

**TRAINING OF NATIONAL JUDGES
IN EU COMPETITION LAW**
**Session 2: Interface between e-commerce
and IPRs with competition law**



Facultad de Derecho
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Roundtable 3

“Exclusive territorial rights and contractual geo-blocking”

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Summary



- Focus
 - EU Legislation
- Geo-blocking Regulation
- Exclusive (+ selective) distribution systems
- Intersection: agreements on passives sales
- Interaction
 - Assessment of vertical agreements
 - Rethinking active vs. passive sales?
 - Effects
 - Enforcement
- Final remarks

Focus

- Use of Internet by integrated distributors for promotion and resale purposes
- Intersection: vertical agreements // geo-blocking
 - Exclusive distribution systems; but selective, too
 - Territorial rights/assignments
 - Contractual geo-blocking
 - Legislation: Art. 101 TFUE // Art. 20(2) DSIM; Art. 26(2), 49, 56 TFUE [+ Art. 18 TFUE]

EU Legislation

- **Art. 101 TFEU**
 - COMMISSION REGULATION (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices (hereafter, BERVA)
 - Guidelines on Vertical Restraints of the European Commission (2010/C 130/01) (hereafter, GVR)
- **Art. 20(2) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (hereafter, DSIM)**
 - REGULATION (EU) 2018/302 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (hereafter, GBR)

Objective of GBR

- Art. 20(2) DSIM

“Article 20 *Non-discrimination*

1. [...]

2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.”

Objective of GBR

- To contribute to the proper functioning of the internal market by preventing unjustified geo-blocking and other forms of discrimination based, directly or indirectly, on the customers' nationality, place of residence or place of establishment
 - *Geo-blocking & Geo-filtering*
 - Including by further clarifying certain situations where different treatment cannot be justified under Art. 20(2) DSIM
 - ➔ Development of Art. 20(2) DSIM [see Art. 1(7) GBR]: freedom to provide services ➔ specially, Information Society Services (cf. *Electronically Supplied Services*); BUT indirectly free movement of goods, too

Scope of Application GBR

- Subjective: trader vs. customer [Art. 2(13) GBR] → “end use only” undertaking
 - no resale, transformation, processing, renting or subcontracting [Whereas No. 16 GBR] – cf. Art. 325-326 Spanish Commercial Code (!)
 - exclusion of resale → distribution/vertical agreements (themselves)
- Objective:
 - Activities and Fields Excluded [Art. 1(3-5) GBR]
 - Art. 2(2) DSIM, Taxation, Copyright
 - [Art. 4(1)(b) GBR] Electronically supplied services from the trader, the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form
- Geographical [Art. 1(2) – Whereas No. 4, 17; Art. 9(2) GBR]:
 - Not applicable to pure internal situations
 - BUT applicable to traders established in a third country (outside EEA)

Scope of Application GBR

- Temporary [Art. 11 GBR]

“1. This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.”

OJ L 60 I/14, 2.3.2018 → enter into force 23.3.2018

“It shall apply from 3 December 2018.

“2. However, **Article 6** shall apply to provisions of agreements concluded before 2 March 2018 that are compliant with Article 101 TFEU and with any equivalent rules of national competition law from 23 March 2020.”

- Vertical Agreements concluded before publication in OJ → transitional period of 2 years to be adapted to GBR

Unjustified GB

Art. 3 GBR *Access to online interfaces*

- Bans
 - Blocking or limiting of access to websites and
 - Re-routing
 - Without the customer's prior consent
- Applies to non-audio-visual services supplied electronically, such as e-books, music, games and SW
- Exception: compliance with legal requirement EU Law or MS Law in accordance with EU Law

Unjustified GB

Art. 4 GBR *Access to goods or services*

- In certain situations there can be no justified reason for applying different conditions of access to good or services by means of geo-blocking or other forms of discrimination → customers from another MS = local customers
 - Sale of goods without delivery outside the area served by the trader
 - Sale of electronically supplied services (i.e, cloud services, data warehousing or website hosting)
 - Exclusion works protected by copyright [see Art. 4(1)(b) and (4) GBR]
 - Sale of services provided in a specific physical location (i.e., concert tickets, accommodation, car hire)
- BUT different offers/conditions (incl. country-specific online interfaces) allowed if done on a non-discriminatory basis (territory/group of customers) → Geo-filtering is allowed! [Whereas No. 27-29 GBR]
- Exception: compliance with legal requirement EU Law or MS Law in accordance with EU Law → e.g., books

