



EUROPEAN COMMISSION

Competition DG

## ***CASE AT.40413 – Focus Home***

(Only the English text is authentic)

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

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Article 7 Regulation (EC) 1/2003

Date: 20/01/2021

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EUROPEAN  
COMMISSION

Brussels, 20.1.2021  
C(2021) 78 final

**COMMISSION DECISION**

**of 20.1.2021**

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the  
European Union (the Treaty) and Article 53 of the Agreement on the European  
Economic Area**

**Case AT.40413 – Focus Home**

(Text with EEA relevance)

(Only the English text is authentic)

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## COMMISSION DECISION

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union<sup>1</sup>,

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 Treaty<sup>2</sup>, and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 2 February 2017 to initiate proceedings in this case,

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

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

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

<sup>2</sup> Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 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 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.

<sup>3</sup> OJ L 123, 27.4.2004, p. 18.

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

Whereas:

## 1. INTRODUCTION

- (1) This Decision concerns Focus Home Interactive S.A., which is referred to in this Decision as “Focus Home”.
- (2) In this Decision, the Commission finds that Focus Home engaged in the following practices:
  - (a) Bilateral agreements and/or concerted practices with Valve to set-up activation restrictions and to provide the related geo-blocked Steam activation keys preventing the activation (and in a few cases the playing) of some of Focus Home’s personal computer (“PC”) video games outside of designated Member States and Contracting Parties to the European Economic Area (“EEA”) Agreement<sup>4</sup> based on the geographical location of the user (“geo-blocking”). These agreements/concerted practices, considered collectively, concerned 19 of Focus Home’s PC video games<sup>5</sup> and took place between 17 May 2013 and 9 October 2015 (see Section 8.1).
  - (b) Distribution agreements with the “Independent Distributors”<sup>6</sup> listed in Table 2 which contain one or more clauses restricting or preventing cross-border sales<sup>7</sup> of the affected PC video games within the EEA. These practices, considered

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<sup>4</sup> For the purposes of this Decision, the EEA is understood to cover the 27 Member States of the European Union (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, 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).

<sup>5</sup> Namely, (1) “[...]”; (2) “[...]”; (3) “[...]”; (4) “[...]”; (5) “[...]”; (6) “[...]”; (7) “[...]”; (8) “[...]”; (9) “[...]”; (10) “[...]”; (11) “[...]”; (12) “[...]”; (13) “[...]”; (14) “[...]”; (15) “[...]”; (16) “[...]”; (17) “[...]” (retail box distributed in Estonia, Latvia and Lithuania under the name “[...]”, comprising five games of the [...] franchise, namely “[...]”, “[...]”, “[...]”, “[...]”, “[...]” – in this Decision, the name “[...]” instead of “[...]” is used to better reflect the available evidence); (18) “[...]”; (19) “[...]”.

<sup>6</sup> The term “Independent distributors” refers to third party distributors who sell Focus Home’s PC video games in the EEA through brick and mortar shops and online shops (i.e. online retailers). [...].

<sup>7</sup> For the purposes of this Decision, the term “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 4 October 2011, *Football Association Premier League and Others* (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).

collectively, concerned 52 of Focus Home's PC video games<sup>8</sup> and took place between 14 March 2007 and 8 November 2018 (see Section 8.2).

- (3) The agreements/concerted practices mentioned in Recital (2)(a) together with the cross-border sales restrictions mentioned in Recital (2)(b) form a single and continuous infringement of Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area ("EEA Agreement") for which Focus Home is liable. The single and continuous infringement lasted from 14 March 2007 and 8 November 2018.

## **2. THE UNDERTAKING CONCERNED**

- (4) 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 – including the Independent Distributors mentioned in Section 3.1.
- (5) The legal entity concerned by this Decision is Focus Home Interactive S.A. (see Section 12.2).

## **3. OTHER UNDERTAKINGS RELEVANT FOR THE INFRINGEMENT**

### **3.1. Independent Distributors**

- (6) Between 2006 and 2017, Focus Home concluded a number of licensing and distribution agreements with the Independent Distributors listed in Table 2 for the physical and digital distribution (both in brick and mortar shops and in online shops) of Focus Home's PC video games in the EEA. These agreements contain cross-border sale restrictions (see Section 8.2).
- (7) Unless it holds the rights for the entire EEA, Focus Home usually grants its distributors copyright licenses for a limited number of EEA countries. [...],<sup>9</sup> [...],<sup>10</sup> [...],<sup>11</sup> [...] and [...] are among Focus Home's distributors in the EEA.
- (8) References to the Independent Distributors are made exclusively for the purposes of describing Focus Home's liability for an infringement of Article 101 of the Treaty and of Article 53 of the EEA Agreement. This Decision is not addressed to any of the Independent Distributors, nor does it establish any liability with respect to any of the Independent Distributors.

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<sup>8</sup> 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) "[...]".

<sup>9</sup> [...].

<sup>10</sup> [...].

<sup>11</sup> [...].

<sup>12</sup> [...].

<sup>13</sup> [...].



### 3.2. Valve

- (9) Valve Corporation (“Valve”) is an entertainment software and technology company 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. 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).<sup>14</sup>
- (10) References to Valve are made exclusively for the purposes of describing Focus Home’s liability for an infringement of Article 101 of the Treaty and of Article 53 of the EEA Agreement. This Decision is not addressed to Valve, nor does it establish any liability with respect to Valve.

## 4. THE PRODUCT AND GEOGRAPHIC MARKETS CONCERNED

- (11) This Decision concerns certain PC video games of Focus Home of different genres/categories which are sold in the EEA with the Steam technology embedded and are to be activated and played on Steam.
- (12) The term “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 6.1.2). “Digital distribution” refers to selling Steam-enabled PC videogames 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.
- (13) The geographic area covered by this Decision is the entire EEA.

## 5. PROCEDURE

- (14) Based on information received from market participants, in 2013 the Commission started an *ex officio* investigation into the practices at issue.
- (15) The Commission sent requests for information (“RFIs”) to Focus Home in 2015,<sup>15</sup> in 2017<sup>16</sup> as well as in 2018<sup>17</sup> and 2019.<sup>18</sup>
- (16) On 2 February 2017, the Commission initiated proceedings against Focus Home and Valve pursuant to Article 2(1) of Commission Regulation (EC) No 773/2004 (“Regulation (EC) No 773/2004”).<sup>19</sup>

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<sup>14</sup> [...].

<sup>15</sup> [...].

<sup>16</sup> [...].

<sup>17</sup> [...].

<sup>18</sup> [...].

