EUROPEAN COMMISSION
Competition DG

# *CASE AT. 40433 – Film merchandise*

(Only the English text is authentic)

## ANTITRUST PROCEDURE
## Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003
Date: 30/01/2020

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EUROPEAN
COMMISSION

Brussels, 30.1.2020
C(2020) 359 final

*PUBLIC VERSION*

**COMMISSION DECISION**

**of 30.1.2020**

**relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area**

**Case AT.40433 – Film merchandise**

(Text with EEA relevance)

(Only the English text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union[1],

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[2], and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decisions of 14 June 2017 and 29 November 2019 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty[3],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case,

Whereas:

1 OJ, C 115, 9/5/2008, p.47.

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 (OJ L 1, 4.1.2001, p.1). With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("the Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the Treaty will be used throughout this Decision.

3 OJ L 123, 27.4.2004, p. 18.

## 1. INTRODUCTION

(1) This Decision is addressed to Comcast Corporation, NBCUniversal LLC, NBCUniversal Media LLC, Universal Studios Licensing LLC, Universal Studios Limited, DreamWorks Animation UK Limited, DreamWorks Animation Publishing LLC, DreamWorks Animation LLC, DreamWorks Animation Licensing LLC and Universal Pictures (Shanghai) Trading Company Limited. Those addressees are referred to collectively in this Decision as "the addressees".

(2) This Decision concerns direct and indirect restrictions on sales of licensed merchandise products to specific territories or customer groups, offline and online, within the European Economic Area ("EEA").

(3) The Commission finds that the undertaking comprising the addressees (referred to in this Decision as "Universal") participated in a single and continuous infringement of Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area ("the EEA Agreement"), spanning the period from 1 January 2013 to 25 September 2019 ("the relevant period"). The infringement involved implementation and enforcement within the EEA of a series of agreements and/or concerted practices restricting active and passive sales of licensed merchandise across territories and across customer groups. Such behaviour constitutes conduct which may affect trade between Member States and which has as its object the restriction of competition within the meaning of Article 101(1) of the Treaty, and conduct which may affect trade between Contracting Parties to the EEA Agreement and which has as its object the restriction of competition within the territory covered by that Agreement, within the meaning of Article 53(1) of that Agreement.

## 2. THE UNDERTAKING CONCERNED

(4) Comcast Corporation is a global media and technology group based in the United States of America (USA), operating, among other things, cable and broadcast networks and film and television production companies.

(5) NBCUniversal LLC (a USA company) is a holding company, wholly owned by Comcast Corporation. NBCUniversal Media LLC (a USA company) is a wholly owned subsidiary of NBCUniversal LLC that produces and markets entertainment, news and information products and services worldwide. The group owns and operates television networks, cable entertainment channels and local TV stations, as well as motion picture companies, television production companies and branded theme parks.

(6) Universal Brand Development is a business segment of NBCUniversal Media LLC. Universal Brand Development acts as a horizontal division across several subsidiaries of NBCUniversal Media LLC and is in charge of, among other things, licensing trade marks and other intellectual property rights for the production and distribution of branded merchandise, making use of the group's extensive portfolio of intellectual property rights (with respect to films and film series, characters, stories). The merchandise consists of toys, fashion items, stationery, publications, food, health and beauty and home products. It is subsequently sold to wholesalers, retailers or consumers worldwide, including in the EEA. Universal Brand Development's European headquarters are in London. Universal Brand Development also has offices in Paris, Milan, Madrid, Munich, Liège and Brussels.

(7) On 22 August 2016, Comcast Corporation acquired the animation studio DreamWorks Animation SKG, Inc. Entities owned by DreamWorks Animation SKG, Inc. were active in the licensing of its film intellectual property rights to other undertakings for the production and distribution of merchandise products.

(8) A number of NBCUniversal Media LLC subsidiaries have been licensing the intellectual property rights of NBCUniversal Media LLC for merchandising purposes. The Commission's investigation has focused on conduct carried out by Universal Studios Licensing LLC (a USA company), Universal Studios Limited (a UK company), DreamWorks Animation UK Limited (a UK company), DreamWorks Animation Publishing LLC (a USA company), DreamWorks Animation LLC (a USA company), DreamWorks Animation Licensing LLC (a USA company) and Universal Pictures (Shanghai) Trading Company Limited (a Chinese company), as the main NBCUniversal Media LLC entities active in film merchandise licensing within the EEA. The undertaking operated by those entities and Comcast Corporation, NBCUniversal LLC and NBCUniversal Media LLC are referred to in this Decision as "Universal".

## 3. THE PRODUCTS AND GEOGRAPHIC AREA CONCERNED

(9) The products concerned by this Decision are licensed film merchandise. The products in question are of a varied nature, for example toys, fashion items, stationery, publications, food, health and beauty and home products. The products may either be in the form of a licensed character or incorporate a licensed image or text applied during the manufacturing process. The aim of incorporating these images or texts, which are typically subject to intellectual property rights, is to increase the attractiveness of the product for consumers and also to help to promote the film or film series to which the intellectual property relates. The manufacturer (licensee) may only use the image or text if he has signed a licensing agreement with the owner of the relevant intellectual property rights (licensor). The products concerned by this Decision are further described in Section 5.1.

(10) The products concerned by this Decision are distributed in the territories of all the Contracting Parties to the EEA Agreement.

## 4. PROCEDURE

(11) In September 2016, the Commission sent a request for information to Universal.

(12) By decision of 14 June 2017[4], the Commission initiated proceedings in accordance with Article 2(1) of Commission Regulation (EC) 773/2004[5] against Comcast Corporation and all legal entities directly or indirectly controlled by it, including NBCUniversal Media LLC, in order to further investigate whether Universal had in place agreements and/or applied practices preventing or restricting the sale of licensed merchandise in the EEA. On 29 November 2019, the Commission adopted a

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4 Commission decision of 14 June 2017 in Case AT.40433 – Licensed merchandise – Universal Studios. See also Antitrust: Commission opens formal investigations into Nike's, Sanrio's and Universal Studios' licensing and distribution practices, European Commission, press release, 14 June 2017, http://europa.eu/rapid/press-release_IP-17-1646_en.htm, ID 61.

5 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18).

further decision to initiate proceedings in accordance with Article 2(1) of that Regulation against further subsidiaries of Comcast Corporation dealing with licensed merchandise in the EEA, namely NBCUniversal LLC, Universal Studios Licensing LLC, Universal Studios Limited, DreamWorks Animation UK Limited, DreamWorks Animation Publishing LLC, DreamWorks Animation LLC, DreamWorks Animation Licensing LLC and Universal Pictures (Shanghai) Trading Company Limited,.

(13) On 25 September 2018, the Commission conducted unannounced inspections at NBCUniversal Media LLC's offices in London, United Kingdom.

(14) On […], the addressees submitted a formal offer to cooperate in Case AT.40433 in view of the adoption of a decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 ("the Settlement Submission").[6] The Settlement Submission contained the following:

(a) an acknowledgement, in clear and unequivocal terms, by the addressees of their joint and several liability for the infringement described in the settlement submission, including an acknowledgment of the facts, their legal qualification, the addressees' roles in the infringement and the duration of their participation in the infringement;

(b) an indication of the maximum fine that the addressees would accept in the context of a cooperation procedure;

(c) a confirmation that the addressees had been sufficiently informed of the objections the Commission envisaged raising against them and that they had been given sufficient opportunity to make their views known to the Commission; and

(d) a confirmation that the addressees had been granted sufficient opportunity to access the evidence supporting the potential objections and all other documents in the Commission's file, and that they did not envisage requesting further access to the file or to be heard again in an oral hearing, unless the Commission did not reflect the Settlement Submission in the statement of objections ("SO") and the Decision.

(15) The Settlement Submission was made conditional upon the imposition by the Commission of a fine not exceeding the amount specified in the settlement submission.

(16) On 29 November 2019, the Commission adopted a SO concerning the addressees' participation in the anticompetitive conduct that is the object of this Decision.

(17) On 16 December 2019, the addressees submitted their joint reply to the SO. All addressees reiterated their commitment to follow the cooperation procedure and confirmed that the SO reflected the content of their Settlement Submission and that they did not wish to be heard again by the Commission.

[6] ID 626.

## 5. CONDUCT UNDER INVESTIGATION

### 5.1. Overview of Universal's activities

(18) Universal's core business is the operation of cable and broadcast networks and film and television production companies and the production, acquisition, marketing and distribution of film, digital and television entertainment content.

(19) A business division within Universal, Universal Brand Development, is dedicated to the exploitation of the company's intellectual property rights with respect to films and film series, characters and stories through, among other things, physical products. In doing so, Universal Brand Development contributes to the promotion of the film or film series to which the intellectual property relates. Through that division, Universal licenses intellectual property rights to other undertakings (i.e., its licensees). The licensees use Universal's trade marks, copyright or other intellectual property rights to produce and distribute merchandise products incorporating the licensed properties. These merchandise products are of a varied nature such as toys, fashion items, stationery, publishing, food, health and beauty and home products. Such products may either take the form of a licensed character or may involve the application of a licensed image or text during the manufacturing process. Licensees may only use these elements of the film if they have signed a merchandising licence agreement with the owner of the relevant intellectual property rights (licensor).[7] Universal's most popular properties for licensing purposes include Despicable Me (including the Minions), Jurassic World, Secret Life of Pets and Trolls.

(20) Universal licenses its intellectual property rights either directly or indirectly in the EEA:

(a) in the case of direct licensing, Universal grants a merchandising licence over certain Universal intellectual property rights directly to a third party for the manufacture and sale of certain products incorporating the franchises covered by those intellectual property rights. [Timing of changes to Universal's licensing strategies];

(b) in the case of indirect licensing, Universal enters into non-exclusive representation agreements with agents for one or more specific territories.[8] The agents are not party to the merchandising licence agreements, but they identify prospective licensees in the territories assigned to them, negotiate the terms of a merchandising license agreement with them, represent Universal vis-à-vis the licensees and monitor and oversee compliance by the licensees with the terms of the merchandising license agreements and report back to Universal.[9] [Timing of changes to Universal's licensing strategies]

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7 Depending on the type of product, licensees' level of investment may vary. For example, in the case of toys, a product in the form of a licensed character may require material investment in moulding etc. unlike other products (e.g. a T-shirt) which may merely involve the application of an image or text during the manufacturing process.

