

INCEPTION IMPACT ASSESSMENT			
TITLE OF THE INITIATIVE	Proposals to address unjustified geo-blocking and other discrimination based on consumers' place of residence or nationality		
LEAD DG – RESPONSIBLE UNIT – AP NUMBER	CNECT/GROW	LEAD DG – RESPONSIBLE UNIT – AP NUMBER	CNECT/GROW
LIKELY TYPE OF INITIATIVE	Legislative initiative		
INDICATIVE PLANNING	<i>Insert hyperlink to forecast report</i>		
ADDITIONAL INFORMATION	<i>Insert link to "Commission decides" or to the specific website for the initiative</i>		
This Inception Impact Assessment is provided for information purposes only and can be subject to change. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.			

A. Context, Subsidiarity Check and Objectives
<p>Context</p> <p>1. Political context</p> <p>One of the key political priorities of the Juncker Commission is to build on the strength of the single market and fully exploit its potential in all its dimensions. The Commission has proposed the completion of the Digital Single Market ("DSM") and to upgrade the Single Market ("SM"). Implementation of the DSM and follow up action to the SM Strategy feature as key initiatives in the Commission Work Programme 2016.</p> <p>In May 2015, the Commission adopted the Digital Single Market (DSM) Strategy (COM (2015) 192 final), which set out the major challenges on how to achieve true DSM and key actions to address them. The DSM Strategy proposes 16 measures ranging from areas such as consumer contract rules and parcel delivery to audiovisual media services and telecoms rules.</p> <p>Under the first pillar of the DSM Strategy, which aims at tackling the existing barriers for the DSM and aims at ensuring better access for consumers and businesses to online goods and services across Europe, the Commission has committed itself to "make legislative proposals in the first half of 2016 to end unjustified geo-blocking".</p> <p>This proposal received high political support from the European Council, when in June 2015 Heads of State and government concluded that: <i>"action must be taken on key components of the Commission communication, notably to remove the remaining barriers to the free circulation of goods and services sold online and tackle unjustified discrimination on the grounds of geographic location."</i></p> <p>Furthermore, in order to fight comprehensively all forms of discrimination, regardless as to the way it takes place and the technology used, the Commission has committed in its Single Market Strategy (Communication on upgrading the Single Market: More Opportunities for People and Business) of October 2015¹ to introduce legislative action "to fight unjustified different treatment of customers on the basis of residence or nationality in terms of access, prices or other sales conditions by: identifying and banning specific forms of residence-based discrimination not grounded on objective and verifiable factors; making it easier for consumers and consumer associations to know if and how there is discrimination, including through transparency tools; and improving enforcement by national authorities through the reform of the Consumer Protection Cooperation Regulation."</p> <p>2. Links to past and possible future initiatives and EU policies</p> <p>The e-Commerce Directive (2000/31/EC) lays down the country of origin principle for information society services with the aim of dismantling barriers to online activities in the Single Market. Member States may not create barriers for the taking up and pursuit of information society services provided from another Member State. That enables online service providers to operate their services on a cross-border basis without previous authorization requirements according to the rules of their country of origin. The concept of an information society</p>

1 COM(2015) 550 final

service, under the e-Commerce Directive, and as interpreted by the Court of Justice of the EU covers steps from accessing the offer until contracting (including payment).²

Article 20(2) of the Services Directive (2006/123/EC) requires Member States to ensure that companies do not treat customers differently according to their nationality or their country of residence. Different treatment is permitted if a company can advance objective criteria, such as lack of copyright or higher shipping costs. This gives companies the right to treat customers differently. Article 20 is applicable in several services sectors³, e.g. retail of goods and tourism services, and it applies in both online and offline situations. Article 20(2) creates rights for all "customers", i.e. service recipients, including SMEs buying services. Discrimination affects all customers (both in B2C and B2B relations) in different ways.

Article 8(3) of the Consumer Rights Directive is complementary to Article 20: it imposes on distance sellers a transparency obligation towards the consumer, requiring information on delivery restrictions to be indicated clearly and legibly at the latest at the beginning of the ordering process on the website. The Consumer Rights Directive in general has been designed to offer better information to consumers for contracts concluded at a distance (including online contracts) but not to address whether territorial restrictions are actually justified. In addition, the Unfair Commercial Practices Directive is also relevant: according to the facts of the individual case, omitting information or discriminatory practices could lead to unfair commercial practices. This applies to B2C situations only.

EU competition law can deal with certain restrictions as well. In particular, it can tackle anti-competitive agreements for the sale and purchase of goods or services which are entered into between undertakings operating at the same (horizontal agreements) or different levels of the production or distribution chain (vertical agreements) that create barriers to cross-border e-commerce. Generally, under EU competition law, distributors must be allowed to "passively" sell to other territories. That means they must be allowed to respond to unsolicited requests of customers. Moreover, undertakings with a dominant position are prohibited from abusing their dominant position. Competition law does not, however, address restrictions stemming from unilateral business decisions of non-dominant companies or intra-group market sharing decisions. In order to systematically analyse restrictions of competition that create barriers to cross-border e-commerce, the Commission has launched a sector inquiry into the e-commerce sector in all Member States.

With a view to strengthening enforcement of consumer rights across borders, the Consumer Protection Cooperation (CPC) Regulation is also under review⁴. A legislative proposal is planned in 2016.

The initiatives discussed in this IIA only address those practices not based on copyright or licensing agreements (including in sports). These will be addressed by the Commission in separate initiatives under the DSM Strategy.

