

Ecommerce Europe

How to ensure online merchants' right to economic and contractual freedom in the debate on geo-blocking practices

February 2016

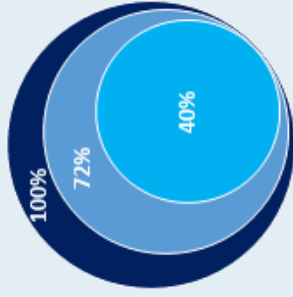


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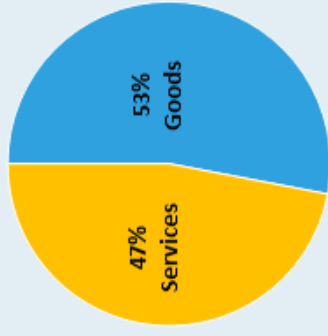


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817 million people live in Europe
491 million* people use the Internet
274 million* people are e-shoppers
 *excluding people aged 0-14

Forecast 2015
€477 bn Turnover E-commerce Goods & Services



Average spending per e-shopper



Europe €423.0 bn 13.6%
EU28 €368.8 bn 13.4%
2.5% eGDP €17.1 trn GDP 2014



2,475,000+ jobs directly or indirectly via E-commerce

715,000+ estimated online businesses

4 billion+ number of parcels annually (f)

UK, Germany, France account for 61% of total E-commerce sales in Europe

Top 5 mature E-commerce countries in turnover (billion)
 UK €127,200
 Germany €71,200
 France €56,800
 Netherlands €13,961
 Switzerland €12,717



Top emerging countries
 Russia €19,947
 Spain €16,900
 Italy €13,278
 Poland €6,541



Estimated share of online goods in total retail of goods



"457 million social media users"

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ECOMMERCE EUROPE

ECOMMERCE EUROPE'S RECOMMENDATIONS IN THE DEBATE ON 'GEO-BLOCKING' PRACTICES

Ecommerce Europe is the association representing 25,000+ companies selling goods and/or services online to consumers in Europe. Founded by leading national e-commerce associations, Ecommerce Europe is the voice of the e-commerce sector in Europe. Its mission is to stimulate cross-border e-commerce through lobbying for better or desired policy, by offering a European platform bringing the European e-commerce sector and other stakeholders together, and by providing in-depth research data about European markets. Moreover, Ecommerce Europe provides more than 10,000 certified online companies across Europe with a European Trustmark label, with the aim of increasing consumers' trust in cross-border purchases.

The rise of the on-demand economy has been astounding. Technology and, in particular, mobile technology have triggered a shift in the way we shop and live, causing the offline and online worlds to merge. Ecommerce Europe acknowledges and welcomes the fact that the modern consumer wants to shop anywhere and at any time and this is clear from the fact that almost all growth in retail stems from e-commerce.

Indeed, online merchants would be very pleased to sell to everyone and everywhere in the European Union, but there are many reasonable explanations why this is not always possible. Therefore, the European e-commerce industry asks European legislators

to endorse and support online merchants' right to economic and contractual freedom in the debate on geo-blocking practices.

European policy makers should acknowledge the fact that consumer differentiation and discrimination - based on the location of the consumer - are two distinctly different phenomena. In this newly published position paper, Ecommerce Europe explains how the debate on geo-blocking should be framed and how to deal with this practice. Ecommerce Europe will remain at the disposal of European and national institutions for any further clarification on the content of this position paper.

1. ENDORSE AND SUPPORT ONLINE MERCHANTS' RIGHT TO ECONOMIC AND CONTRACTUAL FREEDOM IN THE GEO-BLOCKING DEBATE

In principle, Ecommerce Europe believes that consumers buying products and/or services online should not be subject to restrictive business practices when there are no grounds for the seller to do so. Nevertheless, online merchants shall rely on their fundamental rights to economic and contractual freedom and freedom of entrepreneurial activity based on reasonable grounds. This also means that an individual company may decide not to sell or deliver to a consumer in another Member State or apply a different price for the same tangible good/service/digital content sold online.

