POSITION PAPER

BUSINESSEUROPE

10 October 2016

Comments on the geo-blocking proposal

CONTEXT

The Digital Single Market Strategy adopted in May 2015 and the Single Market Strategy adopted in October 2015 announced legislative action to address unjustified geo-blocking and to "comprehensively fight discrimination based on nationality or place of residence or establishment in the single market". Ahead of the publication of the proposal, the European Commission launched a public consultation (from September to December 2015) to which BusinessEurope also contributed (our response here).

On 25 May 2016, the European Commission published its "Digital Single Market e-Commerce and Content Package", which includes a proposal for a ***Regulation to address geo-blocking and other forms of discrimination*** *based on customers' nationality, place of residence or place of establishment within the single market. BusinessEurope issued a press release that day expressing its doubts about the geo-blocking proposal.*

This position paper comments in detail on the proposed Regulation - and its accompanying impact assessment - that will be examined and discussed by the European Parliament, the Council and other EU institutions in the next months.

KEY MESSAGES

1 **Geo-blocking or different treatment is in most cases a direct result of remaining fragmentation in the single market**, for example due to a lack of harmonisation at EU level, a lack of mutual recognition, additional national regulation or diverse interpretation and application of EU legislation by Member States. Remaining obstacles to cross-border trade need to be addressed decisively to make a real difference for consumers and businesses in practice.

2 As it does not address the root causes that hamper buying and selling across borders, **this proposal is not a game-changer that will boost cross-border e-commerce**. Moreover, BusinessEurope urges the EU institutions to thoroughly assess and consider the possible negative implications of this Regulation.

3 **The proposal needs to be clearer to provide certainty to traders and customers**. It should be stated clearly that by fulfilling this draft Regulation's obligations, the trader can indeed solely rely on his own home country rules, e.g. in terms of contract law, labelling, product safety, VAT, etc. It must be crystal clear that compliance with the Regulation (i.e. the *de facto* obligation to sell) should not be interpreted as a sign of targeting activity to the customer's country.

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GENERAL COMMENTS

Unjustified geo-blocking should be prevented

1. BusinessEurope fully agrees that *unjustified* geo-blocking or different treatment in terms of price or conditions purely based on the nationality or residence of the customer - consumers and businesses as end-users - should be prevented, contributing to a better functioning single market.

2. BusinessEurope and the companies we represent - who are also often service recipients - fully share with consumers the common interest not to be subjected to differential treatment in price or otherwise, or refusal of supply. However, there can be a range of justified reasons for different conditions that often directly stem from the current fragmented and incomplete state of the single market.

Examples of fragmentation / barriers that cause differential treatment in the single market

3. Today, it is commonly accepted that there are various objective reasons that can result in *justified* differential treatment in the single market, for example, linked to:

    - Higher incurred costs due to distance;
    - Different or additional national rules and requirements (e.g. labelling, certification, consumer rules, waste disposal regulations, additional safety testing requirements and cultural differences towards achieving compliance, etc.);
    - Different national standards (e.g. electric plugs, fire resistant furniture, or water contact materials, etc.);
    - Different VAT rates;
    - Divergent contract law regimes;
    - Varying market conditions, including competitor pricing often linked to the costs of running a business in that Member State (labour costs, administrative burden, taxes, etc.).

4. Many companies also experience varying and relatively high costs for parcel delivery linked to different national frameworks. BusinessEurope supports an ambitious final agreement on the parcel delivery proposal to reduce time and costs for delivery across Europe.

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5. In recital 2, the proposal states that "*discriminatory practices are an important factor contributing to the relatively low level of cross-border commercial transactions within the Union, including through e-commerce, which prevents the full growth potential of the internal market from being realised*". BusinessEurope believes that the persistent barriers to cross-border trade referred to above (see points 1 - 4) are much more impactful and harm the single market to a much greater degree. Moreover, there is a lack of evidence in the impact assessment that supports this Commission statement.

Address the root causes not the symptoms

6. These situations of different treatment in terms of price and/or conditions are in most cases a direct result of remaining fragmentation in the single market, for example due to a lack of harmonisation at EU level, a lack of mutual recognition, additional national regulation or diverse interpretation and application of EU legislation by Member States.

7. Therefore, BusinessEurope urges EU Institutions to focus more specifically on addressing these persistent barriers that are often at the root of geo-blocking and less developed cross-border trade, offline and online.

