

Position Paper

Bitkom's comments on the proposed Regulation on geo-blocking

Page 1

Bitkom represents more than 2,400 companies in the digital sector, including 1,600 direct members. With more than 700,000 employees, our members generate a domestic turnover of 140 billion Euros a year, exporting high-tech goods and services worth another 50 billion Euros. Comprising 1,000 small and medium-sized businesses as well as 300 start-ups and nearly all global players, Bitkom' members offer a wide range of software technologies, IT-services, and telecommunications or internet services. They produce hardware and consumer electronics or operate in the sectors of digital media and the network industry. 79 percent of the companies' headquarters are located in Germany with an additional amount of 9 percent in other countries of the EU and 9 percent in the USA as well as 4 percent in other regions. Bitkom supports an innovative economic policy by focussing the modernization of the education sector and a future-oriented network policy.

Summary

Bitkom recognises the need to harmonise rules in the EU market and unlock the potential of e-commerce. However, this goal should be reached by adequate means. The European Commission's geo-blocking proposal (COM (2016) 289) disproportionately interferes with the freedom to conduct a business as guaranteed under Art. 16 EU Charter of Fundamental Rights. Although we welcome certain aspects of the proposal such as the exclusion of copyright protected works of the scope, we oppose to a general ban of geo-blocking and are concerned by many provisions. We expressed these concerns in our German language position and would like to summarise the main points:

- **“geo-tailoring” not “geo-blocking” as businesses adapt their products and services to the requirements of a specific market**

The decision by a company to enter a geographical market depends on various factors such as diverging legislation, cultural differences and consumer preferences and habits. In the end, supply and demand determine whether and under which conditions a product is offered on a specific market.

Example: *A SME may at first opt to not engage in cross-border activities but test the business model on the domestic market. This is common practice for start-ups, which in the beginning do not have the capacity to deal with different markets and adapt their*

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products to e.g. diverging legal requirements regarding youth protection, waste disposal or security. **Therefore, companies should be free to conduct their businesses and be able to react to the fragmented environment by geo-tailoring.**

- **Re-routing for a smoother user experience**

A re-routing to a local website is in the vast majority of cases in the interest of the customer and consent will be likely given. Therefore, it is not only questionable whether the ban of re-routing is proportionate to the high administrative burden to businesses (especially when one takes into consideration that the Commission wants to actually strengthen e-commerce activities by SMEs) but also whether such provision would really benefit the consumer.

Example: When configuring a newly bought mobile device such as a tablet or smartphone the customer is often asked which language he or she prefers. This language will be automatically memorised in the settings and also the app store of the device will communicate with the customer in the selected language. This is a very easy and customer-friendly process which still leaves enough choice to the consumer. There is no plausible reason why the customer should be constantly asked when visiting an online retailer's store or website whether he or she still wants to access the website in the language previously chosen. This would lead to a box-ticking exercise and a terrible user experience for the customer on the one side and significant expenses for companies on the other side. **Therefore, a one-time request within a configuration of default settings or consent of terms of use should be sufficient with respect to Art 3 (4).**

- **Rome I and geo-blocking proposal should not contradict each other**

Often access to websites is blocked due to the Rome I Regulation. According to Art. 6 (1)(b) Rom I Regulation a consumer contract shall be governed by the law of the country where the consumer has his habitual residence if, inter alia, the company "by any means directs such activities to that country or to several countries including that country".

Example: Companies often block the access to their website to demonstrate that they do not direct their activity to a geographical market, which they do not intend to be active on. Thereby, they limit the risk to apply a foreign, unfamiliar law in case of a legal proceeding with the customer. There is a certain risk that the obligation to unblock the access of websites could be interpreted as fulfilling the legal requirement of Art. 6 (1) section (b). This creates legal uncertainty.

Even though Recital 10 tries to address this problem, the wording leaves still enough room for interpretation.

Therefore, the interaction of the proposal with Rome I should be further discussed. It must be made absolutely clear that the obligation to grant access to a website cannot fulfil the requirement under the Rome I Regulation.

- **Many practical reasons why different conditions of payments are offered to customers**

The non-discrimination requirement related to payments will lead to more costs and expensive to many companies.

Example: Many companies use the payment conditions, especially the national credit card, as easy and effective method to assess the residence of their customers e.g. for reasons related to tax or copyright. As long as copyright protected works are excluded from the scope of the Directive, a differentiation of payment methods should be allowed.

Furthermore, especially SMEs could be hindered to offer their services online as they fear debt collection problems with certain customer groups.

Example: *Similar as in the banking sector it must be allowed to do risk assessments of potential customer groups regarding the risk of non-payment. The payment default of some customer groups is statistically more likely than of others. It must be therefore possible for companies, especially for SMEs, to offer different payment conditions to minimise the risk of possible payment defaults. **Buyer and seller protection should be equally treated.***

▪ Companies might need to deal with foreign tax systems

Another reason why companies do not direct their offers to customers abroad is the VAT system. Although Recital 8 states that the proposal should be without prejudice to applicable tax rules, Bitkom still sees a high risk that companies are forced to deal with a foreign tax regime. Although the current proposal does not clearly prescribe an obligation to contract with a customer abroad, we believe that it will necessarily lead to this result as it will be hard for companies to justify in practice not to contract with a certain customer.

Example: *Difficulties arise where a company provides an electronically supplied service (see Art. 4 (1) section (b)) such as a cloud service, data warehousing or webhosting to a customer in another Member State. In order to determine and calculate the VAT, the company would need to deal with the law of the place of the supply of the service i.e. the customer's place of residence. The company first has to verify such place of performance and consequently the due tax rate. This naturally creates an increased risk of incorrect tax assessment with a higher liability risk. For certain low price offers costs would be too high and the service would not be profitable anymore.*

Most companies (especially SMEs) will struggle with the costs and expenses to deal with foreign tax systems which often requires hiring a qualified tax lawyer. This will discourage them from offering electronically supplied services in the first place.