

CMA response to the European Commission on geo-blocking and other geographically based restrictions

Introduction

1. This response has been prepared by the UK's Competition and Markets Authority (CMA)¹ – the UK's lead competition and consumer authority. The CMA's aim is to make markets work well for consumers, businesses and the economy. It works to promote competition for the benefit of consumers, both within and outside the UK.² The CMA strives for competitive, efficient and innovative markets where consumers are empowered and confident about making choices, and where businesses comply with competition and consumer laws without being overburdened by regulation.
2. The CMA welcomes this opportunity to respond to the European Commission's consultation on geo-blocking and other geographically based restrictions. We note the limited scope of the consultation which expressly excludes consideration of restrictions arising from copyright and licensing practices and the competition prohibitions. We fully agree with the Commission's objective to maximise access for EU consumers to services provided across the whole EU in order to empower consumers and increase online trade within the Single Market.
3. The key points we make in our submission are:
 - We consider there to be **significant risks associated with the introduction of broad-brush ex-ante regulation** restricting geo-blocking in the absence of economic evidence demonstrating harmful effects of such practices. The impact of any additional ex-ante regulation should be carefully considered and should in any event be limited to governing situations where there is sound economic evidence of overall consumer harm.
 - **Unjustified geo-blocking practices should be addressed using the existing regulatory framework**, in particular the Services Directive. To

¹ The CMA acquired its powers on 1 April 2014, following its creation under the Enterprise and Regulatory Reform Act 2013, bringing together its predecessor bodies the Competition Commission and the Office of Fair Trading (OFT)

² In accordance with its primary duty under the Enterprise and Regulatory Reform Act 2013.

encourage enforcement of Article 20 (2) of the Directive there is a need for further clarification of the categories of ‘objectively justified’ discrimination, which could be achieved through a combination of targeted, precedent-enhancing enforcement action and additional guidance for national enforcement bodies and businesses.

- As a matter of principle it is important that consumers are empowered to access websites which are most relevant to them. In relation to geo-blocking **we have particular concerns about practices depriving consumers of any meaningful information.** An example consists of automated re-routing which consumers cannot override and which prevents consumers even accessing information on certain websites – prima facie, it is not clear that any benefits arising from this practice outweigh the negative impact on consumer choice, although we have not conducted a detailed impact assessment.
 - The concept of the Single Market allows for certain practices entailing elements of discrimination to be justified. As such in our view **price discrimination (and therefore geo-blocking where it supports price discrimination) or a refusal to supply certain geographic areas could be justified in some circumstances.** Businesses which provide services in one Member State (MS) should not necessarily be required to provide their services at the same price in all MS. In our view, **there may be overall economic/consumer advantages arising from geographic price discrimination in some cases that should be taken into account.**
4. We have set out our understanding of the types of geo-blocking we are concerned with and our observations on their potential impact at Annex A.

Services Directive enforcement

5. In our view **unjustified geo-blocking practices which result in consumer detriment, should be addressed using the existing regulatory framework**, in particular Article 20 of the Services Directive as currently formulated.
6. The Services Directive (Article 20(2)) prohibits discrimination based on nationality or place of residence except where those differences are directly justified by objective criteria. The provisions attempt to strike a balance between, on the one hand, pursuing the Single Market objective and addressing the potentially harmful effects of price and other discrimination and, on the other, the freedom of traders to decide on the geographic market they serve, and to set their own supply conditions and prices which may

include justifiable discrimination. This seems to us to be the right approach. An overly restrictive approach may result in the prohibition of price discrimination in cases where overall benefits for consumers might justify such differential pricing.