Unjustified GB

Art. 5 GBR *Non-discrimination for reasons related to payment*

- Traders are free to accept whatever payment means they want
 - BUT non-discrimination within the range of the means of payment they accept.
- Differential treatment is prohibited if the following three conditions are met:
- payments are made by means of electronic transactions by credit transfer, direct debit or a card-based payment instrument within the same brand and category;
 - authentication requirements are fulfilled; and
 - the payments are in a currency that the trader accepts.
- It covers differential treatment a result of the customer's nationality, place of residence or place of establishment; BUT ALSO of the location of the payment account, the place of establishment of the payment services provider or the place of issue of the payment instrument

Exclusive/Selective Distribution

Vertical Agreements

BERVA: “an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services”

- Our Focus on: Downstream Vertical Integrated Distribution Channels
- Types:
 - Exclusive Purchasing (Supply)
 - **Exclusive Distribution (Sale):** Assignment to Distributor of an Exclusive Territory or Group of End Users/Customers/Clients
 - **Selective Distribution:** Selection of Distributor Regarding Concrete Features
 - Franchising

Exclusive/Selective Distribution

- Exclusive Distribution [No. 151 GVR]

“In an exclusive distribution agreement, the supplier agrees to sell its products to only one distributor for resale in a particular territory. At the same time, the distributor is usually limited in its active selling into other (exclusively allocated) territories.”

- Selective Distribution [Art. 1(1)(e) BERVA]

“a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system”

Exclusive/Selective Distribution

Hardcore restraints [Art. 4 BERVA]

“The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

[...]

(b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:

(i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,

[...]

(iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system,

[...]

(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;”

Exclusive/Selective Distribution

Hardcore restraints [Art. 4 BERVA]

- e-Commerce and **Passive Sales** → „Dogma: **Internet** is free!“ Restriction of Distribution in Internet is a Hardcore Restriction [No. 52-64 GVR]
 - General assumption: Use of Internet = Passive Sale [No. 54 GVR] → ECJ Case *Pierre Fabre* (2011) → no reserve in favour of supplier exempted
 - Selective distribution: opening web site = no new outlet in different location [No. 57 GVR] → „Location Clause“ → nor ban of active sales over the Internet exempted
 - Incentive for online commerce: **but** *Brick (and Mortar) & Click*
 - **IT IS Passive Sale** over the Internet [No. 51(2) and 52 GVR]
 - Activities of general advertising or promotion
 - Offer of products
 - Automatic electronic commercial communication
 - Not altered by language options (web/commercial communication)

Exclusive/Selective Distribution

Hardcore restraints: Exclusive distribution: Territory restrictions

[Art. 4(b)(i) BERVA]

- Not exempted
 - Obligation of re-direction of customers
 - Automatic re-routing [No. 52(a) GVR]
 - Credit card data [No. 52(b) GVR]
 - Restriction of total sales: NO in percentage terms (Yes as minimum fixed absolute amount) [No. 52(c) GVR]
 - Price discrimination/dual pricing [No. 52(d) GVR]
 - BUT fixed fee to support offline distribution allowed
 - BUT if more cost for provider → case-by-case assessment [No. 64 GVR]

Exclusive/Selective Distribution

Hardcore restraints: Exclusive distribution: Territory restrictions [Art. 4(b)(i) BERVA]

- Exempted
 - If Internet use can be regarded as active sale (advertising – general/focused ads) [No. 53 GVR]: Prohibition of
 - Online adds specific to certain customers – unauthorised electronic commercial communications
 - Territory-based banners on third party web sites
 - Using search engines for specific promotion

Exclusive/Selective Distribution

Hardcore restraints: Selective distribution [Art. 4(b)(iii) and (c) BERVA]

- Exempted
 - If necessary to ensure the selective nature of the distribution system
 - Use of third parties platforms discernible to the public → ECJ Case *Coty* (2017)
 - Minimum quality standards [No. 54 GVR] → selection power of provider
 - Requirement of Brick and Mortar Shop
 - Way of exclusion of pure players? Only if required by product
 - Selection criteria „overall equivalent“ for sales over the Internet → No necessarily identical as for physical PoS [No. 56 GVR]
 - Quantity restrictions in sales to end customers → oriented to avoid free riding
 - Delivery time to end customers
 - After-sales help (costs of right to withdraw, secure payment)

Exclusive/Selective Distribution

Hardcore restraints: Internet sales [Evaluation Outside BERVA]

- Can be banned → Based on criteria of general application: objective justification (excepcional)
 - RoR: Art. 101(1) TFUE
 - » Health/security [No. 60 GVR]
 - » First commercialisation new brand/market [No. 61 GVR]
 - » Genuine testing/straggled introduction [No. 62 GVR]
 - » Other alternatives:
 - Application of doctrine of ancillary restraints → RoR (?)
 - Selective: nature of products: pre-/aftersale requirements which can not be fulfill by a web channel
 - Art. 101(3) TFUE
 - » Efficiency [No. 60 GVR]
 - » Ban of certain cross-supplies [No. 63 GVR]
 - » „Price discrimination“ [No. 64 GVR]

