How to Treat Product Price Differentials in the EU in the Light of Geoblocking

By Dr. Jochen M. Schaefer

Introduction:

It is only few decades ago that consumers confined their customer journey by purchasing their sporting goods at brick & mortar stores in their local environment. At maximum they ordered them after they had studied the various offerings shown on the multi-coloured pages of voluminous print catalogues large mail order houses such as Quelle in Germany or Freemans in the UK distributed by mail to their loyal customer base. This may sound like Stone Age for the young smart offline and online shoppers of generations X, Y and Z, but when you recall that the very first iPhone was presented by Steve Jobs in January 2007 only, these 'Stone Age' shopping patterns even still prevailed in the early 21st century. Nowadays this has dramatically changed - and the game changer is called Internet/World Wide Web.

The online virtual shop window is nearly borderless for consumers. Only few obstacles such as foreign languages, the online shopper is not familiar with, may still to some extent prevent consumers from making cross-border purchases.

Assumed, I would be interested in purchasing a certain pair of Adidas running shoes, with few clicks only I can get at least an idea at which prices they are offered in certain sales channels in Germany and elsewhere:

adidas Herren Galaxy 5 Running shoes, Schwarz, 44 EU

EAN: 4062059820622 ASIN: B082SZGCH9

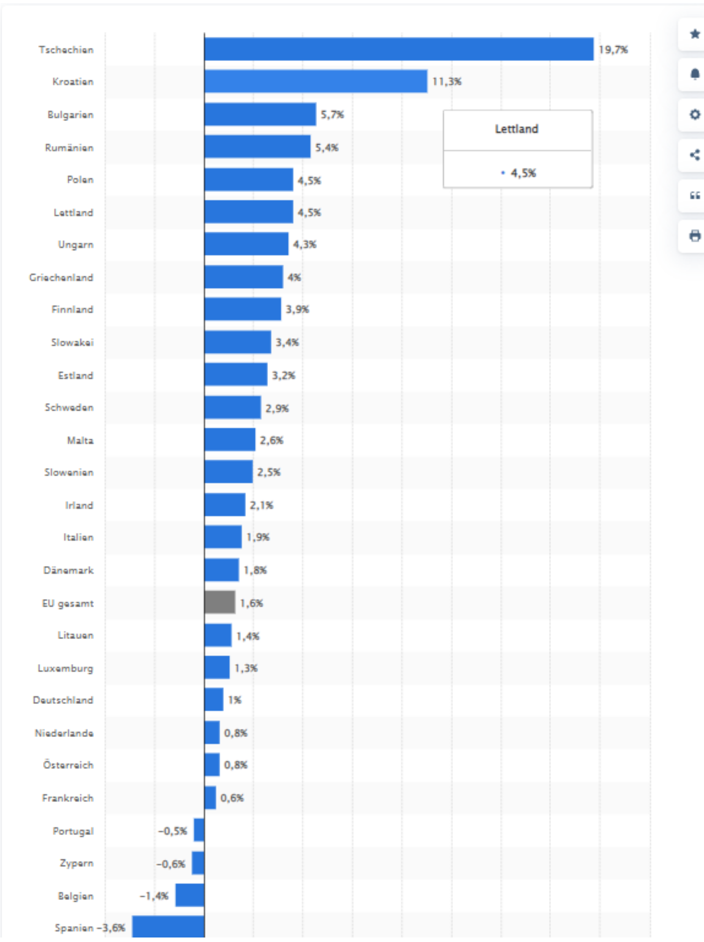
Nettopreis (exkl. USt.)	Land	Händler	
24,99 € exkl. 4,75 € USt.-DE		Amazon.fr amazon.fr	ZUM SHOP
37,81 € exkl. 7,18 € USt.-DE		baur.	ZUM SHOP
40,00 € exkl. 8,00 € USt.-GB		Wynsors World o... amazon.co.uk	ZUM SHOP
41,97 € exkl. 7,98 € USt.-DE		e-megasport_sc ebay	ZUM SHOP
42,01 € exkl. 7,98 € USt.-DE		D	ZUM SHOP
40,98 € exkl. 9,02 € USt.-IT		Marketplace amazon.it	ZUM SHOP
41,89 € exkl. 8,80 € USt.-ES		Marketplace amazon.es	ZUM SHOP
44,50 € exkl. 8,45 € USt.-DE		e-megasport S.C. amazon.de	ZUM SHOP

Source: *https://preis.geizr.de/search/adidas%20Laufschuhe, screenshot taken by JM Schaefer on 04-08 2022*

By realizing that the very same type of shoe is offered for sale in France considerably cheaper I might then in this specific hypothetical case be tempted to order these sneakers through amazon.fr rather than through amazon.de by leaving in this scenario other relevant factors for a moment aside, which may be equally relevant for my purchasing decision such as shipping costs, warranty and return terms and delivery time.

