for ecommerce and the sale of goods.

We could not accept any duty to deliver either now or in the future - and we are glad this is not proposed.

We believe that the proposal needs greater legal clarity, especially in relation to conflict-of-law rules in Regulations Rome I and Brussels I. Clarity is needed on some practical issues, regarding exercise of consumer rights, which should then be included in the text. We will work to achieve that end.

All implications for B2B will need to be carefully considered.

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SUMMARY OF THE POSITION

Applicable law

Traders and consumers need clarity on which law applies to a contract and what criteria are used to determine if a trader targets consumers.

- The Regulation exposes traders to foreign laws and courts. It needs to provide more detailed clarification of where traders are deemed to be targeting other countries and which law applies to a contract (law of the trader or the consumer).
- The principle solution which we seek is a clear definition of passive sales and a clear statement that traders complying with the Regulation may rely on the rules applicable in the trader's country.

Obligation to sell

We welcome the Regulation not imposing any obligation to deliver but, leaving it to traders to determine how and where they deliver. Traders should remain free to determine where to sell and where to deliver their products. Therefore, we regret that the Regulation has not acknowledged this basic principle, and has opted for imposing a de-facto obligation to sell. There is a need for greater clarity about the legal and practical issues concerning the sale of goods to consumers in other countries. These include exercise of consumer guarantees and other rights, organising delivery.

Payments

- We welcome the draft Regulation retaining traders' freedom to offer the payment method of their choice. However, there is a need for more robust safeguards ensuring that traders are not forced to accept payments that are not 100% secure and involve too much risk of losses.
- More clarity is needed on exactly which payment methods are covered, and in particular direct debit (and payment by invoice) should be removed from the scope of the Regulation, as the use of these methods of payment differ considerably across the member states.

Access to websites

EuroCommerce agrees that consumers should be free to browse whatever website they want.

- We support more choice and transparency for consumers, and thus not allowing blocking of access to websites and automatic rerouting.
- We welcome rerouting as such not being prohibited: there can be legitimate reasons behind it. However, opt-in consent should not be required for rerouting as it will unnecessarily complicate the shopping experience for customers and traders.

GENERAL COMMENTS

EuroCommerce is a strong advocate of removing barriers to the Digital Single Market. Although we support the Commission's Digital Single Market Strategy and efforts to improve the Single Market, we are sceptical whether this Regulation will contribute to the growth of cross-border e-commerce for tangible goods within the EU. We are concerned that it might lead to an increase in administrative burden and risks for e-commerce companies without delivering neither proportionate nor significant tangible benefits for consumers.

The statistics show that, overall, ecommerce is thriving: new ecommerce players arise and prosper every day, benefiting more consumers within EU with greater product and prices offer. However, some traders decide to limit their activity to the markets they know best. There are many reasons including varying national regulatory barriers that make it difficult to sell everything to consumers everywhere. These include product-related issues (labelling, technical requirements, product safety, market specific design, WEEE), consumer-related issues (diverging consumer protection rules, different language and consumer service and expectations, sales promotions laws), differing VAT forms, rates and regulations, delivery costs and options, territorial supply constraints, etc.

The Single Market is not complete. There are legal and commercial reasons preventing traders from selling to other countries, just as there are reasons for not setting up a store in every town in their home state. Removing the legal and regulatory barriers would be the best way to encourage cross-border expansion of e-commerce.

Merely banning geoblocking without addressing the reasons behind it will not do this. Geoblocking is only a symptom of the failure to have a fully effective Single Market, not a cause. We have supported the Commission's efforts to make the Single Market a reality and we have lobbied over many years for these barriers to be addressed by more harmonisation and enforcement of single market rules.

At best, the draft Geoblocking Regulation does little to change this, and at worst could act to deter some traders, particularly SMEs, from trading online. It does not remove any barriers, nor encourages traders to target other markets.

While supporting the Regulation's general aim to fight discrimination against consumers, Eurocommerce calls for more legal clarity and rules to be more practical for both consumers and traders. The proposal, as it stands, brings new risks for traders, but it does not increase legal certainty to match these. Buying under the same terms and conditions as local customers but receiving delivery in another country may indeed bring benefits to a small minority of consumers, but it is doubtful that this model for sale and delivery will do much to the average consumer.

