

## **Federation of European Publishers – Position on geo-blocking**

### **Executive summary**

The assessment of the scope of the Geo-blocking Regulation warrants a serious reflection on its potential impact for the ebook sector.

In most cases, ebooks will be available in most, or all, territories, and consumers will be able to find an ebook for sale from one or another source, even if not from all outlets in all countries. Moreover, this does not entail significant price differences. Evidence shows indeed that there is not a real problem of accessibility of ebooks across borders, so that any Regulation would be aimed at a very narrow target. Not least, because demand is driven mainly by language considerations, so that cross-border demand for ebooks is very limited (often insignificant) outside of homogeneous linguistic areas.

On the other hand, the location of a customer matters to a vendor, and it does in a way that is completely independent from whether a sale is active or passive. It matters for technical reasons (displaying correct price, be it for VAT or fixed book price reasons), for economic reasons (the costs of payment systems, of software to handle different sales conditions), for legal reasons (consumer legislation, defamation legislation, child protection, again fixed book price), all of which mean that it is not cost-neutral to sell into more territories, and in some cases it is even not advisable from a legal point of view.

It therefore stands to reason that publishers and booksellers would prefer, in many cases, to limit sales to the territories where it makes sense, legally and economically. A blanket obligation to avoid restrictions at this stage would be very likely to achieve the opposite of the desired effect, by forcing a large number of smaller operators to withdraw from online sales altogether, and reinforcing the already dominant position of a few large players.

Several mitigating measures could be put in place to help traders overcome these difficulties; however, these should – if implemented – come before a ban on geo-blocking is introduced, and might nevertheless not address all issues. In the current situation, simply put, an indiscriminate ban on geo-blocking in the ebook sector would generate costs largely higher than the benefits, and would not stand a proportionality test.

## Introduction

In view of the ongoing assessment of the scope of the Geo-blocking Regulation, the Federation of European Publishers would like to highlight a series of concerns that the topic raises for the book sector. The past and current debates on the issue warrant some very important clarifications regarding the technicalities of e-book sales, which, so far, seem to have been very often ignored or misunderstood. FEP is of the opinion that a decision about the possible inclusion of copyrighted digital content in the scope of the proposal must be weighed very carefully against any possible negative effects, and in any case be subject to a thorough impact assessment – as confirmed by the study commissioned by the European Parliament on geo-blocking.<sup>1</sup>

## How the sector works

To start with, it's important to outline the way the book sector works (each creative industry has its models). Simplifying things to the maximum, a publisher acquires the right to exploit an author's copyright on a work – normally for the language the work is written in, for types of exploitation and territories specified in the author's contract. It is common to acquire rights for all territories (at least in Europe), but it is equally possible that the author decides otherwise.

The publisher, in turn, will sign contracts (commercial agreements) for the sale of ebooks with aggregators, distributors and wholesalers, retailers, assigning to them a commercial right to distribute the ebook, in exchange for a share of the selling price. These agreements will be passed by the intermediaries on to their respective customers, the retailers. Sometimes publishers will deal directly with the retailers. There are several possible models, including direct sales by publishers. None of these deals constitute a transfer of copyright, though the rights necessary for these transactions are based on copyright.

For each individual title of the catalogue available, the contractual terms of these commercial agreements define, among other obligations:

- The price of the title (in the case of agency agreements, which are used for the vast majority of titles in terms of sales volume), provided in the corresponding currency for each territory usually before taxes
- The fixed price of the title for certain territories (where applicable)
- The reporting obligations of the bookseller to the aggregator or e-wholesaler
- The payment practicalities

Contracts can also include provisions on territorial coverage, agreed by the parties, which can depend on various factors (such terms need to be generated and technically incorporated by the

---

<sup>1</sup> [http://bruegel.org/wp-content/uploads/2017/02/IPOL\\_IDA2017595364\\_EN.pdf](http://bruegel.org/wp-content/uploads/2017/02/IPOL_IDA2017595364_EN.pdf)

publisher via metadata attached to ebooks) – the essence being that the location of a potential customer matters.