This must be qualified as differentiation - and not discrimination - based on the place of residence/location of the consumer and can be

justified under so-called "objective criteria" of Article 20.2 of the Services Directive¹ (see page 6 for examples of objective criteria i.e. EU legal fragmentation, high delivery costs, etc.).

Therefore, European legislators must carefully assess if imposing online merchants an obligation to sell to every EU consumer - with a right not to deliver everywhere - would be an opportune solution. In any case, imposing an obligation to deliver everywhere would not be acceptable for the e-commerce industry. A more in depth analysis of this issue can be found in chapter 3.1, pages 7-8.

Policy makers should also take into account the freedom of the merchant to set prices based on the location of the consumer. This principle can be applied in both cross-border and domestic sales. For instance, online merchants should be allowed to set a lower price for a certain good and/or service in certain countries/areas in order to be able to enter that market. Also, costs of living and work can vary widely from country to country, and this can influence the final price of the product.

Ecommerce Europe believes that this phenomenon should also be qualified as price differentiation and not as discrimination, provided that the merchant is acting on legal and reasonable grounds. That is why Ecommerce Europe is also against any rules aimed at imposing price controls.

2. THEN HOW SHOULD GEO-BLOCKING BE DEFINED AND HOW TO DEAL WITH IT?

The European Commission is expected to make a legislative proposal to tackle unjustified geo-blocking in May 2016. Nevertheless, Ecommerce Europe believes that unjustified geo-blocking could also be tackled by better enforcement and clarification of already existing legislation, in particular, Article 20.2 of the Services Directive (the principle of non-discrimination).

If the European legislators decide to propose a new law, first of all it is essential that European policy makers define "geo-blocking" in an appropriate way before creating any new legislation, if there is a need to create it. Any new legislation should focus primarily on geo-blocking *stricto sensu* (in the strict sense) - as framed by Ecommerce Europe in chapter 2.1. Ecommerce Europe asks the European Commission to be cautious when drafting its legislative proposal to tackle 'geo-blocking' to ensure that only unjustified practices will be forbidden.

2.1 Practices that should be considered as geo-blocking *stricto sensu*

Ecommerce Europe distinguishes between two main kinds of geo-blocking *stricto sensu*, namely when a consumer is denied to access an online shop based on his or her location and in the case of forced rerouting without any choice for the consumer to go back to the website he or she prefers.

¹ Directive 2006/123/EC

a. Blocking access to an online shop based on the location of the consumer

Ecommerce Europe considers that totally blocking the access to a web shop to a consumer - based on his or her location - might be problematic, considering also the increasing demand for transparency and choice of products among consumers. Although Ecommerce Europe is not really aware of online merchants totally denying access to their website in relation to the residence/location of the consumer, the European e-commerce association believes that - except for legal access restrictions such as minimum age for alcoholic beverages or content that is harmful for minors - consumers should always have access to and be able to surf the website wherever they are based, even if they are not able to complete an order or the trader has restricted its sales and deliveries to certain territories.

In principle, Ecommerce Europe considers that totally blocking the access to a website to a consumer - based on his or her location - is an unjustified practice, unless the trader has legal grounds to do so as, for instance, in the cases mentioned above.

b. Forced rerouting without any choice for the consumer to go back to the website he or she prefers

In the view of Ecommerce Europe, rerouting with choice for consumers to go back to the initial website should not be seen as geo-blocking in the strict sense (see point 2.2.b) and - therefore - not always prohibited. However, forced rerouting without any choice for the consumer to go back to the website he or she prefers is - in principle - an unjustified

practice, leading to the same effects of totally blocking the access to a website based on the consumer's location. The same remarks made for the practice of blocking access to a website apply, which means that the trader must have legal grounds in order to reroute a consumer without giving him or her any choice to go back.

