

European Commission's proposed regulation on geo- blocking

AmCham EU's position to improve the quality and coherence of the geo- blocking proposal.

Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the European Commission's initiatives to improve the quality and coherence of the European Digital Single Market.

The members of AmCham EU are key digital actors. As such, they fully support the objective of the proposed regulation on geo-blocking: to facilitate cross-border trade by eliminating unjustified geo-blocking and other geographically-based restrictions. Nevertheless, AmCham EU wishes to point out to a number of issues related to this proposal which, if not clarified, may lead to uncertainty both for businesses and consumers, and may become an obstacle to achieving the initial goals of the proposal.

In particular, AmCham EU encourages the European institutions to clarify the interaction of the proposed regulation with the EU *acquis* in the field of applicable law, consumer protection and sector-specific legislation, to facilitate easier online cross-border transactions benefiting business, consumers and society as a whole.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totaled more than €2 trillion in 2015, directly supports more than 4.3 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Introduction

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the European Commission's efforts to create a more digital-friendly Internal Market, and therefore supports initiatives to improve the quality and coherence of European online transactions in the framework of the Digital Single Market package.

However, AmCham EU believes that the proposed regulation addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market, needs to be clarified to ensure that it delivers the promised benefits to consumers and traders of all sizes. In particular, we wish to point out to the liability issues that may arise from the introduction of an obligation to sell throughout the EU.

AmCham EU has outlined in this position paper specific items that are of concern and looks forward to working with the European institutions to further develop the proposed text into a workable and equitable instrument that will drive online cross-border consumer transactions.

Business-to-business transactions should be excluded from the scope of the regulation

AmCham EU believes in contractual freedom between traders. Article 1 (c) of the proposed regulation includes undertakings within the definition of customer, de facto extending the scope of the proposal to business-to-business transactions.

AmCham EU is of the opinion that the principle of contractual freedom should prevail between traders. Imposing an obligation to sell business-to-business would hamper the existing freedom and should be avoided. AmCham EU calls for a removal of the term 'undertakings' from the definition of a customer in order to limit the scope of the proposal to business-to-consumer transactions.

Liabilities arising from an obligation to sell should be explicit

AmCham EU believes that with the appropriate adjustments, the proposed regulation could provide increased legal certainty for cross-border transactions and could act as the desired stimulus for cross-border trade, incentivising traders to sell online.

However, the obligation to sell, as it is currently foreseen, should not become an obligation to deliver. Legal certainty must be guaranteed for all traders to develop a sound legal framework for cross-border trade.

Business distribution strategies are determined by a number of legal, commercial and practical considerations which may prevent traders from selling and/or delivering cross-border. These reasons should be considered before imposing any obligations to sell onto traders. The main reasons behind business choices lie in: labelling and language requirements, divergences between national requirements, VAT regimes and delivery prices, sector-specific requirements, environmental requirements to implement the related legislation that add administrative burden and costs, consumer protection rules that might be difficult to ensure in other Member States, and many others.

Therefore, the concept and consequences arising from an obligation to sell must be clarified. The concept of delivery and the liabilities arising from the delivery should be explicit. AmCham EU could foresee an obligation to sell as legally acceptable only if the point of delivery serves all purposes of the online transaction: including consumer rights, guarantees, remedies, product safety, liability, labelling, dispute resolution and others. Traders opting to sell cross-border should be encouraged to exploit new market opportunities without facing the fear of additional trade barriers arising from an unclear obligation to sell.

AmCham EU calls for clarifications on whether using 'traders' rules' and following the 'sell as at home' principle would mean that, if an issue arises with a product, the consumer would have the responsibility to bring it back to the shop/pick-up point, and if they would have no claim to a local after-service support or to a longer guarantee period than that available to consumers in the country of the sale.

Most traders, while directing their activity towards a certain Member State, must consider operating costs incurred throughout the supply-chain arrangements and processes that must be considered by the institutions, and must be provided for in the proposed regulation. These processes are often established by traders in a cost-effective manner and would have to be reconsidered if implementing the obligation to sell.

The applicable law to potential disputes should be clarified

AmCham EU believes that legal certainty should prevail to encourage traders to sell cross-border. Therefore AmCham EU welcomes the wording of Article 1 (5): 'complying with this regulation shall not be construed as implying that a trader directs his or her activities to the member state where the consumer has its habitual residence or domicile'. As mentioned, if the trader does not direct his/her activities to the Member State of residence of a consumer, the applicable law should not be the national law of that consumer.

