



EUROPEAN COMMISSION
Competition DG

***CASES AT.40413 – Focus Home,
AT.40414 – Koch Media, AT.40420 -
ZeniMax, AT.40422 – Bandai Namco and
AT.40424 - Capcom***

(Only the English text is authentic)

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

Article 7 Regulation (EC) 1/2003

Date: 20/01/2021

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Brussels, 20.1.2021
C(2021) 75 final

COMMISSION DECISION

of 20.1.2021

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

**Cases AT.40413 - Focus Home, AT.40414 - Koch Media, AT.40420 – ZeniMax,
AT.40422 – Bandai Namco and AT.40424 - Capcom**

(Text with EEA relevance)

(Only the English text is authentic)

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(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (the “Treaty”)¹,

Having regard to the Agreement on the European Economic Area (the “EEA Agreement”),

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 Treaty², and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decisions of 2 February 2017 to initiate proceedings in these five cases,

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 Treaty³,

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

¹ OJ, C 115, 9/5/2008, p.47.

² OJ L 1, 4.1.2003, 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 (“TFEU” or “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. For the purposes of this Decision, although the United Kingdom withdrew from the European Union as of 1 February 2020, according to Article 92 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p. 7), the Commission continues to be competent to apply Union law as regards the United Kingdom for administrative procedures which were initiated before the end of the transition period.

³ OJ L 123, 27.4.2004, p. 18.

Having regard to the final report of the Hearing Officer in these cases,

Whereas:

1. INTRODUCTION

- (1) This Decision is addressed to Valve Corporation (“Valve”).
- (2) This Decision establishes that Valve was party to agreements and/or concerted practices with each of the undertakings mentioned in Recital (4) aimed at restricting cross-border sales⁴ of certain personal computer (“PC”) video games outside of designated Member States and Contracting Parties to the EEA Agreement⁵ based on the geographical location of the user⁶ (“geo-blocking”).
- (3) The products affected by the practices are certain PC video games of different genres/categories which are sold in the EEA, on tangible supports, such as CDs and DVDs, as well as in digital format via downloads or streaming,⁷ including PC video games to be activated and played on Valve’s online gaming platform “Steam”.⁸
- (4) The PC video games concerned by this Decision were published by the following undertakings (altogether, “the Publishers”)⁹:
 - Case AT.40422: Bandai Namco Holdings Inc., Japan and Bandai Namco Entertainment Europe S.A.S., France (together, “Bandai”);
 - Case AT.40424: Capcom Co., Ltd., Japan, Capcom USA, Inc., CE Europe Ltd. (together, “Capcom”);

⁴ For the purposes of this Decision, “restrictions of cross-border sales” refers to practices preventing or hindering companies from responding to unsolicited requests from outside a specific territory (“passive sales”). The Court of Justice has held that an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty’s objective of achieving the integration of those markets through the establishment of an internal market and must be regarded, in principle, as an agreement the object of which is to restrict competition within the meaning of Article 101(1) of the Treaty, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition (Judgment of the Court of Justice of 4 October 2011, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)*, hereinafter referred to as “*Murphy*”, Joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:631, paragraphs 139-142).

⁵ For the purposes of this Decision, references to the EEA should be understood as covering the 27 Member States of the European Union (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic (for “Czech Republic” instead of “Czechia”, see footnote 26), Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden) and the United Kingdom, as well as Iceland, Liechtenstein and Norway. Accordingly, any references made to the EEA in this Decision are meant to also include the United Kingdom (UK).

⁶ In all the recitals of this Decision except in Sections 4 and 5 where the term “user” generically refers to a video game player, the term “user” refers to consumers that purchase PC video games in order to activate/play them on Valve’s online gaming platform “Steam”.

⁷ Downloading a PC video game involves transferring digital files from a remote server which is then saved onto a user’s local hard drive (computer). Streaming a PC video game involves transmitting the data to a device (instead of saving and downloading the relevant files) without creating copies other than of transient or incidental nature.

⁸ <https://store.steampowered.com/>, printed on 21 February 2020, [...].

⁹ On the contrary any reference in this Decision to “publishers” with no capitalisation, refers to publishers of PC video games in general.

- Case AT.40413: Focus Home Interactive S.A. (“Focus Home”);
 - Case AT.40414: Koch Media GmbH (Austria), Koch Media GmbH (Germany), Koch Media Ltd (UK) (together, “Koch Media”);
 - Case AT.40420: ZeniMax Media Inc., Zenimax Europe Ltd., Bethesda Softworks LLC (together, “Zenimax”).
- (5) The Commission finds that the agreements/concerted practices referred to in Recital (2) between Valve and each of the five Publishers had the object of restricting competition, within the meaning of Article 101 of the Treaty, by partitioning markets or making the interpenetration of national markets more difficult by geo-blocking certain PC video games, thereby preventing or hindering companies from responding to unsolicited requests for those PC video games from outside a specific territory. These agreements/concerted practices constitute five separate single and continuous infringements of Article 101 of the Treaty and Article 53 of the EEA Agreement for which Valve is liable.

2. THE UNDERTAKING LIABLE FOR THE INFRINGEMENT AND OTHER UNDERTAKINGS RELEVANT FOR THIS DECISION

2.1. Valve

- (6) Valve is an undertaking active in the development and sale of entertainment software and technology, headquartered in Bellevue, Washington State, USA. Valve operates an online PC gaming platform called "Steam", which is available worldwide and in several languages. Via Steam, Valve allows users to download or stream PC video games (and other audio-visual content) from the so-called “Steam Store” where publishers can offer Steam-enabled PC video games to users. In addition, Valve is also a video game developer, creating games for PCs and consoles which it also makes available on Steam.¹⁰ Some of Valve's own games are also sold through retail distribution (e.g. retail sale of packaged products in brick-and-mortar stores and online stores).¹¹
- (7) The legal entity Valve Corporation is the addressee of this Decision in relation to each of the five infringements at issue.

2.2. Bandai [Case AT.40422]

- (8) Bandai is a Japanese undertaking active in the entertainment industry. Bandai is a publisher, developer and distributor of video games for platforms including all major video game consoles and PCs, with marketing and sales operations in fifty countries across Europe, the Middle East, Africa and Australasia. In the EEA, Bandai has several subsidiaries based in France, the UK, Germany, Spain, Italy, Sweden and Greece. Until 2017, Bandai was active at the wholesale level only (through its own subsidiaries). At the retail level, it relied on independent distributors to distribute its own and third-party PC video games. In 2017, Bandai started distributing PC video games directly to users via its online store.
- (9) [...] is one of Bandai’s distributors in the EEA. [...] is an international publisher and distributor of PC video games. It is part of [...].

¹⁰ [...].

¹¹ [...].

(10) Bandai and [...] are not addressees of this Decision.

2.3. Capcom [Case AT.40424]

(11) Capcom is an undertaking headquartered in Japan that is active as an international software and games developer and publisher. In the EEA, Capcom is active in the distribution of its PC video games at wholesale level only. Capcom's PC video games are manufactured and sold to physical distributors¹² by a local licensee/wholesale distributor, and are distributed also digitally via online platforms and digital distributors.

(12) [...] (see Recital (9)) is one of Capcom's distributors in the EEA.

(13) Capcom and [...] are not addressees of this Decision.

2.4. Focus Home [Case AT.40413]

(14) Focus Home is a French undertaking headquartered in Paris specialised in software and video games publishing. Focus Home's video games are developed by independent partner studios. In [...], Focus Home negotiates the distribution of its PC video games directly with wholesalers and large retailers. In the rest of the EEA, Focus Home distributes its PC video games – both physically and digitally – through local distributors. Unless it holds the rights for the entire EEA, Focus Home usually grants its distributors copyright licenses for a limited number of EEA countries. [...],¹³ [...],¹⁴ [...],¹⁵ [...]¹⁶ and [...]¹⁷ are among Focus Home's distributors in the EEA.

(15) Focus Home and the distributors listed in Recital (14) are not addressees of this Decision.

2.5. Koch Media [Case AT.40414]

(16) Koch Media is a German undertaking which produces, markets and distributes digital entertainment products, including video games. In the EEA, Koch Media distributes its PC video games (usually published under the Deep Silver and Ravenscourt labels) as well as third-party PC video games through its own subsidiaries and independent distributors (both brick & mortar distributors (wholesalers and retailers) as well as digital distributors), including [...] (see Recital (9)) and [...] (see Recital (14) and footnote 17). [...] are two of Koch Media's independent distributors in the EEA.

(17) Koch Media, [...] are not addressees of this Decision.

2.6. ZeniMax [Case AT.40420]

(18) ZeniMax is an undertaking based in the USA that is active worldwide as a video game publisher, creating and publishing original interactive entertainment content for consumers. In the EEA, ZeniMax distributes, via its UK subsidiary ZeniMax Europe Ltd., PC video games directly to retailers in those countries where it has an office and uses local independent distributors in countries where it does not have an office.

¹² For a clarification of the terms “physical distributor” and “digital distributor”, see Recital (32).

¹³ [...].

¹⁴ [...].

¹⁵ [...].

¹⁶ [...].

¹⁷ [...].

[...] (see Recital (9)), including [...] (see Recital (14) and footnote 15), is one of ZeniMax’s independent distributors in the EEA.

(19) ZeniMax and [...] are not addressees of this Decision.

3. PROCEDURE

(20) Based on information received from market participants, in 2013, the Commission started an *ex officio* investigation into the practices at issue.

(21) Between October 2013 and January 2015, prior to the opening of the proceedings against Valve which took place on 2 February 2017, the Commission sent Valve four requests for information (“RFI”), i.e. one RFI under Article 18(2) of Regulation (EC) No 1/2003 and three RFIs under Article 18(3) of Regulation (EC) No 1/2003.¹⁸ On 22 August 2017, Valve submitted an Issues Paper.¹⁹

(22) In the course of 2017, the Commission conducted a market investigation. In the context of this market investigation, the Commission sent RFIs under Article 18(2) of Regulation (EC) No 1/2003 to several market participants,²⁰ including - concurrently with the opening of proceedings - to the Publishers.²¹

(23) On 2 February 2017, the Commission initiated proceedings against Valve and the Publishers pursuant to Article 2(1) of Regulation (EC) No 773/2004. On 15 March 2017, the Commission held a state-of-play meeting with Valve in the context of the five cases AT.40422 – Bandai Namco; AT.40424 - Capcom; AT.40413 - Focus Home; AT.40414 – Koch Media; AT.40420 – ZeniMax.

(24) Subsequently, the Commission sent a number of follow-up RFIs to Valve²² and on 1 April 2019 it held a state-of-play meeting with Valve.

(25) Following the adoption of five Statements of Objections on 5 April 2019, the Commission granted Valve access to its file in all five cases.

(26) On 17 July 2019, Valve submitted responses to all five Statements of Objections (“Valve’s responses to the Statements of Objections”).²³

(27) Valve requested the opportunity to develop its arguments at an oral hearing which took place on 9 October 2019 with respect to all five cases (the “oral hearing”). Neither the Publishers nor any of the independent distributors mentioned in Sections 2.2, 2.3, 2.4, 2.5 and 2.6 attended the hearing.

(28) On 21 October 2019, Valve submitted a document summarising the arguments that it presented at the oral hearing (“Valve’s post-oral hearing paper of 21 October 2019”).²⁴

(29) On 18 December 2020, the Commission adopted a letter of facts addressed to Valve informing it about further evidence on which the Commission intended to rely for the purposes of this Decision. Valve responded to this letter of facts on 7 January 2021.

¹⁸ Namely: [...].

¹⁹ [...].

²⁰ Namely, [...].

²¹ Namely, [...].

²² Namely, [...].

²³ [...].

²⁴ [...].

- (30) In parallel, on [...], all the Publishers declared their willingness to cooperate with the Commission beyond their legal obligation to do so. [...]. Each of the Publishers was given the opportunity to express its views on the objections raised by the Commission against it. [...], between [...] and [...], the Publishers submitted formal statements in which they acknowledged the infringement, the relevant facts and their respective liability for that infringement. The five decisions concerning the liability of Bandai (Commission Decision C(2021)57 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40422 – Bandai Namco), of Capcom (Commission Decision C(2021)72 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40424 – Capcom), of Focus Home (Commission Decision C(2021)78 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40413 – Focus Home), of Koch Media (Commission Decision C(2021)74 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40414 - Koch Media), of ZeniMax (Commission Decision C(2021)63 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40420 – ZeniMax) were adopted on the same date as this Decision.

4. PRODUCTS CONCERNED

- (31) This Decision concerns certain PC video games of different genres/categories which are sold in the EEA with the Steam technology embedded (so-called “Steam-enabled PC video games”)²⁵ and are to be activated and played on Steam.
- (32) For the purposes of this Decision, “physical distribution” refers to Steam-enabled PC video games sold on tangible supports (i.e., CDs and DVDs) - via physical channels (i.e., brick-and-mortar shops) and/or online shops (e.g., Amazon) - which contain the technical means needed for their activation and playing on Steam (see Section 6.1.3). The term “physical distributors” refers to retailers/distributors via physical outlets such as brick-and-mortar shops. “Digital distribution” refers to selling Steam-enabled PC video games to be activated and played on Steam without any tangible support, in other words it refers to the sale of the technical means needed for activation and playing of PC video games on Steam which are not contained in any tangible support as further detailed in Section 6.1.3. The terms “digital distributors” refers to retailers/distributors via digital sales channels such as websites and/or online shops.
- (33) Any further reference to "PC video game" in this Decision, except for Sections 4 and 5, refers to Steam-enabled PC video games, unless stated otherwise.

4.1. Overview of the PC video games industry

- (34) A video game is usually defined as an electronic game played by manipulating images on a video display or television screen. In this Decision, a PC video game is understood to indicate a video game which is played by means of a PC regardless of the operating system running on the respective PC.

²⁵ For an explanation concerning Steam technology see Sections 6.1.2, 6.1.3 and 6.1.5.

4.1.1. *Economic value of the gaming sector*

- (35) The gaming sector is one of the fastest growing sectors in the entertainment industry. In Europe, the leading gaming markets are Germany, with USD 6 billion revenues, the UK, with USD 5 billion revenues, France with USD 4 billion revenues, Spain and Italy with almost USD 3 billion revenues each. The gaming market is valued at almost USD 600 million in Poland, USD 176 million in Romania and USD 157 million in the Czech Republic.²⁶ A large part of the gaming sector revenue is generated by digital games.²⁷

4.1.2. *The PC video games industry value chain*

- (36) The PC video games value chain comprises different stakeholders, generally video game developers, publishers and distributors.

4.1.2.1. Development of PC video games

- (37) Current PC video game development involves a large number of specialists engaged in programming of the game code, design, development of the game art and graphics. Developers are natural persons involved in the process of creating PC video games. Whether these developers hold Intellectual Property (IP) rights in the games they create or not will depend on their contribution to the work, on the agreement with the publisher (in case of third party developers) and on the specific IP laws of each jurisdiction.
- (38) Generally, if the PC video game publisher uses its own internal studio to develop a PC video game, it will own the IP rights to the game and will normally have the exclusive right to distribute the game, worldwide, either directly or by means of other publishers/distributors, either by traditional retail “boxed” games, or by digital distribution (typically, streaming or downloads) via mobile, online or other digital distribution platforms.
- (39) If the publisher contracts an independent studio or third party developer to develop (or co-develop) a PC video game, the IP situation depends on the specificities of each jurisdiction. Generally, in the contractual negotiations with the publisher, the developer would retain ownership of the source code and any tools used to create the software used to run the game, since these will most likely be used for creating additional games, thus helping to reduce future costs. The publisher would normally pay royalties to the developer if the PC video game is developed on the basis of a concept created by the third party developer. If the PC video game is developed based on the publisher's own concept, the publisher will own the copyright to the

²⁶ For the purposes of this Decision, reference is made to Czech Republic rather than “Czechia” in the interest of consistency with the terms used in the agreements/evidence quoted.

²⁷ Statista dossier on the video game industry in Europe, <https://www.statista.com/study/29445/video-game-industry-in-europe-statista-dossier/>, printed on 22 November 2019, [...]. In this dossier, digital games are defined as “*fee-based video games distributed over the Internet. Digital games include downloads of full versions for gaming consoles or PCs (installation required), mobile games for smartphones and tablet devices (paid app downloads and in-app-purchases) as well as paid or freemium online/browser games which can be played online and do not require an installation (subscription-based and in-game purchases). Physical video game sales, demo/trial-versions and free-to-play online-games are not included. The market segment Digital Games includes the following sub segments: Download Games, Mobile Games, Online Games*”.

game and will typically pay the developer royalties based on the revenue earned from the PC video game.

- (40) If the developer owns the IP rights, e.g. because he/she has self-financed the development, but has no expertise or money to distribute and sell the game, he/she will normally seek a publisher for the distribution and marketing of the PC video game, especially for the sale in brick-and-mortar retail shops or in digital markets. In these cases, the developer normally enters into a licence and distribution agreement with the publisher, who will act as a distributor, either on an exclusive or non-exclusive basis. In turn, the publisher may conclude a sub-licence and distribution agreement with a distributor. In this latter case the publisher cannot pass more rights to the distributor than those that it had itself obtained from the developer. In such instances, the distributor acts essentially as a sub-distributor.

4.1.2.2. Localisation of PC video games

- (41) An important aspect in the development of a PC video game is localisation, which means translating software from one spoken language into another. Depending on the financial viability of importing a game to a new region, localisation may cover only the translation of the box and documentation or manuals for the game, but not the game itself. Localisation may also cover the video game itself. In this case there may be two alternatives, namely: (i) a partial localisation of the video game which includes only the translation of the text but not voiceover files; or (ii) a full localisation (i.e., all of a game's assets will be translated, including voiceover, game text, graphics, and manuals). Localisation can be very expensive and time consuming especially if voiceover, text and screens are localised.

4.1.2.3. Finalisation and release of PC video games

- (42) Once the development process is complete, quality assurance ("QA") testing is required in order to ensure that the game works. For the release on PCs, a developer could submit the game to a digital distributor (e.g. in the case of self-publishing), however new or small developers would often entrust this task to publishers given their expertise in both QA testing and submission. Publishers' brand recognition plays a major role in the distributor's decision on what games are released on its platform as most users are familiar with the major publishers. The Internet also provides the possibility to update the PC video games after release or to correct faults in them ("patch" the game). PC video game publishers have therefore looked for ways to deliver those updates and patches to the users. For example, Steam was created by Valve in the early 2000s as one of those patch delivery systems.

4.1.2.4. Publishing, sale and distribution of PC video games

- (43) A PC video game publisher is normally responsible for the development, publishing and distribution of PC video games. Usually large publishers have a number of in-house development studios or a subsidiary that develops video games internally. However, they also often contract with independent development studios under a scheme whereby they typically finance the development of the game in return for the exclusive rights and possibly ownership. When acting in this capacity, the publisher is usually referred to as a third-party publisher and its role varies depending on the developer's needs, the type of PC video game in development, the geographic market and the platform chosen for distributing the PC video game.
- (44) In general, PC video game publishers are also responsible for marketing, including all aspects of advertising. Publishers may choose to release new titles of PC video

games at different points in time in different countries or regions.²⁸ PC video games command a higher price when they are released and the price falls as the game ages. Consumers that are unable or unwilling to pay the release price have to wait until the game ages and becomes cheaper. This means that publishers price differentiate over time and thereby cater to differences in consumer willingness to pay.²⁹

- (45) Publishers usually conclude licence and distribution agreements for the sale and distribution of their own PC video games. To this end, they may contract with wholesalers that re-sell to retailers, or make their games available to online gaming platforms such as Steam. Such licence and distribution agreements usually include the following: (i) the authorisation to internally reproduce, use and modify the software code to enable the use and distribution of the PC video game and provide support to the users; (ii) the authorisation to transmit, sell and otherwise distribute the PC video game via digital means (e.g. in the case of Valve, via Steam); and (iii) the authorisation to use the licensor's trademark for distribution, marketing and display purposes, including the reproduction of the PC video game title and logo. Usually, rights ownership and transfer of other exploitation rights are reserved to the licensor.
- (46) Until the recent past, PC video games were generally distributed on tangible supports, such as CDs and DVDs. With the advent of the Internet and the increased speed and bandwidth of Internet connections, users more frequently download or stream PC video games. Digital gaming platforms such as Steam provide users with games that can be played online, either alone or in inter-action with other players (such as social games or online multiplayer games).

4.1.2.5. Rating and content-related legislation

- (47) PC video games, similar to other types of entertainment products, vary greatly in terms of content, from children-friendly to those targeted at adult audiences. To help users understand what type of content they are purchasing, there are several rating systems across the world that indicate the most appropriate user age to play a given video game. For instance, in the EEA the most commonly used rating system is PEGI.³⁰
- (48) The distribution of PC video games in Germany is subject to a stricter set of rules on the type of content, in particular on the level of violence, compared to other EEA countries. In Germany, PC video games receive a classification pursuant to the German Children and Young Persons Protection Act. At the end of the classification process the PC video game is usually attributed an age rating, also called a USK rating.³¹ Other rating systems, including PEGI, are not substitutable for the USK

²⁸ Staggered game releases in different countries or regions (so-called "windows" or "windowing") can be used by publishers for marketing purposes or in order to avoid that the online distribution infrastructure is overwhelmed by many subscribers all over the world logging in at the same time. [...]. This Decision does not concern geo-blocking used to implement windowing.

²⁹ [...].

³⁰ The PEGI system is a voluntary rating system created by the video game industry, <http://www.pegi.info/en/>, printed on 2 August 2017, [...].

³¹ The acronym USK is the German abbreviation for *Unterhaltungssoftware Selbstkontrolle*, which can be translated as Entertainment Software Self-Regulation. The USK is the officially recognized institution responsible for the classification of computer and PC video games in Germany in accordance with the Children and Young Persons Protection Act as well as for online contents in accordance with the Youth

rating. If no USK rating is given by the relevant authorities, it is illegal to publish and distribute the game to minors in Germany with strict sanctions applicable for a breach of this prohibition. For this reason, many publishers create a specific version, often referred to as "low violence version" where the content of the PC video game is edited to ensure it receives a USK rating.³² In light of this legal framework, when a PC video game is launched in the EEA, including in Germany, it is very likely that it will have at least two ratings, namely PEGI and USK.

- (49) In addition, in Germany and Austria national criminal legislation generally prohibits the depiction of Nazi symbols and other references.³³ Accordingly, publishing and/or distributing PC video games could be considered a criminal offense in those two EEA countries if they include Nazi symbols or other references. As a result, PC video game publishers create alternative versions of the PC video games that would otherwise include Nazi symbols or other references for the German and Austrian markets. Therefore, the differences between the Austrian/German version and the original version can be quite extensive.³⁴

4.1.2.6. Relevant EU copyright legal framework

- (50) Video games are complex works containing multiple elements (including the characters in a given video game, its settings, soundtrack, and audio-visual parts) that can each be individually copyright-protected, if they achieve a certain level of originality and creativity. The computer programme (software) that runs the game is a common element of all video games and is also copyright protected.³⁵
- (51) In *Nintendo v PC Box*,³⁶ the Court of Justice described video games in the following terms: "*although videogames take their functionality from a computer program, they begin and progress following a narrated predetermined route by the authors of those games in a way to make a group of images and sounds appear together with some conceptual autonomy*". The Court also observed that "*Videogames [...] constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a*

Media Protection State Agreement, <http://www.usk.de/en/classification/classification-procedure/>, printed on 2 August 2017, [...]. USK's website provides an overview of classified games, https://usk.de/en/?s&jump=usktitel&post_type=usktitel, printed on 26 November 2019, [...]

³² The industry usually refers to the German version of a game as "low violence" since the German legislation has a particular focus on this feature of games.

³³ For Germany, § 86a I Nr. 1 of the German Criminal Code (*Strafgesetzbuch*), the infringement of this provision can be sanctioned by imprisonment not exceeding three years or a fine. For Austria, under § 1 Abzeichengesetz, an infringement can be sanctioned by imprisonment not exceeding one month or a fine up to 4 000 EUR.

³⁴ However, the USK has confirmed the implementation of new criteria in this regard, <https://usk.de/usk-beirat-beschliesst-erweiterung-der-leitkriterien-zur-beruecksichtigung-der-sozialadaequanz-bei-digitalen-spielen/>, printed on 26 November 2019, [...]

³⁵ The Legal Status of Video Games: Comparative Analysis in National Approaches, 29 July 2013, http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf, printed on 24 August 2017, [...]

³⁶ Judgment of the Court of 23 January 2014, *Nintendo Co Ltd and Others v PC Box Srl and 9Net Srl*, (hereinafter referred to as "*Nintendo*"), C-355/12, ECLI:EU:C:2014:25, paragraph 16.

*videogame [...] are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29".*³⁷

- (52) With regard in particular to the question whether or not the principle of copyright exhaustion³⁸ applies to Steam-enabled PC video games (including when distributed outside Steam by means of Steam activation keys), there is currently no legal clarity on this point as different national courts have come to different conclusions. For example, while German courts have held that copyright exhaustion does not apply to Steam-enabled PC video games offered on Steam, a recent judgment by a French court came to the opposite conclusion (see Recital (354)).
- (53) In any event, the applicability of the principle of exhaustion to Steam-enabled PC video games is not material to the Commission's competition law assessment of the nature of the agreements/concerted practices at issue (see Section 8.2.2.3, Recitals from (347) to (355)).

5. RELEVANT MARKETS

5.1. Principles

- (54) For the purposes of applying Article 101(1) of the Treaty, a prior definition of the relevant market is not required where the agreement at issue has in itself an anti-competitive object.³⁹ When interpreting the context of an agreement under Article 101 of the Treaty, it is nonetheless necessary to take into consideration the actual conditions of the functioning and the structure of the market or markets in question and whether the agreements in question are liable to affect trade between Member States.⁴⁰
- (55) Undertakings are subject to three main sources of competitive constraints: demand-side substitution, supply-side substitution and potential competition. Of these constraints, only demand-side and supply-side substitution are relevant for the purpose of defining the relevant product market.

³⁷ Case C-355/12 *Nintendo*, paragraph 22.

³⁸ Based on the exhaustion principle, copyright protected goods (such as CDs or DVDs containing PC video games) can be freely distributed after their first sale within the EEA with the right holder's consent and copyright cannot be invoked to hinder the further distribution within the EEA. The underlying rationale is to strike an appropriate balance between the rights holder's interests in protecting his/her rights and the free circulation of goods within the internal market. The exhaustion principle is part of the *acquis communautaire*. For copyright, see Judgment of the Court of 8 June 1971, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, C-78/70, ECLI:EU:C:1971:59, paragraph 13; for trademarks, see, *inter alia*, Judgment of the Court of 31 October 1974, *Centrafarm BV and Adriaan de Peijper v Winthrop BV*, C-16/74, ECLI:EU:C:1974:115, paragraph 12; Judgment of the Court of 16 July 1998, *Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH*, C-355/96, ECLI:EU:C:1998:374, paragraph 31 and Article 15 of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks, OJ L 336, p. 1–26.

³⁹ Judgment of the General Court of 28 June 2016, *Telefónica, SA v Commission* (hereinafter referred to as "*Telefónica*"), T-216/13, ECLI:EU:T:2016:369, paragraph 214.

⁴⁰ Judgment of the Court of First Instance of 21 February 1995, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v Commission*, T-29/92, ECLI:EU:T:1995:34, paragraph 74; Judgment of the Court of First Instance of 12 September 2007, *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission*, T-30/05, ECLI:EU:T:2007:267, paragraph 86 and the case-law cited.

- (56) Potential competition is not taken into account when defining markets, rather it is considered at a later stage of the substantive assessment.⁴¹ In this respect, there may be relevant competition from products outside the relevant market, which may exercise some competitive constraints and may, therefore, be taken into consideration for the overall assessment of competition.
- (57) A relevant product market comprises all those products and/or services that are regarded as interchangeable or substitutable by users, on the basis of their characteristics, their prices and their intended use (demand-side substitution).⁴² From an economic point of view, for the definition of the relevant market, demand-side substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product.⁴³
- (58) Supply-side substitutability may be taken into account in situations in which its effects are equivalent to those of demand-side substitution in terms of effectiveness and immediacy. There is supply-side substitution when suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative price.⁴⁴
- (59) The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.⁴⁵

5.2. Relevant product market

- (60) As set out in the following recitals, the results of the Commission's market investigation indicate that the market for PC video games encompasses PC video games sold both digitally and physically. For the purposes of this Decision, however, the Commission can leave open the question whether PC video games distributed digitally and physically form part of the same product market as a "detailed analysis" of the markets concerned is not necessary if the agreements/concerted practices at issue have an anti-competitive object as indicated in Section 5.1. In any event, as can be seen from, for example, Recitals (2) and (351), by geo-blocking certain PC video games the agreements/concerted practices to which Valve was a party were capable of restricting cross-border sales of the relevant PC video games regardless of whether they were distributed digitally or physically.

5.2.1. Substitutability of video games running on different electronic systems

- (61) Each video game is produced for one or more specific electronic systems capable of running the video game. The electronic systems currently available on the market are: (i) consoles (such as Sony's PlayStation consoles, Microsoft's Xbox consoles,

⁴¹ Commission Notice of 9 December 1997 on the definition of relevant market for the purposes of Community competition law ("Market Definition Notice") OJ C 372, 9.12.1997, p. 5–13, paragraph 24.

⁴² Market Definition Notice, paragraph 7.

⁴³ Market Definition Notice, paragraph 20.

⁴⁴ Market Definition Notice, paragraph 20.

⁴⁵ Case T-216/13 *Telefónica*, paragraph 214.

Nintendo consoles), (ii) PCs, and (iii) mobile devices (such as smartphones, tablets).⁴⁶

5.2.1.1. PC based games vs. console based games

- (62) In the *Nintendo* decision,⁴⁷ the Commission concluded that separate product markets existed for PC video games and games for consoles (per console and manufacturer) as a result of limited demand-side substitution.⁴⁸ Similarly, in the *Activision Blizzard/King* merger decision,⁴⁹ the Commission found that there were indications that PC video games and console video games were in separate markets given that console video games have higher retail prices, do not offer additional functionalities like PCs and are mostly sold through traditional retail outlets and online retailers, whereas the majority of PC video games are sold through digital download.
- (63) These findings were also confirmed by the market investigation.⁵⁰ From a demand-side perspective most respondents agreed that if the price of a specific video game for a specific electronic system were to increase by 5% to 10%, this would not prompt a substantial number of users to switch to buying the same video game for another electronic system. Several reasons for this were identified:
- First, switching costs would be significant⁵¹ (e.g. purchase a new console or new PC or PC OS in addition to the specific game);⁵²
 - Second, video game users usually select whether to play on console or on a PC based on their personal preferences and tend not to switch;⁵³
 - Finally, some respondents have confirmed that PC video games tend to have lower prices on average than the same video games running on consoles.⁵⁴
- (64) From a supply-side perspective, the respondents indicated that each electronic system has specific characteristics and costs.⁵⁵ For example, video games running on consoles typically require a higher level of quality control compared to those running on PCs.⁵⁶ Moreover, in order to produce console video games, publishers first need to obtain certification and console-specific development kit equipment and to commit to produce minimum quantities of the game.⁵⁷ At the same time, video

⁴⁶ More recently, cloud gaming services, such as Google’s Stadia, have appeared in the market - See <https://stadia.google.com/>, printed on 26 November 2019, [...]

⁴⁷ Commission Decision 2003/675/EC of 30 October 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement in Cases COMP/35.587 *PO Video Games*, COMP/35.706 *PO Nintendo Distribution* and COMP/36.321 *Omega — Nintendo* (hereinafter referred to as the “*Nintendo*” decision), OJ L 255, 8.10.2003, p. 33–100.

⁴⁸ *Nintendo* decision, OJ L 255, 8.10.2003, p. 35–36.

⁴⁹ Commission decision C(2016)955 final of 12 February 2016 pursuant to Article 6(1)(b) of Council Regulation 139/2004 and Article 57 of the Agreement on the European Economic Area in case COMP/M.7866 – *Activision Blizzard/King*, (hereinafter referred to as the “*Activision Blizzard/King*” merger decision), OJ C 12, 15.1.2016, p. 5.

⁵⁰ The Commission sought information from a number of video game publishers including the largest undertakings present in the EEA as well as [...].

⁵¹ [...].

⁵² [...].

⁵³ [...]. See also Market Definition Notice, paragraphs 13 and 20.

⁵⁴ [...].

⁵⁵ [...].

⁵⁶ [...].

⁵⁷ [...].

games running on PCs need to be tailored to adjust to the large multiplicity of existing hardware environments, including different processing, memory, graphics and sound capabilities.⁵⁸ These findings are consistent with the *Activision Blizzard/King* merger decision, in which the supply-side arguments were based on the fact that console video games tend to be more expensive to develop and had to comply with the strict criteria of consoles.⁵⁹

5.2.1.2. Mobile games vs. games on other electronic systems

- (65) In the *Activision Blizzard/King* merger decision, the Commission found that there were indications for a separate market for publishing video games for mobile devices as opposed to video games for PCs and consoles.⁶⁰
- (66) This has been confirmed by the market investigation. In fact, from a consumer perspective mobile video games (i) tend to be less complex,⁶¹ (ii) are meant to be played for shorter individual periods of time,⁶² and (iii) tend to appeal to a specific type of gamer, in particular so-called "casual gamers", who typically do not have the time or the desire to spend considerable time at a fixed location playing games.⁶³ Likewise, from the supply-side perspective, video games for mobile devices tend to be less resource-intensive, require significantly less sophisticated hardware⁶⁴ and entail lower production and marketing costs.⁶⁵

5.2.2. Substitutability of PC video games sold physically and digitally

- (67) Respondents to the market investigation indicated the growing importance of the digital sales channel (i.e., sale via downloading and streaming), especially for PC video games.⁶⁶ However, they also pointed out that sales of PC video games on physical supports such as CDs and DVDs have an important role⁶⁷ within the video game community, as they allow users, for example, to trade used video games more easily, obtain limited editions or to buy them as gifts.⁶⁸
- (68) Many respondents also agreed that typically PC video games are sold both digitally and physically.⁶⁹ Most respondents agreed that prices tend to be similar for both digital and physical sales of the same PC video game.⁷⁰
- (69) From a demand-side perspective, the market investigation showed some degree of substitution between physical and digital games which confirms that these two channels⁷¹ exert at least certain competitive constraint on each other.⁷²

58 [...].

59 *Activision Blizzard/King* merger decision, OJ C 12, 15.1.2016, p. 5.

60 *Activision Blizzard/King* merger decision, OJ C 12, 15.1.2016, p. 4.

61 [...].

62 [...].

63 [...].

64 [...].

65 [...].

66 [...].

67 [...].

68 See [...].

69 [...].

70 [...].

71 For the avoidance of doubt, reference to digital distribution in this Decision means sales via downloads or streaming only (i.e., it does not include sales of CDs and DVDs via internet).

72 [...].

- (70) From a supply-side perspective, virtually all PC video game publishers contacted agreed that it is very easy and relatively costless for them to switch from digital sales to physical sales, or vice versa.⁷³ Most PC video game publishers have established commercial relationships with physical distributors and outlets. The additional costs of selling physical products, due to cost items such as manufacturing, distribution and logistics, have been reported as being relatively limited⁷⁴ and estimated at between zero and 5 % of the retail price of a PC video game.⁷⁵ In any event, responses to the market investigation indicate that the prompt availability of existing digital distributors (e.g. Steam) makes the switch from physical to digital sales relatively straightforward.⁷⁶ This confirms that there is at least potential competition between physical and digital sales.
- (71) In light of the above, for the purposes of this Decision the question of whether the market for video games running on PCs should be further segmented between video games running on PCs sold digitally or physically can be left open, as the Commission's assessment would not differ on the basis of this distinction (see further Recitals (77) - (78)).

5.3. Relevant geographic market

- (72) In the *Vivendi/Activision* merger decision,⁷⁷ the Commission left the geographic market definition open, although it found some indications that the relevant geographic market might be wider than national, namely, the fact that publishers seem to organise their sales on a regional or even EEA basis and that most PC video games played offline include the main European languages in one and the same medium.
- (73) From a demand-side perspective, there are two main ways in which video games might differ within the EEA. First, certain PC video games might need to be tailored to comply with specific regulations existing in Germany and Austria (see Section 4.1.2.5).⁷⁸ Second, although most publishers typically produce one version of a video game with a function which allows users to choose the gaming language themselves,⁷⁹ some publishers create separate video game versions which contain different languages for different EEA countries.⁸⁰ The market investigation has shown that video game users have strong preferences for choosing the language and some even prefer playing the video games in their original language.⁸¹ This is

⁷³ [...].

⁷⁴ [...].

⁷⁵ [...].

⁷⁶ [...].

⁷⁷ Commission decision of 16 April 2008 in case COMP/M.5008 – *Vivendi/Activision*, OJ C 68, 13.3.2008, p. 24.

⁷⁸ [...].

⁷⁹ [...].

⁸⁰ [...].

⁸¹ *Challenges in video game localization: An integrated perspective*, Dawid Czech, Explorations: A Journal of Language and Literature Vol. 1 (2013), pp. 20-21, printed on 3 October 2017, [...]; *The Game Localization Handbook*, Heather Maxwell Chandler and Stephanie O'Malley Deming, 2nd Revised Edition, 6 May 2011, Chapter 1, p. 3, printed on 31 October 2017, [...]. See also Andrea Esser, Iain Robert Smith, Miguel Á. Bernal-Merino, *Media Across Borders: Localising TV, Film and Video Games*, Routledge, 29 January 2016, p. 196-197, printed on 18 October 2017, [...].

because translation of the game can considerably degrade the quality of the gaming experience because of the poor quality of translation.⁸²

- (74) In terms of supply-side substitution, all undertakings confirmed during the market investigation that they release essentially all video games across the entire EEA. Further, the market investigation has shown that creating separate video game versions with different languages is significantly more expensive than having a single version and including a function that allows users to choose the language from the game menu.⁸³
- (75) Moreover, the existence in certain EEA countries of companies that proactively offer parallel-traded PC video games for sale to users indicates that parallel trade is an activity with business potential, which appears not to require significant modifications to adapt PC video games to local market conditions.
- (76) In light of the above, for the purposes of this Decision the relevant geographic market for PC video games coincides with the EEA.

5.4. Conclusion on relevant markets

- (77) In light of the above, while a precise market definition is not required in the present case, for the purposes of this Decision the relevant product market is the market for video games running on PCs and the geographic scope of the market for PC video games coincides with the EEA.
- (78) The market investigation provides indications that the market for PC video games encompasses PC video games sold both digitally and physically. However, the question whether digital and physical distribution constitutes separate product markets can be left open as it has no impact on the outcome of the competitive assessment of the cross-border sales restrictions. This is because the restrictions are anti-competitive regardless of the specific market definition as they have the object of artificially restoring the divisions between national markets.
- (79) In any event, even if there were separate product markets for digital and physical distribution, there would be at least potential competition between these two channels in view of the demand-side and supply-side considerations described in Section 5.2, which confirms that physical and digital sales exert at least some competitive constraints on each other.

6. CONDUCT

6.1. Overview of Valve's business activity

6.1.1. Valve's Steam platform

- (80) Steam is one of the world's largest PC video gaming platforms offering more than 35 000 games and allowing more than 22 000 game developers on its platform. Steam provides users with an inter-active gaming experience that enables them to

⁸² *Challenges in video game localization: An integrated perspective*, cited above in footnote 81, p. 9; [...]; *Creativity in the Translation of Video Games*, Miguel Á. Bernal-Merino, *Quaderns de Filologia. Estudis literaris*. Vol. XIII (2008) p. 68-69, printed on 3 October 2017, [...]. See also *The Game Localization Handbook*, cited above in footnote 81, Chapter 1, p. 3-4.

⁸³ [...].

engage with each other by way of multiple features such as gaming communities, multi-player match-making,⁸⁴ in-game events; social and chat features.

6.1.2. Contractual relationship between Valve and PC video games publishers

- (81) The contractual relationship between Valve and PC video games publishers for the purpose of PC video games distribution is defined by bilateral agreements referred to as the Steam Distribution Agreements - "SDAs". Contractual provisions that relate to one or more specific PC video games are usually included in annexes or schedules to the SDAs.
- (82) In parallel, Valve usually licences a suite of software tools and technologies to the publishers either in the SDA or in a separate agreement referred to as the "Steamworks Agreement" so that the publishers can make their PC video games compatible with the Steam platform.⁸⁵
- (83) In the framework of the contractual relationship between Valve and each of the Publishers concerned by this Decision, the following provisions of the SDAs and, where applicable, of the Steamworks Agreement are relevant:⁸⁶
- The PC video game publisher grants Valve a non-exclusive, worldwide (unless specified otherwise) licence "*to use and to distribute via Steam [publishers] computer games [...] in exchange of compensation*";
 - The publisher's licence to Valve typically includes the rights to "[Direct quote from the license agreement]"⁸⁷ as well as to "[Direct quote from the license agreement]" the PC video games "[Direct quote from the license agreement]" of the games;⁸⁸
 - The publisher "[Direct quote from the license agreement]" the publisher "[Direct quote from the license agreement]" and "[Direct quote from the license agreement]";⁸⁹
 - Valve is not an agent or intermediary for the publishers. In practice, neither party is or becomes an agent of the other on the basis of the SDA: "[Direct quote from license agreement]";⁹⁰
 - Valve pays to each publisher "*seventy percent (70%) of the Adjusted Gross Revenue actually received by Valve from Valve's exploitation of each of the*" publisher's "*computer games or other applications*" as specified in the SDA and/or its annexes. The 30%/70% revenue share agreement is stipulated in the SDAs between Valve and each of the Publishers. In practice, for each PC video game purchased on Steam, users pay to Valve the full price of which Valve retains 30% and transfers 70% to the publishers.⁹¹ In addition, pursuant to the

⁸⁴ A game that allows for more than one player is called a multiplayer game and match-making is the process of connecting players together for online play sessions in multiplayer games.

⁸⁵ [...].

⁸⁶ [...].

⁸⁷ [...].

⁸⁸ [...].

⁸⁹ [...].

⁹⁰ [...].

⁹¹ [...].

Steam Subscriber Agreement,⁹² Valve acts as the merchant of record *vis-à-vis* users and takes responsibility for transactions *vis-à-vis* those users.⁹³

- (84) Valve provides to publishers a Steam technology license and related software tools that enable them to create Steam-enabled PC video games as well as to benefit from digital rights management (“DRM”) and anti-piracy services (“Steamworks” features), all free of charge.⁹⁴ [...].⁹⁵
- (85) Among the Steamworks features that Valve typically provides to publishers are: a) Steam activation keys and b) territory control, detailed as follows:
- (a) Steam activation keys
- (86) Steam activation keys are unique alphanumeric codes or sequences that allow users to access a PC video game via the Internet and play it on Steam after an activation process (Section 6.1.3). Valve generates Steam activation keys for a particular game upon request by the publisher, free of charge. Valve undertakes to provide sufficient Steam activation keys to meet the Publishers’ request within ten days after receiving the request.⁹⁶ [...].⁹⁷
- (87) Steam activation keys are used by the Publishers as a tool to sell Steam-enabled PC video games through their own retail channels, and can be used interchangeably for physical and digital distribution outside of Steam. When the keys are used for physical distribution, they are printed out on paper and included in the sleeves of the CD or DVD boxes; in other words a Steam key is all that is needed for a Steam subscriber to activate and play the game on Steam. In some cases, publishers selling Steam activation keys also provide a physical version of the game with the game’s local installation files. This accelerates the installation process (the CD/DVD typically does not contain all the installation files required to access and play the game). However, such physical version of the game is never required to access and play the game on Steam. When the keys are used for digital distribution, the online distributors email the Steam activation keys directly to the users and direct them to activate and play the games on Steam.⁹⁸
- (b) Territory control

⁹² Available at https://store.steampowered.com/subscriber_agreement/.