3. Ex-post analysis of existing policy

- Revision of the e-Commerce Directive concluded in 2012⁵
- Report on the implementation of the e-commerce action plan in 2013⁶,
- Guidance on the implementation of article 20 of the Services Directive (SWD(2012) 146 final);
- A Digital Single Market Strategy for Europe - Analysis and Evidence (SWD(2015) 100 final)
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2 Case C-108/09, Ker-Optika bt / Antsz, paras 21-31

3 Certain services are excluded from the scope of the Service Directive, e.g. financial services, telecommunication networks, transport, healthcare services, gambling activities, certain social services.

4 http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_014_review_cpc_regulation_2006_2004_en.pdf

5 COM(2011) 942 final, Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A coherent framework for building trust in the Digital Single Market for e-commerce and online services

6 SWD(2013) 153 final, Commission Staff Working Document E-commerce Action plan 2012-2015, State of play 2013

7 SWD(2015) 202

- A Single Market Strategy for Europe – Analysis and Evidence (SWD (2015) 202 final)⁷

Additional analysis: see below section C, Data Collection and Better Regulation Instruments.

Issue

Problem: The Single Market benefits more than 500 million citizens and more than 20 million companies of the EU. To date, efforts to complete the Single Market have mainly focused on ensuring that companies are free to sell products or services cross border to consumers and businesses. The rise of online trade and increased travel between Member States has led to new business opportunities and access to a wider range of offers for consumers. It has allowed for a much wider and easier access to information, for the development of intra EU trade, online commerce and for a boost of market transparency. With an average annual growth rate of 22%, online retail sales of tangible goods surpassed EUR 200 billion in 2014, reaching a share of 7% of total retail in the EU.⁸

Yet, too often consumers and entrepreneurs find themselves discriminated against on the basis of their nationality or place of residence.

1) Geo-blocking

Geo-blocking includes cases when (1) the customer's access to the online service is blocked, when (2) the customer gets automatically rerouted to another service provider, when (3) delivery of the service to the customer is denied or made subject to unjustified obstacles based on its place of residence or nationality, (4) his payment is refused based on nationality or residence, or generally (5) the same product or service is offered under different conditions because of the place of residence of the customer⁹. The definition of geo-blocking is currently subject to the public consultation and will be reviewed accordingly in the full impact assessment.

As a consequence, geo-blocking prevents customers from accessing goods and services on line and searching different websites¹⁰ for the best available offer in the EU. Traders apply different geo-blocking techniques (re-routing to a country-specific website, refusing access to the website based on the IP address of the customer, etc.). Even if the customer has access to the website, he or she could still be prevented from obtaining the service/product or be charged a higher price because of nationality or place of residence. Traders may identify the customer's nationality or place of residence including location based on e.g. the credit card and other technical means to determine the geo-location.

Geo-blocking may also prevent people from obtaining information available across borders, such as news and political broadcasting programmes, for reasons not related to copyright.

2) Discrimination against customers when they receive the service/good in the same location as other EU citizens

The EU single market has greatly facilitated the free movement of citizens and companies in Europe, which is reflected in the number of people travelling cross-border¹¹. The total number of tourism trips in the EU was estimated at approximately 900 million in 2013. Despite the growth of online commerce¹², still most cross-border

8 With an average annual growth rate of 22%, online retail sales of tangible goods surpassed EUR 200 billion in 2014, reaching a share of 7% of total retail in the EU. Duch-Brown N. and Martens B. "The European Digital Single market", JRC IPTS Digital Economy Working Paper, forthcoming 2015

9 Also called geo-filtering.

10 In order to be technologically neutral, when this document mentions websites, other means such as applications are encompassed as well.

11 Flash Eurobarometer 299, 'Consumer attitudes towards cross-border trade and consumer protection', Analytical report, 2010. 2015 figures indicate an increase up to 15%.

12 With an average annual growth rate of 22%, online retail sales of tangible goods surpassed EUR 200 billion in 2014, reaching a share of 7% of total retail in the EU. Duch-Brown N. and Martens B. "The European Digital Single market", JRC IPTS Digital Economy Working Paper, forthcoming 2015

purchases are carried out by customers having physically moved across borders. The total consumption made by visitors or on behalf of visitors for and during these trips was estimated to be 187 billion in 2013.¹³ It is also common for consumers and companies residing close to the border of another Member State (40% of the EU population live in border regions) to travel across the border in search of better offers for goods and services. Eurostat data demonstrates that cross-border trade integration in services is steadily increasing, and can reach, depending on sectors, up to 20%.¹⁴

When customers travel to another Member State and access services (such as summer accommodations, car rental and amusement parks) price differences applied by the same company depending on the consumer's place of residence can be significant even though the service provision takes place at the same time and location. These differences can rarely be justified by regulatory differences or additional costs related to serving foreign clients. The problems also relate to online booking of these services. Furthermore, in some cases, customers who have only a secondary residence in the country are even excluded from the service altogether (for example, some telecom companies require customers to provide a national security number to have access to their internet services).

While different access, prices or sales conditions can be the result of objective differences (e.g. in delivery costs or justified legal requirements), they are often motivated by unjustified market fragmentation strategies on a territorial basis.

Drivers:

The e-Commerce Directive has created the conditions for cross-border e-commerce in the EU by laying down the country of origin principle for information society services. Online service providers can operate on a cross-border basis without previous authorization requirements in the Member States where their customers are coming from. The e-Commerce Directive, however, bars only Member States from creating barriers for cross-border e-commerce and does not establish similar obligations for economic operators.

Article 20 of the Services Directive prohibits all types of unjustified territorial restrictions, but sets only general principles which have not always prevented discriminatory practices on the ground. It allows for different treatment of customers when justified by objective criteria. The Directive refers to a long list of generic and imprecise justifications which can be invoked by companies¹⁵. The current situation under Article 20 gives rise to arbitrary (and changing) justifications.

