

The Consumer Voice in Europe

EUROPEAN COMMISSION'S PROPOSAL TO TACKLE GEO-BLOCKING IN THE EU

BEUC Position Paper



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Why it matters to consumers

Consumers are very often prevented from ordering a product 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 bring prices down.

Summary¹

BEUC welcomes the European Commission's proposal for a regulation on addressing geo-blocking in the Single Market.

The following changes would strengthen the Commission's proposal from a consumer perspective:

- Consumers should be informed upfront in the ordering process **to which countries the trader delivers** and what it would imply for the consumer to organise the delivery on its own taking into account the rules on the **passing of risk** of the Consumer Rights Directive i.e. who is liable if the product get damaged or lost during delivery?
- The principle of non-discrimination of this Regulation should also be extended to **after-sales services** and not be limited to the ordering process. Additionally, **companies should join the EU platform for online dispute resolution** to facilitate the resolution of disputes with consumers located in other member states.
- An **obligation for the universal acceptance of debit cards** should be introduced.
- In order to address geo-blocking practices in the audiovisual sector stemming from contractual restrictions, **Article 6 should also apply to audiovisual services**. This means that contracts between rights holders such as film studios and broadcasters could no longer contain clauses preventing consumers from accessing movies, series or sports events broadcast by foreign channels in the form of the so-called "passive sales".
- Finally, **finances for infringements** of this Regulation should be calculated **on the basis of the company's annual turnover** in order to be proportionate and truly dissuasive.

¹ Our UK member Which? is not a signatory of this paper.

1. General remarks

BEUC welcomes the European Commission's proposal for a regulation addressing geo-blocking and other forms of discrimination based on customer's nationality, place of residence or place of establishment within the internal market².

It is high time to lift restrictions to cross-border shopping stemming, for example, from distribution agreements and/or arbitrary decision of companies to offer different conditions to consumers from other countries.

1.1. Problem definition: Geo-blocking harms consumers and competition in the Single Market

Consumers are exposed to different forms of geo-blocking preventing them to enjoy the benefits of the Single Market. These practices include:

- **Refusal to sell:** This occurs when consumers can access the trader's website but are not able to purchase its products or services because of the country they are buying from, which is identified by means of Internet Protocol (IP) localisation, country of the payment provider or the delivery address.
- **Refusal to provide access:** Consumers are often prevented from accessing the service of a foreign provider due to geo-filtering. This is a common practice for online services providing copyrighted and audiovisual content such as music streaming website or video-on-demand services.
- **Refusal to deliver:** Although a consumer manages to buy from a foreign trader's website the product cannot be delivered to her or his country of residence. This happens regularly in the case of online retailers because of selective distribution agreements. Producers often prohibit retailers to sell their products to consumers living in other markets.
- **Re-routing:** This occurs when consumers try to access the website of a trader in another country but are automatically sent back to their local website offering different products and prices.
- **Price discrimination:** The same trader displays different prices for the same good or service depending on the country of the consumer.

BEUC has identified two main sectors in which geo-blocking is critical for consumers:

- Firstly, the **online sale of goods and online services** (e-commerce). Companies very often refuse to sell to consumers who live in another Member State. According to a recent mystery shopping exercise, between 6 and 8 traders out of 10, depending on the country and region, geo-block foreign customers³. The reasons are, as mentioned above, unilateral company decisions but also exclusive distribution agreements preventing the so-called "passive sales"⁴.

² COM(2016) 289 final

³ Mystery Shopping Survey on Territorial Restrictions and Geo-blocking in the European Digital Single Market, preview of key findings, March 2016, Ref.:

http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/geoblocking-exec-summary_en.pdf

⁴ We define "passive sales" as the possibility for businesses to address requests from consumers located outside their territorial scope of activity within the European Economic Area. For example, by allowing a consumer in Greece to purchase a product from a German retailer even if the retailer is not directing its activities the Greek market.

This is particularly important for small Member States as well as in eastern European economies. For example, our Luxembourgish (*Union Luxembourgeoise des Consommateurs*) and Maltese (*CA Malta*) members confirm that consumers heavily rely on cross-border trade to access goods and services. Only in Luxembourg almost 88% of business-to-consumer transactions taking place with traders located in another Member State⁵.