### Why location matters

Markets in the book sector are very much linked to linguistic areas. Whereas there are generally very few (if any) legal restrictions to distribution based on territory – since publishers acquire rights to works for a specific language in all territories (and sometimes for translation in one or more others) – demand is predominantly linked to language.

Nevertheless, **the location of a customer matters**, and it does in a way that is completely independent from whether a sale is active or passive. It matters for **technical reasons** (displaying correct price, be it for VAT or fixed book price reasons), for **economic reasons** (the costs of payment systems, of software to handle different sales conditions), for **legal reasons** (consumer legislation, defamation legislation, child protection, again fixed book price), all of which mean that it is not cost-neutral to sell into more territories.

The issue deserves expanding. On the technical side, a vendor is obliged to display the correct final price to a customer before the transaction takes place. Even in the absence of price discrimination, this will require the trader to correctly identify in advance the country where the customer is located, in order to apply the correct rate of VAT (the VAT of the place of consumption applies, as a general rule), as well as to comply with any fixed book price regulation that may exist in the customer's country. More in general, article 20 of the Council implementation regulation 282/2011 makes it compulsory for all retailers selling services across borders to identify the place of residence of the customer. Retailers are also required to issue a correct invoice with VAT information to the customer at the time of sale. This requires the implementation of complex and highly costly mechanisms, i.e. the acquisition of geo-localisation tools that only those of the booksellers and aggregators who have decided to invest proactively in cross-border sales can afford to acquire and maintain.

The cost of systems to manage this complexity is relevant, and it increases with the number of different territories, tax rates and prices that have to be handled. Retailers also need to invest in sophisticated payment systems (especially credit cards), the costs of which increase significantly (and more than proportionately) when the geographical scope of sales is broadened. It is worth recalling that the Regulation also obliges the trader to allow the same means of payment across all territories. Thus, the mere capability to perform sales in a number of different countries has important consequences in terms of the cost of doing business, even without any active engagement in those territories.

The location of a customer also has legal implications. To start with, an author may have chosen to exclude certain territories from their contract with the publisher, and the author's choice must be respected regarding how and where their book is marketed (this is not purely hypothetical, many examples exist – authors for instance may want to rely on differentiated marketing strategies and rely on the publishers they deem more appropriate for different areas).

Moreover, the possible need to apply different consumer protection regimes to customers in different countries would generate a massive level of complexity and legal uncertainty. Despite the apparent intention to avoid this problem, the Regulation does not seem to offer sufficient guarantees to this end. The concern here is that the concept of “directed activity” in terms of consumer contract law as outlined by the CJEU is so broad that the geo-blocking ban would effectively make every sale an active sale for the purposes of application of consumer protection rules. The potential risk to be obliged to deal with a multiplicity of rules regarding consumer protection would be enough to put most traders off the market for cross-border sales. A simple return by a customer from a country whose consumer protection rules are not known in detail to the trader could create a huge risk of non-compliance.

Another important legal aspect is that of libel and defamation. The possibility that a particular title is the object of defamation or libel suits in a specific country (with or without the knowledge of the trader) is again a valid reason to restrict its sale in that country. Laws on the subject differ across the EU, and so do penalties and court attitudes; moreover, the outcomes of legal proceedings depend on the territories where a work may have been disseminated. Again, the potential for legal uncertainty, as well as risks and costs, is enormous.

The same goes for child protection laws: what is considered content fit for children in one country might not be legally such in another, which would definitely warrant territorial limitations and differences in treatment for the same content across different countries.

Finally, the need to respect fixed book price legislation where in force is a legal, on top of a contractual, matter. The legislation on fixed book price currently in force in several Member States aims at maintaining a healthy and diverse distribution network (physical and online) as well as promoting the broadest possible selection of diverse titles.

