FEDMA position paper
21st December 2015

FEDMA answers European consultation on Geo-blocking and other geographically-based restrictions when shopping and accessing information in the EU

FEDMA supports the objective of the Digital Single Market to give better access to goods and services across Europe. FEDMA is fully supportive of the ambitious goals set out by President Juncker for the new 2015 Commission. In line with President Juncker’s statement “By creating a connected Digital Single Market, we can generate up to €250 billion of additional growth in Europe in the course of the mandate of the next Commission, thereby creating hundreds of thousands of new jobs, notably for younger job-seekers, and a vibrant knowledge-based society”, we believe that the European Union can strongly benefit from the development of the digital economy.

FEDMA stands for 22 national Direct Marketing Associations, directly representing more than 5,000 organisations, and for more than 50 organisations, representing all parts of the value chain in the data-driven marketing industry. Through its many activities, FEDMA is dedicated to building the business of cross-border data-driven marketing, both through its vast network of contacts and businesses within and beyond Europe and by representation within the institutions of the European Union.

The data-driven marketing industry uses personal information and data to effectively match customers’ needs with relevant brand offers. The data-driven marketing industry aims to create and maintain an individual and interactive relationship between businesses, institutions and their customers (both prospective and existing). The data-driven marketing industry allows retail businesses to target people with a personalised message, to generate sales both online and in store in a cost effective way to build long-lasting relationships with customers and raise brand awareness. It is an essential driving force of the EU economy and the EU Digital Single Market.

FEDMA considers that the principle of non-discrimination in article 20 of the Services Directive plays an important role for the development of the Single Market. For this reason, FEDMA supports the case by case approach in the Commission staff working document. FEDMA encourages the Commission to focus on clarifying criteria for the relevant authorities to assess when there is unjustified geoblocking, differentiated treatment or a refusal to supply. FEDMA also encourages the Commission to continue tackling remaining fragmentation on the Single Market.

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1 Staff Working document of the 8th June 2012 with a view to establishing guidance on the application of article 20 (2) of the Services Directives
FEDMA considers that it is important to focus on effective consumer choice which must be supported as long as there is a balance between business and consumers interests. Indeed article 16 of the Charter of Fundamental Rights lays down freedom of enterprise. Furthermore, article 52.1 of the Charter provides that limitations to the rights in the Charter must be based on the principle of necessity and proportionality. Therefore, discussions must focus on unjustified geoblocking which clearly go against the principle of non-discrimination based on nationality or residence (e.g. a physical store applies different prices to non-nationals).

FEDMA would like to highlight that pricing is key to attract consumers. This is why FEDMA calls on the Commission to focus on unjustified geoblocking clearly going against the principle of non-discrimination based on nationality or residence. Indeed, extending the scope of the discussion on geoblocking to the point of substantially reducing the scope of justified geodifferentiation, would have many implications for the Single Market. A de facto obligation to supply in all countries could be created, contradicting the freedom of enterprise under laid down under the Charter of Fundamental Rights. Moreover, the less companies can geodifferentiate in justified circumstances, the more companies might have to apply similar prices all over Europe. This would lead to an approximation to prices and to progressive increase of prices, affecting in particular countries where purchase power is less strong. Business in dominant position may be able to adapt but SMEs will be severely impacted.

Moreover, in an omnichannel world, the focus should be on the removal of unjustified barriers to cross-border e-commerce, whilst maintaining strict neutrality in terms of channel of distribution. e.g. avoiding discrimination in favour of cross border purchase online versus local purchase offline. In the market, a certain product may often be advertised on printed paper. However, the consumer might decide to buy this product afterward online or we have the same issue vice versa where a consumer might find a product in the online shop and buys this product afterwards at the local retail store of the same company. This clearly shows that online and offline markets are not independent. We strongly believe that digital markets and traditional offline markets influence each other or are even very much connected as the cross-sale example shows. Online pricing and offline pricing can be linked. Markets in the digital area are not always independent of local offline markets, and cost structures of digital markets are not independent of where the consumer is located and uses the product. This entails that cross border online purchase, in a scenario where geodifferentiation is made de facto impossible, will very likely have a strong impact on prices in the physical world; the approximate online price not corresponding any longer to local costs and local consumer preferences, prices in stores will have to adapt to the online approximated price. This will interfere with business strategic decisions. Personalised advertising based on geodifferenciation and local consumer preferences would also be impacted.

FEDMA calls on the European Institutions to further its efforts regarding legal and technical harmonisation to foster a true Single Market. Indeed, numerous legal and technical requirements create barriers for cross-border ecommerce in Europe (e.g. labelling requirements, health and safety requirements). The Single Market is composed of different national markets with various legal and technical challenges for companies to enter the markets. Therefore, companies need to be able to choose which markets they wish to enter or not.