- Secondly, the **audio-visual sector** is perhaps the area where geo-blocking is most evident. This affects consumers in small and big Member States. For example, according to a survey of our German member *VZBV*, almost three quarters of German consumers would like to be able to subscribe to sports, programmes, TV shows offered somewhere else in Europe⁶.

It is a wide-spread practice of right holders (e.g. film studios) to grant exclusive licenses to distributors (TV broadcasters) on a country-by-country basis and to include clauses in those contracts that prevent them from serving consumers living in another Member State (see point 2.6).

This artificial fragmentation of the EU's single market impedes competition resulting in a reduction of choice and higher domestic prices.

1.2. Policy response

The Single Market has been developed over the last decades by removing obstacles to intra-communitarian trade. The EU Treaty freedoms have played a very important role for the establishment of the Single Market, particularly for companies providing services across the borders.

Consumers on the other hand still face problems when trying to access goods and services from other countries. Although discrimination based on nationality or place of residence is prohibited (article 20(2) Services Directive⁷), it often happens by means of different geo-blocking practices.

For example, discrimination is only prohibited under the Services Directive when it is not justified by objective criteria (which are not sufficiently explained in recital 95 of the Directive). In practice, the broad exemptions applicable to the basic principle enshrined in the Directive have led to its failure: it allows companies to circumvent the intention of the legislator to prevent discrimination based on residence or nationality.

BEUC does not advocate for the imposition of an obligation on companies to actively sell across the borders. However, the freedom of party autonomy should be limited in case it leads to unjustified discrimination. Such discrimination is not compatible with the Treaty objective of the establishment of a well-functioning Single Market.

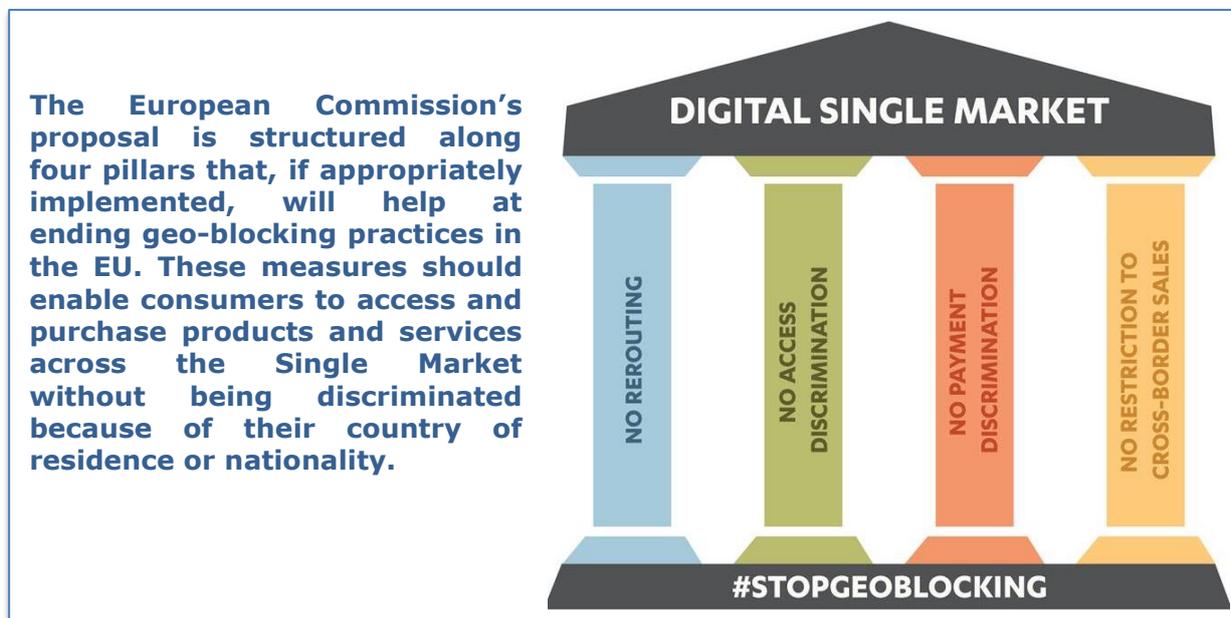
Against this background, BEUC considers that the European Commission has made the right policy choice with the geo-blocking proposal. A strong legal base enshrining the principle of non-discrimination based on nationality or place of residence across all sectors was long-overdue. However, this proposal should be seen as an interim solution. Ultimately all companies shall be able to serve

