BDI
Bundesverband der
Deutschen Industrie e.V.

POSITION PAPER

European Commission proposal for measures against geo-blocking COM(2016)289

About BDI

The Federation of German Industries (Bundesverband der Deutschen Industrie e.V. – BDI) is the leading organisation representing German industry and industrial service providers. It speaks for 36 sectoral associations and more than 100,000 companies with around 8 million employees. Membership is voluntary. As the voice of business, it draws attention to the implications of economic policy for society. The thought that guides our action: BDI is there for business – and business is there for people.

I. Background

The European Commission published a package aimed at strengthening e-commerce on 25 May 2016. This constitutes the second major package in the framework of the digital single market ("DSM strategy"). The European Commission's so-called e-commerce package includes a proposal for a regulation which would dismantle territorial restrictions in the Internet ("geo-blocking"). The purpose of the proposal presented is to proscribe discrimination linked to the customer's nationality, place of residence or place of establishment within the EU single market. In this regard, the customer can also be a company as end user. Access to the online interfaces of the service provider must be ensured. An automatic re-routing to another website, for instance one which uses the customer's national language, may only occur with the express consent of the user. Furthermore, a ban on discrimination with respect to the payment instrument is foreseen in the proposal. If a trader accepts a particular mode of payment (e.g. credit card), payment should be possible using this method regardless of the EU Member State where the card was issued.

In addition, since May 2015 the European Commission's Directorate-General for Competition has been conducting a sectoral e-commerce survey with a view to identifying possible barriers to competition in the area of electronic trade. By way of example, this is looking at whether and to what extent companies erect barriers to cross-border online commerce vis-à-vis their traders, e.g. through online platform bans or contractual restrictions which prevent individual dealers from selling goods or services online to customers in another EU country.

Stefanie Stündel | Digitalisation, Innovation and Healthcare | s.stuendel@bdi.eu | www.bdi.eu

II. Detailed comments

1. Principle of contractual freedom shall not be put into question

BDI welcomes the European Commission's intention of stimulating online commerce, dismantling barriers and increasing transparency in the goods and services offered on the Internet. However, it is important that this does not undermine the principles of private autonomy and contractual freedom. Because adapting the products and services offered by companies to the requirements of a particular market is a business decision which is determined by supply and demand on this market. In many cases, this business decision to shape supply differently on different markets is rooted in legal but also cultural and language differences in Europe.

The principle of non-discrimination is already enshrined in law through the freedom to supply services and is also implemented and respected by companies. It is in no company's interest to discriminate between its customers. After all, it is supply and demand which decide whether and under what conditions a product is offered on a national market. In particular, smaller companies and start-ups want to test their business model initially under circumstances on the domestic market and therefore to restrict their service offer to a geographically circumscribed area. But differences in consumer behaviour, varying demand for certain products, cultural specificities or levels of purchasing power can also necessitate an adaptation of the offer to fit in with different European markets. Furthermore, aspects of risk management also flow into the decision on the conditions under which the product or the service is offered. Companies must be able to factor in the risk of non-payment, return rates and possible hurdles to legal enforceability of contracts when drawing up their terms and conditions. These are objectively justified commercial reasons so that a business model can be a success. It is astonishing that the European Commission regards commercial reasons for a different treatment of markets as not being objective and therefore negative (recital 1 of the proposal). The essence of any commercial exchange is ultimately geared to making a profit.

Not least, the extent to which a company offers its goods and services in Europe is a question of mutual trust and the willingness of the contracting partners to conclude cross-border contracts in the first place. For all these reasons, statutory bans and compulsion should be chosen only as a last resort. It is therefore extremely positive that the European Commission has refrained in its proposal from an obligation to deliver, as initially feared. A statutory obligation to deliver would constitute an unacceptable and disproportionate intrusion into the freedom to conduct a business (article 16, European Charter of Fundamental Rights). But the de facto obligation to conclude contracts contained in the proposal for geo-blocking also constitutes a serious intrusion into contractual freedom. The legal consequences of this are not addressed in the proposal. Moreover, it is questionable whether the intrusion into contractual freedom is proportionate to the objective of non-discrimination in this case.

2. Scope (article 1 in conjunction with article 2 (b))

According to article 2 (c), it is not only consumers but also companies that are deemed to be customers under the Commission's proposal. This means that the proposal for a regulation is also addressed to business-to-business transactions (B2B) insofar as the company acquires the good or service for end use. Even if the underlying idea that it should make no difference whether a good is acquired for an end use by a private person or by a company (e.g. in the case of office supplies) seems reasonable, the practical question arises as to how the trader is supposed to determine the buyer's reason for acquisition. This could lead to the trader at least having to request the reason for every purchase – an inappropriate situation for trader and customer alike, whether consumer or company. A provision that relates essentially to all B2B transactions is neither appropriate nor advisable. Rather, priority should be given to allowing contracts to be freely structured in business flows between companies. Under no circumstances should contractual freedom between companies in particular be diluted. Accordingly, the inclusion of all B2B transactions should clearly be rejected.

