



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
D(2016)

Opinion

Title **DG CNECT/DG GROW – Regulation on addressing geo-blocking and other discriminations based on the principle of residence and nationality**
(draft version of 7 March 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: NEGATIVE

The following key aspects of the report require improvement:

1) The report should put this initiative in a wider Digital Single Market/Single Market Strategy context, clarify its exact scope, spell out what is meant by unjustified geo-blocking and explain the extent and types of unjustified geo-blocking that this initiative aims to tackle, particularly once other related initiatives have been considered (digital contract rights etc.). Moreover, it should be explained why it is still necessary to act given these related initiatives and how the preferred option is proportionate in relation to the identified problem. Previous experience with “soft” instruments is relevant and should be presented in this context.

2) Based on an enhanced presentation of the options, the report should better assess the likely impacts of the preferred option on businesses (differentiating between SMEs and larger companies).

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

3) The report should elaborate on potential unintended consequences such as the collection of VAT revenues from increased cross-border delivery of goods by individuals or their agents (“shopping like a local”) and the potential increased administrative burdens on small on-line retailers (translations, additional queries, etc.).

Once revised, the IA must be resubmitted to the Board which will issue a new opinion on the revised draft.

(C) Main recommendations for improvements

(1) Clarify the scope of the initiative and the policy context. The wider DSM/SMS policy context should be further explained and other initiatives under preparation that may help remedy different aspects of the geo-blocking drivers presented more extensively. The report should clarify the scope of the present initiative, mentioning which areas are covered and which are not by this measure, and explain why. This concerns in particular: (1) the international context (the issue of covering non-EU companies operating within the EU), (2) the reasons why the scope is limited to the intersection of the Services and the E-commerce directives and (3) the regime applying to non-audio-visual content services (e.g. e-books and music). The report should explain why there is a need to regulate now, despite the fact that several legislative proposals in the pipeline (e.g. on VAT - the extension of the Mini One Stop Shop to tangible goods, Payment Services, consumer legislation, etc.) aim at tackling many of the geo-blocking drivers and are likely to decrease the size of the identified problem. In doing so, the report should better assess the magnitude of the problem, based on a more explicit illustration of what form of geo-blocking is considered justified and what is not (and mentioning their relative importance).

(2) Better present the problem. After explaining how this initiative fits in the overall context, the problem description should focus on unjustified forms of geo-blocking that are going to be tackled now (i.e. shop like a local, same deal/same conditions and cross-border provision of services in so far as they are covered within the scope of this measure) and should better reflect the rationale for enterprises to apply justified geo-blocking. The report should assess in more depth the problems related to ineffectiveness of Article 20(2) of the Services Directive and explain the results of the actions/measures that have been taken in order to remedy to the issue of poor enforcement (e.g. guidance, competition cases, etc.).

(3) Clarify the content and choice of the options. The report should clarify the content of the options and how they would work in practice, for instance (a) what a trader could do or not and (b) whether the reference in the preferred option to the non-enforceability of passive sales restrictions in vertical agreements implies an intention to go beyond what applies already under EU competition law. Moreover, it should explain how the options cover B2B versus B2C. Given that one of the main drivers is insufficient enforcement of existing legislation, the report should better explain why less restrictive options, such as a recommendation or voluntary agreements, were discarded upfront.

(4) Better assess the impacts and demonstrate the proportionality of the preferred option. Based on an enhanced definition of the problem, the report should explain how the preferred option would address the underlying causes. For instance, it should better explain what difference this initiative will make given that traders will not be required to deliver to another Member State and substantiate with evidence the statement that cross-border trade will increase even where consumers are required to collect goods (for the 'shop as a local' option). The report should better assess likely impacts on SMEs,

differentiating between them and big companies, as some evidence supporting the problem of geo-blocking seems to be rather attributable to big companies. More generally, it should better assess likely consequences for companies: it should in particular assess compliance costs (e.g. due to transparency requirements) for all online e-traders. Moreover, it should better assess whether the preferred option may lead to increased legal uncertainty regarding the interpretation of legislation in other areas (e.g. Rome I Regulation), as well as possible unintended consequences, such as VAT circumvention, and clarify the enforcement modalities.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.

(D) Procedure and presentation

To the extent possible, likely impacts should be further detailed drawing on the model results or stakeholders views. The limitations of the model used for assessing the economic impacts of lifting geo-blocking restriction should be more explicitly presented and the conclusions of the modelling should be more nuanced with respect to the economic outcomes. Clearer monitoring and evaluation arrangements should be proposed, based on indicators defined for the operational objectives (to be defined for the preferred option).

(E) RSB scrutiny process

Reference number	2016/CNECT+/002
External expertise used	No
Date of RSB meeting	6 April 2016