

EU Investigating Geo-Blocking of Online Video Games

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On May 6, 2015, the **European Competition Commission** released a new *Digital Single Market Plan*, and simultaneously launched a broad antitrust investigation into e-commerce. The DSM plan, consisting of sixteen proposals, seeks to create a single digital European market where access to digital goods and services is unfettered across all 28 member states. The European Competition Commission will investigate whether firms' restrictions on cross-border online trade violate the EU competition laws, and attempt to remedy them through enforcement mechanisms. High on the list is the geo-blocking of online content, including video games. The impending probe will likely target some large U.S. technology companies.

Geo-blocking is a technical barrier that allows online merchants to charge different prices or restrict users' access based on physical location or credit card information. For example, a German resident may have to pay more for a pair of shoes purchased online from an Italian retailer than someone living in Italy. With respect to gaming, the investigation will focus on the geo-blocking of video games that are sold online for use on personal computers. The Digital Single Market plan is highly critical of geo-blocking, which it describes as violating the EU's goal of free movement of commerce within its borders, and proposes to eliminate the practice altogether. But the Competition Commission cannot seek to change a firm's business practice unless it violates EU antitrust law, necessitating a rigorous investigation.

To determine whether certain geo-restricting practices are anticompetitive, the Commission will analyze game publishers' business practices, probing into their contractual limitations on the distribution of online video games. EU Competition Chief Margrethe Vestager said that geo-restrictions "are often the result of arrangements that are included in contracts between manufacturers and content owners on one side and their distributors on the other." Accordingly, the Commission is willing to go as far as "examining the clauses in their contracts." But the Commission also recognizes that companies use geo-blocking for legitimate and procompetitive reasons, like restricting information to paying customers and protecting copyrighted material.

The probe will begin with comprehensive questionnaires sent to companies involved in e-commerce within the EU and could potentially lead to formal inquiries and enforcement actions. Commissioner Vestager hopes to have preliminary findings by mid-2016.

The probe may target large U.S. technology companies, especially if they are suspected of abusing their dominant position to restrict trade. EU competition law places certain duties on companies that

are “dominant” in their markets (a fairly low bar compared to US standards), and abuse of a dominant position can be illegal. American technology companies tend to be larger and more successful than their European counterparts, so they may trigger the Commission’s scrutiny. According to Vestager, “every company that sells products online, including their suppliers and their technology providers, will be affected. Potentially, the scope will be very wide.” On the gaming front, the probe may affect large online game developers.

The Commission hopes that the creation of a single digital market will boost European startups by making it easier for them to launch and grow quickly across borders, similar to the advantage American companies have to rapidly gain a national user base in the U.S. “We want companies in Europe to use the Digital Single Market to scale up, not move out,” said Andrus Ansip, the EC’s Vice President of Digital Single Market. So it’s not surprising that the proposal and investigation come on the heels of the EU’s crackdown on American tech giants, the re-opening of the Google investigation being the most recent example. Indeed, some commentators have characterized the move as protectionist, given Europe’s recent concerns over the increasing power of large U.S. web companies.

The ramifications of the DSM plan are not yet clear, but game companies that use geo-blocking may have to look for other solutions in the future.

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National Law Review, Volume V, Number 132

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