

Geoblocking: a competition or regulatory issue?

Giorgio Monti

Geoblocking agreements

territories are hermetically sealed off, making interpenetrating of national markets impossible, thereby bringing to nought economic integration... jeopardising a fundamental principle of the Treaty.

Nintendo [2003] OJ L255/33 paras. 338 and 374

Counter-arguments

Economic

- Absent market power, vertical restraints are largely unproblematic
- What are the effects of COM decisions condemning geoblocking agreements?
 - Grundig/Consten
 - Parker Pen

By Object status

- Question of law or question of fact?
 - ‘Bank of experience’ regarding the effects of geoblocking agreements?
 - ‘studies or reports prepared by independent authors and based on methods, principles and standards recognised by the international economic community supporting their view’?

AG Bobek, C-228/18

Enforcement style

AT.40428 – Guess; AT.40436 – Nike

Settlement submissions

- 50% discount in Guess; 40% in Nike
- **Effective way of developing the law?**
 - General: Guess faces inter-brand competition; weak market position
 - Specific: ‘exclusive right reserved for Guess Europe to use the Guess brand names and trademarks in online search advertising’ – worth a closer effects-based look?

Fining policy

- Why target only one party to the agreement?
 - Nike: master licensees monitor sub-licensees
 - Cf. *Courage v Crehan*

Unjustified Geoblocking: Regulation 2018/302

Access to online interfaces (Art 3)

- User in Belgium must have access to .nl websites (seller may not block, or re-route to .be)
 - **Except if trader shows need to comply w EU, national law (Art 3.3)**

Access to goods & services (Art 4)

- User right to buy goods from traders established in other MS
- User right to receive electronically supplied services from other MS
 - **Except if trader shows EU or national law prevents sale/supply to certain customers/territories (Art 5.4)**

Non-discrimination for reasons related to payment (Art 5)

- **except for objective reasons (Art 5)**

Geoblocking Regulation – limits

Access to goods & services (Art 4)

- User right to buy goods from traders established in other MS
 - **But no duty on seller to deliver outside MS**
- User right to receive electronically supplied services from other MS
 - **Other than services the main feature of which is the provision of access to copyright protected works**

Maduro, Monti, Coelho The geo-blocking proposal

Internal market, competition law and regulatory aspects (2017)

Copyright exception

Compromises

- Obligation to sell in other MS unless:
 - Trader shows this would infringe copyright
- Portability Regulation
 - Temporary access to subscriptions abroad
 - Undermines *Murphy*?

Arguments in favour of retaining geoblocking

- Supplier reduces quality of services abroad
 - Impact of *Murphy*
- Supplier ceases exports
- Single prices
- Harm to SMEs
- Impact on content
 - Cultural production
 - Diversity

Cf. *Canal Plus* T-873/16

ATP: Geoblocking & Competition Law

Competition Law	VBER Art 4(b)(i) Exclusive territory	Article 101(3) Guidelines [61] New brand/new market
Active sales restriction	Present	Present
Passive sales restriction	Absent	Present
Geoblocking Regulation	Allowed	Forbidden

Geoblocking: enforcement

Public enforcement across a range of bodies

- Network Regulators
- Competition Authorities

Maximum fines

- EUR 5,000 (IRL)
- EUR 10,000 (B)(GR)
- EUR 300,000 (GER)

‘measures provided for shall be effective, proportionate and dissuasive’ Article 7(2)

Art 9 Agenda

- Cost on traders
- Copyright exception

My agenda

- Competition Law/Regulation link: remove Art 6
- Network enforcement
- Remedies/fines: mutual learning