



18 December 2015

Geo-blocking and different treatment in the single market

This position paper constitutes BUSINESSEUROPE's contribution to the European Commission public consultation on geo-blocking and other geographically-based restrictions when shopping and accessing information in the EU

Framing the debate

1. The word “geo-blocking” has become a word with various meanings and understandings at European level. For the sake of clarity, and as stated in the background document accompanying the European Commission’s public consultation, in this contribution we do not refer to restrictions related to copyright and licensing practices (such as the broadcasting of sport events) or issues related to competition law, which are currently addressed by the ongoing e-commerce inquiry launched by DG Competition.
2. Rather, we will focus on “geo-blocking” as a technical measure to block or limit access to a certain service, or to reroute and provide different treatment in terms of price, general conditions or otherwise, on the basis of the nationality or residence of the recipient.
3. BUSINESSEUROPE and the companies we represent – who are also often service recipients - fully share with consumers the common interest not to be subjected to unjustified differential treatment in price or otherwise, or refusal of supply. However, there can be a range of justified reasons for different conditions.
4. Article 20 of the 2006 Services Directive on non-discrimination is an important instrument to make the single market work better. It is particularly relevant for e-commerce as the selling of a good online is a service.
5. While BUSINESSEUROPE fully supports the principle of non-discrimination, there are often justifications to trade online in a more targeted manner or adjusting treatment. For instance, as the Commission rightly stated in 2012 in its Staff Working Document of 8 June 2012 with a view to establishing guidance on the application of Article 20(2) of the Services Directive: “...some instances justify different treatment given the current degree of completion of the internal market”.



Taking a cautious approach – careful considerations to be made

6. It is essential to carefully analyse on a **case-by-case basis** whether restricting access to a certain service or different treatment in terms of price or conditions on the basis of nationality or residence is justified or not. The Commission already concluded this in its above mentioned Staff Working Document of 8 June 2012 that: *“A case-by-case analysis is required in all circumstances to determine whether different treatment is being applied to recipients and whether or not that treatment is justified for objective reasons”*.
7. **Geo-blocking**: offering different conditions, rerouting (so redirecting users to other websites), or limiting access to certain offers, or refusal of supply on a geographic basis are four different situations leading to different considerations and possibly different conclusions.
8. When addressing geo-blocking it is essential to **differentiate** between different situations, for example:
 - (1) Cases where a customer goes to the same place at the same time to enjoy a service, e.g. car rental, and;
 - (2) Cases where a service or good is provided to a business or consumer in different Member States, e.g. e-commerce.

The argumentation used for category 1 cannot simply be extended to cases in category 2 where for instance an online webshop is exporting to seven different Member States with each their own particularities.

9. In addition to the distinction to be made outlined above, **business models** and situations of companies also differ. It is important to take this into consideration.

For instance, consider whether:

- The trader is only serving the “home market” of the Member State in which it is established, or also other Member States.
- The trader is actively targeting Member States other than where the company is established.
- The trader is operating offline and/or online only.

In addition, what is impractical or too costly for one company can be insurmountable for another. For instance, a company may decide not to deliver in countries where there is a different currency to avoid complications with the payment systems, or not to deal with VAT issues.

In 2012, the Commission rightly pointed out in the above mentioned Staff Working Document 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"*.

The principle of freedom of contract must be respected and freedom to conduct a business in accordance with EU law and national laws and practices must be recognised.¹

- 10. Price** is a variable based on various market conditions (e.g. supply and demand or seasonality) – if these conditions change (also from one Member State to another), also the price changes naturally. Not only transaction-related rules such as consumer legislation, but also product-related rules (e.g. the specific national bike light rules in Germany – see example 1 on compliance below) can vary from country to country.

Recital 95 of the Services Directive clearly states that *"It does not follow that it will be unlawful discrimination if provision were made in such general conditions for different tariffs and conditions to apply to the provision of a service, where those tariffs, prices and conditions are justified for objective reasons that can vary from country to country, such as additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment"*.

- 11.** For the case-by-case analysis one has to **distinguish between rerouting and forced rerouting**. Forced rerouting can be justified if the reason is clear for the consumer (for example certain products such as snus or certain animal repellent cannot be sold legally in a certain Member States due to different national regulation). Rerouting also allows better client customisation. The Commission acknowledged this in 2012 by stating that *"Techniques allowing service providers to identify the location of the recipient and thus to direct the consumer to the offer adapted to the territory where he is resident are not per se indicators of discrimination"*.
- 12.** Due to the application of **EU rules on court jurisdiction**², widely interpreted by the Court of Justice in recent case law, any trader engaging with a foreign consumer risks, by the simple fact of having a website, to fall under the jurisdiction of the consumer's place of residence; this whether or not the consumer used the website to find the trader's offer³. In practical terms, if the trader wants to recover a debt he

¹ Charter of Fundamental Rights of the EU, Article 16.

² [Brussels I Regulation](#).