⁵ STATEC, Institute national de la statistique et des études économiques, February 2016 <http://www.statistiques.public.lu/catalogue-publications/regards/2016/PDF-02-2016.pdf>

⁶ Ref. : http://www.vzbv.de/sites/default/files/digital_content_without_borders_factsheet_vzbv.pdf

⁷ Directive 2006/123 on services in the internal market

consumers across the EU, including the possibility to deliver to all member states.



1.3. What impact on domestic prices?

BEUC does not agree with the assumption by a few business stakeholders that lifting geo-blocking restrictions could lead to a harmonisation of prices in the Single Market and therefore an increase of prices in some domestic markets. On the contrary, addressing geo-blocking as proposed by the European Commission would increase choice and competition in local markets and consequently bring prices down.

Similar measures have been implemented to stimulate cross-border purchases of vehicles⁸ without adverse effects on consumer prices. The evaluation report of Regulation 1400/2002 concerning motor vehicle distribution and servicing came to the conclusion that "vigorous and increasing inter-brand competition has translated into falling real prices against a background of increased market integration at EU level".⁹

Furthermore, according to a technical report of the EU's Joint Research Centre, lifting geo-blocking restrictions would have a positive impact on consumer prices, with a stronger effect on smaller Member States¹⁰.

This is confirmed by the Impact Assessment accompanying the European Commission's proposal. In a number of countries prices are likely to decrease as a result of an

Lifting geo-blocking is good for consumer prices

Consumers could gain up to 500 million euros with prices going down up to 2.9% in some countries due to an increase of competition and choice if geo-blocking is completely tackled in the EU's Single Market.

⁸ Regulation 1400/2002 on the application of Articles 81(3) to categories of vertical agreements and concerted practices in the motor vehicle sector

⁹ See European Commission evaluation report on the operation of Regulation (EC) N° 1400/2002 concerning motor vehicle distribution and servicing, page 11, available at http://ec.europa.eu/competition/sectors/motor_vehicles/documents/evaluation_report_en.pdf

¹⁰ JRC Technical Report, The Economic Impact of Removing Geo-blocking in the EU Digital Single Market, Working Paper 2016/02, p 18 available at <https://ec.europa.eu/jrc/sites/default/files/JRC101100.pdf>

increase of competition. This will be particularly important for markets with limited competition like Eastern European countries or countries where prices are often kept artificially high.

	Full removal		'Shop like a local'	
	Offline	Online	Offline	Online
BE	-0.7	-1.2	-0.7	-0.7
DK	-0.5	-2.2	-0.5	-1.4
FR	-0.6	-0.6	-0.6	-0.3
DE	-0.5	-0.8	-0.5	-0.3
UK	-0.2	-0.2	-0.2	-0.1
IT	-0.7	-1.1	-0.7	-0.6
NL	-0.5	-0.8	-0.5	-0.4
PL	-0.5	-0.6	-0.6	-0.3
SK	-0.5	-2.9	-0.5	-1.9
ES	-0.8	-0.5	-0.8	-0.2

Source: European Commission's Impact Assessment, page 92 – This table compares the impact of prices in a sample of 4 electric goods in two scenarios: first if all geo-blocking is banned in the single market and, secondly, if the consumer are allowed to shop like the locals under the terms of the Commission's proposal.

2. Specific comments

Below we provide comments to the specific provisions of the European Commission's proposal as well as suggestions about how to improve the current text from a consumer perspective.