8. It is true that e-commerce is in most countries booming at national level, while cross-border online sales are relatively underdeveloped (*see box 1 on page 4*). This has to do with the above reasons, but also because companies often lack the right information or are not confident to trade (online) across borders. At the same time, the potential here is huge.

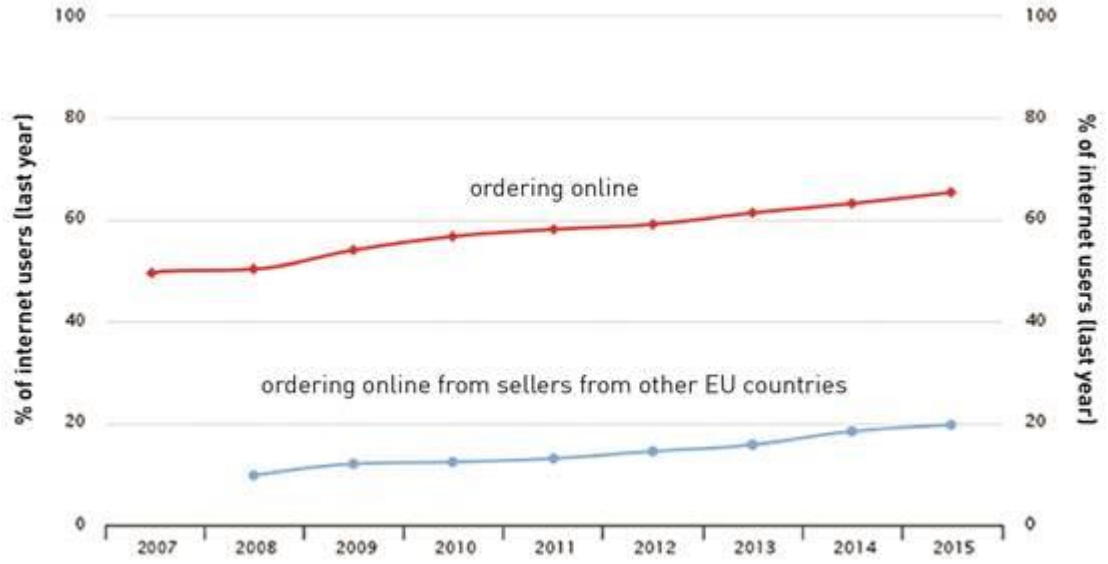
9. Many of the actions announced in the May 2015 Digital Single Market Strategy and the October 2015 Single Market Strategy will contribute to addressing remaining fragmentation and barriers in the single market. Furthermore, the European Parliament's "*Mapping the Cost of Non-Europe*" study[1] identified many of these remaining obstacles. This is where the primary focus of the EU institutions should be to make a real difference for consumers and businesses in practice.

[1] European Parliament, "*Mapping the Cost of Non-Europe*" - third edition, April 2015, available here.

BOX 1 - Cross-border vs. national online commerce

Cross-border e-commerce in Europe is still underdeveloped with only 20% of internet users buying online from other EU Member States. Complex rules, remaining fragmentation and a lack of confidence in selling and buying across borders are often the cause of this.

European Union: Individuals ordering goods or services online



Source: European Commission Digital Scoreboard

10. Furthermore, BusinessEurope is not convinced that this proposal is a game-changer to boost cross-border trade. Unlike what the accompanying impact assessment tries to demonstrate, we do not believe that this proposal will bring significant economic gains or truly alleviate customer' frustrations (*more comments on the Commission's impact assessment below*).

Copyright and licensing issues are rightly excluded at this stage

11. For sake of clarity: restrictions related to copyright and licensing practices (such as the broadcasting of sport events) are rightly excluded from the scope of this proposed Regulation at this stage given the other ongoing measures being discussed in this area, for example the Commission's recent "*copyright package*" presented on 14 September 2016 partially addresses this.

SPECIFIC COMMENTS - THE PROPOSAL

Freedom to do business is fundamental

12. It is positive that the Commission reaffirms traders' rights to continue to decide where and when they offer their goods and services to customers. This principle is laid down in Articles 16 ('freedom to conduct a business') and 17 ('right to property') of the Charter of Fundamental Rights of the European Union. This is in line with what the Commission stated in 2012 in its guidance on the application of Article 20 of the Services Directive, namely that: "*the non-discrimination provision does not impose a general obligation on companies to supply their services in circumstances in which such a supply would involve them travelling to the territory of Member States that do not belong to the area in which they have freely decided to target their activities*". It also rightly states that businesses are free to determine the geographic scope to which they target their activities within the EU, "*even when selling online*". It is clear that the right for businesses to decide where to operate in a particular market based on their own cost-benefit assessment should not be compromised.