³ In the [Alpenhof ruling](#) (joined cases C-585/08 and C-144/09) the Court of Justice established the criteria for assessing when the traders' website addresses an activity to another Member State in order to interpret the concept of direction of activity relevant to determine which jurisdiction is applicable; in the [Mulheithner ruling](#) (case C-190/11) the Court added that for the consumer' country jurisdiction to be applicable it is not necessary that the contract at issue was concluded at a distance; in the [Emrek ruling](#)



will most likely have to do it in a distant court, in a foreign language under unknown procedural\substantial law which can be cumbersome.

13. A number of parameters influence price-setting, where **purchasing power** is also an important factor. A legal obligation to open-up a price to customers all over Europe will bring high risks over the long-term: it will lead to an **approximation of prices**.

Forcing open access to the price a company sets for its product in a national market where the average purchasing power is lower, will in the long term drive business to increase that price as the demand for buying from that website from customers from other countries would increase. This will disadvantage customers from Member States with relatively lower average purchasing power and may lead to increased economic divergences in Europe.

Moreover, such an obligation would directly interfere with **strategic business decisions**. For example, tactical pricing strategies to enter new markets may be more difficult (as coming in with lower prices might be more complicated due to the obligation to grant free access to all), with detrimental effects on competition at national level, as there will be less new market entrants.

14. **Existing information obligations:** There should not be general information obligations for an online trader to list on the **main webpage** (i.e. the “landing page”) where one delivers. An online seller might deliver different products (skies, helmets or gloves) to different countries. It would be better to list this on the product **specific page**, which many traders already do to best serve their clients. Here the line of the 2011 Consumer Rights Directive Article 8 (3) should be followed where it 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”*.

In addition, there are already several initiatives within the digital community aimed at exploring new ways to offer transparency, for example through open source projects such as the Data Transparency Lab (www.datatransparencylab.org) to empower internet users and offer easy ways of for instance better understanding targeted advertising and dynamic pricing practices.

(case C-218/12) the Court went even further by stating that the consumer could sue the foreign trader before the court in his country of residence even if the trader’s website (mean used to address activity to the consumer’s country) was not the basis to conclude the contract. In the latter case the consumer learned from acquaintances, and not from the Internet site, of the trader’s business.



Justified reasons for different treatment

15. BUSINESSEUROPE fully agrees that unjustified discrimination purely based on nationality or residence of recipients should be addressed. However, when addressing the issue of geoblocking BUSINESSEUROPE asks the Commission to reflect on the above considerations and to acknowledge that there can be objective and justified reasons for different treatment.
16. Furthermore, based on freedom to run a business, companies have different kinds of business strategies. Different kind of market conditions (e.g. higher or lower demand in different markets, different kinds of consumer expectations) and economic considerations (e.g. additional operational costs of cross-border business) can influence these considerations and many companies' strategy is to build competitive advantage only in the national or local markets. The companies operating only in their national or local markets or only in some EU Member States must not be punished for their choices.
17. Reasons can also be the result of fragmentation in the single market. In most cases this fragmentation is not caused by companies, but is due to a lack of harmonisation at EU level, a lack of mutual recognition, additional national regulation or diverse interpretation of EU legislation by Member States.
18. In fact, many companies would be willing to expand or offer their services across the single market - as they do in national markets - where the conditions make it feasible and profitable. When this does not happen, while the company has the means and ambition to do so, it often illustrates remaining fragmentation and an incomplete single market.

A number of reasons for different treatment:

- **Different market conditions:** providers are free and should be free to adjust their pricing or conditions in the various markets in line with competitive pressures such as higher or lower demand, purchasing power, seasonality or pricing by competitors.
- **Different or additional national regulation,** for instance related to extra labelling requirements, additional national or local rules or seasonal sales regulations. These result in additional operational or compliance costs, which can make the provision of the good or service non-viable or the additional costs are passed on to consumers, making the offer unattractive. This directly impacts the trader and likely the conditions and can restrict access to a service (*see the example in box 1*).



BOX 1: Prescriptive national rules for bicycle lighting in Germany

StVZO is the German rulebook for vehicles on the road, including bicycles. TA (Technische Anforderungen) is the more precise set of rules and descriptions of testing methods used. The additional German rules for bike lights are considered to be very prescriptive. In addition to indicating light brightness requirements (both minimum to ensure reasonable illumination of the road, and maximum to prevent blinding oncoming traffic) it also has detailed power requirements regarding LED lamps, other battery powered lamps and dynamo systems, prescribing the Watt and Voltage for instance, without clear health or safety reasons.

Direct impact: Such regulation greatly limits which type of bike lights manufacturers sell in Germany, or requires them to adapt their product as their intended use may be forbidden.

Diverse national regulation requires traders to embark on a lengthy legal assessment before offering their good or service in another Member State, which is costly and does not necessarily lead to a final clear conclusion of the legality. These assessments are costly and time-consuming and have to be done for every product sold and for every Member State, and it has to be regularly reviewed.

As a result a trader has to adjust the offer for every different national market.

- **Compliance issues:** For instance, ending geo-blocking as such can also pose problems in terms of compliance with labelling rules (*see the example in box 2*).