Therefore, currently companies may apply geo-blocking or other forms of discrimination based on residence for a variety of reasons. Some of these justifications are unconvincing, or lack any objective criteria, which could explain discrimination between service recipients. The problem is driven by the fact that only "objective criteria" allow for different treatment of customers, but there is neither a shared understanding what it means, nor is it clear how to assess and enforce it. Companies often only refer to contractual freedom in this regard. In addition, there is no adequate enforcement mechanism put in place to enforce this provision cross-border.

Possible justifications can be grouped into three broad categories:

Justifications related to the differences in national legislation

13 Eurostat's annual data on trips of EU residents; (<http://ec.europa.eu/eurostat/web/tourism/data/database>)

14 Eurostat (SBS and BoP, 2012), Eurostat (online data code: tec00123)

15 Article 20 of the Services Directive states that different treatment is allowed when directly justified by objective criteria. Such objective criteria is for example additional costs because of the distance, different market conditions, extra risks linked to different rules in different Member States and lack of intellectual property rights (recital 95).

16 Duch-Brown and Martens, 'Barriers to firms' cross-border e-commerce in the EU Digital Single Market', JRC/IPTS Digital Economy Working Paper, 2015

17 GfK for the European Commission, Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most, September 2015

18 European Commission, 'Study on business practices applying different condition of access based on the nationality or the place of residence of service recipients – Implementation of Directive 2006/123/EC on Services in the Internal Market', 2009

19 Flash Eurobarometer 397 "Consumer attitudes towards cross-border trade and consumer protection", September 2015

In certain cases, geo-blocking may result from the need to comply with national law. For instance, online companies might need to restrict access of consumers to gambling websites when they come from a Member State where online gambling is prohibited, or access to certain content might be limited in order to comply with specific public policy legislation (e.g. legislation on advertising, protection of minors, etc.).

Justifications related to contractual requirements

Some product manufacturers impose restrictions on cross-border access to goods and services on the online traders through contractual agreements.

Under competition rules, it is possible for suppliers to contractually limit where their distributors can promote and market their products (active sales) using exclusive distribution agreements. However, it is contrary to competition law to prevent distributors, even those who are part to an exclusive distribution network, to sell to customers that spontaneously reach those distributors (passive sales). Contractual limitations to cross-border online sales that prevent responses to passive sales would thus generally not be considered valid justification under competition law.

A considerable amount of contractual limitations is due to copyright and licensing practices, particularly in the area of access to digital content. However, the initiative discussed in this IIA only addresses those practices not based on copyright or licensing agreements. These will be addressed by the Commission in separate initiatives under the DSM Strategy.

Recent evidence shows that the likelihood of engaging in cross-border e-commerce would increase by 10 percentage points should the suppliers' restrictions be removed and the volume of sales would also increase by 6 percentage points on average.¹⁶

Economic justifications

Besides legal arguments companies often invoke economic justifications. Some examples include differences in market conditions, demand (e.g. due to perceived language barriers) or seasonality, extra delivery costs or lack of delivery options, extra payment costs, lack of accessible payment means or difficulty to collect payments, differences in currency, extra costs involved due to the technical properties of the goods or services on offer.

At present, Article 20 of the Services Directive refers to a long list of generic and imprecise justifications which can be invoked by companies in an arbitrary manner to segment the internal market. Moreover, certain justifications have lost ground due to the recent developments of the EU's Digital Single Market (i.e. universal service obligations for parcel delivery up to 20 kg, exemption from VAT registration, etc.). Many restrictions are also linked to lack of delivery options above 20 kg, which will be addressed in the forthcoming initiative on parcel delivery foreseen under the DSM.

A considerable amount of geo-blocking is due to **copyright and licensing** practices, particularly in the area of access to digital content. However, this initiative only addresses those geo-blocking practices not based on copyright or licensing agreements. These will be addressed by the Commission in separate initiatives under the DSM Strategy. Many restrictions are also linked to lack of delivery options above 20 kg, which will be addressed in the forthcoming initiative on parcel delivery foreseen under the DSM.

Extent of the problem

According to a recent survey of online consumers on DSM obstacles (2015 DSM survey)¹⁷, of the 6% of respondents who reported on their most recent problem(s) when making/attempting to make a cross-border purchase (for tangible goods and offline services purchased online) from another EU Member State and indicated that foreign sellers refused to sell to them because of their country of residence, 54% experienced this after choosing the delivery address, a further 39% realised that they could not buy the product when visiting the foreign seller's website, and 7% after entering their payment card details.

According to the same survey, of the 5% of respondents who reported on their most recent problem(s) when making/attempting to make a cross-border purchase (for tangible goods and services) from another EU Member State and indicated that they were not able to access the seller's website because they were redirected to the seller's website in their own country, 59% experienced this after choosing the delivery address, a further 34% automatically when visiting the foreign seller's website, and 7% after entering their payment card details.

Additionally, of those respondents who reported on their most recent problem(s) when making/attempting to make a cross-border purchase (for tangible goods and services) from another EU Member State, 6% indicated that the foreign seller charged them a higher price than to consumers in the country of the seller, 4% that their means of payment was refused by the foreign seller and 7% that they couldn't access the foreign seller's website or that only limited content was displayed to them.

The Commission has also analysed complaints received through Your Europe Advice. Since 2008, 53% of all such complaints concerned offline transactions, 30% online ones and 17% both. 37% concerned transport services (including car hire), 15% concerned retail of tangible goods and 22% tourism services. 31% were linked to nationality and 69% were linked to the customer's place of residence. 57% of the complaints relate to price differences, and 15% to an outright refusal to sell.