Fixed lists of justified or unjustified practices should be avoided

13. We welcome the fact that the Commission did not attempt to develop a list of justifications (e.g. a black list or white list approach) for different treatment in terms of price or conditions. A list-approach would be too complex, non-exhaustive, and also not take into account rapidly changing circumstances. A list would be easily outdated in a fast-changing society with new business models arising and existing models adapting constantly.

No obligation to deliver

14. The geo-blocking proposal does rightly not impose an *obligation to deliver* goods or provide services to the country of the customer if the trader does not yet deliver or operate there. Imposing an obligation on companies to deliver throughout the single market would impose disproportionate costs and legal uncertainty on companies, and would in the case of many SMEs, micro-enterprises and start-ups simply be unattainable.

But a "*de facto*" obligation to sell can be problematic

15. *De facto*, the proposal does impose an *obligation to sell* to any customer in the single market as long as the customer arranges for the pick-up of the good or receives the service in a territory where the trader already operates, reasonably allowing traders to use their home country rules. It means that customers throughout the single market should be able to access all offers, and therefore geo-blocking as a technical tool will be prohibited, with exceptions (e.g. a national ban on certain products or services, or electronically supplied services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter).

16. While it is only fair that companies would be able to "*sell like at home*" relying on their home country rules, there are still some situations that will cause legal uncertainty and can easily lead to additional costs for companies that have not been properly assessed and considered by the Commission.

Other important questions not identified nor addressed by the proposal

17. There are more concerns with the *obligation to sell* (like at home) that have not been properly considered by the Commission, namely linked to after-sale services, guarantees and issues related to a lack of conformity, repair or replacement. It must be crystal clear that by using "traders' rules" and following the "sell like at home" principle the trader should not be expected to fulfil all the customer rights in the same conditions (e.g. reimburse return fees, pick up the good, on place repair) as in the case where the customer would reside within the area where the trader actually supplies or delivers.

18. For example, take a webshop in France that sells offline and online and also supplies to customers in Belgium and Germany. According to this proposal, if a customer from the Netherlands goes online he or she must now be able to see all offers of the French company made to these markets online. The Dutch customer decides to purchase a radio online in the Belgian webshop of the French company and has it delivered at an address in Belgium. The Dutch customer arranges for the pick-up, but back in the Netherlands it turns out that the radio is broken. In this case, it needs to be absolutely clear to the trader and to the customer that because the trader's home country rules apply (there are differences for instance between countries in terms of the length of the guarantee period), it is the responsibility of the Dutch customer to return the good to the pick-up point in Belgium or find a way to make it reach the trader. The cost of transportation and to cover the distance travelled should be fully bared by the customer, as this in fact concerns a passive sale.

19. Also referring to points 17 and 18, BusinessEurope believes that the text of the proposal must be made clearer in reassuring the trader on the rules applicable to its case, namely Article 1(5), and in particular the link with other relevant EU legislation and existing CJEU jurisprudence.

20. The obligation to sell will influence traders' possibility to offer after-sales services. For traders after-sales services are important. They offer additional value and are directly linked to the branding of the business. Significant investments are made in the necessary infrastructure such as on the spot service centres or even to provide for a free 'complimentary' home maintenance and technical assistance for a certain period. An obligation to sell will either mean that the trader must arrange to potentially offer after-sales services in all EU/EEA countries, or the trader needs to compromise on the existing after-sales service thereby harming the reputation of the business. Moreover, as an obligation to sell can *de facto* force companies to provide after-sale services in countries where they do not yet operate and have the required infrastructure. It can imply that such services are provided before a certain reputation is built in that specific country (i.e. branding) and customer's expectations - according to set company quality standards - might be hard to meet (*see box 2 below*).

BOX 2 - The costs of expanding, branding and service excellence

A study carried out by the Danish e-commerce Association (FDIH) shows that 16% of all consumer sales made online include some kind of direct contact between the customer and the shop, either by telephone or e-mail. Taking Denmark as an example, where there are around 16,000 online shops and 148 million orders per year, it corresponds to more than 23.5 million e-mails or phone calls annually. The number of online-shops in the EU was at the end of 2014 estimated to be around 715,000, so already today vast resources are spent on managing questions from customers. If an obligation to sell is retained, the number of occasions where direct contact is made can be assumed to be higher due to e.g. language barriers and more legal uncertainty on the applicable rules. This effect needs to be carefully considered with this proposal.