7. Article 20(2) contains no definition on the test of objective justification, but some guidance is contained in recital 95 to the Services Directive which indicates that the range of justification grounds includes the following:
 - Additional costs incurred because of the distance involved or the technical characteristics of the service
 - Different market conditions such as higher or lower demand influenced by:
 - Seasonality
 - Different holiday periods
 - Pricing by different competitors
 - Extra risk linked to the application of different rules.
8. The first and third listed bullets are more straightforward tests because it is easy to understand that a business's costs may be increased by supplying to a consumer in a foreign country, although determining what difference in charges or other conditions may be reasonable can still be complex. A simple example is that a business will likely be justified in charging higher charges for delivery of goods to a foreign country where the uplift reflects the difference in its costs. Similarly, if there is evidence that a business's risks of not receiving payment for dispatched goods is higher in the case of purchases from buyers in some other Member States than from buyers in its own country, then it may be justifiable to impose stricter or different conditions as to time and method of payment.
9. It is more difficult to assess the scope of justifiable reasons under the second bullet ('different market conditions') as this is so wide and could potentially apply to any market factors which a business takes into account in setting a different price for its products in countries other than that where it is established.
10. Article 20 (2) is fundamentally sound in principle, but there is a need to provide further clarity on the scope of justification through targeted enforcement action creating precedents that provide greater legal certainty, alongside further guidance using the examples in Recital 95 as a starting

point. We note that the Commission has carried out some compliance initiatives under the existing regime (for example car rentals), although in general enforcement under this provision across the EU has remained low. The low level of enforcement is likely to be attributable to the breadth of the factors of objective justification cited in recital 95 and the difficulty in applying the test in practice. We therefore recommend that further clarification sets out clear principles that can be applied by businesses and national authorities when assessing whether any particular case of different conditions infringes the non-discrimination rule. We set out a more detailed consideration of the Services Directive and its impact at Annex B.

11. There are a number of factors which we consider should justify different prices or conditions of supply. A non-exhaustive list might include:

- a) **cost-reflective discrimination** (for example, different postal costs, taxation, regulatory costs). There may be some complexities to determining what is cost-reflective in some contexts – some costs may be less direct. For example, if retailers want to commit to a policy of pricing at the same level in their store premises and online, should their different costs of operating premises in different Member States be counted for determining what is cost-reflective discrimination in their online transactions in different Member States?
- b) **different treatment based on societal norms** - for example it may be legitimate to restrict purchase of certain goods which may be culturally unacceptable or likely to cause significant offence in one country but not another
- c) **different technical standards**, although refusal may be disproportionate if there may be ways to standardise supply.

12. In addition to the above, we recommend that further consideration be given to the relevance of wider economic or market factors to the justification test, in particular whether the price discrimination may be of overall benefit to consumers, given the nature of the specific market. We think the current wording of the test in Article 20(2) properly encompasses these factors although the examples of justification in recital 95 do not provide a sufficient degree of guidance or legal certainty for either national enforcement agencies or businesses.

13. We suggest that in the first instance, the Commission explore what improvements can be made to the ex post enforcement regime before seeking changes to ex ante regulation. In our view, the essential test in Article

20(2) should be retained but consideration be given to providing clearer guidance on the circumstances when market factors should justify different treatment. This could be achieved by providing national enforcement agencies with additional support in terms of prioritising appropriate cases and bringing selected cases to a conclusion with a view to creating relevant precedents that would facilitate a uniform application and enforcement of the Services Directive across Member States.

Transparency and Control

14. In relation to specific geo-blocking practices, **we have particular concerns about business practices depriving consumers of any meaningful information or choice, such as blocking consumers' access to cross-border websites with automated re-routing to a domestic website which consumers cannot override.** This runs contrary to the principle that consumers should be informed and empowered. Without this autonomy, while the consumer may not suffer actual detriment (in the form of higher prices), he or she risks being inconvenienced, frustrated and/or will lose trust. It may be acceptable for the consumer to be re-routed to a more convenient website if that is what the consumer genuinely wants. It is less acceptable for the consumer to be blocked from accessing information on the prices or terms on which a product is offered by the same business in other Member States and automatically rerouted to the business's domestic website which he or she has not chosen to visit, on the basis that a third party (whose interests may not be aligned with that of the consumer) decides to do this for them.

15. Where business practices block access to such information, consumers are impeded from discovering differences in a business's prices or conditions of supply in other MSs, so they are not informed and empowered to raise complaints with the businesses concerned, thereby allowing the business the opportunity to explain their justifications. Nor can consumers be well informed to raise complaints with regulators for potential enforcement action. While a restriction on blocking access to information might itself impose some costs on businesses, we recommend the Commission considers whether the benefits of implementing such a restriction in terms of consumer trust and confidence, and ultimately a more successful Digital Single Market, would outweigh the burdens to business (although we have not undertaken a cost/benefit analysis). We acknowledge it is also possible that the benefits of informed/empowered consumers could alternatively be achieved through market forces impacting on business behaviour by means of, for example, review sites.

