

# Position paper on the Regulation addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market.

Brussels, 03 November 2016

## INTRODUCTION

While DIGITALEUROPE welcomes the overall objective of the Digital Single Market to unlock the potential of e-Commerce in Europe, we fear that the geoblocking proposed Regulation will not contribute to this objective. The proposal does not remedy any of the barriers traders face when trading online, making cross-border trade even more complex.

We are genuinely worried that this proposal will have the effect of forcing traders to sell cross-border, which could result in limited offers and price increases. For a fully functioning Digital Single Market, it is essential to ensure that the framework to operate online sales and services in Europe provides confidence to European citizens as well as legal certainty to businesses.

## GENERAL COMMENTS

### The Digital Single Market can only succeed where the Single Market succeeds

A fully functioning Digital Single Market can only come to fruition if built upon a strong Single Market. At the moment, there are still too many variables, which make cross-border trade very difficult, irrespective of it being offline or online. Traders need to adapt their offers to the jurisdictions they target, which may imply some variations to take into account: national standards of living, consumer habits and preferences, language requirements as well as the need to comply with diverging local technical and legal rules - consumer rights, VAT rates, copyright, or rules on the disposal of electronic waste. Those variables justify trading online in a targeted, differentiated way.

### Businesses must be provided with legal certainty to engage in cross-border sales

As a principle, traders should retain the right to decide where to offer their products or services, and for what price. As per the initial ambition of the Digital Single Market, traders can only confidently engage in cross-border sales if they can sell in another EU country “like at home”. Since this proposal does not introduce a full “sell like at home” concept, it is essential that:

1. it does not force businesses to apply legislation from other EU countries other than those they target;

2. it specifies that by fulfilling this draft Regulation’s obligations, the trader can solely rely on his own home country rules – as opposed to the customer’s country rules.

### Companies must be free to conduct their businesses as they see fit

Contractual freedom must be preserved. This proposal should not deviate into a de facto obligation to sell everything, everywhere. The application of “geo-differentiation” can be fully justified on the basis of companies’ need to address a fragmented environment. Consumers benefit from this “geo-differentiation” as a means to ensure their purchases are compliant with local legislation (incl. in terms of safety), adapted to the local demand, and proposed at the best price<sup>1</sup>. Businesses should be free to determine based on their own cost-benefit assessment whether it makes commercial sense to enter a given geographic market. Forcing companies to do so without allowing them to make these commercial considerations would result in significant costs for such businesses, and eventually be to the detriment of European consumers and the overall competitiveness of European companies on the global market.

### MORE SPECIFICALLY

#### The absolute necessity of clarifying the applicable law (Article 1(5))

DIGITALEUROPE welcomes the indirect references to the application of the trader’s law and to the fact that sales to customers from other Member States should be considered as “home sales”.

However, the current wording of the Regulation is insufficiently explicit for such sales to be considered as passive sales, and not directing activity beyond the Member State(s) where the trader already operates / delivers. This creates legal uncertainty that is detrimental both for traders and customers who would be unsure about which rules apply to the sale (incl. which contract rules the products or services should comply with, which VAT rate applies, which labelling rules apply, who should pay the cost to return a product if the good is faulty and has been picked up by the customer in the trader’s country, etc.).

Both traders and customers would benefit from more legal certainty. The link between this Regulation and the Rome I Regulation (and the related CJEU jurisprudence – which has considerably extended the situations where a contract is subject to the rule of law of the country of the customer - and not of the trader<sup>2</sup>) must be clarified in order to ensure, as intended by the Commission proposal, that traders can “sell like at home”.

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1 As stated by the European Commission in its Staff Working Document<sup>2</sup> of 8 June 2012, “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”.

2 See cases Pammer (C-585/08), Alpenhof (C-144/09), Mühlleitner (C-190/11), and EMREK (C-218/12) which have all extended the commercial activities and practices to be considered as directed towards the consumer – and for which the rule of law of the consumer should apply. This has made irrelevant whether a good is delivered across border or in the premises of the trader to apply the consumer’s country rules.

### **The concept of “other online interfaces” (Article 3 and recital 14) needs to be clarified**

The concept of “online interfaces” must be strictly defined to ensure stronger legal certainty and clearer consumer expectations. It must be clarified that the concept of online interfaces do not include portals that sell and distribute applications, as apps themselves are protected under copyright law.

### **The user-experience is put at risk by a lack of clarity on re-routing practices (Article 3 and recital 14)**

The text is unclear regarding the manner in which user consent must be obtained for website redirect, and whether cookies can be used to record user preferences. The proposal should not be interpreted as requiring opt-in consent every time there is a redirect – this would lead to a terrible user experience.

We believe that the collection of consent to be re-routed must be left to the discretion of the service provider in order to ensure the smoothest user experience. In addition, consent should only be collected once and be stored for subsequent visits to the same website.

### **Explaining reasons for blocking or limiting access and of re-routing in multiple languages puts a disproportionate burden on traders (Article 3 (4))**

DIGITALEUROPE opposes the obligation to provide this information in the language of the online interface that the user wanted to access. This creates unnecessary costs especially for SMEs, which would have to develop a statement in the 23 official languages of the European Union.

### **B2B relations should be excluded from the scope of the Regulation (Article 2(c) and recitals 11 and 12)**

Other legal instruments (incl. competition law) already regulate the distribution of goods and the provision of services to businesses. Given the specificities of B2B sales (incl. contracts open for negotiations, tailored offerings, tailored after care packages etc.) and the fact that this Regulation is designed for consumers, we strongly believe that this legislation is not appropriate for regulating B2B relations. The scope of the Regulation should therefore be limited to B2C relations.

