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RECHTSANWÄLTE

European Law - News

March 2021

(1) EU antitrust: Commission fines PC video games industry € 7.8 million for violating geo-blocking ban

The European Commission has imposed fines of € 7.8 million on Valve, the operator of the online PC gaming platform "Steam", and five publishers of PC video games (Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax). It accuses the companies of contractually having restricted the cross-border sale of games over a certain period in breach of EU antitrust law. Specifically, Valve and the publishers, according to the Commission, unlawfully foreclosed the EEA market by entering into bilateral agreements to geo-block certain video games.

According to the Commission, geo-blocked Steam activation keys prevented on the one hand the activation of certain video games in various EU/EEA Member States. On the other hand, four of the five publishers (Bandai, Focus Home, Koch Media and ZeniMax) had bilateral licensing and distribution agreements with some of their video game suppliers in the EEA – except for Valve – restricting cross-border sales within the EEA. The Commission considers that such practices prevented consumers from playing video games purchased in individual EEA Member States on physical media in other EEA countries; activation codes could only be unlocked within certain national borders, thus violating the geo-blocking prohibition. The geo-blocking practices concerned around 100 video games. It was announced that at least Valve wants to defend itself against the Commission's decision for various reasons. Among other items, the fines had been reduced by 10 to 15 % for the publishers, but not for Valve. Valve refutes the accusation that, unlike the publishers, it did not cooperate with the Commission. Court proceedings may have to decide on the extent of cooperation with the authorities, as well as on the liability of platform providers if geo-blocking is carried out via their platforms.

(2) Judgment of the ECJ of 3 February 2021 (C-555/19) on the prohibition of regional advertising in national television programmes

It is not often that the ECJ does not (comprehensively) follow the Advocate General's Opinion. In its judgment of 3 February 2021 in Fussl Modestraße Mayr v. SevenOne Media GmbH and others, the ECJ now emphasised more strongly than the Advocate General that the prohibition in Germany laid down in the State Media Treaty on showing advertising only regionally in German television programmes broadcasted nationwide may violate EU law. Thus, a violation of the freedom to provide services comes into question. Here, it must be examined whether the ban is at all appropriate and necessary. This also corresponds to the Advocate General's approach. Unlike the Advocate General, however, the ECJ also saw the possibility of unlawful unequal treatment of television broadcasters and advertising providers on the internet. The Advocate General, on the other hand, rejected such comparability and regarded it as meaningless. It is now the task of the Regional Court of Stuttgart to decide the case taking into account the preliminary ruling of the ECJ.

(3) Judgment of the ECJ of 20 January 2021 (C-619/19) on access to environmental information regarding "Stuttgart 21"

The ECJ also recently delivered its judgment in another Stuttgart case. The case concerns claims for disclosure of information in connection with the police action in 2010 on the occasion of tree logging for the railway project „Stuttgart 21“. An applicant had requested access to various documents from the State Ministry of Baden-Württemberg, ultimately relying on the European Environmental Directive.

An exception to the right to information under environmental law is provided for under EU Directive law and national transposition law if there are merely "internal communications". The ECJ now regards that „the term ‘internal communications’ covers all information which circulates within a public authority and which, on the date of the access request, has not left that authority’s internal sphere – as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received.“

The ECJ considers that the applicability of the exception to the right of access to environmental information provided for such internal communications is not limited in time. However, it could only be applied during the period in which the protection of the requested information was justified. This is to be included in a balancing of interests. It is now up to the national courts to decide the case.

(4) Decision of the German Federal Supreme Court (BGH) of 11 February 2021, Case No. I ZR 241/19 regarding the duty of internet traders to inform about manufacturers' warranties

The starting point of this case, which was decided in the previous instances by the LG Bochum and the OLG Hamm, is the sale of pocket knives via the internet platform Amazon. Specifically, the question arises to what extent, in addition to a reference to an existing manufacturer's warranty, the consumer's statutory rights must also be pointed out in this context. While the Regional Court had dismissed the claim, the Court of Appeal affirmed the complaint against the defendant trader. The relevant German provisions, in particular § 312d BGB (regarding distance contracts), § 479 BGB (regarding guarantee declarations) and Art. 246a § 1 para. 1 sentence 1 no. 9 EGBGB (specifying which information must be provided to consumers) transpose EU Directive law. The German Supreme Court has therefore decided to submit relevant questions of interpretation to the ECJ for a preliminary ruling. The ECJ will thus have to rule on the interpretation of Art. 6 (1) (m) of the Consumer Rights Directive 2011/83/EU. Such a decision may be of far-reaching significance for internet traders.