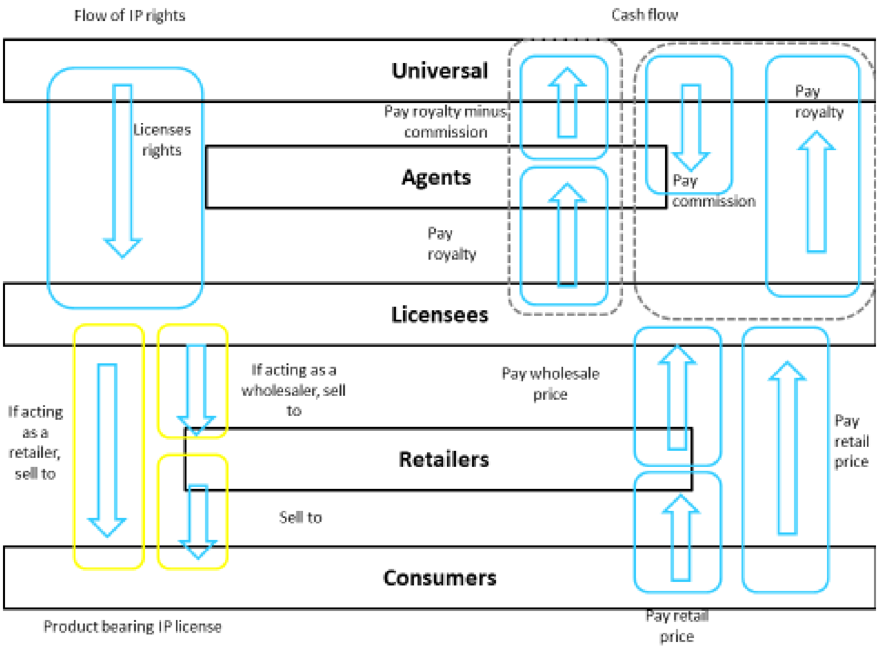
8 ID 475, paragraph 3.9.

9 The main tasks generally allocated by Universal to its agents include, inter alia, (i) seeking out, negotiating and presenting to Universal business opportunities relative to the represented rights in the territory; (ii) monitoring and overseeing the licensing programme to ensure that royalties, minimum guarantees and sales reports are submitted to and approved by Universal; (iii) coordinating with licensees to ensure that quality control and other provisions of the agreement are complied with; (iv)

(21) Universal’s licensees typically manufacture - or sub-contract to third parties the manufacture of - products incorporating Universal’s intellectual property and distribute the products either directly or through wholesalers and distributors.

(22) Figure 1 provides an overview of the different parties involved in the agreements governing the licensing of Universal’s intellectual property rights, including an illustration of the monetary and contractual relationships between them.

Figure 1. Illustrative overview of the licensing of Universal’s intellectual property rights




(23) Conclusion of a merchandising licence agreement usually involves several steps. [Process for negotiating Universal's licensing agreements] Universal, […], typically provides a standard merchandising licence agreement [Process for negotiating Universal's licensing agreements]. Once all details are agreed upon, the merchandising licence agreement with its accompanying schedules is signed by the licensee and sent back to Universal.

(24) While granting a licence to use intellectual property rights, Universal's standard merchandising licence agreements also establish terms and conditions to be followed by the licensee when manufacturing and when distributing the products on which the licensed intellectual property right will be applied. In other words, the scope of Universal’s merchandising licence agreements covers both the grant of intellectual property rights and the manufacturing and distribution of the licensed products.

drafting and negotiating licence agreements to be provided to Universal and licensees for execution in accordance with Universal policies; (v) overseeing and managing pre-existing licence agreements as directed by Universal; and (vi) engaging in other agreed activities and using best efforts to maximise revenue generated from the exploitation of the represented rights and to enhance the value and reputation of the relevant Universal properties. See for example ID 478-1.

(25) The following terms are systematically included in Universal's merchandising licence agreements:

(a) scope of the licence: Universal's merchandising licence agreements provide that all rights not explicitly granted to the licensee are reserved to Universal.[10] The rights granted to the licensee are typically defined for each licensed property in schedules attached to the merchandising licence agreement. Any use of Universal's intellectual property in any manner, medium or territory beyond what is specifically permitted by the respective agreement will constitute a default of the agreement and result in automatic termination of the agreement.[11] Universal's merchandising licence agreements are typically non-exclusive;

*[Specific contractual terms in Universal's licensing agreements]*[12]

*[Specific contractual terms in Universal's licensing agreements]*[13]

*[Specific contractual terms in Universal's licensing agreements]*[14]

*[Specific contractual terms in Universal's licensing agreements]*[15]

(b) *[Specific contractual terms in Universal's licensing agreements]*: Universal's merchandising license agreements list the property(ies) which are subject to the agreement and which the licensee will be able to incorporate in the products that it will manufacture and distribute. A typical agreement will include the following wording: *[Specific contractual terms in Universal's licensing agreement]*;[16]

(c) type(s) of product(s) concerned: Universal's merchandising licence agreements also specify the types of product or categories of product in respect of which the licensee will be able to apply the licensed property for their subsequent manufacturing and/or sale. The types of product or categories of product covered by merchandising licence agreements may be specified more or less narrowly, depending on the agreement;[17]

(d) territorial scope: Universal generally grants licences in the EEA on a non-exclusive basis for one or more specific countries. In practice, there is usually limited overlap between the products and the territories in licensees' agreements. Universal typically reserves to itself the right to grant additional licences and to directly or indirectly manufacture, distribute and sell products identical or substantially similar to the products covered by the license;[18]

(e) channels for distribution of the products: Universal's merchandising licence agreements typically include a list of distribution channels through which the

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10 See also ID 480, p. 56.
11 See also ID 480, p. 82 and 84.
12 See for example ID 478-7, Master Merchandising License Agreement, […].
13 See for example ID 478-7, Master Merchandising License Agreement, […].
14 See for example ID 478-7, Master Merchandising License Agreement, […].
15 See for example ID 478-7, Master Merchandising License Agreement, […].
16 See for example ID 478-7, […].
17 See for example ID 478-9, […], which provides that *[Specific contractual terms in Universal's licensing agreements]*, or ID 478-2, […], which provides that *[Specific contractual terms in Universal's licensing agreements]*".
18 See for example ID 478-7, Master Merchandising License Agreement, […].

licensee may distribute the products. Permitted channels may be defined broadly, as in the following agreement: *[Specific contractual terms in Universal's licensing agreements]*.[19] In other agreements, permitted channels are defined in a narrower way, at times limiting distribution to specific customers or customer groups allocated to the licensee, as in the following agreement: *[Specific contractual terms in Universal's licensing agreements];*[20]

(f) duration of the agreement: Universal's merchandising licence agreements are typically for a term of [0-5] years,[21] although agreements may also be concluded for different terms;[22]

(g) financial consideration of the licensee: Universal's merchandising licence agreements provide for licensees to pay Universal a specified amount in consideration for the grant of the licence. The consideration paid by the licensee to Universal is made up of three elements:[23]

i. royalty payments: Universal’s merchandising licence agreements typically provide for the licensee to pay royalties to Universal as compensation for the licensing of its intellectual property rights. The amount of the royalty payments is normally calculated as a percentage of [Specific contractual terms in Universal's licensing agreements]. Where royalty rates are calculated as a percentage of the […], they are typically in the range of […]. Where they are calculated as a percentage of the […], they are typically in the range of […]%.[24] Licensees would typically be required to report sales and corresponding royalties to Universal and complete the royalty payments on a […] basis;[25]

ii. advance and minimum guarantee payments: Universal’s merchandising licence agreements generally also include an advance and a guarantee payment. These are payments calculated on the basis of the total royalties forecast to be paid by the licensee for its sales within the licensed territory throughout the duration of the agreement. The advance is typically to be paid upon execution of the agreement and the minimum guarantee in instalments determined at the time of the agreement. For merchandising licence agreements in the EEA, the guarantee is typically set at […]% of the royalties forecast and the advance at […]%-[....]% of the guarantee. Both the advance and the guarantee are recoupable against the licensee’s royalty payments. Typically, Universal’s merchandising licence agreements provide for [Specific contractual terms in Universal's licensing agreements];[26]

[19] See for example ID 478-7, […].
[20] See ID 491, […].
[21] See ID 478-12, Annex 9(ii) to the reply to the Commission RFI dated 8 November 2016, p. 2.
[22] See for example ID 525, […], providing for a duration of […], or ID 479-29, p. 2, providing for a duration of […].
[23] See ID 478-13, Reply to the Commission RFI dated 8 November 2016, paragraph 2.3.
[24] See ID 478-12, Annex 9(ii) to the reply to the Commission RFI dated 8 November 2016, p. 2.
[25] See ID 478-13, Reply to the Commission RFI dated 8 November 2016, paragraphs 2.3 and 2.4.
[26] See ID 478-13, Reply to the Commission RFI dated 8 November 2016, Question 2 and ID 478-12, Annex 9(ii) to the reply to the Commission RFI dated 8 November 2016, p. 2; see for example ID 478-7, Master Merchandising License Agreement, […].

iii. marketing payments: when entering into a merchandising licence agreement, licensees typically commit to contributing to the promotion of the movie, franchise, or character licensed to them. [Specific contractual terms in Universal's licensing agreements].[27]

(26) Universal maintains frequent contact with its licensees throughout the duration of the merchandising licence agreement on a variety of issues.[28]

(27) Before conclusion of an agreement, Universal and the licensee will typically engage in discussions about the licensee's manufacturing and distribution plans, in order to ensure that the plans conform with Universal's manufacturing and product safety standards. The next stage would typically be the development and approval of the product, when the product is conceived, designed, developed and produced. Finalised product samples are then sent to Universal for approval. All characteristics of the product, such as its style, its colours and its quality, must conform with the product guidelines set out in Universal's style guides, typically provided to the licensee upon signing the agreement.[29] Universal maintains the right to control the quality of the merchandise products based on the licensed intellectual property rights throughout the duration of the agreement. In the event of non-compliance with the product approval process, Universal may stop the licensed products from being shipped or require them to be recalled.[30]

(28) Once approved, the licensee is entitled to distribute the product in the market as specified in the merchandising licence agreement signed with Universal. Universal's licensees often distribute the products at a wholesale level, although at times they also retail directly to consumers.