2.1. Scope of application (Article 1)

The European Commission's proposal follows the scope of application of the Services Directive. Consequently, the Regulation exempts audiovisual services from the geo-blocking rules. BEUC considers that it is a missed opportunity to maintain this exception bearing in mind that consumers suffer from geo-blocking the most in relation to audiovisual content supplied digitally. In this regard, we ask the legislators to apply a part of the Commission's proposal to these services, namely Article 6 (please refer to point 2.6 of this position paper).

2.2. Re-routing (Article 3)

BEUC welcomes that the European Commission addresses the problem of re-routing and blocking of online websites. Re-routing happens when a consumer cannot access the website of a retailer in another country and instead is directed to the webpage of the consumers' country of residence. This has been a common practice in car rental services¹¹.

BEUC considers that re-routing is perhaps one of the most anti-Single Market practices because it limits the possibility for consumers to look for better deals and products outside their national borders. The Single Market is about giving the chance to

¹¹ See European Commission investigation of June 2014 : http://europa.eu/rapid/press-release_IP-14-917_en.htm

consumers to compare and buy products from across 28 Member States and re-routing limits that possibility to just one country.

2.3. Access restrictions and delivery (Article 4)

It is not enough to access the website of foreign traders if consumers cannot purchase the good or access the service they offer. Therefore, BEUC welcomes the approach suggested by the European Commission in article 4: **traders shall not apply different conditions to consumers when purchasing goods or services**. This provision reflects the principle of non-discrimination of Article 20(2) of the Services Directive.

It is important to highlight that **this provision does not impose an obligation to actively sell or to deliver across all Member States. This provision is about treating equally all European consumers.**

The European Commission's proposal clarifies how this principle would apply to three specific scenarios:

- **Sales and delivery of goods:** The Commission's proposal does not impose an obligation on the trader to ship the purchased good into another Member State. This approach makes sense considering that the cross-border delivery market currently does not function well. A smoothly operating delivery market is a pre-condition for a well-functioning Single Market. This is why the European Commission's measures on related areas such as VAT and parcel delivery¹² are so important to boost cross-border e-commerce.

Against this background, it is important to bear in mind that it will be necessary to explain to consumers the practical implications of this Regulation (i.e. the fact that a trader is not obliged to deliver across a border). Therefore, we ask the European Parliament and the Council to look at the following elements:

- o **Consumer information:** According to the Consumer Rights Directive (CRD) consumers have to be informed in advance about any delivery restrictions. This should also comprise information about the possibility to arrange the delivery themselves in compliance with the Geo-blocking Regulation. In practical terms this means that an e-shop should indicate that although the company does not deliver to the consumer's country, he or she has nevertheless the possibility to purchase the product under the same conditions as local customers. Another important element relates to the information on the passing of risk. Article 20 of the CRD indicates that if the consumer arranges the delivery, the risk that the good gets damaged during the delivery passes to him/her. On this point it is important to explain to consumers what would happen if the product gets damaged during the delivery. The European Commission should also

BEUC's demand

Consumers should be informed at the beginning of the ordering process to which countries the retailer delivers in compliance with article 6.1(g) of the Consumer Rights Directive. Additionally, consumers should be explained the consequences of arranging the delivery themselves in relation to the passing of risk

¹² COM(2016) 285 final, European Commission's proposal on cross-border parcel delivery services

consider flanking measures such as information campaigns and a website about the functioning of the Regulation.

- **After-sales services:** BEUC considers that under the principle of 'buy like a local' the trader should treat those consumers that bought products in compliance with this Regulation in the same way as targeted customers. Therefore, the principle of non-discrimination should be extended to after-sales services. Additionally, in case the product brought in compliance with this Regulation turns out to be defective, consumers should be able to exercise the legal guarantee rights in accordance to the applicable law to the contract.

BEUC's demand

The principle of non-discrimination of the Regulation should also be extended to after-sales services and not be limited to the ordering process

- **Online services:** According to the European Commission's proposal consumers cannot be discriminated when purchasing online services as long as it does not involve copyrighted content. Although the proposal would be applicable to services like cloud storage or e-learning, it is regrettable that the main online services consumed online by consumers such as music streaming services and eBooks are exempted from the application of this provision.