(5) Decision of the OLG Frankfurt a. M. of 11 February 2021, Ref. 26 SchH 2/20, on an invalid arbitration clause in intra-Union investment disputes

Referring to the Achmea jurisprudence of the ECJ, the Frankfurt Court of Appeal (OLG), in a decision of 11 February 2021, declared arbitration proceedings initiated against the Republic of Croatia at the request of an Austrian and a Croatian bank to be inadmissible. The basis for these arbitration proceedings was found in a bilateral investment protection agreement under international law (so-called Bilateral Investment Treaty, BIT). The OLG saw an adverse effect on the autonomy of EU law if an arbitral decision in an investment dispute between some EU Member States may affect EU law. The ECJ had already made a corresponding landmark decision on 6 March 2018 in the Achmea case (C - 284/16). However, these considerations are not readily transferable to commercial arbitration, which, in contrast, is based on private autonomy.

(6) European Council adopts package of measures for the recovery of capital markets (amendments to MiFID II, Prospectus Regulation)

On 15 February 2021, the European Council adopted amendments to the Markets in Financial Instruments Directive (MiFID II) and to the Prospectus Regulation, which are to be promulgated in the Official Journal shortly. The Member States will then have nine months to transpose the Directive into national law; the Regulation will be binding in the Member States without further transposition on the 20th day after its publication. The measures aim to make it easier for companies to recapitalise on the financial markets after the COVID 19 pandemic.

With the approved amendments to the MiFID II provisions, on the one hand, information obligations are to be simplified, but on the other hand, investor protection is to be safeguarded. Among other things, it is planned that, for example, professional investors will have to be provided with less information on costs and fees. In addition, investor information in paper form is to be eliminated. However, retail investors, if they so wish, are exempt from this.

Furthermore, the Prospectus Regulation provides for the introduction of an "EU reconstruction prospectus", a kind of short prospectus for simplified and more cost-effective capital raising. This is intended to enable issuers to carry out capital increases of up to 150% of the admitted shares by the end of 2022. The prospectus, excluding the summary, must not exceed 30 A4 pages and should contain abbreviated information.

(7) COVID 19 aid for companies in the trade fair and congress industry

Compensation can be paid to companies in the trade fair and congress industry that have suffered damage due to the Corona pandemic. For this purpose, the European Commission has approved a federal aid scheme amounting to € 642 million under EU state aid law. Eligibility is given if the relevant companies have suffered a loss of profit in the period between 1 March 2020 and 31 December 2020 and this loss is related to the relevant measures taken by the German Federal States (Länder) in this period to curb the spread of the virus pandemic.

(8) COVID 19 pandemic: Vaccine contract between the European Commission and Sanofi - GSK published

The vaccine contract ("Advance Purchase Agreement") between the European Commission and Sanofi - GSK of September 2020 was published in February 2021 and is accessible via the internet at https://ec.europa.eu/info/sites/info/files/apa_with_sanofi_gsk.pdf. However, sensitive passages have been sanitized.

(9) Telecommunications law: infringement proceedings against 24 Member States

On 4 February 2021, the Commission opened infringement proceedings against Germany and 23 other EU Member States. The Commission alleges that the States have failed to transpose the new provisions of the European Electronic Communications Code (Directive EU 2018/1972) on time. The Code aims to modernise the regulatory framework in the field of telecommunications. It aims to achieve a high standard for communication services, especially in the 5G network area, to strengthen consumer rights and to take into account the needs of certain social groups such as disabled or elderly people. Above all, the focus of the new regulations is on enabling effective competition.

To this end, the Commission adopted additional legislation in December 2020, such as a new delegated Regulation setting uniform maximum call termination charges across the European Union.

(10) BREXIT and EU data protection law: Data flows to the United Kingdom

On 21 February 2021, the EU Commission initiated the procedure for the adoption of adequacy decisions concerning the transfer of personal data to the United Kingdom (UK). According to the Commission, it has thoroughly examined the law and practice of personal data protection in the UK, including access to data by public authorities. It concluded that the existing level of protection in the UK is essentially equivalent to that of the European Data Protection Regulation (GDPR). The European Data Protection Committee now has the opportunity to give its opinion. The proposal is still subject to the approval of the representatives of the EU Member States before the adequacy decisions can be adopted. After four years, the level of data protection in the UK is to be re-examined. With the expiry of the BREXIT transition period on 31 December 2020, the UK has in principle become a third country within the meaning of the GDPR. However, a special transitional period under data protection law, which was agreed in the trade and cooperation agreement between the EU and the UK in December 2020, is currently still running until 30 June 2021. It remains to be seen, however, if this path is followed as outlined, how a court will ultimately assess such an approach. After all, only on 16 July 2020, in the so-called Schrems II ruling (Case C-311/18), the ECJ declared the Privacy Shield mechanism found by the European Commission with the United States to be insufficient. The main point of examination could be the access rights of (security) authorities to data.

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