(29) Universal also remains in contact with its licensees after the product approval stage, for instance regarding the interpretation or modification of certain aspects of the merchandising licence agreements, such as the launch of certain products, extension of licensed territories, royalty payments, or exchanges on potential future licensing opportunities.

(30) Universal retains the right to audit licensees as regards their compliance with the merchandising licence agreement. The audits are conducted by external parties, their main aim being to detect breaches of licensees' contractual or other legal obligations.[31]

### 5.2. Practices restricting licensed merchandise sales

(31) During the relevant period, Universal put in place a series of practices throughout its merchandising business which restricted active and passive sales of licensed merchandise to the territories and/or customers allocated to the licensee. These practices concerned both offline and online sales of licensed merchandise products throughout the EEA.

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27 See for example ID 478-7, Master Merchandising License Agreement, […].

28 Prior to […], and outside the major EEA territories these relationships were and are still largely managed by Universal indirectly, through its EEA agents.

29 See ID 129, Reply to the Commission RFI dated 27 July 2017, Questions 2 and 3.b and ID 249, pp. 8-10.

30 See for example ID 478-7, Master Merchandising License Agreement, […].

31 See for example ID 478-8, Master Merchandising License Agreement, […].

(32) The practices were implemented by both contractual and non-contractual means discouraging, and at times expressly preventing, licensees from distributing the licensed products to customers outside the territory or beyond the customer group assigned to them under their merchandising licence agreement.[32] Universal's practices also dissuaded the licensees from delivering licensed products to distributors who might sell the products to territories or customers other than the ones allocated to the licensees.

(33) In addition to express contractual restrictions, Universal would also at times request licensees to limit their activities to the territories or customers assigned to them in their merchandising licence agreements. For business opportunities involving cross-border sales or additional customers, licensees would often contact Universal in order to request permission to engage in or accept such sales. Universal would at times ask licensees to cease any sales of licensed products to territories in the EEA Contracting Parties or to customer groups not falling within the territory and customer group assigned to them.[33]

(34) Certain standard business tools, such as the conduct of audits, or the termination or renewal of contracts, were at times employed in such a way as to ensure that licensees complied with the restrictions concerning out-of-territory sales or sales to other customers. These practices can be considered indirect measures restricting sales of Universal's licensed merchandise out-of-territory or beyond the assigned customer groups.[34]

### *5.2.1. Direct measures restricting out-of-territory sales by licensees*

(35) During the relevant period, a series of practices directly restricting active and passive, offline and online, out-of-territory sales of licensed merchandise were implemented throughout Universal's merchandising business.

#### 5.2.1.1. Prohibition of out-of-territory passive sales

(36) Since at least 2013, Universal's merchandising licence agreements in the EEA have typically included a general ban on all out-of-territory sales. An example of such clauses is: *"Licensee's right to sell, distribute, and engage in any Advertising and Promotion of the Licensed Article(s) shall be subject to Universal's Approval and shall be limited to the territory specified on the applicable Schedule(s) […]".*[35]

(37) Most agreements also include a so-called "European Union sales" clause, the first part of which reads as follows: *"Notwithstanding the foregoing, if and to the extent that the laws of the European Union or any other international treaty applicable to trade within the License Territory limit the enforceability of any territorial restrictions contained in any provision of this Agreement, such provision shall be*

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[32] For the purposes of this Decision, references to "out-of-territory", "outside the territory" or similar terms are to be understood as referring to transactions between a licensee and a third party who is located in the territory of one of the Contracting Parties to the EEA Agreement, but outside the territory(ies) allocated to the licensee in the licence agreement(s).

[33] See Sections 5.2.1 and 5.2.2.

[34] See Section 5.2.3.

[35] See for example ID 478-7, Master Merchandising License Agreement, […].

*deemed modified to the minimum extent necessary to comply with the legal requirements."*[36]

(38) Whereas the European Union sales clause might have been meant to allow for passive sales beyond the territories allocated to the licensee within the EU/EEA,[37] its language and scope of application are unclear and vague. For example, there is no explicit identification or definition of the "territorial restrictions", whose enforceability "shall be deemed modified to the minimum extent necessary to comply with the legal requirements". Moreover, it is not specified in what way or through which means those provisions "shall be deemed modified to the minimum extent necessary" in order to comply with the legal requirements of Union law.[38]

(39) Furthermore, the way licensees behaved confirms that the clause was not always understood as allowing for passive sales beyond the territories allocated to them within the EEA.[39] Non-contractual evidence on file also shows that, in practice, Universal at times discouraged out-of-territory passive sales within the EEA by its licensees, despite that provision. Whereas Universal representatives generally understood that cross-border passive sales could not be prohibited, they were concerned about the impact of such sales.[40] Universal's interventions to licensees or other dissuading actions typically occurred out of Universal's own initiative,[41] following complaints by agents or licensees,[42] or following requests by licensees to authorise specific passive sales.[43]

5.2.1.2. Prohibition of out-of-territory active sales

(40) In addition to the general prohibition of out-of-territory sales, described in recital (36), the "European Union sales" clause contained in Universal's non-exclusive merchandising licence agreements continues by explicitly prohibiting licensees to engage in active out-of-territory sales: "*In any event, Licensee shall not solicit sales of any Licensed Article(s) outside the License Territory nor establish any branch,*

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36 See for example ID 478-7, Master Merchandising License Agreement, […]. The "European Union sales" clause was included in agreements as from […], see ID 475, paragraph 4.4. Some earlier merchandising licence agreements do not explicitly refer to European Union rules, but more broadly provide that *"Licensee shall not fulfil orders from outside the License Territory unless required to do so by law established by any government or government agency with applicable jurisdiction […]"*, see for example ID 478-11, Master Merchandising License Agreement, […] and ID 475, […].

37 For example, the "European Union sales" clause also stipulates that a licensee intending to respond to an unsolicited sale request must notify Universal: *"In the event that Licensee receives an unsolicited request to export any Licensed Article(s) to another country within the European Union and Licensee elects to fulfil such request, Licensee must notify Universal of such sale by country and by Licensed Article"*, see for example ID 478-8, Master Merchandising License Agreement, […]. See in this regard also Section 5.2.1.4.

38 See Case C-487/16 P, *Telefónica SA v European Commission*, paragraph 63: *"Certes, dans le cas d'espèce, la clause de non-concurrence contient l'incise « dans la mesure autorisée par la loi ». Toutefois, ainsi que l'a constaté le Tribunal au point 200 de l'arrêt attaqué, « la requérante n'a pas démontré que, au vu de l'ensemble des circonstances, la clause [de non-concurrence] ne constituait pas une restriction de la concurrence par objet, puisque [cette incise] l'avait transformée en une clause d'autoévaluation de la légalité d'un engagement de non-concurrence »."* See also ID 480, p. 11-12, where no additional clarification on the application of that clause is provided.

39 See ID 479-41, ID 479-33.

40 See ID 475, […].

41 See ID 479-16, ID 479-21, ID 479-34.

42 See ID 479-14, ID 479-39, ID 479-1.

43 See ID 479-36, ID 479-41, ID 479-33.

*sales office, production plant or depot outside the License Territory for the distribution of Licensed Article(s), nor advertise the Licensed Article(s) outside of the License Territory, without Universal's prior written Approval*".[44]

(41) In addition to that contractual clause, there is evidence of Universal taking steps to enforce the contractual obligations in order to block active sales.[45]

(42) In addition to the evidence of direct intervention by Universal to prevent or stop active out-of-territory sales by its licensees, there is also evidence of licensees asking Universal to stop active sales by other licensees into their allocated territories, or at a minimum bringing such sales to its attention.[46]

5.2.1.3. Prohibition of online sales

(43) As regards online sales, Universal's merchandising license agreements throughout the relevant period either prohibited online sales altogether, or only allowed online sales in the assigned territory.

(44) In particular, the agreements typically stated that: "Except as otherwise specified in the applicable Schedule(s), Licensee shall not directly sell or distribute the Licensed Article(s) […] or via on-line services, all of which are deemed reserved distribution channels for Universal".[47]

(45) Examples of such specification in the applicable schedules show that different types of online restrictions applied.

(46) Some schedules fully prohibited online sales: "DISTRIBUTION CHANNELS: Licensee shall be permitted to market and sell the Licensed Article(s) through Clothing Stores; Department Stores; Grocery Stores; Hyper/Supermarket; Mass Market; Specialty Stores. For purposes of clarification, no rights are granted to any online/Internet channels of distribution."[48]

(47) Some schedules limited online sales to specific websites, typically of certain key customers of the licensee: "DISTRIBUTION CHANNELS: Licensee shall be permitted to market and sell the Licensed Article(s) through all channels of distribution including online/internet channels, subject to all applicable provisions of the Agreement. For purposes of clarification, online/internet sales may only be made through websites owned and operated by Nordic retailers […]".[49]

(48) Other schedules restricted online out-of-territory sales: "LICENSE TERRITORY(IES)": Belgium, Eire, France, Germany, Luxembourg, Netherlands, United Kingdom. Licensee agrees that, with respect to any Licensed Article(s) sold online/via the internet, no orders will be accepted or fulfilled from outside the License Territory(ies)."[50]

(49) E-mails exchanged during the contract negotiations confirmed that Universal at times sought reassurance that licensees would actively monitor online sales to avoid

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44 See for example ID 478-7, Master Merchandising License Agreement, […].
45 See ID 526.
46 See ID 479-31, ID 479-15, ID 523.
47 See for example ID 478-7, Master Merchandising License Agreement, […].
48 See for example ID 478-6, […].
49 See for example ID 479-5, […]
50 See for example ID 478-3, […]

deliveries outside the territory before allowing for online sales in the schedules,[51] or requested that online sales be limited to specific websites.[52]