- (17) Subsequently, in the course of 2017, the Commission conducted a market investigation. In the context of this market investigation, the Commission sent a number of follow-up RFIs to Focus Home, Valve,<sup>20</sup> as well as to other relevant market players.<sup>21</sup>
- (18) On 5 April 2019, the Commission adopted a Statement of Objections alleging that Focus Home (and Valve) engaged in restrictive practices constituting an infringement of Article 101 of the Treaty.
- (19) On [...], Focus Home expressed an interest in engaging in formal cooperation discussions with the Commission in relation to this case. Subsequently, on 3 May 2019 the Commission sent a letter to Focus Home suspending the deadline for replying to the Statement of Objections.
- (20) On [...], Focus Home submitted a formal statement in which it acknowledged the infringement, the relevant facts and its liability for that infringement (the "Settlement Submission"), in view of the adoption of a decision pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003. The Settlement Submission contains:
- an acknowledgment in clear and unequivocal terms of Focus Home's liability for the infringement summarily described as regards its object, the main facts, their legal qualification and the duration of its participation in the infringement;
  - an indication of the maximum amount of the fine that Focus Home would accept in the context of a cooperation procedure;
  - the confirmation that Focus Home had been sufficiently informed of the Commission's objections through the Statement of Objections, that it had full access to the Commission's file at the time of the Statement of Objections, that it does not envisage requesting further access to file and that it had been given sufficient opportunity to make its views known to the Commission;
  - the agreement to receive the final Decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English;
  - the commitment not to repeat any acts or conducts constituting the infringement as described in the Settlement Submission, and to refrain from any act or conduct having the same or equivalent object or effect;
- (21) On the same date as this Decision, the Commission adopted a decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 concerning the liability of Valve (the "Decision against Valve").

## **6. FACTS**

### **6.1. Industry concerned**

- (22) A video game is usually defined as an electronic game played by manipulating images on a video display or television screen. In particular, a PC video game is

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<sup>19</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18.

<sup>20</sup> [...].

<sup>21</sup> [...].

understood to indicate a video game which is played by means of a PC regardless of the operating system running on the respective PC. The industry subject to these proceedings concerns PC video games to be activated and played on Steam. All further references to "PC video game", except for Section 7, refer to "Steam-enabled PC video games" (see Section 6.1.1), unless stated otherwise.

#### 6.1.1. Overview of Valve's business activity

- (23) 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 engage with each other by way of multiple features such as gaming communities; multi-player match-making;<sup>22</sup> in-game events; social and chat features.
- (24) 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 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. 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.<sup>23</sup>
- (25) In the framework of the contractual relationship between Valve and PC video games publishers, the following provisions of the SDAs and, where applicable, of the Steamworks Agreement are relevant:
  - 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*";<sup>24</sup>
  - The publisher's licence to Valve typically includes the rights to "[Direct quote from the license agreement]"<sup>25</sup> as well as to "[Direct quote from the license agreement]" the PC video games "[Direct quote from the license agreement]" of the PC video game;<sup>26</sup>
  - The publisher "[Direct quote from the license agreement]". Thereafter, the publisher "[Direct quote from the license agreement]" and "[Direct quote from the license agreement]";<sup>27</sup>
  - 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]";<sup>28</sup>

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<sup>22</sup> 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.

<sup>23</sup> [...].

<sup>24</sup> [...].

<sup>25</sup> [...].

<sup>26</sup> [...].

<sup>27</sup> [...].

<sup>28</sup> [...].

- 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 SDA between Valve and the publisher. In practice, for each PC video game purchased on Steam, users pay Valve the full price of which Valve retains 30% and transfers 70% to the publishers.<sup>29</sup> In addition, pursuant to the Steam Subscriber Agreement,<sup>30</sup> Valve acts as the merchant of record vis-à-vis users and takes responsibility for transactions vis-à-vis them.<sup>31</sup>
- (26) By way of the Steamworks Agreement, Valve provides publishers with 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 additional services (“Steamworks features”), all free of charge.<sup>32</sup> Among the Steamworks features that Valve typically provides to publishers are: a) Steam activation keys and b) Territory control as follows:
- (a) Steam activation keys
- (27) Steam activation keys are unique alphanumeric codes or sequences (Steam activation keys) that allow users to access a PC video game via the Internet and play it on Steam after an activation process (see Section 6.1.2).<sup>33</sup> 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 of receiving the request.<sup>34</sup>
- (28) 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. When they 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 the CD/DVDs no longer include a copy of the game, but rather a key which is needed to activate and play the game on Steam. When they are used for digital distribution, the online distributor e-mails the Steam activation keys directly to the user.
- (b) Territory control
- (29) Valve defines “territory control” as: “[Direct quote from license agreement]”.<sup>35</sup> Such territory control function, therefore, enables the setting up of geographical

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<sup>29</sup> [...].

<sup>30</sup> Available at [https://store.steampowered.com/subscriber\\_agreement/](https://store.steampowered.com/subscriber_agreement/), printed on 26 November 2019, [...].

<sup>31</sup> Clause 3.I of the Steam Subscriber Agreement 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 is available at [https://store.steampowered.com/steam\\_refunds/?l=english](https://store.steampowered.com/steam_refunds/?l=english), printed on 26 November 2019, [...].

<sup>32</sup> [...] A list of Steamworks features is also available on Valve’s website <https://partner.steamgames.com/doc/features>, [...] and links thereof that explain in detail Steamworks and each feature/service available.

<sup>33</sup> [...].

<sup>34</sup> [...].

<sup>35</sup> [...].

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 always worldwide. The territory control function may be used to ensure regulatory compliance,<sup>36</sup> to manage IP (copyright) territorial limitations from the copyright right holder<sup>37</sup> or for "windowing" purposes.<sup>38</sup>

- (30) 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.

#### 6.1.2. *Sale and activation of PC video games on Steam*

- (31) If a PC video game is purchased on the Steam Store, by opening the Steam client<sup>39</sup> 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. 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. Conversely, when a Steam-enabled PC video game is purchased outside the Steam platform, be it in an intangible or tangible support, the buyer has to go through an activation process on Steam in order to authenticate the game.<sup>40</sup> This process is necessary to enable the user to access the game and play it within the Steam environment. Valve's Steam technology provides for such authentication based on Steam activation keys created by Valve.
- (32) From a practical perspective, when a user purchases a Steam-enabled PC video game outside Steam, irrespective of whether he/she does so 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).

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<sup>36</sup> 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.

<sup>37</sup> For example, video game developers may want to carve out certain territories from the scope of a license given to the publisher, e.g., if the developer wants to self-publish and distribute the game itself in such territories.

<sup>38</sup> 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. [...].

<sup>39</sup> 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.

