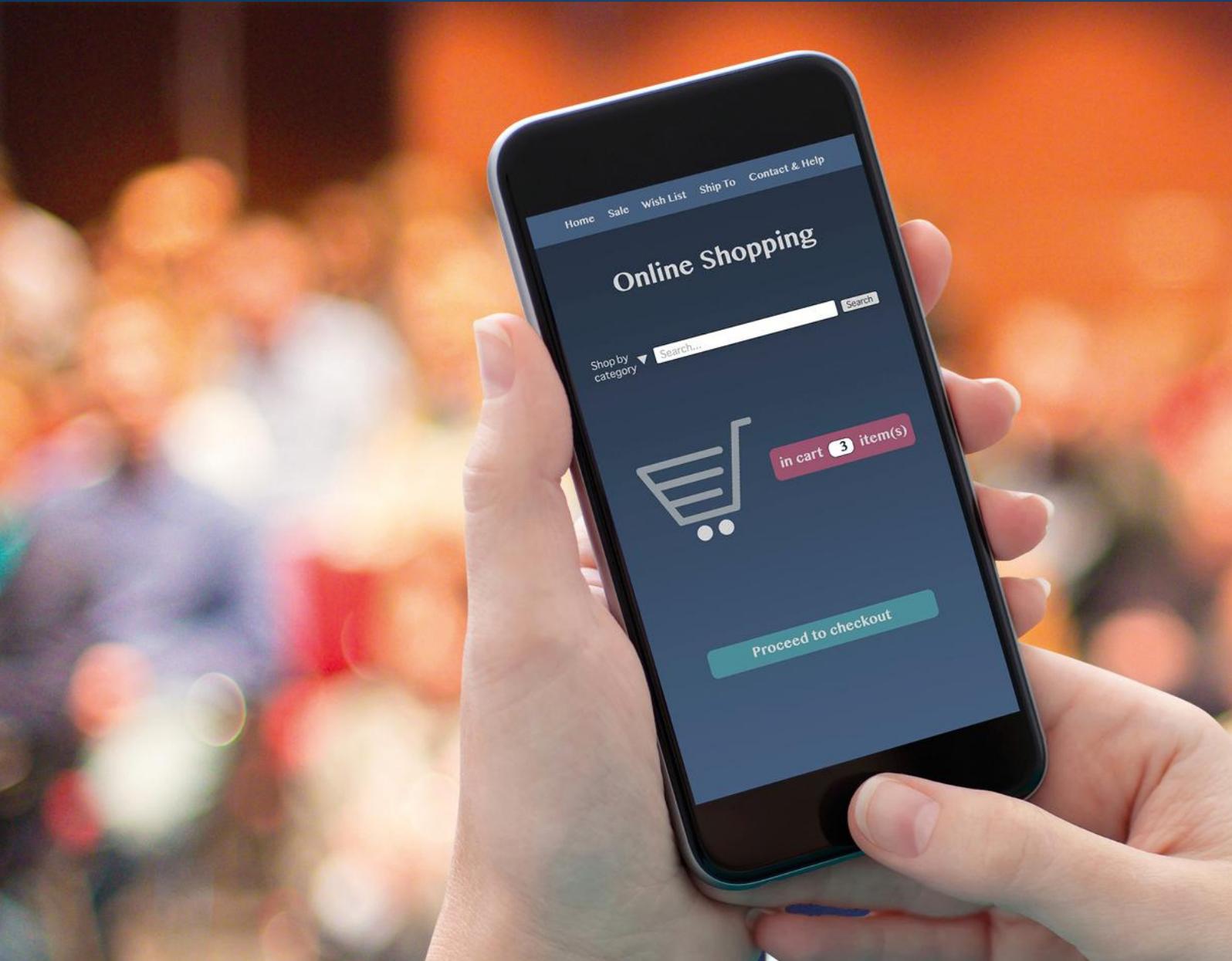


# ECOMMERCE EUROPE POSITION PAPER

## Geo-Blocking

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

March 2017



## Introduction: Overall perspective on the Geo-blocking Proposal

Ecommerce Europe is the voice of the e-commerce sector in Europe. Through its 19 national associations, Ecommerce Europe represents over 25,000 online shops across Europe. Its mission: boost the e-commerce industry by helping decision makers shape policies fit for future sustainable growth. To do so, Ecommerce Europe takes initiatives to come up with innovative market solutions and provides a platform for expert discussion, connect online retailers with relevant stakeholders. It also highlights the importance of e-commerce to the economy through the provision of in-depth research on the European and global markets. Additionally, Ecommerce Europe stimulates the industry by developing initiatives like its [European Trustmark label](#) - provided for free to more than 10,000 certified online shops across Europe. 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 legislative debate on geo-blocking.