A Commission study on business practices related to Article 20 of the Services Directive¹⁸ identified a large number of reasons given by companies to justify price and service differentiation. The results of this study are confirmed by the stream of complaints received through the European Consumer Centres (ECCs) and Your Europe Advice. The ECCs analysed all complaints received in 2014 related to discrimination cases in the field of services covered by the Services Directive. Complaints concerning recreation and cultural services amount to 36 % of all cases. The main causes of complaints are refusal to sell or non-delivery (43%) and differences in prices (14%). One out of four complaints is related to purchases made by consumers on the premises of the provider. Since 2014, intensive investigations in the car hire sector and tourism (including direct discussions with companies) show that reasons given by companies remain largely unchanged.

The results of the Eurobarometer surveys in 2014¹⁹ show that 10% of the consumers with the experience of cross-border online shopping reported that on at least one occasion over the past 12 months the foreign seller refused to deliver to their country, while 8% reported that they were redirected to a website in their own country where prices were different and 5% report that the retailer did not accept payment from their country. According to the 2013 Eurobarometer - which examined the same issue - the highest complaint rate came either from countries with a proportionately large number of online shoppers (Sweden and Denmark) or from smaller countries sharing a language with a larger one (Belgium, Ireland, Luxembourg and Austria). The top three types of complaints (excluding the language offer) concern non-delivery, non-acceptance of particular payment methods and exclusion from extra benefits such as free delivery or extended offers. Complaints about non-delivery were by far the most frequent. This was particularly relevant for respondents from Austria, Belgium, Denmark, Ireland, Luxembourg, Malta, Slovenia and Sweden. In Luxembourg, 31% of all respondents and 53% of online shoppers had experienced refusal to deliver to their country over the last 12 months. As to individual complaints submitted by consumers, the top three concern non-delivery, non-acceptance of particular payment methods and exclusion from extra benefits such as free delivery.

Affected Stakeholders:

- Service recipients (B2B and B2C)
 - Removing discriminations will encourage individual consumers to access more services and to buy more cross-border, and will reinforce trust in the Single Market.
 - Companies can also be service recipients: addressing the above-mentioned issues will also enable them (especially SMEs) to fully use the opportunities of the Single Market and ensure that they are not treated unfairly by local service providers when they move cross-border.
- Service providers
 - Larger service providers already targeting, or established in, several countries will be mostly affected. SMEs concentrating on national or local markets would be less affected

Subsidiarity check

EU action is necessary because the implementation and enforcement of the principle of non-discrimination is not comprehensive. Not a single company in any of 28 Member States has ever been fined for infringing article 20 of the Services Directive since 2009 – the year by when the Services Directive should have been transposed in all Member States.

Geo-blocking or other forms of discrimination based on place of residence or nationality arise in the cross-border context, typically when customers intend to access a service provided by a company established in a different Member State. Due to the cross-border nature of geo-blocking it can only be tackled effectively on EU level. Failure to act would mean that customers are not able to enforce their rights. Service providers would continue to regularly apply different prices and conditions on the basis of residence without objective reasons. Complaints would be dealt with on a case by case basis and risk being unsuccessful if pursued before national courts. There would be no incentive for companies to bring down barriers in the Internal Market, since the non-discrimination principle is not accompanied by sanctions.

It is settled case-law that the Treaty "confers rights not only on the provider of services but also on the recipient"

and that "the abolition, as between Member States, of obstacles to freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy."

Discriminations remain widespread and, the transposition of article 20 of the Services Directive has not led to efficient and consistent enforcement. This suggests that the objective pursued cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Legal Basis: In primary law Article 18 of the Treaty on the Functioning of the European Union establishes the general prohibition of discrimination between persons on the grounds of nationality. Article 56 of the Treaty on the Functioning of the European Union provides for the freedom to provide services. Article 114 TFEU provides for the possibility to adopt regulations or directives to improve the conditions for the establishment and functioning of the internal market, or to prevent the emergence of obstacles to trade resulting from divergent development of national laws.

Article 101 of the Treaty prohibits any agreement or concerted practice which restricts competition if it affects trade between Member States. Some of these agreements, however, may improve the production or distribution of goods or result in technological progress. If so, the prohibition may not apply, provided that the strict conditions laid down in Article 101(3) are met. Article 102 of the Treaty prohibits any abuse by a company of its dominant position in a market.

Main policy objectives

Strengthen a genuine Single market for consumers and business (especially SMEs), regardless of the way transactions take place and the technology used

Implement the DSM commitment to abolish unjustified geo-blocking as a means for implementing territorial restrictions.

Implement the SMS commitment to fight all forms of unjustified discriminatory treatment of customers on the basis of residence or nationality.

Introducing directly enforceable rights for service recipients against service providers

Increase transparency for consumers and business

Increase legal certainty for Member States, consumers and traders

Offer informal problem-solving mechanisms

Step up enforcement and administrative cooperation thereby building on the reform of the CPC Regulation

B. Option Mapping

Baseline scenario – no EU policy change

The base-line scenario implies sticking to article 20 of the Services Directive, the e-Commerce Directive, the current provisions of the consumer rights directive, the unfair commercial practices directive, and the 2012 Guidance document and case-by case legal action.

Consumers and businesses willing to buy will not benefit from increased availability of product and services and increased price competition. Service providers could continue to deny access to certain services online (blocking access or rerouting to national web-services), and delivery and refuse certain payment options, based on the service recipient's nationality or place of residence. This situation would perpetuate the present fragmentation of the single market.

Customers would largely remain unable to enforce their rights. Companies would continue to regularly apply different conditions on the basis of residence without objective reasons. When asked about justifications, they would actually have no obligation to provide an explanation to customers. Complaints would be dealt with on a case-by-case basis. There would be no incentive for companies to bring down barriers in the Single Market, since the non-discrimination principle is not accompanied by sanctions. Customers would therefore remain frustrated when they want to take up the opportunities of the Single Market.

