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.

Summary:

FEDMA supports the case by case approach in the Commission staff working document. FEDMA encourages the Commission to focus on clarifying criteria that the relevant authorities could use to assess when there is unjustified geoblocking, differentiated treatment or a refusal to supply.

FEDMA urges the Commission to respect freedom of enterprise and legitimate geodifferentiation, notably linked to market conditions. Indeed, FEDMA is very concerned by broader and further reaching prohibition of geoblocking. FEDMA is also very concerned by the establishment of black or white lists.

FEDMA would like to raise awareness around the legal challenges regarding applicable consumer law. FEDMA urges the Commission to facilitate the application of the seller’s law.

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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
A case by case approach is recommended

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.

FEDMA reminds the Commission that banning geoblocking aims at benefiting mostly active consumers, i.e. consumers who actively compare prices cross-border and buy abroad on their own initiative. The debate should therefore focus on these active consumers. It is also important to remember that these active consumers are still a minority except in small countries such as Luxembourg or Malta.

Finally, there are differences between online and offline worlds which must be taken into account. When purchasing in a store, the consumer’s address is very often irrelevant as there are no delivery aspects, no secure payment questions. When purchasing online, address is very relevant to ensure delivery is possible and to secure payments.

For the three above reasons, discussions must focus on unjustified geoblocking which clearly goes against the principle of non-discrimination based on nationality or residence. FEDMA supports the case by case approach in the Commission staff working document\(^2\). FEDMA encourages the Commission to focus on clarifying criteria that the relevant authorities could use to assess when there is unjustified geoblocking, differentiated treatment or a refusal to supply.

Call for respect of justified differentiation based on market conditions

The current Staff Working document provides for justifications to different treatment, including “different market conditions” (referred to in recital 95 of the Services Directive)\(^3\). 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

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\(^2\) 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

\(^3\) Recital 95 of the Services Directive provides that “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.
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”. Additional parameters justify price setting such as purchasing power and strategic business decisions (e.g. to enter a market).

**Different market conditions can justify geodifferentiation.** Traders are free and should be free to adjust pricing or conditions to market conditions, notably 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. 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.

**Other factors may justify geodifferentiation for example, consumer preferences which vary among countries.** The beauty of Europe lies in its cultural diversity, expressed through 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. Further factors of geodifferentiation include (list non exhaustive): legal and technical requirements (e.g. postal, telecommunication and energy services), VAT rates, different shipping, distance and delivery costs. For example a stamp for the German market, which is purchased online, cannot be used in the Austrian market and vice versa. So, it is in the interest of active consumers to be kept from purchasing stamps for postal services for the wrong market.

**Banning of geoblocking with respect to the business model**

On the one hand, active consumers wish to have access to more information and be able to compare prices. On the other hand, businesses need predictable and competitive business strategies around which they organise their stock for example. It is therefore fundamental to reach the right balance between the active consumer’s expectations and the viability of the business model. As mentioned earlier, it is vital for businesses to avoid a de facto obligation to sell. Businesses should be able to refuse to sell to active consumers on the basis of objective and justified reasons (e.g. delivery to country where they do not normally deliver). Also, on the grounds of competition law, businesses must be able to protect themselves against traders buying a large stock of goods at the lowest market price in another country within the EU and then reselling at a higher price in the country of origin of the consumer. Any Commission initiative on geoblocking must benefit only purchases by consumers, not professional parallel importers. Established EU competition law provides sufficient guarantees for the latter.

**Call for consistent application of seller’s rules to the active consumer**

**Banning of geoblocking will benefit active consumers, who actively compare prices and search the internet for the best deal. It should be made very clear that in these cases the law of the seller applies.** Indeed, the law (Regulation Rome I) currently provides for the application of the seller’s rules except if the trader directs its activity to the consumer, in which case the more
favourable rules of the consumer will apply. Current jurisprudence\(^4\) has an extensive interpretation of when the trader directs its activity to the consumer, thereby extending regularly the scope of when the more favourable law of the consumer applies. Traders need legal certainty when selling cross-border. We urge the Commission to provide a business friendly interpretation of when a trader is directing its activity to the consumer. This is particularly important in cases where the consumer actively visits a website from another country (e.g. United Kingdom website) and asks for delivery in another country than his/her country of residence, because the trader does not deliver in his/her country of residence (e.g. Belgium). These cases where the consumer actively seeks to purchase a product or service in another member state will become more frequent. In many cases, the trader may not even be aware it is selling to a consumer cross-border if the consumer provides a local delivery address. **Encouraging cross-border sales need to come hand-in-hand with a business friendly interpretation of when a trader is “directing its activity to the consumer”, to ensure that in most cases, the law of the seller will apply, in line with the Ecommerce Directive article 3.**

### Example of a cross border purchase of a good and a service

A consumer based in Belgium actively compares the websites of a same car seller in France, Belgium and Germany to find the best deals. The market conditions of the three different countries will influence the pricing and conditions (e.g. depending on brand penetration in the countries, on competitive pressure from other brands, local consumer preferences). He may therefore see three different prices. The consumer decides to purchase the car online from the German website where he identified the best price. The German seller must be allowed by the manufacturer to sell to the consumer but may refuse himself to do so on grounds of justified reasons (e.g. delivery to Belgium). The seller’s rules (i.e. German rules) apply to the purchase.

The same consumer then decides to go on holiday and to book a hotel in Italy. After active internet search, he may find for the same room, at the same hotel at different prices depending on if he books through the Belgium or Italian website of the hotel. This can be due to different costs of the web teams operating the websites, seasonality and different vacation periods for certain services, high or low demand within the country mainly targeted by the website (e.g. Italians may be less interested by local hotels and so prices are cheaper). The hotel should accept the booking except there are justified objective reasons not to (e.g. excessive booking of the individual(s) threatening the business model of the hotel). The seller’s rules (i.e. Italian rules) should apply to the purchase because the consumer is actively choosing to go through the Italian website and not the Belgium website.

If this Italian hotel launches a marketing campaign cross-border to target consumers in France, Belgium and Luxembourg, he may offer the same service at different prices within these three countries depending on local holidays, local demand, and competitive pressure from other hotel chains in the targeted countries or brand penetration. If our consumer living in Belgium accepts the Belgium offer, since the hotel targeted its activities towards the consumer, the consumer’s more favourable consumer rules may apply. However, if this consumer compares the marketing offers made between Belgium, France and Luxembourg, and chooses to go for the Luxembourg offer, the rules of the seller prevail (i.e. Italian rules).

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Other key measures facilitating cross-border ecommerce

**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 8.3.4 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.

**Most ecommerce barriers are currently being dealt with in other proposals.** For example, mobile will be broadened thanks to initiatives around 5G internet. Legal clarity and online trust will be facilitated thanks to harmonized consumer rules. Better shipping and return will be dealt with on the basis of postal delivery roadmap.

**For these reasons, FEDMA urges the Commission to respect freedom of enterprise and legitimate geodifferentiation, notably linked to market conditions. For further examples, please consult FEDMA input to the online consultation.**