On 25 May 2016, the European Commission published a Proposal for a Regulation addressing geo-blocking.<sup>1</sup> The Proposal did not impose an obligation on online merchants to deliver cross-border to all the EU, which would have been an unreasonable burden in the view of Ecommerce Europe. However, from the perspective of Ecommerce Europe, the Proposal was nonetheless sub-optimal in several ways, especially in terms of providing clarity of applicable law and in imposing a requirement for explicit consent before re-routing to another website, based on the location of the consumer.

On 21 November 2016, the Council of the EU adopted a general approach on the Proposal.<sup>2</sup> In some areas, the Council general approach goes in the right direction. For example, there has been an effort to improve the clarity with regards to the applicable contract law in cases where the trader does not target the country where the consumer is established. Specifically, Ecommerce Europe welcomes the inclusion of a new provision in the Council general approach, clarifying that the trader will not have to bear any additional transport costs other than those foreseen in the contract. However, in other ways, notably in terms of the requirement for explicit consent for re-routing, the general approach has not resolved the issues in the Proposal.

On 19 December 2016, MEP Roza Thun, the European Parliament's Rapporteur for the file, published her draft report on the file.<sup>3</sup> Ecommerce Europe welcomes many elements of the Thun Draft Report. In particular, the removal of the obligation to seek consumers' explicit consent for re-routing, as well as the clarification that the contract law of the country of the trader will prevail in cases where the traders sells to consumers based in countries that are not targeted by the trader.

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<sup>1</sup> [COM\(2016\) 289 final](#), 2016/0152 (COD), hereafter referred to as the Proposal.

<sup>2</sup> [14663/16](#), hereafter referred to as the Council General Approach.

<sup>3</sup> [PE595.745](#), hereafter referred to as the Thun Draft Report.

## Key recommendations for European policymakers

1. Endorse online merchants right to economic and contractual freedom in the geo-blocking debate
2. Provide clarity on the applicable law in cases of sales to consumers resident in countries not targeted by the trader
3. Do not require explicit consent for rerouting of websites
4. Ensure no obligation for traders to cover costs of postage beyond the contractually agreed place of delivery
5. Ensure that any assessment of whether a product has a non-conformity has to be based on the legal obligations in the country where the products are supplied
6. Provide coherence between legislation on geo-blocking and developments in the online payments landscape

## 1. Endorse 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. This also means that an individual company may decide on reasonable grounds 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.

Policymakers 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, as well as the cost of capital goods, and this can influence the final price of the product. That is why Ecommerce Europe is also against any rules aimed at imposing price controls.

Some members of Ecommerce Europe were concerned about a potential misinterpretation of the provision outlined in Article 4 of the Proposal, which states that traders should not apply different conditions of access to their goods and services based on the customer's nationality or place of establishment, as an obligation for traders to contract/sell to everyone at the same price, which would be a serious breach of the fundamental freedom to contract of traders. Ecommerce Europe wants to ensure that the obligation enounced in Article 4.1 is only obliging traders to offer the same conditions of access to their products, and explicitly does not breach in any way the freedom of contract of traders or the freedom to set different prices for different areas targeted. Therefore, traders should always be allowed to select the area(s) to which they want or do not want to direct their activities. Moreover, this Regulation should not be understood as providing for an obligation to deliver goods cross-border to another Member State where the trader would not otherwise offer the possibility of such delivery to its customers or is not willing to offer it.

