

Position Paper

EU Commission Consultation on Unjustified Geo-Blocking¹

EMOTA²'s main goal is to assist policy makers in removing any barriers to cross-border trade. EMOTA's commitment to a barrier free EU Single Market is long standing and can be traced across all our positions and actions. We are making the following comments with the aim to constructively contribute to the debate over the future of the EU Digital Single Market for products and services by reflecting the views of online sellers across 17 markets, including the largest.

EMOTA recommends the following to the EU policy makers:

- **Focus on enhancing the competitiveness of the EU Digital Single Market**
- **Adopt timely measures addressing the remaining barriers to cross-border trade**
- **Apply enforcement measures for the existing consumer and competition rules**
- **Evaluate the high cost of compliance resulting from legal fragmentation especially on SMEs**
- **Refrain from imposing any form of "obligation to sell" on online and distance sellers**
- **Refrain from imposing any form of single price/product obligation on those sellers that sell cross border**
- **Allow sellers to decide the pricing policy for their products (including how to present the delivery costs)**
- **Refrain from forcing sellers to make all websites available to all visitors**

Rationale for Geo-blocking

In its recent roadmap³ the EU Commission defines geo-blocking as: *Geo-blocking includes cases when (1) the customer's access to the online service is blocked, when (2) the customer gets automatically rerouted to another service provider, when (3) delivery of the service to the customer is denied or made subject to unjustified obstacles based on its place of residence or nationality, (4) his payment is refused based on nationality or residence, or generally (5) the same product or service is offered under different conditions because of the place of residence of the customer.*

The EU Commission and most of the stakeholders are well aware of the extremely numerous legal and compliance barriers to cross-border eCommerce which result in the above mentioned examples. These have been noted in countless studies over the past decade by the EU Commission, Parliament and Council.

These include high compliance or unsustainable trading costs as a result of (short selection):

¹ EMOTA Position for the EU Commission Public consultation on Geo-Blocking and Other geographically based restrictions when shopping and accessing information in the EU and the EU Commission Roadmap for Geo-blocking (December 2015)

² EMOTA, the European eCommerce and Omni Channel Trade Association, is the European level umbrella federation representing online and distance sellers across Europe. The main mission of EMOTA is to promote eCommerce and Distance Selling and help policy makers remove any barriers to cross-border selling. Transparency register N° 11251212351-96

³ http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_cnect_002_geo-blocking_en.pdf



- **Data protection rules**
- **Different and unclear VAT rules**
- **Different and unclear payments rules**
- **Market fragmentation in payments**
- **Lack of competition in payments**
- **National rules**
- **Costs of delivery**
- **Different contract law rules**
- **Rules on Unfair Practices**
- **Different labelling rules**
- **Waste management**
- **Different product safety rules**
- **Market access restrictions**
- **Distribution restrictions**

- ☞ EMOTA warns against a legislative blanket approach which does not take these restrictions and barriers into consideration and only aims to address an extremely limited number of market failures by imposing new obligations on the entire market.
- ☞ It is crucial that geo-blocking as a technical measure is not intentionally confused with unjustified access blocking or unfair discrimination by policy makers. In addition, the eCommerce market evolves much too quickly for a granular consumer driven policy approach. By the time policies are implemented the business models will have changed and the issues are often no longer of relevance.

Enforcement through art 20.2 Services Directive and CRD

EMOTA is surprised of the EU Commission's remarks⁴ regarding the limited effectiveness of the Article 20.2 of the 2006 Services Directive (non-discrimination based on place of residence) and the apparent increased interest in new legislation instead of the enforcement of existing rules.

In 2012 the EU Commission published a Staff Working Document⁵, meant to serve for the issuing of a guidance document for the implementation of the Article 20.2 of the 2006 Services Directive. The EU Commission at that time consulted extensively with all relevant stakeholders and identified a coherent approach.

- ☞ EMOTA urges the European Commission and enforcement authorities to use existing guidance on the application of art 20.2 Services Directive

The 2012 EU Commission document builds on the Article 8 of the 2011 Consumer Rights Directive which requires sellers to inform consumers of all restrictions at the earliest stages of the purchase process. The EU Commission published in 2014 a second guidance document on the implementation of the Consumer Rights Directive which also refers to the obligation of sellers to inform consumers regarding all applicable restrictions⁶

- ☞ EMOTA believes CRD are adequate and that further competition rules or unfair commercial practices rules only add to an already firm legal framework that in the view of EMOTA already addresses the unjustified blocking of access or the unfair discrimination of consumers.

