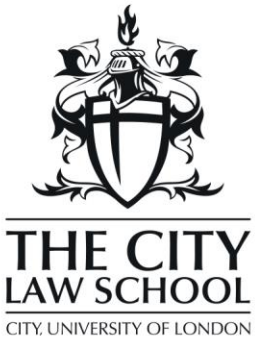

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EU and UK Competition Law in the Video Games Industry: Past, Present, and Potential Future

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Ryan Stones
City St George's,
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EU and UK Competition Law in the Video Games Industry: Past, Present, and Potential Future

***Draft of final version forthcoming in the Research Handbook on Interactive Entertainment Law* (Edward Elgar)**

Ryan Stones*

Abstract

Epic's battles against app store terms and Microsoft's $68.7 billion acquisition of Activision Blizzard have created significant interest in how competition law applies to the video games industry. Research into this topic is limited and often focuses on narrow issues. This paper addresses the gap in the literature by offering a broad analysis of the past, present, and potential future application of EU and UK competition law to video games companies. It covers enforcement of the law on anticompetitive agreements, merger control, and abuse of dominance, plus complementary regimes regulating the digital economy. It offers an accessible overview for those without prior knowledge of competition law. For those more familiar with the law, the also paper highlights peculiarities of investigations into the gaming sector vis-à-vis other areas of activity. These include an exclusive focus on agreements that restrict cross-border sales between EU Member States, greater concern for the non-horizontal effects of acquisitions over direct loss of competition between developers, and ambivalence on market definition. Furthermore, the paper identifies several practices by video games companies which have not yet been subject to scrutiny, but could be. In particular, it explores the implications for gaming of the EU Digital Markets Act and UK Digital Markets, Competition and Consumers Act. While cloud streaming services and mobile gaming are significant beneficiaries of these new regulatory regimes aimed at the gatekeepers of the digital economy, the giants of the gaming industry should be very wary of comparable obligations being placed on their own digital stores.

Keywords: Competition Law; Antitrust; Video Games; Digital Markets; Interactive Entertainment

* Senior Lecturer, The City Law School, City St George's, University of London

Introduction

The video games industry has increasingly come to the attention of competition (or "antitrust") authorities in recent years, sometimes attracting significant media coverage.[1] The most high-profile examples are arguably Epic Games challenging the conditions for distributing it online battle royale game, *Fortnite*, via the Apple App Store and Google Play Store on mobile devices,[2] as well as Microsoft's $68.7 billion acquisition of Activision Blizzard, creator of the popular *Call of Duty* franchise.[3] Yet despite this moment in the antitrust spotlight, detailed investigations by UK and EU competition authorities of video games companies have hitherto been scarce. The same is true of academic commentary on this side of the Atlantic,[4] save for the occasional article focused on a particular decision[5] or specific legal issue.[6] The dearth of regulatory and research interest is surprising; the video games industry generates significant revenue each year,[7] has a relatively long history, and may have pioneered key aspects of digital ecosystems now under intense scrutiny from competition authorities worldwide.[8]

Still, the recent emphasis on how competition law applies to the video games industry seems unlikely to be but a fleeting moment before the public eye. It is therefore important to understand where we have come from and where we may be going. To that end, the purpose

[1] "Competition law" and "antitrust" are used interchangeably in this chapter. The former is more common in Europe and the latter in the USA.
[2] eg Jack Nicas and Erin Griffith, 'Apple and Epic Head to Court Over Their Slices of the App Pie' *New York Times* (2 May 2021) <https://www.nytimes.com/2021/05/02/technology/apple-epic-lawsuit-app-fees.html> accessed 16 December 2024.
[3] eg Alex Hern, 'Microsoft Takeover of Activision Blizzard Raises Concerns at UK Regulator' *Guardian* (1 September 2022) <https://www.theguardian.com/business/2022/sep/01/uk-watchdog-raises-concerns-over-microsoft-buyout-of-activision-blizzard> accessed 16 December 2024; Sarah Needleman, 'Microsoft Prepares to Go to Battle With FTC Over Activision Deal' *Wall Street Journal* (17 December 2022) <https://www.wsj.com/articles/microsoft-prepares-to-go-to-battle-with-ftc-over-activision-deal-11671283792> accessed 16 December 2024.
[4] The US literature is not exactly bountiful either. See eg Clayton Alexander, 'Game Over? How Video Game Console Makers Are Speeding Toward an Antitrust Violation' (2020) 4 Business, Entrepreneurship & Tax Law Review 151; Brianna Alderman and Roger Blair, 'Epic Battles in Two-Sided Markets' (2023) 68 Antitrust Bull 519; Victor Glass and Timothy Tardiff, 'The Federal Trade Commission's Antitrust Lawsuit Against the Proposed Microsoft/Activision Merger: Déjà Vu with a Surprise Ending' (2024) 69 Antitrust Bull 79.
[5] eg Fabian Ziermann, 'Assessing the World's Largest Gaming Acquisition under EU Competition Law' (2023) 14 JECLAP 203.
[6] e,g. on market definition: Alba Ribera Martínez, 'A Fortnite and Odd Days: The Console Wars' (2022) 6 Mkt & Competition L Rev 51.
[7] Around $184 billion worldwide in 2023: Tom Wijman, 'Newzoo's Year in Review: The 2023 Global Games Market in Numbers' *Newzoo* (19 December 2023) <https://newzoo.com/resources/blog/video-games-in-2023-the-year-in-numbers> accessed 16 December 2024.
[8] For an interesting podcast discussing how Nintendo's business ecosystem in the 1980s may have paved the way for Apple: Ben Gilbert and David Rosenthal, 'Nintendo's Origins' *Acquired* (15 March 2023) <https://www.acquired.fm/episodes/nintendo> accessed 16 December 2024.

of this chapter is to fill a gap in the academic literature by offering an analysis of the past, present, and possible future of competition law enforcement by EU and UK authorities to video games companies. It is intended to be accessible to those who are interested in this industry but with no prior knowledge of competition law. It will hopefully also appeal to those who are familiar with the field, but looking for an overview of how it has been applied to video games businesses. As will be demonstrated, there are several unusual features of EU and UK competition enforcement in this sector.

Section 1 is a basic introduction to competition law written for the unacquainted, before the remaining parts look at the video games industry from various antitrust angles. Section 2 examines the limited enforcement of prohibitions against agreements restrictive of competition which, to date, have only been deployed in pursuit of the idiosyncratic EU goal of integration between Member States. Section 3 reviews the more plentiful instances in which mergers and acquisitions in the industry have been investigated at EU and UK level.[9] Unlike merger control more generally, greater concerns have arisen from the combination of firms primarily active at different levels in the video game supply chain. This is contrary to the usual focus of regulators upon horizontal concentrations between direct rivals. Finally, Section 4 argues that while there have been no findings that video games firms have illegally abused market dominance, this should be seen in the context of attempts to tackle market power in the digital economy through greater recourse to ex ante regulation. While mobile and cloud gaming are set to significantly benefit from increased regulatory pressure upon the titans of the digital economy, the console giants should be wary of how they too may be forced to change their ways on digital distribution.

1. An Overview of Competition Law

Competition law is a well-established discipline. Its roots stretch through the centuries-old common law doctrine of restraint of trade, as well as rules on just pricing, usury, and monopolisation in the medieval European *ius commune* developed from Roman law.[10] Modern competition law began with the Anti-Combines Act 1889 in Canada. More famously, the US Sherman Act 1890 prohibited contracts in restraint of trade and monopolisation, with merger control later introduced through the Clayton Act 1914. On this side of the Atlantic, the 1957 Treaty of Rome – now called the Treaty on the Functioning of the European Union (TFEU) – was a turning point. Despite earlier sporadic dabbling in competition enforcement by some

[9] "Merger" is used in this chapter to denote both mergers and acquisitions.
[10] Andrew Scott, 'The Evolution of Competition Law and Policy in the United Kingdom' (2009) 4–5 <https://papers.ssrn.com/abstract=1344807> accessed 16 December 2024; David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press 1998) 34–35.

European countries,[11] this foundational Treaty prohibited agreements restrictive of competition (Article 101 TFEU) and abuses of a dominant market position (Article 102 TFEU), both enforced at supranational level by the European Commission. Since 1990, the Commission has also reviewed proposed mergers and acquisitions with an EU dimension.[12] Especially from the early 2000s when a process of decentralisation occurred, national competition law regimes have flourished in EU Member States, including the UK. The Competition and Markets Authority (CMA) is the primary enforcer of the Chapter I and Chapter II prohibitions of the Competition Act 1998,[13] which are the UK equivalents to Articles 101 and 102 TFEU. The CMA also reviews anticipated and completed mergers pursuant to Part 3 of the Enterprise Act 2002. Recent decades have seen over 140 competition law regimes emerge around the globe,[14] often taking inspiration from more established systems as legal and institutional templates.[15]

Despite such a long lineage and growing geographic coverage, the conceptual underpinnings of competition law remain highly contentious. What this area of the law is intended to achieve and how best to do it are far from obvious. At its most generalised, competition law is a recognition that the benefits of a free-market economy may not be realised if businesses have absolute freedom to acquire and exercise substantial market power as they please, therefore necessitating legal interventions to police their conduct. But beyond such an abstract justification, there is considerable disagreement on various fronts. What are the "benefits" of a free market economy (efficiency, low prices, freedom?),[16] to whom should they accrue (consumers, businesses?),[17] and how are they reconciled with other societal goals (eg market integration, sustainability)?[18] Do certain firms really enjoy substantial market power or are they simply successful in giving consumers what they want, ultimately held in check by potential new entrants waiting in the wings?[19] Are interventions by decision-makers (judges, administrative agencies) strictly necessary and can they be trusted to reach better outcomes than autonomous market self-correction?[20] Which types of economic knowledge (eg price

[11] See generally: Gerber (n 10).
[12] The current regime is: Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings ('EUMR') 2004 (OJ L24/1).
[13] The CMA was created by the Enterprise and Regulatory Reform Act 2013, bringing together powers previously held by the Office of Fair Trading and the Competition Commission.
[14] Richard Whish and David Bailey, *Competition Law* (11th edn, OUP 2024) 1.
[15] eg Andrea Gideon, 'Transplanting EU Competition Law in ASEAN: Towards a Context Informed Method of Investigation' (2022) 17 AsJCL 1.
[16] eg Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (2nd edn, Free Press 1993) 7; Liza Lovdahl Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3 ECJ 329.
[17] eg Eleanor Fox, 'Consumer Beware Chicago' (1985) 84 Mich L Rev 1714.
[18] eg Pablo Ibáñez Colomo, 'Article 101 TFEU and Market Integration' (2016) 12 JCL&E 749; Simon Holmes, 'Climate Change, Sustainability and Competition Law in the UK' (2020) 41 ECLR 384.
[19] eg Bork (n 16) 7–8; Richard Posner, *Antitrust Law* (2nd edn, University of Chicago Press 2001) 89–91; Tim Wu, *The Curse of Bigness: How Corporate Giants Came to Rule the World* (Atlantic Books 2020) 1–3.
[20] eg Frank Easterbrook, 'The Limits of Antitrust' (1984) 63 Tex L Rev 1.

theory, game theory, behavioural economics) should inform our view of whether business conduct is "good" or "bad",[21] and what is the appropriate legal form (rules, standards) for determining illegality?[22] These and many other issues have occupied decision-makers and commentators for over a century.