### **The trader should not be obliged to make their premises accessible in case of pick-up (Article 4 (1)( a))**

In a situation when a trader only runs an online shop (i.e. no brick-and-mortar shop) and customers choose to pick-up the goods themselves, the current Regulation is insufficiently clear as to whether or not the online trader should make its premises accessible to such customers. Such an obligation would create a considerable, if not unbearable, cost for traders who would then need to comply with a whole set of new obligations related to physical stores. Therefore, DIGITALEUROPE calls for an explicit statement that there is no obligation for the trader to make their premises accessible to the public if a consumer decides to pick-up the good.

## The unintended consequences of including electronically supplied services (Article 4(1)(b) and recital 6)

DIGITALEUROPE is concerned that the current proposal does not address its relationship with obligations under the 2015 VAT Directive and that Article 4 (1) (b) will result in increased red-tape and costs for businesses, particularly SMEs, in dealing with VAT implications in cross-border sales.

Although the proposal does not per se introduce an obligation to sell cross-border, we believe it will have unintended consequences. Challenges will inevitably arise when a company provides an electronically supplied service (Art. 4 (1)(b)) such as a cloud service, data warehousing or webhosting to a customer in another Member State. VAT laws require a trader to verify the customer's country of residence in order to apply the correct VAT rate to the transaction, which is in direct contradiction with the principle of "shop like a local" introduced by the proposal. This naturally creates high administrative burden, increased risk of incorrect tax assessment and higher liability risks. This will be particularly challenging for smaller companies and threatens to dilute the economic incentive for low costs services. We fear this will discourage traders from offering electronically supplied services in the first place.

We therefore recommend that this Regulation should not apply in cases it puts the trader in conflict with his obligations under VAT rules.

Considerations also have to be given to the technical feasibility of making such services available cross-border. For instance, the provision of a certain types of cloud services may require the service provider to deliver the service under specific qualitative conditions (e.g. at a minimum broadband speed). Such technical conditions may not be fulfilled / available in other countries than those concerned by the agreement – making it impossible for the service provider to offer a similar service ("under the same conditions") to other customers from another EU country.

Therefore, the scope of the Regulation has to be understood as excluding services subject to such technical constraints and/or for which specific service level agreements have been negotiated between the parties.

## The relationship between access to the service (Article 4) and payment obligations is unclear (Article 5)

The proposed text should be clarified with respect to the interaction between Article 4 and Article 5 of the Regulation. In its current wording, it is unclear whether making a cross-border payment possible prompts an obligation to give access to the goods and services from another Member State. The text should therefore state that Article 5 only becomes applicable when Article 4(1) is applicable.

## The implications of the payment provision (Article 5) need to be clarified

Payments (and online payments in particular) are very specific operations subject to very detailed legal requirements (especially when cross-border) and local specificities.

DIGITALEUROPE would welcome that the current text is clarified with regards to :

- The implications on specific local means of payments and the risk of seeing more expensive transactions to compensate the extra payment cost created (e.g. in Germany specific payment methods like purchase on account are offered often only to certain customer groups which have a good credit rating. The information is requested by the trader from the SCHUFA (General Credit Protection Agency)). Similar as in the banking sector it must be allowed to do risk assessments of potential customer groups regarding the risk of non-payment. The payment default of some customer groups is statistically more likely than of others. It must be therefore possible for companies, especially for SMEs, to offer different payment conditions to minimise the risk of possible defaults.
- Whether special financing plans or loans offered to local customers should be made available to customers from another EU country - the interaction with the Payment Services Directive 2 (PSD2). The latter introduces “strong customer authentication and secure communication” required from payment service providers. When e-commerce websites are operated by 3<sup>rd</sup> party companies, it should be clarified who is responsible for ensuring the authentication between the seller and the 3<sup>rd</sup> party operating the payment service.

### **The risk of conflicting rules on passive sales agreements (Article 6 and recital 26)**

Article 6 creates a risk of conflict with EU competition law. Current EU competition rules allow for a limited exception to passive sales restrictions. The 2010 Guidelines on distribution agreements allow a manufacturer who wants to sign an exclusive agreement with a distributor to prevent passive sales under strict conditions for a maximum of two years. The rationale is that the distributor should be allowed to remain free from competition in a certain territory so that they can recoup the substantial investments they make to build up a new brand and the costs of launching a new product. For example, under the Guidelines, a new product’s exclusive distributor for Germany may ensure that for a period of two years the same product’s distributors for other Member States will not be allowed to engage in passive sales in Germany.

By stating that contracts which include restrictions on passive sales “shall be automatically void”, the proposed Regulation contradicts existing competition law. Therefore, the text should be amended to be aligned with existing competition rules.

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## ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 62 corporate members and 37 national trade associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

## DIGITALEUROPE MEMBERSHIP

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### National Trade Associations

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| <b>Austria:</b> IOÖ                                      | <b>Germany:</b> BITKOM, ZVEI            | <b>Slovakia:</b> ITAS                                   |
| <b>Belarus:</b> INFOPARK                                 | <b>Greece:</b> SEPE                     | <b>Slovenia:</b> GZS                                    |
| <b>Belgium:</b> AGORIA                                   | <b>Hungary:</b> IVSZ                    | <b>Spain:</b> AMETIC                                    |
| <b>Bulgaria:</b> BAIT                                    | <b>Ireland:</b> ICT IRELAND             | <b>Sweden:</b> Foreningen<br>Teknikföretagen i Sverige, |
| <b>Cyprus:</b> CITEA                                     | <b>Italy:</b> ANITEC                    | IT&Telekomföretagen                                     |
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|  | <b>Romania:</b> ANIS, APDETIC           |   |