EUROCHAMBRES

Position Paper

7 October 2016

Reaction to COM proposal on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market

General considerations

Working towards a more ambitious Single Market

EUROCHAMBRES takes note that the objective of the European Commission's proposal for a Regulation to address unjustified geo-blocking both for consumers and traders is to further complete the Single Market. However, it does not consider this proposal to tackle the pressing problems regarding the completion of the Single Market but rather to create more confusion and legal uncertainty for European companies.

Completing the Digital Single Market is one of the main objectives of the current Commission. The gaps in the Single Market need to be addressed and therefore EUROCHAMBRES is fully supportive of any efforts going into that direction. In 2014, 84% of entrepreneurs agreed to the statement that the EU Single Market is not sufficiently integrated, confirming that it is far from achieved.[1] Hence, more focus should be made on eliminating remaining barriers which are discouraging traders from selling across borders. This way, geo-blocking would be eliminated as a natural process.

The Commission's proposal is intended to increase consumers' confidence in e-commerce, with more choice and access to lower priced goods and services. While competition is indeed the driving force to achieve these goals, it seems unlikely that these objectives will be reached through this proposal.

Nevertheless, increasing the access to cross-border goods and services for businesses and consumers is laudable and a recurring demand of European companies. However, EUROCHAMBRES does not consider the prescribed medicines in this Commission proposal to have the potential of yielding the desirable effects. The proposal on geo-blocking in its current form does not fit the bill and does not address the ills that need to be fixed. More than the wrong medicine, the proposal carries the risk of damaging the Single Market. In times of still rather sluggish economic recovery this can hardly be what the European legislators can wish for.

[1] EPE results of October 2014. Every two years, EUROCHAMBRES gathers 750 entrepreneurs from the Chamber network in the European Parliament in Brussels to exchange views on different subjects. In 2014, 84% of these entrepreneurs confirmed that the single market should be better integrated. The original press release with the findings from 2014 is here: http://www.eurochambres.eu/DocShare/docs/1/CEJGJLACMJCBKBMNGDOGDDFMG14LKLYD6AYO6CWNRLVY/EUROCHAMBRES/docs/DLS/45_EPEresults_16Oct14-2014-00730-01.pdf

The business rationale

The offerings of companies to consumers differ between national markets due to many reasons, but the decision to offer (or not) products and services at different terms have to do more with well-considered business considerations than an outright will to discriminate between consumers. In short, the well-established principle of freedom to contract should be respected. EUROCHAMBRES has reservations about the introduction of an obligation to sell across the EU for reasons that are outlined further on, but is nevertheless pleased that the Commission refrained from also introducing an obligation to deliver.

In effect, while opposing unjustified geo-blocking, EUROCHAMBRES recognises a number of well-justified reasons to avoid or refuse cross-border selling or for adjusting prices and conditions as a result of the differences among markets. If traders still provide different treatment to consumers on the basis of location, this is because the internal market has not yet lived up to its promises. Traders do not discriminate on a whim, but act in their best interest, and based on an informed decision. When some markets experience different pricing or are not serviced at all, it is due to the adaptation from the trader to the specific market. In fact, what causes the fragmented European market is the lack of integration, which traders addressed on a case-by-case basis.

Specifically because the business environments and likewise consumer demand differ between Member States, businesses are often obliged to target their offerings just to some markets and must refrain from doing so to others or at least subject a sale to different conditions, which may lead to justified geo-blocking. If the conditions related to tax (VAT in particular), holiday periods, purchase power, consumer protection rules etc had been identical throughout the EU, there would indeed be little reason not to cover the whole EU area under the same conditions. It is surprising given the fragmented legal framework that the current levels of voluntary so-called geoblocking are not even higher than they actually are[2]. This is particularly pertinent to SMEs, which do not have the means to be as informed as larger companies about the legal frameworks of certain countries and would benefit from a genuine single legal framework.

It is for this reason that, for the moment, SMEs stand to lose from both the current proposal on geo-blocking as well as the incompleteness of the Single Market.

Conflicting laws and legal uncertainty

As well as failing to contribute to the completion of the Digital Single Market, the proposal in its current form will lead to legal uncertainty. It creates a series of new questions on how to apply certain existing laws. Inevitably, judicial bodies will be looking for interpretations. The proposal is not clear, especially when it includes references to other EU Law acts. The other consequences are difficult to predict as the Commission is yet to come up with satisfactory answers to a number of legal challenges. Specifically, the new rules in their current form would lead to questions regarding the application of existing regulations ROME I and BRUSSELS I.