16. If non-overridable automated re-routing is banned so that consumers can access cross border websites but traders have justifiably decided not to sell the product cross-border, they should make clear that the product in question is intended for their 'home' market only (the Unfair Commercial Practices Directive may in some circumstances require this). If, on the other hand, traders **do** decide to sell a product cross-border which has any features which makes it more suitable for their 'home' market, they will need to draw this to the consumer's attention appropriately.³

Geo-blocking and Price Discrimination

17. **We would also have concerns if restrictions were imposed on traders who currently choose to only serve a limited market within the EU.**⁴ As a general principle, subject to the law, traders should be free to choose not to sell to a wider market if they do not wish to. Businesses may legitimately limit the areas they wish to serve for a number of reasons. For example a trader in one Member State may not have delivery arrangements in another Member State, may be unfamiliar with the language or may be uncomfortable about submitting to the laws of a different jurisdiction (the consumer's).⁵ This may particularly be the case for SMEs.

18. **In our view there should not be a blanket requirement for services to be provided at the same price in all MS.** A total ban on all types of geo-blocking in all circumstances would prevent businesses from engaging in geographical price-discrimination, which would be an undesirable outcome. In our view, there *may* be *overall* economic advantages in some cases arising from such price discrimination. Where such traders *do* engage in price discrimination, it should not be assumed that it is *necessarily* harmful to consumers' overall welfare and therefore always unjustified.

³ For example an issue has arisen before the Finnish ombudsman: <http://www.anpdm.com/article/4243504A7142405D4774414B584371/15718008/3271752>. In this case, games consoles were delivered without a power cord suitable for Finnish outlets, mobile phones were locked to a foreign operator, and films did not have Finnish subtitles. The ombudsman found that, as a rule, consumers are entitled to assume that the products sold in a Finnish online store are intended for the Finnish market and can be used in Finland. If this is not the case, this must be especially emphasised and brought to the consumer's attention in a clear manner immediately prior to placing an order, and in the order confirmation sent to the consumer.

⁴ As suggested in question 8.

⁵ For example, an English company may choose not to supply French consumers if they do not have delivery arrangements in place. However, it would be unjustifiable to refuse to sell to a French consumer, assuming the collection point were the same.

Economic Considerations

19. Economic research⁶ suggests that the impact of price discrimination, including that facilitated by geo-blocking, is ambiguous. **Price discrimination may be beneficial or harmful in different contexts in terms of overall economic welfare or in terms of overall consumer welfare.** In particular, price discrimination is often welfare-enhancing overall (assuming an alternative of a single price and particularly where there is effective competition between firms), for the following reasons:

- a. Many consumers who would not be willing to purchase at a uniform price are willing to do so under price discrimination. This will often result in an overall expansion of output and an increase in total consumer welfare. In addition, price discrimination may in some cases benefit those customers with lower incomes who may not afford to purchase a product at the higher uniform price,
- b. Price discrimination may enable firms to compete more directly with one another for specific groups of customers to the benefit of those customers leading to intensified competition,
- c. Firms may have greater dynamic incentives to invest. Price discrimination according to willingness to pay provides an efficient way for firms to recover the cost of fixed investments. This may be particularly relevant for certain products or services, such as digital content, which have high fixed or sunk investment costs (for example in research and development) but low marginal costs.

20. Consumer benefits may arise from increased choice in a genuinely borderless market. However, there are also potential risks if an overly restrictive approach is adopted to limit the freedom of firms to set prices independently to reflect differing conditions of demand and supply across Member States.