BEUC's demand

The European Parliament and the Council should consider the inclusion of services involving the supply of non-audiovisual copyrighted services in the scope of Article 4 of the Regulation.

BEUC encourages the European Parliament and the Council to consider the inclusion of these services into article 4.1(b). It does not meet consumers' interested to wait for two years after the

implementation of the Regulation to assess the extension of the scope to cover non-audiovisual copyrighted services (as foreseen in the draft text).

- **Services to be consumed in the place where the trader operates:** We agree to ban discrimination concerning services that are meant to be consumed in the premises of the trader, in a location where the trader operates or in the consumer's country. It defies logic that consumers who sell concert tickets or want to visit amusement parks have to pay more than others for exactly the same service when there are not additional costs linked to the residence or nationality of the customer. This does not prevent a company to offer discounts and seasonal tickets in some Member States, but these offers should be open to all consumers across the EU wishing to purchase those services in the same conditions as local customers.

2.4. Payment discrimination (Article 5)

Article 5 of the proposed Regulation forbids the application of different conditions of payments based on nationality or country of residence for any sale of goods or provision of services that are done by electronic means.

Although BEUC agrees with the objective of this provision, it would be important to consider that there are electronic payment means that may not be available in all

countries (such as for example national payment systems like iDeal) and therefore this could constitute a material obstacle for the application of this Regulation.

In this regard, it should be possible for foreign consumers to pay purchases bought in compliance with this Regulation in a way that is as easy and convenient as for local customers or consumers targeted by the company. This is a principle that should be incorporated in the text of the Regulation by means of an obligation to accept debit cards in all consumer transactions.

The success of the Digital Single Market is very much dependent on the availability of ubiquitous and widely accepted cost-efficient payment instruments. There is a need to create the equivalent of cash for internet payments, in line with the idea of legal tender. Debit cards should be the legal tender payment instrument for internet as opposed to more expensive credit cards. That does not prevent the existence of less expensive payment instruments such as those based on credit transfers.

BEUC's demand

Introduce an obligation for the universal acceptance of debit cards as a means to facilitate the transactions concluded in compliance with this Regulation.

Finally, the European Commission's text is not clear enough as to the additional charges that the trader is allowed to apply to consumers for the use of certain means of payments. The new Payment Services Directive 2 in Article 62(5) indicates that member states have the option to apply a full ban on surcharges and this should be reflected in Article 5.2 of the proposal.

2.5. Restrictions to cross-border passive sales (Article 6)

BEUC welcomes the introduction of a rule declaring void any contractual clause that restricts the ability of companies to serve unsolicited requests of consumers. 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 consumers¹³ and could jeopardise the effectiveness of this Regulation and of the realisation of the Single Market, as confirmed by case law of the Court of Justice of the European Union¹⁴.

BEUC's demand

Extend the application of Article 6 to audiovisual services in order to declare void clauses in licensing agreements between rights holders and distributors preventing consumers from other member states to access audiovisual services in the form of passive sales.

Although BEUC fully agrees with the inclusion of article 6 in the geo-blocking Regulation, we consider that the scope of application of this provision should not be limited to the scope of the Services Directive. In this regard, BEUC asks for an extension of this provision to cover audiovisual services:

¹³ For example, the preliminary results of the e-commerce sector inquiry shows that 12% of retailers report contractual restrictions to sell cross-border for at least one product category they offer and 59% do the same for digital content products Ref.: http://europa.eu/rapid/press-release_IP-16-922_en.htm

¹⁴ C-56/64, C-58/64, *Establisements 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 (...)" (page 339)