Given these concerns, Ecommerce Europe welcomes the clarification provided by the Council general approach, and, in particular, the addition of the new Recital 21a. This recital states that the Regulation 'should not be understood as precluding traders from offering goods or services in different Member States or certain groups of customers with targeted offers and differing terms and conditions,' as long this is done on a non-discriminatory way. From the perspective of Ecommerce Europe, the inclusion of this recital is highly important, as it makes clear that the Regulation will not compromise the contractual freedom of online merchants.

## 2. Provide clarity on the applicable law in cases of sales to consumers resident in countries not targeted by the trader

One of the most important issues at stake in the geo-blocking debate is that of applicable law. Within the EU, contract law varies significantly between member states and, when selling cross-border to consumers, traders must take measures to comply with the mandatory contract law in the country to which they are selling. As Ecommerce Europe's Cross-border E-commerce Barometer 2016<sup>4</sup>

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<sup>4</sup> Cross-border E-Commerce Barometer 2016, <https://www.ecommerce-europe.eu/research/ecommerce-europe-surveys/>

demonstrated, differences of regulatory frameworks between European countries remain one of the most important barriers to cross-border e-commerce. Given this, it is unreasonable to expect online merchants to comply with contract law in all 28 EU member states, as this would be highly burdensome, especially for smaller traders. It is therefore highly important that legislation on geo-blocking does not require this, and instead makes it clear when the trader makes sales to consumers in countries not targeted by the trader, the contract law of the trader will apply.

In particular, Ecommerce Europe believes that cases where there is a sale but no delivery to a consumer in a given country may increase confusion with regards to different consumer protection rules and the practical application of the Rome I Regulation.<sup>5</sup> The original Commission Proposal, from the perspective of Ecommerce Europe, did not sufficiently clarify the applicable law in cases where the trader sells to a customer resident or established in a country that is not targeted by the trader. This risked generating legal uncertainty, as it would not be clear which contract law would apply in certain cases.

The Council's general approach sought to clarify the situation with regards to applicable law. In fact, in Article 1(5), it is clarified that complying with the terms of the Regulation should not be considered as targeting consumers in the Member State where they are resident/established. Although Ecommerce Europe welcomes the effort to provide greater certainty in the Council's general approach, the approach taken in the Thun Draft Report to the issue of applicable law is much more favorable. The Thun Draft Report provides a higher and acceptable level of clarity by introducing a new Article 8a, which states that when a trader indicates which countries they would like to target, either on their website or in their general conditions of access, the contract law applicable in cases where sales are concluded with a customer that is based in a country not listed will - in practice - be the contract law of the trader's country. Therefore, with regards to the need to provide clarity on applicable law, Ecommerce Europe believes the approach taken in the Thun Draft Report represents the best path forward.

As the provisions of this Regulation are basically linked and based on the place of residence or establishment of the consumer, Ecommerce Europe is convinced that a uniform interpretation of these notions is strongly needed as they play an eminent role in the proposed Regulation. However, Ecommerce Europe wants to stress that such clear definitions are missing in the proposed Regulation. Also, the reference in Article 1 paragraph 5 to habitual residence or domicile and the considerations in Recital 5 of the Commission's Proposal do not provide for sufficient clarity or guidance. In that perspective, Ecommerce Europe strongly suggests to include - in Article 2 of the Regulation - clear definitions of "place of residence" or "place of establishment", in line with the established definitions in already existing European legal frameworks.

### **3. Do not require explicit consent for rerouting of customers**

In terms of the conditions required for the rerouting of customers to a different website based on their geographical location, Ecommerce Europe has always opposed a requirement for explicit consent. The practice of rerouting is usually used by the trader to provide the customer with a better, tailor-made shopping experience, for instance, in their own language, currency and payment system and adapted to the local conditions of customer services and delivery. Seeking customers' explicit consent for rerouting would have a negative and irritating effect on the customers' shopping experience, comparable to the irritating consent mechanism now in place for cookies, as it would unnecessarily

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<sup>5</sup> [Regulation \(EC\) No 593/2008](#) on the law applicable to contractual obligations (Rome I)

complicate the process of continuing the search - or returning to the original website. On the other hand, explicit consent - and the recording of it to prove compliance - would be a burdensome and costly requirement for businesses. That is why, in cases of rerouting, Ecommerce Europe has suggested an opt-out option - based on clear information about the fact that the customer is redirected - and the implementation of an easily accessible back button allowing the customer to simply return to the original online interface that he or she sought to access.

