

COMPETITION AND REGULATORY NEWSLETTER

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European Commission fines gaming companies for geo-blocking practices

On 20 January 2021 the European Commission [announced](#) that it had decided to fine Valve, owner of the online PC gaming platform Steam, and five video game publishers (Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax) a total of €7.8 million for breaching Article 101 TFEU by engaging in geo-blocking practices. The companies restricted cross-border sales of certain PC video games on the basis of the geographical location of users within the EEA. The decision comes after the Commission [opened](#) an investigation into the bilateral agreements concluded between Valve and the video game publishers in February 2017.

When Steam users purchase certain PC video games, they need to confirm that their copy of the game is not pirated by using an "activation key". The Commission's investigation considered whether the activation keys were being used to grant access to a game only to consumers in a particular Member State. On 5 April 2019 the Commission [announced](#) that it had sent statements of objections to Valve and the video game publishers, setting out its preliminary view that the companies prevented consumers from purchasing and using PC video games acquired elsewhere than in their country of residence (so-called "geo-blocking") in violation of EU competition rules.

THE DECISIONS

Steam is one of the world's largest online PC video gaming platforms, offering more than 35,000 games. It allows users to download or stream PC video games, and allows users who have bought PC video games outside of Steam (for instance, in brick-and-mortar shops or digitally through downloads from third-party websites) to play video games on Steam. In both cases a Steam activation key may be required to activate and play the game. Valve provides the technical means to do this to video game publishers, and offers the publishers a territory control function, which enables the setting up of geographical restrictions upon activation. According to the Commission, the combination of the Steam activation key with the territory control function facilitates the geo-blocking of PC video games based on the geographical location of the user.

The Commission found that the video game publishers under investigation granted Valve a non-exclusive licence to exploit specified PC video games on a worldwide basis, including the entirety of the EEA. In exchange, Valve granted the publishers licences to use the Steam activation keys for PC video games purchased outside Steam. The publishers requested that Valve set up geographical restrictions and provide geo-blocked Steam activation keys. The publishers provided these keys to their distributors for sale and distribution of the PC video games in the Member States concerned, meaning that users located outside of designated Member States were prevented from activating certain PC video games.

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The Commission held that Valve and each publisher partitioned the EEA market in breach of competition law. Specifically, the Commission concluded that Valve and the publishers engaged in the following geo-blocking practices:

- Bilateral agreements and/or concerted practices between Valve and each of the five video game publishers, implemented by means of geo-blocked Steam activation keys, which prevented the activation of certain of these publishers' video games outside Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and (in some cases) Romania, including in response to unsolicited consumer requests (so-called "passive sales"). These restrictions lasted between one and five years and may have prevented consumers from buying cheaper games available in other Member States.
- Geo-blocking practices in the form of licensing and distribution agreements concluded bilaterally between four out of the five PC video game publishers (Bandai, Focus Home, Koch Media and ZeniMax) and some of their PC video games distributors in the EEA (other than Valve), containing clauses which restricted cross-border passive sales of the affected PC video games within the EEA, including the aforementioned countries. These lasted between three and 11 years and were implemented, depending on each bilateral relationship, between March 2007 and November 2018.

The Commission held that these business practices denied European consumers the benefits of the EU's Digital Single Market to shop around between Member States to find the most suitable offer, and partitioned the EEA market in violation of EU antitrust rules.

The fines were set on the basis of [the Commission's 2006 Guidelines on fines](#). The five video game publishers cooperated with the Commission by providing evidence of added value to the investigation, and by expressly acknowledging the facts and the infringements of EU antitrust rules. The Commission therefore granted reductions to the fines depending on the extent of this cooperation, ranging from 10 per cent to 15 per cent. Valve chose not to cooperate with the Commission, and so the Commission adopted a prohibition decision against Valve under the ordinary antitrust procedure.

Executive Vice-President Margrethe Vestager, in charge of competition policy, said: *"More than 50% of all Europeans play video games. The videogame industry in Europe is thriving and it is now worth over €17 billion. Today's sanctions against the "geo-blocking" practices of Valve and five PC video game publishers serve as a reminder that under EU competition law, companies are prohibited from contractually restricting cross-border sales"*.

CONCLUSION

The decision illustrates how geo-blocking practices can take multiple forms, either through technical restrictions or through contractual clauses in licensing and distribution agreements. It follows other high-profile geo-blocking cases, such as the Commission's [decision](#) to fine hotel group Meliá €6.7 million in February 2020 for entering into contracts with tour operators that restricted active and passive sales of hotel accommodation based on consumers' country of residence, and its [decision](#) in December 2018 to fine Guess nearly €40 million for various breaches of EU competition law, including restricting authorised retailers from selling to consumers located outside the retailers' allocated territories.