<sup>40</sup> In practice, when the user purchases the game from online/offline retailers, he/she needs to go to his/her Steam account's Library which shows all the Steam-enabled video games that he/she has purchased, and introduce the alphanumeric code (Steam activation key) in order to activate and play the game.

- (33) 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).<sup>41</sup>

6.1.3. *Technical implementation of geo-blocking via Steam activation keys*

- (34) Along with Steam activation keys, 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 as described in Section 6.1.1, letter b). During the activation process it 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.
- (35) The geographic restrictions that have been deployed for Focus Home's PC video games using Valve's Steam technology that are relevant for this Decision are the so-called "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. Once activated, however, it can also be played outside the "allowed" territory. In addition, in a few instances some games were subject to "run-time restrictions" whereby users who have legally purchased a PC video game are prevented not only from activating a given PC video game on Steam outside of the "allowed" territory but also from subsequently playing the PC video game outside of the "allowed" territory.<sup>42</sup>
- (36) Activation restrictions are not set up automatically,<sup>43</sup> 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 publisher to first set up activation restrictions on the basis of which geo-blocked Steam activation keys are generated.
- (37) As a first step, in order to set up activation restrictions, the publisher needs to determine the countries/regions in which activation will be allowed, and decide how many different geographic packages (i.e. "subscription ID(s)") Valve will have to set

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<sup>41</sup> 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.

<sup>42</sup> Any reference to "activation restrictions" also covers "run-time restrictions", unless otherwise stated.

<sup>43</sup> [...].

up for the PC video game in question and in which countries/regions activation should be allowed for each geographic package.<sup>44</sup> 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.

- (38) After Valve has set up the different geographic units, the publisher can request that Valve generates and provides a given number of Steam activation keys that it 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 (also referred to as “geo-blocked Steam activation keys”).
- (39) 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 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.
- (40) 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 the distinction between the two is often less clear in the publishers’ requests. There are instances, for example, where the PC video game publisher’s request to set up a geographic unit is implied in the request of the geo-blocked Steam activation keys.<sup>45</sup>
- (41) Before [...], publishers ordered Steam activation keys “manually”, i.e. by email. As of [...], ordering Steam activation keys became automated through a web form, in which publishers needed to specify how many keys they needed and for which geographic unit(s).<sup>46</sup> Conversely, the set-up of the activation restrictions described in Recitals (37) – (40) 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 confirms that activation restrictions for these games were agreed between Valve and Focus Home (see further Recital (95)).

## 7. RELEVANT MARKETS

### 7.1. Principles

- (42) The relevant product and geographic markets are determined according to two criteria, namely, demand-side substitution and supply-side substitution. Potential

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<sup>44</sup> [...].

<sup>45</sup> By way of example, email exchange between Focus Home and Valve of 22 October 2013 ("*Focus – Package request*"): "*We have a new polish partner for the retail version of: • [...] • [...] And we'd like to provide them some keys with a country restriction to Poland only Could you prepare 1 new package for each games in order to make a key request?*", [...].

<sup>46</sup> [...].

competition (i.e., competition from products outside the relevant market) is considered at a later stage when carrying out the overall assessment of competition.<sup>47</sup>

- (43) 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.<sup>48</sup> 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 including for example potential competition, although a "detailed analysis" of the markets concerned is not necessary if the agreement has as its object the restriction of competition as indicated above.

## **7.2. Relevant product market**

### **7.2.1. Substitutability of video games running on different electronic systems**

- (44) In the Commission Decision 2003/675/EC of 30 October 2002 in Cases COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega — Nintendo (hereinafter, "*Nintendo*"),<sup>49</sup> 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. Similarly, in the Commission Decision of 12 February 2016 in case No COMP/M.7866 — *Activision Blizzard / King* (hereinafter, "*Activision Blizzard/King*"),<sup>50</sup> 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.
- (45) These findings were confirmed by the market investigation conducted in the present case.<sup>51</sup> 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 in view of significant switching costs<sup>52</sup> and personal preferences.<sup>53</sup> From a supply-side perspective, the respondents indicated that each electronic system has different features, specific characteristics, and production costs.<sup>54</sup> For example, in the *Activision Blizzard/King* merger decision, the Commission found that there were indications for a separate market for publishing

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<sup>47</sup> Paragraph 24 of 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.

<sup>48</sup> Judgment of the General Court of 28 June 2016, *Telefónica, SA v Commission*, T-216/13, ECLI:EU:T:2016:369, paragraph 214.

<sup>49</sup> OJ L 255, 8.10.2003, p. 33–100.

<sup>50</sup> OJ C 12, 15.1.2016, p. 5.

<sup>51</sup> The Commission sought information from a number of video game publishers, including [...].

<sup>52</sup> [...].

<sup>53</sup> [...]. See also Market Definition Notice, paragraphs 13 and 20.

<sup>54</sup> [...].



video games for mobile platforms as opposed to video games for PCs and consoles.<sup>55</sup> This has been confirmed by the market investigation.<sup>56</sup>

#### 7.2.2. *Substitutability of PC video games sold physically and digitally*

- (46) Respondents to the market investigation indicated the growing importance of the digital sales channel (i.e., sales via downloading and streaming<sup>57</sup>), especially for PC video games.<sup>58</sup> However, they also pointed out that sales of PC video games on physical supports such as CDs and DVDs have an important role<sup>59</sup> 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.<sup>60</sup>
- (47) Many respondents also considered that typically PC video games are sold both digitally and physically.<sup>61</sup> Most respondents considered that prices tend to be similar for both digital and physical sales of the same PC video game.<sup>62</sup>
- (48) From a demand-side perspective, the market investigation showed some degree of substitution between physical and digital games which confirms that these two channels<sup>63</sup> exert at least certain competitive constraint on each other.<sup>64</sup>
- (49) 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.<sup>65</sup> 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 limited<sup>66</sup> and estimated at between 0 and 5% of the retail price of a PC video game.<sup>67</sup> 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<sup>68</sup>. This confirms that there is at least potential competition between physical and digital sales.

### 7.3. **Relevant geographic market**

- (50) 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

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<sup>55</sup> Commission decision of 12 February 2016 in case COMP/M.7866 – Activision Blizzard / King, OJ C 12, 15.1.2016 merger decision, cited above, p. 4.

<sup>56</sup> [...].

<sup>57</sup> 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 entire game.

<sup>58</sup> [...].

<sup>59</sup> [...].

<sup>60</sup> [...].

<sup>61</sup> [...].

<sup>62</sup> [...].

<sup>63</sup> For the avoidance of doubt, reference to digital distribution means sales via downloads or streaming only (i.e., it does not include sales of CDs and DVDs via internet).

