

CPI EU News Presents:

Geo-blocking of Audio-visual Services in the EU: Gone with the Wind?

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EU Competition Commissioner Margrethe Vestager has earned a solid reputation as a “Big Tech regulator” for holding Silicon Valley to account in a series of illegal State aid and abuse of dominance proceedings. A further, equally iconic West Coast industry is also on the EU Commissioner’s radar. In 2015, the competition enforcer sent a statement of objections to the then six major Hollywood studios (20th Century Fox, Warner Bros., Disney, NBCUniversal, Sony, and Paramount) and the broadcaster Sky UK on the cross-border provision of Pay-TV services.² Traditionally, film copyright holders license contents often on a country-by-country basis. According to the Commission’s preliminary assessment, the bilateral contractual agreements between the studios and the broadcaster were in breach of Article 101 TFEU prohibiting anti-competitive agreements. The crux of the matter was the geo-blocking provisions contained in the licensing agreements between Sky UK and each of the six studios,³ due to which Sky UK enjoyed absolute territorial exclusivity. The result, according to the Commission, was the elimination of cross-border competition between Pay-TV broadcasters and the artificial partition of the internal market along national borders.

While the so called *Pay-TV* case is still ongoing, in April 2016 Paramount offered commitments to address the EU’s competition concerns covering both satellite broadcasting and online transmissions,⁴ that were further clarified by the Hollywood studio in the following weeks and made binding in July 2016.⁵ More than two years later, in October 2018, Disney also offered commitments to the European Commission in response to the *Pay-TV* investigation,⁶ and this after striking a \$71.3 billion deal with 20th Century Fox for the acquisition in particular of its film and TV studios.⁷ The remaining studios and Sky UK proposed commitments in December 2018,⁸ namely in the immediate wake of *Groupe Canal+ v. European Commission*, a General Court’s ruling dismissing the major French Pay-TV broadcaster’s appeal against the Commission’s decision that made Paramount’s commitments binding.⁹

This brief piece offers some first thoughts regarding the possible impact on consumer choice following the recent General Court ruling and the possible closing of the *Pay-TV* investigation in the coming months. In her various remarks on the case, Commissioner Vestager made very clear that the main concern was that European consumers’ wish to watch the Pay-TV channels of their choice was frustrated because of the geo-blocking provisions in the licensing agreements between the major film studios and Pay-TV broadcasters.¹⁰ In brief, are EU consumers finding, under their respective Christmas trees, the credible promise of increased choice of cross-border Pay-TV services for the future?¹¹

Some Like It Hot

Addressing the practice of unjustified geo-blocking is an essential element of the Digital Single Market Strategy as announced in May 2015.¹² In essence, geo-blocking consists of the many ways in which traders operating in a country adopt technologies that block or limit access to their online offerings by customers from other countries. An issues paper presenting the initial findings of the Commission’s e-Commerce Sector Inquiry showed that geo-blocking in relation to online digital content such as audio-visual or musical works was mostly based on contractual arrangements.¹³

Regulation 2018/302,¹⁴ which applies in the EU as of December 3, 2018, bans unjustified geo-blocking and other forms of discrimination based on the customer's nationality, place of residence, or establishment. The Regulation, however, excludes from its scope audio-visual services giving access to copyright-protected content such as films, series, and other content, as well as the broadcasting of sports events.¹⁵

The most plausible reason why audio-visual services are outside the scope of the geo-blocking Regulation is that handling these “is a hot potato,”¹⁶ given the sensitivity of the topic. The Commission, however, might soon learn to “like it hot.” In fact, a so-called review clause foresees that the Commission shall report to the European Parliament, the Council, and the European Economic and Social Committee by March 2020, in particular with a view to assessing whether the Regulation should extend its scope to audio-visual services. In a statement issued along with the Regulation, the Commission clarifies that “if the evaluation the Commission comes to the conclusion that the scope of the Regulation needs to be amended, the Commission will accompany it with a legislative proposal to that effect.”

The Thin Red Line

It follows that, at least for the time being, the geo-blocking of audio-visual services is a “hot potato” considered at the European level through the dedicated lens of competition policy. Commissioner Vestager has stated quite clearly that the *Pay TV* case initiated in 2015 is “about a fundamental principle of the European Union - that businesses must not sign contracts that recreate unjustified barriers between European countries,”¹⁷ and not about questioning exclusive territorial licenses for the distribution of copyright-protected content as such.