⁹³ See e.g., the following clauses of the Steam Subscriber Agreement: Clause 1.A: “for any interaction with Steam your relationship is with Valve. [...] any transaction for subscription you make on Steam is with Valve”; Clause 2.A: “Steam and your Subscriptions require the download and the installation of Content and Services onto your computer. Valve hereby grants and you accept a non-exclusive licence and right to use the Content and Services for your personal non-commercial use. [...]”; Clause 2.F: “all title, ownership rights and intellectual property rights in and to the Content and Services and any of the copies thereof are owned by Valve [...]”; Clause 3.I: “without prejudice of any statutory rights” the user “may have”, he/she “can request a refund of” his/her “purchases on Steam in accordance with the Terms of Valve’s Refund Policy”. Valve’s refund policy is available at https://store.steampowered.com/steam_refunds/?l=english. No clause in the Steam Subscriber Agreement excludes Valve’s responsibility *vis-à-vis* users. Valve also confirmed that it acts as the merchant of record *vis-à-vis* users during the oral hearing. See in this respect the following statement by [...]: “[Direct quote]” (Commission’s transcript of oral hearing recordings, [...]).

⁹⁴ [...].

⁹⁵ [...].

⁹⁶ [...].

⁹⁷ [...].

⁹⁸ [...].

- (88) Territory control is defined by Valve as: “[Direct quote from license agreement]”.⁹⁹ Such territory control function, therefore, enables the setting up of geographical restrictions on activation, thereby preventing the users from activating the game if they are not in a designated territory. Territory control features are not specific to the EEA and Steam’s default is that the applicable territory is worldwide. The territory control function may be used to ensure regulatory compliance,¹⁰⁰ to manage IP (copyright) territorial limitations from the copyright holder¹⁰¹ or for "windowing" purposes (see footnote 28).
- (89) Steam activation keys ensure that Steam-enabled PC video games are only used in the countries/territories chosen by the publishers according to their intended use. The territory where the user is located can be identified mainly on the basis of the Internet Protocol address ("IP address") from where the user accesses Steam, or the user's credit card information. If the user employs territory-neutral payment systems, the territory is identified on the basis of the user's IP address only.

6.1.3. *Sale and activation of PC video games on Steam*

- (90) If a PC video game is purchased on the Steam Store, by opening the Steam client¹⁰² the user is taken to his/her “Library” within Steam which shows all the Steam-enabled video games that he/she has purchased. Within his/her Library, the user can purchase access to games through the Steam Store. Purchasing a PC video game directly on Steam automatically grants the subscriber the right to access and play it. No activation is needed. Therefore, if a user purchases a PC video game online directly on Steam, the PC video game can be accessed and played within the Steam environment without any Steam activation key as the game does not need to be activated.
- (91) Conversely, when a Steam-enabled PC video game is purchased outside the Steam platform, be it in an intangible or in a tangible support, the buyer has to go through an activation process on Steam in order to authenticate the PC video game. This process is necessary to enable the user to access the game and play it within the Steam environment.
- (92) Valve's Steam technology provides for such authentication based on Steam activation keys created by Valve (described in further detail in Section 6.1.2, letter a).
- (93) From a practical perspective, when a user purchases a Steam-enabled PC video game outside Steam, irrespective of whether it does through the digital or physical distribution channel, he/she receives the key necessary to activate it. The retail purchase price of the PC video game is typically linked to and advertised as the purchase price of the Steam activation key for that given PC video games (although technically there is no purchase price for the Steam activation key itself).

⁹⁹ [...].

¹⁰⁰ For example, PC video game publishers would create alternative versions of their games that do not include Nazi symbols or other references to the Third Reich for the German and Austrian markets in order to comply with statutory requirements of those countries.

¹⁰¹ For example, video game developers may want to carve out certain territories from the scope of a licence given to the publisher, e.g., if the developer wants to self-publish and distribute the game itself in such territories.

¹⁰² The Steam client is a software application (available free of charge) which runs on Steam users’ PCs and enables them to play video games on Steam.

- (94) Distributors who pay royalties to the publishers to sell PC video games to users and/or to other distributors as per the term of their licence agreements, purchase Steam activation keys from the publisher to distribute the related PC video games (the royalties paid can be said to be the purchase price of Steam activation keys).¹⁰³
- (95) In sum, after obtaining the Steam activation key, in order to be able to access and play the PC video game within the Steam environment the user has to: (i) download the Steam Client on his/her PC; (ii) use or, if he/she does not have one, create a Steam user account; and (iii) input the code of the Steam activation key. Thus, “*the gaming experience is enabled by a combination of code that the subscriber downloads and installs on his/her PC and code held by Valve*”.¹⁰⁴ Once the game is in the subscriber’s Library, it can be accessed and played within the Steam environment in the same way as PC video games purchased directly on the Steam Store.
- (96) Users can access and play their Steam-enabled PC video games (regardless of how they are purchased) as often as they want on any computer with an Internet connection via their Steam user account. Steam-enabled PC video games, regardless of how they are purchased, may be played in offline mode (e.g., during a flight with no Internet access) unless they require an active connection or use an external launcher. Whether a PC video game requires an active connection or not to be played depends on the set up of the PC video game.

6.1.4. *Valve’s relationship with Steam users*

- (97) In order to be able to access and play a Steam-enabled PC video game, the user¹⁰⁵ needs first to become a Steam subscriber by creating a free Steam user account, choosing a name, password and providing an email address. During this process, the user must agree to the Steam Subscriber Agreement (“SSA”)¹⁰⁶ which sets out the rights and obligations of Steam subscribers. In particular the execution of the SSA – including the terms and conditions for creating a Steam user account and installing the Steam Client – is the first necessary step in order for the user to be able to purchase a game on the Steam Store or to activate it if the game was purchased outside the Steam platform via Steam activation keys (see Section 6.1.2, letter a).
- (98) To access and play the game on Steam, users have to also install the Steam Client and log-in with their Steam user account. The creation of the Steam user account can take place either before or after installing the Steam Client.

¹⁰³ The wholesale purchase of Steam activation keys is often referred to as “bulk buying” of Steam activation keys. If the distributor has been granted a physical distribution licence, this means in practice that it will purchase activation keys in bulk from the publisher which it will then include in the “sleeves” of the CD or DVD boxes it sells. Conversely, if the distributor has been granted a digital distribution licence, it will purchase Steam activation keys in bulk from the publisher which it will then sell directly online. The Steam activation keys can be traded in so far as they have not been used (i.e., in so far as the PC video game has not been activated). In this respect, there are companies active in the parallel trade of Steam activation keys (i.e., parallel trade of PC video games by means of parallel trade of the activation keys) which they purchase both from users and/or distributors including physical distributors. In the case of physical distribution these parallel traders buy the CDs containing the Steam activation keys from the distributors, open them, and scan the activation keys which they will then resell online.

¹⁰⁴ [...].

¹⁰⁵ In this recital of the Decision, “user” means Steam user/Steam subscriber.

¹⁰⁶ [...].

(99) The following provisions of the SSA are relevant:

- “*For any interaction with Steam*” the user’s “*relationship is with Valve. Except as otherwise indicated at the time of the transaction [...] any transactions for Subscriptions*¹⁰⁷” that the user makes “*on Steam are being made from Valve*” (Clause 1.A SSA);
- “*Steam and*” the user’s “*Subscriptions require the download and the installation of*” PC video games onto the user’s “*computer. Valve hereby grants and*” the user accepts “*a non-exclusive licence and right to use*” the PC video games for the user’s “*personal non-commercial use. This licence ends upon termination of this agreement or a Subscription that includes the license*”. The PC video games “*are licensed, not sold*”. The license “*confers no title or ownership in*” the PC video games. The license ends “*upon termination of (a) this Agreement or (b) a Subscription that includes the license*” (Clause 2.A SSA). This clause means that Valve acts as a licensor vis-à-vis Steam subscribers. The same clause requires users to “*have a Steam Account*” and to run “*the Steam client and maintaining a connection to the Internet*” in order to make use of the PC video games.
- “*All title, ownership rights and intellectual property rights in and to the*” PC video games “*and any of the copies thereof are owned by Valve and / or its affiliates’ licensors*” (Clause 2.F SSA). This clause means that no ownership or IP rights over the games are transferred from Valve as a licensor to the Steam subscribers.
- The user agrees not to “*use IP proxying or other methods to disguise the place of*” the user’s “*residence, whether to circumvent geographical restrictions on game content, to purchase at pricing not applicable to*” the user’s “*geography, or for any other purpose. If*” the user does this, “*Valve may terminate*” the user’s access to his/her “*Account*” (Clause 3.A SSA). This clause means that the use of e.g. VPN access technology¹⁰⁸ is not allowed to make use of the PC video games.
- Vis-à-vis Steam users, Valve is responsible for delivering the PC video games, handling payment and billing as follows: “*Payment processing related*” to the PC video game “*purchased on Steam is performed by either Valve Corporation directly, or by Valve’s fully owned subsidiary Valve GmbH on behalf of Valve Corporation [...] In any case, delivery of*” the PC video game “*is performed by Valve Corporation*” (Clause 1.D SSA).
- Valve is also responsible for providing refunds as follows: the user “*can request a refund for [...] purchases on Steam in accordance with the terms of Valve’s Refund Policy*”. EU consumers have “*a statutory right to withdraw*”

¹⁰⁷ “Subscriptions” are defined in the SSA as “*the rights to access and/or use any Content and Services accessible through Steam*” whereby such “Content and Services” include “*the Steam client software and any other software, content and updates [the subscriber] download[s] or access[es] via Steam, including but not limited to Valve or third party video games and in-game content [...]*” (Clause 1.B SSA). In the context of the SSA, “access to Content and Services” by the Steam user has to be read as access to the PC video game purchased by the user and activated/played on Steam.

¹⁰⁸ A virtual private network (VPN) is a programming tool that creates a safe connection over a public, non-secure network, using protocols that encrypt/decrypt data.

from certain contracts for physical merchandise and for the purchase of digital content” (Clause 3.I SSA).¹⁰⁹ Valve’s refund policy is available on the website of the Steam Store.¹¹⁰

- Valve also provides to Steam users after sale services and a dispute resolution process: “*On Steam, whenever a customer is unhappy with any transaction, our first goal is to resolve things as quickly as possible through the normal customer support process. However in those instances in which we can't resolve a dispute, we've outlined a new required process whereby we agree to use arbitration or small claims court to resolve the dispute*”.¹¹¹

6.1.5. Technical implementation of geo-blocking via Steam activation keys

(100) As indicated in Section 6.1.2, letter b), along with Steam activation keys (Section 6.1.2, letter a), Valve offers a territory control function to publishers which enables the setting up of geographical restrictions upon activation, in other words which enables the PC video games to be geo-blocked. During the users’ activation process, the technical geo-blocking process not only controls whether the version of the PC video game is legitimate (i.e. not pirated) but also checks, on the basis of the Steam activation key, if such game can be activated in the particular territory where the user is located. The Commission has identified two types of geographic restrictions that have been deployed for PC video games using Valve's Steam technology that are relevant for this Decision:

- “Activation restrictions”: whereby users who have legally purchased a PC video game are prevented from activating the game on Steam because they are located in a territory that is different from the one where activation is allowed. In other words, the PC video game could only be activated by users located in the territory in which activation was allowed. However, once activated, it can be played also outside the "allowed" territory; and
- “Run-time restrictions” whereby users who have legally purchased a PC video game are prevented not only from activating on Steam a given PC video game

¹⁰⁹ See also Valve’s “*EU Right of Withdrawal and Steam Refunds*”: “*European law principally provides a right of withdrawal on software sales. However, it can be and typically is excluded for boxed software that has been opened and for digitally provided content once it is provided to the end user. This is what happens when you make a transaction on Steam: The EU statutory right of withdrawal ends 14 days after your purchase or the moment you start downloading the content and services for the first time (whichever is sooner). At the same time [...] for digital games we allow you to try them for up to two hours, whereas your statutory right of withdrawal does not give you a chance to try out games at all*”, available at https://support.steampowered.com/kb_article.php?ref=8620-QYAL-4516, printed on 26 November 2019, [...].

¹¹⁰ In particular, under Valve’s refund policy, a user can “*request a refund for nearly any purchase on Steam—for any reason [...] Valve will, upon request [...] issue a refund for any reason [...] in the case of games, if the title has been played for less than two hours [...] Purchases Made Outside of Steam: Valve cannot provide refunds for purchases made outside of Steam (for example, CD keys or [...] purchased from third parties)*”, available at https://store.steampowered.com/steam_refunds/?l=english, printed on 26 November 2019, [...].

¹¹¹ See Valve’s “*Updated Steam Subscriber Agreement*”, available at <https://store.steampowered.com/news/8523/>, printed on 26 November 2019, [...].

outside of the "allowed" territory but also from subsequently playing/running the game outside of the "allowed" territory.¹¹²

- (101) Valve explained that the geo-blocking is technically implemented by modifying a text file of key/value pairs associated with the package. The text file of key/value pairs defines the set of countries where the package can or cannot be activated. Changing the relevant settings affects the ability to activate a (Steam) "CD key"¹¹³ for that package. When the settings are on, the countries listed are the only countries where the package can be activated, while the package cannot be activated anywhere else; when the settings are off, the countries listed are those where the package cannot be activated, while all unlisted countries are unrestricted. Similarly, when the "ProhibitRunInCountries" settings are on, given a list of countries by the publisher Steam will block the user from attempting to run the game if the IP address of the user reports that they are located in a listed country; when the settings "OnlyAllowRunInCountries" are on, Steam will block the user from attempting to run the game if they are not in a country from the allowed list.¹¹⁴
- (102) Activation (and run-time) restrictions are not set up automatically,¹¹⁵ i.e. the fact that there is a territory control function associated to the Steam activation keys does not mean that the activation of the PC video games is automatically restricted to a given territory. Instead, in order for Valve to generate geo-blocked keys it is necessary for Valve to reach an agreement with the Publishers to first set up activation restrictions on the basis of which geo-blocked Steam activation keys are generated.
- (103) As a first step, in order to set up activation restrictions, a publisher needs to determine the countries/regions in which activation will be allowed, and decide how many different geographic packages (i.e. "Subscriptions" or "Subscription ID(s)") Valve will have to set up for the PC video game in question and in which countries/regions activation should be allowed for each package. The publisher then needs to tell Valve how many different geographic packages will have to be set up for the PC video game in question and in which countries/regions activation will be possible for each geographic unit.
- (104) After Valve has set up the different geographic units, the publisher can request that Valve generates and provides to it a given number of Steam activation keys that the publisher then passes on to its distributors who will resell the PC video games (digitally and/or physically). The Steam activation keys that Valve generates will be geo-blocked to the territories indicated by the publisher and activation of a given geographic unit will be possible only in the relevant permitted geographic region. In this Decision, these type of keys are also referred to as "geo-blocked Steam activation keys".
- (105) Once a user tries to activate a PC video game, the Steam activation process verifies whether the game is subject to an activation restriction and, if this is the case, whether it may be activated in the particular territory where the user is located. If the

¹¹² For reasons of simplification, in this Decision activation restrictions also cover run-time restrictions unless otherwise stated.

¹¹³ Steam activation keys are used by the publishers as a tool to sell Steam-enabled PC video games through retail channels, and can be used interchangeably for physical and digital distribution outside of Steam, see Recital (87).

¹¹⁴ [...].

¹¹⁵ [...].

PC video game may not be activated in the user's territory, the activation will fail and Steam will prevent the user from accessing the PC video game.

- (106) Although the set-up of the activation restrictions (i.e., set-up of the geographic unit) and the generation of the related geo-blocked keys require two different technical actions in which the second (i.e. generation of the geo-blocked keys) logically follows the first, in practice publishers often simultaneously requested that the geographic unit be set up; specified the territories in which activation should be possible; and requested the generation of the geo-blocked Steam activation keys.¹¹⁶
- (107) Before [...], publishers ordered Steam activation keys “manually”, i.e., by email. In response to the Statements of Objections, Valve explained that, to improve efficiency, the ordering of Steam activation keys is - as of [...] - for the most part done through a web form that is provided via the publisher's dedicated partner webpage, in which the publisher specifies how many Steam keys it wants for each individual video game package.¹¹⁷ Conversely, the set-up of the activation restrictions described in Recitals (102) - (106) was never automated. In fact, the automated system concerns the ordering of Steam activation keys but not the preceding process of agreeing to set up activation restrictions. Therefore, evidence of orders for geo-blocked Steam activation keys via the automated system - along with a list provided by Valve indicating (i) the PC video games for which activation restrictions were in place as well as (ii) the territories in which the activation of such games was allowed and territories in which conversely it was not¹¹⁸ - confirm that activation restrictions for these games were agreed between Valve and each of the Publishers (see further Sections 6.2.1.3, 6.2.2.3, 6.2.3.3, 6.2.4.3, 6.2.5.3).¹¹⁹
- (108) The process of enabling (and disabling) activation restrictions is seamless and takes only a few minutes: a Valve employee needs to manually edit a file¹²⁰ which stores the information about the activation lock in the Steam back-end¹²¹ (for a detailed description of this process, see Recital (101)).

6.1.6. Valve's practice regarding geo-blocked keys

6.1.6.1. Introduction

- (109) This section contains the description of the evidence showing Valve's practice regarding the geo-blocked keys. In particular, the evidence set out in Sections 6.1.6.2 to 6.1.6.6 shows that, *vis-à-vis* each of the Publishers, Valve advertised, made available and on occasions raised pro-actively the possibility of using geo-blocked

¹¹⁶ [...].

¹¹⁷ [...].

¹¹⁸ [...].

¹¹⁹ The automated orders of geo-blocked keys reported per each PC video games the related Subscription IDs (described in Recital (103)). The same Subscription IDs also appear in the list provided by Valve indicating (i) the PC video games for which activation restrictions were in place; as well as (ii) the territories in which the activation of such games was allowed and territories in which conversely it was not. As already explained in detail in Section 6.1.5, publishers need first to agree with Valve on whether to set up activation restrictions for a given game and if so, to agree also on the territories concerned by the activation restrictions before any activation keys geo-blocked to those territories can be requested and generated, including by means of the automated system.

¹²⁰ [...].

¹²¹ In software programming the terms back-end and front-end refer to the separation between the data access layer (back-end) and the client-facing layer (front-end) of a piece of software.

Steam activation keys as a means of enabling the Publishers to restrict cross-border sales, thus maintaining different price levels for certain PC video games in different regions.

- (110) Although it is not necessary, for the finding of an infringement of Article 101 of the Treaty, to show that the undertaking benefits from the infringement, the provision of the free of charge territory control and the related geo-blocked keys is consistent with Valve's business strategy which is to make the Steam platform attractive to publishers and gamers by increasing user adoption and retention.
- (111) In this respect, by providing Steam activation keys Valve drives traffic to the Steam platform given that the PC video games need to be authenticated via Steam. Through the activation process described in Section 6.1.3, Valve obtains valuable user data, such as email addresses, which Valve could then use for dedicated marketing strategies.¹²² In addition, through the Steam activation keys Valve also gets revenues in particular from "in-game purchases". [...].¹²³
- (112) As a secondary element, due to the revenue sharing agreement according to which Valve retains 30% of the actual revenues obtained from any sale of the Publishers' PC video games on Steam (see Recital (83), last indent), Valve benefited from the geo-blocking of cheaper PC video games to be sold in certain EEA countries with low retail prices in order to prevent them from being sold in EEA countries with higher retail prices where Steam generates most of its turnover.¹²⁴ Any change in the sales or price level in EEA countries with higher retail prices - in response to sales to customers located in these territories of cheaper PC video games originating from EEA countries with low retail prices - would have meant lower revenues for Valve from the revenue sharing agreement. Therefore, the provision of geo-blocked Steam activation keys also benefitted Valve as it protected Valve's own margins on the sales of PC video games on Steam in EEA countries with higher retail prices.

6.1.6.2. Evidence with regard to Bandai [Case AT.40422]

- (113) In an email exchange of 5 January 2012, Bandai indicated to Valve its intention to geo-block the PC video game "[...]" in view of its imminent launch, without specifying the territories to which Steam activation keys would be geo-blocked.¹²⁵ In its reply to Bandai, Valve recommended the following: "[...] *as far as the region locking, if you plan to have significantly lower prices in certain regions, we recommend locking the keys to only activate in those regions. I'm happy to talk through any regions you think might require region locking to make sure we have a good plan.*"¹²⁶ While this email exchange does not refer to EEA-specific geo-blocking, it nonetheless shows that Valve recommended to Bandai to geo-block the Steam activation keys with a view to taking advantage of price differences between different regions and to protecting those price differences by preventing users from having access to cheaper versions of the PC video game in question. As shown in Section 6.2.1.3, "[...]" is one of the PC video games for which there is evidence that

¹²² [...].

¹²³ [...].

¹²⁴ [...].

¹²⁵ "We could also [...] have batches per territories", [...].

¹²⁶ [...].

Valve provided to Bandai, upon request, Steam activation keys geo-blocked to certain EEA countries, namely the Czech Republic, Hungary, Poland and Slovakia.

- (114) In an email exchange of 19 June 2012, where Bandai asked Valve for information about geo-blocking by Steam activation keys, Valve explained the following: "[...] we do region locking via IP [internet protocol]. We have two options. We can restrict the ability to purchase the game in the selected countries / regions. We can also restrict the ability to play the game. We typically recommend both if you actually want to prevent grey marketing the game" [emphasis added].¹²⁷ In the same email exchange, Valve also clarified the following: "[...] the region locking is attached to the Steam redemption [i.e. activation] keys. When you request the keys, you need to let me know if there is any special region locking. What are you thinking you will want in terms of number of regions? Typically we see [...] ¹²⁸ with possibly parts of Eastern Europe in one group, then we typically just run the rest of world as a single group".¹²⁹
- (115) Furthermore, in a presentation advertising a number of Steamworks services¹³⁰ provided by Valve to Bandai on 10 June 2013,¹³¹ Valve advertised its Steam technology features and services as follows: "[...] you automatically get: [...] territory and content control"; "no more [...] grey marketing" and "Steam provides CD Keys¹³² which can be used for retail, digital and beta distribution, no fees, usage restrictions or quantity limitation, can be locked by territory and content [emphasis added]".¹³³ This piece of evidence shows that the possibility of geo-blocking Steam activation keys was used by Valve to market Steam and its services to Bandai with the aim of expanding and ensuring the success of the Steam platform. This presentation concerned Valve's practice in general and Bandai made use of the Steam technology features for the purposes of setting up intra-EEA activation restrictions and/or providing the related geo-blocked keys. Therefore this presentation concerned features which were understood as also being available for the EEA.

6.1.6.3. Evidence with regard to Capcom [Case AT.40424]

- (116) In December 2012, following an email of Capcom requesting Steam activation keys for the PC video game "[...]", Valve offered Capcom the possibility of setting up activation restrictions via Steam activation keys for that game: "Did you need any territory locking? Is it ok if all boxed product is available globally or did you want different packaging for lower price territories such as [...]?"¹³⁴ Valve claims that this email was in response to Capcom's first request ever of Steam activation keys and that, due to that, Valve asked a number of "routine" questions, including this

¹²⁷ [...] "Grey marketing" (sometimes also referred as "grey imports") is an industry jargon for parallel trade. With specific regard to the Steam activation keys, it indicates the phenomenon of imports from companies that buy Steam activation keys in countries where retail prices are lower to resell them in countries where games are generally higher priced.

¹²⁸ The [...] includes a large majority of [...] (today all of them independent States), namely [...], but no longer Latvia, Lithuania or Estonia.

¹²⁹ [...].

¹³⁰ [...].

¹³¹ [...].

¹³² See Recital (101).

¹³³ [...].

¹³⁴ [...].

one, to ensure there was no mistake in the issuing of the requested keys.¹³⁵ However, this email rather confirms that Valve *routinely* asked publishers about whether Steam activation keys for games had to be geo-blocked to lower price territories. In this case, [...] is mentioned only as an example of lower price territories.

- (117) In an email exchange dated 7 January 2014 on the subject of the upcoming launch of the game “[...]”, for which Capcom initially requested the set-up of different geographic packages (namely, one for the EU and one for [...]) but which ultimately was not geo-blocked, Valve provided the following comment: *"I could see the use of a [...] restricted package if those products will be sold at a lower cost and you want to prevent grey marketing of key out of those territories."*¹³⁶ In this and in other cases, Valve appears to consider the three Baltic EEA countries (Latvia, Lithuania and Estonia) as part of [...].¹³⁷
- (118) In an email exchange dated 7 February 2013, Capcom was internally discussing the possibility to set up activation restrictions to Eastern Europe for the PC video game “[...]” due to low pricing in that region. It then enquired with Valve about whether, despite the activation restriction, it would be technically possible for a user to activate the game in Poland and then play it in the UK. In response to this email, Valve advised Capcom to set up run-time restrictions in addition to activation restrictions as follows: *"This [run-time restriction] is an option we can turn on and off for the region locked keys. If the prices are significantly lower in Poland, we would recommend that we turn the feature on (i.e. – a customer cannot connect to Steam and play in Germany if they bought a Polish retail copy). This prevents someone from loading a truck full of games in Poland and driving them to Germany for sale or the digital equivalent in online sales"*.¹³⁸ As shown in Section 6.2.2.3, “[...]” is one of the PC video games for which there is evidence that Valve provided to Capcom, upon request, Steam activation keys geo-blocked to certain EEA countries, namely Estonia, Latvia, Lithuania, Czech Republic, Hungary, Poland, Slovakia and Romania.
- (119) Furthermore, in a presentation provided by Valve to Capcom via email on 2 July 2013¹³⁹, Valve advertised its Steam technology features and services as follows: *"[...] you automatically get territory and content control"; "no more zero-day piracy, grey marketing" and "Steam provides CD Keys¹⁴⁰ which can be used for retail, digital and beta distribution, no fees, usage restrictions or quantity limitation, can be locked by territory and content [emphasis added]"*.¹⁴¹ This piece of evidence shows that the possibility of geo-blocking Steam activation keys was used by Valve to market Steam and its services to Capcom with the aim of expanding and ensuring the success of the Steam platform. This presentation concerned Valve’s practice in general and Capcom subsequently made use of the Steam technology features for the purposes of setting up intra-EEA activation restrictions and/or providing the related geo-blocked keys. Therefore this presentation concerned features which were understood as also being available for the EEA.

135 [...].

136 [...].

137 [...].

138 [...].

139 [...].

140 See Recital (101).

141 [...].

6.1.6.4. Evidence with regard to Focus Home [Case AT.40413]

- (120) In an email exchange of 19-20 June 2013¹⁴² Focus Home asked Valve to implement geo-blocking for the PC video game “[...]”, both by territory and language so as to offer Polish language only to Polish users. In response to this request, Valve replied as follows: *“I’d like to suggest we region lock both the activation [restrictions] and play [i.e. via run-time restrictions] to Poland for your Polish keys (we typically just lock the activation piece, not the play) [...] If we do this, you should be able to offer all languages to your Polish customers, since those keys are much less valuable to anyone outside of Poland. We’d like to help you solve your grey market concerns in a way that makes the most sense for you, your partners, your customers and Steam customers. We’ve got a lot of experience dealing with these issues [...] We can restrict the Polish keys so they only unlock the game in Poland. If your goal is to reduce pirating of the title in Poland, your best bet will be to price for that market and give the users the full version of the game (including all localized content). The region restrictions on those keys will help to ensure the Polish [...] keys don’t end up for sale on the Grey Market” [emphasis added].¹⁴³*
- (121) According to Valve, this email shows that Focus Home unilaterally decided to geo-block Steam activation keys to solve its “grey marketing” concerns and that when Focus Home requested that Valve issue a localized version of the game where only the Polish language was available to deal with “VPN issues” – in addition to geo-blocked Steam activation keys – Valve expressed serious concerns about the impact on the users’ experience.¹⁴⁴ In this respect, Valve claims that this email exchange shows that the only instances when it sought to influence the publishers’ decisions (i.e. using geo-blocked keys instead of localisation as a means of resolving “grey market concerns”) were if they could adversely affect the user experience on Steam.¹⁴⁵ However, contrary to Valve’s claims, this email confirms that not only did Valve make territorial controls available and implemented such controls when asked to do so but that on this occasion Valve even pro-actively raised the possibility of using territory controls with Focus Home.
- (122) As evidenced in Section 6.2.3.3, “[...]” is one of the PC video games for which Valve provided Focus Home, upon request, with Steam activation keys geo-blocked to certain EEA countries.
- (123) In an email exchange dated 13 September 2013, Valve explained to Focus Home that geo-blocking the three PC video games concerned (“[...]”, “[...]” and “[...]”) by territory only (i.e. Poland) would be sufficient to alleviate Focus Home’s parallel trade concerns (*“Since we’re region locking the keys, you shouldn’t have to worry about the grey market”* [emphasis added]).¹⁴⁶ As evidenced in Section 6.2.3.3, following a request from Focus Home, Valve provided Focus Home with Steam activation keys for these three PC video games that were geo-blocked to Poland. In the same email exchange, Valve informed Focus Home that most publishers had already stopped geo-blocking games by language but not by territory (“*Most*

¹⁴² [...].

¹⁴³ [...].

¹⁴⁴ [...]. For “VPN”, see footnote 108.

¹⁴⁵ [...] and statement by [...] at the oral hearing – see footnote 614.

¹⁴⁶ [...].

publishers have stopped offering language limited skus¹⁴⁷ in favor of region locking their keys" [emphasis added].¹⁴⁸

- (124) Furthermore, in a presentation advertising a number of Steamworks services provided by Valve to Focus Home via email on 26 July 2012,¹⁴⁹ Valve advertised its Steam technology features and services as follows: "[...] *you automatically get [...] Territory and Content control" and "Region Control – Not by Language - Not by Content" [emphasis added]. This presentation concerned Valve's practice in general and Focus Home subsequently made use of the Steam technology features for the purposes of setting up intra-EEA activation restrictions and/or providing the related geo-blocked keys. Therefore this presentation concerned features which were understood as also being available for the EEA.*

6.1.6.5. Evidence with regard to Koch Media [Case AT.40414]

- (125) In an email of 18 March 2011 from Koch Media to Valve concerning the upcoming release of the PC video game "[...]", Koch Media indicated the following: "*Our current plan is to have the following key batches for [...]for UK only due to low price point in UK compared to the rest of Europe, - Batch for the rest of Western Europe (FIGS),¹⁵⁰ - Batch for Eastern Europe [...] due to the low price point in these countries. Is there any advice against the separation of UK from your side? The rest is basically what you advised when we had a call last week.*"¹⁵¹ In reply to this email, Valve responded as follows: "*Your plan sounds good, the only thing you might want to change is the keys in Eastern Europe. You may want to break this into two groups, Group 1: Eastern Europe and Group 2: [...]and [...]. I understand your concern regarding the UK and having a separate set of keys is smart. We see the UK as these countries IDs: IM, JE, GS, GB, UK.¹⁵² [...]. All you will need to do is tell us how many keys you need for each grouping for your initial release. We will be able to turn the keys around for you in a single business day*".¹⁵³ Koch Media indicated that it followed Valve's advice with regard to splitting Eastern Europe into two groups of countries, namely Eastern Europe and [...] countries.¹⁵⁴
- (126) In response to the Statements of Objections Valve indicated that the suggestion to split Eastern Europe into two groups should be read "[Direct quote]".¹⁵⁵ Valve's interpretation is, however, inconsistent with the content of the email where Valve confirmed that it was a "*good plan*" to have two separate packages for the UK and Western Europe ("FIGS") as well as a package for Eastern Europe. In addition, such interpretation is not in line with Valve's subsequent behaviour where Valve did not object when Koch Media requested Steam activation keys for the video game "[...]" geo-blocked to the Czech Republic, Hungary, Poland, Slovakia and the UK¹⁵⁶

¹⁴⁷ This is the version (i.e. language) of the PC video game (also referred to as "SKU" – "Stock Keeping Unit").

¹⁴⁸ [...].

¹⁴⁹ [...].

¹⁵⁰ FIGS is an acronym for France, Italy, Germany, Spain.

¹⁵¹ [...].

¹⁵² IM, JE, GS, GB, UK are acronyms for Isle of Man, Jersey, Guernsey, Gibraltar and United Kingdom.

¹⁵³ [...].

¹⁵⁴ [...]. For "[...]", see footnote 128.

¹⁵⁵ [...].

¹⁵⁶ For the sake of completeness, in the email [...]. Conversely, [...] Koch Media decided not to set up activation restrictions for the UK: "*despite the first intention to separate the UK from the rest of the*

(Section 6.2.4.3). This meant in practice that for this PC video game two different sets of keys were generated: one set geo-blocked to the UK only and another set geo-blocked to the Czech Republic, Hungary, Poland and Slovakia only.

- (127) On 17 May 2013, Valve contacted Koch Media flagging that the digital distributor [...] was selling Steam activation keys for Koch Media's PC video games "[...]" and "[...]" (which were also sold on Steam)¹⁵⁷ at a very low price, and asking whether Koch Media was aware of that.¹⁵⁸ Koch Media replied that it was not aware of that, pointing out that the very low price applied by this digital distributor was indeed "*hurting*" Koch Media's sales on Steam. [...]the above email exchange confirms that such activity could also "*hurt*" sales of Koch Media's PC video games on Steam and, consequently, Valve's own margins given the 30%/70% revenue sharing agreement with Koch Media (see Recital (184)).
- (128) Subsequently, Koch Media asked for Valve's advice about whether Valve could "*put territorial restrictions on the keys*".¹⁵⁹ On 21 May 2013, Valve replied to Koch Media recommending the following: "[...] *we can put activation restrictions on territories where you believe grey marketing is coming from*".¹⁶⁰
- (129) Under the same chain of email exchanges, on 23 May 2013 one employee of Koch Media indicated to another employee of the company that Valve was able to apply intra-EEA geo-blocking to the Steam activation keys in order to geo-block the games to "*Eastern Europe*".¹⁶¹ A Valve employee was copied on this email exchange of 23 May 2013 and followed up on that email exchange on 25 May 2013, pointing out the following: "[...] *We [Valve] can definitely help to restrict retail keys to only being activated in their specific set of territories to cut down on grey marketing [...]*" [emphasis added].¹⁶²
- (130) Furthermore, in two presentations advertising a number of Steamworks services provided by Valve to Koch Media via email on 13 March 2012,¹⁶³ Valve advertised its Steam technology features and services as follows: "[...] *Steamworks how does it work? [...] no platform or key fees, [...], what's the benefit to Valve? Growing Steam users base and cultivating PC gaming [...] You automatically get territory and content control*"¹⁶⁴ [emphasis added] "*as many retailer keys as you want, keyed for territory and content*" [emphasis added].¹⁶⁵ The expression "*keyed for territory*" used in relation to "*retailer keys*" is the jargon used to indicate that Steam activation keys

Western Europe, we [Koch Media] came to the conclusion to only have one batch of keys for Western Europe just not to confuse consumers". However, further to that, Koch Media [...] asked Valve to set up activation restrictions and/or provide it with the related keys geo-blocked to UK and Valve agreed to this request ([...]).

¹⁵⁷ On the basis of the Steam distribution agreement between Valve and Koch Media dated 11 November 2008, and subsequent amendments [...].

¹⁵⁸ [...].

¹⁵⁹ [...].

¹⁶⁰ [...].

¹⁶¹ [...] which reads: "*Hi [name of Koch Media's employee], [name of Valve's employee] were mentioning they have the possibility and are fine with extending the current split ([...]BR [Brazil], NA [Nord America] and ROW [Rest of the World]), by adding region lock on low SRP [suggested retail price] territories like Eastern Europe, regardless of the Schengen Space*" [emphasis added], [...].

¹⁶² [...].

¹⁶³ [...].

¹⁶⁴ [...].

¹⁶⁵ [...].

could indeed be geo-blocked to a given territory. These pieces of evidence show that the possibility of geo-blocking Steam activation keys was used by Valve to market Steam and its services to Koch Media with the aim of expanding and ensuring the success of the Steam platform. These presentations concerned Valve's practice in general and Koch Media made use of the Steam technology features for the purposes of setting up intra-EEA activation restrictions and/or providing the related geo-blocked keys. Therefore such presentations advertised features which were understood to be used also in the EEA.

6.1.6.6. Evidence with regard to ZeniMax [Case AT.40420]

(131) On 2 September 2010, ZeniMax sent an email to Valve raising a number of technical questions regarding Steam activation keys. Valve responded as follows: *"We would recommend that you allow all languages to be available in all territories, and that all keys be able to be activated worldwide. There are a couple exceptions to this - If you are selling a low price version in a territory like [...], we would setup those keys to only activate in that territory."*¹⁶⁶ Other examples show that Valve was explaining to ZeniMax how the geo-blocking technology worked for its own PC video games.¹⁶⁷ While these email exchanges do not refer to EEA-specific geo-blocking, they nonetheless show that Valve recommended that ZeniMax geo-block the Steam activation keys with a view to taking advantage of price differences between different regions and to protect those price differences by preventing users from having access to cheaper versions of the PC video game in question.

(132) Furthermore, in a presentation advertising a number of Steamworks services provided by Valve to ZeniMax via email in January 2014,¹⁶⁸ Valve advertised its Steam technology features and services as follows: *"[Steam activation keys c]an be used for retail, digital [...] distribution [and] can be locked by territory"*.¹⁶⁹ This piece of evidence shows that the possibility of geo-blocking Steam activation keys was used by Valve to market Steam and its services to ZeniMax with the aim of expanding and ensuring the success of the Steam platform. This presentation concerned Valve's practice in general and ZeniMax made use of the Steam technology features for the purposes of setting up intra-EEA activation restrictions and/or providing the related geo-blocked keys. Therefore this presentation concerned features which were understood as also being available for the EEA.

6.1.6.7. Conclusion

(133) The evidence set out above shows that:

- (a) Valve's practice was to provide territory control and the related geo-blocked Steam activation keys, as per each of the Publishers' request;
- (b) On certain occasions Valve pro-actively raised the possibility of using territory control with the Publishers;
- (c) Valve knew (or ought to have known) that the geo-blocked keys were used by the Publishers for the purposes of restricting cross-border sales; and

¹⁶⁶ [...].

¹⁶⁷ [...].

¹⁶⁸ [...].

¹⁶⁹ [...].

- (d) The provision of the geo-blocked keys is consistent with Valve's business strategy which is the expansion and the success of the Steam platform given the benefits brought to Valve by the provision of the keys.¹⁷⁰

6.2. Agreements and/or concerted practices between Valve and the Publishers

6.2.1. Case AT.40422 – Bandai

6.2.1.1. General description of the agreements/concerted practices

(134) The present Section relates to agreements and/or concerted practices between Valve and Bandai to set up activation restrictions and to provide geo-blocked Steam activation keys preventing the activation of some of Bandai's PC video games outside of specific EEA countries, namely, the Czech Republic, Hungary, Poland, Slovakia. These agreements/concerted practices, considered collectively, concerned five PC video games of Bandai¹⁷¹ and took place overall between 13 March 2012 and 22 April 2014. The same PC video games for which Valve provided geo-blocked Steam activation keys were also sold on Steam across the entire EEA during the same period.

6.2.1.2. The SDA and the Steamworks Agreement between Valve and Bandai

(135) The contractual relationship between Valve and Bandai is governed by the SDA¹⁷² (together with its amendments)¹⁷³ and the Steamworks Agreement¹⁷⁴ which were signed on 22 March 2012.

(136) On the basis of the SDA, Valve was granted a non-exclusive licence to exploit specified Bandai PC video games on a worldwide basis (i.e. including the entirety of the EEA). Under the Steamworks Agreement, Valve also licenced to Bandai its Steam technology which includes the provision of Steam activation keys¹⁷⁵ for distribution outside Steam of those same PC video games. Valve is obliged to provide Steam activation keys within 10 days after receiving a request from Bandai.¹⁷⁶ Valve pays Bandai 70% of the adjusted gross revenues which Valve actually receives from its exploitation of Bandai's PC video games on Steam.¹⁷⁷ In addition, as per Recital (83), last indent, pursuant to the Steam Subscriber Agreement, Valve is the merchant of record *vis-à-vis* users and is responsible for transactions *vis-à-vis* those users.

(137) While the Steamworks Agreement does not contain any clauses which per se restrict the distribution of Bandai's PC video games to a given territory, it created the possibility to geo-block Steam activation keys by means of the territory control function as explained in Section 6.1.2, letter b). In order for Valve to generate geo-blocked keys it was necessary to reach an agreement with Bandai to set up activation restrictions on the basis of which geo-blocked Steam activation keys were generated. Valve and Bandai generally reached this agreement by exchange of emails as explained in Section 6.1.5 and evidenced in the following Section 6.2.1.3.

¹⁷⁰ Valve did not contest the existence of such practice during the oral hearing [...].

¹⁷¹ Namely, "[...]", "[...]", "[...]", "[...]" and "[...]".

¹⁷² [...].

¹⁷³ [...].

¹⁷⁴ [...].

¹⁷⁵ [...].

¹⁷⁶ [...].

¹⁷⁷ [...].

6.2.1.3. Bandai's PC video games geo-blocked via Steam activation keys

- (138) Through the use of geo-blocked Steam activation keys (see Section 6.1.2, letter a), Bandai and Valve restricted the possibility for users to activate five PC video games - namely, 1) "[...]", 2) "[...]", 3) "[...]", 4) "[...]" and 5) "[...]" - outside of specific EEA countries. The Steam activation keys for these PC video games only permitted users to activate these games in the Czech Republic, Hungary, Poland and/or Slovakia. Users located outside these EEA countries could not activate these games.
- (139) Bandai requested that Valve put in place activation restrictions. In particular, Bandai requested Valve to set up activation restrictions and/or to provide it with geo-blocked Steam activation keys, which Bandai then supplied to its EEA distributors (e.g. [...]),¹⁷⁸ for the mentioned five PC video games. The activation of those games was restricted by means of geo-blocked Steam activation keys, which Bandai acknowledges were used interchangeably for the physical and digital distribution by [...].¹⁷⁹ From a geographical perspective, the Steam activation keys for these PC video games were geo-blocked to the Czech Republic, Hungary, Poland and/or Slovakia.
- (140) Valve has confirmed that the five PC video games at issue had activation restrictions in place. Valve provided a list of PC video games with activation restrictions in place¹⁸⁰ as well as several orders of geo-blocked Steam activation keys listed in the reports generated via the automated system Valve introduced in [...] (see Recital (107)).¹⁸¹
- (141) Activation restrictions were in place between 13 March 2012 (date when Valve provided to Bandai geo-blocked Steam activation keys for the game "[...]"¹⁸² and 22 April 2014, when Valve lifted any existing EEA activation restrictions.¹⁸³ During the same period, Valve also sold the same PC video games for which it provided geo-blocked Steam activation keys on Steam across the entire EEA.
- (142) The following contemporaneous evidence submitted by both Bandai and Valve supports the fact that Bandai and Valve agreed to restrict the Steam activation keys for these five PC video games to the Czech Republic, Hungary, Poland and/or Slovakia:
- "[...]": in an email exchange dated 12 March 2012, Bandai addressed to Valve the following request of geo-blocking and order of geo-blocked Steam activation keys: "*Concerning the [...] Poland batches, could you lock them to the following countries? [...] Poland: Poland, Czech Republic, Hungary, Slovakia [...]*". The same email exchange reveals that Valve provided those keys by email the following day on 13 March 2012;¹⁸⁴
 - "[...]": in an email dated 27 June 2012, Bandai addressed to Valve the following request of geo-blocking: "*We received an additional key request*

178 [...].

179 [...].

180 [...].

181 [...].

182 [...].

183 [...].

184 [...].