Notwithstanding such disagreement, competition law regimes around the world generally scrutinise three types of potentially problematic conduct. First, *agreements* (or lesser forms of cooperation) between independent businesses that may restrict competition (s 1 of the US Sherman Act, Article 101 TFEU, Chapter I of the UK Competition Act), whether between direct rivals on the same market ("horizontal") or different businesses in the same supply chain ("vertical", eg between a manufacturer and an independent retailer of a product). Second, the actions of businesses with substantial market power that may be considered monopolising (s 2 Sherman Act) or *abuses of their dominant position* (Article 102 TFEU, Chapter II Competition Act). Third, review of *mergers and acquisitions* to address those which may lessen competition, whether through creating or strengthening a dominant market position, facilitating parallel conduct (eg coordinated price rises), or leading to some other loss of competitive pressure (s 7 of the US Clayton Act, EU Merger Regulation, Part 3 of the UK Enterprise Act).

This chapter focuses upon enforcement of and developments in these three areas of competition law in the EU and the UK vis-à-vis the video games industry. The emphasis is primarily upon public enforcement by the main administrative authorities in each jurisdiction: the European Commission and the UK CMA.[23] Since the 2014 EU Damages Directive,[24] private enforcement against anticompetitive agreements and abuses of dominance has been on the rise across Europe. This has been particularly true of the UK, pre- and post-Brexit. The UK Competition Appeal Tribunal (CAT) is the forum for a significant number of follow-on or standalone claims,[25] including collective proceedings for damages led by a class representative.[26]

[21]eg Bork (n 16) 117; Herbert Hovenkamp, 'Chicago and Its Alternatives' (1986) 1986 Duke LJ 1014; Maurice Stucke, 'Behavioral Economists at the Gate: Antitrust in the Twenty-First Century' (2006) 38 Loy U Chi LJ 513.
[22] eg Anne Witt, *The More Economic Approach to EU Antitrust Law* (Hart 2016); Ryan Stones, 'Why Should Competition Lawyers Care about the Formal Rule of Law?' (2021) 84 MLR 608.
[23] There are other decision-makers in both jurisdictions. National competition authorities in EU Member States are tasked with enforcing Articles 101 and 102 TFEU, in addition to equivalent domestic rules. They may also review mergers that fall outside the jurisdiction of the EUMR. In the UK, other regulatory bodies have powers concurrent to the CMA for enforcing Chapter I and Chapter II in their respective fields (eg gas and electricity, water, communications). The CMA is the only body with merger control powers.
[24] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union 2014 (OJ L 349/1).
[25] Competition Act 1998, s 47A.
[26] Competition Act 1998, s 47B.

Finally, beyond these three core areas of competition law enforcement, it is also important to recognise alternative tools for achieving similar goals, not least ex ante regulation. As will be discussed in Section 4, both the EU's Digital Markets Act 2022 (DMA) and the UK's Digital Markets, Competition and Consumers Act 2024 (DMCCA) have significant implications for the video games industry; some as benefits and others as potential burdens.[27]

2. Anticompetitive Agreements

Article 101(1) TFEU and Chapter I of the UK Competition Act 1998 both prohibit agreements, decisions of trade associations, and concerted practices between independent businesses that prevent, restrict, or distort competition by object or effect.[28] In contrast with the prohibition on abuse of dominance (Section 4), there have been significantly more decisions taken by the European Commission on this ground since the first in 1964[29] and almost four-times more by the CMA from its creation in 2014 to the end of 2023.[30]

Despite the more regular application of this aspect of competition law, UK authorities have never investigated agreements in the video games industry and the European Commission has only done so twice. This may result from focusing enforcement on combatting cartel agreements. As the 'supreme evil of antitrust',[31] punishing rivals who agree to fix prices, restrict output, divide markets, distort bidding contests, etc, is seen as uncontentious and of clear benefit to consumers, even by those most sceptical of antitrust enforcement.[32] Gaming businesses clearly do not engage in such reprehensible agreements (or have just never been caught).[33]

There is, however, an almost guaranteed, peculiarly EU way in which to fall foul of the Article 101 prohibition: agreements that prevent all parallel trade between Member States. This is one of the oldest illegalities of EU competition law. In 1966 the Court of Justice of the EU (CJEU) ruled that agreements establishing absolute territorial protection ("ATP") were restrictive of Article 101(1) TFEU "by object", therefore presumptively illegal without the need to demonstrate actual or likely anticompetitive effects.[34] ATP is when manufacturers

[27] Regulation (EU) 2022/1925 on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) 2022 (OJ L265/1); Digital Markets, Competition and Consumers Act 2024.
[28] Unless exempted pursuant to Article 101(3) TFEU or s 9 Competition Act 1998.
[29] Pablo Ibáñez Colomo, *The Shaping of EU Competition Law* (CUP 2018) 161.
[30] Statistics held by the author. The references to Chapter I and Chapter II also refer to concurrent enforcement of Article 101 and 102.
[31] *Verizon Communications v Law Offices of Curtis V Trinko* (2003) 540 US 398.
[32] Bork (n 16) ch 13.
[33] At least not in the UK or EU: Julie Masson, 'Israel Sanctions Video Game Cartel' *Global Competition Review* (30 November 2021) <https://globalcompetitionreview.com/article/israel-sanctions-video-game-cartel> accessed 16 December 2024.
[34] Joined Cases 56 and 58/64 *Établissements Consten and Grundig-Verkaufs-GmbH v Commission* EU:C:1966:41 342–343. While the presumption is rebuttable pursuant to Article 101(3) TFEU based on procompetitive consumer benefits, the requirements are extremely difficult to substantiate.

contractually prevent their independent distributors (eg wholesalers, retailers) who are authorised to sell in particular Member States from both (i) *actively* selling their stock into other Member States and (ii) *passively* responding to sales requests from customers outside their designated territory. Businesses use ATP to maintain price differences between countries, as it contractually protects sales in higher-priced states from being undercut by trade and sales coming in from lower-priced countries. Despite such a rationale, the Court's firm legal treatment of ATP rested on its view that the Treaty of Rome was intended to lessen barriers to product movement between Member States, which such arrangements increased.[35] Since then, the goal of market integration has animated much enforcement of Article 101 TFEU by the Commission,[36] branching out from ATP to include prohibiting contractual restrictions on exports[37] and bans on internet selling.[38] It is a peculiarity of supranational EU competition law not typically present in domestic regimes such as the UK or US.

It is this old and idiosyncratic aspect of EU law that has twice led to businesses in the video games industry being punished for breaching Article 101 TFEU. Despite the vintage of the applicable law, both instances are relatively novel: the first as the earliest application of EU competition law to gaming companies; the second for the technological method deployed.

Nintendo's 1990s Distribution Agreements

Nintendo has secured many notable achievements over the decades as a pioneering creator of consoles and software. Perhaps its least celebrated accolade is that the fine of almost €150 million it received from the European Commission in 2002 was, at the time, the highest imposed for a vertical agreement under Article 101 TFEU.[39] Seven distributors of Nintendo products in different EEA Member States also shared fines totalling almost €19 million. While the arrangements between Nintendo and each of its territorial distributors differed, the common link was an attempt to prevent the parallel trade of Nintendo goods intended for sale in one country into others.[40] This arose from Nintendo's retail prices in the UK being considerably lower than elsewhere in Europe in response to fiercer console rivalry, especially with the launch of the PlayStation in 1995.[41] While needing to respond to competition in that country, Nintendo and its distributors did not want cheaper products acquired in the UK being

[35] ibid 340.
[36] Ibáñez Colomo (n 18).
[37] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 *P GlaxoSmithKline v Commission* EU:C:2009:610 [61].
[38] Case C-439/09 *Pierre Fabre Dermo-Cosmétique v Président de l'Autorité de la Concurrence* EU:C:2011:649 [38], [47]. This is also presumptively illegal under UK competition law, but its justification is not based on market integration.
[39] As noted: Case T-13/03 *Nintendo and Nintendo of Europe v Commission* EU:T:2009:131 [31].
[40] *Video Games* [2002] (COMP/35.587) para 261; *PO Nintendo Distribution* [2002] (COMP/35.706); *Omega - Nintendo* [2002] (COMP/36.321).
[41] *Video Games* (n 40) paras 104, 153, 268.

sold by exporters into other parts of Europe, making a profit from undercutting the higher prices charged by Nintendo's designated distributors.[42] This led to various practices: Nintendo routinely intervening between its distributors to minimise parallel trade;[43] wholesalers taking action against their retailers who exported;[44] distributors investigating how Nintendo goods got into their territories from outside;[45] marking products to trace their flow between countries;[46] and routine data collection (statistics, surveys) and information sharing on stock movements.[47] Nintendo was subjected to especial blame and aggravated fines as the ringleader of the joint effort to stop parallel trade of its products.[48]

An interesting aspect of this case was how Nintendo was acutely aware of what it could and could not do in its distribution agreements under Article 101 TFEU, seemingly thinking itself on the right side of EU competition law. This was because Nintendo's contractual agreements explicitly only limited *active* sales by one distributor into another territory, but not *passive* sales merely responding to customers located outside of the designated country.[49] It is the combination of preventing active sales *and* passive sales together that is classed as absolute territorial protection, subject to a presumption of illegality without consideration of its actual or likely effect on competition (referred to as a restriction "by object").[50] In contrast, preventing *just* active sales is only illegal if proven to have the actual or likely effect of restricting competition (a "by effect" restriction),[51] perhaps something Nintendo believed competition authorities would struggle to substantiate. Yet despite the wording of its agreements, the Commission nevertheless found that the reality of the relationship between Nintendo and its distributors, as evidenced by their conduct, was intended to stop all parallel trade, active *and* passive.[52] Once established, the Commission had over thirty years of decisional and judicial precedent behind it to find a breach of Article 101(1) TFEU.[53]

This jurisprudence further protected the Commission's decisions from three appeals to the (now) EU General Court:[54] one launched by Nintendo,[55] another by CD-Contact Data, an

[42] ibid paras 105, 115-118.
[43] ibid paras 237-238.
[44] ibid paras 132-144, 172-175, 283-286.
[45] ibid paras 145-146, 276-277.
[46] ibid paras 149-150.
[47] ibid paras 230-235, 273-275.
[48] ibid paras 229, 293, 406.
[49] ibid para 162.
[50] *Consten* (n 34) 342–343. Rebutting the presumption is exceptionally difficult, meaning that a finding of a restriction by object is almost guaranteed to end with a finding of illegality.
[51] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* EU:C:1966:38.
[52] *Video Games* (n 40) paras 163, 266, 331.
[53] ibid para 331.
[54] There was also a failed application for interim relief by one of the distributors in liquidation: Case T-398/02 R *Linea GIG v Commission* EU:T:2003:86.
[55] *Nintendo v Commission* (n 39).

exclusive distributor for Belgium and Luxembourg (further appealed to the CJEU),[56] and a third by Itochu, the Japanese parent company of the Greek distributor.[57] All of the substantive legal arguments raised by the appellants were rejected. There were, however, successes in persuading the Court to reduce the fines for Nintendo (down 15% to €119 million) for spontaneously providing significant evidence to the Commission,[58] and for CD-Contact Data (down 50% to €500,000) due to its passive role in the infringement.[59]

Valve's Geo-Blocked Steam Keys

Almost 20 years after Nintendo, comparable breaches of Article 101 TFEU in the video games industry were also found by the European Commission, albeit involving more advanced methods. In 2021, the Commission fined Valve €1,624,000 for its arrangements with five video game publishers (Bandai Namco, Capcom, Focus Home, Koch Media, and ZeniMax) regarding geo-blocked Steam activation keys for PC games.[60] This decision was upheld on appeal to the General Court in September 2023.[61] The Commission separately fined the five publishers a total of €6,265,000.[62] For four of them,[63] this also partly resulted from arrangements with their own distributors in much the same way as Nintendo beforehand. From 2007 to 2018, they had attempted to prevent the cross border sale of their PC games through outright export bans, threats of termination if distributors sold to customers beyond their designated areas, requiring notification of intended exports, orders to ignore customer requests from outside their country, charging distributors a standard (higher) wholesale North American price if more than 2% of games were sold outside the allotted territory, and so on.[64] Nothing new there.

In contrast, the finding that Valve and the five video game publishers together engaged in absolute territorial protection by geo-blocking Steam activation keys represented a technologically-novel application of the Article 101 TFEU prohibition.[65] Valve's Steam platform is an important distribution channel for downloading PC games, as well as facilitating

[56] Case T-18/03 *CD-Contact Data v Commission EU:T:2009:132*; Case C-260/09 P *Activision Blizzard Germany v Commission* EU:C:2011:62.
[57] Case T-12/03 *Itochu v Commission* EU:T:2009:130.
[58] *Nintendo v Commission* (n 39) paras 164–189.
[59] *CD-Contact Data* (n 56) paras 116–121.
[60] *Focus Home, Koch Media, ZeniMax, Bandai Namco, and Capcom ('Valve')* [2021] (AT.40413, AT.40414, AT.40420, AT.40422, and AT.40424).
[61] Case T-172/21 *Valve Corporation v Commission* EU:T:2023:587.
[62] *Bandai Namco* [2021] (AT.40422); *Capcom* [2021] (AT.40424); *Focus Home* [2021] (AT.40413); *Koch Media* [2021] (AT.40414); *ZeniMax* [2021] (AT.40420).
[63] Capcom was not involved in these practices.
[64] *Bandai Namco* (n 62) paras 74–86, 125–135; *Focus Home* (n 62) paras 70–78; *Koch Media* (n 62) paras 70–95; *ZeniMax* (n 62) paras 65–71. As Valve did not know about these practices, it was not liable: *Valve* (n 60) paras 232–234, 250, 311.
[65] The following focuses upon the discussion in the *Valve* decision. For equivalent with each publisher: *Bandai Namco* (n 62) paras 55–65; *Capcom* (n 62) paras 59–71; *Focus Home* (n 62) paras 56–69; *Koch Media* (n 62) paras 59–69; *ZeniMax* (n 62) paras 55–64.

multiplayer match-making and communications. In return for a 30% cut of the sale price of games purchased through Steam, Valve licences a suite of its technology back to publishers.[66] This includes the ability to request Steam activation keys from Valve, which can be used for game distribution outside of Steam, physically or digitally, but subject to subsequent activation, authentication, and/or access through the Steam platform.[67] From 2010-2015, Steam activation keys for dozens of PC games were geo-blocked to particular Central and Eastern European territories, preventing their use in other EEA countries where the price point of PC games is typically higher.[68] Based primarily upon the IP address of the user, initial authentication ("activation restrictions") or any subsequent attempts to play the game ("run-time restrictions") were blocked outside the territory to which the key was linked.[69] As they prevented cross-border sales of the affected PC games, these arrangements between Steam and publishers were therefore found by the Commission to restrict competition by object.[70] As such, it was irrelevant that only 3% of games on Steam at the time were subject to geo-blocking; minimal anticompetitive effects do not undermine presumptions of illegality by object.[71]

An interesting aspect of the decision against Valve was how the Commission directly linked geo-blocking with the revenues of the Steam ecosystem. Valve argued that it was not actually in agreement with the publishers to stop game sales between Member States, but merely provided geo-blocking services when requested. The Commission and General Court were not convinced, finding evidence that Valve facilitated, advertised, and actively promoted territorial restrictions.[72] But the Commission went beyond this, more broadly finding that geo-blocking video games was also to the commercial benefit of Steam as a distribution platform. It reasoned that offering geo-blocking technology attracted publishers to Steam, brought more games into its ecosystem where it took a 30% cut of in-game purchases, and protected its revenues on PC game sales in higher-priced countries through decreasing cheaper cross-border imports.[73] Such analysis is relevant to broader questions about digital distribution, discussed in Section 4.

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These investigations by the European Commission pursuant to Article 101 TFEU are examples of one of the oldest and most distinct aspects of EU competition law being applied

[66] *Valve* (n 60) paras 80–85.
[67] ibid paras 86-87, 91-96.
[68] ibid paras 138-211. One game was also geo-blocked to the UK.
[69] ibid paras 88-89, 100-108.
[70] ibid paras 312-346.
[71] ibid para 361; *Valve v Commission* (n 61) [222]-[223].
[72] *Valve* (n 60) paras 109, 113–133, 251–276; *Valve v Commission* (n 61) [34], [58]-[59] (and others).
[73] *Valve* (n 60) paras 110-112, 357-360. Acknowledged: *Valve v Commission* (n 61) para [183].

to new technology: both the video games industry in and of itself, and geo-blocking based on codes and IP addresses as a novel means of partitioning by country. But from a legal perspective, there was nothing particularly surprising about these decisions. Valve's unsuccessful defence epitomised this. It defended geo-blocking as a benefit to gamers in lower-priced countries as they might otherwise have to pay a higher standardised price across the entire EEA if profits in higher-priced countries were not shielded from cheaper sales elsewhere.[74] Yet both the Commission and General Court concluded that Valve had not articulated anything special about video games to justify a deviation from precedent.[75] Nor, the General Court added, should the factual novelty of using geo-blocked Steam keys be equated with a legal novelty that could distinguish this from case law stretching back to 1966.[76] Video games companies, just like pharmaceuticals and cars, are not beyond this peculiar facet of EU competition law.

In this way, enforcement against anticompetitive agreements in the gaming industry has been very narrow, entirely focused upon conduct that is idiosyncratic to the EU goal of market integration.

Whether this will continue is uncertain, particularly in light of the public spat between Sony and Microsoft over the latter's acquisition of Activision. The fear of *Call of Duty* only being available on Xbox may have opened Pandora's Box on console exclusivity, with Microsoft deliberately emphasising how PlayStation has many more exclusive games[77] and questions being raised about how much Sony pays for such arrangements with third-party developers.[78] It has long been recognised that exclusivity arrangements *can* be restrictive of competition by effect and, if so, illegal under EU and UK competition law.[79] Whether any interested party will attempt to probe these arrangements further will have to be seen.

3. Mergers and Acquisitions

When one compares the extent of review into mergers and acquisitions in the video game industry with the minimal enforcement against anticompetitive agreements and abuses of dominance, this branch of EU and UK competition law appears bountiful, brimming with

[74] *Valve* (n 60) para paras 480-482; *Valve v Commission* (n 61) [207]-[208].
[75] *Valve* (n 60) para paras 500-504; *Valve v Commission* (n 61) [214]-[220].
[76] *Valve v Commission* (n 61) [174]-[177].
[77] Kris Holt, 'Microsoft: "Sony Has More Exclusive Games … Many of Which Are Better Quality"' *engadget* (24 November 2022) <https://www.engadget.com/microsoft-sony-exclusive-games-quality-playstation-xbox-activision-blizzard-192512776.html> accessed 16 December 2024.
[78] Luke Plunkett, 'Sony Might Have to Reveal What It Pays for Exclusives, Court Says' *Kotaku* (2 March 2023) <https://kotaku.com/playstation-xbox-exclusive-exclusivity-reveal-cost-pay-1850181632> accessed 16 December 2024.
[79] Case 23/67 *Brasserie de Haecht v Consorts Wilkin-Janssen* EU:C:1967:54; Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* EU:C:1991:91.

decisions to dissect. There have been at least seven investigations by the European Commission[80] and two by UK competition authorities.[81]

Nevertheless, the seeming abundance of legal activity here needs to be put in context. EU merger control is primarily initiated through compulsory notification to the European Commission[82] of concentrations (mergers, acquisitions, full-function ventures)[83] with a Community dimension.[84] In such circumstances, the European Commission has sole jurisdiction throughout the EU to reach a conclusion on their legality,[85] prohibiting those that significantly impede effective competition.[86] Since coming into force in 1990, the European Commission has issued decisions on over 8,000 proposed concentrations.[87] Just seven investigations related to the video games industry is therefore a drop in the ocean. In comparison, the UK does not have a compulsory merger notification regime. In determining whether a merger will substantially lessen competition pursuant to Part 3 of the Enterprise Act 2002, the CMA can undertake investigations in response to voluntary notification of a proposed transaction by the parties[88] or review completed mergers,[89] potentially requiring them to be unravelled. Still, out of almost 2,000 UK merger decisions from 2004 to the end of 2023,[90] only two of them have been in the video games industry.

This scarcity of investigations may reflect jurisdictional limitations that cannot capture mergers and acquisitions in this sector. The ability for EU and UK competition authorities to review transactions is primarily based on turnover. Mandatory review by the European Commission is triggered by turnover by each of the parties of at least €250 million or €100 million in the EU in the preceding financial year,[91] while the CMA primarily scrutinises transactions where turnover of the acquired business in the UK exceeds £70 million.[92] To illustrate the jurisdictional misalignment, Microsoft's $7.5 billion acquisition of ZeniMax (parent of Bethesda and id Software, makers of *The Elder Scrolls, Fallout, Doom*) did *not* meet EU

[80] *Vivendi/Activision* [2008] (M.5008); *BDMI/FCPI/Blue Lion Mobile* [2010] (M.5998); *Tencent Holdings/Supercell OY* [2016] (M.8090); *Activision Blizzard/King* [2016] (M.7866); *Sports Direct International/GAME Digital* [2019] (M.9429); *Microsoft/ZeniMax* [2021] (M.10001); *Microsoft/Activision Blizzard* [2023] (M.10646).
[81] *Completed acquisition by Game Group plc of Game Station Limited* [2007] (OFT); *Game Group PLC and Games Station Limited* [2008] (CC); *Anticipated Acquisition by Microsoft of Activision Blizzard, Inc: Final report* [2023] (CMA).
[82] EUMR art 4(1).
[83] ibid art 3.
[84] ibid art 1(2) and 1(3).
[85] ibid art 21(2) and 21(3).
[86] ibid art 2(3).
[87] See <https://competition-policy.ec.europa.eu/mergers/statistics_en> accessed 16 December 2024.
[88] Enterprise Act 2002 s 96.
[89] ibid s 22.
[90] See <https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes> accessed 16 December 2024.
[91] EUMR art 1(2) or 1(3).
[92] Enterprise Act s 26. It also has jurisdiction where the parties' combined UK market share is at least 25%, which is unlikely to be met in games development and publishing (but more plausible if combining distribution channels).

turnover requirements.[93] It only reached the European Commission because the parties voluntarily asked for it to review the proposal, as ZeniMax did not generate sufficient turnover.[94] Because of these jurisdictional thresholds, neither the European Commission nor the CMA has reviewed the $12.7 billion acquisition of Zynga (*Farmville, Words with Friends*) by Take-Two (*Civilization, Grand Theft Auto, Red Dead*), Sony's acquisition of Bungie (*Halo, Destiny*) for $3.7 billion, or Electronic Arts paying a total of $5 billion since 2020 to acquire Codemasters, Playdemic, and Glu Mobile.[95] This is not just a problem for gaming: Facebook's 2014 acquisition of WhatsApp for $19 billion also did not meet the turnover thresholds for automatic scrutiny by the Commission, which was, like *Microsoft/ZeniMax,* reliant on the willingness of the parties to request its approval.[96] Concerns that technology giants are engaging in "killer acquisitions" to eliminate nascent rivals have fostered discussions of supplementing turnover-based merger control thresholds with additional thresholds based on the *value* of the transaction.[97] If we were similarly concerned about the lack of scrutiny for mergers in the video games industry, especially given the evident strategic and financial significance of these transactions to the acquirers, this jurisdictional reform would seem advisable.