COMMENTS ON THE SPECIFIC PROVISIONS

As most EuroCommerce members principally sell goods, the comments below only concern the sale of goods.

Objective and Scope - Article 1.5

The draft Regulation effectively and in practice imposes an obligation to sell.

This will force some traders to apply foreign laws and possibly deal with foreign courts where they had no intention to sell to other countries, but where the Regulation forced them to do so.

Traders and consumers should have absolute legal clarity which law applies and when.

- The Regulation fails to clarify which law applies - the law of the trader or the consumer - when the trader does not target and does not deliver to the country where the consumer lives.

- Traders targeting other member states and delivering cross-border must comply with the rules of the targeted country. The Regulation does not change this.

The Rome I Regulation stipulates that the law applicable to a contract depends on whether a trader pursues his commercial or professional activities in the country where the consumer has his habitual residence or directs such activities to that country. There is a similar rule concerning courts competent to hear a case, under the Brussels I Regulation. In other words, this law depends on whether the sale is passive or active.

The Regulations Rome I and Brussels I do not clarify what constitutes 'directing activities'. Courts have interpreted this in many different ways, sometimes arbitrary, causing considerable uncertainty, both for traders and consumers.

The Geoblocking Regulation does nothing to clarify what targeting is and what triggers targeting. It therefore raises many questions. For example:

- Is the place of delivery 'one of' or 'the' defining criterion for targeting? Will delivery to a consumer in another country always and automatically trigger that a trader is targeting that country? According to the Commission's Guidelines on Vertical Restraints (C(2010) 2365), passive sales mean responding to unsolicited requests from individual customers, including delivery of goods or services to such customers. Clearly, in the competition law, delivery does not automatically trigger targeting.

- Will inadvertent advertisement in another member state be deemed to be targeting? For example an advertisement in a domestic newspaper that is available for sale in other countries – for example an English newspaper sold in a shop in Belgium.

- Will having a website in more than one language be deemed to be targeting other countries? For example, if a Danish website is available in English and Danish, does it

mean that the trader is seen as directing his activities to all or some other member states?

- If a trader operates websites in two countries, for example France and Germany, and consumers can request delivery from both websites, which rules will apply if a foreign consumer (for example from Belgium) buys from one website (Germany) but wants to have things delivered to another country (France)?

The proposal should clearly state in the text that if the trader complies with the Regulation, the trader is not targeting the country of the consumer and therefore, all the rules applicable in the trader's country apply.

It would be helpful to clarify what constitutes or not directing commercial activities.

Passive sales could be clearly defined and there should be clear rules that for passive sales, the rules of the trader apply. Such a definition should provide that:

- **Passive sales mean that the trader does not target his commercial activities to the consumer's country (by intentional advertising, promotions, indications on the website, etc.) but that it is the consumer who is actively seeking to buy from the trader.**
- **A trader who sells to a consumer in order to comply with the Regulation is not deemed to be targeting the country where the consumer lives if the trader's website and any related commercial communication clearly state the country or countries in which the trader actively operates and which he targets.**
- **In case of a passive sale, the trader's law has to apply in all areas, not only consumer law, including labelling, product safety, environment, etc.**

The rules of the consumer's member state should only apply to active sales, where the trader actively seeks to sell in the country in question and therefore intentionally directs his commercial offer to consumers there.

Access to online interfaces – Article 3

1. Consumers should be able to browse whatever website they want and be able to go back to the original website if they have been rerouted. It should be clear to consumers if there are any limitations when they insist on buying on a chosen website (for example if goods cannot be delivered to the address of their choice). Automatic rerouting without any choice for consumers or the ability to go back to the original site has the same consequences, as blocking access to a website.

   We support more choice and transparency for consumers, and thus not allowing blocking of access to websites and automatic rerouting.

2. There are often legitimate reasons behind rerouting, including consumer convenience, availability of a website in local language, quicker delivery options, or offers customised to the consumers' home market regarding labelling, sizes, technical requirements, etc. One of the major reasons for rerouting is customer service. It ensures that products are adapted to the consumer's country where the trader can provide the expected service.