21. Linked to this point, uncertainty may also be experienced in the case of goods not suitable for transportation, e.g. very large goods such as household electronics or goods that are installed such as a built-in coffee machine, boiler, washing machine or refrigerator. How would the trader find a way of inspecting the good? Is the trader in this case not forced to travel to a country where he does not deliver leading to high costs? Or is he even obliged to set up an establishment in the Member State(s) of the particular customer(s)? If the trader does not do that, he can either give up challenging any claim from foreign customers, or he can challenge the claim without knowing if he is right or wrong. Either way he will risk incurring reputational damages and/ or litigation.

22. Moreover, a consequence would likely be a separation of the sale of after-sales services (and other services) from the sale of the goods. Such a development would go against the overall trend of servicification and must surely be against the objective of facilitating cross-border flow of goods and services, or a mix thereof, i.e. a versatile product.

Further transparency is welcomed

23. BusinessEurope welcomes the fact that the transparency requirements imposed on traders regarding geographical restraints remain reasonable and in line with existing legislation, namely the 2011 Consumer Rights Directive. [2]

A lack of proper impact assessment (IA)

24. BusinessEurope is not convinced that this proposal is a game-changer for boosting cross-border e-commerce. We do not believe that this proposal, as the accompanying IA attempts to demonstrate, will bring significant economic gains or help companies to overcome obstacles to sell across the single market.

25. The IA evidence seems to be largely gathered through a mystery shopping exercise which revealed that 2% of the companies surveyed deny access to or use automatic re-routing from their online interfaces. The survey does not provide further information or explanation as to why the companies surveyed did this.

26. Moreover, the IA focuses on cross-border situations, while the proposed Regulation is about a customer buying from a business in another country and arranging for the pick-up (purely a passive sale).

27. At the same time, a *de facto* "obligation to sell" combined with the current fragmented state of the single market makes it very difficult to predict all the consequences of the current proposal. Hence, sound and exhaustive impact assessment is a must. It is not acceptable that such an important and perhaps far-reaching proposal is not based on better evidence of the alleged existing problems to address and possible consequences of the specific provisions proposed.

28. In this context, BusinessEurope urges the Council and European Parliament to carry out in-depth impact assessment and further analysis on the crucial provisions of the proposal to complement the meager impact assessment of the Commission and to ensure that the proposal will not have harmful and unintended consequences, fully respecting better regulation principles.

[2] Article 8 (3) of the Consumer Rights Directive states that: "*Trading websites shall indicate clearly and legibly at the latest at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted*".

COMMENTS ON SPECIFIC PROVISIONS

Recitals

29. Recital 11 rightly states that terms and conditions that are individually negotiated between the trader and the customer should not be considered general conditions of access for the purpose of this Regulation. Customers and traders should have the leeway to conclude an individual agreement, for instance extra options on a kitchen or a car.

Article 1 - Objective and scope

30. BusinessEurope supports the fact that the Regulation does not apply to the activities falling outside the scope of the 2006 Services Directive Article 2.2, such as non-economic services of general interest, transport services and financial services, as these specific types of services often have their own EU legislation due to the specificities and characteristics of these services. Furthermore, it is right to exclude services which are copyrighted or subject to licensing practices (such as the broadcasting of sport events) at this stage, as these services are addressed by specific EU legislation, which is currently being reformed. We also welcome that it is clarified that the provisions of the Regulation shall prevail over provisions of Article 20.2 of the Services Directive in case of conflict.

31. Moreover, we welcome that the proposal rightly preserves the freedom of traders to be able to set prices for different markets in a non-discriminatory manner.

32. Article 1(5): BusinessEurope fully agrees with the Commission that traders' rules should apply and that sales to customers from other Member States should be considered as "selling like at home". In other words, these must be considered to be passive sales, not directing activity beyond the Member States where the trader already operates / delivers. While having doubts about the after-sales services and some aspects of the "obligation to sell", we furthermore believe this Article needs to be clarified and rephrased to legally correspond with the Commission's intention, namely that traders can "sell like at home" and to generate a concrete added value in terms of legal clarity to the benefit of both companies and customers.

