

The Consumer Voice in Europe

## GEO-BLOCKING IN THE EUROPEAN UNION

Recommendations for the trilogue negotiations



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## Why it matters to consumers

Consumers are very often prevented from ordering a product online in another Member State or faced with higher prices than local consumers just because of the country they come from. This is because some companies erect artificial barriers in what is supposed to be a borderless digital Single Market. This practice is called geo-blocking. In the EU, consumers should be able to purchase products and services from the retailer or supplier of their choice. This would increase choice, competition and eventually bring prices down.

### **RECOMMENDATIONS FOR THE TRILOGUE NEGOTIATIONS ON THE GEO-BLOCKING REGULATION**

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The European Parliament and the Council will enter negotiations on the Commission's proposal on geo-blocking in e-commerce. BEUC would like to provide the European legislator with a set of recommendations to ensure a positive outcome for consumers:

#### **1. Scope of application - inclusion of copyrighted content (Article 1)**

BEUC regretted that the European Commission's proposal excluded copyrighted content. This is why we support the European Parliament's position to extend the prohibition of discrimination on the basis of nationality and place of residence to non-audio-visual copyrighted content.

Nobody would accept that a high street record shop or book shop refuses to sell a CD or a book to a consumer because of his nationality or place of residence. Yet, in the on-line world this is a common practice, which leads to consumer frustration.

It is inexplicable, in particular for younger consumers, that geo-blocking should continue to exist for these products which are the most obvious to be purchased on-line across borders. There is ample evidence<sup>1</sup> showing that consumers are willing to pay for legal offers but that too often they cannot do so because of outdated business practices aiming to maximise profits.

There is no good reason why, in a Digital Single Market, consumers should continue to be blocked and unable to decide where across the EU they want to purchase goods, services or digital content.

The upcoming Geo-blocking Regulation is a unique opportunity to tackle (part of) this problem. We acknowledge that a true Single Market which benefits consumers and companies alike cannot be built in a day. It has to be a gradual process. In times of EU-scepticism, the European Commission should take a strong stance to realise the potential of one of the greatest assets of the European Union: its Single Market. This will benefit both consumers and businesses.

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<sup>1</sup> According to a recent study of the EUIPO, 6 out of 10 youngsters would stop using illegal sources to access digital content if there would be affordable original products in place. Ref.: [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IP\\_youth\\_scoreboard\\_study/IP\\_youth\\_scoreboard\\_study\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IP_youth_scoreboard_study/IP_youth_scoreboard_study_en.pdf), page 12

Contrary to what critics say, the removal of geo-blocking would benefit Europe's cultural diversity. It would enable consumers to listen to music, read books and play videogames from across the EU's cultural landscape in the most convenient – and – legal way.

In relation to audio-visual services, this is the sector where geo-blocking is most relevant to consumers as shown by a survey of our German member *vzbv*<sup>2</sup>. Therefore, we recommend co-legislators to include a review clause to assess the eventual extension of the scope to audio-visual services. The first report on the evaluation of the proposed Regulation shall be carried out in a maximum period of two years after the entry into force of this Regulation.

## **2. Applicable law and jurisdiction (Article 1.5)**

The need to protect the weaker party to a contract is undisputed and even more pressing when consumers buy products from traders that are located in a foreign country. As long as contract law and consumer law are not fully harmonised, rules on international jurisdiction and conflict-of-laws are the most important tools to protect consumers in contractual relationships with traders located in other member states. Therefore, the Regulation (EC) No 593/2008 (Rome I) and Regulation (EC) No 1215/2012 (Brussels I bis) allow consumers to rely on the competence of their domestic courts and the applicability of their domestic consumer law standard if traders target them in their countries. This consumer protection principle must be upheld and not undermined by this Regulation.

Any attempt to reduce or preclude the application of existing Union rules on private international law is highly problematic. It is unnecessary too, given that the Geo-blocking Regulation covers unsolicited selling and addresses the problem of discrimination. Any attempt to undermine the full effect of private international law protection for consumers would lead to a significant detriment of European consumers, including denial of access to justice.

Whether a trader has actually directed its activities to the consumer's country of habitual residence or domicile or whether the trader only fulfilled obligations under the new Geo-blocking regulation is a matter to be always assessed by national courts. Any limitation to the power of judges to assess the facts of the case, for example by creating interpretative rules or legal presumptions must be avoided. If clarification of the interplay of this regulation with private international law instruments is needed, what we do not believe, a recital would be sufficient to explain the intended purpose of the Regulation.

