

EU Sector Inquiry Highlights Online 'Geo-Blocking' – Future Enforcement Action Likely

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On 18 March, the European Commission (Commission) published an issues paper presenting its initial findings on "geo-blocking", as part of its wide-ranging inquiry into competition in the EU e-commerce sector. This sector inquiry (which forms part of the Commission's wider Digital Single Market strategy – see our previous [client alert](#)) is examining competition in the e-commerce sector within the EU, with a particular focus on the cross-border sale of consumer goods (primarily consumer electronics, clothes, shoes and sports equipment) and digital content. By summarising the Commission's factual findings on the discrete issue of geo-blocking, the [issues paper](#) will feed into the wider inquiry and provides an interesting snapshot on the prevalence of geo-blocking across the EU and the reasons behind it.

As the term is used by the Commission, geo-blocking describes commercial practices whereby companies selling online prevent consumers from accessing and purchasing goods or digital content based on the customer's physical location. Such practices – which include blocking access to websites, automatically re-routing users to different sites or refusing delivery – can make it harder for consumers to take advantage of cross-border e-commerce within the EU. As such, they are viewed by the Commission as contrary to the fundamental principle that there should be free movement of goods and services across the EU, as reflected in the EU treaties in general and EU competition law in particular. As a result, facilitating cross-border e-commerce is one of the key objectives of the Commission's Digital Single Market strategy.

The sector inquiry, which is essentially a fact-finding operation, involved the Commission sending a large number of information requests to a cross-section of retailers, digital content providers, manufacturers, suppliers and rightsholders throughout the EU. The geo-blocking issues paper reflects the responses received by the Commission from more than 1400 retailers and digital content providers to those questionnaires.

The Commission's main findings

While the Commission's key finding is that geo-blocking is "widespread" in the EU, for both consumer goods and digital content, its use varies markedly between product categories. Thus, for example, while 38% of consumer goods retailers reported that they used geo-blocking to some degree, the figure for digital content providers was 68%. The prevalence of geo-blocking also varies between Member States, with only 46% of Italian businesses engaging in at least one form of geo-blocking, compared with 83% in the UK and 88% in the Czech Republic.

There is also a marked divide between physical goods and digital products when it comes to the reasons behind the implementation of geo-blocking. The Commission's main concern is that suppliers may be forcing retailers to limit their cross-border sales, in contravention of EU competition law. What they in fact found was that geo-blocking relating to the sale of consumer goods is in most cases the result of a unilateral business decision, with only 12% of consumer goods retailers reporting that they implemented geo-blocking as a result of contractual restrictions on cross-border sales. In most cases, therefore retailers are making unilateral decisions to implement geo-blocking, for example because they do not wish to incur higher delivery costs. This is an important distinction, as generally geo-blocking will infringe competition law only if it is implemented as a result of an agreement rather than being implemented unilaterally.

The Commission found that contractual restrictions on the cross-border sale of goods imposed on retailers included: (i) restrictions on selling to consumers outside their Member State of establishment; (ii) restrictions of active sales outside a designated territory where the supplier did not have an exclusive distribution agreement in place; (iii) restrictions of passive sales into territories that had been exclusively allocated to other distributors or reserved to the supplier; and (iv) restrictions on retailers within a selective distribution system on selling to certain end consumers within a designated territory. All of these practices are treated as hard-core restrictions of competition under EU law and are hence presumptively unlawful.

In contrast, 59% of digital content providers reported that they are contractually required to geo-block. Licensing agreements for TV drama and TV series, and firms and sports events, appear to include requirements to geo-block more often than licensing agreements for other digital content categories, although there is a huge variation depending on the content and country. Unilateral decisions not to provide access to digital content cross-border were less common than in the case of consumer goods.

Geo-filtering (ie offering different terms or prices based on the customer's location, rather than blocking access altogether) appears to raise fewer potential concerns than geo-blocking. Approximately 75% of respondents that sell cross-border indicated that they do not charge different prices when they do so. The reasons that were considered most important for charging different prices were different tax regimes, costs, product demand and differing competitive pressure in other markets. While the Commission notes that there appear to be several justifications for price differences, it also notes that contractual limitations on cross-border access, including by geo-filtering, may lead to the partitioning of the single market and hence raise competition concerns.

To provide context to the Commission's findings on geo-blocking, the issues paper includes some interesting statistics on the prevalence of cross-border retail within the EU. As with geo-blocking, the level of cross-border sales activity varies significantly between Member States. For example, while 36% of EU online retailers reported that they do not sell cross-border in at least one product category, this varied by country from 0% in Luxembourg and 20% for German retailers to 83% for their counterparts in Finland. It is also interesting to note the important role played by online marketplaces in facilitating cross-border e-commerce, with the Commission noting that only 17% of retailers using marketplaces did not sell cross-border, compared with 42% of retailers who sell only through their own website.

Comment

The geo-blocking issues paper is the first document to be published by the sector inquiry team. While we will have to wait until this summer for the Commission's full preliminary report, the issues paper nevertheless provides an interesting indication of the inquiry's direction of travel.

The Commission does not have the power to impose remedies directly on the basis of a sector inquiry. As a result, a sector inquiry is typically a prelude to specific investigations and enforcement of the competition rules against companies engaging in anticompetitive behaviour. While the Commission has stated that further analysis is required before it can decide whether any follow-up enforcement action is necessary in this sector, this seems highly likely based on the evidence presented so far.

Given the higher prevalence of geo-blocking as a result of contractual restrictions in relation to digital content, this is the most likely area of focus. In fact, the Commission is already engaged in at least two investigations in this sector, one in relation to video games and one in relation to the supply of pay-TV content.

The difficulty faced by the Commission when seeking to enforce the competition rules with respect to restrictions on the sale of digital content, however, is that rights-holders rely on national copyright laws to justify at least some forms of geo-blocking to protect their rights to control the exploitation of their content. Thus, for example, rights-holders point out the importance of exclusive territorial licensing at a national level in underpinning the commercial exploitation of their works and hence preserving incentives to create and license new content. This is a key focus of the pay-TV case, which remains ongoing at the time of writing.

While the Commission recognises that unilateral decisions not to sell cross-border are less likely to raise competition law concerns, it is also pursuing initiatives to combat geo-blocking that go beyond the scope of competition law. For example, the Commission has published legislative proposals to facilitate limited portability of digital content within the EU, enabling consumers for example to access subscription video services that they have paid for in their country of residence when on holiday elsewhere in the EU. It is notable that the sector inquiry team has confirmed that its findings will feed into those wider initiatives, as well as forming the basis for possible competition law enforcement and potentially new competition guidance.

Although consumers may welcome the Commission's moves to break down national borders for the online sale of goods and provision of digital content, retailers, suppliers and content rights holders are less enthusiastic. The Commission will consult on its Preliminary Report once it is published in mid-2016, with publication of the Final Report due in the first quarter of 2017.

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