<sup>64</sup> [...].

<sup>65</sup> [...].

<sup>66</sup> [...].

<sup>67</sup> [...].

<sup>68</sup> [...].

to comply with specific regulations existing in Germany and Austria.<sup>69</sup> Second, although most publishers typically produce one version of a video game with a function which allows users to choose the gaming language themselves,<sup>70</sup> some publishers create separate video game versions which contain different languages for different EEA countries<sup>71</sup>. 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.<sup>72</sup> This is because translation of the game can considerably degrade the quality of the gaming experience because of the poor quality of translation.<sup>73</sup>

- (51) 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.<sup>74</sup>
- (52) 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,<sup>75</sup> which appears not to require significant modifications to adapt PC video games to local market conditions.

#### **7.4. Conclusion on relevant markets**

- (53) 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.
- (54) The market investigation provides indications that the market for PC video games encompasses PC video games sold both digitally and physically. However, for the purposes of this Decision, the question whether digital and physical distribution constitute 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.

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<sup>69</sup> The distribution of PC video games in Germany is subject to a stricter set of rules on the type of content, in particular the level of violence, compared to other EEA countries. In Germany, the PC video game is usually attributed an age rating, also called a USK rating, which is not substitutable with other rating systems, including PEGI; therefore it is likely that a game launched in Germany will have both PEGI and USK ratings. In addition, PC video game publishers create alternative versions for Germany and Austria markets to comply with the legislation that prohibits the depiction of Nazi symbols and other references.

<sup>70</sup> [...].

<sup>71</sup> [...].

<sup>72</sup> [...].

<sup>73</sup> [...].

<sup>74</sup> [...].

<sup>75</sup> [...].

- (55) 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 7.2.2, which confirms that physical and digital sales exert at least some competitive constraints on each other.

## **8. THE RELEVANT CONDUCT**

### **8.1. Agreements/concerted practices with Valve**

#### *8.1.1. The SDAs and the Steamworks Agreement between Valve and Focus Home*

- (56) The contractual relationship between Valve and Focus Home is governed by: a) the SDA of 8 January 2007 and subsequent amendments (“the 2007 SDA”);<sup>76</sup> b) the SDA of 20 June 2012 and addendum (“the 2012 SDA”);<sup>77</sup> c) the SDA of 14 June 2016 (“the Standard SDA”).<sup>78</sup> 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.<sup>79</sup> The Steamworks Agreement between Focus Home and Valve was signed as an addendum to the 2012 SDA.<sup>80</sup>
- (57) On the basis of these different agreements (together the “SDAs/Steamworks Agreement”) Valve was granted a non-exclusive worldwide licence (i.e. including the entirety of the EEA) to exploit specified Focus Home’s PC video games on Steam.<sup>81</sup> 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.<sup>82</sup> Pursuant to the Steam Subscriber Agreement, Valve is the merchant of record *vis-à-vis* users purchasing Focus Home’s PC video games on Steam Store and is responsible for transactions therein *vis-à-vis* those users. In addition, under the SDA/Steamworks Agreement, Valve also licenced to Focus Home its Steam technology which includes the provision of Steam activation keys<sup>83</sup> 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 Focus Home.<sup>84</sup>
- (58) 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 6.1.1, 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 further evidenced in Section 8.1.2.

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<sup>76</sup> [...].

<sup>77</sup> [...].

<sup>78</sup> [...].

<sup>79</sup> [...].

<sup>80</sup> [...].

<sup>81</sup> [...].

<sup>82</sup> [...].

<sup>83</sup> [...].

<sup>84</sup> [...].

### 8.1.2. Focus Home's PC video games geo-blocked via Steam activation keys

- (59) Through the use of geo-blocked Steam activation keys (see further Section 6.1.2) Focus Home and Valve restricted the possibility for users to activate (and in certain instances play) 19 PC video games<sup>85</sup> outside of specific EEA countries. 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.
- (60) Focus Home requested that Valve put in place activation restrictions.<sup>86</sup> In particular, Focus Home requested Valve to set up activation restrictions and provide geo-blocked Steam activation keys, which Focus Home then supplied to some Independent Distributors (e.g. [...], [...]<sup>87</sup>, [...], [...], [...]) for the mentioned 19 PC video games.<sup>88</sup> 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.
- (61) 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 place<sup>89</sup> 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 6.1.3).<sup>90</sup>
- (62) Activation restrictions were in place between 17 May 2013 (date when Valve agreed to set up activation restrictions for the games “[...]” and “[...]”)<sup>91</sup> and 9 October 2015, when Valve lifted any existing EEA activation restrictions.<sup>92</sup> 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.
- (63) 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 eight (out of 19) PC video games (points (i) – (iii) below) to – depending on the games and territories concerned - Estonia, Hungary, Latvia, Lithuania and/or Poland:
- (1) “[...]”, “[...]”, “[...]”: 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.<sup>93</sup> Valve replied that the subscriptions had been updated to “*limit activations to [...] EE [Estonia] LV [Latvia] LT*

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<sup>85</sup> [...].

<sup>86</sup> For the purpose of this Section, reference to “activation restrictions” also covers “run-time restrictions”.

<sup>87</sup> [...].

<sup>88</sup> [...].

<sup>89</sup> [...].

<sup>90</sup> [...].

<sup>91</sup> [...].

<sup>92</sup> [...].

<sup>93</sup> 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.

[Lithuania]” and approved.<sup>94</sup> 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.<sup>95</sup> 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 [...]*”).<sup>96</sup> 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*”).<sup>97</sup> Contemporaneous evidence shows that Steam activation keys geo-blocked to Poland were requested and existed for “[...]” and “[...]” as well for “[...]” geo-blocked to Hungary.<sup>98</sup>

- (2) “[...]”, “[...]”, “[...]”: In an email exchange of 13 September 2013, Focus Home requested that Valve prepare the packages for these games with limitations to Poland (and to Polish language). In reply, Valve confirmed having “*set up all of the packages [...] requested*” by Focus Home.<sup>99</sup>
- (3) “[...]”, “[...]”: 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.<sup>100</sup> Valve confirmed having started preparing those packages (“*I'll get started on those packages now so you'll be all set*”).<sup>101</sup> On 31 October 2013, the keys that had been prepared were circulated internally at Focus Home.<sup>102</sup> Contemporaneous evidence shows that Steam activation keys geo-blocked to Poland were requested and existed for these two games.<sup>103</sup>

- (64) For nine PC video games, namely, “[...]”, “[...]”, “[...]”, “[...]”, “[...]”, “[...]”,<sup>104</sup> “[...]”, “[...]” 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.<sup>105</sup> In light of the explanation provided in Section 6.1.3 concerning the automated system, such orders confirm that Valve and Focus Home agreed on activation restrictions for these games. In addition, contemporaneous evidence shows

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<sup>94</sup> [...].