*from our EU team: [...]_Eastern: 10,000 keys. This batch needs to be IP restricted to: Poland, Czech Republic, Slovakia, Hungary";*¹⁸⁵

- “[...]”: in an email dated 18 October 2013, Bandai addressed to Valve the following request of geo-blocking and order of geo-blocked Steam activation keys: “[...] is missing 2 packages with the territories limitations [...] for PL/HU/CZ/SK. We need to order 3 batches with those limitations with 500 keys in each for [...] (PL/HU/CZ/SK)”,¹⁸⁶
- “[...]”: in an email dated 3 December 2013, Valve confirmed to Bandai that an activation restriction was in place for this PC video game: “For [...] [...], we have packages which are locked to [...] PL/HU/CZ/SK [...]”.¹⁸⁷
- “[...]”: Bandai and Valve agreed to set up activation restrictions for this PC video game for the Czech Republic, Hungary, Poland and Slovakia.¹⁸⁸ Orders of geo-blocked Steam activation keys were generated via Valve's automated system (see further Recitals (143) and (148)).¹⁸⁹

(143) For four PC video games, namely, “[...]”, “[...]”, “[...]” and “[...]” (for which there are no emailed orders), there is evidence of orders of geo-blocked Steam activation keys which were generated via Valve's automated system.¹⁹⁰ In light of the explanation provided in Section 6.1.5, Recital (107) concerning the automated system, such orders confirm that Valve and Bandai agreed on activation restrictions for these games.

(144) On 22 April 2014, Valve lifted, upon Bandai's request,¹⁹¹ activation restrictions in relation to keys already put on the market.¹⁹²

(145) Table 1 below provides an overview of the five PC video games that were restricted via geo-blocked Steam activation keys.

(146) The start date for each agreement/concerted practice is the date when Bandai and Valve agreed to geo-block the activation keys for a specific PC video game of Bandai.

(147) In the first instance, such date is the date of the email exchange in which Valve upon request of Bandai agreed to set up activation restrictions and/or to provide Steam activation keys. As said in Recital (142), first bullet point, the evidence of geo-blocked keys provided by email by Valve to Bandai is available only for the PC video game “[...]”.

(148) For the PC video games for which such evidence of emailed orders is not available and which were released on the market in 2013,¹⁹³ namely “[...]”, “[...]” and “[...]”, the start date for each agreement/concerted practice is the date of the first order of geo-blocked keys via the automated system (respectively, 23 October 2013,

185 [...].
186 [...].
187 [...].
188 [...].
189 [...].
190 [...].
191 [...].
192 [...].
193 [...].

10 October 2013 and 19 April 2013). In light of the explanations provided in Section 6.1.5, Recital (107) concerning the automated system, this is a reliable date.

- (149) For the PC video game “[...]” which was released on the market on 27 July 2012 (i.e., prior to the introduction of the automated system which took place only in [...]) and for which Bandai requested geo-blocked Steam activation keys from Valve on 27 June 2012,¹⁹⁴ the Commission considers the date of release on the market (27 July 2012) provided by Bandai, as the start date of the agreement/concerted practice for this PC video game. This is a more favourable date compared to the information provided by Valve.¹⁹⁵
- (150) The end date of the agreement/concerted practices is the date when Valve lifted, upon request of Bandai,¹⁹⁶ the activation restrictions in relation to keys already put on the market, i.e. on 22 April 2014.¹⁹⁷

Table 1: Bandai’s PC video games geo-blocked by Steam activation keys

Name of the PC video game	EEA countries to which the activation restriction applies (i.e., EEA countries in which the PC video game is to be activated by means of the geo-blocked keys)	Start Date	End Date
[...]	Czech Republic / Hungary / Poland / Slovakia	23/10/2013 ¹⁹⁸	22/04/2014
[...]	Czech Republic / Hungary / Poland / Slovakia	27/07/2012 ¹⁹⁹	22/04/2014
[...]	Czech Republic / Hungary / Poland / Slovakia	10/10/2013 ²⁰⁰	22/04/2014
[...]	Czech Republic / Hungary / Poland / Slovakia	13/03/2012 ²⁰¹	22/04/2014
[...]	Czech Republic / Hungary / Poland / Slovakia	19/04/2013 ²⁰²	22/04/2014

- (151) Valve was aware that the geo-blocked Steam activation keys it supplied to Bandai were then passed on by Bandai to its distributors who resold the PC video games.²⁰³ In one instance, Bandai indicated to Valve that the geo-blocked Steam activation keys were to be given to [...].²⁰⁴

6.2.2. Case AT.40424 – Capcom

6.2.2.1. General description of the agreements/concerted practices

- (152) The present Section relates to bilateral agreements and/or concerted practices between Valve and Capcom to set-up activation restrictions and to provide geo-blocked Steam activation keys preventing the activation of some of Capcom’s PC video games outside of specific EEA countries, namely the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia. These agreements/concerted practices, considered collectively, concerned five PC video games of Capcom²⁰⁵ and took place between 13 February 2013 and

¹⁹⁴ [...].

¹⁹⁵ [...].

¹⁹⁶ [...].

¹⁹⁷ [...].

¹⁹⁸ [...].

¹⁹⁹ [...].

²⁰⁰ [...].

²⁰¹ [...].

²⁰² [...].

²⁰³ [...].

²⁰⁴ [...].

²⁰⁵ Namely, (1) “[...]”, (2) “[...]”, (3) “[...]”, (4) “[...]” and (5) “[...]”.

17 November 2014. The same PC video games for which Valve provided geo-blocked Steam activation keys were also sold on Steam across the entire EEA during the same period.

6.2.2.2. The SDAs between Valve and Capcom

- (153) The contractual relationship between Valve and Capcom is set out in the SDA of 11 October 2006 between Valve and Capcom Entertainment Inc.²⁰⁶ and in the SDA of 1 February 2007 between Valve and Capcom Japan (“the 1 February 2007 SDA”).²⁰⁷ These two SDAs have been amended multiple times in order to renew them and at the same time to update the list of Capcom’s PC video games distributed by Valve. Valve distributes the five Capcom’s PC video games concerned (see Recital (154)) on the basis of the SDA of 1 February 2007 only. Therefore, the SDA of 11 October 2006 will not be discussed further.
- (154) On the basis of the 1 February 2007 SDA, Valve was granted a non-exclusive worldwide license (i.e. including the entirety of the EEA)²⁰⁸ to exploit, among others, the five Capcom PC video games concerned by this Decision, namely (1) “[...]”, (2) “[...]”, (3) “[...]”, (4) “[...]” and (5) “[...]”. Under the 1 February 2007 SDA, Valve also licensed to Capcom its Steam technology which includes the provision of Steam activation keys²⁰⁹ for distribution outside Steam of those same PC video games. Valve is obliged to provide Steam activation keys within 10 days of receiving a request from Capcom.²¹⁰ Valve pays Capcom 70% of the adjusted gross revenues which Valve actually receives from its exploitation of Capcom’s PC video games on Steam.²¹¹ In addition, as per Recital (83), last indent, pursuant to the Steam Subscriber Agreement, Valve is the merchant of record *vis-à-vis* users and is responsible for transactions *vis-à-vis* those users.
- (155) While the 1 February 2007 SDA itself does not contain any clauses which per se restrict the distribution of Capcom’s PC video games to a given territory, it created the possibility to geo-block Steam activation keys by means of the territory control function explained in Section 6.1.2, letter b). In order for Valve to generate geo-blocked keys it was necessary to reach an agreement with Capcom to set up activation restrictions on the basis of which geo-blocked Steam activation keys were generated. Valve and Capcom generally reached this agreement by exchange of emails as explained in Section 6.1.5 and evidenced in the following Section 6.2.2.3.

6.2.2.3. Capcom PC video games geo-blocked via Steam activation keys

- (156) Through the use of geo-blocked Steam activation keys (see Section 6.1.2, letter a), Capcom and Valve prevented the possibility for users to activate the five PC video games mentioned in Recital (154) outside of specific EEA countries. The Steam activation keys for these PC video games only permitted users to activate these games in Latvia, Lithuania, Estonia, the Czech Republic, Hungary, Poland, Slovakia and Romania. Users located outside these EEA countries could not activate these games.

²⁰⁶ [...].
²⁰⁷ [...].
²⁰⁸ [...].
²⁰⁹ [...].
²¹⁰ [...].
²¹¹ [...].

- (157) Capcom requested that Valve put in place activation restrictions. In particular, Capcom requested Valve to set up activation restrictions and provide geo-blocked Steam activation keys, which Capcom then supplied to its distributor [...] for the mentioned five PC video games. The activation of those games was restricted by means of geo-blocked Steam activation keys concerning physical distribution. The Steam activation keys provided to Capcom were geo-blocked, for the PC video games at issue, to Latvia, Lithuania, Estonia, the Czech Republic, Hungary, Poland, Slovakia and Romania.
- (158) Valve has confirmed that four PC video games, namely (1) “[...]”, (2) “[...]”, (3) “[...]” and (4) “[...]” had activation restrictions in place.²¹² With regard to “[...]”, the email evidence quoted in Recital (159)(b) demonstrates that an activation restriction was agreed between Capcom and Valve. In addition, Valve provided a list of PC video games with activation restrictions in place²¹³ as well as of several orders of geo-blocked Steam activation keys listed in the reports generated via the automated system that Valve introduced in [...] (see Section 6.1.5).²¹⁴
- (159) The following contemporaneous evidence submitted by Capcom²¹⁵ supports the fact that Capcom and Valve agreed to restrict the Steam activation keys for these five PC video games to Latvia, Lithuania, Estonia, the Czech Republic, Hungary, Poland, Slovakia and/or Romania:
- (a) By email of 7 February 2013,²¹⁶ Capcom informed Valve about its upcoming request for geo-blocked keys for the PC video game “[...]”: *"These are region locked Steam keys for the worldwide master. They should only activate the game from within the specified countries: [...] Latvia, Lithuania, Estonia, Poland, Czech Republic, Slovakia, Hungary and Romania"* [emphasis added]. The actual request was sent to Valve by email of 8 February 2013²¹⁷. Valve confirmed on 13 February 2013 that the *"keys are on the way"*²¹⁸.
 - (b) In an email exchange between 22 February 2013 and 1 March 2013,²¹⁹ Capcom requested that Valve provide it with a new batch of Steam activation keys for the PC video game “[...]” that were geo-blocked to a territory encompassing Estonia, Latvia and Lithuania (and a number of non-EEA countries): *"[...] could we have 121K new Steam codes for [...] PC, which are activation locked to only work in the following regions: [...] Latvia, Lithuania, Estonia"*.²²⁰ In the same email exchange, Capcom requested that Valve also retroactively geo-block a batch of Steam activation keys for the PC video game “[...]” that had already been supplied to Capcom but not yet activated, to the same territory as for “[...]” (i.e. Latvia, Lithuania, Estonia, plus a number of non-EEA countries). Capcom explained that it had identified that keys for “[...]” sold to Capcom’s [...]distributor²²¹ were being re-sold in Poland: *"What we found,*

212 [...].
 213 [...]
 214 [...].
 215 [...].
 216 [...].
 217 [...].
 218 [...].
 219 [...].
 220 [...].
 221 [...].

*unexpectedly, is that [...]has a lower price point than those extra territories, and the [...] keys we assigned for [...]are showing up in Poland and undercutting the distributor".*²²² By email of 1 March 2013, Valve confirmed that the two batches of keys at issue (i.e., one for “[...]” and the other one for “[...]”) *...are all fixed up. They will only work in [...]*.”²²³ Although Valve’s confirmation refers simply to [...]countries, in view of the explicit request by Capcom which included Latvia, Lithuania and Estonia, and as Valve systematically considered the three Baltic EEA countries (Estonia, Latvia and Lithuania) as belonging to [...], it is likely that Valve’s confirmation in this specific instance covered also these three Baltic EEA countries.²²⁴

- (c) By email of 16 April 2013,²²⁵ Capcom requested two batches of Steam activation keys for the PC video game “[...]”: one batch of 45 000 keys geo-blocked to Estonia, Latvia and Lithuania and another batch of 15 000 keys geo-blocked to Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia and Romania. Valve confirmed that Capcom's request had been approved by email of 16 April 2013.²²⁶
- (d) By email of 3 May 2013,²²⁷ Capcom requested that Valve provide it with geo-blocked Steam activation keys for the PC video game “[...]”: *"Because there are locks specific to region and key type, I have spelt out the setup in the table below..."*. The table in question shows that Capcom ordered a batch of 50 000 Steam activation keys that were geo-blocked to Estonia, Latvia and Lithuania and another batch of 20 000 Steam activation keys that were geo-blocked to the "Eastern EU" which included, in addition to Estonia, Latvia and Lithuania, also Poland, the Czech Republic, Slovakia, Hungary and Romania. By email of 6 May 2013,²²⁸ Valve indicated to Capcom that the key request had to be submitted via the automated system in place as of [...] (see Recital (107)) and later - by email of 8 May 2013²²⁹ - confirmed to Capcom that Capcom’s request to set up the activation restrictions described above had been approved (*"I have setup packages for these key requests. To order the keys [...] please use this link [...]"*) and indicated the steps that Capcom had to follow to download the requested Steam activation keys with the requested activation restrictions: *"I approved these [= the keys] earlier today as they looked correct. You should be able to download them from the same page."*
- (e) By email of 16 August 2013,²³⁰ Capcom requested that Valve provide it with Steam activation keys for the PC video game “[...]” by sending a similar table as for “[...]”, identifying different regions that should be subject to certain geographic-based activation restrictions. The table in question shows that Capcom ordered a batch of 45 000 Steam activation keys that were geo-blocked to Estonia, Latvia and Lithuania and another batch of 8 000 Steam

222 [...].
223 [...].
224 [...].
225 [...].
226 [...].
227 [...].
228 [...].
229 [...].
230 [...].

activation keys that were geo-blocked to the "Eastern EU" which included, in addition to Estonia, Latvia and Lithuania, also Poland, the Czech Republic, Slovakia, Hungary and Romania. Valve confirmed on the same day that the activation restrictions that Capcom requested had indeed been created.²³¹

- (160) For four PC video games, namely “[...]”, “[...]”, “[...]” and “[...]”, there is also evidence of orders of geo-blocked Steam activation keys which were generated via Valve’s automated system.²³² In light of the explanation provided in Section 6.1.5, Recital (107) concerning the automated system, such orders confirm that Valve and Capcom agreed on activation restrictions for these games.
- (161) Regarding “[...]”, for which the email evidence quoted in Recital (159)(b) demonstrates that an activation restriction to Estonia, Latvia and Lithuania was agreed between Capcom and Valve, Capcom acknowledged that the activation of that game via physical distribution (see Recital (32)) was geo-blocked not only to those three countries, but to all of the eight EEA countries mentioned above.²³³
- (162) As of April 2014 (at the latest) Valve refused to set up additional activation restrictions unless this was required to comply with local legislation and to provide the related geo-blocked Steam activation keys for Latvia, Lithuania and Estonia.²³⁴ On 7 November 2014, Capcom instructed Valve to ensure that any activation restrictions on the above-mentioned five PC video games that relate to Latvia, Lithuania, Estonia, the Czech Republic, Hungary, Poland, Slovakia and Romania be removed and Valve confirmed on 17 November 2014 that the restrictions had been removed.²³⁵
- (163) Table 2 below provides an overview of Capcom’s PC video games that were restricted via geo-blocked Steam activation keys.
- (164) The “start date” for each agreement/concerted practice is the date when Capcom and Valve agreed to geo-block the activation keys for a specific PC video game of Capcom. Such date is the date of the email exchange in which Valve upon request of Capcom agreed to set up activation restrictions and/or to provide Steam activation keys. The evidence of geo-blocked keys provided by email by Valve to Capcom is available for all Capcom’s PC video game mentioned above in Recital (159), letters a) to e).
- (165) The end date for each agreement/concerted practice is the date when Valve confirmed to Capcom that any activation restrictions relating to the EEA on the five Capcom PC video games at issue were removed.²³⁶

Table 2: Capcom’s PC video games geo-blocked by Steam activation keys

Name of the PC video game	EEA countries to which the activation restriction applies (i.e., EEA countries in which the PC video game is to be activated by means of the geo-blocked keys)	Start Date	End Date
[...]	Latvia, Lithuania, Estonia, Czech Republic,	01/03/2013	17/11/2014

²³¹ [...].

²³² [...].

²³³ [...].

²³⁴ [...].

²³⁵ [...].

²³⁶ [...].

Name of the PC video game	EEA countries to which the activation restriction applies (i.e., EEA countries in which the PC video game is to be activated by means of the geo-blocked keys)	Start Date	End Date
	Hungary, Poland, Slovakia, Romania		
[...]	Latvia, Lithuania, Estonia, Czech Republic, Hungary, Poland, Slovakia, Romania	13/02/2013	17/11/2014
[...]	Latvia, Lithuania, Estonia, Czech Republic, Hungary, Poland, Slovakia, Romania	16/08/2013	17/11/2014
[...]	Latvia, Lithuania, Estonia, Czech Republic, Hungary, Poland, Slovakia, Romania	08/05/2013	17/11/2014
[...]	Latvia, Lithuania, Estonia, Czech Republic, Hungary, Poland, Slovakia, Romania	16/04/2013	17/11/2014

(166) Valve was aware that the geo-blocked Steam activation keys it supplied to Capcom were then passed on by Capcom to its distributors who resold the PC video games.²³⁷

6.2.3. Case AT.40413 – Focus Home

6.2.3.1. General description of the agreements/concerted practices

(167) The present section relates to agreements and/or concerted practices between Valve and Focus Home to set up activation restrictions and to provide geo-blocked Steam activation keys preventing the activation (and in few cases playing/running²³⁸) of some of Focus Home’s PC video games outside of specific EEA countries, namely Estonia, Hungary, Latvia, Lithuania and Poland. These agreements/concerted practices, considered collectively, concerned 19 PC video games of Focus Home²³⁹ and took place overall between 17 May 2013 and 9 October 2015. The same PC video games for which Valve provided geo-blocked Steam activation keys were also sold on Steam across the entire EEA during the same period.

6.2.3.2. The SDAs and the Steamworks Agreement between Valve and Focus Home

(168) The contractual relationship between Valve and Focus Home is governed by: a) the SDA of 8 January 2007 and subsequent amendments (“the 2007 SDA”);²⁴⁰ b) the SDA of 20 June 2012 and addendum (“the 2012 SDA”);²⁴¹ c) the SDA of 14 June 2016 (“the Standard SDA”).²⁴² The different SDAs supersede each other with the latest version of the SDA governing the contractual relationship between Focus Home and Valve at any given time.²⁴³ The Steamworks Agreement between Focus Home and Valve was signed as an addendum to the 2012 SDA.²⁴⁴

(169) On the basis of these different agreements (altogether, also “the SDAs/Steamworks Agreement”) Valve was granted a non-exclusive worldwide license (i.e. including the entirety of the EEA) to exploit specified Focus Home’s PC video games on

²³⁷ [...].

²³⁸ For an explanation of “run-time restrictions”, see Section 6.1.5.

²³⁹ Namely, (1) “[...]”; (2) “[...]”; (3) “[...]”; (4) “[...]”; (5) “[...]”; (6) “[...]”; (7) “[...]”; (8) “[...]”; (9) “[...]”; (10) “[...]”; (11) “[...]”; (12) “[...]”; (13) “[...]”; (14) “[...]”; (15) “[...]”; (16) “[...]”; (17) “[...]”; (18) “[...]”; (19) “[...]”.

²⁴⁰ [...].

²⁴¹ [...].

²⁴² [...].

²⁴³ [...].

²⁴⁴ [...].

Steam.²⁴⁵ Under the SDAs/Steamworks Agreement, Valve also licenced to Focus Home its Steam technology which includes the provision of Steam activation keys²⁴⁶ for distribution outside Steam of those same PC video games. Valve is obliged to provide Steam activation keys within 10 days after receiving a request from Focus Home.²⁴⁷ Valve pays Focus Home 70% of the adjusted gross revenues which Valve actually receives from its exploitation of Focus Home’s PC video games on Steam.²⁴⁸ In addition, as per Recital (83), last indent, pursuant to the Steam Subscriber Agreement, Valve is the merchant of record *vis-à-vis* users and is responsible for transactions *vis-à-vis* those users.

- (170) While the SDAs/Steamworks Agreement do not contain any clauses which per se restrict the distribution of Focus Home’s PC video games to a given territory, they created the possibility to geo-block Steam activation keys by means of the territory control function explained in Section 6.1.2, letter b). In order for Valve to generate geo-blocked keys it was necessary to reach an agreement with Focus Home to set up activation restrictions on the basis of which geo-blocked Steam activation keys were generated. This agreement was generally reached by exchange of emails as explained in Section 6.1.5 and evidenced in the following Section 6.2.3.3.

6.2.3.3. Focus Home’s PC video games geo-blocked via Steam activation keys

- (171) Through the use of geo-blocked Steam activation keys (see Section 6.1.2, letter a), Focus Home and Valve prevented the possibility for users to activate and/or play 19 PC video games, namely (1) “[...]”; (2) “[...]”; (3) “[...]”; (4) “[...]”; (5) “[...]”; (6) “[...]”; (7) “[...]”; (8) “[...]”; (9) “[...]”; (10) “[...]”; (11) “[...]”; (12) “[...]”; (13) “[...]”; (14) “[...]”; (15) “[...]”; (16) “[...]”; (17) “[...]”;²⁴⁹ (18) “[...]”; (19) “[...]”, outside of specific EEA countries²⁵⁰. The Steam activation keys for these PC video games only permitted users to activate these games in Estonia, Hungary, Latvia, Lithuania, Poland. Users located outside these EEA countries could not activate and/or play these games.
- (172) Focus Home requested that Valve put in place activation restrictions.²⁵¹ In particular, Focus Home requested Valve to set up activation restrictions and/or provide it with geo-blocked Steam activation keys, which Focus Home then supplied to some Independent Distributors (e.g. [...], [...]²⁵², [...], [...], [...]) for the mentioned 19 PC video games.²⁵³ The activation of those games was restricted by means of geo-blocked Steam activation keys concerning – depending on the licences – digital and/or physical distribution. The Steam activation keys provided to Focus Home were geo-blocked, for the PC video games at issue, to Estonia, Hungary, Latvia, Lithuania and/or Poland.
- (173) Valve has confirmed that the 19 PC video games at issue had activation restrictions in place. Valve provided a list of PC video games with activation restrictions in

245 [...].

246 [...].

247 [...].

248 [...].

249 [...].

250 [...].

251 For the purpose of this section, reference to “activation restrictions” also covers “run-time restrictions”.

252 [...].

253 [...].

place²⁵⁴ as well as of several orders of geo-blocked Steam activation keys listed in the reports generated via the automated system Valve introduced in [...] (see Recital (107)).²⁵⁵

- (174) Activation restrictions were in place between 17 May 2013 (date when Valve agreed to set up activation restrictions for the PC video games “[...]” and “[...]”²⁵⁶ and 9 October 2015, when Valve lifted any existing EEA activation restrictions.²⁵⁷ During the same period, Valve also sold the same PC video games for which it provided geo-blocked Steam activation keys on Steam across the entire EEA.
- (175) The following contemporaneous evidence submitted by both Focus Home and Valve supports the fact that Focus Home and Valve agreed to restrict the Steam activation keys for the following eight (out of 19) PC video games to – depending on the games and territories concerned - Estonia, Hungary, Latvia, Lithuania and/or Poland:
- (a) “[...]”, “[...]”, “[...]”: in an email exchange dated 17 May 2013, Focus Home requested that Valve provide it with geo-blocked Steam activation keys for “[...]” and “[...]” for the “[...]” territory.²⁵⁸ Valve replied that the subscriptions had been updated to “*limit activations to [...] EE [Estonia] LV [Latvia] LT [Lithuania]*” and approved.²⁵⁹ In an email exchange of 29 July 2013, Focus Home requested that Valve “*create a new package*” for “[...]” “*with country restriction to [...]*”. After the packages were created, Focus Home introduced the requests, which Valve approved.²⁶⁰ In an email exchange dated 21 May 2013, Focus Home requested that Valve restrict the activation of “[...]” to Poland (“*I did a request [for] [...] + Territory Poland. Is it possible to restrict this batch only to Poland [...]?*”). Valve replied positively and delivered the geo-blocked keys (“*OK I've got those all wired up correctly now. New subscription is [...]*”).²⁶¹ In an email exchange dated 28-30 May 2013, Focus Home requested that Valve restrict the Steam activation keys for the same PC video game to Hungary (“*Could you confirm [that] the key [...] is locked to Hungary? If not, could you make the restriction to this batch?*”). Valve proceeded as requested, providing the new setting up of the PC video game subscription (“*Ok those keys are now updated*”).²⁶² Contemporaneous evidence shows that Steam activation keys geo-blocked to Poland were requested and existed for “[...]” and “[...]” as well for “[...]” geo-blocked to Hungary.²⁶³
- (b) “[...]”, “[...]”, “[...]”: In an email exchange of 13 September 2013, Focus Home requested that Valve prepare the packages for these games with

254 [...].

255 [...].

256 [...].

257 [...].

258 Estonia, Latvia and Lithuania were regarded as part of the “[...]” territory for the purposes of defining the geographic scope of the restrictions using Valve’s Steam technology.

259 [...].

260 [...].

261 [...].

262 [...].

263 [...].

limitations to Poland (and to Polish language). In reply, Valve confirmed having “*set up all of the packages [...] requested*” by Focus Home.²⁶⁴

- (c) “[...]”, “[...]”: In an email exchange of 30 October 2013, Focus Home asked Valve to prepare the packages for “[...]” with restrictions to Poland and for “[...]” with restrictions to, among others, Poland.²⁶⁵ Valve confirmed having started preparing those packages (“*I’ll get started on those packages now so you’ll be all set*”).²⁶⁶ On 31 October 2013, the keys that had been prepared were circulated internally at Focus Home.²⁶⁷ Contemporaneous evidence shows that Steam activation keys geo-blocked to Poland were requested and existed for these two games.²⁶⁸
- (176) For nine PC video games, namely, “[...]”, “[...]”, “[...]”, “[...]”, “[...]”, “[...]”,²⁶⁹ “[...]”, “[...]” and “[...]” for which there are no emailed orders, there is evidence of orders of geo-blocked Steam activation keys which were generated via Valve’s automated system.²⁷⁰ In light of the explanation provided in Section 6.1.5 concerning the automated system, such orders confirm that Valve and Focus Home agreed on activation restrictions for these games. In addition, contemporaneous evidence shows that keys geo-blocked to Poland were requested and existed for “[...]”²⁷¹ and for the three games of the “[...]” franchise.²⁷²
- (177) Finally, regarding the two games “[...]” and “[...]” box of games, for which Valve acknowledged that they had activation (and, in the case of “[...]”, also run-time) restrictions in place²⁷³ and Focus Home also acknowledged that geo-blocked keys were provided to its distributor in Estonia, Latvia and Lithuania,²⁷⁴ available evidence shows that agreements/concerted practices started, respectively, on 31 July 2013 and 30 December 2014.²⁷⁵
- (178) As of April 2014, Focus Home asked Valve to disable the territorial restrictions in Steam activation keys and to remove the territorial restrictions for some packages/subscription IDs, namely for “[...]” and “[...]”,²⁷⁶ “[...]”, “[...]” and “[...]”.²⁷⁷ Valve confirmed to Focus Home that it had removed the territory restrictions for “[...]” on 20 June 2014²⁷⁸ and for “[...]”, “[...]” and “[...]” (all restricted to Poland) on 20 March 2015.²⁷⁹ Regarding the remaining PC video games concerned by geo-blocked Steam activation keys, by email of 11 September 2015

264

[...].

265

Other regions were “[...]”, which stays for “[...]” and “[...]” respectively. For [...], see footnote 128.

266

[...].

267

[...].

268

[...].

269

For this game, also run-time restrictions were in place. [...].

270

[...].

271

[...].

272

[...].

273

[...].

274

[...].

275

For an explanation, see Recital (180), letter c) and, respectively, footnotes 285 and 298.

276

[...].

277

[...].

278

[...].

279

[...].

Valve informed Focus Home that it would remove, as of 9 October 2015, any existing territorial restrictions in relation to keys already put on the market.²⁸⁰

- (179) Table 3 below provides an overview of the 19 Focus Home's PC video games that were restricted via geo-blocked Steam activation keys.
- (180) The start date for each agreement/concerted practice is the date when Focus Home and Valve agreed to geo-block the activation keys for a specific PC video game of Focus Home, namely:
- (a) For the eight PC video games mentioned in Recital (175), letters a), b) and c), such date is the date of the email exchange in which Valve upon request of Focus Home agreed to set up activation restrictions and/or to provide Steam activation keys;
 - (b) For the nine PC video games for which such evidence of emailed orders is not available mentioned in Recital (176), such date is the date of the first order of geo-blocked keys via the automated system. In light of the explanation provided in Section 6.1.5, Recital (107) concerning the automated system, such orders confirm that Valve and Focus Home agreed on activation restrictions for these games.
 - (c) For the two PC video games mentioned in Recital (177), for which there are neither email exchanges nor orders via the automated system - but for which Valve has acknowledged activation (and, in part, run-time) restrictions were in place - the start date is, respectively, 31 July 2013 for "[...]" and 30 December 2014 for "[...]" box of games distributed by [...]^D in Estonia, Latvia and Lithuania, which correspond to the most reliable respective activation dates. These are reliable dates as the automated system was introduced as of [...].²⁸¹

Table 3: Focus Home's PC video games geo-blocked by Steam activation keys

Column (i)	Column (ii)	Column (iii)	Column (iv)
PC video game title	Territory to which the activation restriction applies (i.e., EEA country, or countries, in which the PC video game is to be activated by means of the geo-blocked keys) + name of Independent Distributor	Start Date	End Date
[...]	Estonia, Latvia, Lithuania ([...])	30/12/2014 ²⁸²	09/10/2015
[...]	Poland ([...])	13/09/2013 ²⁸³	09/10/2015
[...]	Poland ([...]; [...])	30/10/2013 ²⁸⁴	20/03/2015
[...]	Estonia, Latvia, Lithuania ([...])	31/07/2013 ²⁸⁵	09/10/2015

²⁸⁰ [...].

²⁸¹ See, respectively, footnotes 285 and 298.

²⁸² [...].

²⁸³ [...].

²⁸⁴ [...].

²⁸⁵ [...].

Column (i)	Column (ii)	Column (iii)	Column (iv)
PC video game title	Territory to which the activation restriction applies (i.e., EEA country, or countries, in which the PC video game is to be activated by means of the geo-blocked keys) + name of Independent Distributor	Start Date	End Date
[...]	Poland ([...])	04/10/2013 ²⁸⁶	09/10/2015
[...]	Poland ([...])	04/10/2013 ²⁸⁷	09/10/2015
[...]	Poland ([...]; [...])	30/10/2013 ²⁸⁸	20/03/2015
[...]	Poland ([...]) Estonia, Latvia, Lithuania ([...])	13/09/2013 ²⁸⁹	09/10/2015
[...]	Poland ([...]; [...]; [...]) Estonia, Latvia, Lithuania ([...])	29/07/2013 ²⁹⁰	09/10/2015
[...]	Poland ([...]) Estonia, Latvia, Lithuania ([...])	17/05/2013 ²⁹¹	20/06/2014
[...]	Poland ([...]) Estonia, Latvia, Lithuania ([...])	13/09/2013 ²⁹²	09/10/2015
[...]	Poland ([...]; [...])	01/07/2013 ²⁹³	20/03/2015
[...]	Estonia, Latvia, Lithuania ([...])	30/12/2014 ²⁹⁴	09/10/2015
[...]	Poland ([...])	13/08/2013 ²⁹⁵	09/10/2015
[...]	Poland ([...])	13/08/2013 ²⁹⁶	09/10/2015
[...]	Poland ([...])	13/08/2013 ²⁹⁷	09/10/2015
[...]	Estonia, Latvia, Lithuania ([...])	30/12/2014 ²⁹⁸	09/10/2015
[...]	Poland ([...]) Estonia, Latvia, Lithuania ([...])	30/12/2014 ²⁹⁹	09/10/2015

286 [...].
287 [...].
288 [...].
289 [...].
290 [...].
291 [...].
292 [...].
293 [...].
294 [...].
295 [...].
296 [...].
297 [...].
298 [...].
299 [...].

Column (i)	Column (ii)	Column (iii)	Column (iv)
PC video game title	Territory to which the activation restriction applies (i.e., EEA country, or countries, in which the PC video game is to be activated by means of the geo-blocked keys) + name of Independent Distributor	Start Date	End Date
[...]	Hungary ([...]) Poland ([...]; [...]) Estonia, Latvia, Lithuania ([...])	17/05/2013 ³⁰⁰	09/10/2015

* Including both activation and run-time restrictions

(181) Valve was aware that the geo-blocked Steam activation keys it supplied to Focus Home were then passed on by Focus Home to its distributors who resold the PC video games.³⁰¹ In one instance, Focus Home indicated to Valve that the geo-blocked Steam activation keys were to be given to its [...] distributors [...] and [...].³⁰²

6.2.4. Case AT.40414 – Koch Media

6.2.4.1. General description of the agreements/concerted practices

(182) The present Section relates to agreements and/or concerted practices between Koch Media and Valve to set up activation restrictions and to provide geo-blocked Steam activation keys preventing the activation of some of Koch Media's PC video games outside of certain EEA countries, namely, the Czech Republic, Hungary, Poland, Slovakia and/or the UK. These agreements/concerted practices, considered collectively, concerned five of Koch Media's PC video games³⁰³ and took place between 23 August 2011 and 9 October 2015. The same PC video games for which Valve provided geo-blocked Steam activation keys were also sold on Steam across the entire EEA during the same period.

6.2.4.2. The SDA/Steamworks Agreement between Valve and Koch Media

(183) The contractual relationship between Valve and Koch Media is governed by the 2008 SDA and following amendments (the "2008 Koch SDA/Steamworks Agreement")³⁰⁴ on the basis of which Valve offers a number of Koch Media's PC video games on Steam including "[...]", "[...]", "[...]", "[...]" including "[...]" and "[...]".

(184) On the basis of the 2008 Koch SDA/Steamworks Agreement, Valve was granted a non-exclusive licence to exploit specified Koch Media's PC video games on Steam on a worldwide basis (i.e. including the entirety of the EEA). The 2008 Koch SDA/Steamworks Agreement has been amended several times in order to renew it

³⁰⁰ [...].

³⁰¹ [...].

³⁰² [...].

³⁰³ Namely, (1) "[...]", (2) "[...]", (3) "[...]", (4) "[...]", and (5) "[...]".

³⁰⁴ The description of the Steamworks technology set out above applies with regard to the SDA as there is no separate Steamworks Agreement between Koch Media and Valve. As the Steamwork Agreement is included in the SDA, the SDA of 11 November 2008 and subsequent amendments is referred as "2008 Koch SDA/Steamworks Agreement".

and at the same time update the list of Koch Media's PC video games distributed by Valve.³⁰⁵ Valve also licenced to Koch Media its Steam technology which includes the provision of Steam activation keys³⁰⁶ for distribution outside Steam of those same PC video games. Valve is obliged to provide Steam activation keys within 10 days after receiving a request from Koch Media.³⁰⁷ Valve pays Koch Media 70% of the adjusted gross revenues which Valve actually receives from its exploitation of Koch Media's PC video games on Steam.³⁰⁸ In addition, as per Recital (83), last indent, pursuant to the Steam Subscriber Agreement, Valve is the merchant of record *vis-à-vis* users purchasing Koch Media's PC video games on Steam and is responsible for transactions *vis-à-vis* those users.

- (185) While the 2008 Koch SDA/Steamworks Agreement do not contain any clauses which per se restrict the distribution of Koch Media's PC video games to a given territory, they created the possibility to geo-block Steam activation keys by means of the territory control function explained in Section 6.1.2, letter b). In order for Valve to generate geo-blocked keys it was necessary to reach an agreement with Koch Media to set up activation restrictions on the basis of which geo-blocked Steam activation keys were generated. This agreement was generally reached by exchange of emails as explained in Section 6.1.5 and evidenced in the following Section 6.2.4.3.

6.2.4.3. Koch Media's PC video games geo-blocked via Steam activation keys

- (186) Through the use of geo-blocked Steam activation keys (see Section 6.1.2, letter a), Koch Media and Valve restricted the possibility for users to activate five PC video games in specific countries – namely: 1) “[...]”, 2) “[...]”, 3) “[...]”, 4) “[...]”, and 5) “[...]”. The Steam activation keys for these PC video games only permitted users to activate these games in the Czech Republic, Hungary, Poland, Slovakia and the UK (only for “[...]”). Users located outside these EEA countries could not activate the games.
- (187) Koch Media requested that Valve put in place activation restrictions. In particular, Koch Media requested Valve to set up activation restrictions and/or provide it with geo-blocked Steam activation keys, which Koch Media then supplied to its EEA distributors (e.g. [...] and [...]),³⁰⁹ for the mentioned five PC video games. The activation of those games was restricted by means of geo-blocked Steam activation keys. From a geographical perspective, the Steam activation keys for these PC video games were geo-blocked to the Czech Republic, Hungary, Poland and Slovakia so that such PC video games could not be activated by users located outside the above-mentioned EEA countries. In addition, and only for the PC video game “[...]” the keys were also geo-blocked to the UK so that such PC video game could not be activated by users located outside the UK. This meant in practice that for this PC video game two different sets of keys were generated: one set geo-blocked to the UK only and another set geo-blocked to the Czech Republic, Hungary, Poland and Slovakia only.

305 [...] .
306 [...] .
307 [...] .
308 [...] .
309 [...] .

- (188) Valve has confirmed that the five PC video games at issue had activation restrictions in place. Valve provided a list of PC video games with activation restrictions in place³¹⁰ as well as of several orders of geo-blocked Steam activation keys listed in the reports generated via the automated system Valve introduced in [...] (see Section 6.1.5).³¹¹
- (189) Activation restrictions were in place between 23 August 2011 (start date³¹² for “[...]” which is the first game restricted by geo-blocked keys) and 9 October 2015, when Valve lifted any existing EEA activation restrictions in relation to the keys already put on the market.³¹³ During the same period, Valve also sold the same PC video games for which it provided geo-blocked Steam activation keys on Steam across the entire EEA.
- (190) The following contemporaneous evidence submitted by both Koch Media and Valve supports the fact that Koch Media and Valve agreed to restrict the Steam activation keys for these five PC video games to the Czech Republic, Hungary, Poland, Slovakia and/or the UK:³¹⁴
- (i) “[...]”: in an email exchange dated 23 August 2011, Koch Media asked Valve to provide it with geo-blocked “*digital keys*” (i.e., keys to be used for digital distribution of “[...]” in channels other than Steam) for the UK;³¹⁵ on the same day, Valve provided by email 40 000 keys geo-blocked to the UK.³¹⁶ In an email exchange of 24 October 2013 Koch Media asked Valve to provide it with geo-blocked Steam activation keys for its local distributor in the Czech Republic, Hungary, Poland, Slovakia as follows: “*can you set up an additional package for [...] for me please? Name: [...](PL/HU/CZ/SK) restrictions: only PL, HU, CZ, SK. I would need keys that would work in either of the 4 territories for our partner there*”.³¹⁷ Valve replied on 24 October 2013 confirming that this additional package was set up.³¹⁸ Both email exchanges evidence that for the PC video game “[...]” two different packages were set up: one on 23 August 2011 with activation restrictions in the UK only; and another one set up on 24 October 2013 with activation restrictions in the Czech Republic, Hungary, Poland and Slovakia.
- (ii) “[...]”: in an email exchange dated 14 June 2013, Koch Media asked Valve to set up a new package with a view to ordering geo-blocked Steam activation keys as follows: “*we [...] want to restrict the batch to POL/HUN/CZ/SK. Could you set up a new package for that, so that I can request keys for it? [...] The*

³¹⁰ [...].

³¹¹ For additional details of the orders of the games, see footnote 326.

³¹² The start date is the date of the email in which Valve upon request of Koch Media agreed to set up activation restrictions and to provide activation keys. This evidence is available for the PC video games [...] and [...]. Conversely, for [...] and [...], the start date is when the geo-blocked Koch Media PC video games were first activated on Steam by a user who purchased the PC video game (restricted by Steam activation keys) from a distributor other than Valve – see [...].

³¹³ [...].

³¹⁴ Namely, Koch Media submitted email exchanges regarding Steam activation keys; Valve submitted lists of geo-blocked games and automated reports.

³¹⁵ [...].

³¹⁶ [...].

³¹⁷ [...].

³¹⁸ [...].

*specifications are as followed: key batch POL/HUN/CZ/SK, activation locked to: only redeemable in POL/HUN/CZ/SK".*³¹⁹ Valve replied on the same day confirming that this new package was set up according to Koch Media's request.³²⁰

- (iii) “[...]”: in an email exchange dated 16-17 July 2013 Koch Media asked Valve to set up a new package with a view to ordering geo-blocked Steam activation keys as follows: *"I would need more packages for the different territories for [...]. Could you create the following ones please? [...] PO//HU/CZ/SK: only redeemable in POL, HUN/CZ/SK"*.³²¹ Valve replied on the same day: *"I've got these all set up now"*.³²²
 - (iv) “[...]”: in an email exchange dated 16 July 2013 Koch Media asked Valve to set up a new package with a view to ordering geo-blocked Steam activation keys as follows: *"we need a new package for [...] for PL/HU/CZ/SK, can you please set the following up [...] activation lock to PL/HU/CZ/SK?"*.³²³ Orders of geo-blocked Steam activation keys were generated via Valve's automated system which was introduced in [...].
 - (v) “[...]”: Koch Media and Valve agreed to set up activation restrictions for this PC video game for the Czech Republic, Poland and Slovakia.³²⁴ Orders of geo-blocked Steam activation keys were generated via Valve's automated system (see Recital 191).³²⁵
- (191) For all five PC video games, namely, “[...]”, “[...]”, “[...]”, “[...]” and “[...]”, there is evidence of orders of geo-blocked Steam activation keys which were generated via Valve's automated system.³²⁶ In light of the explanation provided in in Section 6.1.5, Recital (107) concerning the automated system, such orders confirm that Valve and Koch Media agreed on activation restrictions for these games.
- (192) Table 4 below provides an overview of Koch Media's PC video games that were restricted via geo-blocked Steam activation keys.
- (193) The start date for each agreement/concerted practice is the date when Valve and Koch Media agreed to geo-block the activation keys for a specific PC video game of Koch Media. In the first instance, such date is the date of the email exchange in which Valve upon request of Koch Media agreed to set up activation restrictions and/or to provide Steam activation keys. As indicated in Recital (190) (i), (ii), and (iii), this evidence is available for the PC video games “[...]”, “[...]”, “[...]”. For those PC video games for which such evidence is not available, namely for “[...]” and “[...]”, the start date for each agreement/concerted practice is when the geo-blocked Koch Media PC video game was first activated on Steam by a user who

319 [...].
320 [...].
321 [...].
322 [...].
323 [...].
324 [...].
325 [...].
326 [...].

purchased the PC video game (restricted by Steam activation keys) from a distributor other than Valve.³²⁷

- (194) By email of 11 September 2015, Valve informed Koch Media that it would remove, as of 9 October 2015, any existing territorial restrictions.³²⁸
- (195) The end date of the agreement/concerted practice is the date when Valve lifted the activation restrictions in relation to any existing keys already put on the market, i.e. 9 October 2015.³²⁹

Table 4: Koch Media’s PC video games geo-blocked by Steam activation keys

Name of the PC video game	EEA countries to which the activation restriction applies (i.e., EEA countries in which the PC video game is to be activated by means of the geo-blocked keys)	Start Date	End Date
[...]	UK, Czech Republic/Hungary/Poland/Slovakia	23/08/2011 ³³⁰ 24/10/2013 ³³¹	09/10/2015
[...]	Czech Republic/Hungary/Poland/Slovakia	23/07/2013 ³³²	09/10/2015
[...]	Czech Republic/Hungary/Poland/Slovakia	14/06/2013 ³³³	09/10/2015
[...]	Czech Republic/Poland/Slovakia	16/11/2012 ³³⁴	09/10/2015
[...]	Czech Republic/Hungary/Poland/Slovakia	17/07/2013 ³³⁵	09/10/2015

- (196) Valve was aware that the geo-blocked Steam activation keys it supplied to Koch Media were then passed on by Koch Media to its distributors who resold the PC video games.³³⁶

6.2.5. Case AT.40420 – ZeniMax

6.2.5.1. General description of the agreements/concerted practices

- (197) The present Section relates to agreements and/or concerted practices between ZeniMax and Valve to set up activation restrictions and to provide geo-blocked Steam activation keys preventing the activation of some of ZeniMax PC video games outside of specific EEA countries, namely, the Czech Republic, Hungary, Poland, Slovakia, Estonia, Latvia, Lithuania and/or Romania.³³⁷ These agreements/concerted practices, considered collectively, concerned five localized PC video games of ZeniMax³³⁸ and took place overall between 27 September 2010 and 9 October 2015.

