



European Economic and Social Committee

INT/797
Unjustified geo-blocking

OPINION

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Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC)

No 2006/2004 and Directive 2009/22/EC
[COM(2016) 289 final – 2016/0152 (COD)]

Rapporteur: **Joost VAN IERSEL**

Consultation	European Parliament, 09/06/2016 Council of the European Union, 10/06/2016
Legal basis	Article 114 of the Treaty on the Functioning of the European Union
Section responsible	Single Market, Production and Consumption
Adopted in section	04/10/2016
Adopted at plenary	19/10/2016
Plenary session No	520
Outcome of vote (for/against/abstentions)	216/3/6

1. Conclusions and recommendations

- 1.1 The EESC welcomes the proposal for a Regulation on geo-blocking, both for companies and for consumers, as an indispensable element of the Digital Single Market (DSM) Strategy. It is, however, a small step, not a game-changer. Companies and customers – both consumers and companies as end-users – will continue to face considerable difficulties when selling and buying across the Single Market.
- 1.2 The EESC urges the European Commission and the Council to put ambitious and well-defined legal provisions in place for a successful DSM in favour of consumers and companies, also as a prerequisite for creating a resilient European economy vis-à-vis the rest of the world. Such arrangements would also promote a positive image of the European Union.
- 1.3 It remains to be seen whether this regulation will really alleviate consumer frustrations. Although traditional off-line trading will continue to be important, the number of companies currently engaged in cross-border on-line trading is still rather limited. However, the potential for on-line buying and selling, especially across borders, is huge.
- 1.4 There is an urgent need for a level playing field for off-line and on-line trading. Consequently, the EU should focus not only on ending unjustified geo-blocking, but also on tackling the remaining obstacles in the Single Market that discourage or hamper traders from selling on-line and/or off-line across borders.
- 1.5 Confidence among companies and consumers should be fostered through the parallel adoption of other legal provisions. Some of the most important such are a Regulation on parcel delivery¹ – to alleviate transport problems and reduce costs through fair competition that also includes social provisions – and that fully respects EU legislation in this area – and a balanced revision of EU copyright rules.
- 1.6 The EESC opposes unjustified geo-blocking. However, the EESC acknowledges a number of well-founded reasons companies, notably SMEs and micro-enterprises, may have for avoiding or refusing cross-border on-line trade or for adjusting prices and/or conditions as a result of differences between markets. These concern, among other things, different legal environments, further national requirements, additional transport costs, language requirements on pre-contractual information and back office requirements.
- 1.7 The EESC underlines that justified geo-blocking resulting from the wide variations Member States' industrial policies and divergent legal systems is hindering the spontaneous development of SMEs and scale-ups operating Europe-wide. These divergences are in turn also undermining the transparency and predictability that are badly needed to stimulate investment and reassure markets in the digital era.

¹ EESC opinion on the proposal for a Regulation on cross-border parcel delivery services complementing the proposals put forward in this opinion. See page XX of OJ.

- 1.8 The proposed Regulation rightly does not impose any obligation on traders to deliver goods or provide services to the country of the customer, if the trader does not (yet) deliver or operate in the country concerned.
- 1.9 Any customer in the Single Market will rightly have access to any offer and may purchase the good or service as long as the customer arranges for pick-up of the good or receives the service in a territory where the trader already operates, reasonably allowing traders to use their home-country rules.
- 1.10 Furthermore, the EESC welcomes the information requirements imposed on traders to enhance transparency and the provision of information to the customer, in line with the 2011 Consumer Rights Directive. An informative EU website may be helpful here. In the context of the 2011 Consumers' Rights Directive, companies are obliged to ensure price transparency. The EESC encourages companies to go beyond minimal standards in order to gain consumer trust.
- 1.11 The EESC welcomes the initial findings of the e-commerce sector inquiry recently published by the European Commission², notably proving that e-commerce is an important driver of price transparency and price competition. Unjustified geo-blocking inhibits this natural development.
- 1.12 Some aspects, however, deserve further clarification, in particular:
- 1.12.1 The wording on laying down the applicable law – Article 1(5) states that the trader can "sell" just as he does at home, relying on his home-country rules – needs urgently to be formulated more clearly.
- 1.12.2 After-sale services (in cases of non-conformity, returns costs, options for compensation, etc.) are not specifically covered by the regulation and therefore are regulated by the 2011 Consumer Rights Directive. A reference should be added in the geo-blocking regulation to the relevant EU legislation that would apply. This warrants further consideration.
- 1.12.3 Some important provisions, such as Article 7 on penalties for infringements and Article 8 on assistance to consumers, confer responsibility for enforcing the regulation on the Member States. It must be ensured that potentially diverging interpretations do not lead to more fragmentation and, consequently, to a weakening of the regulation's impact. The EESC welcomes the willingness of the Commission to put in place an EU-wide model of complaints for consumers³.
- 1.13 The date, mentioned in Article 11 for the application of point (b) of Article 4(1), namely 1 July 2018, should remain open and only be determined at a later stage, depending on the duration of the legislative process.