<sup>95</sup> [...].

<sup>96</sup> [...].

<sup>97</sup> [...].

<sup>98</sup> [...].

<sup>99</sup> [...].

<sup>100</sup> Other regions were “[...]”, which stays for “[...]” and “[...]” respectively. The [...] includes [...] but not including Latvia, Lithuania and Estonia anymore.

<sup>101</sup> [...].

<sup>102</sup> [...].

<sup>103</sup> [...].

<sup>104</sup> For this game, also run-time restrictions were in place.

<sup>105</sup> [...].

that keys geo-blocked to Poland were requested and existed for “[...]”<sup>106</sup> and for the three games of the “[...]” franchise.<sup>107</sup>

- (65) Finally, regarding “[...]” and “[...]” box of games,<sup>108</sup> Valve acknowledged that they had activation (and, in the case of “[...]”, also run-time) restrictions in place.<sup>109</sup> Focus Home also acknowledged that geo-blocked keys for these two PC video games were provided to its distributor [...] in Estonia, Latvia and Lithuania.<sup>110</sup>
- (66) As regards the start date for each agreement/concerted practice (for the exact dates, see Table 1):
- (1) For the games mentioned in Recital (63), (1) – (3), this is the date of the email in which Valve upon request of Focus Home agreed to set up activation restrictions for the respective Focus Home’s PC video games;
  - (2) For the games mentioned in Recital (64), this is the date of the first order of geo-blocked keys via the automated system;<sup>111</sup>
  - (3) For the games mentioned in Recital (65), available evidence shows that agreements/concerted practices started, respectively, on 31 July 2013 for “[...]” and on 30 December 2014 for “[...]”.<sup>112</sup>
- (67) 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 “[...]”,<sup>113</sup> “[...]”, “[...]” and “[...]”<sup>114</sup>. Valve confirmed to Focus Home that it had removed the territory restrictions for “[...]” on 20 June 2014<sup>115</sup> and for “[...]”, “[...]” and “[...]” (all restricted to Poland) on 20 March 2015.<sup>116</sup> Regarding the remaining PC video games concerned by geo-blocked Steam activation keys, by email of 11 September 2015 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.<sup>117</sup>
- (68) Table 1 provides an overview of the 19 Focus Home’s PC video games that were restricted via geo-blocked Steam activation keys. Column (i) reports the title of the relevant PC video game concerned; Column (ii) reports the affected territory (EEA country or countries) to which the activation (and/or run-time) restriction applies<sup>118</sup> as well as the name of the relevant Independent Distributor; Column (iii) reports the start date (and the relevant EEA country or countries concerned by such start date); Column (iv) reports the end date.

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<sup>106</sup> [...].

<sup>107</sup> [...].

<sup>108</sup> [...].

<sup>109</sup> [...].

<sup>110</sup> [...].

<sup>111</sup> [...].

<sup>112</sup> [...].

<sup>113</sup> [...].

<sup>114</sup> [...].

<sup>115</sup> [...].

<sup>116</sup> [...].

<sup>117</sup> [...].

<sup>118</sup> The majority of the games had activation restrictions in place. In the few cases where there were (also) run-time restrictions, this is indicated in the table.

**Table 1 – 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 <sup>119</sup>	09/10/2015
[...]	Poland ([...])	13/09/2013 <sup>120</sup>	09/10/2015
[...]	Poland ([...]; [...])	30/10/2013 <sup>121</sup>	20/03/2015
[...]	Estonia, Latvia, Lithuania ([...])	31/07/2013 <sup>122</sup>	09/10/2015
[...]	Poland ([...])	04/10/2013 <sup>123</sup>	09/10/2015
[...]	Poland ([...])	04/10/2013 <sup>124</sup>	09/10/2015
[...]	Poland ([...]; [...])	30/10/2013 <sup>125</sup>	20/03/2015
[...]	Poland ([...]) Estonia, Latvia, Lithuania ([...])	13/09/2013 <sup>126</sup>	09/10/2015
[...]	Poland ([...]; [...]; [...]) Estonia, Latvia, Lithuania ([...])	29/07/2013 <sup>127</sup>	09/10/2015
[...]	Poland ([...]) Estonia, Latvia, Lithuania ([...])	17/05/2013 <sup>128</sup>	20/06/2014
[...]	Poland ([...]) Estonia, Latvia, Lithuania ([...])	13/09/2013 <sup>129</sup>	09/10/2015
[...]	Poland ([...]; [...])	01/07/2013 <sup>130</sup>	20/03/2015
[...]*	Estonia, Latvia, Lithuania ([...])	30/12/2014 <sup>131</sup>	09/10/2015
[...]	Poland ([...])	13/08/2013 <sup>132</sup>	09/10/2015

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<sup>119</sup> [...].  
<sup>120</sup> [...].  
<sup>121</sup> [...].  
<sup>122</sup> [...].  
<sup>123</sup> [...].  
<sup>124</sup> [...].  
<sup>125</sup> [...].  
<sup>126</sup> [...].  
<sup>127</sup> [...].  
<sup>128</sup> [...].  
<sup>129</sup> [...].  
<sup>130</sup> [...].  
<sup>131</sup> [...].

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 ([...])	13/08/2013 <sup>133</sup>	09/10/2015
[...]	Poland ([...])	13/08/2013 <sup>134</sup>	09/10/2015
[...]*	Estonia, Latvia, Lithuania ([...])	30/12/2014 <sup>135</sup>	09/10/2015
[...]	Poland ([...]) Estonia, Latvia, Lithuania ([...])	30/12/2014 <sup>136</sup>	09/10/2015
[...]	Hungary ([...]) Poland ([...]; [...]) Estonia, Latvia, Lithuania ([...])	17/05/2013 <sup>137</sup>	09/10/2015

\* Also run-time restrictions

- (69) These geo-blocked Steam activation keys were used by Valve and Focus Home as a technical way to prevent cross-border sales of the mentioned 19 PC video games of Focus Home. In certain instances, Focus Home complemented the use of these activation keys with cross-border sale restrictions provided in distribution agreements between Focus Home and certain Independent Distributors<sup>138</sup> which were in place between 14 March 2007 and 8 November 2018 (see Section 8.2).