³²⁷ [...].

³²⁸ [...].

³²⁹ [...].

³³⁰ [...].

³³¹ [...].

³³² [...].

³³³ [...].

³³⁴ [...].

³³⁵ [...].

³³⁶ [...].

³³⁷ The restriction to Romania concerned the PC video game “[...]” (“[...]”) only.

³³⁸ Namely, [...] localized versions of the following games: (i) “[...]”, (ii) “[...]”, (iii) “[...]” (“[...]”), (iv) “[...]”, (v) “[...]”. For the localization of PC video games, see Section 4.1.2.2.

During the same period, Valve also sold EFIGS versions³³⁹ of the same PC video games for which it provided geo-blocked Steam activation keys on Steam.

6.2.5.2. The SDA between Valve and ZeniMax

- (198) The contractual relationship between Valve and ZeniMax is governed by the SDA of 20 October 2008 (hereafter "2008 ZeniMax SDA").³⁴⁰
- (199) On the basis of the 2008 ZeniMax SDA, Valve was granted a non-exclusive worldwide license (i.e. including the entirety of the EEA³⁴¹) to exploit specified ZeniMax PC video games on Steam.³⁴² In the subsequent years until 2015, several amendments to this (initial) SDA were made, which would typically come into force when ZeniMax envisaged to launch a new game.³⁴³ Under the 2008 ZeniMax SDA, Valve also licenced to ZeniMax its Steam technology which includes the provision of Steam activation keys³⁴⁴ for distribution outside Steam of those same PC video games.³⁴⁵ Valve is obliged to provide Steam activation keys within 10 days after receiving a request from ZeniMax.³⁴⁶ Valve pays ZeniMax 70% of the adjusted gross revenues which Valve actually receives from its exploitation of ZeniMax PC video games on Steam.³⁴⁷ In addition, as per Recital (83), last indent, pursuant to the Steam Subscriber Agreement, Valve is the merchant of record *vis-à-vis* users and is responsible for transactions *vis-à-vis* those users.
- (200) While the 2008 ZeniMax SDA does not contain any clauses which per se restrict the distribution of ZeniMax PC video games to a given territory, it created the possibility to geo-block Steam activation keys by means of the territory control function explained in Section 6.1.2, letter b). In order for Valve to generate geo-blocked keys it was necessary to reach an agreement with ZeniMax to set up activation restrictions on the basis of which geo-blocked Steam activation keys were generated. This agreement was generally reached by exchange of emails as explained in Section 6.1.5 and evidenced in the following Section 6.2.5.3.

6.2.5.3. ZeniMax PC video games geo-blocked via Steam activation keys

- (201) Through the use of geo-blocked Steam activation keys (see Section 6.1.2, letter a), ZeniMax and Valve restricted the possibility for users to activate [...] localized versions of five PC video games – namely: 1) "[...]"³⁴⁸, 2) "[...]", 3) "[...]", 4) "[...]", 5) "[...]" - outside of specific EEA countries. The Steam activation keys for these PC video games only permitted users to activate these games in the Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia and/or Romania (regarding the [...] localized version of "[...]" only). Users located outside these EEA countries could not activate these games.

³³⁹ EFIGS is the initialism of English, French, Italian, German, Spanish.

³⁴⁰ [...].

³⁴¹ [...].

³⁴² [...].

³⁴³ [...].

³⁴⁴ [...].

³⁴⁵ [...].

³⁴⁶ [...].

³⁴⁷ [...].

³⁴⁸ See footnotes 337, 338.

- (202) ZeniMax requested that Valve put in place activation restrictions. In particular, ZeniMax requested Valve to set up activation restrictions and provide geo-blocked Steam activation keys, which ZeniMax then supplied to [...] for the mentioned [...] localized versions of the five PC video games. The activation of those games was restricted by means of geo-blocked Steam activation keys concerning physical distribution. The Steam activation keys provided to ZeniMax were geo-blocked, for the PC video games at issue, to the Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia and/or Romania. ZeniMax then provided the geo-blocked Steam activation keys to its sub-publisher and distributor [...] who resold them to users in those territories.
- (203) Valve has confirmed that the five PC video games, localized versions of “[...]”, “[...]”, “[...]”, “[...]” and “[...]”, as published by [...], had activation restrictions in place.³⁴⁹
- (204) Activation restrictions were in place between 27 September 2010 (date when Valve agreed to set up activation restrictions for “[...]”)³⁵⁰ and 9 October 2015, when Valve lifted any existing EEA activation restrictions.³⁵¹ During the same period, Valve also sold EFIGS versions of the same PC video games for which it provided geo-blocked Steam activation keys on Steam.
- (205) The following contemporaneous evidence submitted by both ZeniMax and Valve supports the fact that ZeniMax and Valve agreed to restrict the Steam activation keys for the [...] localized versions of these five PC video games to - depending on the games and territories concerned - the Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia and/or Romania:
- (a) “[...]”: [...] was the first ZeniMax PC video game for which Steam activation keys were used for purchases outside the Steam platform³⁵² and for which evidence indicates that the activation keys for the [...] localized game version were geo-blocked to the Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia and/or Romania. In respect of this game, in an email conversation from before the launch of “[...]”, a Valve employee explained to a ZeniMax employee the reasons for which they would use geo-blocked Steam activation keys.³⁵³ A further email exchange relating to the same game shows that ZeniMax ultimately agreed with Valve on the breakdown of the different countries to which the [...] games were geo-blocked via Steam activation keys. On 5 October 2010, a Valve employee wrote the following to a group of ZeniMax employees: *“The 500K keys that were generated on the 27th [of September 2010] were created for [...],³⁵⁴ Romania, Poland Czech, Hungary [emphasis added]. They will only work with the [...] / Polish / Czech / English SKU³⁵⁵ that [...] is working on [...] They are region locked by country as*

349 [...]

350 [...]

351 [...]

352 [...].

353 [...].

354 The term [...] in this context is to be understood to include Estonia, Latvia and Lithuania.

355 A SKU (“Stock Keeping Unit”) consists of e.g. a local language version of a game, a piece of DLC (“Downloadable Content”) or a bundle of multiple games sold together.

specified in [...] request email".³⁵⁶ Further contemporaneous evidence regarding "[...]" confirms the agreement between ZeniMax and Valve about geo-blocking this [...] localized game. On 30 September 2010, a ZeniMax employee requested keys to Valve: "*Could you please provide test keys*³⁵⁷ *for the following territories: [...] Poland, Czech & Slovak Republic, Hungary and Romania*", and this was confirmed by Valve. On 1 October 2010 the Valve employee indicated that the keys were not region-locked, but that the "*Actual retail keys would be region locked though*".³⁵⁸

- (b) "[...]": in an email of 4 May 2011 entitled "*STEAM Activation and PDLIC Keys – [...] Eastern Europe Territory*", a ZeniMax employee communicated to a Valve employee the territories for which the Steam activation keys should be geo-blocked, including Latvia, Lithuania and Estonia, as well as Poland, Czech Republic, Slovakia and Hungary.³⁵⁹ In a following email exchange dated 6 May 2011, there is evidence showing that Valve agreed with ZeniMax's request of limiting the activation of this games to the countries specified by ZeniMax,³⁶⁰
- (c) "[...]": in an email of 24 August 2011, a ZeniMax employee asked Valve for geo-blocked keys as follows: "*I need to request the following STEAM activation keys for [...] for [...] / [...], Poland, Czech & Slovak Republic and Hungary [...] Again, these keys will need to be region-locked [...]*." Valve answered on 28 August 2011 as follows: "*I have placed these keys on the valve FTP*³⁶¹ *in the bethesdaeurope account*";³⁶²
- (d) "[...]": in an email of 11 April 2011 addressed to his colleagues a ZeniMax employee stated the following: "*Please find below the final deal summary for [...] Game Activation: [...] countries*³⁶³ *[...] Poland [...], Czech and Slovak Republic [...], Hungary [...]*." Although the email is internal, additional details explaining the commercial terms of the agreement ("*finalised deal summary*") were set out in this (internal) email, showing that the ZeniMax employee reported to his colleagues about a finalised commercial agreement, including activation restrictions of the game to the EEA countries mentioned above;³⁶⁴
- (e) "[...]": in an email of 12 September 2012, a ZeniMax employee asked Valve to deliver geo-blocked keys: "*Please deliver the [...] keys [...] below [...]*:"

³⁵⁶ [...]. The term [...] in this context is to be understood to include Estonia, Latvia and Lithuania. See also [...] showing an internal discussion at ZeniMax about geo-blocking "[...]" to the above-mentioned eight EEA countries.

³⁵⁷ [...].

³⁵⁸ [...].

³⁵⁹ [...].

³⁶⁰ In the email of 6 May 2011, Valve said to ZeniMax, with reference to "[...]", the following: "*we plan on offering EFIGS in all regions where the game is available for digital download. Pricing will still be set and adhered to by region, and CD keys for retail activations are still locked by territory as specified.* ", [...].

³⁶¹ The File Transfer Protocol (FTP) is a network protocol used for the transfer of computer files between a client and a server on a computer network.

³⁶² [...]. In the context of this email exchange, the term "[...]" is to be understood to include Estonia, Latvia and Lithuania. [...]

³⁶³ In the context of this email exchange, the term "[...]" is to be understood to include Estonia, Latvia and Lithuania. For "[...]", see footnote 128.

³⁶⁴ [...].

Estonia, [...], Latvia, [...] Lithuania, [...]. These codes can only work in the countries outlined above and nowhere else [...] Poland/Czech & Slovak Republic/Hungary Countries covered: Poland, Hungary, Czech & Slovak Republic [...] These codes can only work in the countries outlined above and nowhere else". The delivery was confirmed by Valve's email of 13 September 2012 as follows: "keys are on your FTP. I have the region locking configured."³⁶⁵

- (206) The above emails concern a “manual” ordering of keys.³⁶⁶ In addition, there is evidence of orders of geo-blocked Steam activation keys which were generated via Valve’s automated system for “[...]”³⁶⁷, “[...]”³⁶⁸, “[...]”³⁶⁹, “[...]”³⁷⁰. In light of the explanation provided in Recital (107) concerning the automated system, such orders confirm that Valve and ZeniMax agreed on activation restrictions for these games.
- (207) Regarding all five [...] localized versions of ZeniMax PC video games geo-blocked via Steam activation keys, by email of 11 September 2015 Valve informed ZeniMax that it would remove, as of 9 October 2015, any existing territorial restrictions in relation to keys already put on the market.³⁷¹
- (208) Regarding all five [...] localized versions of PC video games geo-blocked via Steam activation keys, by email of 11 September 2015 Valve informed ZeniMax that it would remove, as of 9 October 2015, any existing territorial restrictions in relation to keys already put on the market.³⁷²
- (209) Table 5 below provides an overview of the five [...] localized versions of ZeniMax PC video games that were restricted via geo-blocked Steam activation keys.
- (210) The start date for each agreement/concerted practice is the date when ZeniMax and Valve agreed to geo-block the activation keys for a specific PC video game of ZeniMax. Such date is the date of the email exchange described in Recital (205), letters a) to e) in which Valve upon request of ZeniMax agreed to set up activation restrictions and/or to provide Steam activation keys.

Table 5: ZeniMax’s PC video games geo-blocked by Steam activation keys

Name of the PC video game	EEA countries to which the activation restriction applies (i.e., EEA countries in which the PC video game is to be activated by means of the geo-blocked keys)	Start Date	End Date
[...]	Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia, Romania	27/09/2010	09/10/2015
[...]	Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia	6/05/2011	09/10/2015
[...]	Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia	11/04/2011	09/10/2015
[...]	Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia	28/08/2011	09/10/2015

³⁶⁵

[...].

³⁶⁶

[...]. For the difference between “manual” and “automated” orders, see Recital (107).

³⁶⁷

[...]

³⁶⁸

[...].

³⁶⁹

[...].

³⁷⁰

[...].

³⁷¹

[...].

³⁷²

[...].

Name of the PC video game	EEA countries to which the activation restriction applies (i.e., EEA countries in which the PC video game is to be activated by means of the geo-blocked keys)	Start Date	End Date
[...]	Czech Republic, Hungary, Poland, Slovak Estonia, Lithuania, Latvia	13/09/2012	09/10/2015

(211) Valve was aware that the geo-blocked Steam activation keys it supplied to ZeniMax were then passed by ZeniMax on to its distributors who resold the PC video games.³⁷³

6.3. Bilateral agreements between the Publishers (except Capcom) and certain of their respective distributors containing cross-border sales restrictions

6.3.1. Introduction

(212) All of the Publishers (except Capcom)³⁷⁴ complemented the use of geo-blocked activation keys with cross-border sale restrictions set out in bilateral agreements with certain of their respective distributors. The cross-border sales restrictions contained in such bilateral distribution agreements were found by the Commission to be in breach of Article 101 of the Treaty (see Commission Decision C(2021)57 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40422 – Bandai Namco; Commission Decision C(2021)72 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40424 – Capcom; Commission Decision C(2021)78 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40413 – Focus Home; Commission Decision C(2021)74 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40414 - Koch Media; Commission Decision C(2021)63 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40420 – ZeniMax). The following Sections 6.3.2, 6.3.3, 6.3.4, 6.3.5 provide a short description of such cross-border sales restrictions.

6.3.2. Case AT.40422 – Bandai

(213) This section concerns the digital distribution agreements between Bandai and its distributor [...], containing clauses restricting the cross-border sale of certain PC video games within the EEA which will be referred to hereafter as the "Bandai/[...] Digital Distribution Agreement".³⁷⁵ The Bandai/[...] Digital Distribution Agreement concerned nine PC video games of Bandai,³⁷⁶ and was in place between 1 April 2012 and 31 March 2015.³⁷⁷ For five of these nine PC video games,³⁷⁸ Bandai complemented the cross-border sales restrictions provided in distribution agreements with [...] with the use of geo-blocked Steam activation keys described in Section 6.2.1.

³⁷³ [...].

³⁷⁴ The geo-blocked keys were used by Capcom as a standalone technical way to prevent cross-border sales of the concerned PC video games listed in Section 6.2.2.

³⁷⁵ [...].

³⁷⁶ Namely, “[...]”, “[...]”, “[...]”, “[...]”, “[...]”, “[...]”, “[...]”, “[...]” and “[...]”.

³⁷⁷ [...].

³⁷⁸ Namely, “[...]”, “[...]”, “[...]”, “[...]” and “[...]”.

- (214) Under Clause 6 of the Bandai/[...] Digital Distribution Agreement,³⁷⁹ [...] was obliged to use Steam activation keys³⁸⁰ to distribute Bandai's PC video games, and Bandai was obliged to provide such keys to [...].³⁸¹ There is no clause setting out that these keys were to be geo-blocked. With regard to the geographic scope of the agreement, [...]’s rights and obligations were limited to the "Territory",³⁸² which was defined as: "*Poland, Czech, Slovakia, Hungary only*".³⁸³
- (215) Clause 3 contains an explicit prohibition on [...] (and its "indirect distributors") servicing users outside its licensed territory.³⁸⁴ As a result cross-border sales from the Czech Republic, Hungary, Poland and Slovakia into the rest of the EEA were contractually prohibited (i.e., its licensed territories). This clause was aiming at preventing [...] from distributing the Bandai video games at issue outside the licensed territories.

6.3.3. Case AT.40413 – Focus Home

- (216) This section concerns the distribution agreements between Focus Home and certain of its Independent Distributors containing clauses restricting the cross-border sales of certain PC video games within the EEA. As further detailed in the recitals below, these agreements concerned 52 of Focus Home’s PC video games³⁸⁵ and were in place between 14 March 2007 and 8 November 2018. The affected territories included, depending on the cases, one or more of the following EEA countries: Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK. None of these distribution agreements cover Greece, Iceland, Liechtenstein, Malta. In addition, Focus Home’s distribution agreements regarding France did not include restrictive clauses of the types listed in Recital (218). For the 19 games covered in Section 6.2.3, Focus Home complemented the use of geo-blocked Steam activation keys with cross-border sales restrictions provided in distribution agreements with certain Independent Distributors including e.g. [...], [...], [...](see Recital (14)).

³⁷⁹ Clause 6, [...].

³⁸⁰ According to the definitions contained in this agreement "*Key(s)*": *means the trackable activation key attached to each download of the Product which allows the End-User to unlock and play the Product*". [...].

³⁸¹ [...].

³⁸² Clause 2.1 and 3, [...]. Clause 1, [...].

³⁸³ Bandai holds EEA-wide rights for all these games.

³⁸⁴ Clause 3, [...] reads: "*Distributor agrees that the Download Services shall be carried out in the Territory [i.e., the Czech Republic, Hungary, Poland, and Slovakia] only. The parties agree that Distributor shall only serve and respond to requests from End Users that are located in the Territory [i.e., the Czech Republic, Hungary, Poland, and Slovakia], it being agreed and understood that Distributor and/or its Indirect Distributors (i) shall clearly mention this restriction to End-users on its/their websites, (ii) shall not advertise, market and/or promote the Products, Product Materials and/or NBP Marketing Materials outside of the Territory [i.e. outside the Czech Republic, Hungary, Poland, and Slovakia]*".

³⁸⁵ Namely, (1) "[...]"; (2) "[...]"; (3) "[...]"; (4) "[...]"; (5) "[...]"; (6) "[...]"; (7) "[...]"; (8) "[...]"; (9) "[...]"; (10) "[...]"; (11) "[...]"; (12) "[...]"; (13) "[...]"; (14) "[...]"; (15) "[...]"; (16) "[...]"; (17) "[...]"; (18) "[...]"; (19) "[...]"; (20) "[...]"; (21) "[...]"; (22) "[...]"; (23) "[...]"; (24) "[...]"; (25) "[...]"; (26) "[...]"; (27) "[...]"; (28) "[...]"; (29) "[...]"; (30) "[...]"; (31) "[...]"; (32) "[...]"; (33) "[...]"; (34) "[...]"; (35) "[...]"; (36) "[...]"; (37) "[...]"; (38) "[...]"; (39) "[...]"; (40) "[...]"; (41) "[...]"; (42) "[...]"; (43) "[...]"; (44) "[...]"; (45) "[...]"; (46) "[...]"; (47) "[...]"; (48) "[...]"; (49) "[...]"; (50) "[...]"; (51) "[...]"; (52) "[...]".

- (217) The 52 PC video games concerned by these agreements were distributed physically and/or digitally by Focus Home’s Independent Distributors in one or more EEA countries. These agreements are sometimes termed “exclusive” and sometimes “non-exclusive” depending on whether the respective licenses covered physical or digital distribution. Notwithstanding such “exclusive”/“non-exclusive” denomination, since all the 52 PC video games concerned by these agreements were also available for sale on Steam across the EEA – for which Focus Home granted to Valve a non-exclusive EEA-wide licence – and since there is competition between physical and digital distribution of PC video games (see Section 5), it can be said that none of Focus Home’s Independent Distributors was accorded genuine exclusivity for the purposes of an assessment under EU competition law.
- (218) All these agreements included one or more clauses which prevented the Independent Distributors from effectively engaging in cross-border sales of the respective Focus Home PC video games. For ease of reference, the different anti-competitive clauses in the agreements can be grouped together into 4 categories:
- (a) Type 1 Clauses prohibiting distributors from exporting Focus Home's PC video games outside the distributor's licensed territory or from entering into an agreement that would result in such exports,³⁸⁶
 - (b) Type 2 Clauses preventing the sale of Focus Home's PC video games outside the distributor’s licensed territory, by obliging the distributor not only to notify Focus Home of any such export but also, pursuant to certain variations, to intervene in order to immediately stop, prevent and restrict such export to areas outside the licensed territory,³⁸⁷
 - (c) Type 3 Clauses acting in essence as an obligation for the respective distributor not to respond to unsolicited requests received from customers (or prospective customers) based in the EEA but outside the licensed territory but to refer them directly to Focus Home who will decide at its discretion either to fulfil the request itself or allow one of its distributors to do so,³⁸⁸
 - (d) Type 4 Clauses obliging the respective distributor/licensee - unless otherwise approved in writing by Focus Home - to pass directly to Focus Home all enquiries or unsolicited orders outside the territory, for the PC video games received by the distributor/licensee, and therefore having *de facto* the same result of a cross-border sales restriction as they prevent distributors from fulfilling orders directly.³⁸⁹
- (219) The above categories cover the most frequent types of restrictive clauses included in the distribution agreements between Focus Home and certain Independent Distributors which aimed at restricting cross-border sales of the respective Focus Home PC video games.

6.3.4. Case AT.40414 – Koch Media

- (220) This section concerns the distribution agreements between Koch Media and, respectively, its distributors [...] and [...], containing clauses restricting the cross-

³⁸⁶ [...].
³⁸⁷ [...].
³⁸⁸ [...].
³⁸⁹ [...].

border sale of PC video games within the EEA. These clauses were in place between 20 August 2010 and 27 July 2018³⁹⁰ and, as further detailed in the recitals below of this section, they applied to overall 28 PC video games of Koch Media (nineteen distributed by [...]³⁹¹ and nine distributed by [...], respectively).³⁹² For five of these twenty-eight PC video games,³⁹³ Koch Media complemented the cross-border sale restrictions provided in distribution agreements with [...] and [...] with the use of geo-blocked Steam activation keys described in Section 6.2.4 generated by Valve and passed on by Koch Media to [...] and [...] respectively.

6.3.4.1. Agreements between Koch Media and [...]

- (221) Between 2014 and 2015, [...] and Koch Media concluded non-exclusive agreements for the digital distribution of Koch Media's PC video games listed in footnote 391 (the “Koch/[...] Digital Distribution Agreements”).³⁹⁴
- (222) Clause B of the Koch/[...] Digital Distribution Agreements sets out that [...]’s non-exclusive digital distribution rights were limited to the Czech Republic, Slovakia, Hungary and Poland. According to Clause C, [...]is obliged to use Steam activation keys provided by Koch Media for the digital distribution of Koch Media’s PC video games. There is no clause setting out that these keys were to be geo-blocked.
- (223) Clause D contains two variants: Clauses D1 and D2. Clause D1 sets out that in the event that Koch Media found a key, which it had previously supplied to [...], outside [...]’s licensed territories, Koch Media was entitled to decide whether to withdraw [...]’s digital distribution licence.³⁹⁵ The threat of the license withdrawal is an indirect measure that has *de facto* the same effect as an export ban³⁹⁶ on the sale of activation keys. For the games covered by Clause D1,³⁹⁷ while Koch Media provided to [...] non-geo-blocked Steam activation keys, these keys were used by Koch Media as a tracking tool (by way of geo-location using the user’s IP address)³⁹⁸ for the enforcement of the contractual prohibition on [...] to sell Steam activation keys

³⁹⁰ [...].

³⁹¹ 1) “[...]”, 2) “[...]”, 3) “[...]”, 4) “[...]”, 5) “[...]”, 6) “[...]”, 7) “[...]”, 8) “[...]”, 9) “[...]”, 10) “[...]”, 11) “[...]”, 12) “[...]”, 13) “[...]”, 14) “[...]”, 15) “[...]”, 16) “[...]”, 17) “[...]”, 18) “[...]” and 19) “[...]”.

³⁹² 1) “[...]”, 2) “[...]”, 3) “[...]”, 4) “[...]”, 5) “[...]”, 6) “[...]”, 7) “[...]”, 8) “[...]” and 9) “[...]”.

³⁹³ “[...]”, “[...]”, “[...]”, “[...]” and “[...]”.

³⁹⁴ Koch Media holds EEA-wide rights for all of the games listed in footnote 391 (except for “[...]”, “[...]”, “[...]”, “[...]” and “[...]” in respect of which Koch Media did not hold the rights in these PC video games for Poland).

³⁹⁵ Clause D1 - “*Any Keys supplied and then found for sale outside the Territory may at Koch sole discretion result in a review and potential withdrawal of ESD rights*”. This clause appears in all Koch/[...] Digital Distribution Agreements except the ones for the PC video games “[...]” and “[...]”.

³⁹⁶ Although the concept of export ban as well as parallel trade is normally used in relation to physical distribution only, it equally applies in this case since digital distribution means in practice sale of activation keys rather than a download (which conversely takes place when the key is activated on Steam as explained in Section 6.1.3) and in fact, there are companies active in the parallel trade of keys as indicated above. This is also confirmed by the wording of Clause D, (“*any keys [...] found for sale outside the Territory*”) which covers not only the case in which the key is sold by [...]’s itself outside its licensed territory but also the case in which [...] has sold it within its licence territory to, e.g., a parallel trader of keys who then resold it outside.

³⁹⁷ This clause appears in all Koch/[...] Digital Distribution Agreements except the ones for the PC video games “[...]” and “[...]”.

³⁹⁸ [...].

outside its licensed territories. Conversely, Clause D2 sets out that the digital distribution (*ESD*) had to be geo-blocked.³⁹⁹

- (224) Both Clauses D1 and D2 constitute contractual restrictions preventing cross-border sales by [...] to users and parallel traders located outside its (non-exclusive) licensed territory (i.e., the Czech Republic, Hungary, Poland and Slovakia). Although the language of these two provisions of Clause D is different, the ultimate result is in fact the same, i.e., they both lead to a *de facto* prohibition on [...] to sell Koch Media's PC video games from the Czech Republic, Slovakia, Hungary and Poland into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.

6.3.4.2. *Agreements between Koch Media and [...]*

Digital distribution agreements

- (225) [...] distributes digitally two of Koch Media's PC video games – i.e. “[...]” and “[...]” , both referred to as “*Koch/[...] Digital Distribution Agreements*” for the purpose of this Decision.⁴⁰⁰
- (226) Clause D contains two different provisions: Clause D1 and Clause D2. Clause D1 which appears in the Koch/[...] Digital Distribution Agreement for the PC video game “*Deadlight Director's Cut*” is identical to Clause D1 of the Koch/[...] Digital Distribution Agreements described in Section 6.3.4.1 above and therefore all the explanations provided in that section equally apply to this agreement. According to Clause D2, for each user who accessed its online store [...], [...] was bound to check the location of this user by means of his/her IP address.⁴⁰¹ If the IP address showed that the user was located outside [...]’s licensed territories, [...] was not entitled to sell him/her the keys. Both Clauses D1 and D2 were designed to effectively prevent or limit [...] from selling Koch Media's PC video games to users located outside the licensed territory, including in response to unsolicited requests.

Physical distribution agreements

- (227) [...] distributes physically seven of Koch Media's PC video games referred to as “*Koch/[...] Physical Distribution Agreements*” for the purpose of this Decision.⁴⁰² Clause B sets out that [...]’s physical distribution rights were limited to Poland, the Czech Republic and Slovakia. Clause 4.11 of the Koch/[...] Framework Distribution Agreement of 2004 contains two obligations:⁴⁰³ it prevented [...] from selling PC video games in physical format to retailers who might sell them outside its licensed territory (first obligation); if [...] found out that any of its customers was involved in such practice, it was contractually required to immediately cease to supply that

³⁹⁹ Clause D2: “*ESD (non-exclusive and geo-blocked)*”. This clause appears in the Koch/[...] Digital Distribution Agreements for the PC video games “[...]” and “[...]”.

⁴⁰⁰ [...].

⁴⁰¹ Clause D2 reads: “*ESD rights only through [...], [...]’s own end consumer digital store only, whereby only one key per customer is granted and only for the region of Poland (customer check via IP Address will be ensured and enforced by [...])*”.

⁴⁰² [...]. These agreements concern the following PC video games: (1) “[...]” (2) “[...]”, (3) “[...]”, (4) “[...]”, (5) “[...]”, (6) “[...]” and (7) “[...]”.

⁴⁰³ Clause 4.11 “[...]”. *Distributor guarantees that it will not sell to any customer it may reasonably expect to resell the product out-with the Region. In the event that the Distributor is made aware by Koch Media, or that it discovers itself that any of its customers is involved in such practice, it shall immediately cease to supply to that customer informing Koch Media in writing of its action*”.

customer and inform Koch Media in writing (second obligation). Both obligations are to be read together to understand the overall mechanism of Clause 4.11. The second obligation is in fact a back-up in case [...] has failed to comply with the first obligation. Clause 4.11 were designed to prevent or, at least, severely curtail the concerned distributor's/retailers' ability to engage in cross-border sales to users located outside the licensed territory, including in response to unsolicited requests.

- (228) All the clauses described above, i.e. clause D of both the Koch/[...] Digital Distribution Agreements and Koch/[...] Digital Distribution Agreements and Clause 4.11 of the Koch/[...] Physical Distribution Agreements aimed at restricting cross-border sales of the Koch Media PC video games concerned.

6.3.5. Case AT.40424 – ZeniMax

- (229) This section concerns the distribution agreements between ZeniMax and its distributor [...], containing clauses restricting the cross-border sales of certain PC video games within the EEA. For the purposes of this section, the distribution agreements between ZeniMax and [...] are referred to hereafter as “the [...] Agreements”.⁴⁰⁴ These agreements were in force between 1 September 2009 and 11 April 2015.⁴⁰⁵ As further detailed in the recitals of this section, the [...] Agreements concerned the distribution of five PC video games – namely: 1) “[...]”, 2) “[...]”, 3) “[...]”, 4) “[...]”, 5) “[...]”. For all these PC video games, ZeniMax complemented the cross-border sale restrictions provided in distribution agreements with [...] with the use of geo-blocked Steam activation keys described in Section 6.2.5 generated by Valve and passed on by ZeniMax to [...].

- (230) The relevant [...] Agreements contained the following clauses which restricted cross-border sales in respect of the PC video games concerned:

- (a) Clause 1 of Amendment N° 3 to the 2007 Publishing and Distribution Agreement (effective date 1 September 2009), regarding the game “[...]”, states as follows: “[...] localized into the [...], Polish, Czech, Hungarian and Romanian languages [...] distributed and sold by [...] solely in the Territory [...]” (emphasis added). In this agreement, the “Territory” is defined as comprising Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland and Slovakia.⁴⁰⁶ Further, Amendment N° 5⁴⁰⁷ to the same agreement stated that the game should be made “*accessible to end users only by activation via internet access to a free “Steam” account (an online service of Valve Corporation)*”. In addition, Clause 5 to such Amendment 5 included [...];⁴⁰⁸
- (b) Clause 5 to the 2011 Publishing and Distribution Agreement⁴⁰⁹ stipulates the following: “[...] *the Territory is exclusive as to manufacturing, distribution and sale of individually packaged, retail, boxed units of the Product in the*

404 [...].

405 [...].

406 [...].

407 [...].

408 “[...] shall not distribute Product units outside of the Territory or knowingly sell to a third-party distributor that intends to sell Product units outside of the Territory. If more than two percent (2%) of the units of any Product are sold outside of the Territory, then for all units of such Product SKU manufactured by [...], [...] shall be liable for, and shall immediately pay Bethesda upon invoice, the full North America wholesale price for units of such Product”.

409 [...].

following countries [...]: [...] Estonia, Latvia, Lithuania [...] [...]”) and in Poland, Hungary, Slovakia and the Czech Republic (said countries constituting the "Territory"). [...] shall not distribute Product units outside of the Territory or knowingly sell to a third-party distributor that intends to sell Product units outside of the Territory. If more than two percent (2%) of the units of any Product are sold outside of the Territory, then for all units of such Product SKUs manufactured by [...], [...] shall be liable for, and shall immediately pay Bethesda upon invoice, the full North America[n] wholesale price for units of such Product." (emphasis added). On the basis of the 2011 Publishing and Distribution Agreement, the games “[...]”,⁴¹⁰ “[...]”⁴¹¹ and “[...]”⁴¹² were distributed. Each one of these three exhibits contains a Clause D ("Game Activation") which includes a reference to Steam activation keys, providing that to activate the game users would have to use a free Steam account;

- (c) The same Clause 5 described in this Recital (230), letter b) above is included in the 2012 Publishing and Distribution Agreement⁴¹³ (effective date 27 June 2012). The game “[...]” was distributed pursuant to Exhibit A-1 to such agreement,⁴¹⁴ effective from 2 July 2012. Clause D of such exhibit ("Game Activation") contains a reference to Steam activation keys, providing that to activate the game users would have to use a free Steam account. Any agreements that followed those agreements/amendments did not change the territorial limitations contained in the first agreements.⁴¹⁵

- (231) The clauses explained in Recital (230), letters a), b) and c) above were aiming at prohibiting [...] from distributing the ZeniMax PC video games at issue outside the Territories.

6.3.6. Conclusion

- (232) Valve was not aware (nor could it reasonably be expected to have been aware) of the fact that certain of Bandai, Koch Media, Focus Home PC video games, for which no geo-blocked keys were provided by Valve, were restricted by way of cross-border sales restrictions contained in distribution agreements also described in Section 6.3.2, 6.3.3, 6.3.4.⁴¹⁶
- (233) As such, while Valve was, or should have been aware that the geo-blocked keys that it was providing were intended to prevent cross-border sales, it was not aware (nor could it reasonably be expected to have been aware) that the geo-blocked keys were also used, in certain instances (described in Sections 6.3.2, 6.3.3, 6.3.4 and 6.3.5), to reinforce contractual cross-border sales restrictions in distribution agreements between all Publishers (except Capcom) and certain of their respective distributors.

⁴¹⁰ [...].

⁴¹¹ [...].

⁴¹² [...].

⁴¹³ [...].

⁴¹⁴ [...].

⁴¹⁵ [...].

⁴¹⁶ As described in Section 6.3.5, the distribution agreements between ZeniMax and [...] containing the cross-border sales restrictions covered all PC video games for which geo-blocked keys were provided by Valve. On the contrary, the cross-border sales restrictions contained in the agreements between Focus Home, Bandai and Koch Media and certain of their respective distributors covered also PC video games for which there is no evidence that Valve provided geo-blocked keys.

- (234) In light of the above, Valve will not be held liable for any infringement of Article 101 of the Treaty in relation to those distribution agreements which will be further considered in this Decision only for the purposes of assessing Valve's participation to a single and continuous infringement with the concerned Publishers (see Sections 8.3.2.2, 8.3.2.4, 8.3.2.5 and 8.3.2.6).

7. LEGAL ASSESSMENT

7.1. The Treaty and the EEA Agreement

- (235) Article 101(1) of the Treaty prohibits, as incompatible with the internal market, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.
- (236) Article 53(1) of the EEA Agreement contains a similar prohibition. However, the reference in Article 101(1) of the Treaty to trade "*between Member States*" is replaced by a reference to trade "*between contracting parties*", and the reference to competition "*within the internal market*" is replaced by a reference to competition "*within the territory covered by the ... [EEA] Agreement*".⁴¹⁷

7.2. Relationship between the Treaty and the EEA Agreement

- (237) The conduct described in Section 6.2 and sub-Sections of this Decision concerns 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 its effect on trade between the Union and those countries, it falls within Article 53 of the EEA Agreement.
- (238) Unless specifically indicated otherwise, the legal assessment below under Article 101 of the Treaty also applies to Article 53 of the EEA Agreement; references to Article 101 of the Treaty in the present Decision should be understood as referring to both Article 101 of the Treaty and Article 53 of the EEA Agreement and references to Member States should be understood as also referring to contracting parties to the EEA Agreement.

7.3. Jurisdiction

- (239) In order to establish the Commission's jurisdiction, it is sufficient that a conduct is either implemented in the EEA ("implementation test") or is liable to have immediate, substantial and foreseeable effects in the EEA ("qualified effects

⁴¹⁷ The case law of the Court of Justice and the General Court in relation to the interpretation of Article 101 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, as well as Case E-1/94 of 16.12.1994, points 32-35.

test”).⁴¹⁸ Those two approaches for establishing the Commission’s jurisdiction are alternative.⁴¹⁹

- (240) The criterion of implementation is satisfied by mere sales within the EEA irrespective of the location of sources of supply or of production plants.⁴²⁰
- (241) The qualified effects test allows the application of Union competition law to be justified under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the Union.⁴²¹ In this regard, it is sufficient to take account of the probable effects of conduct on competition in order for the foreseeability criterion to be satisfied.⁴²²
- (242) The agreements/concerted practices between Valve and each of the five Publishers were implemented in the EEA. In addition, the geo-blocking practices described under Sections 6.2.1, 6.2.2, 6.2.3, 6.2.4, 6.2.5 cover the entire EEA as they had as their object the partitioning of the internal market according to national borders through the prevention or hindering of cross-border sales. The conduct affected competition and had an appreciable effect on trade between Member States, including in the UK as further explained in Sections 8.2.1.1 and 8.4.2. In so far as the practices affected competition and trade between Member States, Article 101 of the Treaty and Article 53 of the EEA Agreement are applicable.
- (243) Consequently, according to Article 56(1)(c) and (3) of the EEA Agreement, the Commission is competent in the present case to apply both Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

8. APPLICATION OF ARTICLE 101(1) OF THE TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT

8.1. Agreements and concerted practices

8.1.1. Principles

- (244) In order for there to be an agreement for the purposes of Article 101 of the Treaty, it is sufficient that at least two undertakings have expressed their common intention to conduct themselves on the market in a specific way.⁴²³ Although Article 101(1) of the Treaty draws a distinction between the concept of concerted practices and

⁴¹⁸ Judgment of the Court of 27 September 1988, *A. Ahlström Osakeyhtiö and others v Commission* (hereinafter referred to as "*Wood Pulp*"), Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, ECLI:EU:C:1988:447, paragraphs 11 to 18; Case T-102/96, Judgment of the Court of First Instance of 25 March 1999, *Gencor Ltd v Commission* (hereinafter referred to as "*Gencor*"), T-102/96, ECLI:EU:T:1999:65, paragraphs 89 to 101.

⁴¹⁹ Judgment of the Court of 6 September 2017, *Intel Corp. v Commission* (hereinafter referred to as "*Intel*"), C-413/14 P, ECLI:EU:C:2017:632, paragraphs 40-46.

⁴²⁰ Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Wood Pulp*, paragraph 17; Case T-102/96 *Gencor*, paragraph 87.

⁴²¹ Case C-413/14 P *Intel*, paragraph 49.

⁴²² Case C-413/14 P *Intel*, paragraph 51.

⁴²³ Judgment of the Court of 11 January 1990, *Sandoz Prodotti Farmaceutici SpA v Commission*, C-277/87, ECLI:EU:C:1990:6, paragraph 13; Judgment of the Court of First Instance of 26 October 2000, *Bayer AG v Commission* (hereinafter referred to as "*Bayer*"), T-41/96, ECLI:EU:T:2000:242, paragraphs 67 and 173; Judgment of the Court of 6 January 2004, *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, Joined cases C-2/01 P and C-3/01 P, ECLI:EU:C:2004:2, paragraph 97.

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.⁴²⁴ The terms agreements and concerted practices do not presuppose a mutual restriction of freedom of action on one and the same market on which all the parties are present.⁴²⁵

- (245) For a concerted practice to exist it is sufficient for an independent undertaking knowingly and of its own accord to adjust its behaviour in line with the wishes of another undertaking. The motive or the knowledge that the act is unlawful is irrelevant.⁴²⁶ Conduct may fall under Article 101 of the Treaty as a concerted practice even where the parties do not explicitly subscribe to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour.⁴²⁷ The Court of Justice has confirmed that a concerted practice can also exist in a vertical relationship.⁴²⁸
- (246) Passive modes of participation in the infringement are indicative of an anticompetitive agreement capable of rendering the undertaking liable under Article 101(1) of the Treaty since a party which tacitly approves an unlawful initiative without publicly distancing itself from its content encourages the continuation of the infringement.⁴²⁹ Acquiescence to an alleged unilateral policy qualifies as an agreement under Article 101 of the Treaty if the party setting out the policy requires co-operation or assistance of the other party for its implementation and this party complies with that requirement by implementing that alleged unilateral policy in practice.⁴³⁰
- (247) The Court of Justice has confirmed that the text of Article 101(1) of the Treaty refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the common market, irrespective of the market on which the parties operate, and that only the commercial conduct of one of

⁴²⁴ Judgment of the Court of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, C-48/69, ECLI:EU:C:1972:70, paragraph 64; Judgment of 4 June 2009, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, (hereinafter referred to as "*T-Mobile Netherlands*"), C-8/08, ECLI:EU:C:2009:343, paragraph 26.

⁴²⁵ Judgment of the Court of 22 October 2015, *AC-Treuhand AG v Commission* (hereinafter referred to as "*AC-Treuhand*"), C-194/14 P, ECLI:EU:C:2015:717, paragraph 33.

⁴²⁶ Judgment of the Court of 8 July 1999, *Commission v Anic Partecipazioni SpA* (hereinafter referred to as "*Anic*"), C-49/92 P, ECLI:EU:C:1999:356, paragraph 81 and Commission Decision 82/367/EEC of 2 December 1981.

⁴²⁷ Judgment of the Court of First Instance of 17 December 1991, *SA Hercules Chemicals NV v Commission*, T-7/89, ECLI:EU:T:1991:75, paragraph 242.

⁴²⁸ Judgment of the Court of 7 June 1983, *SA Musique Diffusion française and others v Commission*, Joined cases C-100 to C-103/80, ECLI:EU:C:1983:158, paragraphs 72-80.

⁴²⁹ Judgment of the Court of 28 June 2005, *Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) 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, ECLI:EU:C:2005:408, paragraphs 142 and 143 and the case-law cited; Judgment of the Court of 21 January 2016, *"Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba* (hereinafter referred to as "*Eturas*"), C-74/14, ECLI:EU:C:2016:42, paragraph 50.

⁴³⁰ Case T-41/96 *Bayer*, paragraphs 172-173.

the parties need be affected by the terms of the arrangements in question.⁴³¹ It also confirmed that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.⁴³²

- (248) In order to ensure the full effectiveness of the prohibition laid down by Article 101(1) of the Treaty, this provision does not concern only undertakings operating on the market affected by the restrictions of competition or markets upstream or downstream of that market or neighbouring markets. On the contrary, Article 101 of the Treaty covers any contribution by an undertaking even if such contribution does not relate to an economic activity forming part of the relevant market on which that restriction comes about or is intended to come about.⁴³³

8.1.2. *Application to the Cases*

8.1.2.1. Introduction

- (249) The conduct described in Sections 6.2.1 to 6.2.5 presents all the characteristics of bilateral agreements and/or concerted practices entered into between undertakings, namely between each of the five Publishers and Valve. These agreements/concerted practices will be analysed in Sections 8.1.2.2 to 8.1.2.6.
- (250) Furthermore, in the Decisions addressed respectively to Bandai (Commission Decision C(2021)57 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40422 – Bandai Namco), Focus Home (Commission Decision C(2021)78 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40413 – Focus Home), Koch Media (Commission Decision C(2021)74 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40414 - Koch Media), ZeniMax (Commission Decision C(2021)63 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40420 – ZeniMax), the Commission found that each of these Publishers concluded bilateral agreements with several distributors for the physical and/or digital distribution of their respective PC video games in the EEA which contained clauses restricting cross-border sales (see also Sections 6.3.2, 6.3.3, 6.3.4 and 6.3.5). These bilateral agreements, in each respective case, were part of an overall arrangement the purpose of which was to restrict the cross-border sale of the affected PC video games in the EEA and therefore together with the agreements/concerted practices between each of these Publishers and Valve analysed in Sections 8.1.2.2 to 8.1.2.6 form a single and continuous infringement for which Bandai, Focus Home, Koch Media and ZeniMax are, in each respective case, liable. However, there is no evidence that Valve was aware (or should have been aware) of these four Publishers' contractual arrangements with the distributors. Valve is therefore not held liable for this part of the single and continuous infringement in each respective case. These bilateral agreements between each of the Publishers (except Capcom) and their distributors will consequently not be analysed in this section.