² The inquiry was published in May 2015 and the initial findings were made public on 15 September 2016.

³ Given the differences in approach between countries, this is far from easy to achieve. It is now under discussion between the Commission and the Council.

1.14 The EESC supports the Commission proposal for a uniform complaints form.

2. Introduction

- 2.1 Both digital transformation in companies and digital market places, are spreading rapidly worldwide. Given the huge consequences of these dynamic processes, the Commission has rightly declared the Digital Single Market (DSM) to be one of its top priorities.
- 2.2 The EESC is also heavily involved in discussions on digital transformation. In a series of opinions, the EESC has already commented on the overarching and horizontal aspects of digitalisation and on proposals concerning specific issues as presented by the Commission⁴.
- 2.3 In the EESC's view, the digital revolution requires robust conditions to promote the Single Market in this new era. These conditions must be defined by an appropriate – new and/or reviewed - legislative framework that guarantees the rights of citizens and consumers. Moreover, companies should be encouraged to use digital tools and innovative solutions to operate across borders.
- 2.4 Each of the 16 legislative and non-legislative proposals contained in the DSM package must be fully considered from this starting point and the same applies to the proposal on geo-blocking.
- 2.5 The assessment of current practices makes it clear that there are still many obstacles to cross-border on-line transactions. Limited market cross-border development is often not a consequence of unfair market segmentation, but is the result of traders' uncertainty concerning consumer attitudes and remaining administrative obstacles, differing regulatory environments and language barriers. Uncertainties of this kind are also harmful to consumers' confidence.
- 2.6 A lack of information also contributes to the fact that e-commerce (both buying and selling) is rapidly taking off nationally, but remains underdeveloped in the cross-border context.
- 2.7 There are also substantial differences in transnational trading between sectors, bigger and smaller companies, and types of operators such as retailers or intermediaries and websites, while the volume of international on-line trading varies considerably among Member States.
- 2.8 The situation is complicated. In order to promote the required level playing field and transparent solutions for companies and consumers, the legal package for the DSM should be introduced in a consistent manner while, at the same time, other legislative provisions on related matters, for example on VAT, parcel delivery, waste disposal regulation and consumer law, should be fully compatible.
- 2.9 Economic and technological trends are irreversible. Thus, in a world in which on-line trading will increase anyway, the goal of creating a European level playing field for both citizens and companies must be achieved as soon as possible.

⁴ [OJ C 264, 20.7.2016, p. 86](#); [OJ C 264, 20.7.2016, p. 57](#); [OJ C 264, 20.7.2016, p. 51](#); [OJ C 71, 24.2.2016, p. 65](#).

3. **A broad scope**

- 3.1 In these days of disruptive developments, industries – both manufacturing and services - are permanently changing, new sharing economy business models are emerging, and methods of trading are adapting accordingly. Social media and services are fundamentally influencing the development of new patterns of trading and buying goods. They have huge implications for companies and consumers alike. The EU should bring existing and new legislation into line with new market realities, without adopting a heavy-handed approach, so as not to hamper the development of new business models and innovative approaches.
- 3.2 Geo-blocking conflicts with a basic principle of the Single Market. While there are often justified reasons for different treatment in terms of pricing or of conditions that arise, for instance, from remaining market fragmentation or differences between national markets, businesses as well as consumers will benefit from an open and competitive market leading to varied choices and better quality at fair prices.
- 3.3 The significance of B2C e-commerce – consumers and companies as end-users – must be seen in a wider context. Companies are - now more than ever - obliged to innovate and to work efficiently at moderate prices. New breakthroughs push boundaries and help companies to become more robust and resilient. For this reason, among others, the EESC fully endorses the goal of abolishing any discrimination against the customer on grounds of nationality and/or residence.
- 3.4 However, the decision to go international is and will remain the exclusive right of each company. Practical evidence shows that the (large) majority of companies choose a national approach.
- 3.5 Compared to the US, Europe is still dragging its feet. The Chinese and Indian digital sectors are on their way to achieving strong positions. Of the top 20 world Internet leaders, not one is a European company. According to international studies, Europe is a champion in starting companies. However, the fragmentation of the European market hampers the spontaneous development of Euro-wide start-ups and scale-ups. Market segmentation often inhibits market development.
- 3.6 The Commission rightly makes a distinction between justified and unjustified geo-blocking. Justified geo-blocking in B2C commerce occurs primarily as a result of the fragmentation of the EU market and of situations that lack transparency.
- 3.7 It is a very telling side-effect of fighting geo-blocking that (new) failings in the internal market are being clearly revealed. It is essential to carefully analyse on a case-by-case basis whether or not there are grounds for restricting access to a certain service or different treatment in terms of price and/or conditions on the basis of nationality or residence.
- 3.8 A picture of potential geo-blocking and market development in a big home market such the US would have been extremely useful, however difficult and costly such an analysis might be. It could conceivably have provided a model for Europe to follow. As in Europe, individual US