AmCham EU believes that the proposed rules should clearly state that any sales beyond the delivery area determined by the trader are 'passive sales' and underline that passive sales are exempted from Regulation (EC) No. 593/2008 (Rome I) and Regulation (EC) No. 44/2001 (Brussels I). This would help clarify that the trader is not regarded as directing sales to where the consumer lives.

AmCham EU calls for increased legal certainty for traders on the applicable law regarding any dispute arising from a transaction with a consumer residing in a Member State where the trader is not directing his/her activities.

The legal circumstances of delivery should be foreseen within the regulation

AmCham EU believes that the proposal lacks clarity on delivery options for consumers. While rejecting the obligation to deliver, AmCham EU supports a reasonable approach to allow delivery in the markets where the trader already delivers. However, when questions arise surrounding the delivery processes, these uncertainties must be clarified.

If the trader does not already deliver in the country of residence of the consumer, the consumer would have to collect the good in a Member State where the trader does deliver. As a consequence, secondary shipment transactions to the country of residence of the consumer may occur. AmCham EU is concerned about the liability that might arise from a second shipment transaction by an intermediary (i.e. pick-up

point). Therefore the proposal should further elaborate on the practicalities of the delivery, excluding the trader's liability in case of secondary shipment transaction.

Interactions with sector-specific legislation should be taken into account

AmCham EU membership represents a wide range of sectors, and complies with sector-specific legislation. Selling goods in different markets requires regulatory alignment with language, labelling, recycling and other requirements for sector-specific products such as cosmetics, toys or vehicles. The obligation to sell should not be imposed without taking into account the interactions with these requirements.

Regarding Regulation (EC) N°1223/2009 on Cosmetic Products, the obligation to sell in the proposed regulation on geo-blocking does not take into account the divergent labelling obligations for traders or the language specifications, that play a vital role in case of dispute related to a product. Article 19 (5) states that the language in which cosmetic information should be labelled must be determined by the law of the Member State in which the trader decided to sell. If the trader has to sell to another country, this could potentially infringe upon national language requirements. The question of liability also represents an issue, as the responsible person remains the manufacturer even though, when the product is delivered by an intermediary, the manufacturer has no control over it.

AmCham EU calls on the institutions to review the potential interactions with sector-specific legislation to clarify the liabilities arising from the obligation to sell.

Traders should not be forced to disclose commercially sensitive information

Article 3 (4) of the proposed regulation requires traders to provide a 'clear justification' in case they refuse consumers access to an online interface. AmCham EU believes that such a provision should not unnecessarily force companies to disclose commercially sensitive information about their business/distribution strategies. Additional clarifications should be added to the current wording.

Potential impact of this proposal on traders' marketing practices

In its current form, Article 6 of the proposed regulation puts an end to the possibility for our members who have an online interface in the EU to limit the territory on which passive sales of their products are allowed within the EU internal market. The notion of 'passive sales' is defined by the Commission's Guidelines on Vertical Restraints, item 51, as 'responding to unsolicited requests from individual customers' as opposed to 'active sales' which mean 'actively approaching individual customers'. The use by a distributor of a website to sell products is considered a form of passive sales. AmCham EU calls for an exclusion of passive sales from the scope of the regulation.

AmCham EU trusts that traders must remain free to determine their distribution strategies and to not sell their products throughout the EU. Additionally, an indirect obligation to sell to all customers across the EU may affect brands' product marketing strategies (generally adapted/tailor-made to national culture and preferences), such as exclusive country-specific launches.

Conclusion

Overall, AmCham EU welcomes the Commission's efforts to remove barriers within the Digital Single Market. Nevertheless, a number of uncertainties arise from the publication of this proposal.

AmCham EU encourages the European institutions to clarify certain aspects of the proposal and consider its potential impact. Particular attention needs to be devoted to the obligation to sell and its practical consequences regarding delivery and responsibility. AmCham EU urges the institutions to clarify the applicable law, the notion of passive sales and the relation with sector-specific legislation.

In line with the broader objective of better regulation, AmCham EU believes that regulation should be evidence-based and feels this proposal is impractical in its current state. AmCham EU looks forward to the fine-tuning of the proposal to deliver a regulation that will facilitate easier online cross-border consumer transactions, benefitting business, consumers and society as a whole.