

ANNEX DOCUMENT

DIGITALEUROPE's response to the public consultation on geoblocking and other geographical restrictions when shopping and accessing information across the European Union.

Brussels, 14 December 2015

DIGITALEUROPE welcomes the ambition to establish a true Digital Single Market, which is key to the creation of job and economic growth in Europe. We support the objective of the Digital Single Market Strategy to unlock the potential of eCommerce as well as to ensure a better online access to goods and services across Europe. Consumer and businesses' willingness and confidence to engage in cross-border activities is therefore a critical element of the success of the Strategy. It is thus essential to ensure that rules inspire confidence to European citizens as well as provide legal certainty to businesses.

General remarks:

The European Commission announced its intention to put an end to “unjustified” geoblocking in the Digital Single Market Strategy Communication. DIGITALEUROPE welcomes the opportunity to contribute to the public consultation on geoblocking and other geographical restrictions when shopping and accessing information across the European Union, as we understand that such an exercise aims at getting a better understanding of current practices and determining to which extent they could constitute obstacles in the Single Market.

We however regret that the distinction between “justified” and “unjustified” geoblocking, as well as the specific problem that the European Commission would like to address remain unclear.

We also regret the phrasing of many questions of the consultation and the listing of assumed practices of businesses out of context and in isolation from each other, for which we see a degree of bias that could result in misleading answers from the respondents.

Practical, regulatory, and legal barriers that need to be overcome:

The decision to engage in cross-border activities and therefore to give consumers access to goods and services across Europe is based on several objective criteria, one of them being the legal requirements companies must comply with when doing so. Today, the European Union presents difficulties for large and small online providers that seek to trade across Member State borders, due to cultural and

linguistic variations, technical but also legal variations. The current degree of completion of the EU internal market justifies trading online in a targeted, differentiated way. Indeed companies that want to trade across Member States' borders still face legal fragmentation, requiring them to navigate diverging national rules. This fragmentation raises uncertainty and costs for companies willing to sell abroad. For instance:

- Companies that want to sell cross-border have to comply with local regulatory requirements in relation to information obligations, in particular concerning the language on the package, listing materials used in the product and its package, product standards marks applied to the device and/or its packaging, user guides and manuals (incl. format), warranty information and consumer rights obligations, safety information, content, language of the invoice and / or the delivery note and after-sale services. This compliance element is particularly burdensome in case of country specific regulations imposing additional requirements (such as SAR values on mobile devices in France).
- Because a sale into a Member State can trigger the applicability of that Member State's laws (under the Rome I Regulation), companies will not simply "set up and sell" to any consumer in the EU, as they risk being faced with unfamiliar or even potentially contradictory legal landscapes – including different levels of consumer rights.
- The recently implemented new VAT "place of supply" rules that apply to cross-border digital services, as a substitution to the country of origin principle, have dramatically increased the administrative burden associated with cross-border eCommerce.
- The protection of copyright is territorial, with the application of exceptions and limitations varying from one Member State to another. Private copying and levies on electronic devices is a good example where, in order to avoid double payments, online retailers refuse to sell and deliver electronic devices in countries where levies are charged¹: in particular PC exemptions.
- Technical and after-sales requirements as well as different standards further increase burdens on cross-border sales, for example:
 - SAR values in France
 - The type of plugs used across Europe varies greatly.
 - Broadcasting standards are different between EU countries and, therefore, TV sets and video recorders may differ, and not all features be available, across Europe according to the local requirements for technologies and specifications. These are typically:

¹ See also relevant CJEU jurisprudence such as *Austro Mechana vs. Amazon*, C-521/11

- Compression systems: Audio Codecs, Video Codecs.
 - Reception systems: Tuner hardware (S/S2, T/T2, C. Analogue).
 - HbbTV vs. MHEG (UK), MHP (Italy).
 - Requirement for after-sales service networks at local level.
- Cross-border sales also make management of stock more complex: Using the example of a customer residing in one Member State, buying products from an online website in a second Member State for delivery to a third country, there are great complexities for stock keeping unit (SKU) management and website design to ensure that the transaction process and product itself are legally compliant in each market. Having to create order management systems and software logics that (i) recognise which laws and regulations should apply and (ii) identify which product SKU to ship, would be extremely time consuming and expensive. Similarly, current order management systems do not provide adequate support for the management of large volumes of local parts across multiple countries. A mandatory cross-border system would therefore imply imposing additional financial burdens in particular on local online retailers that already face considerable financial implication when launching their online businesses.
 - Companies that want to trade cross-border also often face high delivery costs, which they have no control over. As mentioned in the Digital Single Market Strategy Communication, 62% of the companies that currently do not sell online but are willing to do so mention the high cost of delivery as an obstacle.

Business reality and strategy:

We would like to stress that the decision to target certain national markets and propose local offers is a matter of companies' business strategy (and commercial success), based on different market conditions such as local consumer demand, preferences and purchasing power. Service and product adaptation, for instance, is key to meet local demand and expectations. As a matter of commercial success and consumer satisfaction, it is essential that given products are targeted to a specific set of consumers. To give another example, keyboards are customised depending on the targeted market (Laptops could be QWERTY or AZERTY).

Geoblocking as a consequence of existing fragmentation, not as its source:

DIGITALEUROPE believes that there are objective factors that companies take into account when deciding to engage in cross-border sales and/or propose differentiated offers. The various business strategies (to sell or not to sell cross-border) are resulting from today's highly fragmented

environment in Europe – as described above. Geoblocking should therefore be understood as the consequence of this fragmentation, not the source.

Therefore, we would like to stress that contractual freedom must be preserved. One should not deviate into a default obligation to sell everything, everywhere. The application of “geo-differentiation” between consumers can be fully justified when based on the need for companies 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. As stated by the European Commission in its Staff Working Document² 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”. Businesses should be free to determine based on their own cost-benefit assessment whether it makes commercial sense to enter a given geographic market. Obliging 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.

Existing regulatory and legal framework:

Finally, DIGITALEUROPE believes that the implementation and enforcement of existing EU rules is of the utmost importance. We would therefore strongly encourage the European Commission to take stock of the rules that already apply before rushing in any legislation action. To mention a few:

- Pursuant to Article 20 (2) of the Services Directive, Member States shall ensure that the general conditions of access to a service made available do not discriminate on the grounds of nationality or place of residence. However, applying differences in the conditions of access remain possible where those differences are justified by objective criteria.
- Pursuant to Article 8(3) of the Consumer Rights Directive, online traders shall inform consumers on their website, in a clear and legible way at the latest at the beginning of the order process, indications about delivery restrictions and accepted means of payment.
- Pursuant to Article 101 and 102 of the Treaty on the Functioning of the European Union, agreements between undertakings, decisions by associations of undertakings and concerted

² European Commission, SWD(2012) 146 final, with a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market, p.13

practices that negatively affect competition, as well as abusive dominant positions are prohibited.

Conclusion:

New legislation should only complement EU existing rules where necessary, in order to avoid putting additional burden on companies that make it difficult for them, especially SMEs, to sell abroad. We welcome the objective set up in the Digital Single Market Strategy to “unlock the potential of eCommerce” by simplifying the rules for both consumers and companies. We therefore urge the European Commission, in the spirit of the Better Regulation, to ensure that there is an actual simplification of the current legislation before any new legislation is proposed, a REFIT exercise would be welcome.

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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 59 corporate members and 35 national trade associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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