states may also hold certain legal powers that hamper nation-wide operations, but these are certainly less far-reaching than in Europe. Free enterprise and consumer demand probably overwhelmingly favour B2C e-commerce, thus creating a fertile environment for competition and also for fast-growing start-ups and scale-ups in the US home market.

- 3.9 Such a picture might help to evaluate prospective developments in Europe. The Commission's analyses, based on enquiries in business, describe current practices in markets that are predominantly national in nature. The US example can illustrate the real potential of economic activity following B2C e-commerce once all major barriers are removed.
- 3.10 Promoting cross-border selling has already been on the EU agenda for a while. A series of directives – such as the 2006 Services Directive and the 2011 Consumer Rights Directive – have been put in place. These emphasise consumer protection, while aiming to force companies to guarantee sufficient transparency for the consumer and to stop unjustified cross-border discrimination.
- 3.11 The EESC is disappointed that inadequate implementation and incorrect application, as well as weak enforcement of existing EU legislation, often creates lasting barriers.
- 3.12 To date, however, the effect of legal provisions to encourage cross-border e-commerce remains limited. On the basis of far-reaching market studies and surveys of businesses and consumers, the Commission concludes that "where buying online has become normal for consumer, buying online cross-border remains the exception. Only half of the companies selling online do so cross-border"⁵.
- 3.13 The EESC agrees that cross-border restrictions linked to nationality or residence, undermine trust in the Single Market, and should consequently be combated. On the basis of extensive enquiries, one would be fully justified in concluding that there is overwhelming support among both consumers and the business sector for opening up the European market for B2C online commerce. The European Parliament takes the same view⁶.

4. **State of play**

- 4.1 In order to improve cross-border buying and selling, the Commission has drawn up a package of measures in various areas, such as VAT registration and VAT rules for e-commerce, parcel delivery, copyright reform, a reform of the Consumer Protection Cooperation Regulation. It is also essential that vertical agreements between suppliers and distributors and unilateral measures by individual companies are fully in line with EU competition policy.
- 4.2 The proposal for a regulation on geo-blocking forms part of this overall package. It should be noted that a number of important sectors are not covered by the regulation, for instance the

⁵ See the Impact assessment on geo-blocking and other forms of discrimination based on place of residence or establishment or nationality in Europe (COM(2016) 289 final, p. 2). However, the Commission rightly stated in its 2012 Communication on services that businesses are free to determine the geographic scope to which they target their activities within the EU, "even when selling online".

⁶ See the European Parliament resolution of 19 January 2016 on Towards a Digital Single Market Act (2015/2147(INI)), chapter 2.

patients/health sector, rail passenger transport, (retail) financial services, electronic music, audio-visual services and certain forms of gambling. The rationale is that these sectors require specific sectorial provisions that, according to the EESC, should be put in place soon to fill gaps in DSM legislation.

- 4.3 The same also applies to the extremely important issue of copyright. While copyright issues are rightly excluded from the scope of the present proposal, although definitely related to it, the EESC urges the Commission to take appropriate measures to combat fragmentation in this area, to alleviate consumer frustrations and to help construct a genuine Digital Single Market.
- 4.4 The summary of the 2015 public consultation on geo-blocking concludes that consumers and companies alike are generally unhappy at the current fragmentation of the Single Market. It seems that companies and business associations nevertheless accept the current state of affairs, attributing it to divergent legal systems within different Member States⁷.
- 4.5 The EESC notes that it is important for SMEs that the proposal does not create an obligation to deliver throughout Europe. However, SMEs will certainly benefit from the opportunities⁸ to be able to sell products and services across the continent, especially in border regions, while as end-users they enjoy the same rights as consumers, which is helpful when buying products and services from other Member States. Moreover, the EESC underlines that successful implementation of the Regulation on parcel delivery services is necessary to support and stimulate cross-border trade.
- 4.6 The divergences between legal systems help explain the distinction between justified and unjustified geo-blocking. Apart from the category of companies that simply decide not to go international, businesses' reservations about abolishing geo-blocking must largely be attributed to their existing uncertainty about divergent practices across Europe that hampers international trading.
- 4.7 Consumers have many complaints about cross-border trading, although the available samples are somewhat limited in size and further assessment is desirable. The complaints cover a broad range of issues, such as a lack of information, delivery restrictions or a refusal to deliver, the failure to provide justifications or explanations when services or goods are refused, rerouting, price differences, the refusal of certain credit cards, differentiation based on billing and delivery addresses and languages. Some of these result from differences between legal systems. Others, however, which result from contractual provisions or concerted practices, leading to a fairly widespread vertical market segmentation, i.e. based on personal characteristics, should be banned⁹. Enhancing consumer and business confidence in on-line markets is essential to boost cross-border e-commerce to the benefit of consumers, companies and citizens alike.