Another legal issue relates to the application of EU law as understood by the Court of Justice when it comes to deciding whether a sale should be qualified as a passive or an active sale, and whether it is not opening a window for new burdens since it does not clearly state, that the law of the trader is applicable in the cases covered by the proposal. Not answering this question can have important consequences for companies. The most recent CJEU cases have shown that this a delicate matter which merits the full attention of the European policy makers and legislators.

We would like to stress that "*a prohibition of discrimination on grounds of* "residence" *(irrespective of the nationality of the discriminated persons) has no basis in primary law. As a person's place of residence is*

[2] From the Commission Impact assessment, (page 11): *"The 2015 online mystery shopping survey found that only 2% of websites completely block access or automatically reroute visitors from another Member State, which however account for 7.5% of cross-border online traffic in the survey sample (…)".*

not explicitly mentioned by primary law, it is questionable whether such a limitation on the commercial freedom of businesses may be imposed by secondary law. A service provider should usually have a right to decide where it offers its services since it does not have a duty to contract with every prospective client. The freedom to provide services arising from the Charter of Fundamental Rights operates in two senses – it is also a freedom not to provide services."

These are results of a study conducted for the EP on Art 20 (2) of the Service-Directive (see Schulte-Nölke/Zoll e.a., Discrimination of consumers in the digital single market, Study on behalf of IMCO, 2013, 46, 50). The authors of the study recommend to consider to repeal at least the part on discrimination based on residency in Article 20 of the Services Directive – and not to replace it by another potentially oppressive rule. The proposed regulation provides obligations to conclude a contract and therefore restricts contractual freedom that is protected especially by Art 16 of the Charta of Fundamental rights. It makes the complex legal regime especially for SME more complex and increases legal insecurity.

EUROCHAMBRES' POLICY RECOMMENDATIONS:

- Focus on **completing the single market** rather than resorting to at first glance attractive solutions which create new issues.
- While in principle inadvisable, an obligation to sell for companies can only work out if some fundamental legal questions are addressed at the same time. Consumers will also lose as a result of legal ambiguities, as companies will grow more cautious about going across borders. Therefore, clarification is needed on main aspects of the regulation, namely **the link with existing Directives and their interpretation in relation to the proposal**, according to the CJEU jurisprudence - e.g. Article 1(5).
- Since the decision to operate cross border and the freedom of contract are and will remain the prerogative of traders, clarification regarding the interpretation of the proposal concerning the differentiation of active and passive consumers (and their respective entitlements – e.g. after-sales services) should be included. **The equilibrium between passive consumer and traders' commercial directed activity should be protected, avoiding room to interpretations that might lead to entitlements for active cross-border consumers at the cost of traders** that are not aware nor willing (for any reason) to trade to active consumers' market of origin. It is especially important for SMEs that the proposal does not create any obligation to deliver throughout the whole Single Market if they do not direct their activity to the whole market and that it is clearly stated in the proposal. At the same time, it is also important to clearly indicate in the proposal that any consumer requiring an after-sale service is required to return the good and/or receive the service in the territory where the trader operates, sensibly letting traders to use their home-country rules.
- **Overly burdensome obligations regarding information requirements** to the attention of potential consumers should be avoided. This is particularly relevant in instances where consumers are offered to be re-routed to domestic websites etc.

Comments and suggestions regarding the specific articles

The title of the legislative proposal

The recitals of the proposal should make clear that the regulation is limiting itself to tackling *"unjustified"* geoblocking, but this should also be immediately apparent from the title of the Regulation.

Article 1 – Objective and scope

Article 1 defines the scope of the regulation and defines the three situations when the rules regarding geo-blocking would be applicable. It might be helpful for the sake of clarity to mention that article 4 of the regulation is narrower in scope than article 1.

It should also be stated in the first article of the regulation that its purpose is to give more flesh to article 20 § 2 of the Services Directive. Failing to do so, the regulation might raise a wrong impression about its purpose, which should above all be to give more certainty about cases in which there is no objective reason to discriminate on the basis of residency or nationality of a consumer. It should also be kept in mind that the Commission's Staff Working Document of 8 June 2012[3] clearly states that *"as in the offline world […] businesses are free to determine the geographic scope to which they target their activities within the European Union, even when selling online".*

In order to safeguard legal certainty, and despite the mention that in case of doubt the Regulation would take precedence over article 20 § 2 of the services directive, it would be helpful to be more precise as to when article 20 § 2 will continue to apply.