We welcome that the draft Regulation does not prohibit rerouting and does not deem rerouting to be discriminatory.

3. As long as consumers are free to browse any website of their choice there should be no additional requirements. The opt-in consent will unnecessarily complicate shopping experience for consumers, and will be burdensome for traders (as it is with cookie consent). This will lead to consumers' irritation and consent fatigue.

As long as consumers can freely return to the website of their choice, no additional requirements should be necessary.

Opt-in consent for rerouting is not practicable. It should be sufficient to provide a simple notice (to be designed by the trader) that rerouting is taking place and an option to refuse/object rerouting by an easy opt-out mechanism (i.e. back button) If express consent is pursued, the Regulation should clarify if it will be necessary to re-obtain consent for rerouting when the user visits the website again.

4. Under the Regulation, if a trader blocks or limits access, or redirects customers to a different version of the website, the trader must justify this.

   Information, and not justification should be required, as it will be too burdensome for the traders, with little added value to customers. It is also unclear if justification is necessary only when a trader blocks or limits access to a website and then redirects, or each time the redirection takes place. If the trader had to justify why a consumer is being re-routed (for example because the trader can deliver from the website to which a consumer is being rerouted) this would be disproportionate and would impose additional unnecessary burdens on traders. Moreover, such a burdensome requirement has never existed in brick-and-mortar shops in case they decide not to establish themselves in specific areas of a country. Therefore, we do not see any reasons to introduce this obligation for distance sales.

   The Regulation should be clarified to require information and not justification in cases where consumers cannot access a website due to legal obligations (as in Article 3.3).

Access to goods and services – Article 4.1(a)

The Regulation requires traders to offer the same general conditions of access to goods and services to all consumers, irrespective of where they are located. In practice, if a trader must sell to foreign consumers but does not have the intention, capacity or infrastructure to do so, this could lead to a service below the expectations of the consumer.

1. Regarding **consumer legal rights and expectations** it is not clear from the Regulation which law applies to the contract and whether the point of delivery is the determinant of jurisdiction and rules for all purposes, including consumer rights, product safety, labelling, etc. For example:

- **Consumer guarantees.** A French customer buys glasses from a Danish design store, which targets only Denmark and Sweden. The customer picks up the glasses from Denmark but discovers the defect only France, where he lives. Consumer needs to send the glasses back to the trader for repair or replacement. According to the consumer guarantees rules, this should be at the expense of the trader. Will the trader have to cover the costs of shipping the glasses from France, where the trader never intended to sell?

- **14-day withdrawal for online sales.** For example if a German consumer buys clothes from an Italian designer, who only targets Italian consumers and offers free delivery and free returns within Italy. Will the return be also free if made from Germany?

- Almost no trader will be able to offer the customer a support line in all languages to satisfy their expectations of after-sales support, yet they will be obliged to sell to these consumers.

More clarity is needed on how consumers will be able to exercise their legal rights.

It needs to be absolutely clear if the country of the point of delivery should be accepted for all purposes (including the exercise of consumer rights, rules on product safety, labelling, etc.) as the point where jurisdiction applies.

There should be more clarity regarding the practical exercise of the right of withdrawal or remedies under legal guarantee.

In addition, there should be absolute legal clarity that when complying with the Regulation the traders are not obliged to take the extra mile to deliver the good or service to consumers and provide all the aftersales services that the foreign customers could expect.

2. Regarding the **delivery of goods**, the Regulation reaffirms that traders have no obligation to deliver beyond their normal delivery area as stated in their website. This overcomes some difficulties under Article 20.2. of the Services Directive, in particular the definition of what constitutes an objective reason for refusal to sell and deliver.

