



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
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Opinion

Title

DG CNECT/DG GROW – Regulation on addressing geo-blocking and other discriminations based on the principle of residence and nationality

(resubmitted version of 15 April 2016)*

(A) Context

Direct discrimination based on nationality, as well as indirect discrimination (e.g. based on the place of residence), are in principle contrary to the principles of the EU Treaty as regards service provision. The principle of non-discrimination has been implemented at cross-sector level by Article 20 (2) of the Services Directive (2006/123/EC), while the E-commerce Directive (2000/31/EC) lays down the country of origin principle for information society services and for the providers of such services. Despite these provisions, customers still experience that traders based in other countries refuse to sell to them or change their price because of their country of residence or the geographical location from which they want to access the service.

This impact assessment analyses options to put an end to and prevent unjustified "geo-blocking", i.e. refusing access to commercial offers based on the residence of the customer and other forms of discrimination based on nationality or place of residence or establishment. The initiative is complementary to a number of other proposals announced in the Digital Single Market (DSM) and the Single Market Strategies (SMS), which announced several legislative actions to address the major remaining barriers to sell goods or services to nationals or residents from other Member States.

(B) Overall opinion: POSITIVE

Most of the Board's recommendations have been taken into account. Nevertheless the following elements should be further clarified:

1) Even though the scope is clearer and the principle of proportionality better explained, the interaction and coherence with other related regulatory provisions or initiatives need to be clarified: (i) the rationale for the extension of some provisions to transport services should be further elaborated, given that sectoral transport legislation is currently in place that prohibits discrimination; (ii) the treatment in the envisaged Regulation of passive sales restrictions in vertical agreements and its interaction in this area with EU competition law should be explained. It should also

* Note that this opinion concerns a draft impact assessment report which may differ from the one adopted.

be elaborated to what extent the VAT and Rome I regimes under the preferred option might raise issues of enforcement or of legal certainty for businesses and consumers.

2) The report should clarify whether microenterprises are included or not in the preferred option and the analysis of impacts should be adapted accordingly. The executive summary and the impact analysis, notably for the option of "shopping like a local", should be more nuanced and qualified in order not to overstate the likely size of the problem and to avoid creating unrealistic expectations as to the likely results of the initiative.

(C) Main recommendations for improvements:

1) Further clarify the scope of the initiative. The scope of the initiative has been clarified, for instance, by explaining that non-audio-visual content services are temporarily excluded and by further justifying the non-inclusion of certain sectors. At the same time, the rationale for the extension of the scope to the transport sector should be further elaborated in the report, clarifying what is the underlying problem and explaining why this cannot be addressed by the sectoral transport legislation currently in place that already prohibits discrimination (except for railways).

(2) Enhance the definition of the problem. The problems related to the ineffectiveness of Article 20(2) of the Services Directive should be further explained in the main report, rather than only in Annex 8. The studies used for illustrating the existence of the problem should be quoted with caution and the results should be qualified. For instance, the apparent high demand for arranging cross-border part of the delivery of products by the online buyers (with 32% of consumers ready to do so) is misleading as only 12% of the surveyed online buyers in these countries used freight forwarding due to the reason that the seller did not ship to their country (which may have been true for non-EU countries as well).

3) Better define the options and analyse their impacts. While the analysis of impacts on SMEs has been strengthened, concluding that such impacts would be minimal, the report should clarify whether or not microenterprises are excluded from the initiative. The executive summary and conclusions from the impact analysis should be more nuanced and qualified in order to reflect the uncertainties surrounding: the estimations of the magnitude of unjustified geo-blocking; the fact that the baseline will be affected by the effectiveness of related regulatory initiatives that would reduce the main incentives for geo-blocking; and the possibility for the identified negative impacts to be larger than expected. For example, VAT arbitrage is explicitly referred to, but not seen as opening the door to VAT circumvention practices (p. 44). Similarly, the possible negative impacts in some Member States (such as employment effects related to the reduction in off-line shopping in the option of "shopping like a local") should be mentioned.

4) Legal certainty and coherence with EU policy instruments. The content of the options is much clearer and better respects the principle of proportionality. But in the spirit of better regulation, interactions with other EU regulatory instruments and initiatives will need to be specified. For instance, passive sales restrictions in vertical agreements are mentioned as possible cases of unjustified geo-blocking, but are not clearly part of the scope of the impact assessment (p. 23). It should be clarified whether the envisaged Regulation will include or not such restrictions in its scope. Option 3 on "shopping like a local" has clarified the VAT regime (origin or destination) but might raise compliance issues and the applicability of Rome I is made clear for services but not for tangible goods (p. 39).

5) Monitoring and evaluation. The impact assessment proposes an early evaluation of the envisaged Regulation because of the changing regulatory landscape in the area of geo-blocking, but the indicators chosen refer to geo-blocking in general without trying to better measure the scope and the trends in “unjustified” geo-blocking.

(D) Procedure and presentation:

The report should consistently describe the inclusion of Article 20(2) of the Services Directive in the revised Annex of the Consumer Protection Cooperation Regulation as part of the package of the DSM proposals and, thus, part of the baseline scenario. Some of the annexes should be revised: (i) Annex 1 should briefly explain how the Board's recommendations have led to changes compared to the earlier draft and (ii) Annex 3 should be updated in line with the changes in the main report, in particular regarding the practical implications of the preferred option on businesses. The report (including the executive summary) should be proofread for the use of correct terminology, spelling mistakes, redundant words and inconsistencies. For instance, the operational objective should rather measure the decrease and not the increase of "*the share of websites blocking access to users from other EU Member States*"; options that are not the preferred option are not being "*discarded*", but are simply less effective or efficient.

(E) RSB scrutiny process

Reference number	2016/CNECT+/002
External expertise used	No
Date of RSB meeting	Written procedure (an earlier version of this report was discussed by the Board on 6 April 2016, for which an opinion was issued on 8 April 2016).