EMOTA
The European eCommerce & Omni-Channel Trade Association

Transparency Registry: 11251212351-96

Position Paper

EU Commission Geo-blocking Regulation

FINAL January 2017

EMOTA Updated position based on the EU Council General Approach of 28 November

EMOTA supports the overall goal of this proposal and the EMOTA Members would greatly benefit from a Digital Single Market where the political barriers have been removed. Consumers would equally benefit from increased choice and competition. However, EMOTA ***strongly opposes the obligation to sell introduced by the EU Commission in Articles 3 and 4*** of the Geo-blocking Regulation which seems to ignore the lack of political will by the EU Member States to complete the Digital Single Market (VAT and customs, Contract Rules, Postal Services, Payments, enforcement).

Key EMOTA Comments on the 28 November Council text:

- The Council text does not entirely insulate the sellers from the possible consequences of entering into a contract with a non-domestic consumer.
- The Council text does not protect the seller from the application of other rules in the consumer's country resulting from the compliance with the Regulation (product safety, standards, waste, VAT, labelling, etc.)
- The Council solution to the collection of consent for re-routing only creates an obligation to store this consent forever, as an alternative to collecting consent each time, while maintaining the administrative burdens proposed by the EU Commission.
- The Council text takes a very good approach for the issue of payments, sellers should not be required to enter into new service contracts and are allowed to apply safety measures in payments while at the same time withholding the products until payment is confirmed
- EMOTA does not agree with the approach taken by the Council on distribution restrictions, considering that the proposed text reinforces the use of distribution restrictions.

Is this the right approach for the DMS?

Many businesses find it difficult to accept and dangerous for the future of the EU economy that policy makers on the one hand claim to promote the Digital Economy, including eCommerce, while constructing new administrative burdens based on deliberate inaccurate parallels that have no relevance in the digital world (e.g. the parallel with the possibility for any consumer to access a store in their neighborhood – while at the same time making the argument that once a seller does sell cross-border to a non-domestic consumer, the consumer, be it consumer or business, should benefit from the assistance and rights, guarantees and remedies, affordable to the "domestic" consumers).

What businesses across the EU and beyond need is the reassurance that policy makers are willing and able to work strategically and deliver the necessary results for the economy to further grow. Any other approach, such as it is the case with the Geo-blocking Regulation, whereby an obligation to sell is introduced long before the barriers in the Single Market have been removed, forces businesses and ultimately the consumer to internalize the costs of not having in place the Single Market.

Finally, there are many technical complexities generated as a result of forcing companies of all sizes, large and small, to sell to non-domestic consumers that have not been addressed sufficiently by the EU Commission text or by the Council text. We outline below a series of suggestions for amendments, based on the Council text, addressing some of these issues.

Clarifying the scope: What is the scope of this Regulation? Currently the various stakeholders are divided on its effects, for example showing that some of the provisions are likely to also apply to offline retail and to retail in general, online and offline, nationally. In the view of EMOTA in order to reduce any further legal uncertainty it should be made clear, as the EU Council has tried to some extent, to ensure that the Regulation only applies to online cross-border sales, where the trader is not actively pursuing activities in the consumers market. Political debates have shown that there isn't any openness to re-define the concept of "targeting".

Trader's law and jurisdiction should clearly apply: The EU Commission's text seemed to have been built with an obligation to sell in mind first, and at a later stage an insufficient attempt to address the issue of applicable law has been made. The Council text, in the opinion of EMOTA, does not go far enough in insulating the seller from any possible requirements as a result of accepting a contract from a non-domestic consumer. Any action performed by the seller could in a various number of scenarios, as the EU Court of Justice clearly stated, result in the applicability of the consumer's law (assistance with delivery, with installation, translation, international dialling codes, currency, payment mechanisms, guarantees, etc.)[1]. Should policy makers decide to adopt this Regulation they should also take the responsibility to provide the market with a functional mechanism to solve the issues resulting from the creation of this additional set of obligations for sellers.

Who should be covered by this Regulation? Currently the Regulation introduces an exemption for the provision of Electronic Services for SMEs and Micro-enterprises in line with the VAT Directive from 2006. EMOTA would consider that an overall SME exemption would be a natural solution to many of the problems identified by the EMOTA Members and the various other stakeholders.

B2B? EMOTA opposes the introduction of a general B2B sale obligation, regardless of the safeguards in place. Companies are in competition and in different negotiated contractual relations. Policy makers should encourage companies to sell at a distance and deliver their goods. Instead an obligation to sell B2B would only mean that companies, especially smaller sellers, but also large, would have to also worry about tracking their merchandise to ensure that the system is not abused, at a pan-European level, which is clearly impossible. This will result in a loss of business and equally importantly a loss in business confidence.

Consent? Re-routing is not defined sufficiently and could result in covering many personalization actions. The consequence of this would be either the obligation to collect consent each time or, according to the Council text, collect consent once and store it forever – with all the obligations that would result from such a choice. EMOTA urges the EU Parliament to allow sellers to direct consumers to the most relevant website and only after, allow consumers to visit an alternative site – without an obligation to sell. In Article 3 the Regulation imposes an obligation for sellers to collect prior-consent when automatically re-routing. Re-routing is a unclear term that can capture a very wide spectrum of actions, from website personalization to the display of region specific products, etc. Consent and the validity of consent are very complex concepts addressed by the General Data Protection Regulation and other parts of the Consumer Acquis, such as the Unfair Commercial Practices Directive. Applying such complex concepts to a purely commercial situation is by definition over regulating. In addition the administrative burdens resulting from the Council's 18 November text, asking sellers to collect and store consent as an

[1] (Pammer v. Karl Schlütter GmbH & Co. KG C-585/08 and Hotel Alpenhof v. Mr. Heller C-144/09 or the more recent Emrek Case C-218/12 on the causal link between the commercial or professional activity directed to the Member State of the consumer's domicile via an Internet site and the conclusion of the contract)

alternative to a permanent requirement to collect consent, would result in even further administrative and technical burdens (e.g. burden of proof for consent, actions leading to the decision to purchase, etc.).

Not forcing sellers to enter into new contracts for payments: EMOTA supports the Council approach whereby sellers are not required to enter into new service contracts for payments. This should be clearly reflected in the Article 5 as well.

A fair approach to distribution restrictions: Article 6 as worded by the EU Commission created the danger that the entire agreement/contract would become void in case it would conflict with this Regulation, which would not favour the sellers or the consumers. The 28 November Council text takes a very radical opposite approach rather signalling support for distribution restrictions. EMOTA supports the text proposed during the negotiations by the Slovak Presidency, declaring void only the specific contract clauses which impose illegal distribution restrictions and not the entire contract.

VAT, addressing a real risk: The Regulation also does not entirely protect sellers from the possible obligations to register for VAT in the country where the final consumption actually takes place as a result of the consumer deciding to ask for delivery at a forwarding centre or a delivery company. Such cases should be clearly covered and sellers should not be forced to apply the VAT rules from the country of destination.

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