⁴ EU Commission Public Consultation on Geo-blocking and EU Commission Roadmap on Geo-Blocking

⁵ http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/SWD_2012_146_en.pdf

⁶ http://ec.europa.eu/consumers/consumer_rights/rights-contracts/directive/index_en.htm

Self-regulation: EMOTA European Trustmark

As a result of the 2011 Consumer Rights Directive EMOTA headed the industry efforts to adopt new self-regulatory actions to reflect the new legislative requirements. As an organization that was present during the 2006-2011 development and adoption of the Consumer Rights Directive, EMOTA was best placed to understand the debate and focus on coordinating the adoption of self-regulatory tools by its Members.

EMOTA was among the first organizations to adopt best practice guidelines in line with the 2011 Consumer Rights Directive and the 2012 EU Commission Staff Working Document on the 2006 Services Directive.

These guidelines were included in the EMOTA European eCommerce Trustmark compliance criteria, requiring sellers to duly inform consumers on any applicable restrictions. These guidelines are available and implemented across the market since 2013.

No case against geo-blocking

The EU Commission, in the view of EMOTA, did not provide sufficient evidence for a legislative approach concerning the relatively few examples regularly mentioned in the geo-blocking debates. While EMOTA shares the general goals of completing the EU Single Market, we believe the legislative approach in the case of geo-blocking is not adequate. EMOTA would like to challenge the EU Commission perspective on geo-blocking with the following arguments:

- As shown by the EU Commission in the Roadmap, the instances of blocked payments as a result of the incorrect country of origin of the card drastically decreased since the enforcement of the 2011 Consumer Rights Directive. In any case this is now an enforcement issue.
- **The EU Commission refers in the Roadmap to close to 60% of consumers that could not complete a purchase as the seller's site did not accept their address (country/postcode selection). However, the European Commission did not analyze the individual cases. It may very well be that these 60% covers instances that are in violation of existing legislation.**
- There are many industry actions addressing best practices and pre-contractual information requirements.
- The offer available to consumers in their countries increased drastically over the past five years and only leaves very limited niche products/services as potential areas of interest for non-multinational online sellers. This can be seen in all recent EU Commission Consumer Scoreboard studies where the level of domestic eCommerce is in some countries upwards of 80% while cross-border remains on average at 15%, although in some countries will go over 70%.
- As the EU Commission noted in the Roadmap, eCommerce as an offer or purchase need tends to be regional due to language, price, purchase power, product preference.
- Policy makers have in the past referred to the potentially high number of purchases that encompass some cross-border element but because of the general consumer perception they are labelled as domestic purchases (e.g. consumer buys from a Belgian or .eu site, pays in Euros and the product is delivered by a Belgian postal operator, while it might be that the product was sold and shipped from Germany or the Netherlands). EMOTA therefore believes that the cross-border e-commerce is much higher than current statistics suggest.



- The highest consumption power markets tend to have a much more complete offer. These capture much of the domestic purchase intentions which will leave less resources available for cross-border purchases (an UK or German consumer is likely to find most if not all products available in the domestic market at a competitive price, hence UK or German consumers buy less abroad and non-UK consumers buy from the UK cross-border).

Re-routing; should the consumer see the offers?

The EU Commission and the EU Parliament questioned in the recent debates and in the public consultation on geo-blocking the practice of re-routing.

With respect to re-routing, the ecommerce eco-system involves a range of technology, payment and shipping partners who support retailers in transaction management and fulfilment. Re-routing is an essential part of ecommerce in the sense that elements of the transaction process can be fulfilled by partners in the value-chain by the re-routing of users to partner sites for those elements that are not able to be fulfilled on the retailer's platform.

- ☞ Any language that the EC draws up in relation to re-routing must be proportionate, precise and purposeful in relation to unjustified geo-blocking only.

For example, in order to better reply to consumer demands online sellers sometimes operate different versions of a certain website in the same country (North vs South of France, North vs South of Germany, etc). The product models and prices might sometimes have to be adjusted to reflect the consumer needs and preferences or in order to be adapted to labor costs, delivery costs (flat land vs mountain area, vs islands, etc.). The seller adapts the offer to the specific needs of the consumers he/she is addressing. This is a basic commercial practice which is surprisingly challenged by policy makers.

- ☞ EMOTA opposes an obligation to make all versions of a website available to all consumers. EMOTA is of the opinion that a general obligation to make all versions of a website available to all consumers would be highly impractical and would completely ignore the market realities (search relevance, price comparison, etc.). Sellers should be free to decide if they will address certain markets or not.