33. In the name of legal certainty, a discussion is needed on how to clarify the notions of directed activity and/or passive sales. But this discussion should be separate from concluding the negotiations on this proposed Regulation on geo-blocking, as this proposal concerns merely passive sales. Although the concept of targeted activity has been addressed by the European Court of Justice case law, namely on consumer contracts jurisdiction issues, businesses are still struggling with their application in practice. If not clarified, the question of applicable law and jurisdiction could be a source of uncertainty for sellers who did not previously make sales outside their self-chosen geographical area, or only sold to a few foreign markets. Uncertainty significantly increases the risks associated with customer disputes. This increased risk will normally be factored into the price of the goods, and will

therefore be a disadvantage for the customers in markets where the trader actually directs its activity.

34. By complying with the Regulation, the trader should not be submitted to specific rules of the customer's Member State (to which he originally did not target) regarding technical standards, contract law, labelling, language, user instructions or others. It should be crystal clear that it is always enough for the trader to be compliant with his home country rules. For example, the Regulation should not oblige the trader to offer customer support in any other language than what he normally provides nor to have customer support systems (e.g. maintenance and care services of durable goods such as house appliances) in any country where he does not actively direct his business.

35. The application of this Regulation should also not lead to adjudicate the jurisdiction of a potential dispute by default to the country of the customer to which the trader did not direct his activity (by application of Article 15(1)(c) of the Brussels I regulation). The trader should be able to still rely on the jurisdiction of the country(s) where he chooses to operate, and this should be explicitly expressed in the Regulation.

Article 2 - Definitions

36. The Regulation defines customer as a consumer or undertaking. The undertaking (or business) is covered by the scope of this proposal insofar as the business is an end-user. Transactions where goods or services are purchased by a business for resale are excluded to allow traders to set up their distribution systems in compliance with EU competition law. The proposal rightly excludes business-to-business (B2B) transactions, as it would otherwise affect widely used distribution schemes between undertakings, such as selective and exclusive distribution, which generally allow for manufacturers to select their retailers, subject to compliance with competition rules. The initial results of the recent e-commerce inquiry carried out by DG Competition demonstrate that these agreements are used to preserve the quality and reputation of brands ultimately providing for a better customer experience.

Recitals 14, 15 and 16 and Article 3 - Access to online interfaces

37. BusinessEurope welcome's the fact that the proposal does clarify that blocking or limiting access to a website or redirection are accepted tools when necessary to ensure compliance with national or EU legislation (e.g. sale of snus, rat poison, etc.)

38. Traders should also remain free to structure their sales channels in the way they consider most effective even if it means having different national or regional interfaces. This often allows for a better buyer's experience.

39. Although the proposal does not forbid this practice, Article 3 paragraph 2 requires the customer to give their specific consent prior to being redirected to his "local" version of the trader's website. This can present potential problems when applied in practice. There is a real risk that some Member State consumer regulators will interpret the proposal as requiring opt-in consent. For example, it could potentially add further steps for the customer to enter his desired interface, adding to other consent obligations derived from EU "cookies" legislation. [3] The application of the Regulation should also not mean that traders become limited in the way they design their websites which also impacts the visibility of their goods and services and the findability of their products on a search engine. Especially in the age of mobile applications and easy access to online content, additional consent messages hindering access will negatively impact the overall user-experience.

40. More specifically, clarity will be necessary on:

- How the explicit consent from the consumer is to be framed?

- Whether cookies can be used to record "user preferences" going forward? In other words, how can one avoid the issue of "repeated consent"?

- What is required by way of justification notice when blocking/re-directing a user from a service/digital content?

Article 4 - Access to goods or services

Stipulates that traders shall not apply different general conditions of access to their goods or services, for reasons related to nationality, place of residence or place of establishment of the customer in the following situations:

(a) *where the trader sells goods and those goods are not delivered cross-border to the Member State of the customer by the trader or on his or her behalf;*

(b) *where the trader provides electronically supplied services, other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter;*

(c) *where the trader provides services, other than those covered by point (b), and those services are supplied to the customer in the premises of the trader or in a physical location where the trader operates, in a Member State other than that of which the customer is a national or in which the customer has the place of residence or the place of establishment.*

[3] Article 5(3) of the ePrivacy Directive 2002/58/EC.

41. Paragraph 1, point (a) on goods contains a *de facto* "obligation to sell". In combination with Article 3 it obliges traders to provide customers from all Member States access to all offers online and offline, as long as the customer arranges for the pick-up of the good or receives the service in a territory where the trader already operates / delivers. As indicated above there are several questions arising from the application of this obligation which need to be addressed during the current legislative procedure:

    - Although regarding the sale of goods Recital 18 explains that the trader has no need to register for value added tax (can apply the rate applied in the area it delivers), the situation of non-copyrighted services might be more complicated especially in case of distance (digitally) provided services (e.g. cloud). How is the trader supposed to deal with different VAT rates for services? This should be clarified.