## 8.2. Agreements with the Independent Distributors

### 8.2.1. Overview of Agreements

- (70) As indicated in Section 3.1, between 2006 and 2017 Focus Home concluded a number of licensing and distribution agreements with the Independent Distributors listed in Table 2. These agreements contain a number of cross-border sales restrictions concerning a number of Focus Home's PC video games (see the following Section 8.2.2).
- (71) On the basis of these agreements, the licenced territories included, depending on the cases, one or more of the following EEA countries: Austria, Belgium, Bulgaria, Czech Republic,<sup>139</sup> Croatia, Cyprus, Denmark, Estonia, Finland, Germany, Hungary,

<sup>132</sup> [...].

<sup>133</sup> [...].

<sup>134</sup> [...].

<sup>135</sup> [...].

<sup>136</sup> [...].

<sup>137</sup> [...].

<sup>138</sup> [...] [...].

<sup>139</sup> Reference is made to Czech Republic rather than "Czechia" in the interest of consistency with the terms used in the agreements/evidence quoted.



Ireland, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK. None of the distribution agreements listed in Table 2 cover Greece, Iceland, Liechtenstein, Malta. In addition, Focus Home's distribution agreements regarding France - not listed in Table 2 - do not include restrictive clauses of the types listed in Section 8.2.2.

- (72) The 52 PC video games concerned by these agreements (see Table 2) were distributed physically and/or digitally by Focus Home's Independent Distributors in one or more EEA countries. The large majority of these agreements concerned physical distribution; some concerned both physical and digital distribution and a small number concerned digital distribution only (i.e. via download or streaming). 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 7), 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.

#### 8.2.2. *The restrictive clauses in the agreements*

- (73) All of the agreements set out in Table 2 include one or more clauses which prevented the Independent Distributors from effectively engaging in the cross-border sales of the respective Focus Home PC video games. For ease of reference, the different anti-competitive clauses in the agreements have been grouped together into 4 categories.
- (1) Type 1 Clauses aim at 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;<sup>140</sup>
  - (2) Type 2 Clauses aim at 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. The objective of these types of clauses is to prevent the cross-border sales of Focus Home's PC video games from the licensed territory to the rest of the EEA;<sup>141</sup>
  - (3) Type 3 Clauses act 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;<sup>142</sup>
  - (4) Type 4 Clauses oblige the respective distributor/licensee - unless otherwise approved in writing by Focus Home - to pass directly to Focus Home all

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<sup>140</sup> [...].

<sup>141</sup> [...].

<sup>142</sup> [...].

enquiries or unsolicited orders outside the territory, for the PC video games received by the distributor/licensee, and therefore have *de facto* the same result of a cross-border sales restriction as they prevent distributors from fulfilling orders directly.<sup>143</sup>

- (74) The above categories cover the most frequent types of restrictive clauses included in the distribution agreements set out in Table 2.
- (75) The agreements including anti-competitive clauses, considered together, were in place between 14 March 2007 and 8 November 2018. These dates are, respectively, the earliest starting date and the latest expiry date of an agreement between Focus Home and an Independent Distributor containing one or more of the anti-competitive clauses set out above. In particular: (i) 14 March 2007 is the starting date of the agreements between Focus Home and two Independent Distributors including restrictive clauses for the distribution of the game “[...]” in five EEA countries;<sup>144</sup> (ii) 8 November 2018 is the date of expiry of the agreement between Focus Home and one Independent Distributor including restrictive clauses for the distribution of the game “[...]” in two EEA countries.<sup>145</sup> The same PC video games which were distributed in the EEA by way of distribution agreements including restrictive clauses were also sold on Steam across the entire EEA during the same period.
- (76) Table 2 provides an overview of Focus Home’s PC video games that were geo-blocked by means of restrictive clauses in distribution agreements with Independent Distributors. Column (i) reports the number of entry corresponding to the relevant game title; Column (ii) reports the title of the relevant PC video game geo-blocked via contractual restrictions; Column (iii) reports the document ID number of the relevant distribution agreement; Column (iv) reports the affected territory (EEA countries) covered by the respective distribution agreement; Column (v) reports the name of the relevant Independent Distributor; Column (vi) reports the restrictive clause types included in the relevant distribution agreement (for an explanation of the different clause types, see Recital (73), points (1) to (4) and relevant footnotes).

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<sup>143</sup> [...].

<sup>144</sup> [...].

<sup>145</sup> [...].

**Table 2 – Focus Home’s PC video games geo-blocked by contractual clauses**

(i)	(ii)	(iii)	(iv)	(v)	(vi)
N.	Game title covered by the distribution agreement	ID of distribution agreement (master agreement and/or schedules)	EEA territory(ies) covered by distribution agreement	Independent Distributor	Clause types (1A, 2A, 3A, 4A, 1B, 2B, 3B, 4B, 1C, 2C, 1D, 2D) included in the distribution agreement
1	[...]	[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
2	[...]	[...]	Czech Republic, Slovakia	[...]	1A, 2A, 3A, 4A
		[...]	Denmark, Finland, Norway, Sweden	[...]	1A, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
3	[...]	[...]	Estonia, Latvia, Lithuania	[...]	1A, 2A, 3A, 4A
		[...]	Hungary	[...]	1C, 4A
		[...]	Poland	[...]	1A, 2A, 4A
		[...]	Austria, Germany	[...]	1A, 2A, 3A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 3A, 4A
		[...]	Austria, Germany	[...]	1A, 2A, 3A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
		[...]	Ireland, United Kingdom	[...]	1A
4	[...]	[...]	Estonia, Latvia, Lithuania	[...]	1A, 1D, 2A, 4A
		[...]	Spain	[...]	1A, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 4A
5	[...]	[...]	Italy	[...]	1A, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 3A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
6	[...]	[...]	Belgium, Luxembourg,	[...]	1A, 2A, 4A

(i)	(ii)	(iii)	(iv)	(v)	(vi)
N.	Game title covered by the distribution agreement	ID of distribution agreement (master agreement and/or schedules)	EEA territory(ies) covered by distribution agreement	Independent Distributor	Clause types (1A, 2A, 3A, 4A, 1B, 2B, 3B, 4B, 1C, 2C, 1D, 2D) included in the distribution agreement
			The Netherlands		
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 1D, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 3A, 4A
		[...]	Spain	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
7	[...]	[...]	Poland	[...]	1A, 2A, 4A
		[...]	Austria, Germany	[...]	1A, 2A, 3A, 4A
		[...]	Denmark, Finland, Norway, Sweden	[...]	1A, 2A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
8	[...]	[...]	Hungary	[...]	1A, 2A, 3A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 3A, 4A
		[...]	Denmark, Finland, Norway, Sweden	[...]	1A, 2A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 2A, 3A, 4A
		[...]	Poland	[...]	1A, 2A, 4A
9	[...]	[...]	Italy	[...]	1A, 2A, 4A
		[...]	Romania	[...]	1A, 2A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
10	[...]	[...]	Poland	[...]	1A, 2A, 4B
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
11	[...]	[...]	Poland	[...]	1A, 2A, 4A
		[...]	Italy, Spain	[...]	1A, 2A, 3A, 4A
12	[...]	[...]	Czech Republic, Slovakia	[...]	1A, 2A, 3A, 4A

