Online shopping & geoblocking

Price differentials in cross-border sales and what the EU Geo-Blocking Regulation means for businesses.

Selected legal insight for the sporting goods and consumer goods sector.

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> *“The online virtual shop window is nearly borderless for consumers.”*

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Online shopping: Is geoblocking permitted in cross-border sales? What is the law, and what do you need to know? Our legal expert brings light to the matter and explains the EU Geo-Blocking Regulation. Only a few decades ago, consumers confined their customer journey to purchasing their sporting goods at brick-and-mortar stores in their local environment. At maximum, they ordered them after studying the various offerings shown on the multi-colored pages of voluminous print catalogs, large mail-order houses – such as Quelle in Germany or Freemans in the U.K. – distributed by mail to their loyal customer base. This may sound like the Stone Age for the young smart offline and online shoppers of Gens X, Y and Z. Still, when you recall that Steve Jobs presented the very first iPhone in January 2007 only, these “Stone Age” shopping patterns even still prevailed in the early 21 st century. Nowadays, this has dramatically changed – and the game changer is called the Internet. The online virtual shop window is nearly borderless for consumers. Only a few obstacles, such as unfamiliar foreign languages, may still, to some extent, prevent consumers from making cross-border purchases. Assumed I would be interested in purchasing a specific pair of Adidas running shoes, with a few clicks only, I can get at least an idea at which prices they are offered in certain sales channels in Germany and elsewhere:

International price comparison on a German website

Realizing that the same shoe is offered much cheaper in France, I might be tempted – in this hypothetical case – to order these sneakers from amazon.fr rather than from amazon.de by leaving aside for a moment in this scenario other relevant factors that might be equally relevant to my purchase decision, such as shipping costs, warranty and return conditions, and delivery times. Price differences in the EU and EEA may exist even when a brand applies a DTC policy, as the pricing of a product in a given country is also determined by external factors such as the different national inflation rates in the EU, currently a very vibrant topic. The most recent development of the net prices of textiles and shoes in the various EU member states shows significant differences as published by Statista, a German online platform:

Net prices of textiles and shoes in the various EU member states While the price increase in June 2022 compared to the same month in 2021 was substantial in the Czech Republic (at almost 20 percent), followed by Croatia, developments in the other countries were less dramatic and even showed declining prices in Portugal, Cyprus, Belgium and Spain. Other factors such as different employment levels, logistics and transport costs may also explain cross-border price differences.

How to treat price differences from the perspective of brands and retailers In most cases, it will remain an illusion that uniform pricing of a particular product can be realized in all 27 member states, even in those cases where sporting goods brands are selling directly to consumers. Just to remain competitive, they need to continuously adjust their pricing according to the local commercial environment in the respective country. If selling to B2B customers such as distributors and/or retailers, remember that any attempt to influence the autonomous pricing policy of such marketing partners at a lower vertical level is a mortal sin and constitutes a severe breach of competition law, which can be punished by the relevant EU and national competition authorities with fines of up to 10 percent of an infringer’s annual global turnover. To avoid any misunderstanding: it is, of course, under normal circumstances perfectly legitimate and part of the entrepreneurial freedom when a brand is granting different sales terms,

including pricing to different customers, which may then well result in different retail prices of the very same article in a specific geographic territory. From a legal perspective, does this inevitably force a brand that pursues a DTC policy or a retailer that offers sporting goods for sale online to accept cross-border purchase requests from consumers residing in other EU/EEA member states? This is where the EU Geo-Blocking Regulation comes into play.

The EU Geo-Blocking Regulation and its impact on cross-border purchase and sales transactions Given that, before the inception of such new legislation in December 2018 (which is directly applicable in all 27 member states and the three countries of the European Economic Area [i.e., also in Norway, Liechtenstein and Iceland]), it was a widespread business practice to deny customers who were not residents of a given country access to a website or to redirect them to a local store with less favorable conditions. Consequently, EU lawmakers felt compelled to act to achieve a better standard of protection for consumers in this particular area as well. The EU Geo-Blocking Regulation (hereinafter “GBR”) does not apply to B2B transactions, which can also be attributed to the intense lobbying effects of the Federation of the European Sporting Goods Industry/FESI. Under the GBR, any commercial supplier offering sporting goods on a designated website must now also sell such products to consumers who have a different nationality or reside in another EU/EEA member state. BUT: This does not oblige the seller to deliver the purchased product to the end consumer’s residence in a foreign country. Furthermore, it is essential both for brands selling DTC and retailers to know that warranty or other claims such as product liability are handled based on the applicable national laws and regulations where the seller has its place of business. Consequently, a Belgian customer purchasing a pair of sports shoes from a French retail outlet will have to accept that any warranty claims will be treated according to French law. It is also not widely known that even under the governance of the GBR, redirection of a consumer may be legitimate and possible, provided that the consumer gives his or her explicit consent the first time he or she attempts to access the respective website. This consent will also apply to any subsequent visits to the website by the same consumer. Article 4 of the GBR states that a product can be offered at different prices on different websites within any EU member state as long as such different pricing is not discriminating. However, vendors may not apply different payment terms to “foreign” consumers based on their residence or establishment or based on their different nationality.

Passive sales requests from consumers can also not be restricted by contractual means, provided that they would negatively affect the scope of application of the GBR. A practical example of a passive sale would be, for example, that a Danish consumer – uninfluenced by the operator of a Swedish website in the Swedish language – will try to buy online a particular sports product from such a Swedish trader, who then cannot legitimately refuse to sell it to the Danish individual (except in cases where the Danish website visitor gives his or her explicit consent to be redirected to a corresponding Danish website, as already explained above).

CONCLUSION I hope that readers of this article will find its contents useful from a practical point of view. In my view, cross-border selling will become even more important in the near future in times of high inflation rates in many member states, sharply soaring prices, and fragile supply chains where certain products might not be available in some member states (but can still be purchased in others); or when, due to a decline in consumer spending in certain European regions, commercial enterprises might even use it as a solution for their overstock. About the author: Dr. Jochen M. Schaefer is a German practicing attorney based in the Munich area. For numerous years, he has been representing the World Federation of the Sporting Goods Industry (WFSGI) and the European Federation of the Sporting Goods Industry (FESI) as their legal counsel. He is also chairing the WFSGI's legal committee and co-chairing FESI'S digital working group. At the individual client level, he represents a significant number of wellknown brands within and beyond the bicycle/sporting goods sector; he is a specialist in national and international distribution topics, intellectual property (IP) and risk management issues, and the drafting and negotiation of comprehensive contracts at the operational level, in particular in the area of European selective distribution schemes. In case of any questions about this article (and in general), he can be reached at sj@sjlegal.de and on his cell phone at +49-151-16407932.