3. Access to online interfaces (article 3)

It is the European Commission's wish that in future there should be a ban on blocking or limiting access to online interfaces for reasons of nationality, place of residence or place of establishment through technological means. An automatic re-routing to a website other than that which the user originally wanted to access may only take place with the express consent of the user. It shall be possible to derogate from the ban on re-routing or blocking in order to allow compliance with statutory obligations under EU law or the legislative provisions of the Member States. With a view to improved transparency, this proposal does not seem to place a disproportionate burden on companies. Self-evidently, this can apply only in cases where the website also exists in the other Member State. At this point, we would like to point out an inaccuracy: article 3 paragraph 4 refers to itself, presumably paragraph 3 is intended.

4. Access to goods and services (article 4)

It is the European Commission's wish that different general terms and conditions must not be applied for reasons of nationality, place of residence or place of establishment. According to article 2 (d) of the proposal, general terms and conditions comprises all terms, conditions and other information, including sale prices, regulating access to goods and services. Yet, as a rule, prices are not deemed to be part of general terms and conditions and their substance is not subject to court verification under German law. They should therefore not be regarded as a general business term.

But if companies offer goods and services in different Member States of the European Union, this often takes place on the basis of country-specific general terms and conditions. The consequence of this is that the business in every case has to come to grips with the legislative provisions of the Member States where deliveries are to be made – in particular with consumer protection legislation, price display legislation, data protection legislation or other special statutory provisions on product labelling. This entails sometimes considerable consultancy, translation and implementation fees, in particular for small and medium-sized enterprises. Yet there is no alternative to compliance with the law of the Member States in question if a company wants to act within the law. Article 6 paragraph 2 second sentence of regulation (EC) No 593/2008 ("Rome I regulation") excludes consumer protection law from any right to choose the governing law.

The business must always expect to apply national consumer legislation if it directs its activity in any way to a particular country (article 6 paragraph 1 (b) Rome I regulation).
It is positive that recital 10 points out that the mere fact of a trader acting in accordance with the provisions of Rome I regulation should not automatically be construed as implying that he directs his activities to the consumer's Member State. Nevertheless, in practice, the distinction as to whether there is a "direction" within the meaning of article 6 paragraph 1 (b) Rome I regulation risks legal uncertainty in interpretation. It is not always possible to assess with certainty when a trader directs his activities to the Member State where the consumer is resident, in particular for small and medium-sized enterprises. For instance, if the language used is taken as a benchmark, the question arises as to whether the trader who offers his goods and/or services also in English is automatically directing his activities to the entire EU or only to, say, Scandinavian or Dutch customers.

If a business decides to supply consumers in another Member State, it accepts that the consumer rules of the place where the customer is resident apply. Consequently, the relevant general terms and conditions of the Member State in question also apply.

a) Supplier does not deliver to all EU Member States

In the first case (article 4 paragraph 1 (a)), if the provider's goods are not delivered to the other EU Member State, the customer must be offered the same access possibilities and conditions, including prices and delivery conditions, as a customer from the seller's Member State. In the European Commission's view, this may mean

that the customer in the Member State not served by the supplier will have to pick up the good in the supplier's home country (recital 18 of the proposal).

The first positive point to highlight is that the geo-blocking proposal does not impose a delivery obligation on companies. An obligation to deliver would mean an unreasonable violation of the private autonomy of businesses. Nevertheless, in reality the Commission's proposal puts the business under the de facto obligation to sell in this case. The business does not want to deliver its goods in certain Member States but must conclude contracts with the customer and provide a pick-up option. This *de facto* obligation to sell constitutes a profound intrusion into the freedom to conduct a business and the principle of private autonomy, and is inappropriate for achieving the objective in view. In the framework of entrepreneurial freedom enshrined in article 16 of the Charter of Fundamental Rights, every company must be free to choose its "sales region" for itself. Against the background that the business also has to bear the business risk itself, a restriction of entrepreneurial freedom through an obligation to sell must be considered disproportionate. In addition, this gives rise to considerable practical and cost-intensive problems. Since distance selling contracts are also involved if the customer picks up the good himself, instances of withdrawal would also have to be processed on a cross-border basis.

The present proposal could also cause additional costs for companies. For instance, in order to make it practical to pick up goods, in individual cases businesses active in online commerce would in future have to set up a higher level of pick-up activity. Under some circumstances, this could lead to the organisation of a pick-up station at the firm's headquarters, a larger warehouse or larger parking areas. To avoid contradictions in application, article 4 paragraph 1 (a) should clarify even further that pick-up arrangements only have to be provided insofar as the seller already has such arrangements in place for domestic customers. Otherwise, the possibility of delivering the good to another address or a packing station in the Member State of delivery appears more suitable.