5.2.1.4. Obligation to notify the fulfilment of unsolicited orders for out-of-territory sales to Universal

(50) In addition to the prohibition of passive and active, offline and online out-of-territory sales described in this Section, the "European Union sales" clause in Universal's merchandising license agreements provided that "*In the event that Licensee receives an unsolicited request to export any Licensed Article(s) to another country within the European Union and Licensee elects to fulfil such request, Licensee must notify Universal of such sale by country and by Licensed Article*".[53]

(51) The non-contractual evidence on file shows that this clause was given effect to by the contracting parties, with licensees requesting prior authorisation to service unsolicited purchase requests from outside the territory. The clause thus enabled Universal to control and at times dissuade out-of-territory, including passive, sales, as such authorisation was not always directly granted by Universal.[54]

5.2.1.5. Use of language requirements to restrict out-of-territory sales

(52) The "European Union sales" clause in Universal's merchandising licence agreements also restricted the languages that may be used by the licensee for the labelling, packaging and promotion of the merchandise. More specifically, the clause provided that: *"Further, all labels, Packaging (as defined herein), and Advertising and Promotion materials of and for the Licensed Article(s) shall be produced and exhibited solely in the national language(s) of the License Territory specified otherwise in any applicable Schedule(s)."*[55]

(53) Non-contractual evidence on file reveals that Universal indeed linked language requirements to out-of-territory sales and relied on this type of clause to prevent out-of-territory sales.[56] Moreover, in cases in which licensees asked permission to use additional languages in the labels and packaging of the merchandise, Universal did not grant such requests without receiving reassurance that the licensee did not intend to sell out-of-territory, thus using this clause to control and restrict out-of-territory sales.[57]

5.2.1.6. Recovery of revenues or higher royalties for out-of-territory sales

(54) Universal's merchandising licence agreements allowed it to recover all revenues or to receive much higher royalties in case of sales in breach of the prohibition of out-of-territory sales by the licensee.

(55) Examples of such clauses are the following: *"If it is determined by any audit (or via any other means) that Licensee has (a) shipped and / or sold any Licensed Article(s) outside the License Territory(ies) set forth in the applicable Schedule(s), […] (except as may be required pursuant to […] hereof), […] then Universal, without waiving*

[51] See for example ID 479-22, ID 479-32; see also ID 475, […].
[52] See for example ID 479-6.
[53] See for example ID 478-7, Master Merchandising License Agreement, […].
[54] See ID 479-41, ID 479-36, ID 524.
[55] See for example ID 478-7, Master Merchandising License Agreement, […].
[56] See ID 479-10, p. 5 and ID 475, […].
[57] See ID 479-26, ID 479-25.

*any other rights or remedies, shall be entitled to recover from Licensee one hundred percent (100%) of the proceeds from the sale of such merchandise."*[58]; or *"If It is determined that Licensee has: (a) shipped and/or sold any Licensed Articles outside the License Territory(ies) set forth in the applicable Schedule(s), […] (except as may be required pursuant to […] hereof); […] then Universal, without waiving any other rights or remedies, shall be entitled to recover from Licensee […] Royalties {i.e., […] the Royalty Rate stated on the applicable Schedule(s)) or all sales of such merchandise"*.[59]

(56) Non-contractual evidence on file shows that Universal would insist on the inclusion of such clauses in the merchandising licence agreements and at times used them in order to dissuade licensees from selling out-of-territory.[60]

*5.2.2. Direct measures restricting sales to allocated customers*

(57) During the relevant period, Universal implemented a series of practices restricting sales to allocated customers or customer groups, offline and online.

5.2.2.1. Prohibition of sales beyond allocated customers

(58) Certain of Universal's merchandising licence agreements contained clauses providing that licensees may sell the merchandise only to customers or customer groups, specifically allocated to them. Against the background of other elements in the agreements providing that rights not explicitly granted to the licensee are reserved to Universal,[61] such clauses restricted licensees' ability to sell the licensed products beyond those customers or customer groups without distinguishing between passive and active sales in this context.

(59) Examples of such clauses are the following: *"LICENSE TERRITORIES AND PERMITTED RETAIL TERRITORIES: The License Territories shall include: Germany, Austria, Switzerland, and the United Kingdom (for […] stores only). […] In addition, Licensee has authorization for certain Retail Partners (as defined herein) to sell, import, and distribute the Licensed Articles throughout certain additional Retail Territories specified in the "Retail Territories Table" as defined and included herein."*[62]; or *"2. DISTRIBUTION CHANNELS: The Distribution Channels shall hereby be amended to include […] stores"*.[63]

(60) Non-contractual evidence on file shows that Universal relied on such provisions to allocate customers among licensees and that in the case of licensees selling to customers allocated to other licensees, Universal would take steps to ensure that such sales cease.[64]

5.2.2.2. Recovery of royalties and revenues deriving from sales outside the allocated customers

(61) As already set out in recitals (54)-(56), Universal's merchandising licence agreements allowed it to recover all revenues or to receive higher royalties in case of

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58 See for example ID 478-7, Master Merchandising License Agreement, […].
59 See ID 478-10, Master Merchandising License Agreement, […].
60 See ID 479-13, ID 479-37.
61 See recital 25(a).
62 See for example ID 479-3, […].
63 See for example ID 478-4, […]. See also ID 479-4.
64 See ID 479-18, ID 479-22, ID 479-8, ID 479-45, ID 479-23.

sales in breach of the territorial restrictions by the licensee. Those same clauses also provided that Universal was entitled to all revenues or much higher royalties, in case of sales in breach of the customer restrictions.

(62) Examples of such clauses are the following: *"If it is determined by any audit (or via any other means) that Licensee has (a) shipped and / or sold any Licensed Article(s) […] outside the Channels of Distribution set forth in the applicable Schedule(s) […] then Universal, without waiving any other rights or remedies, shall be entitled to recover from Licensee one hundred percent (100%) of the proceeds from the sale of such merchandise."*[65]; or *"If It is determined that Licensee has: (a) shipped and/or sold any Licensed Articles […] outside the "Distribution Channel(s)" […] then Universal, without waiving any other rights or remedies, shall be entitled to recover from Licensee […] Royalties {i.e., […] the Royalty Rate stated on the applicable Schedule(s)) or all sales of such merchandise".*[66]

(63) Non-contractual evidence on file shows that Universal would insist on the inclusion of such clauses in the merchandising licence agreements and at times impose financial penalties in case of sales beyond the customer group set out in the merchandising licence agreement.[67]

*5.2.3. Indirect measures restricting licensees' sales*

(64) In addition to prohibiting out-of-territory sales and sales to allocated customers, certain contractual and non-contractual practices were implemented throughout Universal's licensing business, which indirectly encouraged compliance with those sales restrictions.[68] Universal threatened to enforce or enforced clauses typically included in licensing and distribution agreements in order to ensure compliance with the restrictions concerning sales to territories and customers, as described in Sections 5.2.1 and 5.2.2.

5.2.3.1. Conduct of audits to ensure compliance with sales restrictions

(65) Universal's merchandising licence agreements typically contain clauses on audit rights, providing for the possible examination by Universal of the licensee's accounts and records with regard to the merchandising licence agreement.[69]

(66) Evidence on file reveals that Universal would at times implement the practices described in Sections 5.2.1 and 5.2.2 by using audits or the threat thereof to ensure that licensees were reporting out-of-territory sales or were limiting their activities to the territories and customers contractually allocated to them. Although audits were

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[65] See for example ID 478-7, Master Merchandising License Agreement, […].

[66] See ID 478-10, Master Merchandising License Agreement, […].

[67] See ID 479-13, ID 479-45 and ID 480, p. 31.

[68] See Sections 5.2.3.1 and 5.2.3.2.

[69] See for example ID 478-7, Master Merchandising License Agreement, […]: *"RECORDS. Licensee shall keep and maintain (at Licensee's principal place of business and at its sole expense) accurate books of accounts and records covering all transactions relating to the applicable License and this Agreement for a period of at least three (3) years following the expiration or earlier termination of this Agreement (inclusive of the applicable Schedule(s)). Universal and its duly authorized representative(s) shall have the right, upon reasonable notice and at all reasonable hours of the day, to examine and copy and otherwise audit said books of account, records and all other documents and materials in the possession or under the control of Licensee wherever located (whether digital or physical) with respect to the License and this Agreement."*

rare, compliance with the territorial and customer restrictions were subject to, and part of, the audit process and audit findings of non-compliance could lead to fines.[70]

5.2.3.2. Threats of termination or non-renewal of contracts due to non-compliance with sales restrictions

(67) The evidence on file shows that, with a view to discouraging sales beyond the allocated territories and customers, Universal at times warned licensees that it may terminate or not renew their contracts. There is also evidence that Universal did actually consider or decide at times not to renew or not to conclude additional licence agreements with specific licensees, due to the licensees having made sales beyond the territories and customers allocated to them.[71]

*5.2.4. Obligation to pass on the sales restrictions*

(68) In addition to imposing contractual restrictions on its licensees regarding active and passive, offline and online sales beyond the territories and customers allocated to the licensee, Universal also imposed an obligation on its licensees to pass on these restrictions to their customers.

(69) Universal's agreements explicitly prohibited licensees from supplying their licensed merchandise products to customers who sell or intend to sell those products, online or offline, outside the allocated territories. The wording of these pass-on obligations was typically as follows: *"Licensee shall also impose the obligation on its customers to sell the Licensed Article(s) solely within the License Territory and shall not advertise or maintain stock of the Licensed Article(s) outside the License Territory."*[72]

(70) The obligation to pass the territorial restrictions down the chain of sales agreements is also evidenced at times in Universal's communications with its agents and licensees.[73]

(71) Moreover, although not expressly provided for in the merchandising licence agreements, non-contractual evidence indicates that Universal imposed similar obligations on its licensees to pass on the customer restrictions.[74]

(72) In addition to drawing the licensee's attention to the issue, Universal would at times also intervene directly in order to ensure that the licensee's customers stopped selling products outside the territory or outside the customer group attributed to the licensee.[75]

## 6. LEGAL ASSESSMENT

### 6.1. Legal and economic context of merchandising licence agreements

(73) Merchandising is a tool that is widely used in order to increase the attractiveness of a product or service. By means of a merchandising licence agreement, one party (the licensor) allows another party (the licensee) to use one or more of its intellectual

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70 See ID 479-42, ID 479-11, p. 6, ID 479-28, ID 479-9 and ID 475, […].
71 See ID 479-35, ID 479-40, ID 479-17.
72 See for example ID 478-7, Master Merchandising License Agreement, […].
73 See ID 479-22.
74 See ID 479-43, ID 479-38, ID 479-2 and ID 475, […].
75 See ID 479-30, ID 479-44.

property rights in or on a certain product or service. Merchandise sales drive consumer interest in and engagement with the licensor's intellectual property and help to promote the film or film series to which the intellectual property relates. The intellectual property rights most commonly used on merchandise products are trade marks, copyright, design rights and image rights.