BOX 2: Issues with compliance

Health and safety regulations often impose additional requirements. For example the Classification, Labelling and Packaging Legislation (CLP), which requires companies to label a product (in addition to the EU-wide used pictograms) in the language of the Member State where it is sold.

If the Commission would fully prohibit geo-blocking, the products destined to be sold in one Member State could be purchased by consumers in other Member States. These consumers would then be confronted with health and safety labels not in their own but in different languages. This would be dangerous to consumers and has already led to inquiries of German poison centers. Moreover, a result is that a company will breach EU law.



On compliance, the Commission rightly stated in 2012 that “*the costs of compliance with differing national rules might give rise to differences in prices and conditions of services supplied across borders. Similarly, service providers may be discouraged from directing their activities to other Member States to avoid having to alter terms and conditions under which the services are provided. Service providers may sometimes perceive the difficulties in complying with a range of different requirements as disproportionate to the revenue they could hope to earn by actively directing their activity to other Member States. Such costs due to the regulatory environment may then be passed on to the customer or justify a refusal to supply.*”

- **Different shipping, distance and delivery costs:** linked to delivery or the need to *physically* go to another Member State to deliver the service purchased online. Price differences may occur due to place of residence of the customer that demands the service (such as higher costs linked to the provision of service in another Member State). This also covers costs related to putting delivery arrangements in place for a limited volume of cross-border sales, i.e. too little demand to make provision attractive.
- **Different national standards,** for instance relating to technical specifications for certain products e.g. to electrical appliances such as different plugs, etc.
- **Payment issues:** limited alternatives to credit cards as a means of payment at a distance, higher risk of fraud attached to acceptance of non-national credit cards, lack of access to credit registers cross-border, varying multilateral interchange fees or insufficient local resources in place to administer specific payment means (e.g. cash on delivery).
- **Contractual obligations:** for instance when providers are forbidden to offer services to recipients resident in a given country due to a contractual relationship between manufacturer/supplier and distributor in that country (*see also the example in box 3*).
- **Different electronic waste disposal regulations:** different requirements and levels of fees and thresholds for registration and reporting of electronic equipment can be too difficult for traders to deal with when selling cross-border.
- **Legal compliance issues:** Traders face potentially high compliance costs in dealing with differing contract and consumer protection laws in different Member States that they may perceive as disproportionate to the sales made outside of their Member State of establishment (*see also box 2 and 3*).
- **Different VAT rates,** based on the country where the recipient is located.
- **Language barriers** as such can be a justified reason to not deliver or offer a service to a certain country. A transaction may imply an exchange between a trader and a recipient where language difference may not be overcome, e.g. after-sales services for a boiler.



- **Strategic promotional, ownership or marketing reasons**, for example:

BOX 3: Marketing and issues with compliance

The company A owns the brand rights of some of its products only in a number of Member States. An example is *Bright* washing powder, a company A innovation. The brand name *Bright* is owned by company A in Germany. However, in the UK it is owned by company B, where company A sells its *Bright* formula under a different name.

Geo-blocking is a tool for company A's retailers to make sure that the respective products are only sold in the Member States where the company is allowed to sell them. By abolishing geo-blocking allowing consumers to purchase the products from other countries online, for example a German *Bright* product to the UK, company A would run the risk of being confronted with legal actions from company B. This would be the case even if it was never the intention to sell the *Bright* product intended for the German market to the British market.

- 19. Cases where geo-blocking does not seem to have an obvious justification are mostly linked to “same service, at the same time in the same place” situations.

However, even here there could be acceptable reasons for targeted offers, for example linked to national or school holidays or vacation periods (*see point 10 on price*). 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.



The way forward

20. BUSINESSEUROPE supports the aims to counter unjustified geo-blocking. Nevertheless, we would like the Commission to carefully consider the elements, considerations and examples outlined above before proposing any legislative proposal.
21. BUSINESSEUROPE agrees that creating more transparency on delivery restrictions could help to avoid complaints and accommodate some of the recipients' concerns (consumers and businesses) for not having access to a certain service or receiving differential treatment.

However, the legislator should not aim to force companies to sell cross-border at any cost and should also avoid putting excessive administrative burden on companies through the introduction of complicated explanation obligations for their website to indicate for every different product in which countries they sell or do not sell and under which conditions (see also point 14 on information obligations). The 2011 Consumer Rights Directive already lays down important information requirements in this respect.

22. Rather, **BUSINESSEUROPE asks the Commission to provide clarity by offering relevant authorities with guidance and a number of criteria to evaluate when geo-blocking, differentiated treatment or a refusal to supply is justified or unjustified.**
23. At the same time traders should be encouraged to provide clear information at the right moment to the customer to avoid misunderstandings and wrong expectations. Many are already doing so as it is also in their interest to make the customer as satisfied as can be. In fact, most traders already clearly indicate in a prominent place on their websites any possible delivery restrictions applying to their services.
24. It is clear that the fundamental principle of contractual freedom must not deviate into a default obligation to supply. Rather, the focus should be on tackling different treatment at the root: addressing challenges to (online) trade across borders and remaining fragmentation in the single market.

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