

WE ARE SHAPING THE INTERNET.
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POSITION PAPER

on the proposal for a regulation of the European Parliament and 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 (COM(2016)289 final)

Berlin, 8 November 2016

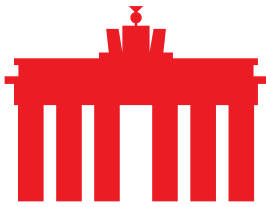
The European Commission has called for an end to geo-blocking, as part of its strategy for the Digital Single Market ([COM\(2015\)192 final](#)), and has made corresponding legislative proposals for 2016, which are based on a consultation carried out in winter 2015/2016. The aim of the legislative measures is the end of geo-blocking. At the same time, there must be recognition that geo-blocking – which is, in the opinion of the Commission, differentiation in price and range of offers according to the location of the specific demand – is the indispensable basis of a whole range of successful business models of the Internet industry throughout Europe.

With the current proposal, the EU Commission wants to move forward with this undertaking. As an association of the Internet industry, eco has critically tracked the issue of geo-blocking. From the consumer perspective, geo-blocking based on demand location has been identified as a specific barrier for the development of a Digital Single Market in Europe: geo-blocking restricts consumers' options. In addition, there are doubts whether the demand location addressed by geo-blocking is actually representative of the place of residence or nationality of the consumer. At present, it is expected that the regulation will be passed in 2017.

1. Content of the regulation

The [regulation](#) governs the purchase and sales of material physical goods and immaterial digital goods and services which involve cross-border access to non-copyright protected material (Articles 1 and 2), with the aim of preventing discrimination due to the nationality, place of residence, or place of establishment of the customer.

The regulation outlines how such traders should proceed when doing business across borders – and online (Article 3). It defines the limited situations in which exceptions apply (Article 4) and regulates non-discrimination in connection with payment methods (Article 5). The supervision of implementation at national level is specified in Articles 7 and 8. Article 9 includes an evaluation clause.



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2. eco's position

From a consumer point of view, geo-blocking is a barrier in the Digital Single Market; particularly in regard to the use of licensed or copyright-protected digital offers abroad. This issue is explicitly not dealt with in the proposal at hand. However, it is addressed in the "Proposal for a regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes" ([COM 2016/594 final](#)).

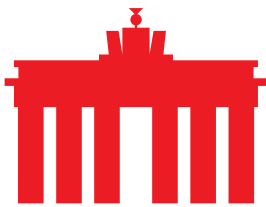
Further proposals from the Commission on regulations for "ensuring the cross-border portability of online content services in the internal market" ([COM\(2015\) 627 final](#)) and "on certain aspects concerning contracts for the supply of digital content" ([COM \(2015\) 634 final](#)), both of which are not yet passed, also address geo-blocking as a barrier for consumers. Whether these regulations will be enough to adequately address cases the Commission sees as being unjustified incidents of geo-blocking remains to be seen. The impact of the "Murphy judgement" of the European Court of Justice ([C-403/08](#) und [C-429/08](#)) and the subsequent supervisory procedure in relation to territorially exclusive Pay TV use of premium fiction content ("Blockbuster Movies"), as well as other individual measures related to audio-visual content in the field of sport, TV films and children's programming inter alia.

This proposal only looks at cross-border trade of goods and services, so a relatively small scope. In general, we note that harmonisation does make sense for this context, but that it should be considered that geo-blocking is relatively rare in this field. A study carried out by the European Commission showed that only 2 percent of websites immediately blocked or "re-directed" traffic ([SWD 2016/173 final](#)). Other forms of geo-blocking, however, such as the geographical limitation of the delivery territory or the stipulation of certain payment methods, are more frequent.

What eco considers to be problematic in this context is the fact that geo-blocking is usually not a self-limitation by the trader, but rather due to other existing challenges. These can be related to how fragmented consumer protection regulations are implemented, the local market norms with diverging levels of demand and other aspects, such as nationally divergent sales tax, which impacts on pricing. Particularly small and medium-sized enterprises (SMEs) in the Internet industry could be overwhelmed by the proposed requirement to fulfil national regulations, like national consumer protection requirements. With this in mind, eco comments on the proposal as follows:

The distinction between retail trade and B2B trade in the trade of goods

The proposed regulation is limited to retail (both persons and companies) and does not address trade between businesses, in which goods or services are bought for resale. It remains unclear under this approach how to record goods and services which have been bought for resale or to be passed on. Such a distinction can pose significant organisational challenges for companies.