Independently of legal and technical requirements, consumer preferences vary among countries. The beauty of Europe lies in its cultural diversity, expressed through

2 This freedom is recognised in the Commission working document.
diverse consumer preferences. It would be a shame to drive business to sell cross border in such a manner that consumer preferences could no longer be reflected. A company might offer a product in Spain according to local taste however there is no reason to force the same company to offer the same product in Finland. Or vice versa a company might offer winter clothing with heavy duty anorak in Finland knowing that they will not have any realistic chance to sell the same product in Spain. There is no reason to force the company offering products against local taste or market conditions.

While supporting free movement of goods across the EU, in some situations, buying in another member state leads to justified reasons for different treatment or additional costs. Some online cross-border geodifferenciation or geotargeting is acceptable. Principle of equality entails that consumers in comparable situations should be treated identically or consumers in non-identical situations should not be treated identically. For legal, technical and market related reasons, not all consumers are in comparable situations in online cross-border scenarios and therefore geodifferenciation or geotargeting can be acceptable. The current Staff Working document of the 8th June 2012 with a view to establishing guidance on the application of article 20 (2) of the Services Directives provides for justifications for example “different market conditions”.

More specifically regarding market conditions, the Commission working staff document provides that market conditions are “determined by a variety of factors which relate to both supply and demand in the market side.” From the supply side, the document refers notably to the cost of providing the service, customer support and advertising costs. The document further refers to factors affecting the demand, such as brand penetration, different preferences or requirements with regard to the level of service to recipients, seasonality and different vacation periods for certain services, presence, strength and marketing policies of competitors. Difference in willingness to pay could be invoked by businesses to justify the existence of different pricing and marketing policies by a service provider towards the various member states. Additional parameters justify price setting such as purchasing power and strategic business decisions (e.g. to enter a market).

FEDMA would like to share examples of justified geodiffenciation to help the Commission focus on clearly unjustified geoblocking and to help it develop criteria to identify these clear cases of unjustified geoblocking:

- The need for translation of website into different languages, the costs and logistics of establishing a local team and local offices, and possibly the lack of market interest for product at local or regional level could justify geodifferenciation. Delivery costs or logistics may make an organisation not deliver in a country or region.

3 Article 95 of the Services Directive “The principle of non-discrimination within the internal market means that access by a recipient, and especially by a consumer, to a service on offer to the public may not be denied or restricted by application of a criterion, included in general conditions made available to the public, relating to the recipient’s nationality or place of residence. It does not follow that it will be unlawful discrimination if provision were made in such general conditions for different tariffs and conditions to apply to the provision of a service, where those tariffs, prices and conditions are justified for objective reasons that can vary from country to country, such as additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment. Neither does it follow that the non-provision of a service to a consumer for lack of the required intellectual property rights in a particular territory would constitute unlawful discrimination.
- An amusement park offers promotions or special packages during a school holiday for a limited time (where the period differs between Member States).

- In a certain region, there might be special discount prices because the company is trying to get into the market.

- Prices might be different because the product needs a certain explanation and therefore the company has to establish a local language telephone support line which is extremely costly.

- In a certain market, business might face the situation in which customers have preferences for certain products e.g. washing-machines. If you are a French manufacturer of washing machines and you normally sell them in France, it is probably sufficient to provide a machine with 800 r.p.m. (revolutions per minute) to spin the goods. If you try to sell the same 800-r.p.m. machine in Germany, where normal market practice is a machine with 1,400 r.p.m., your product has to be significantly cheaper than in France. Vice versa: This does not mean that the cheap price you are forced to ask for in Germany is also the "right" price for France.

- There might be locally available products from competitors obliging you to align your pricing to those products.

- In some local market you can even see some product hypes where certain markets request certain products whilst other markets in Europe are not even aware of this product.

**FEDMA agrees that transparency is important.** Transparency requirements are already provided for under the Consumer Rights Directive and the Unfair Commercial Practices Directive and organisations are working on implementing better these requirements. The Consumer Rights Directive in article 8.3 already provides that the trader must inform the consumer of its delivery and payment restrictions. This article actually implies that the freedom of enterprise provided for in the Charter of Fundamental Rights. Traders are already working on how to indicate clearly this information in a prominent place on the websites. The advertising industry is also more transparent regarding targeted advertising with the European Digital Advertising Alliance. Organisations must remain free to use the appropriate format so as to be able to be creative and innovative in user-friendly techniques to communicate with the customer. To be effective, information requirements need to be maintained at a reasonable level.

In conclusion, justified geodifferentiation should not be impacted, particularly the capacity for business to adapt offers to the market conditions. FEDMA supports the case by case approach in the Commission staff working document previously mentioned. FEDMA asks the Commission to work on defining criteria to assess when there is unjustified geoblocking. The Commission should also continue tackling remaining fragmentation on the Single Market.

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4 “Trading websites shall indicate clearly and legibly at the latest at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted”

5 [www.edaa.eu](http://www.edaa.eu)