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Commission Publishes First Issues Paper into EU Geo-blocking

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1. Summary

On 18 March 2016, the European Commission published an initial “Issues paper” on geo-blocking in the EU. The paper is part of the Commission’s ongoing e-commerce sector inquiry examining whether suppliers impose illegal territorial restrictions on retailers’ online activities.

The Issues Paper concludes that geo-blocking – the practice by which e-commerce sites filter out users based on location – is relatively widespread in the EU: 38% of responding retailers and 68% of responding content providers use geo-blocking within the EU. This may in part be due to the broad definition afforded to “geo-blocking” in the Issues Paper (which includes not only technical measures to block or reroute users, but also refusals to deliver products to, or receive payments from, cross-border customers).

- For physical goods (apparel, electronics, etc.), there are limited instances of suppliers contractually requiring geo-blocking: 12% of respondents geo-block customers located in other EU Member States as a result of an agreement to do so.
- For digital content (films, TV series etc.), geo-blocking is common practice. The paper does not say so, but this is doubtlessly because as a matter of IP law the receipt of an online transmission of copyright content requires a licence in the reception state. Since online digital content providers buy rights to audiovisual works on a territory-by-territory basis, it is unsurprising that they would geo-block access to unlicensed territories. Indeed, this may explain why some providers decide to unilaterally geo-block cross-border access within the EU even when not contractually obliged to do so.

The paper offers no further insights into the legal analysis of online sales restrictions. The legal position remains contentious at least in respect of content, since the position in copyright would seem to preclude competition in unlicensed ex-territory content. So geo-blocking is regarded as an essential means of protecting against IP infringement.

The timing of the paper is unusual: it is based solely on evidence from retailers, and not suppliers; it is not a formal step in an antitrust sector inquiry; and it seems to pre-empt the interim report due

in July 2016. It is possible that the Commission seeks to support other initiatives in its digital single market agenda.

The Issues Paper, and the e-commerce sector inquiry, must be seen in the context of the ongoing EU investigations into online restrictions for both physical goods and content.

The Commission is due to publish a more detailed analysis at the end of June/early July 2016, which will more fully explain the concerns identified by the Commission. A final report is set for early 2017, and enforcement action against individual companies may follow.

2. Background

The Issues Paper is the first output of the Commission's far-reaching sector inquiry into ecommerce. Launched on 6 May 2015, the inquiry focuses on allegedly illegal cross-border restrictions in respect of the distribution of both physical goods and online media, and has seen a large number of companies in a range of sectors receive lengthy (and mandatory) information requests. In so far as it covers digital content, the inquiry purports to exclude films (which are subject to a separate antitrust investigation targeting the Hollywood studios). This is in contrast with the earlier stages of the inquiry, which also focussed on films.

2.1 Enforcement Focus

In parallel with the e-commerce sector inquiry, the Commission is also actively pursuing several antitrust investigations in this area, in relation to pay-TV services, video games and the distribution of consumer electronics products.

The pay-TV investigation focuses on clauses in the contracts between six Hollywood studios and Sky UK which prevent Sky from making its services available to consumers located in other EEA Member States. The clauses under investigation include those obliging Sky to implement geo-blocking to prevent cross-border access. The Commission adopted a statement of objections on 23 July 2015.

2.2 A Complex Legal Landscape

(a) Unilateral Geo-blocking Not Illegal – For Now

EU competition law does not prevent a non-dominant supplier or content provider from unilaterally geo-filtering access to its content or services, something EU Competition Commissioner Margrethe Vestager reiterated in her statement accompanying the publication of the Issues Paper. Unilateral geo-blocking is the target of separate proposed legislation as part of the Commission's Digital Single Market initiative.

(b) Agreements to Implement Geo-blocking Subject to EU Competition Law

Where geo-blocking results from an agreement (e.g. imposed by a licensor or supplier), this falls – *in principle* – within the scope of Article 101(1) TFEU.