The case for IP Blocking

The use of IP address to geo-block the sale of items to certain geographies is supported by international Treaties (such as CITES, endangered animal), HAZMAT and postal restrictions. Geo-blocking in these cases thus automates restrictions, reducing costs and complexity for sellers and buyers alike. The EC's geo-blocking impact study has talked about greater transparency in respect of justified geo-blocking and, while we understand where this sentiment comes from, we fear that excessive regulation in respect of justified geo-blocking will damage the seamless ecommerce customer experience in the same way as cookie pop-ups annoy users in the name of protecting privacy.

- ☞ In any geo-blocking legislation, the EC needs to keep focused on the purpose of its DSM: to promote seamless, efficient and customer friendly cross-border ecommerce, where barriers and transaction costs are reduced – not increased.



And if the consumer agrees to pay the difference?

Many policy makers have asked industry stakeholders if they would supply products/goods if consumers would actively approach the seller and would agree to pay the difference in delivery costs/product cost so that the product can be delivered to the country of their choice.

The question of passive sales is an extremely complex debate because of the many economic/ legal/tax/ competition/distribution restrictions (despite the general ban on prohibiting passive sales) and compliance aspects. In addition:

- The country where products are sold by most of the EMOTA Members is determined before the offer is made. This means the logistic chain is organized in such a way so that the product is available to a consumer in his/her country, can be returned and exchanged/replaced in that country, can be repaired and recycled in that country.
- Passive sales might be a slight indicator of a certain level of interest for a product in a certain market but they are by no means proof that the seller should target that specific market.
- In the logistics chain, if the seller identifies a large enough market opportunity, it might be easier to import stock or work with a local distributor (not in all cases) so to facilitate compliance with local rules. This means the consumer might already have the product available in their country but from another offering.
- In principle the consumer would face a cost of approximately 20 (under 2kg) - 100 Euros extra for a one-way one-piece over the counter delivery. This would make any offering extremely uncompetitive.
- The seller would have to foresee possible passive sales in the sales system, this means that numerous changes will be required in the various operating software without any guarantee of a return. This would ultimately require a one-price one product approach.

Responses to European Commission Roadmap on Geo-blocking

Industry action: EMOTA strongly believes industry is best placed to deal with issuing best practice and guidelines. These would better reflect the needs of the market and the developments. The industry could develop further guidelines on transparency and pre-contractual consumer information to address the most relevant concerns.

No EU action: The EU Commission claims in the Roadmap that no EU action at this stage will, despite all existing rules, leave consumers open to abusive access denial. EMOTA strongly disagrees and calls on the EU Commission to redouble efforts for the correct enforcement of the existing legal framework.

Improving implementation and enforcement: EMOTA calls on the EU Commission to focus on the implementation and enforcement of the 2006 Services Directive. As the EU Commission Roadmap correctly mentions, the EU Member States did very little to enforce the Article 20.2 of the Services Directive. Before any new measures are proposed, existing legislation should be properly enforced.

The EU Commission mentions in this option that the Consumer Rights Directive does not address territorial restraints. While this is correct, the Directive does require that consumers are informed of any restrictions which aims to reduce consumer frustration.



Enhanced Transparency and displaying the costs of delivery separately:

EMOTA strongly opposes any legislative obligation for sellers to make all their offerings available to all consumers. In addition, EMOTA strongly opposes any legislative initiative that would require sellers to present the cost of delivery distinctively.

This approach is not consistent with the recent debates where policy makers are requesting online sellers to present a price including delivery costs where this is possible (e.g. DG JUST Price Comparison). Sellers should be free to decide how they present the costs of delivery (e.g. free delivery free returns).

Any further legal obligations around delivery prices could pose an extremely complex from a competition law perspective as postal tariffs are negotiated per volume and would negatively affect SMEs who by default are in a less optimal position due to their lower volumes and therefore higher delivery costs.

Option 2 Ban on denial or access and rerouting: EMOTA strongly opposes such an approach and does not agree with the EU Commission that this approach would contribute to widening the offering for consumers. Sellers make a conscious decision on where they sell and organize their business in such a way. Passive sales should be possible but should remain exceptional due to the high costs they would entail.

Option 3 and 4 Prohibition of geo-blocking: The described actions by the EU Commission would translate into an obligation to sell, despite the “exceptions”. EMOTA strongly opposes an obligation to sell.

Regarding the white list mentioned by the EU Commission, EMOTA believes that a good start for a positive list (explaining how sellers should inform on the justifications for not serving some countries, but taking a case by case approach) is the 2012 EU Commission Staff Working Document for the enforcement of the Article 20.2 of the Services Directive.

Conclusion:

EMOTA calls on the EU Commission to refrain from imposing any new obligations on online sellers regarding how their offerings are presented and to whom they are targeted and work with the industry stakeholders and Dutch EU Presidency to identify the best and most effective solutions forward, focusing on transparency and enforcement.