OTHER DEVELOPMENTS

ANTITRUST

EUROPEAN COURT OF JUSTICE DISMISSES QUALCOMM'S APPEAL REGARDING EUROPEAN COMMISSION REQUEST FOR INFORMATION

In a [judgment](#) of 28 January 2021 the European Court of Justice (CJ) upheld a General Court judgment that rejected Qualcomm's appeal against a European Commission formal decision to request information (RFI) as part of its Article 102 TFEU investigation into alleged predatory pricing practices.

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In December 2015 the European Commission [issued](#) two statements of objections to which Qualcomm responded and an oral hearing was held in November 2016. On 30 January 2017 the Commission then issued an RFI which Qualcomm failed to respond to in time, resulting in the Commission adopting a formal RFI decision on 31 March 2017.

Qualcomm appealed that RFI decision and on 9 April 2019 the General Court [dismissed](#) the appeal in its entirety. Qualcomm subsequently brought an appeal to the CJ against the judgment.

In its judgment, the CJ also dismissed the appeal in its entirety, confirming the General Court's conclusions that the RFI was proportionate and necessary. In particular, the CJ confirmed that the alleged predatory practice justified the need to provide a significant amount of information which was necessary given the scope and purpose of the investigation. The CJ also addressed Qualcomm's claim as regards the necessity of the RFI following the statement of objections, noting that the Commission possessed a broad range of powers to decide what information it required to conduct its investigation and that it was not bound by any assessments of fact set out in the statement of objections. The CJ stated that *"the Commission is required to evaluate those assessments on the basis of factors emerging from the whole of its investigation and, in particular, the observations submitted by the parties, with a view to adjusting and supplementing its arguments in support of the objections which it maintains"* (Paragraph 73 of the judgment). Furthermore, the CJ agreed with the General Court that the Commission could reasonably assume that the information would help it determine whether the alleged infringement had taken place. In addition, the CJ confirmed the General Court's conclusion that the RFI did not breach Qualcomm's right to avoid self-incrimination.

A separate appeal against the Commission's [decision](#) of 18 July 2019 imposing a fine of €242 million on Qualcomm for abusing its dominant position due to predatory pricing in the market for 3G baseband chipsets is currently pending before the General Court.

APPLE FACES COURT CHALLENGE FOR ABUSIVE CONDUCT IN CHINA

An abuse of dominance claim has been accepted by the Beijing Intellectual Property Court against Apple over alleged abuse of dominance in relation to the Apple App Store. The case mirrors similar claims made against Apple in the [US](#) and [UK](#), in which Epic Games alleges that Apple's prohibition on third party in-App purchasing methods constitutes anticompetitive behaviour.

Currently, in-App payments made on Apps hosted on the Apple App Store in China must be made using Apple Pay. The claimant, Zhang Zhengxin (a lawyer at Yingke Law Firm), is seeking a court order to force Apple to allow use of other third party payment systems, rather than requiring the use of Apple Pay, for such in-App purchases. The claimant is also seeking nominal compensation for extra fees that were allegedly incurred by the claimant for an in-App purchase.

Apple has faced similar complaints within China previously. In 2017, Chinese App developers lodged a list of complaints to the relevant competition authorities, [accusing](#) Apple of abusing its dominant market position by requiring all Apps to be purchased through iTunes and prohibiting payments (including for in-App purchases) via third parties. However, whilst the Chinese authorities had reportedly looked at these allegations, there were no resulting formal proceedings against Apple.

STATE AID

UK GOVERNMENT PUBLISHES CONSULTATION ON NEW DOMESTIC SUBSIDY CONTROL REGIME

On 3 February 2021 the UK Government [published](#) a consultation paper inviting comments on its proposed approach for establishing a new domestic subsidy control regime.

The consultation paper sets out the UK Government's objective of delivering a regime that will meet the UK economy's specific needs whilst also ensuring it is in line with the UK's international commitments, including those set out in the UK-EU Trade and Cooperation Agreement (TCA).

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Key elements of the proposals include:

- a list of seven principles underpinning the new UK subsidy control regime which public authorities are required to adhere to when considering awarding possible subsidies. These principles include the six principles set out in the TCA together with an additional principle aimed at minimising any harmful or distortive effects on competition within the UK internal market;
- certain particularly harmful types of subsidy that will be prohibited and others that will be controlled (in line with the provisions in the TCA, Free Trade Agreements and the WTO regime); and
- specific exemptions to ensure that low-risk and time-sensitive subsidies can proceed without first having to satisfy the subsidy control principles referred to above.

The consultation paper also invites views on the possible functions and responsibilities of the independent body, required to be established under the terms of the TCA, which will oversee the new system. A broad category of tasks are considered which could fall within its remit including: (i) responsibility for scrutinising and reporting on the operation and effectiveness of the system as a whole; (ii) providing (non-binding) subsidy development advice; (iii) undertaking post-award reviews (for example, following a complaint); and (iv) taking action against unlawful subsidies (enforcement powers).

The consultation period closes on 31 March 2021. For more details on the proposed regime, see our Brexit [blog post](#) "*Towards a home-grown subsidy regime for the UK*".

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