⁷ Summary of Responses to the EC's 2015 Public Consultation on Geo-blocking, p. 15.

⁸ See European Small Business Alliance (ESBA).

⁹ See also the Issues paper presenting the initial findings of the e-commerce sector inquiry conducted by DG Competition SWD(2016) 70 final, see point (7).

- 4.8 As well as applying different treatment in terms of price, conditions or other aspects for services provided at the same time and in the same location (for instance through the tracking of IP addresses or profiling), unjustified geo-blocking should be banned. There is no justification for different treatment on a systematic basis regarding services such as car rental, amusement parks or hotels. Temporary promotions or price differences, however, for example during school holidays, – thus on a temporary basis and horizontal – should be allowed.
- 4.9 Contractual cross-border sales restrictions appear in multiple forms and contractual territorial restrictions can be found in all product categories¹⁰. Some apparently unjustified restrictions, however, are in fact acceptable, such as the common example of different pricing. The Commission is right to speak of a grey zone¹¹ in this context. For instance, differences between prices can be (at least partially) explained by different markets, the different categories of consumers targeted and the higher costs arising from different or additional national regulations and legal advice, payment services, delivery and returns handling¹².
- 4.10 Negative perceptions and corresponding complaints about the Single Market's false promises are widespread among consumers and, equally, in business. These complaints basically arise from two overlapping phenomena: national industrial policies and divergent legislation.
- 4.11 The EESC has often criticised the existence of 28 industrial policies, as a national focus on industrial policy hampers EU-wide operations in business and in particular undermines SMEs' scope for cross-border operations. Uncoordinated national policies with an obvious lack of uniformity, where appropriate, hamper cross-border planning. Unpredictable or arbitrary government measures add to further uncertainty.
- 4.12 The current landscape is certainly colourful: there are different national standards and different certification schemes; some websites are blocked to prevent them from selling from another country; payment regimes usually differ; language requirements may be prohibitive; market surveillance authorities sometimes impose extra requirements¹³ and existing EU Directives are badly implemented or not implemented at all. A well-known example is Article 20 of the Services Directive, which Member States systematically ignore, although in this particular case there is a lack of clarity on how to enforce the article properly. All of these factors undermine both market transparency and the desired level playing field.
- 4.13 The internal market is a key issue. The on-line society brings the Single Market into sharp focus. Companies and consumers across the continent are brought closer together. One click of the mouse instantly opens up a huge variety of options and choices. The opportunities for specialties and fine-tuning solutions can grow exponentially. It should, however, be kept in mind that even if the Single Market worked perfectly, there would still be differences between regions.

10 Ibid. points (98) and (99).

11 Ibid. point (102). This *grey zone* should be defined more clearly.

12 Ibid. point (114).

13 See Germany as an example.

- 4.14 Artificial barriers are hampering companies, especially SMEs, from developing spontaneously. Companies look for concerted actions to bypass problems or to overcome obstacles in order to secure market positions. Vertical and horizontal agreements between traders and distributors, as well as various forms of market segmentation that are generally considered to form unjustified geo-blocking, must often also be seen as defensive measures against what companies consider to be arbitrary national barriers. For example, shipping costs and the cost of after-sales services due to national policies may unexpectedly turn out to be higher. A company obliged to deliver under all circumstances might find it difficult to meet its obligations in the light of unknown conditions.
- 4.15 In some cases, cross-border intermediaries are used to smooth out national complications between the company in the country of origin and customers in another country. However useful this might be, this does not generally facilitate direct relations between supplying companies and customers.
- 4.16 There is no doubt that unjustified geo-blocking must be mapped and combated but the EESC insists that, when putting in place the correct conditions, the right conclusions also have to be drawn from the ongoing fragmentation of the internal market as a consequence of diverging national approaches.

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Georges DASSIS
The President of the European Economic and Social Committee