Exclusive/Selective Distribution

Hardcore restraints: Internet sales [Evaluation Outside BERVA]

- Can not be banned:
 - NO objective justification: absolute reserve of the Internet channel in favour of provider and/or other distributors
 - Exclusive [No. 52(a) GVR]
 - Selective [No. 176 GVR]: however, can be argued requirement of *brick-and-mortar shop*
- Cumulative effect of parallel distribution networks [No. 178, 179 and 188 GVR]: balancing
 - Degree of necessity of selective distribution → foreclosing to certain formats → Internet **Vs.**
 - Low prices, transparency and higher access to final customers

Agreements on Passive Sales

- Art. 6(1) GBR EN

“1. Without prejudice to Regulation (EU) No 330/2010 and Article 101 TFEU, this Regulation shall not affect agreements restricting active sales within the meaning of Regulation (EU) No 330/2010 **or** agreements restricting passive sales within the meaning of Regulation (EU) No 330/2010 that concern transactions **falling outside** the scope of the prohibitions laid down in Articles 3, 4 and 5 of this Regulation.”

Agreements on Passive Sales

- Changes in Assessment of Vertical Agreements?
 - Restrictions of passive sales within the meaning of BERVA that concern transactions **falling INSIDE** the scope of the prohibitions laid down in Art. 3, 4 and 5 GBR → Assessment *ex Art. 3, 4 and 5 GBR* – not anymore *ex Art. 101 TFEU + BERVA + GVR*?
 - The European Commission says, regarding the application of Art. 6 GBR in interim period: “If the question of the legality of the passive sales restriction comes up as part of a consumer complaint under the [GBR], the designated body responsible for enforcing the [GBR] will assess the legality of passive sales restrictions **under competition law** in the framework of the enforcement of the [GBR]” → *a sensu contrario*?
 - Whereas No. 34 GBR: “Where, however, such an exemption [= BERVA] applies, or where contractual restrictions are not covered by Article 101 TFEU, there is a risk that they could be used to circumvent the provisions of [GBR]” → First assessment *ex Art. 101 TFEU + BERVA + GVR*, if not prohibited or not exempted, then assessment *ex Art. 3, 4 and 5 GBR*? BUT... Does not Art. 6 GBR integrate a *per se prohibition*?
 - Link to **Enforcement**
- Passive vs. active sales – new shape?

Active vs. Passive Sales

- No. 51 GVR: “‘Active’ sales mean 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”.
 - “Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory”.

Active vs. Passive Sales

- No. 51 GVR: “‘Passive’ sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers”.
 - “General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.”

Active vs. Passive Sales

- Whereas No. 12-15 GBR
 - Art. 1(6) GBR: “This Regulation shall be without prejudice to Union law concerning judicial cooperation in civil matters. Compliance with this Regulation shall not be construed as implying that a trader directs activities to the Member State of the consumer's habitual residence or domicile within the meaning of:
 - point (b) of Article 6(1) of Regulation (EC) No 593/2008 (Rome I) and” → applicable law
 - “point (c) of Article 17(1) of Regulation (EU) No 1215/2012 (Brussels I bis)” → jurisdictionin contracts between a consumer and a professional
- ECJ of 7 December 2010 Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof* (applying Brussels I)

Active vs. Passive Sales

ECJ Joined Cases C-585/08 and C-144/09 *Pammer* and *Hotel Alpenhof*

- Not exhaustive list of matters constituting evidence of “directing activities”
 - “the international nature of the activity,
 - mention of itineraries from other Member States for going to the place where the trader is established,
 - use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language,
 - mention of telephone numbers with an international code,
 - outlay of expenditure on an internet referencing service in order to facilitate access to the trader’s site or that of its intermediary by consumers domiciled in other Member States,
 - use of a top-level domain name other than that of the Member State in which the trader is established, and
 - mention of an international clientele composed of customers domiciled in various Member States”
- In the opposite, it does not constitutes such an evidence
 - “the mere accessibility of the trader’s or the intermediary’s website in the Member State in which the consumer is domiciled is insufficient”
 - “mention of an email address and of other contact details”
 - “use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established”

Active vs. Passive Sales

- Art. 1(6) GBR .../...