⁴³¹ Case C-194/14 P *AC-Treuhand*, paragraphs 34 and 35; Judgment of the Court of 26 January 2017, *Villeroy & Boch Belgium v Commission* (hereinafter referred to as “*Villeroy & Boch*”), C-642/13 P, ECLI:EU:C:2017:58, paragraph 58.

⁴³² Case C-49/92 P *Anic*, paragraph 81.

⁴³³ Case C-194/14 P *AC-Treuhand*, paragraph 36.

8.1.2.2. Agreements and/or concerted practices between Valve and Bandai (Case AT.40422 – Bandai)

- (251) As described in Section 6.2.1, on the basis of the SDA and Steamworks Agreement of 22 March 2012, Bandai was entitled to receive Steam activation keys that included territory controls. To request these territory controls (i.e. activation restrictions) be put in place by Valve, Bandai had to indicate to Valve the territories in which activation restrictions were to be set up for each PC video game package. Activation restrictions were therefore not set up unilaterally either by Valve or Bandai.
- (252) Bandai also had to indicate how many keys it needed and the package(s) to which the geo-blocked Steam activation keys related. As indicated in Section 6.2.1.3, Bandai requested by email that Valve provide it with geo-blocked Steam activation keys for the following PC video games: “[...]”, “[...]”, “[...]” and “[...]”.
- (253) As a reaction to the emails, Valve provided to Bandai, via email, Steam activation keys only for the PC video game “[...]” in the amounts requested and geo-blocked to the territories Bandai had defined.
- (254) For the remaining games (“[...]”, “[...]” and “[...]” as well as for “[...]”), Bandai requested geo-blocked Steam activation keys through Valve's automated system for ordering geo-blocked Steam activation keys (see Recital (107)). The fact that Valve developed the automated system through which Bandai could order geo-blocked Steam activation keys, and that Bandai submitted requests for geo-blocked Steam activation keys for the above-mentioned PC video games via that automated system demonstrates the existence of an agreement/concerted practice between Bandai and Valve to set up activation restrictions for these games (see Section 6.2.1.3).
- (255) The evidence described in Section 6.2.1 shows a concurrence of wills between Bandai and Valve to set up activation restrictions and/or to provide it with the related geo-blocked Steam activation keys which were used to restrict cross-border sales in respect of the above-mentioned five Bandai PC video games. This conduct therefore constitutes an agreement or in any event a concerted practice between undertakings within the meaning of Article 101(1) of the Treaty.

8.1.2.3. Agreements and/or concerted practices between Valve and Capcom (Case AT.40424 – Capcom)

- (256) As described in Section 6.2.2, on the basis of the SDA of 1 February 2007, Capcom was entitled to receive Steam activation keys that included territory controls. Capcom had to indicate to Valve the territories in which activation restrictions were to be set up for each PC video game package. Activation restrictions were therefore not set up unilaterally either by Valve or Capcom.
- (257) Capcom also had to indicate how many keys it needed and the package(s) to which the geo-blocked Steam activation keys related. As indicated in Section 6.2.2.3, Capcom requested, by email, that Valve set up activation restrictions and/or provide it with geo-blocked Steam activation keys for the following PC video games: “[...]”, “[...]”, “[...]”, “[...]” and “[...]”. In reaction to such emails, Valve provided Capcom with Steam activation keys for those PC video games in the amounts requested and geo-blocked to the territories defined by Capcom.
- (258) In addition, as of [...] when the system for ordering geo-blocked Steam activation keys became automated (see Recital (107)), Capcom requested geo-blocked Steam activation keys through Valve's automated system for the following PC video games: “[...]”, “[...]”, “[...]” and “[...]”. For the reasons explained in Section 6.2.2.3, the

fact that Valve developed the automated system through which Capcom could order geo-blocked Steam activation keys, and that Capcom submitted requests for geo-blocked Steam activation keys for the above-mentioned PC video games via that automated system demonstrates the existence of an agreement/concerted practice between Capcom and Valve to put activation restrictions in place for these games.

- (259) The evidence described above shows a concurrence of wills between Capcom and Valve to set up activation restrictions and/or provide it with the related geo-blocked Steam activation keys which were used to restrict cross-border sales in respect of the above-mentioned five Capcom PC video games. This conduct therefore constitutes an agreement or in any event a concerted practice between undertakings within the meaning of Article 101(1) of the Treaty.

8.1.2.4. Agreements and/or concerted practices between Valve and Focus Home (Case AT.40413 – Focus Home)

- (260) As described in Section 6.2.3, on the basis of the SDAs/Steamworks Agreement Focus Home was entitled to receive Steam activation keys that included territory controls. Focus Home had to indicate to Valve the territories in which activation restrictions⁴³⁴ were to be set up for each PC video game package. Activation restrictions were therefore not set up unilaterally either by Valve or Focus Home.
- (261) Focus Home also had to indicate how many keys it needed and the package(s) to which the geo-blocked Steam activation keys related. As indicated in Section 6.2.3.3, Focus Home requested, by email, that Valve provide it with geo-blocked Steam activation keys for the following eight PC video games: “[...]”; “[...]”; “[...]”; “[...]”; “[...]”; “[...]”; “[...]”; “[...]”. In reaction to such emails, Valve provided Focus Home with Steam activation keys for those PC video games in the amounts requested and geo-blocked to the territories defined by Focus Home.
- (262) In addition, there is evidence that as of [...], when the system for ordering geo-blocked Steam activation keys became automated (see Recital (107)), Focus Home requested geo-blocked Steam activation keys through Valve's automated system for the following nine PC video games: “[...]”; “[...]”; “[...]”; “[...]”; “[...]”; “[...]”; “[...]”; “[...]”; “[...]”. For the reasons explained in Section 6.2.3.3, the fact that Valve developed the automated system through which Focus Home could order geo-blocked Steam activation keys, and that Focus Home submitted requests for geo-blocked Steam activation keys for the above-mentioned PC video games via that automated system demonstrates the existence of an agreement/concerted practice between Focus Home and Valve to put activation restrictions in place for these games.
- (263) Moreover, regarding all the 17 PC video games mentioned in Recitals (261) and (262) as well as the PC video game “[...]” and “[...]” retail box of PC video games, Valve acknowledged that they had activation restrictions in place and Focus Home acknowledged that its distributors were provided with geo-blocked Steam activation keys for those 19 games.
- (264) The evidence described above shows a concurrence of wills between Focus Home and Valve to set up activation restrictions and/or provide it with to provide the related geo-blocked Steam activation keys which were used to restrict cross-border

⁴³⁴ For the purpose of this Section, reference to “activation restrictions” also covers “run-time restrictions”.

sales in respect of the above-mentioned 19 Focus Home PC video games. This conduct therefore constitutes an agreement or in any event a concerted practice between undertakings within the meaning of Article 101(1) of the Treaty.

8.1.2.5. Agreements and/or concerted practices between Valve and Koch Media (Case AT.40414 – Koch Media)

- (265) As described in Section 6.2.4, on the basis of the 2008 Koch SDA/Steamworks Agreement, Koch Media was entitled to receive Steam activation keys that included territory controls. Koch Media had to indicate to Valve the territories in which activation restrictions were to be set up for each PC video game package. Activation restrictions were therefore not set up unilaterally either by Valve or Koch Media.
- (266) Koch Media also had to indicate how many keys it needed and the package(s) to which the order of the related geo-blocked Steam activation keys should be related. As indicated in Section 6.2.4.3, Koch Media requested, by email, that Valve provide it with geo-blocked Steam activation keys for the following PC video games: “[...]”, “[...]” and “[...]”, to be restricted to the following EEA countries: Czech Republic, Hungary, Poland, Slovakia and the UK (only for “[...]”). In reaction to such emails, Valve provided Koch Media with Steam activation keys for those PC video games in the amounts requested and geo-blocked to the territories defined by Koch Media.
- (267) In addition, as of [...] when the system for ordering geo-blocked Steam activation keys became automated (see Recital (107)), Koch Media requested geo-blocked Steam activation keys through Valve's automated system for the following PC video games: “[...]” and “[...]”, to be restricted to the following EEA countries: the Czech Republic, Hungary, Poland and Slovakia.
- (268) The evidence described in Section 6.2.4 shows a concurrence of wills between Koch Media and Valve to set up activation restrictions and/or provide it with the related geo-blocked Steam activation keys which were used to restrict cross-border sales in respect of the above-mentioned five Koch Media PC video games. This conduct therefore constitutes an agreement or in any event a concerted practice between undertakings within the meaning of Article 101(1) of the Treaty.

8.1.2.6. Agreements and/or concerted practices between Valve and ZeniMax (Case AT.40420 – ZeniMax)

- (269) As described in Section 6.2.5, on the basis of the 2008 ZeniMax SDA ZeniMax was entitled to receive Steam activation keys that included territory controls. ZeniMax had to indicate to Valve the territories in which activation restrictions were to be set up for each PC video game package. Activation restrictions were therefore not set up unilaterally either by Valve or ZeniMax.
- (270) ZeniMax also had to indicate how many keys it needed and the package(s) to which the order of the related geo-blocked Steam activation keys should be related. As indicated in Section 6.2.5.3, ZeniMax requested, by email, that Valve provide it with geo-blocked Steam activation keys for the following PC video games: “[...]”, “[...]”, “[...]”, “[...]” and “[...]” to be restricted to the following EEA countries: the Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania and Latvia and additionally Romania (regarding “[...]”). In reaction to those emails, Valve provided ZeniMax with Steam activation keys for those PC video games in the amounts requested and geo-blocked to the territories defined by ZeniMax.
- (271) In addition, as of [...] when the system for ordering geo-blocked Steam activation keys became automated (see Recital (107)), ZeniMax requested geo-blocked Steam

activation keys through Valve's automated system for the following PC video games: “[...]”, “[...]”, “[...]”, “[...]” to be restricted to the following EEA countries: Estonia, Latvia, Lithuania, the Czech Republic, Slovakia, Hungary and Poland.

(272) The evidence described in Section 6.2.5 shows a concurrence of wills between ZeniMax and Valve to set up activation restrictions and/or provide it with the related geo-blocked Steam activation keys which were used to restrict cross-border sales in respect of the above-mentioned five ZeniMax PC video games. This conduct therefore constitutes an agreement or in any event a concerted practice between undertakings within the meaning of Article 101(1) of the Treaty.

8.1.2.7. Conclusion on agreements and concerted practices

(273) The evidence described in Sections 8.1.2.2 to 8.1.2.6 shows that the set up of the activation restrictions required interaction and a concurrence of wills between Valve and each of the Publishers. At no point during the relevant period were the activation restrictions set up unilaterally.

(274) Therefore, the conduct between Valve and Bandai (described in Section 8.1.2.2), between Valve and Capcom (described in Section 8.1.2.2), between Valve and Focus Home (described in Section 8.1.2.3), between Valve and Koch Media (8.1.2.4) and between Valve and ZeniMax (described in Section 8.1.2.2), constitute agreements or at least concerted practices within the meaning of Article 101(1) of the Treaty.

(275) Valve claims that there was no “*meeting of minds*” with the Publishers to restrict cross-border sales and therefore no agreements within the meaning of Article 101 of the Treaty as Valve only provided the tools that enable Publishers “*to implement their own unilaterally decided commercial strategies*”.⁴³⁵

(276) The Commission rejects this argument as, on the basis of the case-law analysed in Section 8.1.1, Valve chose to put the territorial control functions at the Publishers’ disposal; informed the Publishers’ of that possibility; complied with Publishers’ requests to geo-block the relevant PC video games; could not have been unaware that the geo-blocked Steam activation keys were used to restrict cross-border sales (indeed, as indicated at Sections 6.2.1, 6.2.2, 6.2.3, 6.2.4, 6.2.5 Valve promoted the use of geo-blocked Steam activation keys as a means of restricting “grey imports”) and did not indicate that it was participating in the conduct in a manner different from that of the Publishers or otherwise distance itself from this practice.⁴³⁶

8.2. Restriction of competition by object

8.2.1. Principles

(277) The Court of Justice has clarified that 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 effect.⁴³⁷ Such reasoning derives from the fact

⁴³⁵ [...].

⁴³⁶ Case C-74/14 *Eturas*, paragraph 46.

⁴³⁷ Judgment of the Court of 11 September 2014, *Groupement des cartes bancaires (CB) v European Commission* (hereinafter referred to as “*CB*”), Case C-67/13 P, ECLI:EU:C:2014:2204, paragraph 49 ; Judgment of the Court of 19 March 2015, *Dole Food Company, Inc. and Dole Fresh Fruit Europe v Commission* (hereinafter referred to as “*Dole Food*”), C-286/13 P, ECLI:EU:C:2015:184, paragraph 113; Judgment of the Court of 7 January 2004, *Aalborg Portland A/S (C-204/00 P), Irish Cement Ltd*

that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.⁴³⁸

- (278) To determine whether an agreement reveals such a sufficient degree of harm to competition regard must be had *inter alia* to:
- (i) The content of its provisions;
 - (ii) The objectives it seeks to attain; and
 - (iii) The economic and legal context of which it forms a part.⁴³⁹ When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.⁴⁴⁰
- (279) The Court of Justice has also clarified that the “by object” category is appropriate where there is robust and reliable experience about the nature of the agreement so that, in the light of this experience, it can generally be recognised as being harmful to competition.⁴⁴¹ An agreement having an anticompetitive object, “by its nature” constitutes an appreciable restriction of competition in violation of Article 101 of the Treaty, independently of any concrete effect that it may have.⁴⁴²

8.2.1.1. Restrictions of cross-border sales

- (280) It is settled case-law that an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty’s objective of achieving the integration of those markets through the establishment of an internal market.⁴⁴³
- (281) Consequently, certain types of conduct such as those limiting parallel trade or partitioning the EEA along national markets, or making the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) of the Treaty.⁴⁴⁴ The Court of Justice held that where an agreement is designed to prohibit or limit the

(C-205/00 P), *Ciments français SA (C-211/00 P)*, *Italcementi - Fabbriche Riunite Cemento SpA (C-213/00 P)*, *Buzzi Unicem SpA (C-217/00 P)* and *Cementir - Cementerie del Tirreno SpA (C-219/00 P) v Commission* (hereinafter referred to as “*Aalborg Portland*”), Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, paragraphs 81 and 82.

⁴³⁸ Case C-67/13 P *CB*, paragraph 50; Case C-286/13 P *Dole Food*, paragraph 114.

⁴³⁹ Case C-67/13 P *CB*, paragraph 53; Joined cases C-403/08 and C-429/08 *Murphy*, paragraph 136; Judgment of the Court of 6 October 2009, *GlaxoSmithKline Services Unlimited v Commission (C-501/06 P)* and *Commission v GlaxoSmithKline Services Unlimited (C-513/06 P)* and *European Association of Euro Pharmaceutical Companies (EAEPIC) v Commission (C-515/06 P)* and *Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission (C-519/06 P)* (hereinafter referred to as “*GSK*”), Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECLI:EU:C:2009:610, paragraph 58; Judgment of the Court of 8 November 1983, *NV IAZ International Belgium and others v Commission* (hereinafter referred to as “*IAZ*”), Joined cases 96-102, 104, 105, 108 and 110/82, ECLI:EU:C:1983:310, paragraphs 23-25.

⁴⁴⁰ Judgment of the Court of 14 March 2013, *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal* (hereinafter referred to as “*Allianz Hungária*”), C-32/11, ECLI:EU:C:2013:160, paragraph 36; Case C-67/13 P *CB*, paragraph 53, Case C-8/08 “*T-Mobile Netherlands*”, paragraph 43.

⁴⁴¹ Judgment of the Court of 2 April 2020, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, (hereinafter referred to as “*Budapest Bank*”), C-228/18, ECLI:EU:C:2020:265, paragraph 76.

⁴⁴² Judgment of the Court of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others* (hereinafter referred to as “*Expedia*”), C-226/11, ECLI:EU:C:2012:795 paragraph 37.

⁴⁴³ Joined cases C-403/08 and C-429/08 *Murphy*, paragraphs 139-142.

⁴⁴⁴ Joined cases C-403/08 and C-429/08 *Murphy*, paragraphs 139-142.

cross-border distribution of a product, it is deemed to have as its object the restriction of competition⁴⁴⁵.

- (282) In *Consten and Grundig*⁴⁴⁶ the Court of Justice held (with regard to an agreement for the assignment of a trademark aimed at partitioning the internal market) that "[s]ince the agreement aim[ed] at isolating the French market for Grundig products and maintaining artificially, for products of a very well-known brand, separate national markets within the Community, it is therefore such as to distort competition in the Common Market".
- (283) In *Miller*, the Court of Justice held that a clause contained in an exclusive dealing agreement prohibiting exports constituted a restriction of competition "by its very nature".⁴⁴⁷ In *Tipp-Ex*, an agreement requiring a reseller not to resell contractual products outside the contractual territory has been held as having as its object the restriction of competition in the internal market.⁴⁴⁸
- (284) In *Groupe Canal Plus*,⁴⁴⁹ the Court of Justice confirmed that license agreements which entail reciprocal obligations which aim to prohibit the cross-border provision of broadcasting services with respect to audiovisual content and which give broadcasters an absolute territorial protection can be seen as restrictions by object.
- (285) It is not material for the assessment who initiated the conduct. The Court of Justice has held that "[...] by its very nature, a clause prohibiting exports constitutes a restriction on competition, whether it is adopted at the instigation of the supplier or of the customer, since the agreed purpose of the contracting parties is to endeavour to isolate a part of the market".⁴⁵⁰
- (286) In this context, the Court of Justice explained that the fact that resellers prefer to limit their commercial operations to more restricted markets, whether regional or national, cannot justify the formal adoption of clauses prohibiting parallel trade, in

⁴⁴⁵ Joined cases C-403/08 and C-429/08 *Murphy*, paragraph 139; Judgment of the Court of 16 September 2008, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AVEE Farmakeftikon Proïonton, formerly Glaxowellcome AVEE*, Joined cases C-468/06 to C-478/06, ECLI:EU:C:2008:504, paragraph 65; Joined cases 96-102, 104, 105, 108 and 110/82 *IAZ*, paragraphs 23 to 27; Judgment of the Court of 28 April 1998, *Javico International and Javico AG v Yves Saint Laurent Parfums SA (YSLP)* (hereinafter referred to as "*Javico*"), C-306/96, ECLI:EU:C:1998:173, paragraphs 13 and 14; Judgment of the Court of 6 April 2006, *General Motors BV v Commission*, C-551/03 P, ECLI:EU:C:2006:229, paragraphs 67 to 69.

⁴⁴⁶ Judgment of the Court of 13 July 1966, *Établissements Consten S.à.r.l. and Grundig-Verkaufs-GmbH v Commission* (hereinafter referred to as "*Consten and Grundig*"), Joined cases 56 and 58/64, ECLI:EU:C:1966:41, p. 343.

⁴⁴⁷ Judgment of the Court of 1 February 1978, *Miller International Schallplatten GmbH v Commission* (hereinafter referred to as "*Miller*"), C-19/77, ECLI:EU:C:1978:19, paragraph 7.

⁴⁴⁸ Judgment of the Court of 8 February 1990, *Tipp-Ex GmbH v Commission*, C-279/87, ECLI:EU:C:1989:230, paragraph 22 (summary publication).

⁴⁴⁹ Judgment of the Court of 9 December 2020, *Groupe Canal + v Commission* (hereinafter referred to as "*Canal Plus*"), C-132/19 P [not yet reported], paragraph 54.

⁴⁵⁰ Case C-19/77 *Miller*, paragraph 7; Judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission*, Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85 to C-129/85, ECLI:EU:C:1993:120, paragraph 176 (hereinafter referred to as "*Woodpulp*"); Judgment of the Court of First Instance of 14 July 1994, *Herlitz AG v Commission*, (hereinafter referred to as "*Herlitz*"), T-66/92, ECLI:EU:T:1994:84, paragraph 29; Judgment of the Court of First Instance of 14 July 1994, *Parker Pen Ltd v Commission* (hereinafter referred to as "*Parker Pen*"), T-77/92, ECLI:EU:T:1994:85, paragraph 37.

that case exports, either in particular contracts or in conditions of sale, any more than the desire of the producer to wall off sections of the internal market.⁴⁵¹

- (287) Agreements or concerted practices may be in breach of Article 101 of the Treaty not only when they hinder distributors (e.g. traders) from selling cross-border, but also when users who want to purchase the relevant product for their own use are prevented from doing so because of their geographical location.⁴⁵²
- (288) In order to assess sales restrictions, the Commission differentiates between restrictions on active and passive sales. Active sales refers to actively approaching individual users, user groups or users in a specific territory in a targeted manner.⁴⁵³ Passive sales refers to responding to unsolicited requests from individual users.⁴⁵⁴
- (289) Restrictions on active sales may be necessary to protect the investment in a territory or user group allocated exclusively to a distributor or that a supplier reserves to itself.⁴⁵⁵ Restrictions on passive sales however are designed to prohibit or limit any cross-border distribution.⁴⁵⁶ These types of restrictions have as their object the partitioning of markets within the meaning of the case-law referred to above.⁴⁵⁷
- (290) The Union Courts and the Commission in its decisional practice found that certain types of conduct falling short of an outright parallel trade restriction also constitute infringements of Article 101 of the Treaty by object. These include situations where export is permitted only if the consent of the producer is obtained,⁴⁵⁸ where the producer must be contacted before exporting via the internet,⁴⁵⁹ or where an

⁴⁵¹ Case C-19/77 *Miller*, paragraph 14.

⁴⁵² Judgment of the Court of First Instance of 6 July 2000, *Volkswagen AG v Commission* (hereinafter referred to as "*Volkswagen*"), T-62/98, ECLI:EU:T:2000:180, paragraph 115; Case C-306/96 *Javico*, paragraphs 13 and 14. See also, to that effect, Judgment of the Court of 21 February 1984, *Hasselblad (GB) Limited v Commission* (hereinafter referred to as "*Hasselblad*"), C-86/82, ECLI:EU:C:1984:65, paragraph 46; Judgment of the Court of 24 October 1995, *Bayerische Motorenwerke AG v ALD Auto-Leasing D GmbH* (hereinafter referred to as "*BMW*"), C-70/93, ECLI:EU:C:1995:344, paragraphs 19 and 21.

⁴⁵³ Guidelines on Vertical Restraints ("Guidelines on Vertical Restraints"), OJ C 130, 19.5.2010, p. 1–46, point 51.

⁴⁵⁴ Guidelines on Vertical Restraints, point 51.

⁴⁵⁵ The Vertical Block Exemption Regulation allows a supplier to protect an exclusive distributor from active sales by other distributors in order to encourage that distributor to invest in the exclusively allocated territory or customer group. This is possible upon condition that the supplier agrees to sell its products only to one distributor for distribution in a particular territory or to a particular customer group and when that exclusive distributor is protected against active selling into its territory or to its customer group by all the other distributors.

⁴⁵⁶ Judgment of the General Court of 12 December 2018, *Groupe Canal + v Commission*, T-873/16, ECLI:EU:T:2018:904, paragraph 45, confirmed on this point on appeal in Case C-132/19 P *Canal Plus*, paragraphs 51-54.

⁴⁵⁷ See also Judgment of the Court of First Instance of 13 January 2004, *JCB Service v Commission*, T-67/01, ECLI:EU:T:2004:3, paragraph 85; Case C-86/82 *Hasselblad*, paragraph 46.

⁴⁵⁸ Case T-77/92 *Parker Pen*, paragraphs 37 and 44; Judgment of the Court of 14 December 1983, *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG*, C-319/82, ECLI:EU:C:1983:374, paragraph 6.

⁴⁵⁹ 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.

agreement requires a distributor to pass on to the producer any customer enquiries coming from outside the contract territory.⁴⁶⁰

- (291) The Court of Justice also held that competition may be distorted by agreements which prevent or restrict the competition which might take place between one of the parties to the agreement and third parties.⁴⁶¹ This applies all the more since, by such an agreement, the parties might seek, by preventing or limiting the competition of third parties in respect of the products, to create or guarantee for their benefit an unjustified advantage at the expense of the user, contrary to the general aims of Article 101 of the Treaty.⁴⁶²
- (292) The case-law analysed above shows that agreements restricting cross-border sales⁴⁶³ have been held to constitute a restriction of competition by object pursuant to Article 101 of the Treaty for decades.

8.2.1.2. IP rights and the assessment of restrictions of cross-border sales under Article 101 of the Treaty

- (293) The Court of Justice has established that the legality of companies' conduct under EU competition rules is unrelated to their compliance or non-compliance with other legal rules.⁴⁶⁴ Settled case-law confirms that an agreement is not exempted under EU competition law merely because it concerns an IP right.⁴⁶⁵ Therefore, the fact that the very same conduct may be allowed from a copyright law point of view (i.e. on the basis that the copyright holder could seek to prohibit the cross-border provision of digital services) is not material to the EU competition law assessment of such conduct and does not exclude the application of EU competition law in such constellations.⁴⁶⁶
- (294) In *Consten and Grundig*,⁴⁶⁷ the Court of Justice established a distinction between the existence of IP rights and the exercise of such rights with regard to an agreement for the assignment of a trademark aimed at partitioning the internal market. The Court of Justice held in particular that IP rights under national law cannot be exercised so as to frustrate the very objective of the Treaty which is the creation and protection of the internal market.

⁴⁶⁰ Judgment of the Court of First Instance of 19 May 1999, *BASF Lacke + Farben AG v Commission*, T-175/95, ECLI:EU:T:1999:99, paragraph 87.

⁴⁶¹ Joined cases 56 and 58/64, *Consten and Grundig*, pages 492 and 493; Case C-194/14 P, *AC-Treuhand*, paragraphs 34 and 35; Case C-642/13 P *Villeroy & Boch Belgium*, paragraph 58.

⁴⁶² Joined cases 56 and 58/64, *Consten and Grundig*, page 339.

⁴⁶³ Case C-228/18 *Budapest Bank*, paragraph 79.

⁴⁶⁴ Judgment of the General Court of 1 July 2010, *AstraZeneca AB and AstraZeneca plc v Commission*, T-321/05, ECLI:EU:T:2010:266, paragraph 677, confirmed on appeal in the Judgment of the Court of 6 December 2012, *AstraZeneca AB and AstraZeneca plc v Commission* (hereinafter referred to as "*AstraZeneca*"), C-457/10 P, ECLI:EU:C:2012:770, paragraph 132.

⁴⁶⁵ Judgment of the Court of 27 September 1988, *Bayer AG and Maschinenfabrik Hennecke GmbH v Heinz Süllhöfer*. C-65/86, ECLI:EU:C:1988:448, paragraph 15; Judgment of the General Court of 8 September 2016, *Generics (UK) Ltd v Commission*, T-469/13, ECLI:EU:T:2016:454, paragraph 209. Judgment of the Court of 30 January 2020, *Generics (UK) Ltd and Others v Competition and Markets Authority*. (hereinafter referred to as "*Generics (UK)*"), C-307/18, ECLI:EU:C:2020:52, paragraph 79.

⁴⁶⁶ See case-law cited in footnote 465.

⁴⁶⁷ Joined cases 56 and 58/64, *Consten and Grundig*, page 345.

- (295) In *Coditel II*, the Court of Justice recognised that the so-called "existence/exercise dichotomy" applied also when the (exclusive) IP right is exploited in an intangible form (as a service rather than through integration in physical goods).⁴⁶⁸
- (296) In *Nungesser*,⁴⁶⁹ the Court of Justice held that the exercise of an IP right is prohibited by Article 101(1) of the Treaty in cases where an exclusive licence grants absolute territorial protection to a licensee as regards the products and the territory in question, that is eliminating all competition from third parties such as parallel importers or licensees for other territories, and results in artificial maintenance of separate national markets which is contrary to the Treaty.⁴⁷⁰
- (297) This type of exclusive relationship that places limitations on the other licensees/distributors of the supplier who are prevented from selling into the exclusive distributor's territory was therefore not deemed compatible with Article 101 of the Treaty on the basis of the principles established in *Consten and Grundig*⁴⁷¹ and described in Recital (294).
- (298) Similarly, in *Murphy*,⁴⁷² the Court of Justice held that an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of an internal market and must be regarded, in principle, as an agreement whose object is to restrict competition within the meaning of Article 101(1) of the Treaty, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition.
- (299) The General Court ruled that restrictions on passive sales are capable of partitioning national markets leading to absolute territorial protection in the following terms: "[...] when the agreements concluded by the copyright holder contain clauses under which the holder is thereafter required to prohibit all its contracting partners on the EEA market from making passive sales to geographic markets situated outside the Member State in respect of which it grants them an exclusive licence, those clauses confer a contractually specified absolute territorial exclusivity and thereby infringe Article 101(1) Treaty".⁴⁷³
- (300) The Union Courts have held that additional obligations designed to ensure compliance with the territorial limitations upon exploitation of those licences that are contained in the clauses of the contracts concluded between the right holders and the licensee concerned run counter to Article 101 TFEU.⁴⁷⁴
- (301) Although the case-law cited above refers predominantly to exclusive distribution relationships, the principles established in this case-law apply equally – if not more so – in the context of non-exclusive distribution and licensing agreements such as

⁴⁶⁸ Judgment of the Court of 6 October 1982, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* (hereinafter referred to as "*Coditel II*"), C-262/81, ECLI:EU:C:1982:334, paragraphs 13 and 17.

⁴⁶⁹ Judgment of the Court of 8 June 1982, *C. Nungesser KG and Kurt Eisele v Commission* (hereinafter referred to as "*Nungesser*"), C-258/78, ECLI:EU:C:1982:211, paragraph 29.

⁴⁷⁰ Case C-258/78 *Nungesser*, paragraphs 53 and 61.

⁴⁷¹ Joined cases 56 and 58/64, *Consten and Grundig*, page 343; Case C-258/78 *Nungesser*, paragraph 61.

⁴⁷² Joined cases C-403/08 and C-429/08 *Murphy*, paragraphs 139-142.

⁴⁷³ Case T-873/16, *Groupe Canal + v Commission*, paragraph 45, confirmed in Case C-132/19 P *Canal Plus*, in particular paragraphs 51 - 54.

⁴⁷⁴ Case C-132/19, *Canal Plus*, paragraph 51.

those at issue in the present cases to the extent that those agreements restrict passive sales.

- (302) As is clear from the case law cited above, the Union Courts have accepted that a degree of protection of exclusive distributors is justified where such protection is necessary to avoid deterring a licensee from accepting risks linked to production and distribution of the licensed product. Such protection does not extend to conduct that is liable to result in the artificial maintenance of separate markets, which would be contrary to the aims of the Treaty. Such rationale, however, which provides additional protection for exclusive distributors, is clearly not present in the context of non-exclusive distribution arrangements. Having agreed to enter into a non-exclusive agreement it cannot justifiably be claimed that the non-exclusive distributor requires additional protection in order not to be deterred from accepting the risks linked to the distribution or production of the licensed product. As such, the reasons identified by the Union Courts justifying exclusive licences – which, as set out in Recitals (295) to (299) do not, in any event, extend to conferring absolute territorial protection on the exclusive distributor or licensee – cannot apply with respect to non-exclusive distributors.
- (303) Consequently, the Commission considers that the Union Courts' conclusion that agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) of the Treaty must equally apply to non-exclusive licensing and distribution arrangements.
- (304) Moreover, according to settled case-law, an agreement can be considered to restrict competition by object even if it also pursues legitimate objectives.⁴⁷⁵ Thus, once it is established on the basis of the content, objectives and the context of the agreement that the agreement has an anticompetitive object, the fact that the same agreement may also pursue legitimate objectives does not affect this qualification.
- (305) In that regard, and concerning more particularly the conduct of undertakings linked to intellectual property rights, the Court has held, *inter alia*, that an industrial or commercial property right does not possess those elements of an agreement or concerted practice referred to in Article 101(1) of the Treaty, but the exercise of that right might fall within the ambit of the prohibitions contained in the Treaty if it were to manifest itself as the subject, the means or the consequence of an agreement or concerted practice, notwithstanding the fact that it may constitute the legitimate expression of the intellectual property right attached to the patent which empowers the holder of that patent, *inter alia*, to oppose any infringement.⁴⁷⁶
- (306) That is all the more the case when it is for public authorities and not private undertakings to ensure compliance with statutory requirements.⁴⁷⁷ Indeed, the

⁴⁷⁵ Judgment of the Court of 20 November 2008, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.* (hereinafter referred to as "Irish Beef"), C-209/07, ECLI:EU:C:2008:643, paragraph 21.

⁴⁷⁶ Case C-307/18 *Generics (UK)*, paragraph 79.

⁴⁷⁷ Case C-307/18 *Generics (UK)*, paragraph 88. See also Judgment of the Court of 7 February 2013, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.*, (hereinafter referred to as "*Slovenská sporiteľňa*"), C-68/12, ECLI:EU:C:2013:71, paragraph 20, where the Court held that "[...] it

national courts are the proper forum for actions by an IP rights holder who wishes to obtain a finding of an IP law violation by a licensee on the basis of national IP law.⁴⁷⁸ In other words, the decision as to whether or not a type of conduct may infringe IP rights is to be determined by the relevant courts, rather than the parties to an agreement.

- (307) The Court of Justice has held that it is not for a competition authority to review the strength of the rights conferred by an IP right or the probability of a dispute between a right holder and any party that is allegedly infringing.⁴⁷⁹
- (308) Furthermore, the Court held that if it were to be accepted that the presumption of validity of an IP right precludes the holder of that IP right from being in a relationship of potential competition with any party that is allegedly infringing that IP right, that would have the consequence that Article 101 of the Treaty would be deprived of all meaning and that would be liable, thereby, to frustrate EU competition law.⁴⁸⁰ In other words, under established case-law, an agreement may constitute a restriction by object even if it affects only potential competition between the two parties to the agreement in the sense that one of the parties – absent the restrictive agreement – would be able to enter the market only at risk of possible IP infringement action.⁴⁸¹
- (309) Therefore, the fact that a given business conduct (e.g. passive sales by the licensee outside its licensed territory in the context of a non-exhausted IP right) may be potentially "risky" for the licensee because it may be subject to legal action (since the IP holder may resort to IP infringement action in courts to block such sales), the merits of which have to be determined by the relevant courts, does not preclude the application of Article 101 of the Treaty as, at the very least, such conduct represents potential competition which may be restricted by means of an agreement.

8.2.2. Application to the Cases

8.2.2.1. Introduction

- (310) This section of the Decision analyses the content, objective, legal and economic context of each agreement/concerted practice between Valve and each of the Publishers. These agreements and/or concerted practices concerned the setting-up of activation restrictions and the provision of the related geo-blocked Steam activation keys, which prevented the activation (and in some cases playing/running)⁴⁸² of a number of PC video games outside of specific EEA countries. Each bilateral agreement/concerted practice was part of an overall arrangement the purpose of which was to restrict the cross-border sale of the affected PC video games in the EEA. These agreements/concerted practices will be analysed in Section 8.2.2.2.

is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements."

⁴⁷⁸ Judgment of the Court of 25 February 1986, *Windsurfing International Inc. v Commission*, C-193/83, ECLI:EU:C:1986:75, paragraph 52.

⁴⁷⁹ Case C-307/18 *Generics (UK)*, paragraph 50.

⁴⁸⁰ Case C-307/18 *Generics (UK)*, paragraph 49.

⁴⁸¹ Judgment of the General Court of 8 September 2016, *H. Lundbeck A/S and Lundbeck Ltd v Commission* hereinafter referred to as "*Lundbeck*"), T-472/13, ECLI:EU:T:2016:449, paragraph 380.

⁴⁸² Focus Home's PC video games [...] and [...] were geo-blocked also via run-time restrictions – see Section 6.2.3.3.

(311) For all Publishers (except Capcom), the geo-blocked Steam activation keys for a number of PC video games were used in combination with contractual cross-border sales restrictions provided in bilateral distribution agreements between the Publishers (except Capcom) and one or more of their respective distributors to whom the concerned Publishers passed on the geo-blocked keys. The cross-border sales restrictions contained in these distribution agreements prevented distribution of certain PC video games outside a number of EEA countries which, in a number of cases, coincides with the EEA countries to which the keys were geo-blocked. These bilateral distribution agreements, in each respective case, have as their object the restriction of competition within the meaning of Article 101 of the Treaty (see, respectively, Commission Decision C(2021)57 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40422 – Bandai Namco; Commission Decision C(2021)78 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40413 – Focus Home; Commission Decision C(2021)74 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40414 - Koch Media; Commission Decision C(2021)63 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40420 – ZeniMax as well as Sections 6.3.2, 6.3.3, 6.3.4 and 6.3.5 of this Decision). However, there is no evidence that Valve was aware (or should have been aware) of these agreements. Valve is therefore not held liable for this part of the single and continuous infringement.

8.2.2.2. Content and objective of agreements and/or concerted practices between Valve and each of the Publishers

(a) Agreements/concerted practices between Valve and Bandai (Case AT.40422 – Bandai)

(312) The email exchanges and the other evidence detailed in Section 6.2.1 show that Bandai asked Valve to be provided with geo-blocked Steam activation keys for the following five PC video games: (1) “[...]”, (2) “[...]”, (3) “[...]”, (4) “[...]” and (5) “[...]”.

(313) It follows from the evidence that Bandai defined the territories in which such Steam activation keys could be used to activate a PC video game. In particular, the Steam activation keys that Valve provided to Bandai following Bandai's request were geo-blocked, depending on the request, to the following EEA countries: the Czech Republic, Hungary, Poland and Slovakia.

(314) This means that, once the activation restrictions were put in place, those games could not be activated in the rest of the EEA because of a technical restriction. It also means that [...], or any other distributor in those EEA countries to whom these geo-blocked Steam activation keys were provided, were effectively prevented from providing (in particular in response to unsolicited requests from a potential user) those games to users based in EEA countries other than the Czech Republic, Hungary, Poland and/or Slovakia, because those games could not be activated outside the EEA countries concerned.

(315) As explained in Section 6.2.1, Bandai and Valve agreed to put in place such restrictions on the Steam activation keys of the five Bandai's PC video games mentioned above. The territory to which the Steam activation keys for these PC video games were restricted was also agreed: Bandai requested activation restrictions

to be set up and Steam activation keys to be geo-blocked to a territory covering the Czech Republic, Hungary, Poland and Slovakia and Valve provided the requested geo-blocked Steam activation keys to Bandai for all five PC video games.

- (316) As indicated in Recital (151), Valve was aware that the geo-blocked Steam activation keys it supplied to Bandai were then passed on by Bandai to its distributors, who resold the PC video games in the above-mentioned EEA countries.⁴⁸³
- (317) In line with the case-law quoted in Section 8.2.1.1, competition may be distorted within the meaning of Article 101(1) of the Treaty not only by agreements/concerted practices which limit it as between the parties but also by agreements which prevent or restrict the competition which might take place between one of them and third parties.
- (318) On the basis of the above, the Commission concludes that the objective of the agreements/concerted practices between Bandai and Valve was to technically restrict the circulation of the five Bandai PC video games mentioned in Recital (312) above from certain EEA countries, namely the Czech Republic, Hungary, Poland and Slovakia into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.
- (b) Agreements/concerted practices between Valve and Capcom (Case AT.40424 - Capcom)
- (319) The email exchanges and the other evidence detailed in Section 6.2.2 show that Capcom asked Valve to provide it with geo-blocked Steam activation keys for the following five PC video games: (1) “[...]”, (2) “[...]”, (3) “[...]”, (4) “[...]”, (5) “[...]”.
- (320) It follows from this evidence that Capcom defined the territories in which such Steam activation keys could be used to activate a PC video game. The Steam activation keys that Valve provided to Capcom following Capcom’s request were geo-blocked to the following eight EEA countries: Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia and Romania.
- (321) The five games concerned could not be activated outside of those countries. [...], or any other Capcom distributor in those EEA countries to whom these geo-blocked Steam activation keys were provided, was effectively prevented from providing those games to users based in EEA countries other than Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia and Romania, because those games could not be activated outside these countries.
- (322) As explained in Section 6.2.2, Capcom and Valve agreed to put in place, and Valve did put in place, such restrictions on the Steam activation keys of the five Capcom’s PC video games mentioned above with respect to Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia and Romania.
- (323) As indicated in Recital (166), Valve was aware that the geo-blocked Steam activation keys it supplied to Capcom were then passed on by Capcom to its distributors, including [...], who resold the PC video games in the above-mentioned EEA countries.⁴⁸⁴

⁴⁸³ [...].
⁴⁸⁴ [...].

- (324) In line with the case-law quoted in Section 8.2.1.1, competition may be distorted within the meaning of Article 101(1) of the Treaty not only by agreements/concerted practices which limit competition as between the parties but also by agreements which prevent or restrict the competition which might take place between one of them and third parties. As indicated at Recital (157), as a result of the activation restrictions put in place by Valve, independent distributors to which the geo-blocked keys were passed were effectively prevented from selling the concerned keys to other distributors and consumers outside the EEA countries to which the keys were geo-blocked. By means of such technical restrictions, Capcom and Valve artificially partitioned the internal market.
- (325) On the basis of the above, the Commission concludes that the objective of the agreements/concerted practices between Capcom and Valve was to technically restrict the circulation of the five Capcom PC video games concerned, mentioned in Recital (319), from certain EEA countries, namely Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia and Romania into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.
- (c) Agreements/concerted practices between Valve and Focus Home (Case AT.40413 – Focus Home)
- (326) The email exchanges and other evidence detailed in Section 6.2.3 show that Focus Home asked that Valve provide it with geo-blocked Steam activation keys for the following 19 PC video games: (1) "[...]"; (2) "[...]"; (3) "[...]"; (4) "[...]"; (5) "[...]"; (6) "[...]"; (7) "[...]"; (8) "[...]"; (9) "[...]"; (10) "[...]"; (11) "[...]"; (12) "[...]"; (13) "[...]"; (14) "[...]"; (15) "[...]"; (16) "[...]"; (17) "[...]" box of games; (18) "[...]"; (19) "[...]".
- (327) It follows from this evidence that Focus Home defined the territories in which such Steam activation keys could be used to activate (and run/play⁴⁸⁵) a PC video game. The Steam activation keys that Valve provided to Focus Home following Focus Home's request were geo-blocked, depending on Focus Home's request, to one or more of the following EEA countries: Estonia, Hungary, Latvia, Lithuania, and/or Poland.
- (328) The 19 games concerned could not be activated (and, moreover, two of those games could also not be run/played⁴⁸⁶) outside of those countries. Focus Home's distributors in those EEA countries (namely, [...], [...], [...], [...], [...]), or any other distributor in those EEA countries to whom these geo-blocked Steam activation keys were provided, were effectively prevented from providing (in particular in response to unsolicited requests from a potential user) those games to users based in EEA countries other than Estonia, Hungary, Latvia, Lithuania and/or Poland, because those games could not be activated outside these countries.
- (329) As explained in Section 6.2.3, Focus Home and Valve agreed to put in place, and Valve did put in place, such restrictions on the Steam activation keys of the 19 Focus Home's PC video games mentioned in Recital (326) with respect to Estonia, Latvia, Lithuania, Hungary and/or Poland.

⁴⁸⁵ Only with regard to [...] and [...] box of games. See Section 6.2.3.3.

⁴⁸⁶ See footnote 485.