### **Costs vs benefits: assessing consequences**

The fact that demand is driven mainly by language considerations means that cross-border demand for ebooks is very limited (often insignificant) outside of homogeneous linguistic areas. Publishers surveyed by FEP report indeed very small sales outside of their language areas, with few exceptions, thus confirming this framework of reference.

Ebook sales are a small part of the income of independent booksellers, and much smaller when considering cross-border sales. More in general, the ebook market is relatively small compared to overall book sales in most editorial sectors; with few exceptions, it represents less than 10% of the turnover of the publishing industry in most European countries and less than 5% in trade sectors.

The location of a potential customer is in no way cost neutral. Managing the complexity of dealing with different territories can easily increase the costs of doing business significantly. The option of applying the same final price (including VAT) to all customers – which may be the inevitable solution in certain cases – would cut into the already low margins of operators, in some cases erasing them completely.

As a result, it stands to reason that publishers and booksellers would prefer, in many cases, to limit sales to the territories where it makes sense economically – usually along linguistic areas. Additional costs can be a very serious obstacle to cross-border sales, in particular when compared to very low potential sales in many markets. Incurring certain costs needs to be justified by demand, and costly measures should not be mandated by law without regard for the context in which they are imposed. Moreover, a publisher may find it too risky to sell in a country where there is a high level of piracy and low copyright enforcement.

A blanket obligation to avoid restrictions at this stage would be very likely to achieve the opposite of the desired effect, by forcing a large number of smaller operators to withdraw from online sales altogether, and reinforcing the already dominant position of a few large players. Forcing retailers to invest in the necessary infrastructure to address the complexities, to engage in unreasonable market conditions, or to take unjustified legal risks, is likely to cause disproportionate costs and make ebook sales unsustainable for SMEs, to the sole benefit of major platforms (GAFA, first and foremost). The maintenance of a strong and diversified network of booksellers is of utmost importance as they play a key role in the number of titles displayed and therefore for cultural diversity. The only real obstacles to cross-border sales are natural linguistic barriers.

In order to generate significant revenues from cross-border sales in practice, traders have to tailor their marketing to the context, based on local practices and pursue a customised approach when promoting ebooks, effectively directly targeting the particular market. Wherever this is a commercially viable scenario, this is precisely what the actors of the book chain do today.

The findings of the study on geo-blocking commissioned by the European Parliament summarise the issue very clearly: *“The average online purchase of an e-publication often involves very little money. Consequently, the transaction costs associated with the support of cross-border sales (including verification of the location of the consumer in order to assess the proper VAT, and to conform to any fixed price rules) loom large relative to revenues. Special care may be needed in*

*order to ensure that any rules imposed do not simply force small merchants to exit the e-publications business.”*

### **Possible solutions**

At least for some of the challenges outlined above, solutions could potentially be envisaged to mitigate the negative impact of a general ban on geo-blocking for digital content. The potential benefits of such a ban should be assessed only in the presence of such solutions in order to avoid disproportionate burden, particularly on SMEs.

The development of geo-localisation tools should be supported, as well as a data source that would work with book sector metadata to provide correct VAT for every sale (building on current tools like the MOSS, possibly). Crucially, there would have to be a limit to the cost of securitisation and credit card handling. For example, an EU-wide payment system that removed these barriers and risks for all vendors, large and small, could be created.

The previously quoted study also acknowledges that *“If geo-blocking were to be prohibited in general, it would still be necessary to take into account any fixed prices that may be imposed by law. E-books fall within the category of cultural goods, and may be subject to price regulation in the country of consumption [...]”* It is indeed essential to ensure that the safeguards embedded in the Regulation are also effectively enforced, so that it may not be used to circumvent fixed book price regimes.

There should be an absolute guarantee that, in every case where the trader does not actively target the consumer’s market by choice, the consumer protection law of the country of the vendor will apply. The vendor should also never be obliged to deal with customers in languages other than those made clear in its commercial offerings. Similar safeguards, if possible, should apply to the risks related to libel and defamation.

### **A non-issue?**

Some additional reflection further emphasises that the real benefits of a complete ban on geo-blocking for digital content are greatly overshadowed by the potential costs; It can be argued that, for the ebook sector, the issue is rather a non-issue.

Firstly, existing user surveys confirm the limited extent of cross-border demand for ebooks, and what is more, show that this demand encounters virtually no obstacles. According to the most recent Eurobarometer survey on the subject, only 3% of internet users in the EU (around 2.5% of the overall population) have tried to access or download digital books across borders in the 12 months before February-March 2019. Among those who didn’t, only 12% expressed an interest in

doing so – something that must be at least partly related to the fact that most cross-border book purchases take place in homogeneous linguistic areas. Moreover, among those who did try to access content across borders, of all the types of content examined, respondents tended to be blocked from accessing ebooks less frequently: close to two thirds of users were never blocked, one out of four was rarely blocked, and just about one in ten was blocked ‘often’ or ‘always’, meaning that arguably geo-blocking in the ebook market could currently be a concern for 0.3% of internet users in the EU (some 0.25% of the population). This warrants serious reflections about the need for legislative action.

Parallel to this, and to some extent already implied, is the absence of real problems on the supply side – i.e., there is no significant lack of availability of ebook titles in different countries. Whereas not every single title may be available in every country on every platform, there are numerous outlets that sell ebooks all over Europe, and readers will always be able to find a suitable offer.

According to the study<sup>2</sup> carried out by the Joint Research Centre of the European Commission precisely on this subject: *“The welfare effects of lifting geo-blocking restrictions are very hard to predict in the absence of detailed data on consumer demand by book title and price levels in each country. E-books cross-border availability is already very high in the Amazon stores, especially when the Amazon.com US store is taken into account as a back-door access. Lifting geo-blocking restrictions will only produce a very small increase in the variety of titles available. Moreover, most popular books will be available in translation, especially in larger markets. That would again dampen the variety effect as consumers can choose between different language versions of the same book. The main impact will therefore come from the price effect.”*

Considering that price discrimination is not prevalent in this sector, so in fact poses a purely theoretical issue, it can be inferred that very little (if any) impact on consumers can be expected from a lifting of geo-blocking. Once again, the point is that limitations to cross-border sales are simply meant to concentrate sales where they make commercial sense and are justifiable given their minimal impact.

## Conclusion

Technical, legal and/or economic difficulties can reasonably lead to introducing territorial restrictions in distribution agreements along the book value chain. Several mitigating measures could be put in place to help traders overcome these difficulties; however, these should – if implemented – come *before* a ban on geo-blocking is introduced, and might nevertheless not address all issues (first and foremost the natural barriers to cross-border book sales related to language).

---

<sup>2</sup> <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc106520.pdf>

Simply put, with an indiscriminate ban on geo-blocking, costs would offset benefits, and legislation of this kind should never have such consequences. Any political decision in this respect should be carefully assessed and should take into account the possible negative effects, weighing them against the potential benefits. From the existing evidence, it seems clear that a ban on geo-blocking for ebooks would not stand a proportionality test.

Given the modest dimension of the issue and the potential negative consequences, the choice of selling across borders should be left to the market operators, including the selection of the territories where making business is viable. Forcing everyone to sell everywhere is not the solution. It is not a matter of discrimination, but of sustainability.

Quoting again the JRC study: *“This leaves policy makers with a policy dilemma between lifting geo-blocking restrictions on the basis of empirical economic evidence and welfare considerations, or on the basis of the DSM policy principle to oppose price discrimination based on the country of residence of the consumer. The data required to compile the evidence is hard to access (held by private operators).”* We concur that at this stage, economic evidence and welfare considerations do not justify changing the scope of the Regulation.

*FEP is an independent, non-commercial umbrella association representing 29 national associations of book, learned journal and educational resource publishers, from all over Europe.*

[www.fep-fee.eu](http://www.fep-fee.eu)