(74) Merchandising licences are typically granted on a non-exclusive basis in order to ensure territorial coverage and to increase the number of merchandise products in circulation in the market. Exclusive licences are at times also granted, but they would normally be limited in scope, for example only granted for a specified product area or for a limited period.

(75) Despite the non-exclusive licences, licensors often try to avoid overlaps between different licensees' territories and customers. However, this attempt to avoid overlaps falls short of creating a de facto exclusive environment both because some overlaps still remain (albeit only a limited number) and because the licensor still retains the ability to appoint additional licensees in the territory or for the customers allocated to licensees.

(76) The Commission finds that the practices investigated in this case, including the clauses restricting sales in agreements for the licensing and distribution of merchandise products, amount to restrictions prohibiting or limiting the supply of goods in the EEA. Irrespective of whether intellectual property rights are exhausted,[76] such restrictions fall under Union competition law.[77]

(77) In particular, Union Courts have acknowledged their competence to assess the legality of such clauses under Union competition law and have found that a misuse of intellectual property rights may amount to an infringement of competition rules.[78] By reference to earlier case law concerning the distribution of pharmaceutical products, the Court of Justice has also found restrictions on the cross-border sales of broadcasting services to constitute by object infringements, on the basis that they allow *"all competition between [licensees] in the field of those services to be eliminated"*.[79]

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76 The doctrine of regional exhaustion establishes that once products or services incorporating a certain intellectual property right have been placed in the EEA by or with the consent of the rightholder, rightholders can no longer use their intellectual property rights to prevent a further distribution of those goods within the Area. Union Courts have a long standing tradition of recognising the exhaustion of trade mark rights. See in this respect Judgment of the Court of 16 July 1998, *Silhouette International Schmied v Hartlauer Handelsgesellschaft*, C-355/96, EU:C:1998:374. Union Courts have also acknowledged that the distribution right enjoyed by the copyright holder is also exhausted with the first sale in the Union of the original of a work or copies thereof by the rightholder or with his consent. See in this respect, Judgment of the Court of 3 July 2012, *UsedSoft v Oracle*, C-128/11, EU:C:2012:407.

77 See also Commission Decision of 25.03.2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in Case AT.40436 – Ancillary sports merchandise and Commission Decision of 09.07.2019 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in Case AT.40432 – Character merchandise.

78 Judgment of 23 May 1978, *Hoffman-La Roche v Centrafarm*, Case 102/77, EU:C:1978:108, paragraphs 15 and 16.

79 Judgment of 4 October 2011, *Football Association Premier League and Others v QC Leisure and Others and Karen Murphy v Media Protection Services*, Joined Cases C-403/08 and C-429/08, EU:C:2011-631, paragraphs 139-142; Judgment of 12 December 2018, *Groupe Canal + v Commission*, T-873/16, EU:T:2018:904, paragraph 50.

## 6.2. Application of Article 101(1) of the Treaty and Article 53 of the EEA Agreement

### *6.2.1. The Treaty and the EEA Agreement*

(78) Article 101(1) of the Treaty prohibits as incompatible with the internal market agreements between undertakings, decisions by associations of undertakings and concerted practices that (i) may affect trade between Member States and (ii) have as their object or effect the prevention, restriction or distortion of competition within the internal market, unless they meet the conditions for an exemption set out in Article 101(3) of the Treaty.

(79) Article 53(1) of the EEA Agreement prohibits as incompatible with the functioning of the EEA Agreement agreements between undertakings, decisions by associations of undertakings and concerted practices that (i) may affect trade between Contracting Parties to the EEA and (ii) have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement, unless they meet the conditions for an exemption set out in Article 53(3) of the EEA Agreement.

(80) The agreements and/or concerted practices described in Section 5 concerned the territory of the Union and the EEA. Insofar as the conduct affected trade between Member States, Article 101 of the Treaty is applicable. As regards operation of those agreements and/or concerted practices in Norway, Iceland and Liechtenstein and their effect on trade between the Union and those countries, it falls within Article 53 of the EEA Agreement.

(81) In this case, the Commission is the competent authority to apply both Article 101 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the conduct had an appreciable effect on trade between Member States.

(82) References in the succeeding recitals of this Section to Article 101 of the Treaty, to effect on trade between Member States, or to competition within the internal market, are to be taken to include, respectively, Article 53 of the EEA Agreement, effect on trade between Contracting Parties to the EEA Agreement, and competition within the territory covered by the EEA Agreement.

### *6.2.2. Concept of undertaking*

#### 6.2.2.1. Principles

(83) Article 101(1) of the Treaty applies to undertakings and associations of undertakings.[80] The notion of an "undertaking" covers any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed.[81]

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80 Judgment of 3 March 2011, *AG2R Prévoyance*, C-437/09, EU:C:2011:112, paragraph 40.

81 Judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission,* Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 112; Judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 107; and Judgment of 11 July 2006, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission,* C-205/03 P, EU:C:2006:453, paragraph 25.

6.2.2.2. Application to this case

(84) Universal and the licensees with which it has concluded licensed agreements described in Section 5 carry out independent economic activities and therefore qualify as undertakings for the purposes of Article 101(1) of the Treaty.

*6.2.3. Agreements and/or concerted practices between undertakings*

6.2.3.1. Principles

(85) In order for there to be an agreement for the purposes of Article 101(1) of the Treaty, it is sufficient that at least two undertakings have expressed their joint intention to conduct themselves on the market in a specific way.[82] Although Article 101(1) draws a distinction between the concept of concerted practices and agreements between undertakings, the object is to bring within the prohibition of that Article a form of co-ordination between undertakings by which, without having reached the stage where an agreement has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.[83]

(86) The concepts of an agreement and a concerted practice are fluid and may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, even though, when considered in isolation, some of its manifestations could more accurately be described as one rather than the other.[84]

6.2.3.2. Application to this case

(87) The conduct described in Section 5 presents all the characteristics of agreements and/or concerted practices entered into between undertakings, namely between Universal, on the one hand, and licensees, on the other. Universal enforced the out-of-territory and customer group restrictions by means of contractual agreements, the merchandising licence agreements and their schedules, spanning the whole duration of the infringement. Moreover, as explained in recitals (34) and (72), even in the absence of explicit contractual clauses, Universal and its licensees agreed to behave, and/or engaged in concerted practices, in such a manner as to restrict offline and online sales of the merchandise products within the EEA beyond the territory or customer group allocated to the licensee.

## 6.3. Out-of-territory sales restrictions and customer allocations as restrictions of competition by object

*6.3.1. Principles*

(88) Certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.[85] Such reasoning derives from the fact that certain types of coordination

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[82] Judgment of 11 January 1990, *Sandoz Prodotti Farmaceutici v Commission*, C-277/87, EU:C:1990:6, paragraph 13; Judgment of 26 October 2000, *Bayer v Commission*, T-41/96, EU:T:2000:242, paragraphs 67 and 173.

[83] Judgment of 14 July 1972, *ICI v Commission*, C-48/69, EU:C:1972:70, paragraph 64; Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 26.

[84] Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 81.

[85] Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 113.

between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.[86]

(89) Certain types of conduct such as market partitioning by limiting parallel trade or by allocating customers[87], may be considered as being so likely to have negative effects on the market, in particular on the price, choice, quantity or quality of the goods or services in question, that it is considered redundant, for the purposes of applying Article 101(1) of the Treaty, to prove that they had had actual effects on the market.[88]

(90) In *Consten and Grundig*, the Court established a distinction between the existence and the exercise of intellectual property rights with regard to an agreement for the assignment of a trade mark aimed at partitioning the internal market. The Court held that rights under national trade mark law, such as the right to assign the trade mark, cannot be exercised so as *"to frustrate the Community's law on cartels"*.[89]

(91) In the same case, the Court held that agreements restricting out-of-territory active and passive sales make it possible for undertakings to charge for the products in question prices which are sheltered from all effective competition by artificially maintaining separate markets within the EEA.[90]

(92) Union Courts have held that agreements aimed at partitioning national markets along national borders or at allocating customers, must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) of the Treaty.[91] Moreover, the fact that the clauses are not strictly enforced is irrelevant since the very existence of those clauses may create a *"visual and psychological"* background contributing to the division of the markets.[92]

(93) These principles are also reflected in Commission Regulation (EU) No 330/2010[93] ("the Vertical Block Exemption Regulation") and Commission Regulation (EU) No

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86 Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 114.

87 Judgment of 4 October 2011, *Football Association Premier League and Others v QC Leisure and Others and Karen Murphy v Media Protection Services*, Joined Cases C-403/08 and C-429/08, EU:C:2011-631, paragraphs 139-140; Judgment of 12 December 2018, *Groupe Canal + v Commission*, T-873/16 EU:T:2018:904, paragraph 50; Judgment of 12 July 2018, *Hitachi Metals v European Commission*, T-448/14, EU:T:2018:442, paragraph 67.

88 Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 115.

89 Judgment of 13 July 1966, *Consten and Grundig v Commission of the EEC*, Joined Cases 56 and 58-64, EU:C:1966:41, p.346.

90 Judgment of 13 July 1966, *Consten and Grundig v Commission of the EEC*, Joined Cases 56 and 58-64, EU:C:1966:41, p.343.

91 Judgment of 4 October 2011, *Football Association Premier League and Others v QC Leisure and Others and Karen Murphy v Media Protection Services*, Joined Cases C-403/08 and C-429/08, EU:C:2011:631, paragraphs 139-140; Judgment of 12 December 2018, *Groupe Canal + v Commission*, T-873/16, EU:T:2018:904, paragraph 50; Judgment of 12 July 2018, *Hitachi Metals v Commission*, T-448/14, EU:T:2018:442, paragraph 67.