In the Proposal, the provisions relating to rerouting were a source of major concern for Ecommerce Europe. This is because the Proposal introduced a requirement for the explicit consent of the customer before the trader could reroute them to a different website, based on their geographical location. As has been outlined above, this is precisely the provision that Ecommerce Europe has always advocated against, given that, from Ecommerce Europe's perspective, it serves to worsen the consumer experience, while simultaneously imposing a costly burden on businesses, without providing more protection or choice to the consumer.

The Council general approach sought to improve the Proposal by introducing the clarification that the explicit consent of the consumer would be needed just once. This clarification is the result of the change in the phrasing of Article 3.1 from a requirement that the customer 'gives' their consent, to a requirement that the customer 'has given' their consent. Nonetheless, the Council general approach retains the essential requirement for explicit consent, even if only once. From the perspective of Ecommerce Europe, this is deeply sub-optimal.

In contrast, the Thun Draft Report presents, in the view of Ecommerce Europe, the preferable framework for rerouting of the customer, based on their geographic location. Instead of imposing a requirement for explicit consent, the Thun Draft Report instead requires the trader to provide the customer with 'clear and comprehensive information' concerning the redirection. This is closely aligned with the position that Ecommerce Europe has long advocated for, and represents a model by which the customer will be able to make informed decisions, without imposing the burden of explicit consent on both the consumer and traders.

Overall therefore, as with the issue of applicable law, Ecommerce Europe aligns most closely with the position taken in the Thun Draft Report on the issue of the conditions for rerouting the customer to a different website, based on their geographical location.

#### **4. Ensure no obligation for traders to cover costs of postage beyond the contractually agreed place of delivery**

In Ecommerce Europe's view, it is extremely important that this Regulation should not be understood as providing for an obligation to deliver goods cross-border to another Member State where the trader would not otherwise offer the possibility of such delivery to its customers or is not willing to offer it. This includes costs of postage associated with the customer's exercise of their right to withdrawal, in case the trader voluntarily covers the costs to send the good back from customers in the areas targeted by the trader, as well as any postage costs associated with the assessment of non-conformity or the repair/replacement of the product. The Proposal did not provide sufficient clarity on this crucial issue, in the view of Ecommerce Europe, and there was a risk that the provisions of the Regulation, and in particular the provisions of Article 4(1) of the Proposal, would be interpreted as creating an obligation for traders to cover costs of postage in countries that are not targeted by the trader. This represented a deeply problematic situation for traders.

The Council general approach made some effort to clarify that there would be no obligation for traders to cover additional costs of postage. In particular, in the new introduced Recital 21b, it is clearly stated that the Regulation should not be viewed as creating an obligation ‘to cover any additional costs of postage and transport beyond the contractually agreed place of delivery.’ From the perspective of Ecommerce Europe, this provision is highly welcome, as expecting traders to bear any extra costs would be burdensome and unjustified. In addition, the Thun Draft Report also sought to provide greater clarity on this issue, again through the introduction of a new Recital 21b. The Recital explicitly states that the trader should not be obliged to cover costs of postage related to bringing products into conformity, or to the exercise of the right of withdrawal on the part of the customer. This Recital therefore provides clarity on this crucial issue.

Thus, both the Council general approach and the Thun Draft Report have introduced amendments to the Proposal that help to clarify that the trader will not be obliged by the Regulation to cover costs of postage beyond the contractually agreed place of delivery.

## **5. Ensure that any assessment of whether a product has a non-conformity has to be based on the legal obligations and conditions in the country where the products are supplied**

Ecommerce Europe wants to stress that compliance with the Regulation should also mean that the customer should benefit from the same general conditions that would be applicable as if such a customer would have his or her habitual residence in a country where the trader offers the option to deliver the goods or where the provision of the services/digital content takes place. It should, however, be ensured that any assessment of whether the product has a non-conformity has to be based on legal obligations and conditions (including technical and operational requirements) in the country where the goods/services/digital content are actually supplied. A product will therefore not be considered as defective if it complies with the requirements of the country of delivery, even if it turns out that it does not comply with the requirements of the customer's home country.