(i)	(ii)	(iii)	(iv)	(v)	(vi)
N.	Game title covered by the distribution agreement	ID of distribution agreement (master agreement and/or schedules)	EEA territory(ies) covered by distribution agreement	Independent Distributor	Clause types (1A, 2A, 3A, 4A, 1B, 2B, 3B, 4B, 1C, 2C, 1D, 2D) included in the distribution agreement
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 2A, 3A, 4A
		[...]	Spain	[...]	1A, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
13	[...]	[...]	Italy	[...]	1A, 2A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 1D, 2A, 4A
		[...]	Belgium, Luxembourg, Netherlands	[...]	1A, 2A, 4A
14	[...]	[...]	Spain	[...]	1A, 2A, 4A
15	[...]	[...]	Poland	[...]	1A, 2A, 3A, 4A
16	[...]	[...]	Poland	[...]	1A, 2A, 3A, 4A
		[...]	Spain	[...]	1A, 2A, 3A, 4A
		[...]	Italy	[...]	1A, 2A, 3A, 4A
		[...]	Ireland, United Kingdom	[...]	1B, 2D, 3A, 4A
17	[...]	[...]	Poland	[...]	1A, 2A, 4A
		[...]	Austria, Germany	[...]	1A, 2A, 3A, 4A
18	[...]	[...]	Spain	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 1D, 2A, 4A
		[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
19	[...]	[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
20	[...]	[...]	Spain	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Ireland, United Kingdom	[...]	1A, 1D, 2A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 1D, 2A, 4A
21	[...]	[...]	Italy	[...]	1A, 2A, 4A

(i)	(ii)	(iii)	(iv)	(v)	(vi)
N.	Game title covered by the distribution agreement	ID of distribution agreement (master agreement and/or schedules)	EEA territory(ies) covered by distribution agreement	Independent Distributor	Clause types (1A, 2A, 3A, 4A, 1B, 2B, 3B, 4B, 1C, 2C, 1D, 2D) included in the distribution agreement
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
22	[...]	[...]	Italy	[...]	1A, 2A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
23	[...]	[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Croatia, Slovenia	[...]	1A, 2A, 4C
24	[...]	[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
25	[...]	[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
26	[...]	[...]	Poland	[...]	1A, 2A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 3A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
		[...]	Hungary	[...]	1A, 2A, 3A, 4A
		[...]	Austria, Germany	[...]	1A, 2A, 3A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 2A, 3A, 4A
27	[...]	[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
		[...]	Czech Republic, Slovakia,	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Spain	[...]	1A, 2A, 4A
		[...]	Romania	[...]	1A, 2A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 2A, 3A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 3A, 4A
28	[...]	[...]	Spain	[...]	1A, 2A, 4A

(i)	(ii)	(iii)	(iv)	(v)	(vi)
N.	Game title covered by the distribution agreement	ID of distribution agreement (master agreement and/or schedules)	EEA territory(ies) covered by distribution agreement	Independent Distributor	Clause types (1A, 2A, 3A, 4A, 1B, 2B, 3B, 4B, 1C, 2C, 1D, 2D) included in the distribution agreement
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
		[...]	Czech Republic, Slovakia,	[...]	1A, 2A, 4A
		[...]	Romania	[...]	1A, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 3A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 1D, 2A, 4A
29	[...]	[...]	Spain	[...]	1A, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 1D, 2A, 4A
		[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
30	[...]	[...]	Poland	[...]	1A, 2A, 3A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1C, 4A
		[...]	Ireland, United Kingdom	[...]	1B, 2D, 3A, 4A
31	[...]	[...]	Spain	[...]	1A, 2A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
		[...]	Poland	[...]	1A, 2A, 4A
		[...]	Austria, Germany	[...]	1A, 2A, 3A, 4A
32	[...]	[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
		[...]	Hungary	[...]	1A, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 4B
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Spain	[...]	1A, 2A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 4A
		[...]	Romania	[...]	1A, 2A, 4A

(i)	(ii)	(iii)	(iv)	(v)	(vi)
N.	Game title covered by the distribution agreement	ID of distribution agreement (master agreement and/or schedules)	EEA territory(ies) covered by distribution agreement	Independent Distributor	Clause types (1A, 2A, 3A, 4A, 1B, 2B, 3B, 4B, 1C, 2C, 1D, 2D) included in the distribution agreement
33	[...]	[...]	Spain	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
		[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
34	[...]	[...]	Czech Republic, Slovakia	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
35	[...]	[...]	Bulgaria, Romania	[...]	1A, 2A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
		[...]	Croatia, Slovenia	[...]	1A, 2A, 4C
36	[...]	[...]	Spain	[...]	1A, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 1D, 2A, 4A
37	[...]	[...]	Poland	[...]	1A, 2A, 4A
		[...]	Ireland, United Kingdom	[...]	1B, 2D, 3A, 4A
		[...]	Hungary	[...]	1A, 2A, 3A, 4A
		[...]	Denmark, Finland, Norway, Sweden	[...]	1A, 2B, 3B, 4A
38	[...]	[...]	Poland	[...]	1A, 2A, 4A
		[...]	Spain	[...]	1A, 2A, 3A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 3A, 4A
		[...]	Hungary	[...]	1C, 4A
		[...]	Belgium, Luxembourg,	[...]	1A, 2A, 3A, 4A