In a 2011 ruling (*Murphy*) concerning the satellite transmission of Premier League football matches, the Court of Justice of the European Union (“CJEU”) found that provisions in copyright licenses forbidding passive sales are restrictive of competition.¹⁸ The right of the copyright owner to receive remuneration is part of the essential function of copyright. The Court in *Murphy* held that, in negotiating “appropriate remuneration,”¹⁹ the right holder was not prevented from asking “for an amount which takes account of the actual audience and the potential audience both in the Member State of broadcast and in any other Member State in which the broadcasts are also received.”²⁰ The Court ruled, however, that the right holder in the case at hand sought to receive remuneration that went beyond what was necessary to attain the objective of protecting the copyright at issue. The excessively high premiums the Premier League was charging resulted, according to the Court, in artificial price differences which tended to restore the divisions between national markets.²¹ According to the Court, “such partitioning and such an artificial price difference to which [the premium] gives rise are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market.”²²

For a Few Dollars More

In this respect, *Murphy* can be read as prohibiting restrictions on passive sales, in line with EU competition law's distinction between *absolute* exclusive licenses and exclusive licenses that are not absolute. As recalled by the General Court's ruling in *Groupe Canal+ v. European Commission*, where the agreements concluded by the copyright owner contain clauses under which the owner is required to prevent broadcasters in the European Economic Area ("EEA") from making passive sales to consumers outside the Member State for which it grants them an exclusive license, these clauses confer absolute territorial exclusivity and therefore infringe Article 101 (1) TFEU.²³

Following *Murphy*, the General Court further holds that where a licence agreement is intended to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have the purpose of restricting competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition.²⁴ As regards the economic and legal context of the relevant clauses, the General Court specifies that the commitments made legally binding under the Commission's decision do not affect the granting of exclusive territorial licenses as such, but aim to put an end to absolute territorial exclusivity intended to eliminate *all* competition between broadcasters about works covered by these rights under a set of reciprocal obligations.

As seen above, Paramount's commitments to remove the clauses that restrict broadcasters' ability to accept cross-border unsolicited requests have been binding since July 2016. The Hollywood studio committed not to enforce the geo-blocking requirements on both online and satellite services with any broadcaster in the EEA and to refrain from including them in future contracts for a period of five years. By the end of 2018, similar commitments have been offered by each of the parties involved in the *Pay-TV* case. Sky and other broadcasters could now respond to unsolicited requests from customers located outside their licensed territory regarding most of the attractive Hollywood movies on their respective channels. This might entail some level of competition between broadcasters in so far as they are willing to allow access from and offer audio-visual services to customers in other Member States. Thus, for instance, a consumer in France could buy access to the mayor Hollywood movies from Sky UK. The exclusive licensee of the same movies for France, however, could in principle challenge that conduct.

Against this background, competition between broadcasters is likely to materialize only if the companies are willing and capable of adapting their business models to embrace the opportunity to offer their services to potential customers in the whole EU territory, in accordance with the European Union's law objective to ensure the transition from national markets to a single program production and distribution market.²⁵ Under the current market circumstances, the e-Commerce Sector Inquiry has revealed that the cost involved in purchasing content is the most important reason why digital content providers decide not to make their services accessible in Member States other than those in which they currently operate.²⁶ It remains to be seen whether the new opportunities of cross-border distribution of copyrighted content created by the

negotiated commitments engender enough incentives to adapt the business models to obtain revenue from users in other territories.

As the CJEU highlighted in *Murphy*, the copyright holder could ask for a price that considers the possible audience in other Member States, making clear that copyright protection does not always require territorial partitioning, much less absolute territorial exclusivity. The more recent General Court's ruling on the suitability of Paramount's commitments further clarifies that nothing prevents the copyright holder from negotiating an amount that considers the potential audience both in the Member State for which the exclusive licence is granted and any other Member State in which the programs covered by the distribution are also received. Indeed, the technology necessary for the reception of works covered by the rights in question, both online and by (encrypted) satellite transmission, allows to determine the actual and potential audience, and this by breakdown by country of origin of the purchase request. This is the same technology, adds the Court, that allows active sales to be restricted to the territory for which an exclusive licence is granted.²⁷

The General Court goes on to suggest that, absent the absolute territorial protection guaranteed by geo-blocking, the possible fall in subscription prices in the French territory may be offset by the fact that Canal+ is now free to serve customers located throughout the EEA and not only in France. Therefore, even if the French broadcaster dedicates part of his income to the financing of audio-visual products that require specific support, the normal game of competition, now EEA-wide, gives him possibilities that the geo-blocking clauses denied as long as Paramount intended to require their compliance.