- (330) As indicated in Recital (181), Valve was aware that the geo-blocked Steam activation keys it supplied to Focus Home were then passed on by Focus Home to its distributors, who resold the PC video games in the above-mentioned EEA countries.⁴⁸⁷
- (331) In line with the case-law quoted in Section 8.2.1.1, competition may be distorted within the meaning of Article 101(1) of the Treaty not only by agreements/concerted practices which limit competition as between the parties but also by agreements which prevent or restrict the competition which might take place between one of them and third parties. As indicated at Recital (172), as a result of the activation restrictions put in place by Valve, independent distributors to which the geo-blocked keys were passed were effectively prevented from selling the concerned keys to other distributors and consumers outside the EEA countries to which the keys were geo-blocked. By means of such technical restrictions, Focus Home and Valve artificially partitioned the internal market.
- (332) On the basis of the above, the Commission concludes that the objective of the agreements/concerted practices between Focus Home and Valve was to technically restrict the circulation of the 19 Focus Home PC video games mentioned in Recital (326) from certain EEA countries, namely Estonia, Latvia, Lithuania, Hungary and/or Poland into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.
- (d) Agreements/concerted practices between Valve and Koch Media (Case AT.40414 – Koch Media)
- (333) The email exchanges and the other evidence detailed in Section 6.2.4 show that Koch Media asked that Valve provide it with geo-blocked Steam activation keys for the following five PC video games: (1) “[...]”, (2) “[...]”, (3) “[...]”, (4) “[...]”, (5) “[...]”.
- (334) It follows from this evidence that Koch Media defined the territories in which such Steam activation keys could be used to activate a PC video game. For “[...]”, “[...]”, “[...]” and “[...]”, this territory was defined by Koch Media as encompassing the following EEA countries: the Czech Republic, Hungary, Poland and Slovakia. For “[...]”, two different packages (see Section 6.1.5) were set up. For one package the territory was defined by Koch Media as encompassing the Czech Republic, Hungary, Poland and Slovakia; for the other package the territory was defined by Koch Media as encompassing the UK only.
- (335) The five games concerned could not be activated outside of those countries because of the technical restriction. Thus, [...], [...], or any other distributor in those EEA countries to whom these geo-blocked Steam activation keys were provided, were effectively prevented from providing those games to users based in EEA countries other than in the Czech Republic, Hungary, Poland and Slovakia, and the UK (for one game only) because those games could not be activated outside the EEA countries concerned.
- (336) As explained in Section 6.2.4, Koch Media and Valve agreed to put in place, and Valve did put in place, such restrictions on the Steam activation keys of the five

⁴⁸⁷ [...].

Koch Media's PC video games mentioned in Recital (333) with respect to the Czech Republic, Hungary, Poland, Slovakia and/or the UK (as the case may be).

- (337) As indicated in Recital (196), Valve was aware that the geo-blocked Steam activation keys it supplied to Koch Media were then passed on by Koch Media to its distributors, who resold the PC video games in the above-mentioned EEA countries.⁴⁸⁸
- (338) In line with the case-law quoted in Section 8.2.1.1, competition may be distorted within the meaning of Article 101(1) of the Treaty not only by agreements/concerted practices which limit competition as between the parties but also by agreements which prevent or restrict the competition which might take place between one of them and third parties. As indicated at Recital (187), as a result of the activation restrictions put in place by Valve, independent distributors to which the geo-blocked keys were passed were effectively prevented from selling the concerned keys to other distributors and consumers outside the EEA countries to which the keys were geo-blocked. By means of such technical restrictions, Koch Media and Valve artificially partitioned the internal market.
- (339) On the basis of the above, the Commission concludes that the objective of the agreements/concerted practices between Koch Media and Valve was to technically restrict the circulation of the five Koch Media PC video games mentioned in Recital (333) from certain EEA countries, namely the Czech Republic, Hungary, Poland, Slovakia and the UK into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.
- (e) Agreements/concerted practices between Valve and ZeniMax (Case AT.40420 - ZeniMax)
- (340) The email exchanges and the other evidence detailed in Section 6.2.5 show that ZeniMax asked that Valve provide it with geo-blocked Steam activation keys for the following five PC video games: (1) "[...]", (2) "[...]", (3) "[...]", (4) "[...]" and (5) "[...]".
- (341) It follows from this evidence that ZeniMax defined the territories in which such Steam activation keys could be used to activate a PC video game. In particular, the Steam activation keys that Valve provided to ZeniMax following ZeniMax request were geo-blocked, depending on the request, to one or more of the following EEA countries: the Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia and/or Romania (for one game only, i.e., "[...]").
- (342) This means that those five games could not be activated outside of those countries because of the technical restriction. Thus, [...] or any other distributor in those EEA countries, to whom these geo-blocked Steam activation keys were provided, were effectively prevented from providing those games to users based in EEA countries other than in the Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia and Romania, because those games could not be activated outside the EEA countries concerned.
- (343) As explained in Section 6.2.5, ZeniMax and Valve agreed to put in place, and Valve did put in place, such restrictions on the Steam activation keys of the five ZeniMax

⁴⁸⁸ [...].

PC video games mentioned above with respect to the Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia and Romania.

- (344) As indicated in Recital (211), Valve was aware that the geo-blocked Steam activation keys it supplied to ZeniMax were then passed on by ZeniMax to its distributors, who resold the PC video games in the above-mentioned EEA countries.⁴⁸⁹
- (345) In line with the case-law quoted in Section 8.2.1.1, competition may be distorted within the meaning of Article 101(1) of the Treaty not only by agreements/concerted practices which limit competition as between the parties but also by agreements which prevent or restrict the competition which might take place between one of them and third parties. As indicated at Recital (202), as a result of the activation restrictions put in place by Valve, independent distributors to which the geo-blocked keys were passed were effectively restricted from selling the concerned keys to other distributors and consumers outside the EEA countries for which the keys were geo-blocked. By means of such technical restrictions, ZeniMax and Valve artificially partitioned the internal market.
- (346) On the basis of the above, the Commission concludes that the objective of the agreements/concerted practices between ZeniMax and Valve was to technically restrict the circulation of the five ZeniMax PC video games mentioned in Recital (340) from certain EEA countries, namely the Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania, Latvia and Romania into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.

8.2.2.3. Legal and economic context

(a) Legal context

- (347) Each of the Publishers had IP rights (copyright) for the PC video games concerned by this Decision covering the entire EEA. This is confirmed by the fact that each of the Publishers granted at least an EEA-wide (if not world-wide) licence to Valve for the exploitation of the same PC video games on Steam. The actual grant of licenses for the distribution of the Publishers' PC video games limited to a number of EEA countries to the distributors receiving the keys is not called into question by this Decision. With respect to Valve, the conduct at issue concerns the additional actions⁴⁹⁰ – in the form of technical restrictions agreed bilaterally between each of the Publishers and Valve - which were designed to ensure compliance with the territorial limitations as defined by the Publishers.⁴⁹¹ As a result, the Publishers' respective distributors to which the geo-blocked Steam activation keys were passed were effectively restricted from selling the concerned keys to other distributors and consumers outside the EEA countries to which the keys were geo-blocked (because such keys would not work outside of the designated territory). By means of such additional technical restrictions, the Publishers and Valve artificially partitioned the internal market.

⁴⁸⁹ [...].

⁴⁹⁰ Joined cases C-403/08 and C-429/08 *Murphy*, paragraph 141; Case C-132/19 P *Canal Plus*, paragraph 51.

⁴⁹¹ For the reasons set out in Section 8.3.2 such conduct forms part of a single and continuous infringement comprising both the technical restrictions agreed between Valve and the Publishers and the contractual restrictions described in Section 6.3 in place between the Publishers (except Capcom) and certain distributors.

Valve's argument that geo-blocked Steam activation keys reflected non-exhausted copyright

- (348) Valve claims that the provision of geo-blocked Steam activation keys - including Steam activation keys which are distributed in a physical support⁴⁹² - does not create any artificial barriers to trade between Member States and does not restrict competition by object within the meaning of Article 101(1) of the Treaty as it merely reflects non-exhausted copyright in the digital distribution of PC video games.
- (349) Valve argues that Steam subscribers, irrespective of whether they purchased the game on Steam or outside Steam, do not acquire ownership of the game; they only acquire a non-exclusive license to access and play the game on Steam. The use of Steam activation keys makes the distinction between physical and digital distribution obsolete, as irrespective of the distribution channel through which the game is sold i.e., whether through a physical distribution channel whereby retailers sell CD/DVDs containing Steam activation keys or through a digital distribution channel whereby retailers email the Steam activation key to users, the game is accessible and playable on Steam only. In this regard Valve argues that retailers of Steam-enabled games (e.g., retailers of CD/DVDs containing Steam activation keys) distribute exactly the same products as those that are sold on Steam.
- (350) Valve's arguments are rejected for the following reasons.
- (351) First, under settled EU case-law and established Commission decisional practice, restrictions on passive sales are capable of partitioning national markets and of leading to absolute territorial protection;⁴⁹³ they infringe Article 101 of the Treaty and are incompatible with the completion of the internal market, which is one of the fundamental aims of the Treaty. The fact that an agreement/concerted practice between Valve and each Publisher concerns IP rights (e.g. copyright) does not exempt it from EU competition law.⁴⁹⁴
- (352) Second, in line with the case-law quoted in Section 8.2.1.2, the interpretation of what is lawful or not under copyright law is to be left to the courts, and not to the parties to an agreement.⁴⁹⁵ A competition authority is not required to assess the validity of IP or an infringement thereof, but only whether the conduct represents potential competition which may be restricted by means of an agreement.⁴⁹⁶

⁴⁹² [...].

⁴⁹³ Case T-873/16, *Groupe Canal + v Commission*, paragraph 45: "when the agreements concluded by the copyright holder contain clauses under which the holder is thereafter required to prohibit all its contracting partners on the EEA market from making passive sales to geographic markets situated outside the Member State in respect of which it grants them an exclusive licence, those clauses confer a contractually specified absolute territorial exclusivity and thereby infringe Article 101(1) Treaty". See also Joined cases C-403/08 and C-429/08 *Murphy*, paragraph 115: "absolute territorial exclusivity which is such as to result in artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference to which it gives rise are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market"; confirmed in Case C-132/19 P, *Canal Plus*, paragraphs 51 – 54.

⁴⁹⁴ See, in particular, Recitals (295) to (299).

⁴⁹⁵ Case C-307/18 *Generics (UK)*, paragraph 88; Case C-68/12 *Slovenská sporiteľňa*, paragraph 20, where the Court held that "[...] it is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements."

⁴⁹⁶ Case C-307/18 *Generics (UK)*, paragraphs 49, 50 and Case T-472/13 *Lundbeck*, paragraph 380.

- (353) In circumstances where engaging in passive sales in the context of IP license agreements may be potentially "risky" for the licensee because it may be subject to legal action (e.g., copyright infringement action), the merits of which have to be determined by the relevant courts, the application of Article 101 of the Treaty is not precluded.
- (354) This is particularly so in the present case where there is currently no clarity as to whether copyright exhaustion applies to Steam-enabled PC video games. Different national courts have come to different conclusions on this point. German courts for example have established that Steam subscribers do not acquire any ownership of Steam-enabled PC video games.⁴⁹⁷ Conversely, a French court has established that the Steam user account consisting in the "right to access and/or use" a video game "accessible through Steam"⁴⁹⁸ is in fact a purchase because the game is available to users for an unlimited duration.⁴⁹⁹
- (355) In light of the above, Valve's arguments that Steam-enabled PC video games are digital services and as such they are not subject to copyright exhaustion and therefore the provision of geo-blocked Steam activation keys were a legitimate means to avoid copyright infringement (irrespective of whether they were used for physical or digital distribution outside Steam) are not relevant for the assessment under Article 101 of the Treaty.

(b) Economic context

⁴⁹⁷ In particular, the Higher Regional Court of Berlin has stated that: "Steam users do not download a complete executable program copy of the games from the Valve's servers. The customers cannot use the computer games without an additional and continuously required performance of Valve, since Valve does not make the product code freely available. The program code installed on the user's computer is not executable without online access to the Valve's servers since part of the program code required for the use of the computer game remains always on these servers and the user has access to it only on the basis of the contractual relationship existing with Valve [...]. Steam users do not have an "owner-like position" in such a way that they would be able to use the acquired computer game independently without further cooperation from Valve [...]" [Unofficial translation from German] - See judgment by the Higher Regional Court of Berlin of 10 August 2015 in KG, Case Az. 23 U 42/14 VZBV/Valve, paragraph 10. Under an earlier judgment, this applies to both video games accessible on the Steam Store and through online and offline retailers: "[I]n the context of the purpose of the contract with Valve, there is no difference whatsoever if the Steam account has been opened after the purchase of a CD with a game or if the game was purchased online" [Unofficial translation from German] – See judgment by the Federal Court of Justice of 11 February 2010 in BGH, I ZR 178/08 – Half-Life 2. This judgment upheld a judgment of 16 October 2008 by the Higher Regional Court of Hamburg (OLG Hamburg, 10 U 87/07 HalfLife 2).

⁴⁹⁸ See Clause 1B SSA, described in footnote 107.

⁴⁹⁹ Tribunal de Grande Instance de Paris, 17 September 2019, N° RG 16/01008, *UFC - QUE CHOISIR c. S.a.r.l. Valve et Société Valve Corporation*, page 69. In this judgment, the French court has notably ruled that « contrary to the allegations made by Valve [...] the video game does not fall under the "provision of an online service" which would escape – if established – the application of" the EU Directives 2001/29/EC and 2009/24/EC because, "first, the "distribution" of a video game corresponds to "putting [such game] within the market" (or "making [it] available") within the meaning" of such Directives and, second, "the services offered by the platform, different from the video games to whom they are "attached", would not be offered to the user in the absence of a previous purchase of a video game by him/her". On the basis of these legal texts and the Court of Justice's judgment in *UsedSoft* (Case C-128/11 of 3 July 2012, EU:C:2012:407), the French court ruled that "the exhaustion of the distribution right applies irrespective of the distribution mode such as the one consisting in putting the video game on the market by way of downloading. As a consequence, the rightholder [...] cannot anymore oppose to the resale of such copy despite the existence of contractual provisions prohibiting further circulation" [Unofficial translation from French].

- (356) As far as the market situation is concerned, given that each of the Publishers is the copyright holder for all of its games geo-blocked by Steam activation keys at least for the whole of the EEA, there are no specific requirements or justifications for the use of geo-blocked keys other than hindering potential cross-border sales in order to artificially raise barriers to trade across the EEA market along geographic lines. For this reason, rather than being inherent to the nature of the licence itself, the agreements on the use of geo-blocked Steam activation keys between each of the Publishers and Valve were designed to ensure that distributors receiving the keys (e.g. [...] and [...]/[...]) would comply with the contractually defined territorial scope of their respective distribution licence (described in Section 6.2).
- (357) As a secondary consideration, from an economic perspective, the provision of Steam activation keys by Valve, including geo-blocked keys, is to be seen in the context of Valve’s business relationship with each of the Publishers whereby all PC video games for which Valve provided geo-blocked Steam activation keys were also offered for sale on Steam in (at least) the entire EEA.
- (358) In this respect, Valve indicated that the provision of the geo-blocked keys was offered as a free-of-charge extra service by Valve to the Publishers, aimed only at making Steam more successful.⁵⁰⁰ In fact, as indicated in Section 6.1.6, by expanding the output of Steam keys, Valve drives traffic to the Steam platform given that the PC video games need to be authenticated via Steam. Through the activation process described in Section 6.1.3, Valve obtains valuable user data, such as email addresses, which Valve could then use for dedicated marketing strategies.⁵⁰¹ In addition, through the Steam activation keys Valve gets also revenues in particular from “in-game purchases” (see also Recital (111)). In the responses to the Statements of Objections, Valve acknowledges that such revenues are significant.⁵⁰²
- (359) Although, as indicated in Section 6.1.6, it is not necessary for the finding of an infringement of Article 101 of the Treaty to show that the undertaking benefits from it and despite the fact that the benefits described in the previous Recital (358) are derived from the provision of Steam activation keys in general i.e. not necessarily geo-blocked ones, they are nonetheless relevant as they show that Valve’s position is not competitively neutral.
- (360) An additional element confirming this point is the fact that the geo-blocked Steam activation keys also allowed Valve to protect its own margins on the sales of PC video games on Steam in Western Europe. Such keys were in fact aimed at preventing cheaper imports from Central-Eastern Europe in order to keep prices in Western Europe higher. For Valve, the Western European market is more important, in terms of Steam revenues, than the Central-Eastern European market, as confirmed by Valve in response to the Statements of Objections: “*Steam Store sales in Western Europe very substantially outstrip sales in Eastern Europe*”⁵⁰³. Therefore, any change in the sale or price level in Western Europe as a result of cross-border sales would have meant lower revenues for Valve because of the 30%/70% revenue sharing agreement between Valve and each of the Publishers. The evidence listed in

⁵⁰⁰ This was also confirmed by Valve during the oral hearing [...]– see e.g. the following statement by [...].

⁵⁰¹ [...].

⁵⁰² [...].

⁵⁰³ [...].

Recital (127)⁵⁰⁴ show in fact that cross-border sales from cheaper Member States could “hurt” sales on Steam and, consequently, Valve’s own margins given the 30%/70% revenue sharing agreement with each of the Publishers.

- (361) Contrary to Valve’s claims, the existence of this practice is not contradicted by Valve’s estimation that only 3% of all games on Steam at the time were subject to “Steam Key locks” (i.e., geo-blocking via Steam activation keys) in the EEA.
- (362) What matters for the assessment under EU competition law (see Section 8.2.2.2, letters a) to e)) is that Valve’s practice was to make intra EEA-territorial controls available and to implement such controls whenever asked by the Publishers to do so and, on occasions, to raise this pro-actively with Publishers.

Valve is not a mere service provider

- (363) Valve claims that it is not liable for the conduct as it acted as a service provider rather than as a distributor.⁵⁰⁵
- (364) The clauses of the Steam Subscriber Agreement (SSA) mentioned in Section 6.1.4 show, however, that Valve acts as a digital distributor of the Publishers’ PC video games as it concludes transactions with users on Steam in its own right and not on behalf of the Publishers.⁵⁰⁶ In addition, Valve acts as the merchant of record *vis-à-vis* users⁵⁰⁷ and takes responsibility for transactions *vis-à-vis* them.⁵⁰⁸
- (365) Therefore, in relation to the products assessed for the purposes of this Decision, Valve acts as a distributor of third party PC video games on Steam rather than as an intermediary between users and publishers without interfering in the transactions on the platform.
- (366) The legal qualification of Steam does not affect the Commission’s competition law assessment in any event.⁵⁰⁹ This is because Article 101 of the Treaty refers to all agreements which distort competition and covers any contribution by an undertaking even if such contribution does not relate to an economic activity forming part of the relevant market on which that restriction comes about or is intended to come about.⁵¹⁰ It is therefore immaterial for the assessment under Article 101 of the Treaty whether Steam is an intermediary once it is established that Valve entered into

⁵⁰⁴ [...].

⁵⁰⁵ [...]

⁵⁰⁶ In particular, Clause 1.A: “For any interaction with Steam” the Steam user’s “relationship is with Valve. Except as otherwise indicated at the time of the transaction [...] any transactions for Subscriptions” that the Steam user makes “on Steam are being made from Valve”.

⁵⁰⁷ Statement by [...] at the oral hearing: [...].

⁵⁰⁸ No clause in the SSA excludes Valve’s responsibility *vis-à-vis* users. Clause 3.1 SSA reads as follows: “without prejudice of any statutory rights” the user “may have”, he/she “can request a refund of” his/her “purchases on Steam in accordance with the Terms of Valve’s Refund Policy”. Valve’s refund policy states as follows: “You can request a refund for nearly any purchase on Steam—for any reason. Maybe your PC doesn’t meet the hardware requirements; maybe you bought a game by mistake; maybe you played the title for an hour and just didn’t like it. It doesn’t matter. Valve will, upon request [...] issue a refund for any reason”, available at https://store.steampowered.com/steam_refunds/?l=english, printed on 26 November 2019, [...].

⁵⁰⁹ In the interests of clarity, the Commission notes that its assessment in this Decision of Valve’s position as a distributor is without prejudice to any qualification of the Steam platform for any other regulatory purposes.

⁵¹⁰ Case C-194/14 P AC-Treuhand, paragraphs 34-35.

agreements/concerted practices the object of which was to restrict cross-border sales in respect of the PC video games concerned.

8.2.3. *Conclusion on restriction of competition by object*

- (367) The Commission concludes that the object of the restrictions examined in Section 8.2.2.2, letters a) to e) was to hinder cross-border sales, in particular by restricting cross-border sales from the territory to which the geo-blocked Steam activation keys relate to the rest of the EEA.
- (368) According to settled case-law (see Sections 8.2.1.1 and 8.2.1.2), agreements that prevent or restrict users from buying a product because of their geographical location and/or prevent or restrict dealers from selling in response to unsolicited user requests (“passive sales”) lead to the partitioning of the internal market in breach of Article 101 of the Treaty and are deemed a restriction of competition by object under Article 101 of the Treaty.⁵¹¹ The same applies in relation to agreements which prevent/restrict parallel trade.⁵¹² The case-law confirms the anticompetitive nature of such type of agreements/concerted practices.
- (369) Therefore, the Commission concludes that the agreements/concerted practices between Valve and Bandai described in Section 6.2.1, between Valve and Capcom described in Section 6.2.2, between Valve and Focus Home described in Section 6.2.3, between Valve and Koch Media described in Section 6.2.4, and between Valve and ZeniMax described in Section 6.2.5 have as their object the restriction of competition within the meaning of Article 101 of the Treaty. As the notion that such agreements/concerted practices constitute a restriction by object under Article 101 of the Treaty is well established, it cannot be seen as novel.⁵¹³
- (370) The Commission also concludes that there are no circumstances falling within the economic and legal context of the agreements/concerted practices between Valve and Bandai; between Valve and Capcom; between Valve and Focus Home; between Valve and Koch Media and between Valve and ZeniMax that would prevent the Commission from finding that such agreements/concerted practices are liable to impair competition and have as their object the restriction of competition within the meaning of Article 101 of the Treaty.

8.3. **Single and continuous infringement**

8.3.1. *Principles*

- (371) 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 continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. It follows from the express terms of Article 101 of the Treaty that an agreement may consist of a series of acts or a course of conduct.⁵¹⁴

⁵¹¹ Case C-70/93 *BMW*, paragraphs 19 and 21; Case T-62/98 *Volkswagen*, paragraph 115; Case C-306/96 *Javico*, paragraphs 13 and 14.

⁵¹² Case C-19/77 *Miller*, paragraph 7; Case T-66/92 *Herlitz*, paragraph 29; Case T-77/92 *Parker Pen*, paragraph 37.

⁵¹³ Case T-472/13 *Lundbeck*, currently under appeal, paragraph 438.

⁵¹⁴ Case C-49/92 P *Anic*, paragraph 81.

- (372) The Court of Justice 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*"⁵¹⁵ and that the existence of an "overall plan" (and thus a single infringement) can be established by a finding that the participants to a series of practices and/or agreements collusively aimed at restricting competition between them.⁵¹⁶
- (373) Accordingly, if the different actions form part of an "overall plan" because their identical objects distort 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.⁵¹⁷ Furthermore, a complex infringement may properly be viewed as a single and continuous infringement for the time during which it existed.⁵¹⁸
- (374) The Commission is also entitled to attribute liability to an undertaking in relation to all of the types of anticompetitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole, even if the undertaking has participated directly in only some of the types of anticompetitive conduct comprising the single and continuous infringement, but has been aware of all of the other unlawful conduct planned or put into effect by the others in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk.⁵¹⁹
- (375) In the absence of such awareness, where an undertaking has directly taken part in one or more of the forms of anticompetitive conduct comprising a single and continuous infringement but it has not been shown that it was aware of the other offending conduct planned or put into effect by the other participants in pursuit of the same objectives, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it participated directly and for the conduct planned or put into effect by the other participants for which the undertaking was shown to be aware or was able to reasonably foresee.⁵²⁰

⁵¹⁵ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P *Aalborg Portland*, paragraph 258; Judgment of the Court of 21 September 2006, *Technische Unie BV v Commission*, C-113/04 P, ECLI:EU:C:2006:593, paragraph 178. In this judgment, the Court of Justice also pointed out that the different arrangements and practices "*pursued the same anti-competitive object, consisting of maintaining prices at a supra-competitive level*" (paragraph 180).

⁵¹⁶ Judgment of the Court of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, ECLI:EU:C:2006:592, paragraphs 162-163.

⁵¹⁷ Judgment of the Court of 24 June 2015, *Fresh Del Monte Produce Inc. v Commission and Commission v Fresh Del Monte Produce Inc.*, (hereinafter referred to as "*Del Monte*"), Joined cases C-293/13 P and C-294/13 P, ECLI:EU:C:2015:416, paragraph 156.

⁵¹⁸ Judgment of the Court of First Instance of 15 March 2000, *Cimenteries CBR and Others v Commission*, Joined cases T-25/95 and others, ECLI:EU:T:2000:77, paragraph 3699.

⁵¹⁹ Joined cases C-293/13 P and C-294/13 P *Del Monte*, paragraph 158 and the case-law cited.

⁵²⁰ Joined cases C-293/13 P and C-294/13 P *Del Monte*, paragraph 159 and the case-law cited.

- (376) In this regard, the finding of the existence of a single and continuous infringement is separate from the question whether liability for that (single and continuous) infringement is imputable to an undertaking in its entirety.⁵²¹
- (377) This has been confirmed by the General Court in *Soliver*: "[...] the fact that there is a single and continuous infringement does not necessarily mean that an undertaking participating in one or more aspects can be held liable for the infringement as a whole. The Commission still has to establish that that undertaking was aware of the other undertakings' anti-competitive activities at European level or that it could reasonably have foreseen them".⁵²²
- (378) The Court of Justice has also found that an undertaking can be held liable for participating in a single and continuous infringement even if that undertaking did not put into effect the anticompetitive practices in a given Member State where competition was affected by the infringement.⁵²³
- (379) Finally, the Commission has already held that the concept of single and continuous infringement applies to vertical agreements/concerted practices that restrict competition within the internal market⁵²⁴ which has also been recognised by the Court of Justice.⁵²⁵

8.3.2. Application to the Cases

8.3.2.1. Introduction

- (380) This section of the Decision sets out the reasons underlying the conclusion that the agreements/concerted practices between each Publisher and Valve for the setting-up of activation restrictions and/or for the provision of the related geo-blocked Steam activation keys constitute (part of) five separate single and continue infringements of Article 101 of the Treaty for which Valve is held liable.
- (381) As indicated in Section 8.2.3 the Commission has reached the conclusion that the agreement/concerted practice for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys between each of the five Publishers on the one hand and Valve on the other hand, constitute infringements by object of Article 101 TFEU.
- (382) Distribution agreements between Bandai, Focus Home, Koch Media and ZeniMax and certain of their respective distributors, containing cross-border sale restrictions (described in this Decision under Section 6.3) were also found by the Commission to be in breach of Article 101 of the Treaty (see, respectively, Commission Decision C(2021)57 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40422 – Bandai Namco; Commission Decision C(2021)78 of 20 January 2021 relating to a proceeding under

⁵²¹ Judgment of the General Court of 15 December 2016, *Infineon Technologies AG v Commission*, T-758/14, ECLI:EU:T:2016:737, paragraph 226.

⁵²² Judgment of the General Court of 10 October 2014, *Soliver NV v Commission*, T-68/09, ECLI:EU:T:2014:867, paragraph 62.

⁵²³ Case C-642/13 P *Villeroy & Boch*, paragraphs 59-60.

⁵²⁴ Commission Decision of 30 October 2002 in Case COMP/35.587 *PO Video Games*, paragraphs 261 and ff. Commission decision of 26 May 2004 in Case COMP/C-3/37.980 *Souris-Topps*, paragraphs 122–128.

⁵²⁵ Judgment of the Court of First Instance of 30 April 2009, *Nintendo Co., Ltd and Nintendo of Europe GmbH v Commission*, T-13/03, ECLI:EU:T:2009:131, paragraphs 45 and 50.

Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40413 – Focus Home; Commission Decision C(2021)74 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40414 - Koch Media; Commission Decision C(2021)63 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40420 – ZeniMax).

(383) According to the case-law quoted in Section 8.3.1, if the different actions form part of an "overall plan" because their identical objects distort 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.⁵²⁶ In practice that means that when two sets of agreements, each of them constituting in itself a separate infringement, share an overall plan pursuing a common objective they can be characterised as constituting a single and continuous infringement.

8.3.2.2. Agreements/concerted practices between Valve and Bandai

(384) As indicated in Sections 8.2.2.2 letter a) and 8.2.3, the agreements/concerted practices between Valve and Bandai for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys for each of the Bandai PC video games and geographic area concerned, on the one hand, and the licensing and distribution agreements between Bandai and the relevant independent distributors including cross-border sales restrictions, on the other hand, have, respectively, as their object the restriction of competition within the meaning of Article 101 of the Treaty and, taken in isolation, constitute restrictions of competition pursuant to Article 101(1) of the Treaty.

(385) According to the case-law quoted in Section 8.3.1, when two sets of agreements share an overall plan pursuing a common objective, they can be characterized as constituting a single and continuous infringement, even if each of them may in itself constitute a separate infringement.

(386) The evidence set out in Sections 6.2.1 and 6.3.2 demonstrates that Bandai wanted to achieve the anticompetitive objective of restricting cross-border sales within the internal market and, for this purpose, it had a two-pronged strategy combining technical restrictions via the Steam activation keys with contractual restrictions imposed on the relevant independent distributors. In this regard, the agreements/concerted practices between Bandai and Valve regarding geo-blocked Steam activation keys, on the one hand, and the bilateral agreements between Bandai and one of its distributors, [...], containing cross-border sale restrictions, on the other hand, shared the common objective of restricting cross-border sales of certain of Bandai's PC video games (see Sections 6.2.1 and 6.3.2).

(387) For Bandai's PC video games listed in Section 6.2.1, the activation restrictions and the provision of the related geo-blocked Steam activation keys that Valve provided to Bandai for the PC video games listed in Section 6.2.1 were used in combination with cross-border sale restrictions set out in agreements between Bandai and one of its distributors, [...] (see Section 6.3.2).⁵²⁷ This further confirms that the use of geo-blocked Steam activation keys along with the underlying activation restrictions on

⁵²⁶ Joined cases C-293/13 P and C-294/13 P *Del Monte*, paragraph 156.

⁵²⁷ As indicated in Section 6.3.2 cross-border sale restrictions set out in agreements between Bandai and [...] covered also PC video games for which there is no evidence that Valve provided geo-blocked keys.

the one hand and the contractual cross-border sales restrictions on the other hand both pursued the same anti-competitive aim of preventing the physical and digital distribution of PC video games to users located outside [...]’s licensed territory.

- (388) The evidence in Section 6.3.2 shows that Valve not only provided Bandai with the technical means to geo-block the PC video games sold by certain Bandai's distributors, e.g. [...], in certain EEA countries, but it also actively contributed by providing geo-blocked Steam activation keys to the common objective of restricting cross-border sales.
- (389) Therefore, Valve contributed by its own conduct to the common objective of restricting cross-border sales from the territory to which the Steam activation keys were geo-blocked and/or the contractual clauses restricting cross-border sales were related, to the rest of the EEA.
- (390) In light of the above, the Commission finds that Bandai and Valve were party to a single and continuous infringement consisting in agreements/concerted practices for the setting up of activation restrictions and the provision of the related geo-blocked Steam activation keys for five of Bandai’s PC video games⁵²⁸ which, together with the distribution agreements between Bandai and its distributor [...], form a broader single and continuous infringement for which Bandai is liable (see Commission Decision C(2021)57 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40422 – Bandai Namco and Section 6.3.2 of this Decision).
- (391) On the basis of the principle set out in the case-law quoted in Section 8.3.1, as there is no evidence that Valve was aware (or should have been aware) of the cross-border sale restrictions contained in the distribution agreements between Bandai and [...] (as described in Section 6.3.2), Valve is held liable within the broader single and continuous infringement only for the part concerning agreements/concerted practices for the setting up of activation restrictions and/or the provision of geo-blocked Steam activation keys to Bandai.

8.3.2.3. Agreements/concerted practices between Valve and Capcom

- (392) As indicated in Sections 8.2.2.2 letter b) and 8.2.3, the agreements/concerted practices between Valve and Capcom for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys for each of the Capcom PC video games and the geographic area concerned have as their object the restriction of competition within the meaning of Article 101 of the Treaty and, taken in isolation, constitute restrictions of competition pursuant to Article 101 of the Treaty.
- (393) According to the case-law quoted in Section 8.3.1, when several agreements, each of them constituting in itself a separate infringement, pursue a common objective they can be characterised as constituting a single and continuous infringement. The evidence set out in Section 6.2.2.3 demonstrates that the agreements/concerted practices between Capcom and Valve regarding geo-blocked Steam activation keys shared the common objective of restricting cross-border sales of certain of Capcom’s PC video games (see Section 8.2.2.2 letter b). This shows the existence of an identity of purposes within the meaning of the case law quoted in Section 8.3.1 between each

⁵²⁸ Namely, “[...]”, “[...]”, “[...]”, “[...]” and “[...]”.

agreement to set up activation restrictions and/or to provide the related geo-blocked Steam activation keys for a given Capcom PC video game,.

- (394) In light of the above, the Commission finds that Capcom and Valve were party to a single and continuous infringement consisting in agreements/concerted practices for the setting up of activation restrictions and the provision of the related geo-blocked Steam activation keys for the five Capcom PC video games identified at Section 6.2.2.

8.3.2.4. Agreements/concerted practices between Valve and Focus Home

- (395) As indicated in Sections 8.2.2.2 letter c) and 8.2.3, the agreements/concerted practices between Valve and Focus Home for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys for each of the Focus Home's PC video games and geographic area concerned, on the one hand, and the licensing and distribution agreements between Focus Home and the relevant independent distributors including cross-border sales restrictions, on the other hand, have, respectively, as their object the restriction of competition within the meaning of Article 101 of the Treaty and, taken in isolation, constitute restrictions of competition pursuant to Article 101(1) of the Treaty.

- (396) The evidence set out in Sections 6.2.3 and 6.3.3 demonstrates that Focus Home wanted to achieve the anticompetitive objective of restricting cross-border sales within the internal market and, for this purpose, it had a two-pronged strategy combining technical restrictions via the Steam activation keys with contractual restrictions imposed on the relevant Independent Distributors. In this regard, the agreements/concerted practices between Focus Home and Valve regarding geo-blocked Steam activation keys, on the one hand, and the bilateral agreements between Focus Home and certain of its distributors containing cross-border sale restrictions, on the other hand, shared the common objective of restricting cross-border sales of certain of Focus Home's PC video games (see Sections 8.2.2.2 letter c) and 6.3.3). This shows the existence of an identity of purposes between these two separate infringements, within the meaning of the case law quoted in Section 8.3.1.

- (397) In addition, for Focus Home's PC video games listed in Section 6.2.3, the set up of activation restrictions and the related geo-blocked Steam activation keys that Valve provided to Focus Home were used in combination with cross-border sale restrictions set out in agreements between Focus Home and certain of its distributors, including [...], [...], [...],⁵²⁹ This further confirms that the use of geo-blocked Steam activation keys along with the underlying activation restrictions on the one hand and the contractual cross-border sales restrictions on the other hand both pursued the same anti-competitive aim of preventing the physical and digital distribution of PC video games to users located outside the Independent Distributors' licensed territories, including Estonia, Hungary, Latvia, Lithuania and/or Poland.

- (398) The evidence in Sections 6.2.3 and 6.3.3, shows that Valve not only provided to Focus Home the technical means to geo-block the PC video games sold by certain Focus Home's distributors, e.g. [...], [...], [...], [...] and [...] in certain EEA countries,

⁵²⁹ As indicated in Section 6.3.3 cross-border sale restrictions set out in agreements between Focus Home and Independent Distributors covered also PC video games for which there is no evidence that Valve provided geo-blocked keys.

but it also actively contributed by providing geo-blocked Steam activation keys to the common objective of restricting cross-border sales.

- (399) Therefore, Valve contributed by its own conduct to the common objective of restricting cross-border sales from the territory to which the Steam activation keys were geo-blocked and/or the contractual clauses restricting cross-border sales were related, to the rest of the EEA.
- (400) In light of the above, the Commission finds that Focus Home and Valve were party to a single and continuous infringement consisting in agreements/concerted practices for the setting up of activation restrictions and the provision of the related geo-blocked Steam activation keys for Focus Home's PC video games listed in Section 6.2.3 which, together with the distribution agreements between Focus Home and certain of its distributors, form a broader single and continuous infringement for which Focus Home is liable (see Commission Decision C(2021)78 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40413 – Focus Home and Section 6.3.3 of this Decision).
- (401) On the basis of the principle set out in the case-law quoted in Section 8.3.1, as there is no evidence that Valve was aware (or should have been aware) of the cross-border sale restrictions contained in the distribution agreements between Focus Home and certain of its distributors (as described in Section 6.3.3), Valve is held liable within the broader single and continuous infringement only for the part concerning agreements/concerted practices for the setting up of activation restrictions and/or the provision of geo-blocked Steam activation keys to Focus Home.

8.3.2.5. Agreements/concerted practices between Valve and Koch Media

- (402) As indicated in Sections 8.2.2.2 letter d) and 8.2.3, the agreements/concerted practices for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys for each of the Koch Media PC video games and geographic area concerned, on the one hand, and the licensing and distribution agreements between Koch Media and the relevant independent distributors including cross-border sales restrictions, on the other hand, have, respectively, as their object the restriction of competition within the meaning of Article 101 of the Treaty and, taken in isolation, constitute restrictions of competition pursuant to Article 101(1) of the Treaty.
- (403) The evidence set out in Sections 6.2.4 and 6.3.4 demonstrates that Koch Media wanted to achieve the anticompetitive objective of restricting cross-border sales within the internal market and, for this purpose, it had a two-pronged strategy combining technical restrictions via the Steam activation keys with contractual restrictions imposed on the relevant independent distributors. In this regard, the agreements/concerted practices between Koch Media and Valve regarding geo-blocked Steam activation keys, on the one hand, and the bilateral agreements between Koch Media and certain of its distributors containing cross-border sale restrictions, on the other hand, shared the common objective of restricting cross-border sales of certain of Koch Media's PC video games Home (see Sections 6.2.4 and 6.3.4). This shows the existence of an identity of purposes between these two separate infringements, within the meaning of the case law quoted in Section 8.3.1.
- (404) In addition, for Koch Media's PC video games listed in Section 6.2.4, the setting up of the activation restrictions and the provision of the related geo-blocked Steam

activation keys that Valve provided to Koch Media were used in combination with cross-border sale restrictions set out in agreements between Koch Media and two of its distributors, i.e. [...] and [...].⁵³⁰ This further confirms that the use of geo-blocked Steam activation keys along with the underlying activation restrictions on the one hand and the contractual cross-border sales restrictions on the other hand both pursued the same anti-competitive aim of preventing the physical and digital distribution of PC video games to users located outside the distributors' licensed territories.

- (405) The evidence in Section 6.2.4, shows that Valve not only provided Koch Media with the technical means to geo-block the PC video games sold by Koch Media's distributors, e.g. [...] and [...], in certain EEA countries, but it also actively contributed by providing geo-blocked Steam activation keys to the common objective of restricting cross-border sales.
- (406) Therefore, Valve contributed by its own conduct to the common objective of restricting cross-border sales from the territory to which the Steam activation keys were geo-blocked and/or the contractual clauses restricting cross-border sales were related, to the rest of the EEA.
- (407) In light of the above, the Commission finds that Koch Media and Valve were party to a single and continuous infringement consisting in agreements/concerted practices for the setting up of activation restrictions and the provision of the related geo-blocked Steam activation keys for Koch Media's PC video games listed in Section which, together with the distribution agreements between Koch Media and, respectively, [...] and [...] form a broader single and continuous infringement for which Koch Media is liable (see Commission Decision C(2021)74 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40414 - Koch Media and Section 6.3.4 of this Decision).
- (408) On the basis of the principle set out in the case-law quoted in Section 8.3.1, as there is no evidence that Valve was aware (or should have been aware) of the cross-border sale restrictions contained in the distribution agreements between Koch Media and, respectively, [...] and [...] (as described in Section 6.3.4), Valve is held liable within the broader single and continuous infringement only for the part concerning agreements/concerted practices for the setting up of activation restrictions and/or the provision of geo-blocked Steam activation keys to Koch Media.

8.3.2.6. Agreements/concerted practices between Valve and ZeniMax

- (409) As indicated in Sections 8.2.2.2 letter e) and 8.2.3, the agreements/concerted practices for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys for each of the ZeniMax PC video games and geographic area concerned on the one hand, and the licensing and distribution agreements between ZeniMax and the relevant independent distributors including cross-border sales restrictions, on the other hand, have, respectively as their object the restriction of competition within the meaning of Article 101 of the Treaty and, taken in isolation, constitute restrictions of competition pursuant to Article 101(1) of the Treaty.

⁵³⁰ As indicated in Section 6.3.4 cross-border sale restrictions set out in agreements between Koch Media and [...] and [...], respectively, covered also PC video games for which there is no evidence that Valve provided geo-blocked keys.

- (410) The evidence set out in Section 6.3.5 demonstrates that ZeniMax [...] had a two-pronged strategy combining technical restrictions via the Steam activation keys with contractual restrictions imposed on the relevant independent distributors. In this regard, the agreements/concerted practices between ZeniMax and Valve regarding geo-blocked Steam activation keys, on the one hand, and the bilateral agreements between ZeniMax and one of its distributors, namely [...], containing cross-border sale restrictions, on the other hand, shared the common objective of restricting cross-border sales of certain of Zenimax' PC video games (see Sections 8.2.2.2 letter e) and Section 6.3.5). This shows the existence of an identity of purposes between these two separate infringements, within the meaning of the case law quoted in Section 8.3.1.
- (411) The activation restrictions and the related geo-blocked Steam activation keys that Valve provided to ZeniMax for the PC video games listed in Section 6.2.5, were used in combination with cross-border sale restrictions set out in agreements between ZeniMax and one of its distributors, [...]. This further confirms that the use of geo-blocked Steam activation keys along with the underlying activation restrictions on the one hand and the contractual cross-border sales restrictions on the other hand both pursued the same anti-competitive aim of preventing the [...] distribution of PC video games to users located outside [...]’s licensed territories.
- (412) According to the case-law quoted in Section 8.3.1, when two sets of agreements, each of them constituting in itself a separate infringement, share an overall plan pursuing a common objective, they can be characterized as constituting a single and continuous infringement, even if each of them may in itself constitute a separate infringement.
- (413) The evidence in Section 6.2.5, shows that Valve not only provided ZeniMax with the technical means to geo-block the PC video games sold by ZeniMax distributor, e.g. [...], in certain EEA countries, but it also actively contributed by providing geo-blocked Steam activation keys to the common objective of restricting cross-border sales.
- (414) Therefore, Valve contributed by its own conduct to the common objective of restricting cross-border sales from the territory to which the Steam activation keys were geo-blocked and/or the contractual clauses restricting cross-border sales were related, to the rest of the EEA.
- (415) In light of the above, the Commission finds that ZeniMax and Valve were party to a single and continuous infringement consisting in agreements/concerted practices for the setting up of activation restrictions and the provision of the related geo-blocked Steam activation keys for ZeniMax PC video games listed in Section 6.2.5, together with the distribution agreements between ZeniMax and its distributor [...], form a broader single and continuous infringement for which ZeniMax is liable (see Commission Decision C(2021)63 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40420 – ZeniMax and Section 6.3.5 of this Decision).
- (416) On the basis of the principle set out in the case-law quoted in Section 8.3.1, as there is no evidence that Valve was aware (or should have been aware) of the cross-border sale restrictions contained in the distribution agreements between ZeniMax and [...], Valve is held liable within the broader single and continuous infringement only for the part concerning agreements/concerted practices for the setting up of activation restrictions and/or the provision of geo-blocked Steam activation keys to ZeniMax.

