

Position of the Malta Chamber of Commerce, Enterprise and Industry on

***The European Commission's proposals to address unjustified geo-blocking and other discrimination based on consumers' place of residence or nationality.***

## **Introduction**

As part of its Digital Single Market Strategy, the European Commission is currently conducting a thorough analysis on the matter of geo-blocking with the aim of preparing a legislative proposal to eliminate unjustified geo-blocking. The Malta Chamber welcomes the opportunity to contribute to the national consultation process that seeks to draw up a comprehensive Malta Position on this matter, in light of the fact that legislative proposals will be discussed during Malta's Presidency of the Council of the European Union during the first half of 2017.

## **Framing the Issue**

Geo-blocking has come to have many meanings and interpretations at European level. For the sake of clarity, the Malta Chamber's position hereunder focuses on the issue of 'geo-blocking' as:

*A technical measure to block or limit access to certain products/services or to reroute and provide different treatment in terms of price or other conditions, on the basis of nationality or location of the recipient.*

The Malta Chamber is in full agreement with the European Commission's aim to achieve a Digital Single Market which, inter alia, intends to remove barriers to e-commerce across the European single market. One such barrier is geo-blocking. In this respect, the Malta Chamber supports the common interest of consumers not to be subjected to unjustified differential treatment in price or other general conditions, or the outright refusal of supply based on the recipients' nationality or location/residence.

While The Malta Chamber fully supports the principle of non-discrimination, policy makers must understand and recognise the range of justifiable reasons on which a company may apply different treatment to customers based on their location.

Indeed, in a European Commission Staff Working Document<sup>1</sup> establishing the guiding principles for the application of Article 20(2) of the Services Directive dated 8<sup>th</sup> June 2012, the Commission

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<sup>1</sup> [http://ec.europa.eu/internal\\_market/services/docs/services-dir/implementation/report/SWD\\_2012\\_146\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/SWD_2012_146_en.pdf)

recognised that “...some instances justify different treatment given the current degree of completion of the internal market”.

## Careful considerations to be made

It is essential that an analysis of the justifications leading to different treatment in terms of price or conditions based on nationality or location of recipient must be carried out on a case-by-case basis with a clear understanding of the four situations of geo-blocking, namely

1. Offering different conditions,
2. Rerouting,
3. Limiting access to certain offers,
4. Refusal of supply.

It is important to consider a company’s business model, especially whether the company aims to serve its local/national market or cross-border markets and whether the company is actively targeting other member states. Considerations must also be given to the particular company’s resources and capacities, since what is impractical for one company may be insurmountable for another.

In the European Commission Working Document referred to above, it is noted that “...non-discrimination provision does not impose a general obligation on companies to supply their services in circumstances in which such a supply would involve them travelling to the territory of Member States that do not belong to the area in which they have freely decided to target their activities”. It also rightly states that businesses are free to determine the geographic scope of their activities within the EU, “...even when selling online”.

In a case-by-case analysis, one must differentiate between rerouting and forced rerouting since forced rerouting can be justified in instances such as different national laws. It is also essential to consider the number of parameters that determine price-setting (purchasing power, market size, demand, seasonality, consumer expectations) strategies for all types of products and services.

## Non-exhaustive List of Justified Reasons for Different Treatment

There exist a number of what can be considered as justifiable reasons for the different treatment of recipients

1. **DIFFERENT MARKET CONDITIONS.** Providers should remain free to adjust their pricing and/or conditions in the various markets depending on market conditions such as higher or lower demand, purchasing power of the market, seasonality or pricing by competitors.
2. **DIFFERENT OR ADDITIONAL NATIONAL REGULATIONS, STANDARDS & COMPLIANCE REQUIREMENTS.** If geo-blocking becomes prohibited, products destined to be sold in one member state could be purchased by consumers in another member state. The company would be confronted by different regulatory environments, and recipients would be confronted with

packaging and safety labels in a different language, thus posing possible danger. Any costs to satisfy the regulatory/compliance environment of recipient in a territory other than the company's chosen territory justify additional costs for the recipient or even the outright refusal to supply.

3. **ADDITIONAL STORAGE/WAREHOUSING & SHIPPING/DELIVERY COSTS.** It is justifiable that price differences may occur due to the place where the recipient requests delivery/provision of goods/services.
4. **PAYMENT ISSUES** such as limited alternatives to credit cards as a means of payment at a distance, higher risk of fraud attached to the acceptance of non-national credit cards and the lack of cross-border access to credit card registers are justifiable reasons to differentiate price or refuse to supply based on recipient's location.
5. **CONTRACTUAL OBLIGATIONS** such as when providers are forbidden to offer services and/or sell products in a given country due to the nature of a contractual relationship with a supplier/distributor in that country is a justifiable reason to refuse supply.
6. **DIFFERENT (electronic) WASTE DISPOSAL REGULATIONS & FEES** can be cumbersome and costly for an operator to deal with when selling cross-border, thus constituting a justifiable reason to differentiate price or refuse supply based on the recipient's location.
7. **DIFFERENT VAT RATES** justify price differentiation based on recipient's location.
8. **STRATEGIC PROMOTIONAL OR MARKETING REASONS** such as promotions linked to national or school holiday periods and seasonality/temperature differences are, amongst others, justifiable reasons for targeted promotional offers. On the other hand, no obvious justifications for price differentiations may be linked to situations where the same service is offered at the same time in the same place.

## The Way Forward

The setting up and completion of a comprehensive Digital Single Market is a commendable and essential priority set by the European Commission, however, the Commission should not force companies to sell across borders regardless of additional cost and administrative obligations.

The Malta Chamber notes that geo-blocking, differentiated treatment and refusal to supply are a symptom of the fragmented single market reality in Europe, and not its source. While reiterating that unjustified discriminations purely based on nationality or residence of recipients must be addressed, if ever an outright removal of geo-blocking and differentiated treatment is implemented, it must be preceded by a deeper level of single market integration, especially in standards, regulations and compliance.

Reflecting on the non-exhaustive considerations and justifiable reasons above, the Malta Chamber joins other organisations in requesting the European Commission to provide clarity and guidance on the criteria to evaluate when geo-blocking, differentiated treatment and refusal to supply are justifiable options.