21. Certain risks arise directly from the loss of the benefits of price discrimination described above, with the implication that restricting the ability of firms to geo-block may be harmful rather than beneficial to consumers in some cases. These risks may be more significant in situations where suppliers sell both online and 'offline' and there is competition between the two channels. Price

⁶ For instance, the CMA's predecessor, the Office of Fair Trading, carried out some economic analysis of research on differential pricing, both generally and in online markets (see report from OFT's 2010 market study on online targeting of advertising and prices). http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/business_leaflets/659703/OFT1231.pdf and report on 'Economics of Online Personalised Pricing' (annexed to OFT's 2013 report on personalised pricing)

discrimination according to willingness to pay 'offline' across Member States is commonplace (and is in practice sustained as customers would face substantial transport costs to access the same product at a cheaper price from another Member State). In this context, it is possible that a ban on geo-blocking may result in a particular supplier choosing to withdraw from selling online in order to sustain its ability to price discriminate.

22. As far as possible, the actual likely consequences of a restriction in geo-blocking should be explored. **In our view, the effect of geo-blocking, and therefore the effect of a restriction on geo-blocking in practice are likely to vary according to product markets and to depend on a number of factors, including factors relating to customer behaviour.**
23. For example, in some circumstances, if automatic re-routing were prohibited and consumers were presented with a menu option of cross-border websites, the majority of customers may still select to go to their country-specific websites and only a small minority choose to go to a cross border website even if the product is cheaper on that website. In that case the supplier would still be able to price discriminate and the risks/benefits of a restriction on geo-blocking would not necessarily materialize. In other circumstances, if the cross border website offers cheaper products the majority of customers may go to that website to purchase goods, and the risks/benefits of eliminating price discrimination would then materialize. This might occur for example in a market where customers were more technologically confident.⁷ **This example also illustrates the limitations of a broad-brush approach to ex-ante regulation which risks banning practices that do not give rise to consumer harm whilst imposing significant costs on businesses.**
24. In summary, the economic consequences in discrete markets of eliminating the ability of firms to geo-block are, we suspect, hard to predict and likely to be variable across different products and markets. In many cases it appears that eliminating the ability of firms to geo-block could harm consumers overall. Therefore, the impact of any additional ex-ante regulation should be carefully considered and should in any event be limited to governing situations where there is sound economic evidence of overall consumer harm.

⁷ Even now, technology competent consumers may use a proxy server or other services to enable them to purchase from websites from which they would otherwise be 'geo-blocked'

SMEs and Micro Businesses

25. In general, micro businesses/SMEs do not have the resources of the large multi-nationals to comply with additional regulatory burdens, therefore the impact of any change to the regulatory regime requires careful consideration to ensure that:
- a. the benefit to consumers is not outweighed by the burdens to SMEs.
 - b. SMEs are not disproportionately adversely affected vis a vis larger businesses which makes it more difficult for them to compete.
26. We believe there is a need to carefully assess the impact on small businesses of imposing an absolute ban on geo-blocking.

ANNEX A

TYPES OF GEO-BLOCKING

A1. Geo-blocking may take several forms but may include the following broad types of conduct (which for convenience we have labelled A, B and C) achieved by the following means:

| Category | Form of geo-blocking | Means |
|----------|---|---|
| A | <p>Denial of access (no re-routing)</p> <p>Simply blocking access to a cross-border website;</p> | IP address ⁸ |
| B | <p>Denial of access/re-routing</p> <p>Blocking access to a cross-border website with automated compulsory re-routing from a 'cross-border' website (CBW) to a 'home' website (HW) so that the consumer can only purchase from the 'home' website⁹ ;</p> | IP address |
| C | <p>Supply restriction/Price differentiation</p> <p>Allowing access to a cross-border website but denying or restricting supply or discriminating on non-cost grounds, for example:</p> <ol style="list-style-type: none"> 1. Refusing to sell from a cross border website and redirecting the consumer to the "home" website 2. Preventing consumers collecting goods or paying for additional cross-border delivery costs | <p>Payment card address</p> <p>Postal address</p> <p>Consumer disclosure¹⁰</p> |

⁸ or other technical measures

⁹ The 'home' website (or 'HW') in this context means a website which is targeted at the consumer based on their geolocation, for example a .uk website targeting the UK consumer in the UK or a .fr website targeting the French consumer in France. A cross-border website (or 'CBW') is a website targeted at the consumers of a different MS.