- The **main reason for geo-blocking of audiovisual content is found in contractual agreements** between rights holders and distributors. The European Commission's initial findings of the e-commerce sector enquiry reveals that **6 out of 10 agreements require digital content service providers to geo-block consumers**¹⁵.
- **Clauses restricting cross-border access to audiovisual services** in the form of passive sales **have already been considered anticompetitive** and therefore unjustified under the treaties by the Court of Justice of the European Union in relation to the satellite distribution of sport events¹⁶.
- The extension of the scope of Article 6 to the audiovisual sector will **complement the copyright review** (presented on 14 September 2017), in which the Commission proposed solutions to facilitate the clearance of rights for the cross-border broadcasting of audiovisual content¹⁷. BEUC is supporting the Commission's plan to extend the country of origin model of satellite distribution of the Satellite and Cable Directive to the distribution of films, series and sport events online¹⁸. However, because this will only help the clearance of rights but will not solve the problem of geo-blocking itself it is necessary to also solve contractual restrictions to cross-border access. This is what we propose doing with extending the scope of this Regulation.

2.6. Monitoring and enforcement (Article 7 and 10)

BEUC supports the inclusion of the Geo-blocking Regulation into the scope of the Consumer Protection Cooperation network¹⁹ and the Injunctions Directive²⁰.

A key element for the success of this regulation is its effective monitoring and enforcement. The Services Directive does not provide for specific sanctions in case of discrimination and it does not allocate the enforcement of Article 20(2) to any European or national competent authority. This is one of the reasons that the principle of non-discrimination was not respected in practice.

BEUC's demand

Fines for infringements of this Regulation should be calculated on the basis of the company's annual turnover.

The European Commission's proposal obliges Member States to adopt effective, proportionate and dissuasive penalties. In this regard, BEUC recommends that such penalties should follow the system

applicable to competition law infringements, which are based on a percentage of the companies' turnover²¹. This is the only way to ensure that the sanctions will be effective.

¹⁵ SWD(2016) 70final, paragraph 159

¹⁶ C-403/08 and C-249/08, *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*

¹⁷ COM(2016)594, European Commission's proposal for a Regulation on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes

¹⁸ Refer to BEUC's response to the public consultation on the revision of the Satellite and Cable Directive, available at http://www.beuc.eu/publications/beuc-x-2015-116_are_beuc_response_satcab_consultation.pdf

¹⁹ COM(2016) 283, European Commission proposal on cooperation between national authorities responsible for the enforcement of consumer protection laws

²⁰ Directive 98/27/EC on injunctions for the protection of consumers' interests

²¹ Article 23(2) of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 [101] and 82 [102] of the Treaty [Treaty of Functioning of the European Union]

2.7. Assistance to consumers (Article 8)

BEUC supports the appointment of contact points for consumers in all Member States in case problems arise between consumers and traders as a result of the application of this regulation. Additionally, it is important to encourage companies to join the Online Dispute Regulation platform, which should also be competent to solve cross-border disputes with consumers who have bought products from retailers in other member states.

2.8. What applicable law to the B2C transaction under the Geo-blocking Regulation? (Article 1.5)

The European Commission's proposal aims at clarifying that compliance with this Regulation by traders selling to consumers does not trigger the application of Article 6.2 of Rome I Regulation²². In other words, consumers purchasing from traders based in another Member

BEUC's demand

Clarify in a recital that compliance with the geo-blocking Regulation by traders does not necessarily imply that they are targeting the consumer's country of habitual residence in the sense of Article 6(2) of Rome I Regulation.

State – and which do not target the consumer's country of habitual residence – cannot rely on the level of protection granted by their national laws.

This interpretation of Article 6(2) of Rome I Regulation by the European Commission seems to be accurate since traders selling to consumers in compliance with the Geo-blocking Regulation would not be directing their activities towards the consumer's country of habitual residence. This is a pre-condition for the application of Article 6(2) of Rome I Regulation therefore traders shall not fear that consumers could eventually invoke a higher level of protection than the one provided in the applicable law chosen by the trader for its transactions with consumers.

Therefore, in principle it should not be necessary to state in the Regulation that Article 6(2) of Rome I Regulation would not apply (because there is no targeted activity by the trader to the consumer's country of habitual residence in any case). However, if traders want to get reassurance that compliance with this Regulation does not lead to a direction of activities to the consumer's country, this could be clarified in the recitals of the regulation and not in the text of the regulation itself.

END

²² Regulation 593/2008 on the law applicable to contractual obligations



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