Article 1 § 5 mentions the regulations ROME 1 & BRUSSELS 1 and opens the question which law should be applicable in case of litigations between seller and consumer. A clarification on reassuring that active consumers do not get the same protection in territories where the trader is not directing a commercial activity should be included. In B2B situations the law of the trader should continue to apply but the rules concerning regular consumers are far from clear, especially in the case when the seller supposedly has *"directed activities"* to this consumer. The CJEU has recently issued a number of rulings[4] stretching the term and interpreting it very liberally, each time to the detriment of the seller. These issues cannot be taken lightly and a modification of the ROME I regulation should be considered. If not through a Regulation on geoblocking, other ways should be considered. ROME I, which defines which national law should be applicable, is also a key factor in this legal uncertainty.

Article 2 – Definitions

The definition of *"consumer"* in art. 2 (b) creates a new consumer concept which is not in line with the definitions in former consumer law.[5] At least at the European level, there should be one single definition of a consumer.

[3] Commission's Staff Working Document of 8 June 2012, http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/SWD_2012_146_en.pdf

[4] Especially ruling C-190/11 Mühlleitner is very far-reaching in its interpretation of what a directed activity is: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd6c7cb325c55d43a7ba86f5694b7e229c.e34KaxiLc3qMb40Rch0SaxuTbNn0?text=&docid=126428&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=812930
However ruling C-218/12 Emrek (http://curia.europa.eu/juris/document/document.jsf?text=&docid=143184&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=816066) is even going further.

[5] See e.g. Consumer Rights Directive (2011/83/EU), Art. 2 § 1: 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;

Article 3 – Access to online interfaces

This article addressing the issue of rerouting and access of the sellers' offer on their websites should be clearer in the fact that access is not to be interpreted as an obligation to conclude a contract with potential consumers.

The European legislators should also take into account that this constitutes administrative burden on SMEs that do not always have the necessary financial means to invest in IT infrastructure and applications to comply with this article. A reasonable transitory period should be considered.

Article 4 – Access to goods or services

EUROCHAMBERS welcomes the fact that pricing as such is not targeted and that traders are *"free to set their prices in a non-discriminatory manner"* and that it does not address *"dynamic pricing, where traders adapt their offers over time..."* (Page 2 of the proposal document).

However, EUROCHAMBRES interprets article 4 as that the prohibition to discriminate would apply only at the level of the company's website and not the company itself. In that sense it makes perfect sense that a company can keep different dot national websites each offering goods and services at different conditions.

More clarity should also be created with regards to art. 4 § 1 lit. a). The current wording does not explain what would happens in the case of a reverse transaction, e.g. due to a defect covered by a warranty. Can the trader ask the customer to return the good to the company premises? Moreover, current German judicature asks for a "double-opt-in" when a customer has to accept re-routing. A "double-opt-in-situation" is extremely annoying for the consumer and will lead to a loss of interest in the website.

Article 6 – Agreements on passive sales

Taking into account the recent rulings of the CJEU (see above), almost all activities which are in the scope of the future regulation would be considered as directed activities. Effectively this would have as a consequence that the provisions and the application of the consumer's national law would be applied in far more cases than might be considered as reasonable. The rulings of the CJEU have broadened the application of ROME 1 to sales that cannot really be considered as being distant sales. In effect, this means that an overwhelming part of commercial activities can be considered to be directed towards other EU countries. This means that in almost all cases the law of the consumer will apply and the court in charge will be in the country of residence of the consumer.

Following the latest CJEU jurisprudence, it is not relevant any more whether a good is delivered across borders or in the premises of the trader. It won't matter anymore either whether a service is consumed in the country of the trader or of the consumer.

All these elements will force traders who do not wish to direct their activities abroad to explicitly specify on their website they do not wish to sell to consumers in another member state.

This legal uncertainty, will lead to significant costs for traders who do not wish to be subject to the law of the consumer's country. It is therefore far from fiction that in the future SMEs will decide **not to sell at all** to consumers who are not resident on their territory. This does not only concern online and distance sales but also offline sales as the costs linked to potential legal issues are just too high.

Article 10

Art. 10 § 2 aims at integrating the regulation addressing geo-blocking into a “list of directives” in annex I of directive 2009/22/EC. The nature of regulations and directives are however different. The legal systematic is questionable.

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