Options of improving implementation and enforcement of existing legislation or doing less/simplifying existing legislation

The current legal framework does not offer concrete tools for consumers and businesses.

- The e-Commerce Directive (2000/31/EC) lays down the country of origin principle for information society services with the aim of dismantling barriers to online activities in the Single Market. Member States may not create barriers for the taking up and pursuit of information society services provided from another Member State; however it does not address the issue of discrimination against recipients of goods or services by companies.
- Article 20 of the Services Directive, which is in force since 2009, has not been the object of dedicated enforcement actions by Member States, some of which have not identified clear enforcement authorities. A mere update of its June 2012 Guidance on the application of Article 20 seems not sufficient to create legal certainty or deliver concrete results.
- Article 8(3) of the Consumer Rights Directive does not prohibit territorial restrictions and cannot address the root of the matter.
- Likewise, EU competition law may not address the problem caused by unilateral decisions of non-dominant companies and intra-group decisions regarding market sharing. Targeted enforcement of Article 101 of the Treaty prohibiting any agreement or concerted practice which restricts competition together with the Block Exemption Regulation on vertical agreements and the corresponding guidelines would only partially address problems mentioned here. Competition law would not catch cases of discrimination not based on an agreement with a supplier, unless the company has a dominant position.

Better enforcement in itself would fail to address the shortcomings of the current framework. Consumers would still not have any directly enforceable right. The enforcement practice between Member States would remain highly diverse.

Alternative policy approaches

The following options can complement each other. They are listed in a logic of increasing level of access: access to information, access to the website, access to the service.

Option 1: Improved transparency

Measure could include (1) obligation for traders to answer consumers' requests about the justifications for different treatment within a short time period, and (2) informing consumers about the possibility of accessing offers on country-specific websites in cases where companies have several different webpages targeting consumers from different Member States and (3) when it comes to goods, requiring companies to clearly indicate separately product delivery costs. Prior information on delivery restrictions already provided for under the Consumer Rights Directive could be extended to justifications for restrictions for all transactions concerned.

Option 2: A ban of denial of access to a website and re-routing

This option would make denial of access to a website illegal (blocking, rerouting), with a very limited set of exceptions. It would make information about products and services available to all EU customers and thus enhance transparency on prices and conditions. It would also widen the choice for customers. This option would enable customers' access to all online offers in the EU however **without an assurance to be served by the trader.**

Blocking access to webpages and automatically re-route customers would only be permitted if needed to comply with EU law or national law including legislation protecting minors or prohibitions on online gambling (white list).

Non-automatic re-routing could be allowed subject to the customer's consent. The original website targeted by a customer should always be accessible and the customer should be informed about this at the time of giving his/her consent to rerouting. This would serve as a transparency measure in itself, allowing customers to compare offers between the one available to them in their home country and other countries.

Option 3: Prohibition of geo-blocking and other forms of discrimination based on customers' place of residence or nationality, except where an objective and verifiable justification is provided

This option would address not only the issue of accessing the website and the various offers but also that of granting customers' access to the service or good at the same terms and conditions regardless of their nationality or place of residence. Different treatment of consumers based on nationality or place of residence would not be allowed unless justified in a convincing and verifiable and proportionate way.

This option could consist of **complementary** elements which **achieve the intended effect**. The elements take into consideration the differences in the context of the provision of the service: a general list of non-acceptable justifications complemented by specific arrangements for three types of situations where there are no or very few acceptable justifications which can be used by traders as follows: (a) Purchase when non-resident customers accept the same terms and conditions as the resident customers including taking care directly of the delivery (b) purely digital content and services, i.e. where no physical delivery is needed and (c) services and goods received on the spot ("same location, same deal").

Currently companies use a wide range of arguments to justify different treatment of customers; some are acceptable and others are not. For example, when traders have additional costs to ship a product to another country, it could be justified that the trader charges higher shipping costs. However, in many cases the trader does not have valid reasons to refuse to serve a customer or apply different conditions. This option introduces a black list of reasons which cannot be invoked by traders to justify refusals to sell and the application of different conditions based on nationality or place of residence. The black-list could for example include the nationality of a customer, the lack of delivery options if the customer is ready to organise pick up or delivery, the problem of recovering debts.

Option 3 a) Purchase under the same conditions when the customer arranges pick-up in the country of the trader including the case in which the customer is ready to organise delivery himself.

Non-residents should have the possibility to contract under the same conditions as residents of the country where the trader is operating. In such a case, the trader would not be obliged to deliver the ordered tangible good to the country of the customer but the latter would be given the option of picking it up, or get it delivered, in the country of the trader.

3 b.) Purely digital services

The range of arguments invoked by companies as a justification when differentiating between customers in this context includes cases, which could not objectively justify discrimination due to the nature of purely digital services (such as cloud services), i.e. where no physical delivery is needed. Justifications could also become invalid due to developments in EU and national law. However, the black list referred to above may include some justifications applicable in these situations.

3 c.) "Same location, same deal"

EU consumers can legitimately expect the same treatment when receiving services or products in the same location regardless of where and how the transaction took place (e.g. car rental pick-up in a certain location on a certain date for a particular duration with the same car and options, amusement park entrance on a particular date, hotel room on a particular date and for a particular duration). For access to services/products, companies and other services providers would not be allowed to refuse to sell or differentiate prices between customers based on the place of residence or nationality if they receive the service/product in the same location. When selling services or products online, companies would still have the freedom to set different prices across websites (including country specific websites) but customers would be free to choose from which country website they wish to buy. This could also include relevant arrangements for the after-sales services.

Option 4: Far reaching prohibition of geo-blocking and other forms of discrimination based on customers' place of residence or nationality, except where an objective and verifiable justification is provided - a white list

This option would go further than option 3 by including instead of a black list, a limited list of acceptable justifications (white list).