Geo-blocking requirements imposed in relation to the sale of physical goods which restrict cross-border sales in the EU are generally treated as “by object” infringements of Article 101. According to the Issues Paper, 38% of consumer retailers surveyed use geo-blocking. In 12% of these cases, this was as the result of an agreement. Indeed, the concerns identified by the Commission are broader than blanket restrictions on distributors and retailers making cross-border sales (what might be thought of as geo-blocking in the straightforward sense). The Issues Paper suggests that the Commission will focus on additional illegal restrictions in distribution networks, including:

1. De jure or de facto restrictions that prevent distributors/retailers selling products online.
2. Restrictions on active sales into territories that have not been exclusively reserved to the supplier or other distributors/retailers.
3. Restrictions on passive sales into territories which have been exclusively reserved, either to the supplier or to other distributors/retailers.
4. Restrictions on authorised dealers (within a selective distribution system) from supplying consumers, whether passively or actively, in all EU Member States.

(c) Legal Uncertainty Surrounding Online Services

The position is much more complicated in respect of online content-based services. These services are governed by the European copyright framework, which is still national in scope. A service provider must license the national rights in each EEA Member State where it wishes to make the content available, and these rights – unlike IP rights implicated in the sale of tangible goods – are not subject to exhaustion, something the Issues Paper confirms. In this context, geo-blocking does no more than reflect the national scope of the licensed rights. Moreover, licensors will typically require their licensees to use geo-blocking to prevent IP infringement. This is reflected in the survey statistics: 68% of service providers surveyed use geo-blocking to prevent cross border access, with 59% doing so pursuant to an agreement. Moreover, for those providers using geo-blocking, the cost of purchasing rights to other EU Member States is listed as the primary factor for not making services available cross-border.

Clauses requiring geo-blocking in relation to films are at the heart of the on-going pay-TV investigation. This investigation, which was first launched in July 2012, follows the Court of Justice’s ruling in *Murphy*, which found *inter alia* that clauses preventing a Greek broadcaster from making decoder cards available to consumers outside of its licensed territory (Greece) infringed Article 101(1). But it is far from clear whether *Murphy* extends to online services.

Satellite and online modes of distribution are subject to different copyright regimes. Satellite communication is deemed (as a matter of EU law) to occur only in the Member State of uplink. So, in *Murphy*, the Greek broadcaster did not require copyright clearance in the UK to make the broadcast available. But this regime does not, at present, apply to online services where copyright must still be cleared in each Member State. Indeed, this is the rationale for the current consultation as to whether the country of origin principle in the Satellite Directive should be extended to online services.

Therefore, reading *Murphy* as prohibiting geo-blocking clauses in online services is fraught with difficulty. The Commission has acknowledged these difficulties in its own submissions to the OECD. The Commission's latest guidance on IP licensing (the Guidelines on technology transfer agreements) makes no reference to *Murphy*.

2.3 A particularly European phenomenon?

Geo-blocking as a means of achieving geographic price discrimination is primarily of concern to the European Commission (given the single market imperative), but also to Switzerland (given its proximity to the EU). A recent survey by the ICN (International Competition Network) suggests that other agencies would not view it as a priority. At the same time, this high profile inquiry will not go unnoticed. The same ICN report showed that 25% of surveyed agencies were keeping a watching brief on geographic price discrimination. Agencies in countries which border 'lower price' countries may be especially keen to ensure that their country does not become a high price island with foreign dealers being prevented from selling to consumers in their country.

3. Key Learnings for Companies

The Issues Paper offers precious little fresh analysis or guidance for companies, who must wait for a fuller analysis due for publication in mid-2016. However, some initial observations are set out below

- It is likely that the Commission will pursue individual cases where it identifies anti-competitive conduct. The Issues Paper suggests that the Commission will target a range of issues in distribution agreements beyond pure "geo-blocking". So businesses should be thorough in reviewing their distribution agreements and networks for antitrust compliance.
- How the Commission approaches geo-blocking clauses in relation to online services is much more complex and controversial. The film and TV production eco-system in Europe is a delicate one, and is underpinned by territorial licensing. Undermining rights holders' abilities to enforce copyright threatens the very foundations on which the industry is based. According to press reports, the oral hearing in the pay-TV case was attended by a number of independent producers and their associations, who warned that ending geo-blocking for audiovisual content would have disastrous consequences for European film production. Whilst these concerns are clearly on the radar of European policymakers in respect of other Digital Single Market initiatives, it is regrettable not to see them reflected – so far – in the e-commerce sector inquiry or in the Issues Paper.
- Whatever solution is finally reached for online services will have potentially far-reaching and significant ramifications for the European creative industries as a whole. Businesses involved in this area, to the extent that they have not already done so, should consider making their views known to the Commission and to wider stakeholders in the EU arena.

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