2.2 Practices that should not be considered as geo-blocking *stricto sensu*

Ecommerce Europe distinguishes between two cases that should not be considered geo-blocking in the strict sense, namely when the online trader allows access to its website but does not sell/deliver to the consumer or applies different prices based on the consumer's location and when the consumer is rerouted to another website - based on his or her location - with the option of going back to the website he or she initially chose.

a. Allowing access to the online shop but not selling to the consumer or applying different prices based on his or her location

Ecommerce Europe believes that differentiation in price, terms and conditions for the online sale of the same tangible good/service/digital content - based on the location of the consumer - should be allowed if there is an objective reason for the online merchant to do so. As already anticipated above, it is crucial that online shops can rely on their right to economic and contractual freedom and freedom of entrepreneurial activity based upon grounded reasons.

Currently, many legal and non-legal barriers to cross-border e-commerce still persist, therefore European policy makers should acknowledge the fact that online retailers can

decide to limit the markets where they want to expand and sell/deliver or apply different prices. The choice of not selling or applying different price policies should, however, be supported by objective reasons.

Ecommerce Europe has gathered some examples of the most important barriers that represent objective reasons for the web shop to apply different prices/decide not to sell:

- **Delivery: long distances, lack of options** can lead to higher costs for an online shop, choice not to sell everywhere in the EU.
- **Language differences across the EU** (i.e. translation costs for the website, sales and after-sales services in different languages).
- **Legal fragmentation** in consumer protection laws and legal guarantees, privacy, copyright, etc. across the EU raise legal uncertainty for both consumers and businesses.
- **Selective distribution:** manufacturers (and not online merchants) prohibiting the good to be sold everywhere in Europe or at the same conditions.
- **Differing consumer's acquisition costs** across Europe.
- **Differing after-sales service costs** across different regions in Europe (i.e. the situation where a trader does not want to sell goods to a consumer in a specific country because he cannot repair the goods in that country if the goods is found to be defective, and it is too expensive to have it sent back and forth).
- **VAT:** complicated registration and declaration rules, different VAT rates, differing accounting and administrative costs.

- **Different IT systems** depending on the country where it is used, i.e. because of historical or technical reasons.
- **Differing payment methods** because of different card fees and localization.
- **High fraud risks for online payments:** online merchants should be able to protect themselves from fraud by being able to refuse certain payment cards, i.e. cards issued in a different country than the consumer's IP address in order to fight online fraud in a legitimate and proportionate manner and credit cards not providing adequate security for online payments.

b. Rerouting with choice to go back to the website initially chosen by the consumer

Online merchants mostly reroute to the benefit of consumers, in order to facilitate their shopping experience. Rerouting is normally not meant to deprive consumers of the choice of purchasing on the site where they surfed initially as, in practice, most of the websites give consumers the opportunity to go back and therefore they do not use forced rerouting.

There can be many objective reasons in support of this practice, for instance, redirecting the consumer towards a website where they can effectively buy a tangible good/service/digital content that cannot be sold and delivered by the original website. Ecommerce Europe considers that rerouting with a choice for consumers to go back to their preferred website should not be considered a discriminatory practice as such and - for this reason - not always forbidden, provided that the consumer has the option to go back to the website of his or her choice. Rerouting is a

practice normally used by the trader to provide the consumer with a better, tailor-made shopping experience, for instance, in their own language and currency, adapted to the local conditions of customer services and delivery. Rerouting also allows traders to adapt and customize the services/goods delivered to the local legal, taxation, technical and labeling requirements of the market of the consumer.

In the view of Ecommerce Europe, online merchants should give clear, easily accessible, reliable and transparent information on the page where the consumer initially lands concerning the geographical restrictions for contracting and delivering to the country where the consumer is located. A “back button” should also allow the consumer to go back to the initial website, where the consumer should, in principle, be able to complete a purchase when he or she provides a delivery address geographically covered by the web shop. Ecommerce Europe warns policy makers not to restrict this practice and to give web shops some flexibility because the objective reasons behind rerouting can vary according to market and consumer trends and are mostly meant to benefit the consumer.