Option 5: Effective enforcement to combat discrimination

As a stand-alone option or to complement the above options, enforcement can be strengthened:

Existing legislation:

The provisions of the new instrument could be included in the scope of the Consumer Protection Cooperation Regulation (CPC)²⁰. Each Member State would have a designated body responsible for the enforcement of the instrument. The CPC Regulation would give the national authorities the proper tools to address discrimination. It would also enable cooperation between the enforcement authorities on issues addressed by this proposal. Currently the CPC Regulation is limited to B2C situations, i.e. it would not cover situations where businesses are service recipients.

The provisions of the new instrument could also be included in the scope of the Injunctions Directive. This would allow consumer associations to seek injunctions when companies use blacklisted justifications, making them subject to future penalties if the company continues to use the justification.

New enforcement instrument:

Each Member State would have a designated body responsible for the enforcement of the instrument. Sanction provisions would be introduced; companies would be subject to fines imposed by the enforcement bodies (giving effect to the black list and the obligation to provide an explanation/justification within a few days). Companies would not have the possibility to invoke new justifications if the justification given upon request was not accepted by the enforcement body. A specific complaint form would help consumers file complaints to the enforcement authorities and to require justifications from companies when facing restrictions. Each Member State would have to provide for appropriate rules ensuring that the harm caused to individual consumers is duly compensated. Problem solving mechanisms could be developed to solve cases between customers and traders.

The new instrument could cover both B2B and B2C relationships.

Alternative/differentiated scope

Adjustments to take account of SMEs/micros are already embedded in the articulation of the various options above. Other recently adopted and forthcoming harmonization measures, which aim at making cross-border trading easier in the EU (harmonisation of consumer protection rules, rules on alternative and online dispute resolution, facilitation of cross-border payment services, the proposal on consumer contracts, etc.) should address potential concerns. One of the adjustments could be to offer small businesses an adaptation period to adjust their business to the new requirements, however a wide carve-out would undermine the effectiveness of a prohibition.

Alternative policy instruments

Awareness – raising: Other companies are simply not aware of the opportunities provided by EU Law. Awareness-raising campaigns are not sufficiently efficient to spur companies into using the tools available to them and therefore stop using unfounded arguments as justifications to discriminate consumers.

Transparency: The Commission would however support market-led actions outside the scope of the legislative instrument, by fostering development of transparency tools that allow consumers to easily determine whether they are facing different sales conditions based on their place of residence or nationality.

Options that take account of new technological developments

It is important that the proposal be technologically neutral. That means addressing the underlying drivers of differentiation and means of redress in a way which applies to all transactions.

Preliminary proportionality check

20 Regulation 2006/2004/EC on consumer protection cooperation

None of the options go beyond what is necessary to solve the identified problems. Moreover, the initiative is limited to solving a problem of a cross-border nature that cannot be achieved by the Member States alone.

C. Data Collection and Better Regulation Instruments

Data collection

The existing evidence base

The current assessment is based on surveys, reports and complaints from citizens, Eurobarometer surveys and studies based on clickstream data as well as mystery shopping exercises.

- A study prepared by the European Parliament concluded that there are three common types of market practices which differentiate between different consumers using the DSM: simple refusal to sell, automatic re-routing, and unjustified diversifying of sale conditions.²¹
- The JRC studied supply-side constraints of cross-border e-commerce, based on a mystery shopping survey, that pulled together data from 13.000 attempts to buy a product online from a service provider established in another Member State. It found that only 48% of all cross-border online orders led to a successful shipment, compared to a 97% success rate for domestic orders²².
- A recent study focusing on U.S. general retailers and travel sites found evidence of price discrimination. The study proved the geographical location of the user was one of the reasons of price differences.²³
- A web-scraping study found that a leading car rental company consistently sets different prices, depending on the consumer's country of residence. A car could be up to 53 % more expensive to rent if the country of residence is the UK than RO, SI and PL.²⁴
- The European Consumer Centres (ECCs) analysed all complaints received in 2010-2012 related to discrimination cases in the field of services. Most frequent are cases related to distribution of goods and services (73 %). The main causes of cross border complaints alleging discrimination in online shopping identified refusal to deliver as the main cause, followed by price discrimination and technical requirements such as country of credit card.²⁵
- In a study carried out by the Commission in 2012 about 1000 websites proposing digital content downloads were screened, 73% of them remained silent on geographical restrictions and when information was given, it was often presented only in the general terms and conditions.²⁶
- Further academic studies show that consumers' behaviour on the market is greatly influenced by their perception of fairness regarding market conditions and prices. In the Internal Market, prices charged by service providers in one Member State, are often used as "reference prices" by consumers in other Member States²⁷.

21 Discrimination of Consumers in the Digital Single Market. European Parliament Policy Department A: Economic and Scientific Policy, IP/A/IMCO/ST/2013-03, November 2013

22 Cardona and Martens (2014) "Supply-side Barriers to Cross-border eCommerce", JRC/IPTS Digital Economy working paper, available at <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/supply-side-barriers-cross-border-e-commerce>

23 Hannak, Aniko, et al. "Measuring Price Discrimination and Steering on E-commerce Web Sites." Proceedings of the 2014 Conference on Internet Measurement Conference. ACM, 2014.

24 Recent complaints received from citizens by Commission services have included renting a car in other country. As a result of the complaints, the Commission initiated a dialogue with the car rental industry to address the issues of major price discrimination experienced by consumers across the EU. The main reason for applying different prices depending on the consumer's country of residence was 'source market pricing', i.e. pricing the service based on demand and other market factors in the consumer's country of residence.