8.3.2.7. Conclusion

- (417) The agreements/concerted practices between Valve and Capcom constitute the whole of the single and continuous infringement in Case AT.40424 – Capcom, for which Valve is held liable.
- (418) Conversely, the agreements/concerted practices between Valve and, respectively, Bandai, Focus Home, Koch Media and ZeniMax form part of four broader single and continuous infringements, which additionally consist of distribution agreements between each of the four concerned Publishers and certain of their respective distributors, containing cross-border sale restrictions which were found by the Commission to be in breach of Article 101 of the Treaty (see, respectively, Commission Decision C(2021)57 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40422 – Bandai Namco; Commission Decision C(2021)78 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40413 – Focus Home; Commission Decision C(2021)74 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40414 - Koch Media; Commission Decision C(2021)63 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40420 – ZeniMax as well as described in this Decision under Section 6.3). There is no evidence that Valve was aware of the cross-border sales restrictions in these distribution agreements.
- (419) In Cases AT.40413 – Focus Home, AT.40414 – Koch Media, AT.40420 – ZeniMax and AT.40422 - Bandai, Valve is therefore only held liable for the parts of those infringements concerning the setting up of activation restrictions and/or the provision of the related geo-blocked Steam activation keys, irrespective of whether these geo-blocked keys were used as a standalone technical way to restrict cross-border sales or in combination with contractual restrictions limiting such cross-border sales.

8.4. Effect on trade between Member States and between Contracting Parties to the EEA Agreement and appreciable restriction of competition

8.4.1. Principles

- (420) Agreements or concerted practices that have as their object or their effect an appreciable restriction of competition are caught by the prohibition contained in Article 101 of the Treaty when they appreciably affect trade between Member States. Those agreements are equally caught by Article 53 of the EEA Agreement when they appreciably affect trade within the EEA.
- (421) It follows from well-established case-law that the interpretation and application of the condition relating to effects on trade between Member States contained in Articles 101 and 102 of the Treaty must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by EU law and the law of the Member States. Thus, EU law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of the internal market, in particular by sealing off

national markets or by affecting the structure of competition within the common market.⁵³¹ The effect on trade needs to be assessed on the basis of three elements.⁵³²

- (422) First, the concept of trade between Member States is not limited to traditional exchanges of goods and services across borders, but covers all cross-border economic activity. In addition, it also encompasses practices affecting the competitive structure of the internal market by eliminating or threatening to eliminate a competitor operating within the territory of the European Union.⁵³³
- (423) Second, a practice must be capable of having an effect on trade between Member States⁵³⁴. According to settled case-law, this notion implies that it must be foreseeable with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.⁵³⁵
- (424) Third, the potential effect on trade between Member States must be "appreciable". This is assessed primarily with reference to the position of an undertaking on a relevant product market.⁵³⁶ The stronger the position of an undertaking, the more likely it is that the effect on trade between Member States of a practice will be appreciable.⁵³⁷ When by its very nature the agreement or practice is capable of affecting trade between Member States, the appreciability threshold is lower than in the case of agreements and practices that are not by their very nature capable of affecting trade between Member States.⁵³⁸
- (425) The Court of Justice held that an agreement that may affect trade between Member States and that has an anticompetitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.⁵³⁹

⁵³¹ Judgment of the Court of 25 January 2007, *Dalmine SpA v Commission*, C-407/04 P, ECLI:EU:C:2007:53, paragraph 89.

⁵³² Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty ("Guidelines on the effect on trade concept"), OJ C 101 of 27.4.2004, page 81, paragraphs 18, 19-22, 23-43 and 44-57.

⁵³³ Judgement of the Court of 6 March 1974, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, Joined cases 6 and 7-73, ECLI:EU:C:1974:18, paragraph, paragraphs 32-33; Judgment of the Court of First Instance of 8 October 1996, *Compagnie Maritime Belge transports SA and Compagnie maritime belge SA, Dafra-Lines A/S, Deutsche Afrika-Linien GmbH & Co. and Nedlloyd Lijnen BV v Commission*, Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93, ECLI:EU:T:1996:139, paragraph 203.

⁵³⁴ Judgment of the Court of 9 November 1983, *Michelin NV/Nederlandsche Banden Industrie Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, paragraph 104; Judgment of the Court of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, ECLI:EU:C:1991:161, paragraph 32; Judgment of the Court of First Instance of 7 October 1999, *Irish Sugar plc v Commission*, T-228/97, ECLI:EU:T:1999:246, paragraph 170.

⁵³⁵ Judgment of the Court of 9 July 1969, *Franz Völk v S.P.R.L. Établissements J. Vervaecke* (hereinafter referred to as "*Völk*"), C-5/69, ECLI:EU:C:1969:35, paragraphs 5-7.

⁵³⁶ Case C-5/69 *Völk*, paragraphs 5-7.

⁵³⁷ Judgment of the Court of First Instance of 1 April 1993, *BPB Industries plc and British Gypsum Ltd v Commission*, T-65/89, ECLI:EU:T:1993:31, paragraph 138.

⁵³⁸ Guidelines on the effect on trade concept, paragraph 45.

⁵³⁹ Case C-226/11 *Expedia*, paragraph 37.

8.4.2. *Application to the Cases*

- (426) The agreements/concerted practices between Valve and each of the Publishers have the object of restricting or preventing trade between Member States and EEA countries as they restrict the ability of the respective Publishers' distributors based in certain EEA countries to sell in response to unsolicited requests from users or resellers located within the EEA but outside the EEA countries where those Publishers' distributors are located.⁵⁴⁰
- (427) Valve itself operates on the basis of non-exclusive EEA-wide (if not worldwide) licences. In addition, as shown by the emails in Sections 6.1.6 and 6.2, the purpose of the geo-blocked keys was to restrict cross-border sales, which confirms that there is trade on a cross-border basis that would have been possible in the absence of the restrictions.
- (428) By their very nature, those agreements/concerted practices are designed to prevent cross-border sales and are thus liable to partition the internal market and consequently to affect trade between Member States.
- (429) The Commission concludes that Valve's conduct described in Section 6.2 and sub-Sections affected trade between Member States and had an anticompetitive object. Therefore, by its very nature and independently of any concrete effect that it may have had, such conduct constituted an appreciable restriction of competition in violation of Article 101 of the Treaty and of Article 53 of the EEA Agreement.

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

- (430) Unless specifically indicated otherwise, in the present Section references to Article 101(3) of the Treaty should be understood as referring to both Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement and references to Member States should be understood as also referring to Contracting Parties to the EEA Agreement.

8.5.1. *Introduction*

- (431) Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement may be declared inapplicable pursuant to Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement where an agreement or concerted practice satisfies the following four cumulative criteria:
- (i) it contributes to improving the production or distribution of goods or to promoting technical and economic progress;
 - (ii) it allows consumers⁵⁴¹ a fair share of the resulting benefit;
 - (iii) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objects, and

⁵⁴⁰ Namely, the Czech Republic, Hungary, Poland and Slovakia in Case AT.40422 – Bandai; Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia and Romania in Case AT.40424 – Capcom; Estonia, Hungary, Latvia, Lithuania and Poland in Case AT.40413 – Focus Home; the Czech Republic, Hungary, Poland, Slovakia and (for one game only) the UK in case AT.40414 – Koch Media; the Czech Republic, Hungary, Poland, Slovakia, Estonia, Latvia, Lithuania and (for one game only) Romania in case AT.40420 – ZeniMax.

⁵⁴¹ For the purposes of this section of the Decision, consumers that buy PC video games are referred to as users.

(iv) it does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(432) Even where a restriction by object pursuant to Article 101(1) of the Treaty is established, there is in principle the possibility for an exemption from the prohibition if the agreement satisfies the four conditions set out in Article 101(3) of the Treaty.⁵⁴²

8.5.1.1. Block Exemption Regulations

(433) Regulation No 16/65/EEC⁵⁴³ empowers the Commission to apply Article 101(3) of the Treaty by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty. This type of regulation is referred to as "block exemption regulation" ("BER"). Agreements which are not covered by a BER require an individual examination under Article 101(3) of the Treaty. A BER applies to both (formalised) agreements and concerted practices.

(434) Two BERs are potentially relevant to the conduct subject to this Decision, namely, the Technology Transfer Block Exemption Regulation ("TTBER")⁵⁴⁴ as well as accompanying Guidelines ("TT Guidelines")⁵⁴⁵ and the Vertical Block Exemption Regulation ("VBER")⁵⁴⁶ as well as accompanying Guidelines ("Vertical Guidelines")⁵⁴⁷.

8.5.2. The TTBER

8.5.2.1. Principles

(435) The TTBER and TT Guidelines apply to licence agreements entered into force as of 1 May 2014; earlier agreements remain subject to the 2004 TTBER ("2004 TTBER")⁵⁴⁸ and accompanying Guidelines ("2004 TT Guidelines")⁵⁴⁹ for a transitional period which ended on 30 April 2015.⁵⁵⁰

(436) The TTBER does not generally apply to trademark and copyright licence agreements, other than software copyright licence agreements, unless they are

⁵⁴² Judgment of the Court of First Instance of 15 July 1994, *Matra Hachette SA v Commission*, T-17/93, ECLI:EU:T:1994:89, paragraph 85; Judgment of the Court of 13 October 2011, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, (hereinafter referred to as «*Pierre Fabre*»), C-439/09, ECLI:EU:C:2011:649, paragraph 59.

⁵⁴³ Regulation No 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, OJ 36, 6.3.1965, p. 533.

⁵⁴⁴ 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 L93, 28.03.2014, p. 17-23.

⁵⁴⁵ Communication from the Commission - Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ C89, 28.03.2014, p. 3-50.

⁵⁴⁶ 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 102/1, 23.4.2010, p. 1-7.

⁵⁴⁷ Commission notice - Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1-46.

⁵⁴⁸ Commission Regulation (EC) 772/2004/EU on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123/11, 27.4.2004, p. 11-17.

⁵⁴⁹ Commission Notice — Guidelines on the application of Article 81 of the EC Treaty to technology Transfer Agreementstransfer agreements, OJ C 101/2, 27.4.2004, p. 2 – 42.

⁵⁵⁰ Article 10 of TTBER.

directly related to the production or sale of the contract products which are produced with the licenced technology.⁵⁵¹

- (437) The TTBER applies to agreements to the extent that: (i) they do not contain hardcore restrictions; and (ii) market shares of the parties to the agreement do not exceed 20% for agreements between competitors or 30% for agreements between non-competitors. Passive sales restrictions between licensees of the same licensor are hardcore restrictions,⁵⁵² hence not exempted by the TTBER, as such restrictions may partition the market and hinder market integration.

8.5.2.2. Application to the Cases

- (a) Agreements/concerted practices between Valve and Bandai (Case AT.40422 – Bandai)

- (438) For the purpose of the assessment of the agreements/concerted practices between Valve and Bandai only the 2004 TTBER and accompanying 2004 TT Guidelines are potentially relevant given that on 22 April 2014 Valve lifted the activation restrictions in relation to Steam activation keys already put on the market.
- (439) Without it being necessary to determine whether the SDA and the Steamworks Agreement of 22 March 2012 and the agreement/concerted practice to set up activation restrictions and/or to provide geo-blocked Steam activation keys between Valve and Bandai (which are all part of the same conduct as described in Section 6.2.1) involved a transfer of technology such that they could potentially fall within the scope of the 2004 TTBER, the benefit of the exemption would be lost in any event, since the agreement to geo-block the Steam activation keys qualifies as a hardcore restriction on the basis of Article 4(1)(c) and of Article 4(2)(b) of the 2004 TTBER.
- (440) In fact, as a result of this practice, Bandai's licensee in the Czech Republic, Hungary, Poland and Slovakia, i.e., [...], was prevented from selling passively into the EEA countries allocated to other licensees of Bandai.
- (441) Passive sales restrictions between licensees are not exempted by the 2004 TTBER. The exception set out in Article 4(2)(b)(ii) of the 2004 TTBER (i.e., protecting an exclusive licensee during the first two years of an agreement between non-competitors) is not applicable since the cumulative conditions set out in that Article are not met.
- (442) The Commission concludes that, even if the 2004 TTBER were to be applicable to the agreements/concerted practices between Bandai and Valve, the benefit of the block exemption would be lost given that there was an overall agreement between Bandai and Valve to restrict cross-border sales via geo-blocked Steam activation keys which qualifies as a hardcore restriction under Article 4(1)(c) and 4(2)(b) of the 2004 TTBER.

⁵⁵¹ Art 2(3) TTBER. In the 2004 TTBER the test was different as the block exemption was available for licensing agreements relating to trademark and copyright if these were ancillary to the technology licensed (e.g. software copyright).

⁵⁵² This applies both in relation to agreements between competitors (see Article 4(1)(c)) and between non-competitors (see Article 4(2)(b)). The 2004 TTBER contained an exception to this exclusion of passive sales restrictions, protecting an exclusive licensee during the first two years of an agreement between non-competitors (Article 4(2)(b)(ii) of 2004 TTBER).

(b) Agreements/concerted practices between Valve and Capcom (Case AT.40424 – Capcom)

- (443) For the purpose of the assessment of the agreements/concerted practices between Valve and Capcom only the 2004 TTBER and accompanying 2004 TT Guidelines are potentially relevant given that on 17 November 2014 Valve lifted the activation restrictions in relation to keys already put on the market.
- (444) Without it being necessary to determine whether the SDA of 1 February 2007 and the agreement/concerted practice to set up activation restrictions and / or to provide geo-blocked Steam activation keys between Valve and Capcom (which are all part of the same conduct as described in Section 6.2.2) involved a transfer of technology such that they could potentially fall within the scope of the 2004 TTBER, the benefit of the exemption would be lost in any event, since the agreement to geo-block the Steam activation keys qualifies as a hardcore restriction on the basis of Article 4(1)(c) and Article 4(2)(b) of the 2004 TTBER.
- (445) In fact, as a result of this practice, Capcom's licensee in the Czech Republic, Hungary, Poland and Slovakia, i.e., [...], was prevented from selling passively into the EEA countries allocated to other licensees of Capcom.
- (446) Passive sales restrictions between licensees are not exempted by the 2004 TTBER. The exception set out in Article 4(2)(b)(ii) of the 2004 TTBER (i.e., protecting an exclusive licensee during the first two years of an agreement between non-competitors) is not applicable since the cumulative conditions set out in that Article are not met.
- (447) The Commission concludes that, even if the 2004 TTBER were to be applicable to the agreements/concerted practices between Capcom and Valve, the benefit of the block exemption would be lost given that there was an overall agreement between Capcom and Valve to restrict cross-border sales via geo-blocked Steam activation keys which would qualify as a hardcore restriction under Article 4(1)(c) and 4(2)(b) of the 2004 TTBER.

(c) Agreements/concerted practices between Valve and Focus Home (Case AT.40413 – Focus Home)

- (448) For the purposes of the assessment of the agreements/concerted practices between Valve and Focus Home both the TTBER (and accompanying TT Guidelines) and the 2004 TTBER (and accompanying 2004 TT Guidelines) are potentially relevant given that the agreements/concerted practices between Valve and Focus Home started before 1 May 2014 and ended after 30 April 2015.
- (449) Without it being necessary to determine whether the SDAs/Steamworks Agreement and the agreement/concerted practice to set up activation restrictions and/or to provide geo-blocked Steam activation keys between Valve and Focus Home (which are all part of the same conduct as described in Section 6.2.3) involved a transfer of technology such that they could potentially fall within the scope of the TTBER and the 2004 TTBER, the benefit of the exemption would be lost in any event, since the agreement to geo-block the Steam activation keys qualifies as a hardcore restriction on the basis of Article 4(1)(c) and of Article 4(2)(b) of the TTBER and the 2004 TTBER.
- (450) In fact, as a result of this practice, Focus Home's licensees in Estonia, Hungary, Latvia, Lithuania and Poland, i.e. depending on their respective licensing and

distribution agreements [...], [...], [...], [...] , [...], were prevented from selling passively into the EEA countries allocated to other licensees of Focus Home.

- (451) Passive sales restrictions between licensees are not exempted by the TTBER or the 2004 TTBER. The exception set out in Article 4(2)(b)(ii) of the 2004 TTBER (i.e., protecting an exclusive licensee during the first two years of an agreement between non-competitors) is not applicable since the cumulative conditions set out in that Article are not met. This exception no longer appears in the TTBER.
- (452) The Commission concludes that, even if the TTBER or the 2004 TTBER were to be applicable to the agreements/concerted practices between Focus Home and Valve, the benefit of the block exemption would be lost given that there was an overall agreement between Focus Home and Valve to restrict cross-border sales via geo-blocked Steam activation keys which would qualify as a hardcore restriction under Article 4(1)(c) and 4(2)(b) of the TTBER and of the 2004 TTBER.
- (d) Agreements/concerted practices between Valve and Koch Media (Case AT.40414 – Koch Media)
- (453) For the purpose of the assessment of the agreements/concerted practices between Valve and Koch Media both the TTBER (and accompanying TT Guidelines) and the 2004 TTBER (and accompanying 2004 TT Guidelines) are potentially relevant given that the agreements/concerted practices between Valve and Koch Media started before 1 May 2014 and ended after 30 April 2015.
- (454) Without it being necessary to determine whether the 2008 Koch SDA/Steamworks Agreement and the agreement/concerted practice to set up activation restrictions and / or to provide geo-blocked Steam activation keys between Valve and Koch Media (which are all part of the same conduct as described in Section 6.2.4) involved a transfer of technology such that they could potentially fall within the scope of the TTBER and the 2004 TTBER, the benefit of the exemption would be lost in any event, since the agreement to geo-block the Steam activation keys qualifies as a hardcore restriction on the basis of Article 4(1)(c) and of Article 4(2)(b) of the TTBER and the 2004 TTBER.
- (455) In fact, as a result of this practice, Koch Media’s licensees in the Czech Republic, Hungary, Poland, Slovakia, i.e., [...] and [...], were prevented from selling passively into the EEA countries allocated to other licensees of Koch Media.
- (456) Passive sales restrictions between licensees are not exempted by the TTBER or the 2004 TTBER. The exception set out in Article 4(2)(b)(ii) of the 2004 TTBER (i.e., protecting an exclusive licensee during the first two years of an agreement between non-competitors) is not applicable since the cumulative conditions set out in that Article are not met. This exception no longer appears in the TTBER.
- (457) The Commission concludes that, even if the TTBER or the 2004 TTBER were to be applicable to the agreements/concerted practices between Koch Media and Valve, the benefit of the block exemption would be lost given that there was an overall agreement between Koch Media and Valve to restrict cross-border sales via geo-blocked Steam activation keys which would qualify as a hardcore restriction under Article 4(1)(c) and 4(2)(b) of the TTBER and of the 2004 TTBER.
- (e) Agreements/concerted practices between Valve and ZeniMax (Case AT.40420 – ZeniMax)

- (458) For the purposes of the assessment of the agreements/concerted practices between Valve and ZeniMax both the TTBER (and accompanying TT Guidelines) and the 2004 TTBER (and accompanying 2004 TT Guidelines) are potentially relevant given that the agreements/concerted practices between Valve and ZeniMax started before 1 May 2014 and ended after 30 April 2015.
- (459) Without it being necessary to determine whether the 2008 ZeniMax SDA and the agreement to set up activation restrictions and/or to provide geo-blocked Steam activation keys between Valve and ZeniMax (which are all part of the same conduct as described in Section 6.2.5) involved a transfer of technology such that they could potentially fall within the scope of the TTBER and the 2004 TTBER, the benefit of the exemption would be lost in any event, since the agreement to geo-block the Steam activation keys qualifies as a hardcore restriction on the basis of Article 4(1)(c) and of Article 4(2)(b) of the TTBER and of the 2004 TTBER.
- (460) In fact, as a result of this practice, ZeniMax licensee in the Czech Republic, Hungary, Poland, Slovakia, Estonia, Lithuania and Latvia, i.e., [...], was prevented from selling passively into the EEA countries allocated to other licensees of ZeniMax.
- (461) Passive sales restrictions between licensees are not exempted by the TTBER or the 2004 TTBER. The exception set out in Article 4(2)(b)(ii) of the 2004 TTBER (i.e., protecting an exclusive licensee during the first two years of an agreement between non-competitors) is not applicable since the cumulative conditions set out in that Article are not met. This exception does no longer appear in the TTBER.
- (462) The Commission concludes that, even if the TTBER or the 2004 TTBER were to be applicable to the agreements/concerted practices between ZeniMax and Valve, the benefit of the block exemption would be lost given that there was an overall agreement between ZeniMax and Valve to restrict cross-border sales via geo-blocked Steam activation keys which would qualify as a hardcore restriction under Article 4(1)(c) and 4(2)(b) of the TTBER and of the 2004 TTBER.

8.5.3. *The VBER*

8.5.3.1. Principles

- (463) The VBER and Vertical Guidelines apply to distribution agreements entered into as of 1 June 2010; earlier agreements remain subject to the old VBER ("1999 VBER")⁵⁵³ and accompanying Guidelines ("1999 Vertical Guidelines")⁵⁵⁴ for a transitional period which ended on 31 May 2011.⁵⁵⁵ The current VBER and accompanying Guidelines equally apply – as of 1 June 2011 - to agreements already in force on 1 June 2010 and thus concluded under the old legal framework.
- (464) On the basis of Article 2(5) VBER, if a particular technology license falls within the TTBER, the VBER will not be applicable. In this respect, pursuant to Article 2(3),

⁵⁵³ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21–25.

⁵⁵⁴ Commission notice - Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, p. 1–44.

⁵⁵⁵ Article 9 VBER.

pure licensing agreements (such as licences of a trademark for purposes of merchandising), fall outside its scope.⁵⁵⁶

- (465) Article 2(3) VBER also specifies that the exemption only applies if the agreement does not contain restrictions of competition having the same object as vertical restraints which are not exempted under the VBER. A restriction on passive sales and parallel trade is a hardcore restriction under the VBER (Article 4 (b)). Therefore, any restriction directly or indirectly imposed by the supplier upon its distributor to passively sell within the EEA would automatically prevent the VBER from applying to the entire agreement. The VBER generally considers online sales to be passive sales, which suppliers cannot therefore in principle restrict. This was confirmed by the Court of Justice.⁵⁵⁷

8.5.3.2. Application to the Cases

- (a) Agreements/concerted practices between Valve and Bandai (Case AT.40422 – Bandai)
- (466) The agreements/concerted practices between Bandai and Valve started after 1 June 2010. Therefore, only the VBER and accompanying Vertical Guidelines are applicable.
- (467) Without it being necessary to determine whether the SDA and the Steamworks Agreement of 22 March 2012 and the provision of geo-blocked Steam activation keys by Valve to Bandai fall within the scope of the VBER, the agreement/concerted practice between Valve and Bandai for the provision of geo-blocked Steam activation keys qualifies as a hardcore restriction as it restricts (at least) passive sales from the EEA countries in which distribution of the geo-blocked PC video games is allowed. Given that passive sales restrictions constitute hardcore restrictions under Article 4(b) VBER, the benefit of the VBER would be lost in any event.
- (b) Agreements/concerted practices between Valve and Capcom (Case AT.40424 – Capcom)
- (468) The agreements/concerted practices between Capcom and Valve started after 1 June 2010. Therefore, only the VBER and accompanying Vertical Guidelines are applicable.
- (469) Without it being necessary to determine whether the SDA of 1 February 2007 and the provision of geo-blocked Steam activation keys by Valve to Capcom fall within the scope of the VBER, the agreement/concerted practice between Valve and Capcom for the provision of geo-blocked Steam activation keys qualifies as a hardcore restriction as it restricts (at least) passive sales from the EEA countries in which distribution of the geo-blocked PC video games is allowed. Given that passive sales restrictions constitute hardcore restrictions under Article 4(b) VBER, the benefit of the VBER would be lost in any event.
- (c) Agreements/concerted practices between Valve and Focus Home (Case AT.40413 – Focus Home)

⁵⁵⁶ See Vertical Guidelines, paragraph 33.

⁵⁵⁷ Case C-439/09 *Pierre Fabre*, paragraph 54.

- (470) The agreements/concerted practices between Focus and Valve started after 1 June 2010. Therefore, only the VBER and accompanying Vertical Guidelines are applicable.
- (471) Without it being necessary to determine whether the SDAs/Steamworks Agreement and the provision of geo-blocked Steam activation keys by Valve to Focus Home fall within the scope of the VBER, the agreement/concerted practice between Valve and Focus Home for the provision of geo-blocked Steam activation keys qualifies as a hardcore restriction as it restricts (at least) passive sales from the EEA countries in which distribution of the geo-blocked PC video games is allowed. Given that passive sales restrictions constitute hardcore restrictions under Article 4(b) VBER, the benefit of the VBER would be lost in any event.
- (d) Agreements/concerted practices between Valve and Koch Media (Case AT.40414 – Koch Media)
- (472) The agreements/concerted practices between Valve and Koch Media started after 1 June 2010. Therefore, only the VBER and accompanying Vertical Guidelines are applicable.
- (473) Without it being necessary to determine whether the 2008 Koch SDA/Steamworks Agreement and the provision of geo-blocked Steam activation keys by Valve to Koch Media fall within the scope of the VBER, the agreement/concerted practice between Valve and Koch Media for the provision of geo-blocked Steam activation keys qualifies as a hardcore restriction as it restricts (at least) passive sales from the EEA countries in which distribution of the geo-blocked PC video games is allowed. Given that passive sales restrictions constitute hardcore restrictions under Article 4(b) VBER, the benefit of the VBER would be lost in any event.
- (e) Agreements/concerted practices between Valve and ZeniMax (Case AT.40420 – ZeniMax)
- (474) The agreements/concerted practices between ZeniMax and Valve started after 1 June 2010. Therefore, only the VBER and accompanying Vertical Guidelines are applicable.
- (475) Without it being necessary to determine whether the 2008 ZeniMax SDA and the provision of geo-blocked Steam activation keys by Valve to ZeniMax fall within the scope of the VBER, the agreement/concerted practice between Valve and ZeniMax for the provision of geo-blocked Steam activation keys qualifies as a hardcore restriction as it restricts (at least) passive sales from the EEA countries in which distribution of the geo-blocked PC video games is allowed. Given that passive sales restrictions constitute hardcore restrictions under Article 4(b) VBER, the benefit of the VBER would be lost in any event.

8.5.4. *Individual assessment of the application of Article 101(3) of the Treaty*

8.5.4.1. Introduction

- (476) Once it is established that an agreement/concerted practice is not covered by a BER, it remains possible for the undertakings under investigation to claim that the

restrictive agreements/concerted practices benefits from the application of Article 101(3) of the Treaty.⁵⁵⁸

Principles

- (477) According to Article 2 of Regulation (EC) No 1/2003, the undertaking claiming the benefit of Article 101(3) of the Treaty shall bear the burden of proving that the conditions of that recital are fulfilled.
- (478) Therefore, the examination of an agreement for the purposes of determining whether it contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, and whether that agreement generates appreciable objective advantages, must be undertaken in the light of the factual arguments and evidence provided by the undertaking.⁵⁵⁹
- (479) However, in certain cases the arguments and evidence put forward by the undertaking seeking to rely on the exemption under Article 101(3) of the Treaty may be of such a kind as to require the Commission to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged.⁵⁶⁰

Valve's arguments

- (480) According to Valve, the use of geo-blocked Steam activation keys provided objective benefits for consumers by allowing each of the Publishers to offer lower prices and expand output of PC video games in the EEA countries with generally lower purchasing power. According to Valve, due to the lack of friction regarding the cross-border trade of Steam activation keys, using geo-blocked Steam activation keys was the only way for the Publishers to prevent arbitrage and make geographic price differentiation possible.⁵⁶¹
- (481) Given that according to Valve the demand in the EEA countries with generally lower purchasing power is significantly lower and more elastic (price sensitive), without the possibility to use the geo-blocked Steam activation keys it is, according to Valve, highly likely that each of the Publishers would have aligned prices of PC video games in all EEA countries to the higher prices prevailing in the EEA countries with higher purchasing power, thereby reducing output and harming consumers.⁵⁶²
- (482) The geo-blocked Steam activation keys did not, according to Valve, eliminate competition in respect of a substantial part of the products in question because i) they applied to a very small share of the PC video games offered on Steam; ii) the PC video games sector is not highly concentrated; and iii) there are hundreds of publishers offering PC video games.⁵⁶³

⁵⁵⁸ Case C-439/09 *Pierre Fabre*, paragraph 59.

⁵⁵⁹ Judgment of the Court of 11 September 2014, *MasterCard Inc. and Others v Commission*, (hereinafter referred to as "*MasterCard*"), C-382/12 P, ECLI:EU:C:2014:2201, paragraph 235 and Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GSK*, paragraph 102.

⁵⁶⁰ Judgment of the Court of First Instance of 27 September 2006, *GlaxoSmithKline Services Unlimited v Commission*, T-168/01, ECLI:EU:T:2006:265, paragraph 236; Judgment of the General Court of 24 May 2012, *MasterCard, Inc. and Others v Commission*, T-111/08, ECLI:EU:T:2012:260, paragraph 197, upheld by the Court in Case C-382/12 P *MasterCard*.

⁵⁶¹ [...].

⁵⁶² [...].

⁵⁶³ [...].

- (483) During the oral hearing Valve stated that, before the Publishers’ requests to geo-block games intra-EEA, Valve “*pushed back*” those requests by proposing to the Publishers an alleged “*lower friction*” restriction, i.e. geo-blocking by territory only (as opposed to geo-blocking by territory and language as requested by certain Publishers).⁵⁶⁴ In this regard, Valve stated that what Publishers did, i.e. using the geo-blocked Steam activation keys to stop intra-EEA trade, “*was stupid*”.⁵⁶⁵
- (484) During the oral hearing, Valve also stated that there are countries such as [...]or China where the average sales prices of PC video games are so much lower than in the EU that geo-blocking makes commercial sense. However, Valve does not believe that the same applies to the EEA and considers that “*the Publishers completely have their priorities wrong here*”.⁵⁶⁶ Consequently, Valve indicated that it does not apply geographical restrictions within the EEA for their own games on Steam, and concluded that “*having these kinds of region locks within the EEA is*” not “*a good idea*”.⁵⁶⁷

Evidence

- (485) Valve claims that it does not have the data necessary to prove that the use of geo-blocked Steam activation keys led to lower prices and expansion of output of PC video games and that it is for the Commission to investigate the validity of the arguments, which it puts forward.⁵⁶⁸
- (486) In particular, Valve argues that the Court of Justice has made clear that when an undertaking has shown that the conditions of Article 101(3) of the Treaty “*could reasonably apply*”, by putting forward relevant, reliable and credible arguments, “*the Commission is obliged to refute those arguments*”.⁵⁶⁹
- (487) Valve thereby implies that it has satisfied its burden of proof in relation to Article 101(3) of the Treaty.

Application to the Cases

- (488) Based on the case-law cited in Recitals (478) and (479) and contrary to Valve’s claims, it is not enough for the undertaking to provide arguments to show that the conditions of Article 101(3) of the Treaty could reasonably apply in order to fulfil its burden of proof and to oblige the Commission to refute those arguments. The undertaking has to provide facts and evidence as otherwise the burden of proof would be reversed.
- (489) In this respect, as set out more in detail in Section 10 and sub-Section below, the Commission notes that the conduct subject to this Decision ended, respectively, in 2014 in relation to Valve’s agreements/concerted practices with Bandai and Capcom, and in 2015 in relation to Valve’s agreements/concerted practices with Focus Home, Koch Media and ZeniMax. Therefore, the data on the market impact of the conducts should be available, including to Valve.

⁵⁶⁴ Statement by [...] at the oral hearing: [...].

⁵⁶⁵ Statement by [...] at the oral hearing: [...].

⁵⁶⁶ Statement by [...] at the oral hearing, [...].

⁵⁶⁷ Statement by [...] at the oral hearing: [...].

⁵⁶⁸ [...].

⁵⁶⁹ [...].

- (490) In fact, given its ownership of the Steam platform, Valve has access to the vast amount of data including the data on games which were sold outside Steam but which were activated on Steam by means of Steam activation keys. In fact, the activation which requires the use of the activation key allows tracking when and in which territory the PC video game has been activated as described in Section 6.1.5.⁵⁷⁰ Consequently, Valve is able to estimate any change in the output of Steam-enabled PC video games in each of the EEA countries concerned, which allegedly occurred due to the use of geo-blocked Steam activation keys.
- (491) Information on retail prices at which the PC video games are sold is publicly available and, therefore, also available to Valve. Such information can be used to estimate any change in the price of the PC video games in each EEA country concerned, which allegedly occurred due to the use of geo-blocked Steam activation keys.
- (492) Valve has only put forward arguments which it claims could reasonably apply. It did not provide any data or information listed in Recitals (490) and (491) to which it has access or should have access to, to prove that the conditions of Article 101(3) of the Treaty are fulfilled.
- (493) Therefore, as Valve did not provide any facts or evidence to substantiate its claims, it did not satisfy the burden of proof when claiming that the conditions of Article 101(3) of the Treaty are fulfilled. Valve's claims in relation to Article 101(3) of the Treaty must, therefore, be rejected as unsubstantiated.

8.5.4.2. Cross-border sales restrictions and the internal market

- (494) Notwithstanding the fact that Valve did not satisfy its burden of proof in relation to Article 101(3) of the Treaty and that its claims must therefore be rejected as unsubstantiated, the Commission considers in the following paragraphs whether Article 101(3) of the Treaty could apply to the conduct at issue.

Principles

- (495) It is settled case-law that an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of a single market.⁵⁷¹ One of the goals of EU competition law is therefore to prevent the creation of obstacles to market integration, including, above all, limitations on the possibilities for consumers to purchase goods or services in any Member State they may choose.⁵⁷²
- (496) In assessing the potential pro-competitive effects flowing from an agreement/concerted practice against its potential anti-competitive effects for the purposes of applying Article 101(3) of the Treaty regard must therefore be had to the

⁵⁷⁰ [...]. The fact that Valve is in a position to check where keys are activated (see for example See Koch Media's internal email of 21 May 2013 h 21:36: "Hi [*name of Koch's employees*], **can you please ask Steam** [emphasis added] to give us some data on the [...] batches for [...]: 1) how many codes of the [...] batch have been redeemed, 2) **where were they activated country by country?**" [emphasis added], [...].

⁵⁷¹ Joined cases C-403/08 and C-429/08 *Murphy*, paragraph 139.

⁵⁷² Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, paragraph 100(d).

impact of the agreement on market integration and the creation of an internal market.⁵⁷³

- (497) In order to balance the goal of achieving market integration within the EU and legitimate business interests of right holders, the European Courts had recourse to the concept of absolute territorial protection.⁵⁷⁴
- (498) In *Murphy*,⁵⁷⁵ the Court of Justice held that a premium paid to the right holders concerned in order to guarantee absolute territorial exclusivity, which was such as to result in artificial price differences between the partitioned national markets, was not justified by the specific subject-matter of the intellectual property right at stake. Such partitioning and such an artificial price difference to which it gives rise are irreconcilable with the fundamental aim of the Treaty, which is the completion of the internal market.
- (499) Moreover, in *Nungesser*,⁵⁷⁶ the Court of Justice held that absolute territorial protection manifestly goes beyond what is indispensable for the improvement of the production or distribution or the promotion of technical or economic progress required by Article 101(3) of the Treaty and that it, therefore, constitutes a sufficient reason for refusing to grant an exemption under Article 101(3) of the Treaty.

Application to the Cases

- (500) The use of geo-blocked Steam activation keys restricted cross-border sales and therefore resulted in restrictions on users to purchase goods or services in any Member State they may choose contrary to the concept of an internal market.
- (501) It follows from *Nungesser* that an agreement/concerted practice aimed at contributing to the artificial maintenance of separate national markets generally go beyond what is indispensable for the improvement of the production or distribution or the promotion of technical or economic progress and that it therefore constitutes a sufficient reason for refusing to grant an exemption under Article 101(3) of the Treaty.
- (502) There are no indications that the market for PC video games has specific characteristics in terms of production or distribution which would require cross-border sales restrictions for its proper functioning. On the contrary, the fact that only a small number of PC video games were subject to the conduct at issue shows that such restrictions were not indispensable for the production and distribution of PC video games in general.
- (503) As to the specific geo-blocked PC video games, even if one accepted that the use of geo-blocked Steam activation keys generated pro-competitive effects in terms of a possible expansion of output of certain PC video games in certain Member States, for

⁵⁷³ Commission Notice: Guidelines on the application of Article 81(3) of the Treaty (OJ C 101/97, 27.4.2004), paragraph 50.

⁵⁷⁴ Case C-258/78 *Nungesser*, paragraph 78.

⁵⁷⁵ Joined cases C-403/08 and C-429/08 *Murphy*, paragraphs 115-116. This was also confirmed by the General Court in Case T-873/16 *Groupe Canal + v Commission*, paragraph 67 and, on this point, by the Court in Case C-132/19 P *Canal Plus*.

⁵⁷⁶ Case C-258/78 *Nungesser*, paragraphs 77 and 78. This was also confirmed by the General Court in Case T-873/16 *Groupe Canal + v Commission*, paragraph 68 and, on this point, by the Court in Case C-132/19 P *Canal Plus*.

which Valve would bear the burden of proof⁵⁷⁷, these potential pro-competitive effects do not outweigh the harm to the internal market brought about by cross-border sales restrictions which would afford the undertakings concerned the possibility of eliminating all cross-border competition for the geo-blocked PC video games.⁵⁷⁸

(504) The Commission concludes that there are no indications that the cross-border sales restrictions resulting from the use of geo-blocked Steam activation keys was indispensable for the improvement of production or distribution of the PC video games at stake or the promotion of technical or economic progress within the meaning of Article 101(3)(i) of the Treaty and that it, therefore, does not satisfy the third condition laid down in Article 101(3) of the Treaty.

8.5.4.3. Conclusion on the individual assessments of the application of Article 101(3) of the Treaty

(505) Valve has not fulfilled its burden of proof when claiming a benefit under Article 101(3) of the Treaty and its claims must therefore be rejected as unsubstantiated in relation to each of the five infringements subject to this Decision.

(506) Notwithstanding this, the Commission considers that the third condition of Article 101(3) of the Treaty, i.e., indispensability, is not satisfied. As the conditions for application of Article 101(3) of the Treaty are cumulative, the Commission concludes that Article 101(3) of the Treaty is not applicable to any of the five infringements subject to this Decision.

8.5.5. *Conclusion on the application of Article 101(3) of the Treaty*

(507) In conclusion, the five infringements subject to this Decision are neither exempted under the VBER nor under the TTBER nor do they meet the conditions for exemption provided for in Article 101(3) of the Treaty.

9. ADDRESSEE

9.1. Principles

(508) Article 101 of the Treaty and Article 53 of the EEA Agreement apply to undertakings and associations of undertakings.⁵⁷⁹ The notion of "undertaking" covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.

(509) The concept of *undertaking* in Union law is a functional one that is not identical to the notion of corporate legal personality in national commercial or fiscal law. The undertaking that participated in an alleged infringement is therefore not necessarily the same entity as the precise legal entity within a group of companies whose representatives actually took part in the anticompetitive conduct. Therefore, for each undertaking that is to be held liable for infringing Article 101 of the Treaty, one or

⁵⁷⁷ Valve contradicts itself when claims, on the one hand, that the activation restrictions resulted in efficiencies in terms of an expansion of output of PC video games and, on the other hand, that the price differential within the EEA is not sufficiently high for activation restrictions to make commercial sense.

⁵⁷⁸ Case C-132/19 P *Canal Plus*, paragraph 85.

⁵⁷⁹ Judgment of the Court of 3 March 2011, *AG2R Prévoyance v Beaudout Père et Fils SARL*, C-437/09, ECLI:EU:C:2011:112, paragraph 40.

more legal entities may bear legal liability for the alleged infringement as only entities with legal personality can be held liable for infringements.⁵⁸⁰

- (510) It is therefore necessary in order to identify the addressees of this Decision to determine the legal entities to which responsibility for the infringement should be attributed.
- (511) The same principles hold true, *mutatis mutandis*, for the purposes of the application of Article 53 of the EEA Agreement.

9.2. Addressee of this Decision

- (512) In the present cases, as an entity engaged in an economic activity, Valve is an undertaking within the meaning of Article 101(1) of the Treaty. The same applies with respect to each of the five Publishers (see Section 2).
- (513) Valve Corporation is the legal entity that concluded all the agreements/concerted practices set out in Sections 6.21, 6.2.2, 6.2.3, 6.2.4, 6.25 with each of the five Publishers.⁵⁸¹ In particular, Valve Corporation:
- (a) Concluded with Bandai the SDA and Steamworks Agreement of 22 March 2012 and Valve Corporation's employees set up activation restrictions and/or provided geo-blocked Steam activation keys for the Bandai's PC video games indicated in Section 6.21 that are concerned by this Decision (Case AT.40422 – Bandai);
 - (b) Concluded with Capcom the 1 February 2007 SDA and Valve Corporation's employees set up activation restrictions and/or provided geo-blocked Steam activation keys for Capcom's PC video games indicated in Section 6.2.2 that are concerned by this Decision (Case AT.40424 – Capcom);
 - (c) Concluded with Focus Home the SDAs/Steamworks Agreement and Valve Corporation's employees set up activation restrictions and /or provided geo-blocked Steam activation keys for the Focus Home's PC video games indicated in Section 6.2.3 that are concerned by this Decision (Case AT.40413 – Focus Home);
 - (d) Concluded with Koch Media the 2008 Koch SDA/Steamworks Agreement and Valve Corporation's employees set up activation restrictions and/or provided geo-blocked Steam activation keys for the Koch Media's PC video games indicated in Section 6.2.4 that are concerned by this Decision (Case AT.40414 – Koch Media);
 - (e) Concluded with ZeniMax the 2008 ZeniMax SDA and Valve Corporation's employees set up activation restrictions and / or provided geo-blocked Steam

⁵⁸⁰ Although an 'undertaking' within the meaning of Article 101 of the Treaty is not necessarily the same as a company having legal personality, it is necessary for the purposes of applying and enforcing decisions to identify an entity possessing legal or natural personality to be the addressee of the measure. Judgment of the Court of First Instance of 20 April 1999, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA 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, ECLI:EU:T:1999:80, paragraph 978.

⁵⁸¹ [...].

activation keys for the ZeniMax PC video games indicated in Section 6.25 that are concerned by this Decision (Case AT.40420 – ZeniMax).

- (514) In light of the above, the Commission finds that Valve Corporation directly participated in the five single and continuous infringements of Article 101 of the Treaty and of Article 53 of the EEA Agreement described in Sections 6.21, 6.2.2, 6.2.3, 6.2.4, 6.25. Therefore, on the basis of the legal principles set out in Section 9.1, the Commission holds Valve Corporation liable for its direct participation to each of the five single and continuous infringements of Article 101 of the Treaty and of Article 53 of the EEA Agreement.
- (515) This Decision is therefore addressed to Valve Corporation in relation to each of the five infringements at issue.

10. DURATION OF THE INFRINGEMENT

10.1. Agreements/concerted practices between Valve and Bandai (Case AT.40422 – Bandai)

- (516) As established in Section 8.3.2.2, the Commission finds a single and continuous infringement of Article 101 of the Treaty consisting in (i) agreements/concerted practices for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys for which Valve is liable, and which together with (ii) the distribution agreements between Bandai and its distributor [...], containing cross-border sale restrictions, form a single and continuous infringement for which only Bandai is liable (see, in respect of Bandai, Commission Decision C(2021)57 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40422 – Bandai Namco).
- (517) As regards the duration of the part of the single and continuous infringement for which Valve is liable, the infringement started on 13 March 2012 which is the date when Valve upon the request of Bandai agreed to set up activation restrictions and to provide geo-blocked Steam activation keys for the Bandai PC video game “[...]” (see Section 6.2.1.3).⁵⁸² This is the earliest date on which a PC video game of Bandai was geo-blocked by means of geo-blocked Steam activation keys. In response to the Statement of Objections, Valve confirmed that it “*started providing locked Steam Keys to Bandai on 13 March 2012 for the game [...]*”.⁵⁸³
- (518) On 22 April 2014, Valve confirmed that it had lifted the existing activation restrictions upon Bandai’s request for the PC video games relevant for this Decision (namely, [...], [...], [...], [...] and [...]) (see Section 6.2.1.3).⁵⁸⁴ As of this day, all territorial restrictions in relation to Steam activation keys already put on the market relating to the EEA ceased to apply. For this reason the Commission considers 22 April 2014 as the end date of the single and continuous infringement for which Valve is held liable.