But even with the few merger reviews that *have* been undertaken involving video game companies, not all of them were fully reasoned. Three of the seven investigations taken by the Commission were concluded according to the simplified procedure of short-form decision-making: the joint acquisition in 2010 of Blue Lion Media, an early pioneer of live multiplayer mobile-based gaming, by media conglomerate Bertelsmann and former French mail monopolist La Poste;[98] the 2016 acquisition by Chinese conglomerate Tencent, active as a publisher and developer of many successful mobile games (*Call of Duty: Mobile* and *Pokémon: Unite*), of the majority of shares in mobile game developer Supercell (*Clash of Clans*);[99] and Sports Direct acquiring GAME, a prominent UK console and software retailer, in 2019.[100] All the Commission does in such short-form decisions is conclude that they fall within the categories stipulated in paragraph 5 of the Notice on Simplified Procedure, without any

[93] *Microsoft/ZeniMax* (n 80) para 6.
[94] ibid para 7. This is possible through EUMR art 4(5). Member States can also request Commission review under EUMR art 22, but only if the transaction falls within national jurisdictional rules: Joined Cases C-611/22 P and C-625/22 P *Illumina v Commission* EU:C:2024:677.
[95] Mergers below EU turnover thresholds may still be reviewed by Member State authorities based on national jurisdictional requirements, some of which are now value-based (e.g. Germany, Austria). It might be that some national authorities did review these transactions, just not the European Commission or UK CMA.
[96] *Facebook/WhatsApp* [2014] (COMP/M.7217) para 4.
[97] See Richard Bunworth, 'Pre-Emptive Acquisitions in the Technology Sector: Is It Time to Reconsider the Turnover Thresholds?' (2021) 52 IIC 734.
[98] *BDMI/FCPI/Blue Lion Mobile* (n 80).
[99] *Tencent/Supercell* (n 80).
[100] *Sports Direct/GAME* (n 80).

further analysis of the facts.[101] While the turnover of the joint venture in *BDMI/FCPI/Blue Lion Mobile* was indeed relatively small, and the market share increments in all affected markets were low in *Tencent/Supercell*, insights into the Commission's thinking on the rapidly evolving mobile gaming markets have been lost through it closing these investigations without meaningful substantive reasoning. In contrast, the brief approval of a non-gaming store acquiring a specialist retailer in *Sports Direct/GAME* seems a more acceptable case for prioritising administrative efficiency.

But do even the more substantially rationalised decisions on mergers and acquisitions in the video game industry show careful scrutiny of their implications for competition and, ultimately, gamers? It appears to depend on whether the transaction is horizontal or non-horizontal, and not in the way this distinction usually affects the intensity of review.

Horizontal Effects: Vivendi, Activision Blizzard, King, GAME/Gamestation et al

An unusual aspect of merger decisions in the video games industry is how relatively uncontentious the effects of horizontal concentrations have been. A horizontal concentration is where firms in the same market combine (eg a games developer with another games developer). Because this necessarily involves the loss of direct competition between former rivals, EU and UK authorities have traditionally emphasised that horizontal effects tend to be more likely to harm competition than non-horizontal concentrations.[102] In reaching conclusions on whether the merged entity will itself lessen competition (referred to as "non-coordinated effects"), the authorities both take into account similar considerations: the combined post-merger market share; whether the parties are especially close competitors with each other; the ease with which consumers could switch away to alternative providers; and whether one of the parties is an important competitive force, the amalgamation of which into a larger enterprise would reduce competitive pressure and/or innovation on the market.[103] Against these risks arising from the merger, the Commission and CMA also take into account a series of factors that could neutralise any issues – powerful buyers, market entry – and counterbalancing positive efficiencies arising from the concentration.[104]

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[101] Commission Notice on a Simplified Treatment for Certain Concentrations under Council Regulation (EC) No 139/2004 on the Control of Concentrations between Undertakings 2023 (C 160/01).
[102] Guidelines on the Assessment of Non-horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings ('EU N-HMG') 2008 (OJ C 265/07) paras 11–14; Merger Assessment Guidelines 2010 (CC2 (Revised) OFT1254) para 5.6.1. The 2021 update to the UK guidelines seems to have rowed back from this position: Merger Assessment Guidelines ('UK MAG') 2021 (CMA129) para 7.7.
[103] Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between Undertakings ('EU HMG') 2004 (OJ C 31/5) paras 26–38; UK MAG para 4.6-4.15, 4.20-4.25, 4.35-4.38. Consideration of an "important competitive force" often concerns the removal of a "maverick firm": a business with a strong impact on competition that is disproportionate to its relatively small market share. This might be through aggressively low pricing, influential decision-making, or exceptional innovation, any of which could be extinguished if incorporated into a larger, less feisty rival.
[104] EU HMG paras 64–88; UK MAG para 4.16-4.20, 8.1-8.46.

On four occasions these factors have structured EU or UK analysis of the horizontal effects of mergers and acquisitions within the video games industry.[105] First, the European Commission reviewed the $1.7 billion merger in 2008 between Vivendi Games and Activision to create Activision Blizzard.[106] Second, the Commission later investigated the 2016 acquisition by Activision Blizzard of King, creator of famous mobile games including *Candy Crush*, for $5.9 billion.[107] In both instances, the Commission found that these combinations would not significantly impede effective competition at Phase I of the investigation, unconditionally permitting them to proceed without the need for further detailed scrutiny. Third, the Commission reviewed the horizontal implications of *Microsoft/Activision Blizzard* in 2023, fearing no issues with regard to markets in which the parties overlapped.[108] Fourth, in 2007 and 2008 the UK Office of Fair Trading (OFT) and the Competition Commission (CC) both investigated GAME's acquisition of Gamestation for £74 million from Blockbuster.[109] Unlike those reviewed by the Commission, this was a combination at the retail level, with over 600 outlets between them in the UK. The OFT had considerable concerns about the impact on competition at Phase 1, with which CC at Phase 2 disagreed, thereby permitting the acquisition – but only just.[110]

A series of themes can be distilled from these decisions on horizontal mergers in the video games industry.

First, there has generally been a lack of specificity as to the markets affected by the concentrations reviewed. How the relevant product and geographic markets impacted by the merger are defined can influence the analysis of its competitive effects.[111] Imagine a merger between two of only three UK-based developers of historical strategy video games for PC. If the market on which they operate is defined broadly – eg "global developers of all video games worldwide" – it appears inconsequential for competition, given the worldwide abundance of developers of all genres. However, if it is decided that the relevant market is narrower – eg "UK developers of historical strategy video games for PC" – then it combines two of only three competitors, creating a duopoly and potentially significant market power. Despite the importance of market definition, in all instances of EU review the Commission has been relatively ambivalent in its conclusions. There *may* be a single market for all video games;

[105] Horizontal effects were briefly considered in *Microsoft/Zenimax* but given the very low market shares on overlapping markets, the emphasis was primarily upon vertical effects: *Microsoft/ZeniMax* (n 80) paras 58–61.
[106] *Vivendi/Activision* (n 80). There were also non-horizontal considerations, discussed later.
[107] *Activision Blizzard/King* (n 80).
[108] *Microsoft/Activision (EU)* (n 80). The more extensive – and problematic – non-horizontal effects are considered in the next section.
[109] These separate predecessor institutions conducted the two-part review that is now undertaken internally within the CMA.
[110] The four members of the CC were split down the middle, so the Chair's approving vote led to unconditional clearance.
[111] EU HMG para 10. The CMA increasingly downplays the importance of market definition: UK MAG para 9.1-9.5.

separate markets for games on each console and PC; distinctions between online and offline gaming or AAA and non-AAA games; and exclusive markets for each game genre or distribution model (physical or digital direct purchase, free-to-play, subscription-based services). Or there may not be.[112] While consensus seems to have arisen that games developed for mobile devices are not in the same market(s?) as those for PC and consoles,[113] the broader uncertainty has not been without criticism.[114] Yet the *GAME/Gamestation* saga in the UK shows why this matters; market definition decisively influenced the more positive outlook of the CC majority, permitting the deal to go ahead. The OFT and CC both agreed that there were differences between the retail of "mint" (ie new) games and the sale of "pre-owned" (ie second-hand) games, with competition from rivals stronger for the former and weaker for the latter. However as the majority of the CC found that mint and pre-owned were part of the *same* overall product market,[115] the logic was that if the prices for pre-owned games were inflated post-merger, potential consumers would simply switch to purchasing mint versions from supermarket and internet rivals.[116] This approach significantly diluted competitive concerns, whereas finding mint and pre-owned to be *separate* markets would have rendered the competitive consequences of the merger on the pre-owned market much less rosy.

Second, the European Commission has relied heavily on low combined post-merger market shares to rule out competition issues. Wherever it drew the boundaries of the market in *Vivendi/Activision*,[117] most iterations of Activision Blizzard's post-merger market share for video game publishing would be so low – generally under 15% – that harm was deemed unlikely.[118] Similarly with *Activision Blizzard/King*, it was content that regardless of market definition, the merged entity would generally have a share below 20% and on the highest iterations – the UK mobile market and the EEA browser gaming market – it was still below 30%.[119] For the horizontal aspects of *Microsoft/Activision Blizzard*, the Commission only focused on several narrow markets for games development and distribution with a combined 2022 revenue share over 20%, excluding other smaller overlaps between the parties that could be scrutinised.[120] In contrast, opposite conclusions informed the OFT's initial gloomy view of

[112] *Vivendi/Activision* (n 80) paras 15–29; *Activision Blizzard/King* (n 80) paras 18–32; *Microsoft/Activision (EU)* (n 80) paras 49–84, 98–109.
[113] *Microsoft/Activision (EU)* (n 80) para 61,104.
[114] Martínez (n 6).
[115] *GAME/Gamestation (CC)* (n 81) para 6.38-6.40.
[116] ibid paras 7.30, 7.101. Although the minority disagreed, commentators were supportive: Richard Murgatroyd, Adrian Majumdar and Simon Bishop, 'Grand Theft Antitrust: Lessons from the GAME/Gamestation Transaction' (2009) 30 ECLR 53.
[117] This goes some way to explaining why the Commission has often been ambivalent on market definition.
[118] *Vivendi/Activision* (n 80) paras 47, 61.
[119] *Activision Blizzard/King* (n 80) paras 39–40.
[120] *Microsoft/Activision (EU)* (n 80) paras 131–135, 178–179. With regard to game development and publishing, it only looked at RPGs on PC, racing and flying games on PC and console, action and adventure games on PC and consoles, and shooters on console. This therefore excluded overlaps for fighting games, RPGs on console, and shooters on PC. In additional, it considered distribution of games on PC and console.