92 Judgment of 1 February 1978, *Miller v Commission*, Case 19/77, EU:C:1978:19, paragraph 7.

93 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1–7.

316/2014[94] ("the Technology Transfer Block Exemption Regulation"), which provide guidance on the assessment of restrictions in distribution and licensing agreements. More specifically, Article 4 of the Vertical Block Exemption Regulation provides that, in the absence of an exclusive or selective distribution agreement, restrictions of both active and passive sales by territory or customers are 'hardcore' restrictions and where such hardcore restrictions are included in an agreement, the agreement is to be presumed to fall within Article 101(1) of the Treaty.[95]

(94) Even an agreement which does not explicitly contain an export ban or confer absolute protection from competition on a distributor may be found to restrict competition if such is its purpose or if it makes parallel imports more difficult by subjecting them to treatment less favourable than that reserved for official imports or by restricting the buyer's freedom to use the goods supplied in accordance with his own economic interests.[96] In this respect, Union Courts and the Commission's decisional practice have found that certain types of conduct falling short of an outright prohibition on out-of-territory sales or sales beyond the specified customer group also constitute anticompetitive infringements.[97] These include situations where letters are sent discouraging or prohibiting exports,[98] where export is permitted only if the consent of the producer is obtained,[99] where the producer must be contacted before exporting via the internet,[100] where an agreement requires a distributor to pass on any customer enquiries coming from outside the licensed territory to the producer,[101] where discounts are reduced or additional fees charged in the event of sales outside the destination territory,[102] or where a producer threatens to terminate

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[94] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93, 28.3.2014, p. 17–23.

[95] See also paragraph (47) of the Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, pp. 1–46. Similarly, paragraphs (14) and (96) of the Technology Transfer Guidelines, OJ C 89, 28.3.2014, pp. 3-50, provide that the mere presence of these hardcore restrictions in an agreement results in the whole agreement falling outside the scope of the block exemption and constitutes a presumption that the restriction falls under Article 101(1) of the Treaty.

[96] Opinion of Advocate General Tizzano delivered on 25 October 2005, *General Motors v Commission*, C-551/03 P, EU:C:2005:639, paragraph 72, quoting Judgment of 8 November 1983, *IAZ and Others v Commission*, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, EU:C:1983:310, paragraph 6. See also paragraph (50) of the Guidelines on Vertical Restraints and paragraph (96) of the Technology Transfer Guidelines.

[97] Commission Decision of 25.03.2019 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in Case AT.40436 – Ancillary sports merchandise, paragraphs 54-72 and Commission Decision of 09.07.2019 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in Case AT.40432 – Character merchandise.

[98] Judgment of 26 October 2000, *Bayer v Commission*, T-41/96, EU:T:2000:242.

[99] Judgment of 14 July 1994, *Parker Pen v Commission*, T-77/92, EU:T:1994:85, paragraphs 37 and 44 ; Judgment of 14 December 1983, *Société de Vente de Ciments v Kerpen & Kerpen*, C-319/82, EU:C:1983:374, paragraph 6.

[100] Commission Decision of 16.07.2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement in Case No COMP/37.975 PO/Yamaha, paragraph 107.

[101] Judgment of 19 May 1999, *BASF Lacke + Farben v Commission*, T-175/95, EU:T:1999:99, paragraphs 87 and 88.

[102] Judgment of 9 July 2009, *Peugeot Nederland v Commission*, T-450/05, EU:T:2009:262, paragraphs 47-49.

or actually terminates contractual arrangements with distributors or dealers which sell outside their allocated territory.[103]

(95) Concerning online restrictions, the Court has held that a contractual provision prohibiting de facto the internet as a method of marketing amounts to a restriction of competition by object within the meaning of Article 101(1) of the Treaty. It has at the very least as its object the restriction of passive sales to end users wishing to purchase online and located outside the trader's territory.[104] Similarly, a provision prohibiting online sales would also have as its object the restriction of passive sales to customers outside the customer group allocated to a trader.[105]

#### *6.3.2. Application to this case*

(96) Through the set of agreements and/or concerted practices described in Section 5.2 restricting sales beyond the territories and customers allocated to a licensee, Universal restricted the ability of its licensees to sell licensed merchandise beyond allocated territories or customers, thereby partitioning the EEA market.

(97) Universal engaged in these restrictive practices by different direct means, including by putting into practice various measures prohibiting or preventing licensees from concluding active and passive, online and offline sales of its licensed merchandise products beyond the territories and customers allocated to them. Since these practices restricted to whom or where products may be sold, by their very nature they had as their object the restriction of competition within the internal market within the meaning of Article 101(1) of the Treaty.

(98) Through those direct measures, Universal achieved a compartmentalisation of its licensing network restricting sales across territories and customers within the EEA. All these practices are liable to frustrate the Treaty's objective of achieving market integration through the establishment of a single market.

(99) In addition to direct measures restricting to whom or where licensees may sell their products, Universal at times used indirect measures which supported and reinforced the direct restrictions, as described in Section 5.2.3. Universal's use of these indirect measures against the background of the direct sales restrictions constitutes conduct that, by its very nature, has as its object the restriction of competition within the meaning of Article 101(1) of the Treaty.

### 6.4. Single and continuous infringement

#### *6.4.1. Principles*

(100) An infringement of Article 101 of the Treaty can result not only from an isolated act, but also from a series of acts or from a course of conduct, even if one or more aspects of that series of acts or course of conduct could also, in itself and taken in isolation, constitute an infringement of that Article. It follows from the express terms of Article

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[103] Judgment of 6 July 2000, *Volkswagen v Commission*, T-62/98, EU:T:2000:180, paragraphs 164-166, 236-237 and 242.

[104] Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paragraphs 47 and 58.

[105] See also paragraphs (52) and (53) of the Guidelines on Vertical Restraints.

101 of the Treaty that an agreement may consist of a series of acts or a course of conduct.[106]

(101) The Court has also held that when: "[…] the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole".[107] It also held that the existence of an "overall plan" (and thus a single infringement) can be established by a finding that the participants in a series of practices and/or agreements collusively aimed at restricting competition between them.[108]

(102) Accordingly, if the different actions form part of an "overall plan" because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[109] Furthermore, a complex infringement may properly be viewed as a single and continuous infringement for the time during which it existed.[110]

*6.4.2. Application to this case*

(103) The Commission concludes that the conduct described in Section 5 constitutes a single and continuous infringement of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement throughout the EEA.

(104) The restrictions implemented by Universal were all adopted in pursuit of an overall anti-competitive objective, namely a compartmentalisation of its licensing network restricting intra-brand competition and partitioning the market across territories and customers within the EEA.

(105) The evidence described in Section 5.2. demonstrates that those practices formed part of an overall business strategy by Universal aimed at restricting licensee sales outside of the non-exclusive territories and customer groups assigned to them,[111] thereby reducing or eliminating competition between Universal's licensees.[112]

(106) The existence of a single and continuous infringement is further supported by the fact that Universal's conduct followed a similar pattern throughout the whole infringement and throughout the territories of the EEA.

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[106] Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92P, EU:C:1999:356, paragraph 81.

[107] Judgments of 7 January 2004, *Aalborg and others v Commission*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 258; Judgment of 21 September 2006, *Technische Unie v Commission*, C-113/04 P, EU:C:2006:593, paragraph 178.

[108] Judgment of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, EU:C:2006:592, paragraphs 162-163.

[109] Judgment of 24 June 2015**,** *Fresh Del Monte Produce v. Commission,* Joined Cases C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 156.

[110] Judgment of 15 March 2000, *Cimenteries CBR v Commission*, Joined Cases T-25/95 and others, EU:T:2000:77, paragraph 3699.

[111] See ID 479-21, ID 479-12, ID 479-24, ID 479-19 […].

[112] See also paragraphs 151 and 168 of the Guidelines on Vertical Restraints.

## 6.5. Effect on trade between Member States and between Contracting Parties to the EEA Agreement

### *6.5.1. Principles*

(107) Article 101(1) of the Treaty is aimed at agreements and concerted practices which might harm the attainment of an internal market between Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market.[113] Article 53(1) of the EEA Agreement is similarly aimed at agreements and concerted practices which might harm the attainment of an internal market between Contracting Parties to the EEA Agreement.

(108) The Court of Justice has held that an agreement affecting trade between Member States and having an anticompetitive object by its nature constitutes an appreciable restriction of competition in violation of Article 101(1) of the Treaty, independently of any concrete effect that it may have.[114]

### *6.5.2. Application to this case*

(109) Notwithstanding the non-exclusive nature of Universal's merchandising licence agreements, by implementing a series of prohibitions on offline and online sales out-of-territory and beyond allocated customer groups during the relevant period, Universal prevented its licensees from selling licensed merchandise products outside their allocated territories or customer groups, even when the sales were geared towards territories or customers in another territory of the EEA.[115]

(110) In addition to outright prohibitions, certain other practices were implemented that allowed Universal to monitor and/or encourage compliance with those prohibitions.[116]

(111) The Commission therefore concludes that Universal’s conduct affected trade between Member States within the meaning of Article 101(1) of the Treaty and between Contracting Parties to the EEA Agreement within the meaning of Article 53 of the EEA Agreement.

## 6.6. Application of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement

### *6.6.1. Principles*

(112) Article 101(1) of the Treaty may be declared inapplicable pursuant to Article 101(3) of the Treaty, where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and the agreement or concerted practice does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objects; and (b) afford those

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113 Judgment of 15 March 2000, *Cimenteries CBR v Commission*, Joined Cases T-25/95 and others, EU:T:2000:77, paragraph 3930; Judgment of 28 April 1998, *Javico v Yves Saint Laurent Parfums*, Case C-306/96, EU:C:1998:173, paragraphs 16-17. See also Judgment of 13 July 1966, *Consten and Grundig v Commission of the EEC*, Joined Cases C-56/64 and C-58-64/64, pp. 341-342.

114 Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795 paragraph 37.