⁵⁸² [...].
⁵⁸³ [...].
⁵⁸⁴ [...].

- (519) In the response to the Statement of Objections, Valve claimed that the end date of the infringement should be February 2014 which is when Valve refused to set up new activation restrictions and to provide the related geo-blocked keys to Bandai⁵⁸⁵
- (520) The Commission rejects this argument. While Valve may have refused to set up additional activation restrictions, it did not, at the same time, lift the activation restrictions already in place. The existing activation restrictions which were set up on the basis of agreements/concerted practices between Valve and Bandai described in Section 6.2.1 were not impacted by the refusal of Valve to set up new activation restrictions. The keys which had been generated based on the existing activation restrictions continued to be geo-blocked, although it was technically possible to revoke these existing activation restrictions. In the case of Bandai PC video games, it was only as of 22 April 2014 that Valve disabled this geo-blocking so that users were able to activate the games irrespective of their geographical location.
- (521) In light of the above, the duration of this part of the single and continuous infringement is therefore 771 days (2.11 years).

10.2. Agreements/concerted practices between Valve and Capcom (Case AT.40424 - Capcom)

- (522) As established in Section 8.3.2.3, the Commission finds a single and continuous infringement of Article 101 of the Treaty consisting in agreements/concerted practices between Valve and Capcom for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys (see, in respect of Capcom, Commission Decision C(2021)72 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40424 Capcom).
- (523) The single and continuous infringement started on 13 February 2013 which is the date when, upon Capcom's request, Valve agreed to set up activation restrictions for the Capcom PC video game "[...]" (see Section 6.2.2.3).⁵⁸⁶ This is the earliest date on which a PC video game of Capcom was geo-blocked by means of geo-blocked Steam activation keys. In response to the Statement of Objections, Valve confirmed that it "*started providing locked Steam Keys to Capcom on 13 February 2013 for the game [...]*".⁵⁸⁷
- (524) On 17 November 2014, Valve confirmed to Capcom that the existing activation restrictions for the Capcom PC video games relevant for this Decision were removed (see Section 6.2.2.3).⁵⁸⁸ All territorial restrictions based on Steam activation keys relating to the EEA for these PC video games that had already been put on the market ceased to apply on that date, hence bringing the single and continuous infringement to an end on 17 November 2014. Therefore, the Commission considers 17 November 2014 as the end date of the single and continuous infringement for which Valve is liable.
- (525) For the same reasons set out in Recital (520), the Commission rejects Valve's claims that the end date of the infringement should be 9 October 2014 which is when Valve

⁵⁸⁵ [...].

⁵⁸⁶ [...].

⁵⁸⁷ [...].

⁵⁸⁸ [...].

refused to set up new activation restrictions and to provide the related geo-blocked Steam activation keys to Capcom.⁵⁸⁹

(526) In light of the above, the duration of the single and continuous infringement is 643 days (1.76 years).

10.3. Agreements/concerted practices between Valve and Focus Home (Case AT.40413 – Focus Home)

(527) As established in Section 8.3.2.4, the Commission finds a single and continuous infringement of Article 101 of the Treaty consisting in (i) agreements/concerted practices for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys and (ii) the distribution agreements between Focus Home and certain of its distributors, including e.g. [...], [...], [...], , containing cross-border sale restrictions. Valve is liable for that part of the single and continuous infringement relating to the setting up of activation restrictions and the provision of geo-blocked Steam activation keys, while Focus Home is liable for the entirety of the single and continuous infringement (see, in respect of Focus Home, Commission Decision C(2021)78 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40413 – Focus Home).

(528) As regards the duration of the part of the single and continuous infringement for which Valve is liable, the infringement started on 17 May 2013, which is the date when, upon Focus Home’s request, Valve agreed to set up activation restrictions for Focus Home’s PC video games “[...]” and “[...]” (see Section 6.2.3.3).⁵⁹⁰ This is the earliest date on which a PC video game of Focus Home was geo-blocked by means of geo-blocked Steam activation keys.

(529) On 9 October 2015, Valve removed any existing EEA activation restrictions for the Focus Home PC video games relevant for this Decision (see Section 6.2.3.3).⁵⁹¹ All territorial restrictions based on Steam activation keys relating to the EEA for these PC video games that had already been put on the market ceased to apply on that date. Therefore, the Commission considers 9 October 2015 as the end date of the part of the single and continuous infringement for which Valve is liable.

(530) For the same reasons set out in Recital (520), the Commission rejects Valve’s claims that the end date of the infringement should be 25 March 2015 which is when Valve refused to set up new activation restrictions and to provide the related geo-blocked Steam activation keys to Focus Home.⁵⁹²

(531) In light of the above, the duration of this part of the single and continuous infringement is therefore 876 days (2.4 years).

10.4. Agreements/concerted practices between Valve and Koch Media (Case AT.40414 – Koch Media)

(532) As established in Section 8.3.2.5, the Commission finds a single and continuous infringement of Article 101 of the Treaty consisting in (i) agreements/concerted practices for the setting up of activation restrictions and the provision of geo-blocked

⁵⁸⁹ [...].

⁵⁹⁰ [...].

⁵⁹¹ [...].

⁵⁹² [...].

Steam activation keys and (ii) the distribution agreements between Koch Media and its distributors, i.e. [...] and [...], containing cross-border sale restrictions. Valve is liable for that part of the single and continuous infringement relating to for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys, while Koch Media is liable for the entirety of the single and continuous infringement (see, in respect of Koch Media, Commission Decision C(2021)74 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40414 - Koch Media).

- (533) As regards the duration of the part of the single and continuous infringement for which Valve is liable, the infringement started on 23 August 2011, which is the date when, upon Koch Media’s request, Valve agreed to set up activation restrictions and to provide Steam activation keys for Koch Media’s PC video games “[...]”, “[...]” and “[...]” (see Section 6.2.4.3).⁵⁹³ This is the earliest date on which a PC video game of Koch Media was geo-blocked by means of geo-blocked Steam activation keys. In response to the Statement of Objections, Valve confirmed that it “*started providing locked Steam Keys to Koch on 23 August 2011 for the game [...]*”.⁵⁹⁴
- (534) On 9 October 2015, Valve removed any existing EEA activation restrictions for the Koch Media PC video games relevant for this Decision (see Section 6.2.4.3).⁵⁹⁵ All territorial restrictions based on Steam activation keys relating to the EEA for these PC video games that had already been put on the market ceased to apply on that date. Therefore the Commission considers 9 October 2015 as the end date of this part of the single and continuous infringement for which Valve is liable.
- (535) For the same reasons set out in in Recital (520), the Commission rejects Valve’s claims that the end date of the infringement should be 9 October 2014 which is when Valve refused to set up new activation restrictions and to provide the related geo-blocked Steam activation keys to Koch Media ⁵⁹⁶
- (536) In light of the above, the duration of this part of the single and continuous infringement is therefore 1509 days (4.13 years).

10.5. Agreements/concerted practices between Valve and ZeniMax (Case AT.40420 – ZeniMax)

- (537) As established in Section 8.3.2.6, the Commission finds a single and continuous infringement of Article 101 of the Treaty consisting in (i) agreements/concerted practices for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys, and (ii) the distribution agreements between ZeniMax and its distributor, i.e. [...] containing cross-border sale restrictions. Valve is liable for that part of the single and continuous infringement relating to for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys, while ZeniMax is liable for the entirety of the single and continuous infringement (see, in respect of ZeniMax, Commission Decision C(2021)63 of 20 January 2021 relating to a proceeding under Article 101 of the Treaty and Article 53 of the EEA Agreement in Case AT.40420 – ZeniMax).

⁵⁹³ [...].

⁵⁹⁴ [...].

⁵⁹⁵ [...].

⁵⁹⁶ [...].

- (538) As regards the duration of the part of the single and continuous infringement for which Valve is liable, the infringement started on 27 September 2010 which is the date when, upon ZeniMax' request, Valve agreed to provide it with keys restricted to a number of territories for the ZeniMax PC video game "[...]" (see Section 6.2.5.3).⁵⁹⁷ This is the earliest date on which a PC video game of ZeniMax was geo-blocked by means of geo-blocked Steam activation keys. In response to the Statement of Objections, Valve confirmed that it “*started providing locked Steam Keys to ZeniMax on 27 September 2010 for the game [...]*”.⁵⁹⁸
- (539) On 9 October 2015, Valve removed any existing EEA activation restrictions for the PC video games of ZeniMax relevant for this Decision (see Section 6.2.5.3).⁵⁹⁹ All territorial restrictions based on Steam activation keys relating to the EEA for these PC video games that had already been put on the market ceased to apply on that date. Therefore the Commission considers 9 October 2015 as the end date of this part of the single and continuous infringement for which Valve is liable. In response to the Statement of Objections, Valve did not indicate any different start date or end date of the infringement.⁶⁰⁰
- (540) In light of the above, the duration of this part of the single and continuous infringement is therefore 1839 days (5.03 years).

11. REMEDIES

11.1. Article 7 of Regulation (EC) No 1/2003

- (541) According to Article 7(1) of Regulation (EC) No 1/2003, 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 undertaking concerned to bring such infringement to an end. If the infringement has already come to an end, the Commission may also find that an infringement has been committed in the past provided that it has a legitimate interest in doing so.⁶⁰¹

⁵⁹⁷ [...].

⁵⁹⁸ [...].

⁵⁹⁹ [...].

⁶⁰⁰ [...].

⁶⁰¹ Judgment of the Court of 2 March 1983, *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission*, C-7/82, ECLI:EU:C:1983:52, paragraph 24; Judgment of the Court of First Instance of 6 October 2005, *Sumitomo Chemical Co. Ltd and Sumika Fine Chemicals Co. Ltd v Commission*, Joint Cases T-22/02 and T-23/02, ECLI:EU:T:2005:349, paragraph 137; Judgment of the General Court of 12 April 2013, *AEPI Elliniki Etairia pros Prostasian tis Pnevmatikis Idioktisias AE v Commission*, T-392/08, ECLI:EU:T:2013:168, paragraph 62; Judgment of the General Court of 12 April 2013, *Société des auteurs, compositeurs et éditeurs de musique (SACEM) v Commission*, T-422/08, ECLI:EU:T:2013:182, paragraph 80; Judgment of the General Court of 12 April 2013, *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger reg. Gen. mbH (AKM) v Commission*, T-432/08, ECLI:EU:T:2013:185, paragraph 66; Judgment of the General Court of 16 September 2013, *Villeroy & Boch Austria GmbH and Villeroy & Boch AG v Commission*, T-373/10, ECLI:EU:T:2013:455, paragraphs 300-306; Judgment of the General Court of 16 September 2013, *Keramag Keramische Werke AG and Others v Commission*, Joined Cases T-379/10 and T-381/10, ECLI:EU:T:2013:457, paragraphs 249-258; Judgment of the General Court of 6 February 2014, *Arkema France and CECA SA v Commission*, Joined Cases T-23/10 and T-24/10, ECLI:EU:T:2014:62, paragraphs 111-120; Judgment of the General Court of 6 February 2014, *Elf Aquitaine SA v Commission*, T-40/10, ECLI:EU:T:2014:61, paragraphs 389-398.

11.1.1. Termination of the infringement

(542) The five single and continuous infringements of Article 101 of the Treaty and Article 53 of the EEA Agreement established in this Decision have ceased.

11.1.2. Justification of a Commission decision

(543) Although the five infringements were brought to an end, the Commission has nevertheless an interest in finding that the infringements have been committed in the past given the seriousness of the restrictions of competition at issue, which concern conduct which is liable to frustrate one of the Treaty's main objectives, namely the establishment of an internal market, and given the precedent value.

(544) For the above reasons, a Commission decision in these cases is justified.

(545) In addition, Valve should be required to refrain from repeating the conduct described in this Decision and from any act or conduct that would have the same or similar object or effect as the conduct described in this Decision.

11.2. Article 23(2) of Regulation (EC) No 1/2003 – Fines

(546) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines upon undertakings where, either intentionally or negligently, they infringe Article 101 of the Treaty and Article 53 of the EEA Agreement. In accordance with the same provision, for each undertaking participating in an infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

(547) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission shall, in fixing the amount of the fines, have regard to all relevant circumstances, particularly to the gravity and duration of the infringement, which are the two criteria explicitly referred to in that Regulation. In doing so, the Commission sets the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement(s) is assessed on an individual basis.

(548) In setting the fines imposed by this Decision, the Commission took account of 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 Fining Guidelines”).⁶⁰²

11.3. Intent and/or negligence

(549) Valve provided to each of the Publishers upon request geo-blocked Steam activation keys which were deployed to restrict cross-border sales within the EEA, as explained in Sections 6.21, 6.2.2, 6.2.3, 6.2.4, 6.25 and respective sub Sections.

(550) More precisely, Valve agreed with each of the Publishers to set up activation restrictions and, on this basis, provided each of the Publishers with technology to enable them to distribute geo-blocked PC video games in the EEA. This practice had the object of restricting cross-border sales within the EEA. This practice was implemented in the context of Valve's contractual relationship with each of the Publishers.

⁶⁰² Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, page 2 .

(551) Consequently, Valve knowingly participated in agreements/concerted practices with each of the Publishers for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys with the express purpose of restricting the territories within the EEA into which each Publisher’s distributors receiving the geo-blocked Steam activation keys (e.g., [...] ([...], [...], [...], [...], [...], [...]) could sell certain of their PC video games.

(552) Each of the five infringements was committed by Valve intentionally, or at the very least, negligently.

11.4. General arguments of Valve against the imposition of fines

11.4.1. Novelty and legal certainty

(553) Valve argues that imposing fines would not be justified in light of the novelty of the case.⁶⁰³ According to Valve “*there is no precedent that finds an online platform liable for providing technology that enables a third party to implement its own unilateral commercial conduct*”.⁶⁰⁴

(554) Furthermore, according to Valve the Commission has developed a new interpretation of a restriction by object. In particular, Valve claims that “*due to the current state of the case law, Valve had reasonable expectations that locking Steam Keys which reflects the provision of a service involving non-exhausted copyright within the EEA would not constitute a restriction of competition ‘by object’.* The novelty of the Commission’s position on the intersection between copyright provisions and competition law confirms that Valve could not have intentionally nor negligently infringed competition rules. The law is simply not settled on this issue.”⁶⁰⁵

(555) Whilst it is correct that neither the Commission nor the Union Courts have yet assessed the liability of an undertaking which provides geo-blocked Steam activation keys, it has long been established that agreements which restrict cross-border sales and contribute to the artificial maintenance of separate national markets constitute a restriction of competition by object pursuant to Article 101 of the Treaty. The case-law set out in Section 8.2.1 confirms the anticompetitive nature of such type of agreements/concerted practices.⁶⁰⁶ It therefore cannot be said that the conduct at issue is novel even if the technology underlying the conduct may be.⁶⁰⁷

(556) As regards the qualification of the conduct, “[t]he fact that the Commission has not, in the past, considered that a certain type of agreement was, by its very object, restrictive of competition is [...] not, in itself, such as to prevent it from doing so in the future following an individual and detailed examination of the measures in question having regard to their content, purpose and context”.⁶⁰⁸

(557) According to settled case-law, the principle of legal certainty requires that EU rules enable those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons must be able to ascertain unequivocally

⁶⁰³ [...].

⁶⁰⁴ [...].

⁶⁰⁵ [...].

⁶⁰⁶ Case C-228/18 *Budapest Bank*, paragraphs 76 and 79.

⁶⁰⁷ Case C-457/10 P *AstraZeneca*, paragraph 164; Case T-472/13 *Lundbeck*, currently under appeal, paragraph 438.

⁶⁰⁸ Case T-472/13 *Lundbeck*, currently under appeal, paragraph 438 and Case C-228/18, *Budapest Bank*, paragraphs 76 and 79.

what their rights and obligations are and take steps accordingly.⁶⁰⁹ Conversely, such principle cannot be interpreted as prohibiting the gradual clarification of the rules of liability, but it may preclude the retroactive application of a new interpretation of a rule establishing an offence.⁶¹⁰

- (558) Whilst it is correct that neither the Commission nor the Union Courts have yet assessed the liability of an undertaking which provides geo-blocked Steam activation keys, agreements which prohibit or limit cross-border sales have been held to constitute a restriction by object pursuant to Article 101 of the Treaty for decades. It therefore cannot be said that the conduct at issue is novel even if the technology underlying the conduct may be.
- (559) Therefore, Valve cannot credibly claim that it was not aware that agreements/concerted practices between undertakings aimed at restricting cross-border sales can be considered contrary to Article 101 of the Treaty. In view of this, at least, Valve should have exerted a high degree of caution in relation to territorial restrictions when providing geo-blocked Steam activation keys within the EEA.

11.4.2. *Intent and/or negligence*

- (560) According to established case law, intention or negligence do not require the relevant undertaking to have been aware that it was infringing competition law.⁶¹¹ It is sufficient that the undertaking could not have been unaware that its conduct was aimed at restricting competition.⁶¹²
- (561) As indicated in Recitals (151), (166), (181), (196) and (211), Valve was aware that the geo-blocked Steam activation keys it supplied to each of the Publishers were passed on by each of them to their distributors.⁶¹³ The email exchanges quoted in Sections 6.21, 6.2.2, 6.2.3, 6.2.4, 6.25 show that the Publishers clearly indicated that the geo-blocked Steam activation keys were used to prevent cross-border sales so that Valve was aware or ought to have been aware of the reason behind the Publishers' requests.
- (562) In addition, as indicated in Section 6.1.5, while the ordering of the keys became automated, the set up of the activation restrictions, which is the first step necessary to generate the keys, was never automated. In this way, Valve maintained control over the activation restrictions so to be able to reject certain types of restrictions requested by the Publishers, such as geo-blocking games by language in addition to geo-blocking by territory, which, in Valve's view, would seriously impact on the user

⁶⁰⁹ Judgment of the Court of 29 March 2011, *ArcelorMittal Luxembourg SA v Commission (C 201/09 P)* and *Commission v ArcelorMittal Luxembourg and Others (C-216/09 P)*, Joined cases C-201/09 P and C-216/09 P, ECLI:EU:C:2011:190, paragraph 68 and the case-law cited.

⁶¹⁰ Judgment of the Court of 10 July 2014, *Telefónica SA and Telefónica de España SAU v Commission*, C-295/12 P, ECLI:EU:C:2014:2062, paragraph 148 and the case-law cited.

⁶¹¹ Case C-19/77 *Miller*, paragraph, paragraph 18; Joined cases 96-102, 104, 105, 108 and 110/82 *IAZ*, paragraphs 43-45; Case T-62/98 *Volkswagen*, paragraph 334.

⁶¹² Judgment of the General Court of 5 October 2011, *Romana Tabacchi Srl v Commission*, T-11/06, ECLI:EU:T:2011:560, paragraph 227; Judgment of the Court of First Instance of 14 May 1998, *Enso Española SA v Commission*, T-348/94, ECLI:EU:T:1998:102, paragraph 277; Judgment of the Court of 18 June 2013, *Bundeswettbewerbsbehörde and Bundeskartellamt v Schenker & Co. AG and Others*, C-681/11, ECLI:EU:C:2013:404, paragraph 37 and the case-law cited.

⁶¹³ [...].

experience.⁶¹⁴ Valve was therefore fully aware of the restrictions and the reason behind the Publisher's requests.⁶¹⁵

(563) Therefore, Valve could not have been unaware that the set-up of the intra-EEA activation restrictions was aimed at restricting competition.

(564) The Court of Justice has held that an infringement should be considered intentional where the undertaking cannot have been unaware that the object of the offending conduct was to restrict parallel imports, and, as a result, by partitioning the various national markets, to thwart the very objective of realising the internal market which the Treaty seeks to attain.⁶¹⁶ The Commission therefore concludes that the infringement was committed intentionally, or at the very least negligently, by Valve.

11.5. The calculation of the fine

(565) Under Article 23(2) of Regulation No 1/2003, the Commission may by decision impose upon undertakings fines where, either intentionally or negligently, they infringe Article 101 TFEU and/or Article 53 of the EEA Agreement.⁶¹⁷

11.5.1. General methodology

(566) The Commission's current methodology for determining the level of the fines is set out in the Fining Guidelines.

(567) First, the Commission determines 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.⁶¹⁸ The basic amount is related to a proportion of the value of sales of up to 30%, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement. Second, the Commission takes into account circumstances that result in an increase or decrease in the basic amount. It does so on the basis of an overall assessment which takes account of all the relevant circumstances⁶¹⁹.

(568) Third, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect.⁶²⁰

11.5.2. Five separate fines

(569) This Decision imposes a fine for each of the five single and continuous infringements in the five different cases. The Commission will apply the limit set forth in Article 23(2) of Regulation (EC) No 1/2003 to Valve in relation to each of the five different fines.

⁶¹⁴ Statement by [...] at the oral hearing: [...].

⁶¹⁵ As indicated, Valve did not contest the existence of such practice during the oral hearing – see statement quoted in footnote 170 [...].

⁶¹⁶ Judgment of the Court of First Instance of 19 May 1999, *Accinauto SA v Commission*, T-176/95, paragraph 119 and case law cited.

⁶¹⁷ Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area “the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 101 and 102 TFEU] of the EC Treaty [...] shall apply mutatis mutandis.” (OJ L 305, 30.11.1994, page 6).

⁶¹⁸ Point 13 of the Fining Guidelines.

⁶¹⁹ Point 27 of the Fining Guidelines.

⁶²⁰ Point 30 of the Fining Guidelines.

11.5.3. Determination of the basic amount of the fine

11.5.3.1. Value of sales

- (570) It is settled case-law that whilst the concept of the "value of sales" cannot be extended to encompass sales which do not fall within the infringement, it nonetheless cannot solely be limited to the value of sales in respect of which it is established that they were actually affected by that infringement.⁶²¹ The concept of the "value of sales" must be understood as referring to sales on the market concerned by the infringement.⁶²²
- (571) Valve had no sales directly associated with its activities as a provider of Steam activation keys. However, Valve received economic benefits described in detail in Section 8.2.2.3, letter b) from the provision of the geo-blocked Steam activation keys as a result of the revenue share agreement between Valve and each of the Publishers. In particular the geo-blocked Steam activation keys have allowed Valve to protect its 30% revenue stream from the sale of the concerned PC video games on Steam.
- (572) The geo-blocking practices described under Sections 6.2.1, 6.2.2, 6.2.3, 6.2.4, 6.2.5 cover the entire EEA as they had as their object the partitioning of the internal market according to national borders through the prevention or hindering of cross-border sales. Because of the EEA nature of the cross-border restrictions concerned by the present cases, for the purposes of calculating the fines, in each of the five cases the Commission has taken into consideration 30% of the gross revenue that Valve generated from EEA sales on Steam of the PC video games affected by the geo-blocked Steam activation keys in the relevant case.⁶²³

11.5.3.2. The last full business year

- (573) Pursuant to the Fining Guidelines, for the calculation of the value of sales, the Commission takes into account the sales made by the undertakings during the last full business year of their participation in the infringement.⁶²⁴ If the infringement does not cover a full business year or the individual involvement in the infringement is shorter than a full business year, the Commission may take into account a different period.⁶²⁵ There are no exceptional reasons to deviate from the basic principle that the fines should be based on Valve's last full business year of participation to each of the five infringements. In light of the above the Commission has calculated Valve's value of sales as follows:

(a) Agreements/concerted practices between Valve and Bandai (Case AT.40422)

⁶²¹ Judgment of the Court of 11 July 2013, *Team Relocations NV and Others v Commission*, C-444/11 P, ECLI:EU:C:2013:464, paragraphs 76 and 77.

⁶²² Judgment of the Court of 1 February 2018, *Deutsche Bahn AG and Others v Commission*, C-264/16 P, ECLI:EU:C:2018:60 paragraph 50.

⁶²³ [...].

⁶²⁴ Point 13 of the Fining Guidelines.

⁶²⁵ Commission decision of 21 February 2018 relating to a proceeding 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.39920 - *Braking Systems*, OJ C 143, 24.4.2018, p. 4–7 (Summary of decision), paragraph 93; Commission decision of 24 June 2015 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, Case AT - 39563, *Retail Food Packaging*, OJ C 402, 4.12.2015, p. 8–14 (Summary of decision), paragraphs 1014 and 1024, confirmed by the Judgment of the General Court of 6 December 2019, *Coveris Rigid France, formerly Coveris Rigid (Auneau) France v Commission*, T-531/15, ECLI:EU:T:2018:885.

(574) The value of sales used by the Commission for calculating the fine in Case AT.40422 – Bandai corresponds to 30% of the turnover generated by Valve in 2013 (the last full business year of the infringement - see Section 10.1) from EEA sales on Steam of the Bandai PC video games (listed in Section 6.2.1).

(575) The Commission has used the turnover generated by the sale on Steam of Bandai PC video games concerned by the infringement (listed in Section 6.2.1). In order to take into account 30% of the gross revenue on Steam related to Bandai PC video games affected by the infringement, the Commission has subtracted Bandai's share (70%) from the total Steam revenues for the relevant Bandai games. Accordingly, the value of sales to be taken into account is EUR [200 000 – 300 000].

(b) Agreements/concerted practices between Valve and Capcom (Case AT.40424)

(576) The value of sales used by the Commission for calculating the fine in Case AT.40424 – Capcom corresponds to 30% of the turnover generated by Valve in 2013 (the last full business year of the infringement - see Section 10.2) from EEA sales on Steam of the Capcom PC video games listed in Section 6.2.2).

(577) The Commission has used the turnover generated by the sale on Steam of Capcom PC video games concerned by the infringement (listed in Section 6.2.2). In order to take into account 30% of the gross revenue on Steam related to Capcom PC video games affected by the infringement, the Commission has subtracted Capcom's share (70%) from the total Steam revenues for the relevant Capcom games.

(578) Because Valve's involvement in the infringement with Capcom does not cover a "full business year" as defined by Valve,⁶²⁶ the Commission has established the value of sales by reference to Valve's average monthly sales for the period covered by the infringement which have then been annualised.⁶²⁷ Accordingly, the value of sales to be taken into account is EUR [800 000 - 900 000].

(c) Agreements/concerted practices between Valve and Focus Home (Case AT.40413)

(579) The value of sales used by the Commission for calculating the fine in Case AT.40413 – Focus Home corresponds to 30% of the turnover generated by Valve in 2014 (the last full business year of the infringement - see Section 10.3) from EEA sales on Steam of the Focus Home PC video games listed in Section 6.2.3).

(580) The Commission has used the turnover generated by the sale on Steam of Focus Home PC video games concerned by the infringement (listed in Section 6.2.3). In order to take into account 30% of the gross revenue on Steam related to Focus Home PC video games affected by the infringement, the Commission has subtracted Focus

⁶²⁶ The infringement in Case AT.40424 started on 13 February 2013 and ended on 17 November 2014. However, Valve's business year follows the calendar year (1 January to 31 December).

⁶²⁷ In response to RFI (2020/068893), Valve provided the monthly sales on Steam for the geo-blocked PC video games for the period covered by the infringement in Case AT.40424. The Commission calculated the average monthly sales value by taking into consideration the sales of the months fully covered by the infringement. In other words, as the infringement started on 13 February 2013 and ended on 17 November 2014, the Commission did not take into consideration the sales for the months of February 2013 and November 2014. The average monthly sale value was then multiplied by 12 in order to obtain an estimate of the annual value of sales. For the sake of clarity, for the reason explained above in Recital (575), the Commission has taken into consideration only 30% of such annualised value of sales.

Home's share (70%) from the total Steam revenues for the relevant Focus Home games. Accordingly, the value of sales to be taken into account is EUR [700 000 – 800 000].

(d) Agreements/concerted practices between Valve and Koch Media (Case AT.40414)

(581) The value of sales used by the Commission for calculating the fine in Case AT.40414 – Koch Media corresponds to 30% of the turnover generated by Valve in 2014 (the last full business year of the infringement - see Section 10.4) from EEA sales on Steam of the Koch Media PC video games listed in Section 6.2.4).

(582) The Commission has used the turnover generated by the sale on Steam of Koch Media PC video games concerned by the infringement (listed in Section 6.2.4). In order to take into account 30% of the gross revenue on Steam related to Koch Media PC video games affected by the infringement, the Commission has subtracted Koch Media's share (70%) from the total Steam revenues for the relevant Koch Media games. Accordingly, the value of sales to be taken into account is EUR [1 000 000 - 5 000 000].

(e) Agreements/concerted practices between Valve and ZeniMax (case AT.40420)

(583) The value of sales used by the Commission for calculating the fine in Case AT.40420 – ZeniMax corresponds to 30% of the turnover generated by Valve in 2014 (the last full business year of the infringement - see Section 10.5) from EEA sales on Steam of the ZeniMax PC video games listed in Section 6.2.5).

(584) The Commission has used the turnover generated by the sale on Steam of ZeniMax PC video games concerned by the infringement (listed in Section 6.2.5). In order to take into account 30% of the gross revenue on Steam related to ZeniMax PC video games affected by the infringement, the Commission has subtracted ZeniMax's share (70%) from the total Steam revenues for the relevant ZeniMax games. Accordingly, the value of sales to be taken into account is EUR [1 000 000 - 5 000 000].

11.5.3.3. Gravity

(585) The gravity of the infringement determines the percentage of the value of sales taken into account when setting the fine. When assessing the gravity of the infringement, the Commission has regard to a number of factors, such as the nature of the infringement, the combined market share of all undertakings, the geographical scope of the infringement and whether or not the infringement has been implemented. These elements are assessed as follows:

(586) Cross-border sales restrictions by their very nature, restrict competition within the meaning of Article 101(1) of the Treaty.⁶²⁸ Each of the five infringements was also EEA-wide in scope. However, vertical agreements and concerted practices are, by their nature, often less damaging to competition than horizontal agreements.⁶²⁹ Furthermore, the infringements concerned a limited number of PC video games.⁶³⁰

⁶²⁸ Joined cases C-403/08 and C-429/08 *Murphy*, paragraph 139.

⁶²⁹ Case C-32/11 *Allianz Hungária*, paragraph 43.

⁶³⁰ Valve estimates that only 3% of all games on Steam were affected by subject to geo-blocked Steam activation keys in the concerned practice [...].

Taking into account these factors, the proportion of Valve's values of sales to be taken into account is set at 6% for each of the five infringements.

- (587) However, in order to take account of the difference in liability between Valve and, respectively, Bandai, Focus Home, Koch Media and Zenimax in Cases AT.40422, AT.40413, AT.40414 and AT.40420 as set out in Sections 8.3.2.2, 8.3.2.4, 8.3.2.5, 8.3.2.6),⁶³¹ and the difference in the scope of the infringement for Valve and Capcom in Case AT.40424, *vis-à-vis* Bandai, Focus Home, Koch Media and Zenimax, respectively, as set out in Section 8.3.2.3),⁶³² the Commission applied a 7% gravity factor to Bandai, Focus Home, Koch Media and Zenimax.

11.5.3.4. Duration

- (588) In calculating the fines to be imposed on Valve, the Commission also took into consideration the duration of Valve's participation in each of the five infringements, as determined in Section 10 and sub-Sections and summarised as follows:
- Case AT.40413: 17 May 2013 to 9 October 2015
 - Case AT.40414: 23 August 2011 to 9 October 2015
 - Case AT.40420: 27 September 2010 to 9 October 2015
 - Case AT.40422: 13 March 2012 to 22 April 2014
 - Case AT.40424: 13 February 2013 to 17 November 2014

11.5.4. Calculation of the basic amount

- (589) The basic amount of the fine to be imposed on Valve for each of the five infringements amounts to:
- Case AT.40413: EUR [...] i.e., 876 days (duration multiplier 2,4);
 - Case AT.40414: EUR [...] i.e., 1 509 days (duration multiplier 4,13);
 - Case AT.40420: EUR [...] i.e., 1 839 days (duration multiplier 5,03);
 - Case AT.40422: EUR [...] i.e., 771 days (duration multiplier 2,11);
 - Case AT.40424: EUR [...] i.e., 643 days (duration multiplier 1,76).

11.5.5. Adjustments to the basic amount

11.5.5.1. Aggravating and mitigating circumstances

- (590) The Commission concludes that there are no aggravating or mitigating circumstances that should result in an increase or decrease in the basic amount of the fine for any of the five infringements.

⁶³¹ In fact, as set out in Sections 8.3.2.2, 8.3.2.4, 8.3.2.5, 8.3.2.6, in Cases AT.40422, 40413, 40414 and 40420, Valve is only held liable for the parts of the respective single and continuous infringements concerning the setting up of activation restrictions and/or the provision of the related geo-blocked keys, while Bandai, Focus Home, Koch Media and Zenimax are held liable for the entire single and continuous infringements.

⁶³² In fact as set out in Section 8.3.2.3, in Case AT.40424 the single and continuous infringements consisted only in the agreements/concerted practices for the set up of activation restrictions and/or the provision of the related geo-blocked keys, while in Cases AT.40422, 40413, 40414 and 40420, each of the five single and continuous infringements were broader as, additionally, consisted also of bilateral distribution agreements between Bandai, Focus Home, Koch Media and Zenimax, and certain of their respective distributors, containing cross-border sale restrictions.

- (591) That conclusion is not affected by Valve's claims that: (i) there is uncertainty surrounding the legal characterisation of Valve's conduct; (ii) Valve effectively cooperated with the Commission during the course of the investigation; (iii) any infringement was not intentional; and (iv) Valve terminated the infringement as soon as the Commission intervened.
- (592) First, there is no uncertainty surrounding the legal characterisation of Valve's conduct (see Section 8 and sub-Sections).
- (593) Second, Valve's alleged cooperation cannot be considered an effective cooperation beyond its legal obligations.⁶³³ Valve only provided evidence relating to the infringement in response to RFIs. While Valve also made a voluntary submission,⁶³⁴ that submission did not contain added value in terms of new evidence concerning geo-blocking practices.
- (594) Third, the evidence available set out in Section 11.4.2 shows that Valve committed the infringement intentionally or at the very least negligently.
- (595) Fourth, the evidence available does not support Valve's claims concerning the immediate termination of the infringements as soon as the Commission intervened, as set out below:
- (a) Agreements/concerted practices between Valve and Bandai (Case AT.40422)
- (596) While it is true that the agreements/concerted practices with Bandai were not secret and that their termination took place on 22 April 2014, i.e., prior to the Commission initiating proceedings (on 2 February 2017), it took Valve almost seven months from the first RFI (sent on 4 October 2013) to lift the activation restrictions in place. In addition, Valve did not lift the activation restrictions on its own initiative but as a result of Bandai's request.⁶³⁵
- (597) As indicated in Recital (518), the Commission rejects Valve's claims that the infringement ended in February 2014 when Valve refused to set up new activation restrictions. However even considering this as the end date of the infringement (*quod non*), this occurred after almost four months from the first RFI and after Valve had already received another RFI.⁶³⁶
- (b) Agreements/concerted practices between Valve and Capcom (Case AT.40424)
- (598) While it is true that the agreements/concerted practices with Capcom were not secret and that their termination took place on 17 November 2014, i.e., prior to the Commission initiating proceedings (on 2 February 2017), it took Valve more than one year from the first RFI (sent on 4 October 2013) to lift the activation restrictions in place. In addition, Valve did not lift the activation restrictions on its own initiative but as a result of Capcom's request.⁶³⁷

⁶³³ Point 29 of the Fining Guidelines. Judgment of the General Court of 23 January 2014, *SKW Stahl-Metallurgie Holding AG and SKW Stahl-Metallurgie GmbH v Commission*, T-384/09, ECLI:EU:T:2014:27, paragraph 186.

⁶³⁴ [...].

⁶³⁵ See internal email of Bandai, "*Merci de retirer les restrictions sur les territoires suivants, et demander à Steam de retirer les restrictions sur leur Store s'il y en a. PL/CZ/SK/HU Merci*", [...].

⁶³⁶ Footnote 585.

⁶³⁷ [...].

(599) As indicated in Recital (524), the Commission rejects Valve’s claims that the infringement ended on 9 October 2014 when Valve refused to set up new activation restrictions. However even considering this as the end date of the infringement (*quod non*), this occurred after more than one year from the first RFI and after Valve had already received two other RFIs.⁶³⁸

(c) Agreements/concerted practices between Valve and Focus Home (Case AT.40413)

(600) While it is true that the agreements/concerted practices with Focus Home were not secret and that their termination took place on 9 October 2015, i.e., prior to the Commission initiating proceedings (on 2 February 2017), it took Valve two years from the first RFI (sent on 4 October 2013) to lift the activation restrictions in place.

(601) As indicated in Recital (529), the Commission rejects Valve’s claims that the infringement ended on 25 March 2014 when Valve refused to set up new activation restrictions. However even considering this as the end date of the infringement (*quod non*), this occurred almost six months from the first RFI and after Valve had already received other two RFIs.⁶³⁹

(d) Agreements/concerted practices between Valve and Koch Media (Case AT.40414)

(602) While it is true that the agreements/concerted practices with Koch Media were not secret and that their termination took place on 9 October 2015, i.e., prior to the Commission initiating proceedings (on 2 February 2017), it took Valve two years from the first RFI (sent on 4 October 2013) to lift the activation restrictions in place.

(603) As indicated in Recital (534), the Commission rejects Valve’s claims that the infringement ended on 9 October 2014 when Valve refused to set up new activation restrictions. However, even considering this as the end date of the infringement (*quod non*), this occurred one year from the first RFI and after Valve had already received other two RFIs.⁶⁴⁰

(e) Agreements/concerted practices between Valve and ZeniMax (case AT.40420)

(604) While it is true that the agreements/concerted practices with ZeniMax were not secret and that their termination took place on 9 October 2015, i.e., prior to the Commission initiating proceedings (on 2 February 2017), Valve stopped the practice only after two years from the first RFI (sent on 4 October 2013).

11.5.6. Conclusion

(605) Therefore, the Commission does not consider that Valve terminated the infringement as soon as the Commission intervened.

(606) In light of the above, the Commission considers that there are no grounds for adjusting the basic amount for any of the five infringements on the basis of mitigating factors.

⁶³⁸ Footnote 589.

⁶³⁹ In particular, prior to the opening of the proceedings against Valve which took place on 2 February 2017, Valve received three request for information (“RFI”) under Article 18.2 and one under Article 18.3 of Regulation 1/2003. [...].

⁶⁴⁰ Footnote 639.

11.6. Application of the 10% turnover limit

- (607) Article 23(2) of the Regulation (EC) No 1/2003 provides that the fines imposed on each undertaking shall not exceed 10% of its total turnover relating to the business year preceding the date of the Commission Decision. The legal maximum applies per infringement.
- (608) The fines for each of the five infringements set out in Recital (609) do not exceed 10% of Valve's total turnover in the business year preceding the date of the adoption of this Decision⁶⁴¹.

11.7. Conclusion: final amount of individual fines

- (609) In light of the foregoing the fines imposed on Valve Corporation pursuant to Article 23(2) of Regulation (EC) No 1/2003 are as follows:⁶⁴²

Infringement	Fine
Case AT. 40422 – Bandai	Valve Corporation: EUR 31 000
Case AT. 40424 – Capcom	Valve Corporation: EUR 90 000
Case AT. 40413 – Focus Home	Valve Corporation: EUR 102 000
Case AT. 40414 – Koch Media	Valve Corporation: EUR 308 000
Case AT. 40420 – ZeniMax	Valve Corporation: EUR 1 093 000
Total	Valve Corporation: EUR 1 624 000

12. CONCLUSION

- (610) In light of the considerations set out in this Decision, the Commission finds that Valve has infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by concluding and implementing bilateral agreements/concerted practices with respectively Bandai, Capcom, Focus Home, Koch Media and ZeniMax to set up activation restrictions and provide the related geo-blocked Steam activation keys which were used to restrict cross-border sales of a number of PC video games within the EEA. Accordingly, fines are to be imposed on Valve pursuant to Article 23(2) of Regulation (EC) No 1/2003.

HAS ADOPTED THIS DECISION:

Article 1

- (1) Valve Corporation infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, from 13 March 2012 to 22 April 2014, in a single and continuous infringement covering the whole of the EEA by entering into

⁶⁴¹ [...].

⁶⁴² The final amount of the fine is rounded down.

agreements/concerted practices with Bandai to set up activation restrictions and/or provide the related geo-blocked Steam activation keys which were used to restrict cross-border sales of a number of PC video games within the EEA.

- (2) Valve Corporation infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, from 13 February 2013 to 17 November 2014, in a single and continuous infringement covering the whole of the EEA consisting in agreements/concerted practices with Capcom to set up activation restrictions and/or provide the related geo-blocked Steam activation keys which were used to restrict cross-border sales of a number of PC video games within the EEA.
- (3) Valve Corporation infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, from 17 May 2013 to 9 October 2015, in a single and continuous infringement covering the whole of the EEA by entering into agreements/concerted practices with Focus Home to set up activation restrictions and/or provide the related geo-blocked Steam activation keys which were used to restrict cross-border sales of a number of PC video games within the EEA.
- (4) Valve Corporation infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, from 23 August 2011 to 9 October 2015, in a single and continuous infringement covering the whole of the EEA by entering into agreements/concerted practices with Koch Media to set up activation restrictions and/or provide the related geo-blocked Steam activation keys which were used to restrict cross-border sales of a number of PC video games within the EEA.
- (5) Valve Corporation infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, from 27 September 2010 to 9 October 2015, in a single and continuous infringement covering the whole of the EEA by entering into agreements/concerted practices with ZeniMax to set up activation restrictions and /or provide the related geo-blocked Steam activation keys which were used to restrict cross-border sales of a number of PC video games within the EEA.

Article 2

- (1) For the infringement referred to in Article 1(1) a fine of EUR 31 000 is imposed on Valve Corporation:
- (2) For the infringement referred to in Article 1(2) a fine of EUR 90 000 is imposed on Valve Corporation:
- (3) For the infringement referred to in Article 1(3) a fine of EUR 102 000 is imposed on Valve Corporation:
- (4) For the infringement referred to in Article 1(4) a fine of EUR 308 000 is imposed on Valve Corporation:
- (5) For the infringement referred to in Article 1(5) a fine of EUR 1 093 000 is imposed on Valve Corporation:

The fines shall be credited, in euros, within six months of 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.:

- for the infringement referred to in Article 1(1): EC/BUFI/AT.40422
- for the infringement referred to in Article 1(2): EC/BUFI/AT.40424
- for the infringement referred to in Article 1(3): EC/BUFI/AT.40413
- for the infringement referred to in Article 1(4): EC/BUFI/AT.40414
- for the infringement referred to in Article 1(5): EC/BUFI/AT.40420

After the 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 the undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fines by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fines in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council.⁶⁴³

Article 3

Valve Corporation shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

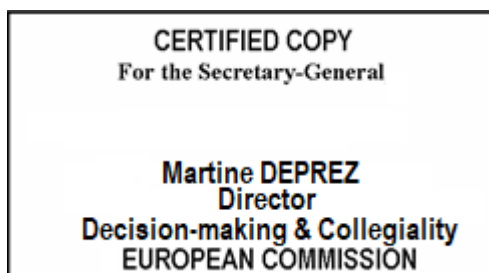
This Decision is addressed to Valve Corporation, 10400 NE 4th Street, Suite 1400 Bellevue, Washington 98004, United States of America.

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels,

For the Commission

Margrethe VESTAGER
Executive Vice-President



⁶⁴³ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the European Union (OJ L 193, 30.7.2018, p. 80).