¹⁰ The consumer may be asked to provide these details or may be provided with a form which is not suitable for cross-border purchases (for example, postal code format specific to only one country).

| Category | Form of geo-blocking | Means |
|----------|--|-------|
| | 3. Charging a different price based purely on geo-location | |

A2. Our broad observations on each of these is as follows:

Type A (denial of access)

- A3. Type A includes where, for example, a consumer geo-located in the UK seeks to access a cross-border website and is blocked – but not rerouted.
- A4. The significance of this may depend on whether the trader has also chosen to supply UK consumers by alternative means and is seeking to segment its customers by national markets. Insofar as a trader simply wishes to limit its market, this should generally be a matter for the trader. If the trader blocks consumers' access to the website in order to procure them to use an alternative supply channel of the business, then our observations are as set out below in relation to Type B in paragraphs A5 and A6.

Type B (blocking access and compulsory re-routing)

- A5. Type B is similar to type A except that the consumer is automatically re-routed from a cross-border website to the 'home' website. For example, a trader may have a .uk website targeting the UK market and a .fr website targeting the French market.¹¹ This trader may deny a UK consumer from accessing, and therefore purchasing from, the .fr website on the basis that it wishes such sales to take place through the .uk website.
- A6. While this may be beneficial for many consumers, such practices may be harmful to the goal of a Single Market and also disempower consumers because the consumer cannot override the re-routing and is therefore deprived of exercising choice and accessing information. In our view, this practice could be harmful to consumers and we recommend the Commission consider whether it should be banned. Businesses would then have to make consumers aware that they were being re-routed and give them the option of selecting to access the

¹¹ These may or may not represent markets in an economic sense.

cross border website.¹² On balance, we think that it should be considered whether such a ban might also apply to cases where redirected consumers cannot buy from the cross border website for legitimate reasons.

Type C (Supply restriction/Price differentiation)

- A7. Under Type C, the consumer can access the cross-border website (i.e. is not re-routed) but cannot purchase from it on the same terms as that available from the trader's website for consumers resident in that Member State.
- A8. For example, a trader may have a .uk website targeting the UK market and a .fr website targeting the French market. The prices available on the .uk website are higher than those on the .fr website which is not reflective of additional costs (i.e. there is price discrimination). This trader may allow a UK consumer to access the .fr website but refuse purchases from it based on the consumer's assumed home address. The UK consumer in the UK may then only be able to make purchases from the .uk site. Alternatively, the consumer may be allowed to purchase but a different price may be applied based on the consumer's assumed place of residence.
- A9. In these cases, in our view, whether or not the trader's practices are justified is likely to depend on the nature of the restrictions placed on the consumer's ability to purchase the product from the cross border website.
- a. **Refusing to sell from a cross border website and redirecting the consumer to the "home" website**: For the reasons set out previously, insofar as the reason for the refusal is to enable the trader to price discriminate, this may be to the overall benefit of consumers in some circumstances. We think the justification test to be applied should take account of whether this is the case given the nature of the specific market.
- b. **Preventing consumers collecting physical products**: Consumers who shop abroad offline may routinely pay for and collect physical

¹² We note that such re-routing does not necessarily involve price discrimination. The price on the 'home' website – for example where a trader has selected to re-route on the basis only that it considers that this will better serve its customers' needs in aggregate. This may also be a particular issue for search engine algorithms. In general, our view on this is that consumers who are seeking out a particular CBW may be expected to use search terms which identify the CBW with sufficient particularity that the search engine will locate the relevant site. If the consumer then selects to visit the CBW, (s)he should not be rerouted in a way that cannot be overridden.

goods. Where the trader allows this for consumers within its home area, unless the product is somehow unsuitable for the consumer's Member State (for example, safety instructions for dangerous goods in a foreign language) it is difficult to see a justification for a trader refusing to offer the same facility to cross border consumers. There may, however, be Unfair Commercial Practice Directive (UCPD) considerations to consider to ensure that all material information is brought to the attention of the consumer before purchase.

- c. **Charging a different price based purely on the consumer's geo-location**: As previously noted, we believe the justification test to be applied should take account of whether price discrimination is of overall benefit to consumers given the nature of the specific market.