GAME/Gamestation. Even in the most competitive environment, the retail of "mint" games, the post-merger share was around 40%,[121] which it considered especially problematic in the knowledge that many other games retailers had recently shrunk.[122]

Third, the absence of concerns from the European Commission and differences in views of the UK authorities were greatly influenced by the strength of rivals to the merged entity. In *Vivendi/Activision,* even where Activision Blizzard might have a more significant market presence, the Commission highlighted that it would not be the market leading video games publisher,[123] especially noting the stronger positions of Electronic Arts across consoles and PCs, the pressure from Ubisoft, Take2, and Atari, plus Microsoft, Nintendo, and Sony on their respective consoles.[124] Little would stop players of Activision Blizzard games unhappy with its post-merger offering switching to other games.[125] The same was true of the mobile gaming market with *Activision Blizzard/King*,[126] where the Commission also noted that creating these games was considerably easier than for PC or consoles, as evidenced by the thousands of new titles released each year, lower capital and technical requirements, and the success of some titles produced by a single person (eg *Flappy Bird*).[127] It also found that entry and expansion was facilitated by the ease of distribution afforded by Apple's App Store and Google Play for mobile games.[128] The strength of rivals played a significant role in the Commission quickly denying that there would be issues with the overlap between Microsoft and Activision Blizzard in each gaming genre it reviewed, noting the influence of, *inter alia*, Embracer (*Eve Online*) and Tencent (*Path of Exile*) in the PC RPG segment, or Epic (*Fortnite*) and EA (*Battlefield*) in the shooter genre.[129] At the distribution level, it also believed that a combination of Microsoft's console and PC digital stores with Activision's Battle.net site would still be constrained by Sony as a console distributor and powerful online PC stores (eg Steam).[130] In contrast, a split on the pressure applied to GAME/Gamestation after the concentration also animated the OFT/CC disagreement. While the OFT accepted that there had been growth in supermarket and internet sales,[131] it believed that the parties still had the retail edge owing to their extensive stock of titles, the immediacy of purchases, and the provision of in-store sales advice.[132] The situation was thought to be even worse for pre-owned games, where the OFT

[121] *GAME/Gamestation (OFT)* (n 81) para 28.
[122] ibid paras 35-37.
[123] *Vivendi/Activision* (n 80) para 62.
[124] ibid paras 47-59.
[125] ibid para 64.
[126] *Activision Blizzard/King* (n 80) para 42.
[127] ibid paras 48-49.
[128] ibid paras 49-51.
[129] *Microsoft/Activision (EU)* (n 80) paras 202, 214, 230, 244.
[130] ibid para 257.
[131] *GAME/Gamestation (OFT)* (n 81) para 8.
[132] ibid paras 10, 21-24.

considered it unlikely that rivals would expand into this space,[133] and internet sales less viable owing to reduced opportunities to inspect products and perceived difficulties with returning defective games.[134] In contrast, the CC emphasised the considerable pressure from rival retailers of "mint" games, with all stores facing multiple rivals within half a mile.[135] Although the majority recognised that there were fewer alternatives for pre-owned sales and trade-ins,[136] they stressed that internet purchases did include schemes for faulty and mis-described products,[137] along with evidence that online second-hand sales were a realistic substitute (eg through eBay).[138]

Fourth, the lack of especially close competition between the merging parties has been a key factor in reaching positive conclusions where concerns might most likely have arisen. In *Vivendi/Activision*, the only major issue for the Commission was the impact of the merger on online gaming, where Activision Blizzard would be the market leader owing to the success of *World of Warcraft*. Its share of the overall EEA market for online gaming would be 40-50%, with almost 60% in some countries.[139] But this was still permitted owing to the lack of close competition between Vivendi and Activision. Evidence collected from market participants indicated a widespread belief that their game offerings were distinguished, as Activision focused on offline console gaming while Vivendi generated significant revenue from online PC gaming.[140] Dependent on how the market was defined, they might not even be competitors.[141] A similar distinction justified the clearance of Activision Blizzard's subsequent acquisition of King: the very significant presence of the merged entity in mobile gaming overwhelmingly came from one of the parties, King, with Activision Blizzard only having a very limited role, if any.[142] Beyond feedback from market participants, the Commission also looked to mobile download and revenue rankings to contrast King's very strong presence with Activision Blizzard games not featuring in the top 10.[143] As a result, the parties were not especially close competitors.[144] Both the OFT and CC in *GAME/Gamestation* acknowledged that the parties were each other's closest rivals based on offering, presence, and customer feedback.[145] Still, other factors mentioned previously nevertheless persuaded the CC majority to allow it to proceed.

[133] ibid paras 38-40, 58-62.
[134] ibid paras 45-46.
[135] *GAME/Gamestation (CC)* (n 81) para 4.76-4.77, 7.8-7.20.
[136] ibid paras 7.23-7.29, 7.54-7.61.
[137] ibid para 7.31.
[138] ibid paras 7.66-7.72, 7.105-7.106.
[139] *Vivendi/Activision* (n 80) para 48.
[140] ibid para 63.
[141] ibid para 49.
[142] *Activision Blizzard/King* (n 80) para 41.
[143] ibid paras 45-47.
[144] ibid para 43.
[145] *GAME/Gamestation (OFT)* (n 81) paras 16–20, 28; *GAME/Gamestation (CC)* (n 81) para 4.76-4.77.

Finally, there is an alternative theory of competitive harm that has been almost entirely absent from EU and UK analysis into video games concentrations. In a market with only a handful of rivals selling an homogenous good and shielded by barriers to entry, it may be possible for the firms to engage in anti-competitive coordination through increasing prices, reducing output, or degrading quality.[146] This will however only materialise if the market is transparent, rivals and customers are weak to respond, and there exists a punishment mechanism (eg a price war) to deter deviations from the coordinated behaviour.[147] Where a merger contributes to the likelihood of such "coordinated effects", it may also be prohibited by competition authorities.[148] This is rare.[149] Still, it is striking that only one decision in the video games industry – *Vivendi/Activision* – has really engaged with this theory of harm and even then, the Commission seemed to all but rule it out as a possibility. At a structural level, the Commission simply thought that game publishing markets, however defined, did not look sufficiently oligopolistic: while high shares for games were enjoyed by Sony, Microsoft, and Nintendo on their own platforms, these did not stretch across platforms, and the multi-platform publishers tended to have variable presences.[150] Additionally, the Commission seemed doubtful that anticompetitive coordinated effects were actually possible. There was a lack of product homogeneity that is usually at the heart of coordinated effects analysis.[151] Furthermore, the need to innovate in response to the short life cycles of games and improving hardware drove competition.[152] Assuming that video games remain highly differentiated and innovative products, it therefore seems highly unlikely that competition authorities will block mergers due to coordinated effects.

Non-Horizontal Effects: Microsoft, ZeniMax, Activision Blizzard et al

Non-horizontal concentrations have traditionally been subjected to less scrutiny by antitrust authorities.[153] This is because they do not lead to the loss of competition between direct rivals, instead bringing together firms that operate upstream or downstream in the same product/service supply chain ("vertical") or that are neither horizontally nor vertically related ("conglomerate"). What is unusual about merger control in the video games sector is how non-horizontal effects have been the main source of competitive problems. Beyond Microsoft's

[146] EU HMG paras 39–48; UK MAG para 6.1-6.13.
[147] EU HMG paras 49–57; UK MAG para 6.14-6.21. See Case T-342/99 *Airtours v Commission* EU:T:2002:146 [62].
[148] It need not be a horizontal concentration, as non-horizontal concentrations can also facilitate coordinated effects. However, coordinated effects are a more tangible consequence of horizontal concentrations and it is in this context where the Commission discussed them in *Vivendi/Activision*.
[149] As the CMA has admitted: UK MAG para 6.5.
[150] *Vivendi/Activision* (n 80) para 68.
[151] ibid para 66.
[152] ibid para 67.
[153] EU N-HMG paras 11–14.

acquisition of Activision Blizzard reviewed by both the Commission and CMA,[154] the former has also scrutinised the non-horizontal effects of two other video games mergers.[155]

The primary theory of harm regarding vertical effects is that a single business operating at different levels of the supply chain may have the ability and incentive to exclude rivals. There are two different ways in which this can be achieved: cutting off or degrading access for downstream rivals (eg console systems) to an important upstream input of the merged entity (eg important game franchises) to benefit the merged entity's downstream business ("input foreclosure");[156] or denying or degrading access for upstream rivals (eg game developers/publishers) to an important downstream outlet of the merged entity (eg a console system) to benefit the merged entity's upstream business ("customer foreclosure").[157]

Vertical effects were first considered by the Commission in *Vivendi/Activision* from two different angles, albeit briefly. Most significantly, the Commission probed potential issues arising in the relationship between rival video games publishers to Activision Blizzard and Universal Music Group (UMG), a subsidiary of Vivendi.[158] Although UMG could refuse to license songs to the detriment of other developers, the Commission found licensed music not to be a critical component of games, with developers generally opting for in-house or independent compositions.[159] Even with the subgenre of music games where licensed tracks were a much more important input (eg *Guitar Hero*), the Commission found that access to *specific* tracks was not critical, making it feasible to licence music from alternatives to UMG.[160] It also speculated that Sony could retaliate by refusing to license its own music to Activision Blizzard games.[161]

In contrast, the European Commission's 2021 clearance decision in *Microsoft/ZeniMax* was much more extensive in its engagement with potentially harmful vertical effects, reviewing the relationship between video game publishing and digital distribution through the Microsoft Store.[162]

First, the Commission considered customer foreclosure as a theory of harm: whether limiting the games available through the Microsoft Store only to those of Microsoft and

[154] *Microsoft/Activision (EU)* (n 80); *Microsoft/Activision (CMA)* (n 81).
[155] *Vivendi/Activision* (n 80); *Microsoft/ZeniMax* (n 80).
[156] EU N-HMG paras 31–57.
[157] ibid paras 58-77.
[158] *Vivendi/Activision* (n 80) paras 72–90. The Commission was short in its dismissal of customer foreclosure (ie of other music publishers not having sufficient video game creators to whom to license their music): ibid paras 82, 90. It also briefly denied the likelihood of vertical effects arising from Activision's role in the UK as a wholesale distributor of games and logistics service agent vis-à-vis rival game publishers who had several alternative distribution channels: ibid paras 91-102.
[159] *Vivendi/Activision* (n 80) paras 77–81.
[160] ibid paras 82-88.
[161] ibid para 89.
[162] *Microsoft/ZeniMax* (n 80) para 59.

ZeniMax after the acquisition (or subjecting others to worse terms) would exclude rival video game publishers.[163] This was deemed unlikely. While access to the digital Microsoft Store and ultimately Xbox users was an important distribution channel for games publishers (30-40% in 2019 of all digital sales in the EEA), they could still rely upon Sony's digital store (50-60% of digital downloads in 2019) or Nintendo's digital store (5-10% in 2019) to reach gamers.[164] Furthermore, Microsoft could not depend entirely on ZeniMax for all of its Xbox games, especially given the desirability of third-party content.[165] Even in the unlikely event that Microsoft could harm other games publishers, there was little incentive to do so: restricting Xbox users to ZeniMax games and denying their access to third-party games with considerable brand loyalty – mentioning, among others, *Grand Theft Auto* and *Assassin's Creed* – would be irrational and unprofitable, given how the success of consoles depends upon their broad array of games.[166]

Second, from an input foreclosure perspective, the Commission also dismissed the risk to Sony and Nintendo of ZeniMax games being exclusively available via the Microsoft Store on Xbox.[167] While ZeniMax was found to publish some popular franchises – noting *The Elder Scrolls* and *Fallout* – its games were deemed nonessential for Sony or Nintendo given their limited market share (below 5% of digital video games in 2019), strong competing franchises, and ZeniMax having no games among the 15 bestselling in Europe in 2018.[168] Again, it would also not be in the financial interests of Microsoft to engage in such behaviour post-merger. The significant revenue lost from not distributing ZeniMax games on Sony and Nintendo consoles would not be offset by increased switching from these consoles to Xbox to play exclusive ZeniMax content.[169]

Underpinning *Microsoft/Zenimax* was an interesting analysis of console-exclusive games. The Commission seemed to endorse Microsoft securing more games specifically for Xbox to better compete with Sony and Nintendo, whose greater amount of exclusive content may, the Commission implied, have made them more successful.[170]

Perhaps the Commission struck a nerve. In 2022 Microsoft attempted to acquire Activision Blizzard for $68.7 billion, a move scrutinised by antitrust authorities worldwide. Despite the controversy surrounding the UK CMA's decision, the European Commission had

[163] ibid para 63.
[164] ibid para 70.
[165] ibid paras 70-71.
[166] ibid paras 82-88.
[167] ibid para 94.
[168] ibid paras 102-104.
[169] ibid paras 115-124.
[170] ibid paras 105, 118.

the same concern (and, indeed, one more). The difference in outcomes came entirely down to contrasting conclusions on Microsoft's proposed remedy.

From the deal's announcement, the acquisition was caught up in the narrative of "console wars" between Microsoft and Sony,[171] but neither the CMA nor the European Commission found any issues in this regard. Although the CMA's provisional findings of February 2023 expressed concerns about Microsoft harming Sony through making Activision games – primarily *Call of Duty* – Xbox exclusives,[172] an addendum published in March 2023 made clear that it would ultimately reach a difference conclusion.[173] When it came to the final decisions of the CMA and European Commission in spring 2023, both thought that it made no business sense for Microsoft to make Activision games exclusive to Xbox.[174] The removal of commercially sensitive information from the public decisions makes it difficult to ascertain specifics, but it is clear that both recognised the significant loss of revenue from Microsoft no longer making *Call of Duty* available on Sony consoles that would not be compensated by PlayStation users switching to Xbox.[175] The losses must have been enormous, especially given that the CMA acknowledged that such a strategy would significantly improve Game Pass, Microsoft had done the same following previous acquisitions (eg *Redfall* and *Starfield* of ZeniMax), and that it could have survived the reputational backlash.[176] Despite all this, both the European Commission and the CMA found that the major financial losses for Microsoft would prevent any harm to Sony from arising.[177]

In contrast, it was the potential implications for cloud game streaming that caused *both* the CMA and European Commission to conclude that the deal should be prohibited, unless acceptable remedies were offered.[178] Microsoft's protestations that streaming games from the

[171] Mark Sweney, 'Microsoft Takeover of Call of Duty Maker Wipes $20bn off Sony Shares' *Guardian* (19 January 2022) <https://www.theguardian.com/technology/2022/jan/19/microsoft-takeover-call-of-duty-games-firm-wipes-20bn-off-sony-shares-playstation-activision-blizzard-games> accessed 16 December 2024.
[172] The CMA also considered partial foreclosure through degraded operation, higher prices, or fewer features on Sony versions of *Call of Duty*, but ultimately found these unlikely to reduce Sony's ability to compete: *Microsoft/Activision (CMA)* (n 81) para 7.295-7.303.
[173] CMA, 'CMA Narrows Scope of Concerns in Microsoft – Activision Review' (24 March 2023) <https://www.gov.uk/government/news/cma-narrows-scope-of-concerns-in-microsoft-activision-review> accessed 16 December 2024.
[174] *Microsoft/Activision (CMA)* (n 81) para 7.346; *Microsoft/Activision (EU)* (n 80) paras 400–413.
[175] *Microsoft/Activision (CMA)* (n 81) para 7.396, 7.399. One specific is that 80-90% of Activision's 2021 revenue on consoles came from Sony: *Microsoft/Activision (EU)* (n 80) para 403.
[176] *Microsoft/Activision (CMA)* (n 81) para 7.354-7.384
[177] The emphasis was on Sony because the Nintendo Switch was thought not to be as close a rival based on technical capabilities, games catalogue, and demographic: ibid 7.56-7.87. Not that it changed their conclusions, but it is interesting to note that the CMA and Commission disagreed on the previous question of whether Microsoft *could* harm Sony – regardless of whether it wanted to – by denying access to Activision games. The CMA thought *Call of Duty* players were a significant part of Sony's revenue, would not have bought a PlayStation if it were unavailable, and alterative games (*Fortnite, Battlefield*) were poor substitutes: ibid 7.183-186, 7.262-7.270. The European Commission did not disagree with these reflections but thought that, as Sony was so well resourced and arguably more successful than Microsoft with its AAA exclusives, it could create its own franchise or negotiate/sponsor a rival from a third-party developer: *Microsoft/Activision (EU)* (n 80) paras 392–398.
[178] *Microsoft/Activision (CMA)* (n 81) para 8.442; *Microsoft/Activision (EU)* (n 80) para 571.

cloud was an overstated and unimportant novelty it wasn't interested in,[179] mainly used just for trying games without full download,[180] were squarely rejected (in part by internal evidence from Microsoft). The CMA especially focused upon the transformative potential of cloud streaming as a means of accessing content, changing the types of games played and devices used, and requiring from streaming services different assets to consoles (eg cloud infrastructure with minimal latency).[181] In analysing this rapidly developing market, the authorities reached similar conclusions on two preliminary issues. First, they found that Microsoft was already in a very strong position, much more so than with console gaming. Microsoft's xCloud, provided as part of its Game Pass Ultimate subscription, was thought to have 60-80% of the UK monthly active users for cloud game streaming.[182] It also enjoyed several competitive advantages, including ownership of its Windows and Xbox operating systems (OSs) with a wide array of games and no licensing fees for their use, existing and scalable cloud infrastructure, and relationships with third party developers.[183] Second, both authorities dismissed suggestions that Activision's popular multiplayer shooter games were not suitable for cloud streaming owing to latency concerns; absent the acquisition, they believed Activision would make its games available via cloud streaming services in the immediate future.[184] With these two factors taken into account, the CMA and Commission both found that Microsoft had the ability to harm rival cloud streaming services severely by making Activision content exclusive to itself. Largely redeploying their earlier analysis of the importance of Activision games for the console market,[185] the CMA was especially concerned that competitors on this nascent market would be significantly harmed through lack of access to *Call of Duty, World of Warcraft*, or *Overwatch*,[186] while the European Commission emphasised their powerlessness to develop counterstrategies to stop users flocking to Microsoft's cloud streaming service.[187] But unlike with the consoles market, both the CMA and European Commission found that it *would* be in Microsoft's financial interest to make Activision content exclusive to its service, outweighing revenue lost from not licensing Activision games to rival streaming platforms.[188]

The different outcomes from the investigations at UK and EU level resulted purely from divergent appraisals of Microsoft's remedial commitments. Generally, Microsoft promised to license current and future Activision games on a royalty-free basis to certain cloud gaming

[179] *Microsoft/Activision (CMA)* (n 81) para 8.14-8.60; *Microsoft/Activision (EU)* (n 80) paras 481–492.
[180] *Microsoft/Activision (CMA)* (n 81) para 5.75-5.81.
[181] ibid paras 5.82-5.97.
[182] ibid paras 8.86-8.90.
[183] ibid paras 8.96-8.225.
[184] ibid paras 8.226-8.280; *Microsoft/Activision (EU)* (n 80) paras 494–511.
[185] *Microsoft/Activision (CMA)* (n 81) para 8.287-8.346; *Microsoft/Activision (EU)* (n 80) paras 513–529.
[186] *Microsoft/Activision (CMA)* (n 81) para 8.287-8.346.
[187] *Microsoft/Activision (EU)* (n 80) paras 534–534.
[188] *Microsoft/Activision (CMA)* (n 81) para 8.369-8.377; *Microsoft/Activision (EU)* (n 80) paras 547–555.

services for ten years, allowing gamers who purchase Activision titles to play a PC-equivalent via eligible cloud streaming services.[189] Following several revisions in response to market testing, the European Commission was ultimately satisfied that the final package of commitments would address its concerns.[190] Indeed, it believed that this situation was *better* than if Activision were not acquired, as games already owned would be immediately streamable via almost all cloud gaming services, thereby considerably speeding up their roll-out in the EEA.[191] The CMA was not so convinced. It wanted a structural solution, rather than a set of rules that risked ossifying business behaviour in a nascent and dynamic market.[192] More specifically, the CMA thought the remedy too focused on "bring-your-own-game" services, where users *already* had the ability to play the game on another platform; were a cloud streaming service wishing to create its own multi-game subscription for users without pre-existing access to Activision content, it would have to negotiate licences with Microsoft.[193] The CMA was also displeased with the commitment to facilitate streaming only of the Windows PC versions of games and any other OS versions (eg MacOS) that Activision happened to release, without a firm requirement to actually create alternatives formats. As Activision had released very few versions of its games for non-Windows OSs in the past, this meant that cloud gaming services either had to run on Windows – incurring significant licensing fees – or port the games themselves at great expense.[194] This was all combined with concerns about timeframes, circumvention, market distortions, and enforcement.[195] As a result, the CMA prohibited the acquisition with its final order on the 22nd August 2023.[196]

The CMA's disapproval led Brad Smith, President of Microsoft, to claim that this was its 'darkest day in our four decades in Britain', that it would 'discourage innovation and investment in the United Kingdom', and he implored the Prime Minister to review the CMA's role.[197] Like some commentators,[198] Smith instead praised the approach of the European Commission, which he considered more open to technological investment.

[189] *Microsoft/Activision (CMA)* (n 81) para 11.45-11.47; *Microsoft/Activision (EU)* (n 80) paras 759–767.
[190] *Microsoft/Activision (EU)* (n 80) para paras 875-899.
[191] ibid paras 886-887.
[192] *Microsoft/Activision (CMA)* (n 81) para 11.83-11.87.
[193] ibid paras 11.93-11.102. The Commission thought this unnecessary: *Microsoft/Activision (EU)* (n 80) paras 815–821.
[194] *Microsoft/Activision (CMA)* (n 81) para 11.103-11.110. The Commission thought an obligation to make all Activision games available on non-Windows OSs unnecessary and the complaint that this remedy would force cloud streaming services to pay fees for using Windows OS outside the scope of its concerns: *Microsoft/Activision (EU)* (n 80) paras 827–828, 833–838.
[195] *Microsoft/Activision (CMA)* (n 81) para 11.114-11.127.
[196] Microsoft and Activision Merger Inquiry Order 2023.
[197] Christopher Dring, 'Microsoft: "This Is the Darkest Day in Our Four Decades in Britain"' *GamesIndustry.biz* (27 April 2023) <https://www.gamesindustry.biz/microsoft-this-is-the-darkest-day-in-our-four-decades-in-britain> accessed 16 December 2024.
[198] eg Paul Tassi, 'EU Microsoft Activision Approval Contrasts the Deeply Odd UK Rejection' *Forbes* (16 May 2023) <https://www.forbes.com/sites/paultassi/2023/05/16/the-cma-stands-by-its-deeply-odd-microsoft-activision-decision-after-eu-approval/> accessed 16 December 2024.

Such responses were overly simplistic. Merger review is context-specific and, in these instances, inherently speculative of future developments based on limited evidence on which regulators can reasonably disagree. *Both* authorities had the same misgivings about the implications for the nascent cloud gaming market but differed in their satisfaction with the remedies offered. Furthermore, any suggestion that the CMA was "stricter" than its EU counterpart completely overlooks that the transaction was additionally prohibited by the European Commission – absent remedial commitments – owing to a second theory of harm not even reviewed in the UK: that rival PC operating systems (eg MacOS, ChromeOS) would be harmed if Microsoft's cloud gaming service with exclusive Activision content became only available on Windows OS.[199]

In any event, the CMA's final order of August 2023 was not so final. On the same day, the CMA announced that Microsoft had proposed acquiring Activision *without* the rights to cloud-stream its games.[200] Instead, the parties committed to divesting the streaming rights for Activision games to Ubisoft for 15 years, to license to cloud gaming services as it sees fit, thereby replicating how Activision would act were it still an independent publisher. While Microsoft may nonetheless license the rights from Ubisoft, it will enter negotiations on the same footing as any other streaming service. Furthermore, various anti-circumvention measures have been agreed and Ubisoft can require Microsoft to port Activision games to non-Windows OSs. The CMA accepted these commitments on 13th October 2023, thereby permitting the broader acquisition of Activision to go ahead in the UK.[201]

Despite this happy ending for Microsoft, the heightened interest in the video games industry that its deal has generated may lead to closer scrutiny by authorities going forward.

4. Abuse of Market Dominance and Ex Ante Regulation

Article 102 TFEU and Chapter II of the UK Competition Act prohibit abuse of a dominant market position. Various business practices by large firms have been scrutinised over the years: excessively high prices,[202] predatory low prices,[203] refusals to grant access or license intellectual property deemed indispensable for others to compete,[204] tying and bundling of

[199] *Microsoft/Activision (EU)* (n 80) paras 642–747. This is the only time conglomerate effects have been significantly analysed in a video games merger in the EU or UK. Limited space prevents detailed discussion.
[200] CMA, 'Microsoft Submits New Deal for Review after CMA Confirms Original Deal Is Blocked' (22 August 2023) <https://www.gov.uk/government/news/microsoft-submits-new-deal-for-review-after-cma-confirms-original-deal-is-blocked> accessed 16 December 2024. It has however acquired them in the EEA, having received EU approval.
[201] *Anticipated Acquisition by Microsoft Corporation of Activision Blizzard (excluding Activision Blizzard's non-EEA cloud streaming rights): Decision on Acceptance of Undertakings in Lieu of Reference*.
[202] Case C-177/16 *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome* EU:C:2017:689.
[203] Case C-62/86 *AKZO Chemie v Commission* EU:C:1991:286.
[204] Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann and Independent Television Publications Ltd v Commission* EU:C:1995:98; Case T-204/01 *Microsoft v Commission* EU:T:2007:289,.

complementary products and services,[205] exclusive dealing,[206] and many other forms of behaviour not deemed competition "on the merits".[207]

To date, there have been no decisions by the European Commission or the CMA pursuant to Article 102 TFEU or Chapter II related to the video games industry. Presumably, this is not because companies in this sector have avoided conduct that might be considered abusive. For example, exclusivity deals between consoles and third-party game developers/publishers are common,[208] the bundling of games with consoles has happened for decades,[209] and consoles are usually sold at a loss.[210] However, the lack of action probably results from the antecedent requirement of a *dominant* market position, which is difficult to establish in the video games sector. Non-dominant firms can lawfully engage in conduct that would otherwise be illegal for companies deemed dominant. Whether dominance exists requires analysis of the strength of rivals currently operating on the market, the potential for entry to challenge its position, and the power of buyers.[211] Although the figures are unclear, merger decisions discussed hitherto indicate that games development and publishing are probably far too fragmented to afford any one company dominance. Perhaps the most likely locus for dominance is in the distribution of digital games for each console (ie PlayStation Store, Microsoft Store for Xbox), but even here it would depend on how broadly or narrowly the market/s are drawn (all sales, digital distribution versus physical, per console or across platforms?). As was explained previously, the Commission and CMA remain agnostic on who competes with whom and ultimately therefore whether any of the distribution channels might be dominant.

The lack of Article 102 TFEU and Chapter II decisions directly *against* video games companies is not, however, the end of the story. This is because the gaming industry is also the *beneficiary* of this facet of competition law being enforced against the giants of the digital economy, particularly Apple and Google. Furthermore, efforts to tame the tech titans are shifting attention away from enforcing the prohibitions of abusive conduct towards ex ante regulation. Article 102 TFEU and the DMA in the EU, plus Chapter II and the DMCCA in the UK, are complementary legal tools for addressing the incredible market power of digital

[205] *Microsoft (2007 GC)* (n 204); Case T-604/18 *Google and Alphabet v Commission* EU:T:2022:541.
[206] Case C-680/20 *Unilever Italia v Autorità Garante della Concorrenza e del Mercato* EU:C:2023:33.
[207] See generally Case C-377/20 *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato* EU:C:2022:379.
[208] Plunkett (n 78).
[209] The bundling of *Super Mario Bros* with the NES and *Wii Sports* with the Wii helped both become some of the highest selling games ever.
[210] Eddie Makuch, 'Xbox Loses As Much As $200 On Every Xbox It Sells, Phil Spencer Says' *Gamespot* (2 November 2022) <https://www.gamespot.com/articles/xbox-loses-as-much-as-200-on-every-xbox-it-sells-phil-spencer-says/1100-6508748/> accessed 16 December 2024. Apparently not Sony: *Microsoft/Activision (EU)* (n 80) para 421.
[211] Guidance on the Commission's enforcement priorities in applying [Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings 2009 (OJ C 45/7) paras 9–11.

platforms. While these new regulatory regimes have significant positive implications for mobile gaming and cloud streaming services, the console giants should be wary of comparable scrutiny of their own digital distribution platforms.

Video Games Companies as Beneficiaries of Abuse Claims and Regulation

The dispute between Epic Games and Apple that erupted in 2020 effectively demonstrates how video games publishers benefit from the application of abuse of dominance prohibitions and ex ante regulation to digital platforms. Epic was disgruntled with the terms for distributing *Fortnite* via the Apple App Store (and similarly the Google Play Store).[212] These included Epic paying a 30% cut from all in-app purchases, obligations to use the proprietary payment processing system, and its inability to direct users towards alternative sales channels where the same content may be cheaper and/or Epic receives 100% of the purchase amount ("anti-steering obligations"). Following *Fortnite*'s ejection from the Apple App Store for breaching these terms, Epic brought monopolisation and abuse of dominance claims against Apple and Google all around the world, including before the UK CAT. While Epic itself was not granted permission by the CAT to pursue Apple in the UK,[213] Apple's terms remain subject to other ongoing class actions which allege illegality on similar grounds.[214] Furthermore, Epic was permitted to challenge the terms of the Google Play Store, which has been combined with other collective proceedings alleging that they amount to an abuse of dominance.[215] Beyond such private action against app store terms, in March 2024 the European Commission fined Apple over €1.8 billion for its anti-steering obligations.[216] While this decision was focused on their impact on music streaming apps, anti-steering had been one of the key points of contention between Epic and Apple.

The scarcity of public investigations pursuant to Article 102 TFEU or Chapter II Competition Act must be understood in the context of a changing regulatory backdrop for digital platforms. New ex ante regulations have been adopted at EU and UK level with the intention of altering the behaviour of digital technology firms more decisively than the Commission and CMA can achieve through their existing ex post antitrust powers.[217] Among

[212] For more detailed discussion: CMA, 'Mobile Ecosystems Market Study: Appendix H: Apple's and Google's In-App Purchase Rules' (2022) <https://www.gov.uk/government/publications/mobile-ecosystems-market-study-final-report> accessed 16 December 2024.
[213] *1377/5/7/20 and 1378/5/7/20 Epic Games v Apple and Epic Games v Google* [2021] CAT 4.
[214] *1403/7/7/21 Dr Rachael Kent v Apple*; *1601/7/7/23 Dr Sean Ennis v Apple*.
[215] *1408/7/7/21 Elizabeth Helen Coll v Alphabet*; *1378/5/7/20 Epic Games v Alphabet*.
[216] *Apple – App Store Practices (Music Streaming)* [2024] (AT.40437).
[217] e.g. in August 2024, the CMA closed its Chapter II abuse of dominance investigations into app store terms so that they could instead be taken up with its DMCCA powers: CMA, 'CMA Looks to New Digital Markets Competition Regime to Resolve App Store Concerns' (21 August 2024) <https://www.gov.uk/government/news/cma-looks-to-new-digital-markets-competition-regime-to-resolve-app-store-concerns> accessed 16 December 2024

many other issues in the digital economy, these new regulatory tools are squarely focused on the conditions for distribution via app stores, with significant repercussions for mobile gaming.

The EU's Digital Markets Act (DMA) of 2022 contains obligations which apply to core platform services designated as a 'gatekeeper' in the digital economy.[218] Having been designated in September 2023,[219] the Apple App Store and Google Play Store have been obliged to meet its requirements since March 2024, several of which have implications for gaming app developers distributing via these stores. These include permitting the sale of in-app content for cheaper outside the app,[220] allowing steering towards alternative sales channels where content might be on offer,[221] facilitating use of content purchased elsewhere in apps,[222] permitting the use of alternative in-app payment systems,[223] and allowing users to effectively download alternative apps and rival app stores.[224] Despite various pre-emptive alterations to prevent further regulatory scrutiny,[225] in 2024 the Commission launched investigations into whether the terms of Apple and Alphabet's stores comply with DMA requirements.[226]

The UK Digital Markets, Competition and Consumers Act (DMCCA) was approved in 2024, fully coming into force in 2025. It applies to firms designated by the CMA as having 'strategic market status' in the digital economy.[227] In contrast with the DMA, the conduct requirements that might be imposed under the DMCCA are tailored to the specific firm and are therefore framed in the legislation in a broad, goal-oriented manner.[228] Still, the CMA has already offered indications as to how the competitive conditions for gaming app developers could change in the near future under the DMCCA regime, particularly through its 2022 Mobile Ecosystems Market Study.[229] First, the fee levied on gaming apps by digital stores could fall.