25 http://ec.europa.eu/consumers/ecc/docs/ecc-services_directive_en.pdf

26 http://ec.europa.eu/consumers/enforcement/sweeps/digital_contents/docs/dcs_complementary_study_en.pdf

27 Kahneman, D. et al., 'Fairness and the Assumptions of Economics', The Journal of Business Vol. 59 (4), 1986 or Kahneman, D. et al., 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market', American Economic Review Vol. 74 (4), 1986. Other relevant research includes Anderson, E. T. and Simester, D. I., 'Does Demand Fall When Customers Perceive That Prices Are Unfair? The Case of Premium Pricing for Large Sizes', Marketing Science Vol. 27 (3), 2008.

- The Flash Eurobarometer 397 (fieldwork April 2014)²⁸ shows that 10% of consumers with experience of cross-border online shopping reported that on at least one occasion over the past 12 months the foreign seller refused to deliver to their country; 8% were redirected to a website in their own country where prices were different; 5% report that retailer did not accept payment from their country.
- In the recent survey of online consumers on DSM obstacles²⁹, of those respondents who reported on their most recent problem(s) when making or attempting to make a cross-border purchase³⁰ from another EU Member State, 5% indicated that they were not able to access the seller's website because they were redirected to the seller's website in their own country³¹. A further 6% indicated that sellers refused to sell to them because of their country of residence³², whereas 7% reported that they could not access the foreign seller's website (or that only limited content was displayed to them) and 4% that their means of payment was refused by the foreign seller.
- Recent evidence shows that the likelihood of engaging in cross-border e-commerce would increase by 10 percentage points should the suppliers' restrictions be removed and the volume of sales would also increase by 6 percentage points on average³³.

Practical implementation and complaints handling:

- Discussions in the Commission's Expert Group on the implementation of the Services Directive showed that many Member States have in practice no effective enforcement mechanisms in place.
- The European Consumer Organisation BEUC also reported in 2015 various barriers to a genuine Single Market for consumers in financial services, with restrictions linked to residence which prevent consumers from opening a bank account, getting a mortgage or buying an insurance policy in another country than the one in which they are resident.

Analytical work:

- The Matrix study: A Commission study on business practices related to Article 20 of the Services Directive showed evidence of price discrimination and outright refusals to sell based on the consumer's place of residence. The study covered car rental, digital downloads, online sales of electronic goods and tourism.³⁴
- Study on the Fairness and the Assumptions of Economics: Consumers' behaviour on the market is greatly influenced by their perception of fairness regarding market conditions and prices. In the Internal Market, prices charged by service providers in one Member State, are often used as "reference prices" by consumers in other Member States, which determines their perception of price fairness.³⁵

Further evidence gathering

28 Flash Eurobarometer 397 "Consumer attitudes towards cross-border trade and consumer protection", September 2015

29 GfK for the European Commission, Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most, September 2015.

30 Of tangible goods or services ordered online but used offline (e.g. hotel, transport, etc.)

31 59% experienced this after choosing the delivery address, a further 34% automatically when visiting the foreign seller's website, and 7% after entering their payment card details. It should be noted that such practices, which are not always easy for consumers to notice, may be under-reported.

32 54% experienced this after choosing the delivery address, a further 39% realised that they could not buy the product when visiting the foreign seller's website, and 7% after entering their payment card details. It should be noted that such practices, which are not always easy for consumers to notice, may be under-reported.

33 Duch-Brown and Martens, 'Barriers to firms' cross-border e-commerce in the EU Digital Single Market', JRC/IPTS Digital Economy Working Paper, forthcoming 2015 (b)

34 Study on business practices applying different condition of access based on the nationality or the place of residence of service recipients – implementation of Directive 2006/123/EC on services in the internal market (2009)

35 Kahneman, D. et al., 'Fairness and the Assumptions of Economics', The Journal of Business Vol. 59 (4), 1986 or Kahneman, D. et al., 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market', American Economic Review Vol. 74 (4), 1986. Other relevant research includes Anderson, E. T. and Simester, D. I., 'Does Demand Fall When Customers Perceive That Prices Are Unfair? The Case of Premium Pricing for Large Sizes', Marketing Science Vol. 27 (3), 2008.

1. Forthcoming report on the inquiry into the e-commerce sector by the Commission

Findings published in the reports on the inquiry into the e-commerce sector could be used in the impact assessment.

2. Study on territorial restrictions and geo-blocking

The Commission is conducting a study on "**Territorial restrictions and geo-blocking in the European DSM**". The objective is to provide the Commission with data to build evidence regarding the prevalence, main features and economic impact of geo-blocking as an obstacle to the full deployment of the DSM. The two main tasks will be:

- A mystery shopping exercise to collect the relevant information about the concrete practices of geo-blocking and their prevalence across different Member States.
- Overall analysis, with a special emphasis on documenting the different geo-blocking practices and assessing their economic impact. This analysis will build on the data from the above mystery shopping exercise and on a large-scale dataset of specific consumer electronic products.

The study will support the economic impact assessment.

Consultation approach

Public consultation

A first stakeholder conference took place on 9/02/2015 http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8076&lang=en&title=Buying-Services-everywhere-in-the-Single-Market

The Commission has launched a standard public consultation on geo-blocking and other geographically based restrictions which is scheduled to run until the end of December 2015. In accordance with the better regulation guidelines, an Inter Service Steering Group (ISSG) has approved the consultation questions. *The consultation planning of this initiative can be found at http://ec.europa.eu/yourvoice/consultations/docs/planned-consultations_en.pdf.*

Other information gathering exercises

a) Academic workshops

The Commission will hold workshops with academic scholars and other experts assessing aspects of geo-blocking and related barriers in e-commerce. The aim is to complete the information and knowledge on the more technical issues.

b) Stakeholders

Member States

- The High Level Group on the Digital Agenda met on 16 June 2015 in Riga allowed for a first exchange of views on the different issues covered by the DSM Strategy. The Expert Group on E-commerce met on 3 July 2015 in Brussels to exchange views, more in particular and from a more technical perspective, on the e-commerce related issues stemming from the DSM Strategy (geo-blocking, liability, platforms). The Commission will use future events of the High Level Group on the Digital Agenda and the Expert Group on E-commerce to engage on the topic with Member States in the second half of 2015 and first half of 2016. The issue of geo-blocking will also be discussed with the Consumer Policy Network, which brings together national consumer authorities, in December 2015.
- The Commission's Expert Group on the implementation of the Services Directive – Article 21 Network regularly meets to discuss the challenges of Article 20 of the Service Directive.