## **3. Access to online interfaces and re-routing (Article 3)**

Re-routing limits the possibility for consumers to look for better deals and products outside their national borders. The EU's internal market is about giving the chance to consumers to compare and buy products from across 28 Member States and re-routing limits that possibility to just one country.

Whenever accessing a trader's website for the first time, consumers should be given the choice whether they prefer to access the online interface of the retailer in another Member State or the one of consumers' own country of residence. Their initial choice could apply

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<sup>2</sup> 67% of respondents say that they have been denied access to digital content and 64% of users of paid-for streaming services say that the content should be available in all EU countries, 41% of users of online video-libraries ("Mediatheken") say that they would want to have access to it wherever they are in the EU. <http://www.marktwaechter.de/pressemeldung/marktwaechter-untersuchung-zu-geoblocking>

to all future visits to this trader's website, on the condition that consumers can easily change their decision and all versions of the online interface remain easily accessible.

#### **4. Payment discrimination (Article 5)**

BEUC considers that 'strong customer authentication' as established in the Payment Services Directive 2 is a guarantee for the consumer that should be safeguarded. In this context, we strongly support the Council's version of Article 5 (1) b) which takes into account the verification of the payment by strong customer authentication.

Furthermore, BEUC opposes to the possibility of additional charges including indirect costs. Under Article 62 of the new Payment Services Directive 2, additional charges can only include direct costs.

#### **5. Restrictions to cross-border passive sales (Article 6)**

BEUC strongly supports the initial draft of article 6 of the European Commission's proposal declaring void any contractual clause that restricts passive sales.

This rule is justified because business-to-business restrictions to cross-border passive sales in exclusive and selective distribution agreements are often used as a basis to geo-block consumers and could jeopardise the effectiveness of this Regulation and the realisation of the internal market<sup>3</sup>. This is confirmed by case law of the Court of Justice of the European Union<sup>4</sup>.

Furthermore, BEUC believes that an ex-ante prohibition to restrictions on passive sales is more appropriate and cost-efficient than the case-by-case assessment under competition law enforcement. This is because it would be extremely difficult to justify the maintenance of passive sales restrictions in the context of the products and services falling in the scope of the regulation.

#### **6. Return of products**

Existing EU consumer rights, which may apply before (right of withdrawal) or after (legal guarantee rights) purchase should not be affected by this new regulation.

Any references in this regulation related to return costs or other costs in case the consumer exercises his right to withdrawal under the 2011 Consumer Rights Directive or to the exercise of remedies under the 1999 Consumer Sales Directive should be removed. These specific consumer protection instruments apply to *any* purchase, not only those which are covered by the Geoblocking Regulation. Thus, any clarification of who bears the costs for returning products made in *this* specific instrument risks affecting the application of these horizontal consumer protection laws.

On the contrary, the case law of the European Court of Justice has already clarified that the return of goods upon lack of conformity must be without additional costs to the

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<sup>3</sup> For example, according to the e-commerce sector inquiry almost 60% of digital content providers contractually agree with right holders to "geo-block" their services.

Ref.: [http://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_en.pdf](http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf)

<sup>4</sup> C-56/64, C-58/64, *Establissemments Consten and Grundig v. Commission*: "(...) an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objectives of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article 85 (1) is designed to pursue this aim (...)"

consumer<sup>5</sup>. In this context, the Court decided that the costs necessary to bring the product back to conformity to be borne by the trader would include also shipping costs:

*"It is true that the costs of removing goods not in conformity and installing replacement goods are not among those specifically laid down in Article 3(4) of the Directive, which defines **the expression 'free of charge' as referring to 'the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials'**. However, the Court has already held that it follows from the use by the European Union legislature of the adverb 'particularly' that that list is illustrative, not exhaustive (see *Quelle*, paragraph 31). Furthermore, those costs are from this point necessary so that the goods not in conformity can be replaced and are therefore 'necessary costs incurred to bring the goods into conformity' within the meaning of Article 3(4)."*

Thus, any new obligation on the consumer to carry costs in the case of exercising his/her legal guarantee rights would undermine existing well-established consumer rights.

In the case of the exercise of the right of withdrawal under the Consumer Rights Directive, the question of shipping costs has already been dealt with in Article 14: *"The consumer shall only bear the direct cost of returning the goods unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear them."* Thus, there is no need to add further clarifications in this Regulation.

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<sup>5</sup> C-65/09 and C-87/09, *Weber and Putz*



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