   We welcome the fact that the Regulation has not imposed any obligation to deliver and has reaffirmed the interpretation in the Article 20 (2) Guidelines that traders are free to determine how and where they deliver. We also welcome that the European Parliament has stressed that: "*a ban on geo-blocking should never oblige retailers to deliver goods from their web shops to a certain Member State when they have no interest in selling their products to all Member States and prefer to stay small or only sell to consumers close to their shops*".[1]

   Delivering cross-border is not the same as delivering domestically or selling at a bricks & mortar shop. For example, when the goods are defective, the consumer can just bring them back to a physical shop. The online trader is responsible for retrieving the products at no cost to the consumer. This can be particularly costly cross-border, especially for small traders that sell only a few items to a specific member state and are not able to get a good

[1] Point 31 of the EP report Towards a Digital Single Market of 21 December 2015, 2015/2147(INI).

deal on parcel delivery costs. Nor do many traders have service contracts with local repairers that can handle the repair or replacement locally.

The proposal is unclear and raises significant practical problems for traders, particularly SMEs, in a number of ways:

- Traders that do not target a specific country but occasionally deliver to its residents will be treated as targeting that country. This will put at a disadvantage those traders that want to provide good customer service, and will block them from offering what most users of e-commerce expect – delivery to their door. Also, as already mentioned, under existing competition law, delivering cross-border does not always automatically mean that a transaction is to be regarded as an active sale.

- The proposal does not clarify the legal relationship between the trader and a third party delivery company. It is not clear how far a trader wanting to help a foreign customer by making arrangements to deliver may be deemed to be targeting a market, nor how close or distant the relationship between the two entities needs to be to avoid this.

- Under the proposal, if a trader draws the attention of a customer to a delivery company who could help them in delivering the goods, (for example through a mention or a link on the website) this will be deemed as targeting the consumer's country. Traders who want to avoid being considered, as targeting other markets will not be able to help their consumers. For many consumers, it will be difficult and impracticable to organise the delivery without some help from the trader.

Under no conditions, traders would accept any obligation to deliver.

Clarity is needed regarding delivery, and the extent traders may help consumers receive the good without risking to be deemed as targeting the consumer's country.

Traders should not be obliged to create specific pick up points for delivery beyond those that already exist.

Access to goods and services – Article 4.3

The Geoblocking Regulation does not apply to tangible goods that are not allowed for sale in other Member States.

According to Recital 23, traders may in some cases be prevented from selling goods as a consequence of a specific prohibition or a requirement laid down in the EU law or into the laws of member states. However, a trader should not be expected to have knowledge on which tangible goods may be prohibited in a member state to which the company does not actively sell.

More clarity is needed on what 'a specific prohibition and requirements' are, what national rules are covered, and, for example, whether mandatory rules on the labelling of goods in the consumer's language fall under the scope of 'specific provisions'.

Traders cannot reasonably be expected to check whether their products fulfil specific provisions and requirements in another member state.

Non-discrimination related to payment – Article 5

1. If there is a robust business case to accept a transaction, and the risk is low, traders will offer and accept as broad a range of payment methods as they can. There is always a reason behind any decision to refuse a sale or a payment method – the most common being suspected fraud, or too high a cost associated with acceptance, or a high value purchase that does not have a payment guarantee, as in telephone orders for example.

   According to the European Commission 43% of the traders are concerned about a high risk of fraud and non-payments when selling online to consumers in other countries. (Source: Consumer Conditions Scoreboard 2015).

   When it comes to the payment process itself, in most cases, it is a bank or a payment service provider acting on the instruction from the bank, and not the trader, who makes the decision to decline a transaction. Unless there is a payment guarantee, the trader has to bear the cost of a fraudulent transaction beyond a very low fixed limit. Traders should not be forced to accept all transactions irrespective of risk or accept an obligation to take a risk, for which they would be expected to cover any losses that may arise.

   We welcome the fact that the draft Regulation takes into account the risk of fraud in payments. However, traders, by their nature, cannot easily comply with the same obligations as financial service providers or banks. The Regulation needs to be clearer on how in practice traders will be expected and able to comply with the obligations, which have been designed for payment service providers.

   More robust safeguards are needed to ensure that traders are not obliged to accept payments that are not 100% secure and involve too much risk of losses.

2. Ecommerce is borderless, but consumer preferences for payment methods differ across the EU. Credit cards are the most popular with 40% of users across the EU. Other payment methods include micropayment (23%), invoice (15%), and direct bank transfer (10%). Traders offer methods that work for a particular market or a consumer target group.