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The evaluation clause for certain electronically-supplied services

The evaluation clause (Article 9) of the draft regulation envisages periodic reviews of the application of the Regulation by the Commission and “whether the prohibition of discrimination set out in Article 4(1)(b) should be extended to electronically supplied services, the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, provided that the trader has the requisite rights for the relevant territories.”

This gives rise to the question of whether there will be any interplay with the planned regulations on the purchase of digital content and cross-border portability. eco would welcome clarification which unambiguously and bindingly regulates the use and purchase of digital services and content without realigning legal structures. It is also not clear how traders should treat bundled services and offers which include both copyright-protected material and regular services. A fragmentation of the regulation could have a negative impact on such service providers.

Lack of clarity on the scope of application of the regulation in relation to bundled services, also in the context of goods which are needed to use the service bundle

Not only copyright-protected material, but also the delimitation from certain other legal measures is problematic. The delimitation of product bundles with elements that are subject to specific legislation or subject to conditions stipulated by sector-specific regulations should be adequately addressed in the Commission’s proposal.

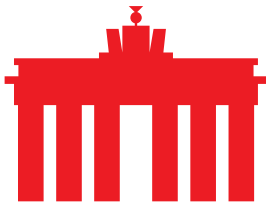
Implementation for localised services and products

It is equally unclear how the proposed regulation intends to deal with localised offers which are connected to special quality markers. These are often crucial, particularly in the area of digital services, and can only be delivered under given infra-structural conditions and in accordance with specific local pricing mechanisms. A delivery guarantee of digital services under the same conditions as in the country of origin is hardly possible, if not impossible. A regulation analogue to Article 3 (2) of the proposed regulation¹ would be expedient in giving the providers of such digital services legal certainty.

Sales obligation for online traders

Companies which sell goods or services over the Internet (“online traders”) are greatly worried about the anticipated obligation to sell which has been foreseen in several places in the proposal (limited obligation to contract). This is a source of legal uncertainty and – for SMEs – an insurmountable economic barrier. The interplay

¹ “The obligation set out in paragraph 1 shall not extend to any quality requirements applicable to the delivery of an online content service that the provider is subject to when providing this service in the Member State of residence, unless otherwise expressly agreed by the provider.” Article 3 (2), COM(2015) 627 final



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between local law in the country of the purchaser and local or regional requirements as well as an obligation to sell could lead to huge difficulties for traders. This begins with a lack of knowledge about sales requirements in the respective country of the purchaser and ends with the question of the place of jurisdiction, should any legal action be taken.

Language barriers and inability to provide customer service in the language of the country the demand originates from are major problems for SMEs and are often listed as reasons for reticence when it comes to doing cross-border trade. An unambiguous stipulation of the jurisdiction of the country of sale would make sense, particularly as the proposal indirectly suggests that the place of residence of the purchaser is the same as the place of demand for the product. However, this is hard to prove and is only slightly mitigated by the rule of habitual residence and temporary stays (Article 1 (2)). The regulation in Article 1 (5) concerning European contract law is not sufficient for many of those affected. Only thus can it be ensured that SMEs especially are not disadvantaged by this proposed regulation and driven from the market.

Summary

From the point of view of the Internet industry, it has to be said that numerous aspects which require more detailed consideration were neglected in the drafting of the proposed regulation. The existing uncertainties in legal interpretation have the potential to negatively impact on online trade and should be reconsidered or at least more precisely defined. As the European market is fragmented with differing national requirements, SMEs are particularly dependent on keeping their offers off certain markets using geo-blocking, so as not to possibly contravene national laws.

The access to digital services and offers which are not subject to copyright is not sufficiently addressed by the proposal. In eco's point of view, further specification is called for in order to not carelessly endanger established models of value creation for digital products in the Internet industry.

About eco

eco – Association of the Internet Industry fosters all companies that create economic value with or in the Internet and represents their interests. The association currently represents more than 900 member companies.

These include, among others, ISPs (Internet Service Providers), carriers, hardware and software suppliers, content and service providers, and telecommunication companies. eco is the largest national Internet Service Provider association in Europe.