Once again, the Proposal did not provide sufficient clarity on this issue, from the perspective of Ecommerce Europe. In particular, the terms as outlined in Article 4 of the Proposal, did not provide sufficient legal certainty regarding the general conditions that the trader would be obliged to offer, particularly with regards to after-sales services, including the assessment of any non-conformity. Ecommerce Europe views relatively favorably the position taken in the Council general approach on this issue. In particular, Ecommerce Europe welcomes the addition of a new Recital 21b, which states that, with regards to any after-sales services, including the assessment of any non-conformity, the trader is not expected to provide the after-sales services to customers resident in countries not targeted by the trader in the same way as provided to customers in the countries that are targeted by the trader.

In addition, the Thun Draft Report also introduced a favorable new Recital 21a, which helped to clarify the general conditions of access that the trader would be obliged to offer under the Regulation. The new Recital 21a as proposed by the Thun Draft Report states that traders ‘need not ensure that the general conditions of access comply with the laws and regulations of the Member State of residence of a consumer to whom the trader does not intend to sell.’ This provides a great degree of clarity with regards to the trader’s obligations concerning general conditions of access, and, in the view of Ecommerce Europe, helps to clarify that any assessment of non-conformity will not be based on the

legal obligations of countries not targeted by the trader.

Therefore, both the Council general approach and the Thun Draft Report have offered suitable frameworks for clarifying that any assessment of non-conformity in cases of sales to countries not targeted by the trader will be based on the legal obligations of the trader's country.

Provide coherence between legislation on geo-blocking and developments in the online payments landscape

## **6. Ensure coherence between legislation on geo-blocking and developments in the online payments landscape**

It is vital that the legislation on geo-blocking is formulated in order to provide coherence with developments in the online payments landscape. When operating cross-border, online merchants often face high levels of online payments fraud resulting from different standards in online payments across Europe. To mitigate the risk of online fraud, resulting from fraudulent online payments, merchants often take the business decision to "geo-block" customers from a certain area. Ecommerce Europe welcomes the Payment Services Directive 2 and its objective to increase competition, security and consumer confidence in the European online payments landscape.

With respect to the provisions under the Payment Services Directive 2 on Strong Customer Authentication, Ecommerce Europe welcomes the European Banking Authority's recent exemptions to allow a 3-tiered transactional risk-based assessment for electronic remote transactions up to a value of €500. Ecommerce Europe, however, would stress its concern that the required reference fraud-levels are set too stringent, effectively pushing a large number of transactions to undergo Strong Customer Authentication. In addition, the European Banking Authority's exemption for transactional risk-based monitoring only applies to Payment Service Providers. Online merchants, who often have much more and higher quality data to assess transactional risk, are not allowed to avail of this exemption. Ecommerce Europe would like to stress its concern that, leaving an invaluable link in the information chain out, this is likely to contribute to an increase in payment abandonments and declined transactions. In the context of the geo-blocking proposal, the application of a transactional risk-based assessment to online payments allows online merchants to target countries more prone to online fraud, without incurring high levels of risks and being able to offer a high level of checkout convenience.

Furthermore, the legislative proposal on geo-blocking highlights the fragmentation and lack of interoperability between national electronic payments systems. In a fragmented market of competing and non-compatible electronic payment systems, obliging European online merchants to offer equivalent electronic payment options in each targeted market is too burdensome, in particular for SMEs. In the context of the discussions of the proposal, Ecommerce Europe calls on European policymakers to facilitate the highest level of harmonization of electronic payment systems between Member States before obliging online merchants to accept cross-border payments. As a result, online merchants often are forced to refuse customers from a specific country based on the available card infrastructure. Ecommerce Europe's concern regarding a lack of interoperability between national payments systems is particularly highlighted through co-branded card-based payment methods and direct debits which vary greatly between EU Member States. Therefore, Ecommerce Europe recommends to frame the obligation to offer the same payment method to customers abroad only in such cases where such payment method is 100% equivalent and interoperable to the payment methods offered by the trader.

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