



Geo-blocking: Unjustified barrier to the digital single market or legitimate commercial practice?

A key plank in the Digital Market Strategy is described by the European Commission as “preventing unjustified geo-blocking”, and legislative proposals are planned for the first half of 2016 to address this practice. Online sellers use geo-blocking for commercial reasons to either deny access to websites and content based in other member states, re-route traffic to local websites or apply different prices. By limiting consumer opportunities and choice, geo-blocking is a significant cause of consumer dissatisfaction and fragmentation of the Internal Market.

This seminar focused on territoriality issues regarding copyright in the audiovisual sector. Key questions for the seminar included:

- Can geo-blocking ever be justified, or are the plans on geo-blocking and copyright too cautious?
- Is geo-targeting a legitimate practice arising from commercial agreements between producers and distributors to segment the market, e.g in the cinema industry?
- Do geo-blocking restrictions infringe the rules of EU competition law?

Importantly, geo-blocking reflects a broader ‘internal market’ issue and occurs more generally in e-commerce also for non-copyrighted goods. This means that although the same good or service may be provided in several EU Member States, consumers can access only their “national” offer at local conditions and prices. As applied in the context of digital content, geo-blocking was defined by **Felice Simonelli (CEPS)** as a technological measure preventing online consumers from accessing a website or from purchasing content based on location of access. Such a measure implies the use of geo-location techniques and software that check the user's Internet Protocol address and may block or re-route consumers to a local website, or simply bar end-users from downloading content. Thus, the main impacts of geo-blocking are two-fold. The first is limiting cross-border portability, meaning that consumers who have lawfully subscribed for online services in a certain Member State are not allowed to access the same service when moving, even temporarily, to another Member State. The second is limiting cross-border trade, meaning that some EU consumers cannot access goods or services that are instead available to other EU consumers.

Felice Simonelli focused his analysis on geo-blocking that affects copyrighted goods. He notably stated that when thinking of digital content, opportunities to achieve a fully integrated market may be much higher than in the offline world, in particular when considering intangible goods with no delivery cost. On this basis, we can legitimately question the practice of geo-blocking. The key aspect of the analysis is the interplay between competition law and the EU copyright framework. Article 101 TFEU prohibits all agreements between undertakings which may affect trade between Member States and which have as an object or effect, the prevention, restriction, or distortion of competition within the internal market. As a result, absolute territorial exclusivity *per se* is forbidden through EU competition law, and this principle applies to both active and passive sales. As a result, geo-blocking is in principle, at odds with EU competition law. Nevertheless, due to the EU copyright and related rights architecture, that confers protection through national laws and limits it to the territory of the granting State (principle of

territoriality), both active and passive sales of copyrighted content are subject to mechanisms that prevent any kind of copyright infringement. Therefore, a principle of exhaustion was designed to mitigate the principle of territoriality and to stimulate cross-border exploitation of copyrighted products. However, Article 4 of the InfoSoc Directive confines the scope of the exhaustion principle to the distribution right, which concerns only physical media embodying copyrighted works. The consequence is that territorial licensing of intangible copyrighted works, which are equalised to services, is a lawful business strategy and parallel imports can be prevented by relying on copyright territoriality. Dr Simonelli emphasized that the patchwork of copyright rules has created artificial transaction costs that are particularly burdensome in the music sector, before adding that many additional barriers stemmed from the different interpretation and application of exceptions and limitations to exclusive rights.

Although the researcher illustrated the tensions between competition and copyright principles, suggesting the 'non-functioning' of the internal market for copyrighted goods, he also made a special caveat as regard the audiovisual sector. Partitioning the Internal Market is explained by the need to adapt content to each national market, due to the strong cultural and linguistic diversity across EU Member States and because of the financing scheme adopted to fund the production of movies, along with distribution strategies. Thus, the main reasons for this partition lie in European cultural diversity, but also in the socio-economic disparities across Europe, including purchasing power and net incomes.

Improving cross-border portability would be a response to mitigate the effects of territorial licensing and geo-blocking in the audiovisual sector, in particular for short-term migrants and travellers (about 5 million Europeans per day). Similarly, enhancing cross-border trade and service would help long-term migrants (about 13 million Europeans). In his view, improving accessibility of digital content would be beneficial for both consumers and content providers such as broadcasters, especially seeing the potential demand for cross-border services subscriptions, and the significant increase of interests and foreign language skills throughout the EU, without neglecting that versioning (content adaptation) and pricing strategies (adapting prices to national purchasing power) remain key practices in this particular sector.