Price differentials in the EU and the EEA may even exist, if a brand applies a d2c policy, since the pricing of a product in a certain country is also determined by external factors such as the different national inflation rates in the EU, which is right now 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:



Source: ***https://de.statista.com/statistik/daten/studie/1322920/umfrage/preisentwicklung-fuer-bekleidung-und-schuhe-in-den-laendern-der-eu/*** ***;*** *Screenshot taken by JM Schaefer on August 04, 2022.*

While price increases in June 2022 compared to the very same month in 2021 were significant in the Czech Republic by reaching nearly 20%, followed by Croatia, the developments in the other countries were less dramatic and showed even decreasing prices in Portugal, Cyprus, Belgium and Spain. Other factors such as a different level of employment, logistics and transportation cost may also be an explanation for cross-border price differentials.

How to Treat Price Differentials from a Brand's and Dealer's Perspective

In most cases it will remain an illusion that uniform pricing of a certain 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 environment in a certain country. If they sell to B2B customers such as distributors and/or retailers, be reminded that any attempt to influence the autonomous pricing policy of such marketing partners at lower vertical level is a deadly sin and constitutes a hard-core competition law infringement, which can be sanctioned by the competent EU and national competition authorities by imposing fines up to 10% of the global annual turnover of an infringer. 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 into different retail prices of the very same article in a certain geographic territory.

Does this then from a legal perspective inevitably force a brand, which is pursuing a d2c policy or a retailer offering sporting goods for sale online to accept cross-border purchasing requests by consumers residing in other EU/the EEA member states??

Here the EU Geoblocking Regulation comes into play.

The EU Geo-Blocking Regulation and its Impact on Cross Border Purchase and Sales Transactions

Since it had been a widespread commercial practice before such new set of laws came into force in December 2018 (which applies directly in all 27 member states and in the three countries of the European Economic Area [i.e. also in Norway, Lichtenstein and Iceland]) to deny access to a website for customers not residing in a given country, or to re-route them to a local store with less favorable conditions, the EU legislators felt a need to act with the aim to reach a better standard of protection for consumers also in this specific area. The EU Geo-Blocking Regulation (hereinafter "GBR") does not apply to B2B transactions, which can also be contributed to the intense lobbying effects of the Federation of the European Sporting Goods Industry/FESI.

The GBR does now indeed require any commercial operator, who offers sporting goods products for sale online on a certain website to also sell such product to a consumer regardless of his or her nationality or place of residence within another EU/ EEA member state.

YET: This does not obligate the seller to also deliver the purchased product to the place of residence of such end consumer in the respective other country.

Further, it is important, both for brands selling d2c and retailers, to know that any warranty claims or other claims such as product liability claims will be treated on the grounds of the governing 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 point of sales will have to accept that any warranty claim will be dealt with by applying French laws.

It is also not widely known that even under the governance of the GBR, a re-routing of a consumer might still be legitimate and possible, on condition that a consumer provides its explicit consent when she or he tries for the first time to access the respective website. Such consent will then also be valid for any subsequent website visits by the very same consumer.

In article 4 of the GBR it is expressly stated that a product can be offered for sale at different prices on different websites within any EU member state as long as such different pricing is not of a discriminating nature.

Nevertheless, the sellers will not be allowed to apply different payment conditions for 'foreign' consumer customers for reasons of their place of residence or establishment, or since they are of different nationality.

Passive sales requests of consumers can also not be restricted by contractual means, provided they would negatively affect the scope of application of the GBR. A concrete example for a passive sale would for instance be that a Danish consumer - totally uninfluenced by the operator of a Swedish website in Swedish language - would make the attempt to purchase a certain sports product from such Swedish trader, who could then not legitimately refuse to sell it to the Danish individual (except in those cases where the Danish website visitor provides his or her explicit consent to be rerouted to a corresponding Danish website as already pointed out above).

CONCLUSION:

I do hope that the readers of this article will find its contents from a practical perspective useful. In my view cross-border sales will become even more relevant in the near future in these times of high inflation rates in numerous member states, sharply increasing prices and fragile supply chains, where certain products may not be available in some member states, yet can be still purchased in others, or where due to a decline of consumer spending in certain European regions, commercial operators may even stimulate those as a solution for their overstock.

About the author:

Dr. Jochen M. Schaefer is a German practicing attorney based in the Munich area. Since numerous years he represents both the World Federation of the Sporting Goods Industry (WFSGI) and the European Federation of the Sporting Goods Industry (FESI) as their Legal Counsel while he is also chairing the WFSGI's Legal Committee and co-chairing FESI'S digital working group. At individual client level he represents a significant number of well-known 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 in the drafting and negotiation of comprehensive contracts at 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-(0)16407932.