Industry and civil society

- The Commission will organize at least two rounds of targeted workshops with academic independent experts covering geo-blocking. The meetings will represent an opportunity to 1) present the developments by the

Commission, including different options, 2) gather opinions on the different proposals.

- The Commission holds regular meetings with both business and consumer representatives (ongoing dialogue with associations like BEUC, Eurocommerce, EMOTA etc.)
- The Commission holds regular meetings with both business and consumer representatives (ongoing dialogue with associations like BEUC, Eurocommerce, EMOTA etc.). The issue of geo-blocking was also discussed with the European Consumer Consultative Group, consisting of representatives from national and EU-level consumer organisations, on 6 October 2015.
- The Commission is currently conducting a sector enquiry into e-commerce during which it collects information directly from companies. The sector inquiry aims at identifying potential competition concerns hampering cross-border e-commerce
- Within the framework of the forthcoming Single Market Forum 2015/2016, the Commission will organise two workshops in early 2016

c) Outreach to Parliament

- The Commission will engage in a series of contact network meetings with Members of the European Parliament.

d) Online engagement - Digital4EU

- Digital4EU is a website of the Commission continuously used to complement EU-survey public consultations; to harvest ideas and receive feedback on concrete policy options.

Will an Implementation plan be established?

Yes No

D. Information on the Impact Assessment Process

The work on the IA started in October 2015. An Inter-Service Group has been set up including SG, CNECT, GROW, JUST, SJ and COMP.

E. Preliminary Assessment of Expected Impacts

Likely economic impacts

The initiative will help consumers and businesses to take full advantage of the Single Market by increasing choice between products and services, improving price transparency and the conditions of competition. It is unlikely, however, that such a measure would lead to price harmonisation. Legislative action would not prevent companies from adapting their conditions (including prices) to local markets, as they do today.

Besides, evidence of other policies (competition law enforcement against vertical agreements preventing passive sales, roaming charges) demonstrate that bringing down barriers in the Single Market does not imply a unification – or increase of prices.

As a consequence, a well-targeted and proportionate policy will mostly increase trust in the Single Market and encourage consumers to buy cross-border. This, as a result, will also encourage companies to make full use of the opportunities of the larger Single Market and expand their reach.

Likely social impacts

The initiative will likely have a positive social impact, since consumers and businesses willing to access products and services will benefit from increased product availability and price transparency. The initiative will also help to build up trust in the Single Market, by reducing consumer dissatisfaction stemming from unsuccessful cross-border purchases. Abolishing unjustified discrimination will enable consumers to get better price for the products or services bought, thus providing them with a higher purchasing power and offer them a wider choice.

They will be empowered and more keen to enforce their rights.

Likely environmental impacts

The initiative would not have environmental impacts.
Likely impacts on simplification and/or administrative burden
Options having an impact on simplification and administrative burden: Transparency obligations would create additional burden on companies applying unjustified different terms and conditions based on residence or nationality. Companies which have objective reasons for such a treatment should find it reasonably easy to explain these reasons in a few words. An outright and total prohibition of direct discrimination based on nationality would force companies discriminating on the basis of nationality to carry out instead a genuine and individualised risk assessment, which would increase their costs. A clear list of prohibited justifications would create more legal certainty and simplify the regulatory framework.
Likely impacts on SMEs
If small companies were only subject to the prohibition of the most serious types of discriminations (such as discrimination based on nationality or the Same Location – Same Deal principle and the prohibition of certain geo-blocking techniques), they could however continue to apply differences of treatment in case of distance selling, in order to enable them to cope more easily with the risks and legislative heterogeneity of other Member States. This would largely maintain the fragmentation of the Single Market. Small companies as service recipients would benefit from such a measure and they should also comply with the obligations under such an instrument. A legislation which would not exempt SMEs or small companies would create more legal certainty for them and would not create any additional burden, compared to the current situation: The various elements of a legislative initiative would not affect all companies to the same extent. The most stringent options would not affect pure small online retailers since they would focus on services provided on the same location to all consumers (no distance selling where neither consumer nor company moves). Other options would only affect larger companies already making full use of the single market (e.g. having branches/subsidiaries in several Member States), which, again, would leave SMEs largely unaffected. Other options would merely lead to awareness raising of SMEs without placing undue burden on them (for instance, cross-border delivery options already exist and are not more burdensome than national ones)
Likely impacts on competitiveness and innovation
Many companies use nationality or residence as a proxy for risk assessment. In many cases, they would be forced to conduct a more individualised risk assessment, in order to justify the restrictions on genuinely objective criteria. This would encourage them to innovate and develop new ways to analyse their markets. The measure would encourage companies operating in several Member States to better integrate their operations, for instance by setting up common modernized customer files (for instance to manage cross-border voucher claims or after-sale services). This type of innovation will increase their internal efficiency.
Likely impacts on public administrations
A directive would have higher administrative burden than a regulation, both for the Commission and for Member States. A regulation would simplify the legislative framework and create more legal certainty for traders and enforcement authorities.
Likely impacts on third countries, international trade or investment
The initiative would not have impacts on third countries, international trade or investment.