In most cases, the company will also have taken a conscious decision only to deliver in certain countries or even not to deliver outside the home country. The reasons for this can be of a very varied nature. They may be linked to a risk assessment and concerns about payment defaults. Language, user manuals which are not available in all languages or emergency numbers which are not valid for all regions can constitute further justified obstacles. In addition, many companies and business models are defined via a particular customer service which cannot be offered at the same level in all countries and all languages. Inasmuch, it should be made clear in the present proposal that, in application of the rules obtaining at the company's seat, the customer is obliged to return the good to the pick-up location at his own cost when claiming under a warranty. Customer services are often directly associated with the good in question and are difficult for the business which is not directed to the customer's Member State to provide without the corresponding infrastructure. For all the stated reasons, it is questionable how effective and proportionate the proposal is here, also from the consumer`s point of view. It should also be clarified that the transfer of risk occurs at the time of delivery and at the point of delivery in the seller's country or where the seller is active. The same applies for the validity period in the event of returns, withdrawal or warranty claims.

b) Electronic services

The second case (article 4 paragraph 1 (b)) relates to electronically supplied services such as cloud services, data warehousing, website hosting or provision of firewalls. BDI welcomes the fact that works protected by copyright and hence also audio-visual media content have been excluded from the Commission's draft. In particular, portability of the protected content as well as cross-border access to services has not yet been ensured for audio-visual media content. The reasons lie in the territorial scope of copyright and often also in the difficulties to clarify the rights. In any event, an extension to include audio-visual media content should be excluded as long as the review of copyright has not been concluded.

A different treatment on different markets could also be justified for electronically supplied services which are not covered by copyright. Also in those cases, the offer of certain services depends on the demand of the market. Under some circumstances, particular services such as a helpdesk cannot be made available for every item of electronic content in all languages. It may also be difficult for some electronic services to find qualified employees in all EU countries who can provide the service expected by the customer. From the companies'

point of view, it is therefore difficult to understand why the European Commission only specifies in the explanation in recital 19 that the service does not have to be delivered physically. The reasons set out above for different service offers on different markets could also be relevant in the case of non-physical electronic service delivery.

c) Service is provided at a particular location

If, in the third case (article 4 paragraph 1 (c)), the service is provided at a certain location such as hotel accommodation, car rental or a concert (recital 20), the existence of different business terms and conditions for reasons of nationality, place of residence or place of establishment should be disallowed. In the first place, this provision is in conflict with the Rome I regulation, where the determinant factor is not nationality, place of residence or establishment but where the consumer has his habitual residence. In the second place, for the requirement to direct the activity to another country referred to in article 6 paragraph 1 (b) Rome I regulation, the location of the service (by contrast with delivery to the consumer's place of residence for online traders) is likely to be of secondary importance. Regardless of this, the European Commission fails to consider in these cases the possibility that hotels in particular can operate on a very seasonal basis. A difference on the market could therefore arise, for example, if holiday periods in a region are such that a travel operator is justified in charging a higher price during these periods due to increased demand.

5. Agreements on passive selling (article 6)

According to article 6 of the Commission's proposal, agreements which impose obligations on sellers, in respect of passive sales, to act in violation of the regulation should be automatically void. According to the antitrust Guidelines on Vertical Restraints (2010/C 130/01), passive selling – by contrast with active selling – entails responding to unsolicited requests from individual customers as well as general, i.e. non-targeted, advertising or sales promotion measures. In other words, the customer is not actively approached by the company but approaches the company by himself. Hence, the area regulated by article 6 of the proposal covers issues already regulated in article 4 of the vertical block exemption regulation 330/2010/EU. Under the new proposal on geo-blocking, all agreements on the restriction of passive selling falling within the scope of the new regulation would essentially be void. This is not deemed to be an antitrust assessment of the situation (see also recital 26). Accordingly, the absolute ban of article 6 is in partial contradiction with competition rules. Because the invalidity consequence would come into play even if an exemption from competition rules would be possible by way of exception. This contradictory solution cannot be the legislator´s aim. To maintain uniformity in the legal order, article 6 should refer to the provisions of competition law.

6. Review clause (article 9)

Two years after the regulation has been entered into force of a first review is foreseen. The proposal already envisages a review of the ban in article 4 paragraph 1 (b) with view to extend the scope to electronically supplied services which provide access to copyright protected works. Under no circumstances should there be an extension to include access to copyright protected works or other protected subject-matter as long as the modernisation of copyright law has not been concluded. The portability of protected content as well as cross-border access to services has not yet been ensured in particular for audio-visual content. The reasons lie in the territorial scope of copyright and often also in the difficulties of clarifying rights. It is currently highly questionable whether these obstacles can be tackled at all with the reform of copyright law. In the event of a first evaluation after two years, it must be strictly ensured that any new provisions incorporated in the regulation are in line with the EU copyright framework. Given the complexity of the self-contained system of copyright provisions, BDI is in favour of continuing to exclude access to copyright protected works from the scope of the geo-blocking regulation even after the evaluation.

Colophon

Bundesverband der Deutschen Industrie e.V. (BDI)
Breite Straße 29, 10178 Berlin
www.bdi.eu
T: +49 30 2028-0

Contact

Stefanie Stündel
T: +32 2792 -1015
s.stuendel@bdi.eu

Carolina Müller
T: +32 2792 -1008
c.mueller@bdi.eu

Nadine Rossmann
T: +32 2792 – 1005
n.rossmann@bdi.eu