Type D (existing contract)

- A10. We also identify a fourth type of geo-blocking which does not necessarily involve price discrimination but indicates the problems of automated rerouting. In this scenario, the consumer already has a contract with a supplier which was entered into in one MS but the consumer then physically moves to another MS. Re-routing by automated means such as the consumer's IP address is likely to result in the consumer being directed to an unsuitable website intended to serve those in the immediate geo-location and in a different language. An example may be a UK consumer who buys an airline ticket from a .uk website but, when checking in for the return journey in France is automatically directed to the .fr site and is unable to check in for language or technical reasons. In this case, it seems to us that the UK consumer should be able to override that choice and be able to access the original .uk website.
- A11. There are possible parallels with licensing issues here to be explored. Copyright and licensing issues are not included within the consultation but the relationship of the outcome of this consultation with IP law also needs to be considered and aligned. In an IP context, we take the view that, while geo-blocking may be an appropriate tool to stop people accessing content they haven't paid for, consumers should be able to access content that they have already purchased. Similar considerations apply here: consumers should not be prevented from accessing services they have paid for while they are abroad.

ANNEX B

Services Directive Implications

- B1. The Services Directive was adopted in December 2006, with an implementation date of December 2009, in order to help further open up the European Single Market. It aimed to do this by removing both barriers to the provision of services across borders, and barriers to the access by consumers (and businesses) to services offered by providers in other Member States. Article 20 was directed at preventing unjustified restrictions on cross border access to services by prohibiting discrimination in the provision of services based on nationality or place of residence.
- B2. In particular, Article 20(2) requires Member States to ensure that a provider's general conditions of access to a service it offers to the public at large, do not contain discriminatory provisions relating to the recipient's nationality or place of residence unless any differences are directly justified by objective criteria.
- B3. There has been very little enforcement of the Article 20(2) provision by Member States, which is attributed to the challenges of interpreting the provisions and applying the objective criteria test. This is despite the fact that Article 20(2) arguably imposes the onus on businesses to justify why their prices or conditions of business vary between different Member States.
- B4. In light of the lack of enforcement action, in 2012 the Commission issued a Commission Staff Working Document 'with a view to establishing guidance on Article 20(2)' to assist enforcement authorities in assessing business's compliance with the provision, albeit expressly stating that it did not represent the Commission's official view. That document proposed that national authorities had to carry out a 'case-by-case analysis' in order to determine whether Article 20(2) had been breached.
- B5. A 2012 ECC-Net report¹³ published around the same time considered the impact of Article 20(2), including an analysis of the complaints it

¹³ http://europakonsument.at/sites/europakonsument.com/files/ECC_Services_Directive.pdf

had received from consumers during the period 2010 to 2012 and the outcomes of those complaints. It highlighted the lack of enforcement in this area and concluded that more work needed to be done to improve knowledge and understanding of Article 20(2) on the part of businesses and national authorities. It considered the categories of justifications put forward by businesses for differences in treatment and sought to interpret some guidelines as to what should be deemed to be an objective justification.

- B6. Significantly the report commented that the category of 'different market conditions' was 'a conceptually complex area' and that an authority assessing it as a claimed justification had to go through a process of examining the market and analysing supply and demand side factors to determine the market conditions, followed by an evaluation of whether these market conditions justified the different conditions. Even for more straightforward categories of justification relied on such as additional costs, or lack of intellectual property rights the report emphasised the in-depth nature of the analysis that an authority had to perform, which included taking account of the characteristics of the market and the size of the provider, so as to determine whether the different treatment genuinely reflected 'economic or legal incentives', and if so, whether the differences in treatment were 'proportional'.
- B7. The ECC-Net report concluded that there remained a risk that Article 20(2) would not take its full effect without further clarity as to what might constitute a breach of the non-discrimination principle.
- B8. In summary, while the Services Directive sets a clear principle that consumers should not be subject to discrimination in the conditions of businesses' offerings on grounds of their nationality or country of residence, the practical application of this principle is extremely complex and unclear. It seems to us therefore that there is a strong case for the Commission to provide national enforcement agencies with additional assistance in terms of prioritising and running relevant enforcement cases. The scope of permissible 'objective justification' grounds could also, in parallel, be clarified through additional guidance in order to increase legal certainty for businesses.