“In particular, where a trader, acting in accordance with Articles 3, 4 and 5 of this Regulation,

- does not block or limit consumers' access to an online interface,
- does not redirect consumers to a version of an online interface based on their nationality or place of residence that is different from the online interface to which the consumers first sought access,
- does not apply different general conditions of access when selling goods or providing services in situations laid down in this Regulation, or
- accepts payment instruments issued in another Member State on a non-discriminatory basis, [or]
- [provides information and assistance to the consumer after the conclusion of a contract that has resulted from the trader's compliance with this Regulation],

that trader shall not be, on those grounds alone, considered to be directing activities to the Member State where the consumer has the habitual residence or domicile”.

Active vs. Passive Sales

- GBR says IF activity in accordance with Arts. 3-5 GBR → NO “directing activities”
 - No application of Art. 6(1)(b) Rome I nor of Art. 17(1)(c) Brussels I bis → NO ‘directing the trader's activities to the consumer's Member State’
 - Reduction of the scope of ECJ *Pammer* and *Hotel Alpenhof* → not just “mere accessibility”
- GBR no definition of active/passives sales → BERVA + GVA
- However connection *via* Art. 6 GBR → at least, transactions falling inside the scope of Art. 3-5 GBR
 - Connection between “directing the trader's activities to someone” and “active sales” + no distinction if customer is consumer or undertaking

Effects

- Art. 6(2) GBR EN

“2. **Provisions of agreements** imposing obligations on traders, in respect of passive sales within the meaning of Regulation (EU) No 330/2010, to act in violation of the prohibitions laid down in Articles 3, 4 and 5 of this Regulation **shall be automatically void**.”

- Art. 6(2) GBR ES

“2. **Los acuerdos** que impongan a los comerciantes, con respecto a las ventas pasivas en el sentido del Reglamento (UE) n.º 330/2010, la obligación de actuar en incumplimiento de la prohibición recogida en los artículos 3, 4 y 5 del presente Reglamento **serán nulos de pleno derecho**.”

Effects

- Whereas No. 34 GBR EN

“The **relevant provisions of such agreements** should therefore be **automatically void** where they impose obligations on traders to act in breach of the prohibitions laid down in this Regulation regarding access to online interfaces, access to goods or services and payment.”

- Whereas No. 34 GBR EN

“Las **correspondientes disposiciones de esos acuerdos** deben ser, por lo tanto, **nulas de pleno derecho** cuando impongan obligaciones a los comerciantes de actuar infringiendo las prohibiciones establecidas en el presente Reglamento relativas al acceso a interfaces en línea, al acceso a productos o servicios y al pago.”

Effects

- Private (Contract) Law effects
 - The relevant “contractual requirements” (European Commission) are void: no binding efficacy for retailer
 - The vertical agreement is, in principle, partially void [= Art. 101(2) TFEU]
 - Same effect as in case of being the relevant “contractual requirement” a hardcore restraint ex Art. 4 BERVA? NO: assessment of individual exemption fails!
 - Contract Law effects resulting from Art. 6 GBR prevail over the ones resulting from Art. 101(2) TFEU → *per se* rule-style
 - Claim for damages?
→ Link to **Enforcement**
- Public (Administrative-Penalties) Law effects
 - Nothing is said in Art. 6 GBR → Link to **Enforcement**

Enforcement

Art. 7 Enforcement

“1. Each Member State shall designate a body or bodies responsible for adequate and effective enforcement of this Regulation.

“2. Member States shall lay down the rules setting out the **measures applicable to infringements of the provisions of this Regulation** and shall ensure that they are implemented. The measures provided for shall be effective, proportionate and dissuasive.”

Enforcement

- Body/Bodies → MS Bodies, not European Commission
 - Administrative bodies → Cessation + Penalties vs. Judicial bodies
 - Consumer Protection Cooperation (CPC) Regulation
 - Risk of inconsistent enforcement → ECJ

<https://ec.europa.eu/digital-single-market/en/policies/geoblocking>

- Public (Administrative-Penalties) Law effects

European Commission says: *"Is there a need for specific sanctions when Article 6 [GBR] is not respected? No specific sanction is needed in order to implement Article 6. The sanction provided for in Article 6 is that the relevant provisions in agreements that infringe Article 6 are automatically void and therefore cannot be enforced."*

- No sanction in case of violation of Art. 6 GBR
- If trader geo-blocks unjustified invoking contractual obligation infringing Art. 6 GBR → contractual obligation is void → no "umbrella" → sanction because of infringement of Art. 3-5 GBR

Final Remarks

- Intersection
- Interaction
 - A new “doomed splitting” analysis of vertical agreements in Art. 101 TFUE?
 - Contagion Effect: New shape of active/passive sales also when applying BERVA + GVA?
- Need for tuning
 - Evaluation of EU competition rules on vertical agreements (November 2018) → Tuning of GVR and GBR

Thank you very much for your attention!

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