3. IMPORTANT RECOMMENDATIONS FOR EUROPEAN POLICY MAKERS

3.1 Be cautious when assessing whether or not to impose an eventual obligation for online merchants to sell to everyone in the European Union

In the policy option mapping proposed in the Inception Impact Assessment on geo-blocking published by the Commission in December

2015², Ecommerce Europe understands that one of the possible policy options would be to force online merchants to sell to everyone in the EU, but with the right for the trader not to deliver everywhere. Even though Ecommerce Europe does not consider imposing merchants an obligation to sell as an opportune solution, it might be acceptable but only if it is balanced by a right for the trader not to deliver everywhere in the EU.

European policy makers should pay careful attention to the effects that this obligation would have. Ecommerce Europe would see only one way for this option to work (hypothetically). In practice, an online merchant could be obliged to sell to every consumer in the EU, provided that the consumer accepts having the product delivered within the geographical area covered by the online trader. The latter should inform the consumer on time and in a transparent way about the delivery. In general, Ecommerce Europe believes that this solution may increase confusion with regards to different consumer protection rules and the practical application of the Rome I Regulation³.

In order for this solution to work, Ecommerce Europe suggests that the place of delivery (i.e. pick-up point in the trader’s country) should be considered as the place of reference for consumer protection rules, product safety requirements, etc. Therefore, there should be a possibility for the Rome I Regulation to be applicable to the place where the product is actually delivered, not being the country of

² http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_cnect_002_geo-blocking_en.pdf

³ Regulation 593/2008/EC

residence of the consumer. Ecommerce Europe asks EU legislators for guidance and clarification of the Rome I Regulation in this regard, in order to avoid confusion and legal uncertainty. In any case, Ecommerce Europe considers that forcing online merchants to deliver everywhere in the European Union would be a disproportionate, nonsensical and unreasonable option.

3.2 Support the creation of guidelines for online merchants

Ecommerce Europe asks European legislators to create guidelines of practices where totally blocking access to a website, rerouting the consumer to another website or restricting delivery to certain geographical areas are always allowed and justified. This would increase legal certainty for online merchants. Ecommerce Europe strongly recommends European legislators to consult the industry when drafting the guidelines, to ensure that the concerns of the e-commerce sector will be taken into account. However, these guidelines should not be considered exhaustive because, given the speed with which the e-commerce sector is evolving, they will require regular updating in collaboration with relevant stakeholders.

3.3 Ensure transparency towards consumers

Ecommerce Europe is convinced that consumers buying online are not interested in reading long texts on the page where they initially land explaining why they cannot complete an order on a certain website. What they want is to be aware of geographical restrictions before starting the ordering process and not at the very last stages, for instance,

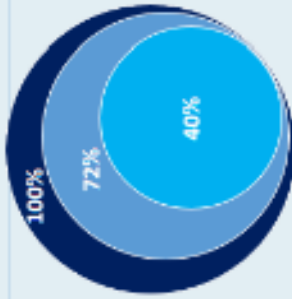
during the check-out process, which could indeed be frustrating for them. Ecommerce Europe considers that the online merchant should always be transparent towards the consumer when the sales are geographically restricted, but this should not be translated into an excessive administrative burden for online traders and into an information overload for the consumer.

3.4 Take into account future innovation and technology

For a matter of clarity, Ecommerce Europe structured this position paper by simply referring to “access to a website”. However, any new legislation based on “access to a website” may not be fit for modern business, as it might not cover, for instance, innovative solutions, mobile or desktop apps. Therefore, the European Commission should be very careful when drafting its proposal to avoid a situation where different access methods to an online shop would be regulated in different ways. For this reason, Ecommerce Europe recommends that any new legislation should be “technologically neutral”, which means fit for the future and taking into account potential innovations in the e-commerce sector.

Ecommerce Europe Association Data at a Glance 2015

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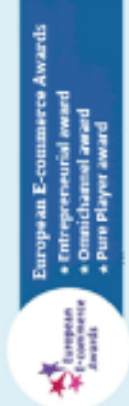


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Our mission:
 To unlock the potential of cross-border e-commerce in Europe



June 6-8 2016
 Barcelona



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Global Online Measurement Standard B2C E-Commerce

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