    - What is the situation for mixed purpose contracts (goods and services) or contracts for the sale of goods with connected services (e.g. maintenance)? Traders should not be forced, as per application of this proposed Regulation, to provide a service and extend their infrastructure to the country of the customer to which the company does not (yet) target its activity, e.g. for coffee machines or multifunction printers for in the office.

    - How will this Regulation link with Directive 2012/19/EU on waste electrical and electronic equipment (WEEE Directive)? It should be avoided that the trader is obliged to fulfill the obligations outlined in the WEEE-Directive, e.g. register or appoint a representative, in the costumer's country.

42. Regarding paragraph 1, point (b) on electronically supplied services (other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter) it has to be clarified if also here the applicable law is the law of the trader taking into account that a contract can be concluded at distance and the product is delivered online. Situation (b) is only applicable from 1 July 2018. BusinessEurope believes that it is premature to put a date here, as the timing is subject to the further development of the current discussions and progress in the legislative process.

43. Regarding point (c) on services, BusinessEurope agrees that in "same service, at the same time in the same place" situations, such as car rental, hotel accommodation, sports events, and entry tickets to music festivals or leisure parks different treatment on the basis of nationality or residence can generally not be justified and should therefore be prohibited. However, there can be exceptions to this. As mentioned in recital 95 of the Services Directive, seasonal variations and different vacation periods in the various Member States are objective reasons that may justify different treatment. An amusement park for example, should be in a position to offer "promotions" or "special packages" during a period of school holidays (where the period differs between Member States) or specific festivities, so for a limited period of time. Therefore, even in these situations there should not be a presumption that the practice is unjustifiably discriminatory by the outset. That

said, differences in price or conditions should be justifiable and not on a systematic basis, but temporary in nature.

Article 5 - Non-discrimination for reasons related to payment

44. Payment options should be the same for every customer throughout the single market. Yet, a company remains free to choose which payment options it offers to all its customers and it should be allowed to apply additional customer authentication procedures to prevent fraud, not favouring any type of authentication over others, insofar as the objective is achieved. Article 5 (b) should therefore be revised accordingly. Moreover, the article rightly mentions that charges linked to certain payment systems may be requested from the customer insofar as they do not exceed the costs borne by the trader.

Article 6 - Agreements on passive sales

45. This article indicates that agreements with traders containing passive sales restrictions which would lead to violations of the rules set out in this Regulation are automatically void. It is designed to avoid circumvention of these rules by contractual means which is fair. In fact, as the recent e-commerce inquire by DG Competition has confirmed is that customers often benefit from better and more targeted service through vertical agreements. [4]

Article 7 - Enforcement by Member State authorities

46. In the explanatory memorandum the Commission states that a Regulation is preferred, as it is directly applicable in Member States and establishes the same level of obligations for private parties, and enables the uniform application of rules on non-discrimination based on residence across all Member States. While this is generally true, there are exceptions for instance in the case of Article 7 on penalties in case of infringements and also Article 8 on assistance to consumers, which confer the responsibility to implement the Regulation to the Member States. This can lead to diverse interpretation and *de facto* fragmentation leading to uncertainty for traders and consumers. In the case of Article 7, as Member States are also free to lay down rules on penalties for infringements, it has to be ensured that these penalties are proportionate and do not vary too much between countries.

Article 8 - Assistance to consumers

47. This article states that consumers should be in the position to receive assistance from responsible authorities facilitating the resolution of conflicts with traders, arising from the application of this Regulation, including by way of a uniform

[4] Commission Staff Working Document - "Preliminary Report on the E-commerce Sector Inquiry" - 15 September 2016, available here.

complaint form. However, problems that traders incur should also not be forgotten. A reference to SOLVIT or another form of assistance to traders in case of disputes should be inserted.

Article 9 - Review clause

48. After entry into force, the first evaluation of the Regulation shall be in 2 years, and every 5 years thereafter. During the first evaluation it will also be assessed whether the prohibition of Article 4(1)(b) should also apply to electronically supplied services, the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, provided that the trader has the requisite rights for the relevant territories. This requires further assessment and reflection on the link with other relevant proposals in the area of intellectual property, copyright and portability currently being discussed.

Article 11 – Entry in force

49. BusinessEurope believes that it is premature to put 1 July 2018 as date for application of this Regulation to non- copyrighted electronically provided services, as the timing is subject to the further development of the current discussions and progress in the legislative process.

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