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[218] DMA Art 3.
[219] *Alphabet - Online Intermediation Services - App Stores* [2023] (DMA.100002); *Apple - Online Intermediation Services - App Stores* [2023] (DMA.100013).
[220] DMA art 5(3).
[221] ibid art 5(4).
[222] ibid art 5(5).
[223] ibid art 5(7).
[224] ibid art 6(4).
[225] eg 'An Update on Google Play Billing in the EEA' (19 July 2022) <https://blog.google/around-the-globe/google-europe/an-update-on-google-play-billing-in-the-eea/> accessed 16 December 2024; 'Update on Apps Distributed in the European Union' (25 January 2024) <https://developer.apple.com/news/?id=fsmaf67j> accessed 16 December 2024
[226] 'Commission Opens Non-Compliance Investigations against Alphabet, Apple and Meta under the Digital Markets Act' (25 March 2024) <https://ec.europa.eu/commission/presscorner/detail/en/IP_24_1689> accessed 21 October 2024; 'Commission Sends Preliminary Findings to Apple and Opens Additional Non-Compliance Investigation against Apple under the Digital Markets Act' (24 June 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3433> accessed 12 December 2024.
[227] DMCCA s 2.
[228] ibid s 20 (eg imposing requirements to 'trade on fair and reasonable terms' or prohibiting restrictions on 'how users or potential users can use the relevant digital activity').
[229] CMA, 'Mobile Ecosystems Market Study: Final Report' (2022) <https://www.gov.uk/government/publications/mobile-ecosystems-market-study-final-report> accessed 16 December 2024.

The CMA believes that the profit margins accrued from the up to 30% cut taken by Apple and Google are too high.[230] It suggested that rates as low as 15% would still see profitability for app stores, with savings to developers benefitting consumers through lower prices and more investment in new apps.[231] Any such reductions would disproportionately benefit game app developers: in-app purchases for games accounted for over half of Apple and Google's profits from app-based payments in 2021.[232] Second, we could see increased routes for how games get onto mobile devices. The CMA is of the opinion that side-loading of apps onto a mobile device – ie acquiring an app through the internet rather than an app store – should be possible. Unlike Apple, Google does allow side-loading of content, but the CMA found that over 90% of app downloads on Android devices in the UK in 2021 were still via Google's Play Store.[233] Using the example of Epic's *Fortnite*, it believed that the process for sideloading apps onto Android devices was cumbersome, accompanied by off-putting messages about security, and required manual updating which is not viable with frequently patched content.[234] Side-loading of mobile gaming apps may therefore become much easier in the future. A third potential change identified in the CMA's 2022 Market Study has already been largely resolved: cloud game streaming platforms on Apple mobile products. Streaming high-end games on low-end devices may not be in Apple's commercial interest, given that its business model is partly based on the sale of increasingly more sophisticated hardware.[235] Cloud gaming apps granting direct access to many games also undermine the importance of the App Store for discovering new content.[236] In 2022 the CMA was concerned that the App Store's terms were inhibiting the development of cloud gaming.[237] In particular, Apple prohibited apps that included *collections* of games for streaming, instead requiring each game to be accessible via a separate app, with its own product page, ratings, and search result on the App Store.[238] Such individual app downloads made it difficult for users to quickly shift between and discover titles.[239] It was therefore unsurprising to the CMA that on Android devices, not subject to comparable restrictions, there were ten-times more users worldwide for cloud gaming services than on Apple.[240] However in January 2024, Apple changed its guidelines to allow apps which

[230] ibid paras 4.191-4.198.
[231] ibid paras 7.67-7.68.
[232] ibid paras 6.127-6.128.
[233] ibid para 4.35.
[234] ibid paras 4.105-4.120.
[235] ibid 2.39, 6.247-6.252.
[236] ibid paras 6.238-6.245.
[237] For more detailed discussion: CMA, 'Mobile Ecosystems Market Study: Appendix I: Apple's Restrictions on Cloud Gaming' (2022) <https://www.gov.uk/government/publications/mobile-ecosystems-market-study-final-report> accessed 16 December 2024.
[238] CMA, 'Mobile Ecosystems Final Report' (n 229) para 6.227.
[239] ibid para 6.628.
[240] ibid paras 6.234-6.235.

include a catalogue of games for streaming.[241] As a result of this, the CMA has provisionally concluded that Apple is no longer limiting their growth, making it unnecessary to recommend further remedial action.[242]

It therefore seems likely that mobile and cloud gaming companies are set to be significant beneficiaries from the application of abuse of dominance law and new regulatory regimes to app stores.

Video Games Companies as Subjects of Abuse Claims and Regulation?

Beyond the clear benefits for some video games companies, it is not clear that all firms will come out of this new regulatory landscape entirely unscathed. Digital games distribution by the console giants may be in a precarious position.

One interesting aspect of the CMA's Mobile Ecosystems Market Study was a defence raised by Apple and Google to support their slice of in-app purchases. They argued that the up to 30% commission levied was not just comparable to rival mobile app stores (Samsung, Huawei, Amazon) but also was prevalent with digital distribution platforms for console and PC games.[243] Indeed, Apple claimed that when it decided to set a 30% fee in 2008, it took inspiration from Steam.[244] The CMA thought these inappropriate benchmarks.[245] Especially with regard to console digital distribution, it argued that the business model was different, with little to no margin on consoles being supplemented by game and subscription sales, while Apple and Google were profitable without app store revenue.[246]

Still, what would be the financial and strategic consequences for Sony, Microsoft, and Nintendo if their respective digital game stores *were* subjected to the same conditions as anticipated for Apple's App Store and the Google Play Store? If they could not take a commission from third-party games of more than 15% (as per CMA musings) to reduce prices and foster investment in new titles? If rival digital stores had to be accessible on each console, with pre-installation of the proprietary default prohibited? If side-loading games onto consoles beyond digital stores had to be possible? If giving greater coverage in the digital store and related channels to first-party games over third-party rivals were considered problematic self-

[241] 'Apple Introduces New Options Worldwide for Streaming Game Services and Apps That Provide Access to Mini Apps and Games' (25 January 2024) <https://developer.apple.com/news/?id=f1v8pyay> accessed 16 December 2024.
[242] CMA, 'Mobile Browsers and Cloud Gaming: Provisional Decision Report' (2024) para 12.156 <https://www.gov.uk/cma-cases/mobile-browsers-and-cloud-gaming> accessed 16 December 2024. The final report is due in 2025.
[243] CMA, 'Mobile Ecosystems Final Report' (n 229) para 4.185.
[244] ibid para 4.204.
[245] For PC, it argued that digital distribution had multiple avenues and variable commission rates, even on Steam since 2018: ibid para 4.205.
[246] ibid para 4.203.

preferencing? Such requirements would profoundly reshape how the titans of the gaming industry digitally distribute their games on console.

This might be thought a fantasy. It is unlikely that the Sony, Microsoft, or Nintendo digital stores will come within the jurisdictional reach of the DMA or DMCCA.[247] But it is not impossible. Regardless, such a relaxed attitude overlooks the symbiotic relationship between ex ante regulation of the tech giants and the enforcement of competition law on abuses of market dominance. The obligations on digital gatekeepers in the DMA are crystallisations of prior enforcement of Article 102 TFEU in the digital economy, essentially using regulation to stack the deck against the tech giants, rather than the Commission having the burden of proof in ordinary competition investigations.[248] Many of the potentially problematic terms for accessing digital platforms could be addressed by both legal tools and any novel issues arising from experience with the DMA and DMCCA (e.g. the competitive harm of preventing side-loading of content) may subsequently inspire enforcement of Article 102 TFEU and Chapter II *beyond* the tech giants. All that is required is a finding that a digital distribution store for video games is dominant. This is subject to the vagaries of market definition that, as seen with merger control, can be unpredictable. But if the competition authorities settled on the relevant market being "digital distribution of video games *specifically* on console X", Sony, Microsoft, and Nintendo could unexpectedly find themselves in situations comparable to Apple and Google. The likelihood of this is only growing as game publishers shun physical releases to spend more time on development,[249] while Sony and Microsoft seem to be moving to digital-only consoles.[250] In a digital-only console world with access to games exclusively via their own digital stores, Sony, Microsoft, and Nintendo could be more than just dominant. They could be monopolists.

This is not mere speculation: similar legal questions have already been initiated before the UK CAT. In November 2023, the Tribunal certified a class representative to pursue an opt-out collective action against Sony for abusing its dominance contrary to Article 102 TFEU and Chapter II of the Competition Act.[251] The challenge concerns, *inter alia*, Sony charging a 30%

[247] They have not been designated 'gatekeepers' under the DMA to date.
[248] Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2022) 47 ELRev 85; Friso Bostoen, 'Understanding the Digital Markets Act' (2023) 68 Antitrust Bull 263.
[249] David Carcasole, 'Remedy Isn't Doing a Physical Release for Alan Wake II Due to the Extra Development Time the Team Gets Out of It' *PlayStation Universe* (26 June 2023) <https://www.psu.com/news/remedy-isnt-doing-a-physical-release-for-alan-wake-ii-due-to-the-extra-development-time-the-team-gets-out-of-it/> accessed 16 December 2024.
[250] Roland Moore-Colyer, 'Xbox Series X Could Copy PS5 with a Powerful Digital-Only Console' *tom's guide* (8 August 2023) <https://www.tomsguide.com/news/xbox-series-x-could-copy-ps5-with-a-powerful-digital-only-console> accessed 16 December 2024; Rhiannon Bevan, 'PS5 Pro Won't Have A Disc Drive, Needs To Be Purchased Separately' *TheGamer* (10 September 2024) <https://www.thegamer.com/ps5-pro-no-disc-drive-digital-only/> accessed 16 December 2024.
[251] *1527/7/7/22 Alex Neill v Sony* [2023] CAT 73.

commission on digital sales through the PlayStation Store and not allowing other digital distribution platforms to operate on its consoles, which may have led UK consumers to pay up to £5 billion more than would otherwise have been the case. Final outcomes from this collective action could be several years in the making, but the warning should be heeded: while mobile and cloud gaming are set to be significant beneficiaries of the intense regulatory fire being applied to the giants of the digital economy, the giants of the video games industry should also be wary of themselves getting burned.

Conclusion

The application of EU and UK competition law to the video games industry has been underexplored in the literature. This probably results from the scarcity of investigations, the general absence of concerns when reviewed, and a regulatory preoccupation with the giants of the digital economy. Yet Epic's battles with Apple and Google and the controversy surrounding *Microsoft/Activision Blizzard* may mark a turning point. In anticipation of greater interest in this subject, this chapter has aimed to chart where competition law in the video games industry has come from and where it might be going.

While probably less obvious to those unfamiliar with competition law, this chapter has identified several aspects of the video games industry that make it an unusual area of enforcement. Despite the prevalence of exclusivity arrangements, anticompetitive agreements by gaming companies have only been found to result from restrictions on cross-border sales between EU Member States; an idiosyncrasy – albeit an important one – of EU law. Interestingly, the mergers between gaming firms that have proven most problematic to the authorities have been non-horizontal, when regulators tend to find more issues with concentrations between direct business rivals. Furthermore, market definition has been afforded a less important role in the analysis than is common and coordinated effects analysis has been seemingly abandoned as an impossibility. The lack of scrutiny of developer acquisitions may provide additional support for introducing value-based jurisdictional thresholds for merger control, as has been discussed more broadly in competition circles. Finally, the video games industry is set to be a major beneficiary of new regulatory regimes aimed at the titans of the digital economy, particularly mobile and cloud gaming. Yet despite such gains, digital distribution of video games is where we could first see administrative experience under the DMA and DMCCA influencing the enforcement of prohibitions against abuse of market dominance. If so, we might be on the cusp of significant changes to how the giants of the video games industry operate. Understanding these developments will require more attention from competition law commentators than has hitherto been the case.