Agustin Reyna (BEUC) deplored the fact the territoriality principle was generally the rule, while the single market an exception. Calling for clarifying the reasons justifying such discriminations, he also supported the idea that authors and right-holders should have the right to define and frame the exploitation of their works. However, he thought that exclusive licensing based on territory and time (release window) were not justified any more in the online world. He favoured that business interests should be mitigated by the public interest. This has already been illustrated in DG COMPT investigations, where non-exclusive and non-discriminatory offers were ordered in merger controls (e.g. SkyItalia) or in the renowned Magill case law (ECJ) where the abusive behaviour from a company that refused to grant a licence were corrected by means of a 'must-offer obligation'. He notably stated that online, the distribution is different due to the nature of the internet and could benefit small players from smaller countries, who cannot reach their national fellows abroad. Hence, Agustin called for a strong but smart regulatory response, targeting certain audiovisual services, and following the key pillars of the EU such as free movement of citizens and goods. He advised that enhancing a legal offer online and reducing release windows strategies would help fight piracy and the use of Virtual Private Networks. It would be beneficial for both businesses and end-users.

Stephen Turner (EDiMA) advocated a balanced and flexible response. On the one hand, he acknowledged that greater cross-border accessibility is essential to harness the potential of the online environment,

claiming that many services were facing legal uncertainty due to fragmentation, also in other policy streams such as consumer protection laws, national rating systems, child protection obligations, quotas and promotion of local content and in particular varying VAT regimes. On the other hand, both big and small companies shouldn't be forced to provide services or to develop infrastructure, or to alter their business models to serve markets that are out of their offering scope. Therefore, the forthcoming legislative proposals should protect the freedom to conduct business as enshrined in Article 16 of the EU Charter of Fundamental Rights and certainly not implement mandatory schemes that would backlash on consumers through higher prices, and undermine the current trend of innovative offerings being offered across Member States.

Nicola Frank (EBU) welcomed the shift in focus to e-commerce services and recalled the importance of territorial exclusivity in financing audiovisual works, also for Public Service Media (PSM) that are at the same time right-holders and users of rights. Additionally, PSM have a peculiar stance in defending public interest, and strive for delivering quality content. She was particularly supportive of the idea to review the Cable and Satellite Directive in order to apply the traditional licensing system to online media services. She notably advocated extending the 'country of origin' principle as applied to satellite distribution to the broadcasters' own online services (iPlayers). In her view, collective licensing management should be applied to the retransmission of broadcasters' services on third-party platforms (e.g. IPTV). This would be essential, in particular when considering the underlying rights of on-demand media services. Therefore, technologically neutral rules would not put into question territoriality but could help in increasing the availability and accessibility of content online, while ensuring fair remuneration to the many parties involved in the creation and distribution of content.

Anna Herold (European Commission, Cabinet of Commissioner Oettinger) presented her team's roadmap that includes key measures to unlock digital offers and encourage a larger dissemination of content across the EU. She also pointed out other measures that, on a separate track, are meant to cope with broader aspects of geo-blocking affecting tangible goods. Those actions include the review of the Regulation on Consumer Protection Cooperation, measures in the area of parcel delivery, and undertakings to reduce red tape arising from different VAT regimes. The current competition sector inquiry into e-commerce should help policymakers to set priorities and assess the potential effects for SMEs and big players. For the time being, she pledged that all efforts were dedicated to improving data portability and cross border access to content.

As a conclusion, the Q&A session focused on the possible effects that banning geo-blocking could have on investment in the audiovisual sector, but also more generally on innovation in Europe. Some participants also raised concerns over the recent trends in bundling services offerings, where distributional costs and modalities of data portability were not always transparent for the consumer, nor were their choices or obligations as regards specific commercial practices.

One important point was finally made on the possible and unexpected side effects that geo-blocking may have on content creation and how it might impact European culture as a whole, by limiting the storytelling potential and discoverability for many artists and creators. It was also highlighted that many online services operating within the EU offer users the ability to discover thousands new European artists and creators every year, further escalating European diversity, which is full of local legends and stories that have numerous sources of inspiration and potential success at higher scale.