115 See Sections 5.2.1 and 5.2.2.

116 See Section 5.2.3.

undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(113) The Commission is empowered to apply Article 101(3) of the Treaty by regulation to certain categories of agreement falling within Article 101(1) of the Treaty that can be regarded as normally satisfying all the conditions laid down in Article 101(3) of the Treaty. The Vertical Block Exemption Regulation and the Technology Transfer Block Exemption Regulation were adopted under that empowerment.

(114) Even where a restriction by object within the meaning of Article 101(1) of the Treaty is established and the Vertical Block Exemption Regulation and the Technology Transfer Block Exemption Regulation are not applicable, there is in principle the possibility of an exemption from the prohibition in Article 101(1) if the parties prove that the agreement fulfils the four conditions for exemption set out in Article 101(3) of the Treaty.[117]

*6.6.2. Application to this case*

(115) Given that the agreements governing Universal's licensed merchandise products govern both the licensing of intellectual property rights and the distribution of the products incorporating those rights, the Vertical Block Exemption Regulation and the Technology Transfer Block Exemption Regulation could provide guidance on the assessment of the restrictions in this case. However, the hardcore nature of these restrictions means that the exemptions in the Vertical Block Exemption Regulation[118] and in the Technology Transfer Block Exemption Regulation[119] would not apply in this case.

(116) The Commission also concludes that Universal’s conduct does not meet the conditions for exemption set out in Article 101(3) of the Treaty itself.

(117) There are no indications that Universal’s conduct was indispensable to induce retailer investment in certain territories or to alleviate the repercussions of free-riding between licensees. Moreover, as shown in Section 5, the restrictions implemented by Universal throughout its network of licensees had as their aim to distort competition between licensees and distributors of products incorporating Universal’s intellectual property, reducing the possibility of a wider choice and lower prices for consumers.

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117 Judgment of 15 July 1994, *Matra Hachette v Commission*, T-17/93, EU:T:1994:89, paragraph 104; Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paragraphs 49 and 59.

118 In accordance with Article 2(3) of the Vertical Block Exemption Regulation, the block exemption applies to vertical agreements containing provisions which relate to the use of intellectual property rights provided the licensing of intellectual property rights is not the ‘primary object’ of the agreement. However, where hardcore restrictions, such as those set out in Article 4 of that Regulation, are included in an agreement, that agreement is presumed to fall within Article 101(1) of the Treaty and unlikely to fulfil the conditions of Article 101(3). See paragraph (47) of the Guidelines on Vertical Restraints.

119 The licensing agreements in this case do not fall under the Technology Transfer Block Exemption Regulation to the extent that they not only concern the licensing of intellectual property rights, but also the distribution of related contract products. Moreover, restrictions of passive sales fall under the list of 'hardcore' restrictions in article 4 of that Regulation. According to paragraphs (14), (74), (75) and (96) of the Technology Transfer Guidelines, the mere presence of hardcore restrictions in an agreement results in the whole agreement falling outside the scope of the block exemption and constitutes a presumption that the restriction falls under Article 101(1) of the Treaty and is unlikely to fulfil the conditions of Article 101(3).

## 7. DURATION OF THE INFRINGEMENT

(118) Universal's licensing activities in the EEA materially expanded after 1 January 2013, following the success of the Despicable Me franchise. 2013 was also the first year in which licensees systematically entered into merchandising licence agreements to which the clauses described in Section 5.2 were applicable.[120]

(119) The contractual evidence is further supported by non-contractual evidence (such as e-mails) spanning the period from 2013 to September 2018, when the Commission conducted unannounced inspections at Universal's premises in London, United Kingdom.

(120) Following the opening of proceedings by the Commission in September 2017, Universal organised a training event on Union competition rules for its staff members based in the EEA who dealt with merchandising licence agreements.[121] Moreover, in August 2017, Universal modified its template merchandising licence agreement and schedule in order to address the Commission's concerns, as understood by Universal at that time. Agreements concluded after August 2017 were mostly based on that template.[122] The new templates provided, inter alia, that:

(a) where the licensed territory set out in the schedule of the agreement included any EEA country, it would be deemed to cover all EEA countries; [123]

(b) when the licensed territory covered the EEA, cross-border sales within the EEA would not result in automatic termination of the agreement and Universal would not be entitled to 100% of the revenues generated from such sales;

(c) where the licensee was allowed to sell the licensed merchandise online and the licensed territory covered the EEA, cross-border internet sales were allowed within the EEA;

(d) licensees were allowed to sell the licensed merchandise through all distribution channels, apart from a very limited list of rights reserved to Universal.

(121) In April 2019, Universal sent a notice to 68 of its licensees whose merchandising licence agreements had not been concluded on the basis of the September 2017 template. In that notice, Universal declared, inter alia, that, since August 2017, it had not enforced clauses prohibiting the license from selling or soliciting sales in the EEA, in cases where the licensed territory in the agreement covered at least one EEA country, and that it would not seek to enforce such clauses in those cases in the future. Universal also clarified that such sales would not be considered unlicensed or unapproved and would not trigger any higher royalty rates or other payments on that basis.

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120 See ID 475, Corporate Statement, paragraphs 3.3 and 5.1, ID 434, Universal submission of 13 March, paragraph 19. Prior to 2013, Universal's consumer products business was extremely small in the EEA and most of the major Universal's merchandising license agreements had either an EEA-wide or global scope.

121 See ID 481, Corporate Statement, Annex 47, paragraph 17, ID 555.

122 See ID 475, Corporate Statement, paragraph 5.3 and Annex 1.

123 The prohibition on maintaining a, outside the license territory, a branch, sales office, production plant or depot, was also removed.

(122) On 25 September 2019, Universal sent letters to all its licensees to further clarify how its merchandising licence agreements were to be interpreted and enforced.[124] The letters clarified that:

(a) licensees are free to sell to any distribution channels, territories or customer groups within the EEA unless the licensee is aware and has been notified that the distribution channels, territories or customer groups in question are exclusively reserved to Universal or another licensee;

(b) licensees are free to sell on a passive basis to all distribution channels, territories or customer groups within the EEA, even if exclusively reserved to Universal or another licensee;

(c) clauses containing obligations to notify out-of-territory sales no longer apply;

(d) clauses limiting licensees ability to use languages other than those of the licensing territory no longer apply;

(e) licensees are free to sell online within the EEA;

(f) sales to distribution channels, territories or customer groups within the EEA that are not exclusively reserved to Universal or another licensee will not be considered unlicensed or unapproved and will not trigger any penalty payment.

(b) By sending the letters to all licensees, all restrictions which are identified in this Decision as constituting by object restrictions of competition within the meaning of Article 101(1) TFEU ceased to apply in the EEA. Universal thus brought the infringement identified in this Decision to an end on 25 September 2019.

## 8. ADDRESSEES OF THIS DECISION

### 8.1. Principles

(123) Union competition law applies to the activities of undertakings. The notion of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status or the way in which it is financed.[125]

(124) When an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. However, the infringement must be imputed unequivocally to a legal person on whom fines may be imposed. Where several legal persons may be held liable for an infringement committed by one and the same undertaking, they must be regarded as jointly and severally liable for the infringement.

(125) The conduct of a subsidiary may be imputed to the parent company, even though the parent company does not participate directly in the infringement, if the parent company and the subsidiary form a "*single economic unit*" and therefore form a single "*undertaking*" for the purposes of Union competition law. In particular, that may be the case, where a subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, regard being

124 See ID 567.

125 Judgment of 13 June 2013, *Versalis v Commission*, C-511/11 P, EU:C:2013:386, paragraph 51.

had in particular to the economic, organisational and legal links between those two legal entities.[126]

(126) In the specific case, however, in which a parent holds all or almost all of the capital in a subsidiary that has committed an infringement of Union competition rules, there is a rebuttable presumption that that parent company in fact exercises a decisive influence over its subsidiary. In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption applies.[127]

### 8.2. Application to this case

(127) The Commission concludes that liability for the infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement, as described in Section 5 of this Decision, should be imputed to the addressees as follows:

(a) to Comcast Corporation, NBCUniversal LLC and NBCUniversal Media LLC in their capacity as parent companies for the whole period of infringement from 1 January 2013 to 25 September 2019;

(b) to Universal Studios Licensing LLC, for its direct participation in the infringement for the whole period of infringement from 1 January 2013 to 25 September 2019;

(c) to Universal Studios Limited, for its direct participation in the infringement from the date of its incorporation on 6 June 2014 to the end of the infringement on 25 September 2019;

(d) to DreamWorks Animation UK Limited, DreamWorks Animation Publishing LLC, DreamWorks Animation LLC and DreamWorks Animation Licensing LLC for their direct participation in the infringement from 22 August 2016, being the date on which they were acquired by Comcast Corporation, to the end of the infringement on 25 September 2019;

(e) to Universal Pictures (Shanghai) Trading Company Limited, for its direct participation in the infringement from the date of its incorporation on 21 October 2016 to the end of the infringement on 25 September 2019.

## 9. REMEDIES AND FINES

### 9.1. Remedies under Article 7 of Regulation (EC) No 1/2003

(128) Where the Commission finds that there is an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003. For this purpose, it may also impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

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126 Judgment of 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, EU:C:2011:620, paragraph 54.

127 Judgment of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraphs 60 and 61, Case T 217/06 Arkema v Commission, paragraphs 68-70.

(129) The requirement that a remedy has to be effective also empowers the Commission to require the undertaking concerned to refrain from repeating the act or conduct in question and to refrain from any act or conduct having the same or a similar object or effect.[128]

(130) As explained in Section 7, by 25 September 2019 Universal had already brought the infringement identified in this Decision to an end. However, it is necessary for the Commission to require Universal to refrain from any agreement or concerted practice which might have the same or a similar object or effect.

## 9.2. Article 23(2) of Regulation (EC) No 1/2003

(131) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty and/or Article 53 of the EEA Agreement. For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.

(132) In this case, the Commission considers that, based on the facts described in Section 6, the infringement has been committed intentionally. The infringement consists of restrictions on sales of licensed merchandise products beyond the allocated territories and customer groups within the EEA. Moreover, even in the absence of explicit contractual clauses, for instance prohibiting passive sales, as explained in recital (39), Universal and its licensees behaved in such a manner as to restrict all out-of-territory sales and sales to other customer groups. Universal employees at times intervened to request licensees not to make cross-border sales or sales to other customer groups. If not intentionally, the infringement has been committed at least negligently.