   - An example is the Dutch payment system iDEAL. It allows consumers to pay online through their own bank in the Netherlands. Payments via iDEAL are cheap and reliable because the fraud detection system works extremely well. Many traders in the Netherlands offer online payments only via iDEAL. This means that only customers having accounts in the Dutch banks can use it. Customers with bank accounts outside the Netherlands cannot pay in Dutch online shops if the trader only offers and accepts payment via iDEAL. iDEAL is not an electronic payment system,

but a "collection of technical requirements and agreements between banks and payment processors.

Many national payment schemes like iDEAL or Bancontact are co-branded with V-Pay or Maestro. These are for use by the customer in transactions when abroad, but do not necessarily apply in the country in which they are issued.

It is unclear if traders only accepting national payment cards will be able to keep this system or whether they will need to offer to accept foreign credit and debit cards which they do not at present have any facility to process.

- Another question concerns direct payment from the consumer's bank account to the online trader. It is a popular payment method in many EU countries. However, providing direct payment via online bank requires the online trader to either open a bank account in the same bank as the foreign consumer or procuring costly payment solutions to handle the payment process for the online trader.

  Clarity is needed to ensure that online traders offering direct payment via Internet bank are not forced to offer this to all consumers buying from other markets.

Traders must be free to offer payment methods according to their choice and market conditions in which they operate.

Traders should not be forced to offer any specific payment methods just to accommodate foreign consumers. It needs to be clear that the trader who offers a specific payment method, such as iDEAL, Bancontact, DanKort etc., is not forced to accept Maestro, V-Pay, or other card brands held by foreign consumers simply because the national card is co-branded.

Similarly, a trader in one member state which currently accepts payment by bank transfer from its own residents should not be forced to offer a corresponding bank transfer facility to a customer in another member state if the volumes of sales or the cost of accepting bank transfers from that country makes it economically unviable to the trader to do so.

Clarity is needed to ensure that online traders offering direct payment via Internet bank are not forced to offer this to all consumers buying from other markets.

3. Some payment methods are more risky or significantly more costly to accept than others, such as direct debit or payment by invoice and therefore, not all can be offered to all customers across the EU

   - Regarding **direct debit**, it is used frequently in Germany: the trader may directly charge the customer's account – provided money is on the account. There is no authentication and the risk is with the trader. Customers can unilaterally withdraw from the deal within six weeks. To minimise the risk, traders use credit-scoring agencies, most of whom only cover domestic customers , or pay a small premium to have the payment guaranteed. This is becomes even more complicated where a picks up the product at a delivery point in the country of the seller without any home delivery address. There is a risk that traders will cease offering direct debit (and the

same applies to payment upon invoice) even within their country. This would be to the disadvantage of all consumers, since direct debit provides a very secure and cheap means of payment.

- The same concerns **invoice payments**: a store shipping the goods and receiving money later, upon invoice payment. In some countries, such as in Germany or Sweden, there is a strong consumer preference to pay via invoice. Although this involves significant fraud risks for traders, consumers like it. However, this method can only work if the trader can rely on vendors providing consumer credit scoring services, which usually operate in one or few specific country – but do not exist across the EU.

  If the Geoblocking Regulation applied to invoice payments – it would for example concern cases where a German trader forced to sell a good to customer in Portugal: sends the invoice to Portugal and the good within Germany without waiting for the invoice to be paid. If the invoice is not paid, it would be very difficult, in practice, to recover the money. It would be impossible and commercially unsustainable to fraud screen customers in all EU countries.

  If the Geoblocking Regulation aimed to cover payment by invoice – and so far this not clear from the text, this would represent major financial risk for the traders and would force some of them to withdraw from offering it to all customers, also domestically. Our view is that invoices should be excluded from the scope of the Regulation as the risks and costs associated with acceptance, such as credit checking and the lack of a payment guarantee, could make offering an invoice facility to a foreign customer high risk and very expensive.

More clarity is needed on exactly what payments are covered, against which fees and how will this work in practice. In particular, direct debit should be removed from the scope of the Regulation and it should be clarified that invoice payments are not covered.