Back to the Future

Whether the *Pay-TV* case will unlock some additional cross-border competition between broadcasters remains to be seen. One of the findings of the e-Commerce Sector Inquiry is that insufficient consumer demand for foreign content is one of the main reasons why digital content providers do not make their services accessible in territories other than the one in which they are established.²⁸ This fact also puts in doubt Canal+'s claim that the Commission's decision would severely compromise the functioning of EU audio-visual market. Based on the commitments, digital content providers could now be willing to find out whether more significant demand for cross-border audio-visual services does exist. Despite the ban on active sales outside of the exclusive territory, intermediaries could emerge that make the different offerings more transparent and cut consumers' transaction costs.

Admittedly, however, competition law is hardly the ideal instrument to effectively promote the cross-border provision of audio-visual content. Thorough analysis of geo-blocking practices related to audio-visual services is expected in the context of the planned re-evaluation of the geo-blocking Regulation in 2020. The *Pay-TV* case's practical repercussions, or the lack thereof, will likely inform this analysis. Finally, as pressing as ever are in-depth discussions at the EU level leading to the necessary adaptation of copyright law to the digital age.

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- ¹ Department of Economics and Management at the Università degli Studi di Trento.
- ² European Commission, *Antitrust: Commission sends Statement of Objections on cross-border provision of Pay-TV services available in UK and Ireland*, Press Release July 23, 2016
- ³ *Ibid.*
- ⁴ European Commission, *Antitrust: Commission seeks feedback on commitments offered by Paramount Pictures in Pay-TV investigation*, Press Release April 22, 2016.
- ⁵ Case AT.40023 - *Cross-border access to Pay-TV*, Commission Decision of July 26, 2016, C(2016) 4740 final.
- ⁶ European Commission, *Antitrust: Commission seeks feedback on commitments offered by Disney in Pay-TV investigation*, Press Release November 9, 2018.
- ⁷ In the EU, the merger between Disney and 20th Century Fox was approved subject to minor conditions, see European Commission, *Mergers: Commission approves Disney's acquisition of parts of Fox, subject to conditions*, Press Release November 6, 2018.
- ⁸ The Commission is currently market testing the commitments, see European Commission, *Antitrust: Commission seeks feedback on commitments offered by NBCUniversal, Sony Pictures, Warner Bros, and Sky in Pay-TV investigation*, Press Release December 20, 2018.
- ⁹ T-873/16 *Groupe Canal + v. European Commission*, Judgment December 12, 2018.
- ¹⁰ See *supra* note 2; Margrethe Vestager, *Celebrating European culture*, Speech, January 24, 2017 (“Our only concern is about terms that stop broadcasters responding to requests from potential customers from other countries. Customers who want to enjoy a different cultural experience from the one they get at home – and who are perfectly willing to pay for it”).
- ¹¹ *Ibid.* (“One of the aims of our rules is to give people more choice – and that includes being able to watch films and TV programmes that reflect their own cultural interests”).
- ¹² European Commission, *Communication: A Digital Single Market Strategy for Europe*, COM(2015) 192 final. May 6, 2015.
- ¹³ European Commission, *Geo-blocking practices in e-commerce: Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition*, SWD(2016) 70 final, March 18, 2016.
- ¹⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R0302>.
- ¹⁵ The audio-visual services are defined in Directive 2010/13/EU. As to non-audio-visual electronically supplied services giving access to copyright-protected content, such as e-books, music, games and software, these are within the scope of the Regulation but are specifically excluded from the scope of the discrimination prohibition, whereas other rules apply.
- ¹⁶ See Giorgio Monti & Gonçalo Coelho, *Geo-Blocking Between Competition Law and Regulation*, CPI Antitrust Chronicle January 2017, 1, 3.
- ¹⁷ Margrethe Vestager, *Celebrating European culture*, *supra* note 10.
- ¹⁸ CJEU, Joined cases C-403/08 and C-429/08, *Football Association Premier League v. QC Leisure and Karen Murphy v. Media Protection Services Limited* [2011] ECR I-09083. The *Guidelines on Vertical Restraints*, paragraph 51, define passive sales as “responding to unsolicited requests from individual customers including delivery of goods or services to such customers,” while active sales entail “actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory.”
- ¹⁹ *Ibid.*, paragraph 108.
- ²⁰ *Ibid.*, paragraph 112.
- ²¹ *Ibid.*, paragraph 139.
- ²² *Ibid.*, paragraph 115.
- ²³ *Supra* note 9.
- ²⁴ *Ibid.* paragraph 48.
- ²⁵ *Ibid.* paragraph 47.
- ²⁶ European Commission, *Preliminary Report on the E-commerce Sector Inquiry*, SWD(2016) 312 final, Table C. 6, p. 227.
- ²⁷ Roughly the same reasoning underlies *Regulation 2017/1128 on cross-border portability of online content services in the internal market*, 14 June 2017, OJEU 30.6.17 L168.
- ²⁸ *Ibid.*