## 9.3. Calculation of the fine

### *9.3.1. General methodology*

(133) Under Article 23(3) of Regulation (EC) No 1/2003, in fixing the amount of a fine the Commission must have regard to a number of elements, in particular the gravity and the duration of the infringement. The Commission will also refer to the principles laid down in its Guidelines on the Method of Setting Fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 ("the Guidelines on Fines").[129]

(134) In calculating the fine the Commission will first determine a basic amount. The basic amount of the fine is set by reference to the value of sales to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.[130] The basic amount consists of a percentage of the value of sales up to a maximum percentage of 30%,[131] depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.[132] The Commission may also

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[128] See e.g., Judgment of 6 October 1994, *Tetra Pak v Commission*, T-83/91, EU:T:1994:246, paragraph 220; Judgment of 27 October 1994, *Fiatagri and New Holland Ford v Commission*, T-34/92, EU:T:1994:258, paragraph 39; Judgment of 20 April 1999, *LVM v Commission*, Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 1254.

[129] OJ C 210, 1.9.2006, p. 2.

[130] Point 13 of the Guidelines on Fines.

[131] Point 21 of the Guidelines on Fines.

[132] Point 19 of the Guidelines on Fines.

include in the basic amount an additional amount of up to 25% of the value of sales (an “entry fee”) to deter undertakings from entering into anticompetitive agreements.[133]

(135) Second, the Commission may increase or decrease the basic amount to take into account any aggravating or mitigating circumstances in accordance with points 28 and 29 of the Guidelines on Fines. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.[134]

(136) Third, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect.[135]

### 9.3.2. *Value of sales*

(137) For calculating the value of sales, the Commission will normally take the sales made by the undertaking during the last full business year of the undertaking’s participation in the infringement.[136]

(138) In this case, given the nature of the merchandising business, the value of sales should be based on the royalties received by Universal from its licensees for sales of licensed merchandise products in the EEA. These royalties represent Universal’s revenues from its licensed merchandise business and are paid to Universal in consideration for use of the intellectual property rights licensed.

(139) The value of sales generated by Universal’s licensed merchandise business in the EEA during the last full business year of the infringement, namely 2018, should constitute the starting point for calculating the fine.

(140) Based on the assessment in this Section, the value of sales to be taken into account in this case amounts to EUR [30 000 000 – 40 000 000].

### 9.3.3. *Gravity*

(141) The gravity of the infringement determines the percentage of the value of sales to be taken into account in setting the fine. In assessing the gravity of the infringement, the Commission will have regard to a number of factors, such as the nature of the infringement, the market share of the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.[137]

(142) By their very nature, out-of-territory restrictions and customer allocations, restrict competition within the meaning of Article 101(1) of the Treaty. However, vertical restraints are generally less harmful than horizontal ones. Taking into account these factors and the EEA-wide impact of the restrictions in this case, the percentage of the value of sales to be used for calculating the fine in this case should be set at 8%.

### 9.3.4. *Duration*

(143) The duration of the infringement, as set out in Section 7, was 2 459 days. The multiplier for calculating the fine (based on the number of years of the infringement) should therefore be 6.73.

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133 Point 25 of the Guidelines on Fines.
134 Point 27 of the Guidelines on Fines.
135 Point 30 of the Guidelines on Fines.
136 Point 13 of the Guidelines on Fines.
137 Point 22 of the Guidelines on Fines.

*9.3.5. Calculation of the basic amount*

(144) Applying the criteria explained in recitals (133) to (143), the basic amount of the fine to be imposed in this case therefore amounts to EUR [20 000 000 – 30 000 000].

*9.3.6. Additional amount*

(145) The Commission considers that no additional amount should be included in the basic amount.

*9.3.7. Aggravating or mitigating factors*

(146) The Commission considers that there are no aggravating or mitigating circumstances applicable in this case.

*9.3.8. Deterrence*

(147) The Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect. To that end, the Commission may increase a fine to be imposed on an undertaking which has a particularly large turnover beyond the sales of goods or services to which the infringement relates.[138]

(148) In this case, the Commission considers that no increase in the fine for purposes of deterrence is warranted.

*9.3.9. Application of the 10% turnover limit*

(149) The fine does not exceed 10% of Universal's total turnover relating to the business year preceding the date of adoption of this Decision in accordance with Article 23(2) of Regulation (EC) No 1/2003.

*9.3.10. Reduction of the fine in view of cooperation*

(150) Point 37 of the Guidelines on Fines allows the Commission to depart from the methodology set out in those Guidelines if the particularities of the case justify it.

(151) Universal cooperated with the Commission beyond its legal obligation to do so by acknowledging the infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement in relation to the conduct, as well as providing additional evidence to the Commission, thereby strengthening to a certain extent its ability to prove the infringement, and waiving certain procedural rights resulting in administrative efficiencies. As explained in Section 7, as soon as formal proceeding were opened, Universal provided guidance on practices compliant with competition law to Universal's EEA-based employees and changed its template agreement. In September 2019, Universal sent clarification letters to all licensees clarifying how the merchandising licence agreements are to be interpreted and enforced.

(152) In order to reflect the effective and timely cooperation provided by Universal, the basic amount of the fine that would otherwise have been imposed should be reduced, in accordance with point 37 of the Guidelines on Fines, by 30%.

*9.3.11. Final amount of the fine*

The Commission concludes that the final amount of the fine to be imposed pursuant to point (a) of the first subparagraph of Article 23(2) of Regulation (EC) No 1/2003 should be EUR 14 327 000. Comcast Corporation, NBCUniversal LLC,

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[138] Point 30 of the Guidelines on Fines.

NBCUniversal Media LLC and Universal Studios Licensing LLC should be held jointly and severally liable for the total amount of this fine, while the other addressees of this Decision should only be held jointly and severally liable for a proportion of that amount reflecting the part of the relevant period starting from their incorporation or acquisition,

HAS ADOPTED THIS DECISION:

*Article 1*

The undertaking comprising the legal entities Comcast Corporation, NBCUniversal LLC, NBCUniversal Media LLC, Universal Studios Licensing LLC, Universal Studios Limited, DreamWorks Animation UK Limited, DreamWorks Animation Publishing LLC, DreamWorks Animation LLC, DreamWorks Animation Licensing LLC and Universal Pictures (Shanghai) Trading Company Limited has infringed Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area by participating, during the period indicated below, in a single and continuous infringement regarding licensed merchandise. The infringement covered the whole European Economic Area, and consisted in the implementation and enforcement of a series of agreements and/or concerted practices restricting sales of that licensed merchandise across territories and across customer groups, both offline and online, through the relevant legal entities as follows:

(a) through Comcast Corporation, NBCUniversal LLC, NBCUniversal Media LLC and Universal Studios Licensing LLC, from 1 January 2013 until 25 September 2019;

(b) through Universal Studios Limited, from 6 June 2014 until 25 September 2019;

(c) through DreamWorks Animation UK Limited, DreamWorks Animation Publishing LLC, DreamWorks Animation LLC and DreamWorks Animation Licensing LLC, from 22 August 2016 until 25 September 2019;

(d) through Universal Pictures (Shanghai) Trading Company Limited, from 21 October 2016 until 25 September 2019.

*Article 2*

For the infringement referred to in Article 1, a fine totalling EUR 14 327 000 is imposed as follows:

(a) Comcast Corporation, NBCUniversal LLC, NBCUniversal Media LLC and Universal Studios Licensing LLC, jointly and severally: EUR 3 044 000;

(b) Comcast Corporation, NBCUniversal LLC, NBCUniversal Media LLC, Universal Studios Licensing LLC and Universal Studios Limited jointly and severally: EUR 4 706 000;

(c) Comcast Corporation, NBCUniversal LLC, NBCUniversal Media LLC, Universal Studios Licensing LLC, Universal Studios Limited, DreamWorks Animation UK Limited, DreamWorks Animation Publishing LLC, DreamWorks Animation LLC and DreamWorks Animation Licensing LLC, jointly and severally: EUR 340 000.

(d) Comcast Corporation, NBCUniversal LLC, NBCUniversal Media LLC, Universal Studios Licensing LLC, Universal Studios Limited, DreamWorks Animation UK Limited, DreamWorks Animation Publishing LLC, DreamWorks Animation LLC, DreamWorks Animation Licensing LLC, and Universal Pictures (Shanghai) Trading Company Limited, jointly and severally: EUR 6 237 000.

The fine shall be credited, in euro, within three months from the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI/AT.40433

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council.[139]

*Article 3*

The undertaking referred to in Article 1 shall immediately bring to an end the infringement referred to in that Article insofar as it has not already done so.

The undertaking referred to in Article 1 shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or a similar object or effect.

*Article 4*

This Decision is addressed to:

Comcast Corporation, One Comcast Center, Philadelphia, PA 19103, United States of America

NBCUniversal LLC, Comcast Capital Corporation, 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America

NBCUniversal Media LLC, Enterprise Corporate Services LLC, 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America

Universal Studios Licensing LLC, Enterprise Corporate Services LLC, 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America

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139 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rues applicable to the general budget of the European Union (OJ L 193, 30.7.2018, p. 80).

Universal Studios Limited, 1 Central St. Giles, St. Giles High Street, London WC2H 8NU, United Kingdom

DreamWorks Animation UK Limited, 1 Central St. Giles, St. Giles High Street, London WC2H 8NU, United Kingdom

DreamWorks Animation Publishing LCC, Enterprise Corporate Services LLC, 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America

DreamWorks Animation LLC, Enterprise Corporate Services LLC, 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America

DreamWorks Animation Licensing LLC, Enterprise Corporate Services LLC, 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America

Universal Pictures (Shanghai) Trading Company Limited, RMS 1903-08, ICC Office Bldg 2, No. 288 South Shanxi Road Shanghai, People's Republic of China.

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the Agreement on the European Economic Area.

Done at Brussels, 30.1.2020

*For the Commission*
*Margrethe VESTAGER*
*Executive Vice-President*

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION