

# Position Paper

## UEAPME<sup>1</sup> position paper on Geo-blocking

### Executive Summary

Online traders must have freedom of contracts as all traders do. There are many objectively justified reasons for a cross-border sale to be blocked, not necessarily of legal nature, such as very high compliance costs, copyright, or even non-viable or feasible business models. It therefore appears necessary to maintain the enterprises' freedom to make the choice to distribute where they wish to do so. If harmonisation of laws in Europe should allow the lift of certain barriers hindering enterprises in their conquest of new cross-border markets, some blocking results from certain legal obligations or the cost of work should not be forgotten. Overall, UEAPME is against regulating geo-blocking because this would restrict contractual freedom of businesses.

### Preliminary Remarks

UEAPME welcomes the fact that the Commission finally applied the 12 weeks consultation rule in the correct way, namely that it only started when all language versions were available.

However, UEAPME cannot accept the compulsory use of the questionnaire by stakeholders. Questionnaires do not provide the means to take into account the manner in which position papers are drafted and agreed upon in intermediary organisations such as SME organisations. In addition, most of the questions are biased as they already contain a certain position on the different topics mentioned. This is even explicitly admitted as the introduction to the open consultation states that "*The views expressed in this public consultation may not be interpreted as stating an official position of the European Commission.*" The results of such questionnaires can consequently not be considered as relevant and representative.

UEAPME is also surprised that the Commission has already announced legislative proposals on geo-blocking. So far we have not seen any comprehensive report concerning unjustified geo-blocking and real needs for a new legislative proposal. The data and surveys mentioned in the Commission Staff Working Document (SWD (2015)100 final)<sup>2</sup> are certainly not convincing. Consequently the Commission is not acting in accordance with its own Better Regulation Package<sup>3</sup> principles which should ensure that measures are evidence-based and explain why the initiative is needed. In addition legislation already in force should be properly evaluated, to see whether existing tools could be used to do the job – before considering new initiatives.

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<sup>1</sup> UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

<sup>2</sup> A Digital Single Market Strategy for Europe – Analysis and Evidence. Commission Staff Working Document. SWD (2015) 100 final, 6.5.2015, pages 21-24.

<sup>3</sup> Better regulation for better results - An EU agenda, COM (2015) 215 final, 19.5.2015.

## Opinion on Geo-blocking

UEAPME stated already in its position paper concerning the Digital Single Market Strategy<sup>4</sup>, that the main rule should definitely be that online traders must have the same freedom of contracts as all traders have. Residence based restrictions should be allowed if reasonable and justified grounds for geo-blocking exist.

In addition it should be kept in mind that in accordance with the Services Directive (2006/123/EC) article 20, general conditions of access to a service shall not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria. Taking into account the Service Directive, it could be more reasonable to improve monitoring and where necessary enforcing of the Service Directive than to enact a completely new regulation. As stated above, this is also what the Better Regulation Agenda of the Commission recommends. Moreover, so far, we have not seen any comprehensive report concerning unjustified geo-blocking and real needs for a new binding regulation. Overall, the Commission should firstly estimate carefully how widespread and extensive the so-called problem of unjustified geo-blocking actually is.

However, in principle, we accept the idea behind this initiative. Preventing and prohibiting geo-blocking based on unjustified or unreasonable practices is justifiable and beneficial both for consumers and traders. It is certainly true that limiting consumer opportunities and choice, based on unjustified geo-blocking, can cause consumer dissatisfaction and fragmentation of the internal market. As a general principle, buyers should be able to purchase and access services from everywhere in the EU and have de facto chances to take full advantage of the single market.

Nevertheless, there exist many objectively justified reasons for a cross-border sale to be blocked, not necessarily of legal nature, such as the very high compliance costs, copyright, or even non-viable or feasible business models. Other reasons could be local regulation in the field of youth protection. Therefore, it appears necessary to maintain the possibility for companies to make the choice to distribute where they wish to. Any regulation should create an appropriate legal framework for digital business but not hinder it. Thus, it might be necessary to highlight, once again, the argument that the question on the transferability of legally acquired contents should be in most cases solved on a market-conform basis. Hence, geo-blocking should be allowed if reasonable and justified grounds for geo-blocking exist. In addition, it should be kept in mind that banning of geo-blocking may also raise several potentially regulatory questions and problems related, for example, to the IP rights and distribution agreements.

Furthermore, concerning the specific measures mentioned in the questionnaire, we would like to point out a few relevant issues. Firstly, the proposal concerning the list of specific rules and reasons that may never justify geo-blocking, is not necessary and over-simplifies the problem as the reasons for geo-blocking are often a combination of different reasons. Moreover, we have even stronger doubts about the proposal concerning the binding rules prohibiting traders to refuse cross-border download of digital products or rules requiring traders to accept cross-border transactions from users/consumers from throughout the EU and to provide delivery cross-border inside the EU. Instead of enacting so called "black lists" or binding obligations related to the transactions and delivery, the Commission should concentrate on defining more clearly the unjustified reasons behind the geo-blocking. – Regarding the black lists related to the forbidden restrictions or technical details, we do not see it as relevant or necessary.

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<sup>4</sup> See: [http://www.ueapme.com/IMG/pdf/UEAPME\\_position\\_on\\_Digital\\_Single\\_Market\\_Strategy.pdf](http://www.ueapme.com/IMG/pdf/UEAPME_position_on_Digital_Single_Market_Strategy.pdf)

Regarding the question of when such a regulation should come into effect, the fact that it is the trader's voluntarily made business decision to decide whether to run business and deliver products just in one country, several EU countries or throughout the EU, is far more relevant. It is the trader, not the legislator, who has the best knowledge and responsibility to make a decision as to whether it is reasonable, desirable, profitable and cost-effective to do business and deliver throughout the EU, or not.

As a conclusion, restrictions of contractual freedom and forcing traders to provide services and goods throughout the EU is not what is needed. Current regulation already prohibits unjustified discriminations on the basis of residence or nationality. Instead of enacting more sector-specific rules, the Commission should improve enforcement and monitoring of current regulation and boost good practices. In any event, if the Commission is planning to propose new regulations concerning geo-blocking, instead of a list of forbidden restrictions, the starting point could be to promote transparency between the trader and buyer. Without making it an obligation, the traders could be encouraged to explain upon buyer's request objective and verifiable reasons why they treat customers differently based on their residence. The harmonisation of copyright and data protection legislations remains an important policy instrument to intervene at EU level.

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