(i)	(ii)	(iii)	(iv)	(v)	(vi)
N.	Game title covered by the distribution agreement	ID of distribution agreement (master agreement and/or schedules)	EEA territory(ies) covered by distribution agreement	Independent Distributor	Clause types (1A, 2A, 3A, 4A, 1B, 2B, 3B, 4B, 1C, 2C, 1D, 2D) included in the distribution agreement
			The Netherlands		
		[...]	Cyprus	[...]	1A, 2A, 3A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
39	[...]	[...]	Poland	[...]	1A, 2A, 4A
		[...]	Hungary	[...]	1A, 2A, 3A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 3A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
		[...]	Poland	[...]	1C, 4A
		[...]	Denmark, Norway, Sweden,	[...]	1A, 2C, 3A, 4A
40	[...]	[...]	Ireland, United Kingdom	[...]	1A, 2A, 3A, 4A
		[...]	Austria, Germany	[...]	1A, 2A, 3A, 4A
41	[...]	[...]	Poland	[...]	1A, 2A, 3A, 4A
		[...]	Spain	[...]	1C, 4A
42	[...]	[...]	Spain, Italy	[...]	1A, 2A, 3A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 2A, 3A, 4A
		[...]	Poland	[...]	1A, 2A, 3A, 4A
		[...]	Spain	[...]	1A, 2A, 3A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 3A, 4A
43	[...]	[...]	Poland	[...]	1A, 2A, 4A
		[...]	Spain, Italy	[...]	1A, 2A, 3A, 4A
44	[...]	[...]	Poland	[...]	1A, 2A, 4A
		[...]	Spain, Italy	[...]	1A, 2A, 3A, 4A
45	[...]	[...]	Portugal	[...]	1A, 2A, 3A, 4A
		[...]	Poland	[...]	1A, 2A, 4A
		[...]	Italy, Spain	[...]	1A, 2A, 3A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 3A, 4A

(i)	(ii)	(iii)	(iv)	(v)	(vi)
N.	Game title covered by the distribution agreement	ID of distribution agreement (master agreement and/or schedules)	EEA territory(ies) covered by distribution agreement	Independent Distributor	Clause types (1A, 2A, 3A, 4A, 1B, 2B, 3B, 4B, 1C, 2C, 1D, 2D) included in the distribution agreement
		[...]	Hungary	[...]	1C, 4A
46	[...]	[...]	Bulgaria, Romania	[...]	1A, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 4B
		[...]	Czech Republic, Slovakia,	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
		[...]	Croatia, Slovenia	[...]	1A, 2A, 4C
47	[...] / [...] / [...]	[...]	Cyprus	[...]	1A, 2A, 3A, 4A
		[...]	Poland	[...]	1A, 2A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 3A, 4A
		[...]	Denmark, Finland, Norway, Sweden	[...]	1A, 2A, 4A
		[...]	Hungary	[...]	1A, 2A, 3A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 2A, 3A, 4A
		[...]	Czech Republic, Slovakia,	[...]	1A, 2A, 3A, 4A
48	[...] //	[...]	Spain	[...]	1A, 2A, 3A, 4A
		[...]	Ireland, United Kingdom	[...]	1B, 2D, 3A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 3A, 4A
		[...]	Portugal	[...]	1A, 2A, 3A, 4A
		[...]	Spain	[...]	1A, 2A, 3A, 4A
		[...]	Denmark, Norway, Sweden	[...]	1A, 2C, 3A, 4A
		[...]	Poland	[...]	1A, 2A, 3A, 4A

(i)	(ii)	(iii)	(iv)	(v)	(vi)
N.	Game title covered by the distribution agreement	ID of distribution agreement (master agreement and/or schedules)	EEA territory(ies) covered by distribution agreement	Independent Distributor	Clause types (1A, 2A, 3A, 4A, 1B, 2B, 3B, 4B, 1C, 2C, 1D, 2D) included in the distribution agreement
49	[...]	[...]	Estonia, Latvia, Lithuania	[...]	1A, 1D, 2A, 4A
		[...]	Spain	[...]	1A, 2A, 4A
		[...]	Czech Republic, Slovakia	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Romania	[...]	1A, 2A, 4A
		[...]	Ireland, United Kingdom	[...]	1A, 2A, 4A
		[...]	Hungary	[...]	1A, 2A, 4A
50	[...]	[...]	Czech Republic, Slovakia,	[...]	1A, 2A, 3A, 4A
		[...]	Poland	[...]	1A, 2A, 4A
		[...]	Denmark, Finland, Norway, Sweden	[...]	1A, 2A, 4A
		[...]	Hungary	[...]	1A, 2A, 3A, 4A
51	[...]	[...]	Spain	[...]	1A, 2A, 4A
		[...]	Italy	[...]	1A, 2A, 4A
		[...]	Belgium, Luxembourg, The Netherlands	[...]	1A, 2A, 4A
		[...]	Estonia, Latvia, Lithuania	[...]	1A, 1D, 2A, 4A
		[...]	Czech Republic, Slovakia,	[...]	1A, 2A, 4A
		[...]	UK, Ireland,	[...]	1A, 2A, 4A
		[...]	Poland	[...]	1A, 2A, 4C
52	[...]	[...]	Czech Republic, Slovakia	[...]	1A, 2A, 3A, 4A

### 8.3. Conclusion on the agreements/concerted practices entered into by Focus Home

- (77) For the 19 PC video games described in Section 8.1.2 and listed in Table 1, Valve provided geo-blocked Steam activation keys to Focus Home who passed them on to its distributors in Estonia, Hungary, Latvia, Lithuania and/or Poland (e.g. [...], [...], [...], [...], [...]). These distributors resold them to users in those territories. The geo-blocked Steam activation keys for the 19 relevant PC video games were in 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.

- (78) For the 52 PC video games described in Section 8.2.2 and listed in Table 2, Focus Home concluded with the Independent Distributors<sup>146</sup> a number of licensing and distribution agreements including one or more clauses containing cross-border sales restrictions. The relevant overall duration of the distribution agreements is from 14 March 2007 until 8 November 2018. The same PC video games for which Focus Home concluded with the Independent Distributors listed in Table 2 agreements containing cross-border sale restrictions were also sold on Steam across the entire EEA during the same period.

## 9. LEGAL ASSESSMENT

- (79) 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.
- (80) 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*".<sup>147</sup>
- (81) The agreements and concerted practices referred to in this Decision concerned the territory of the Union and the EEA. Insofar as the conduct affected trade between Member States, Article 101 of the Treaty is applicable. As regards operation of those agreements and/or concerted practices in Norway, Iceland and Liechtenstein and its effect on trade between the Union and those countries, it falls within Article 53 of the EEA Agreement.
- (82) Unless specifically indicated otherwise, the legal assessment below under Article 101 of the Treaty also applies to Article 53 EEA; 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 EEA and references to Member States should be understood as also referring to Contracting Parties to the EEA Agreement.
- (83) The Commission is the competent authority to apply both Article 101 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the conduct had an appreciable effect on trade between Member States or EEA countries.

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<sup>146</sup> [...].

<sup>147</sup> 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.

## **10. APPLICATION OF ARTICLE 101(1) OF THE TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT**

- (84) The Commission finds that the agreements and/or concerted practices referred to in this Decision had the object of restricting competition by partitioning markets or making the interpenetration of national markets more difficult by geo-blocking PC video games along national/regional borders. Those agreements and/or concerted practices infringed Article 101 of the Treaty and Article 53 of the EEA Agreement and do not satisfy the four cumulative conditions to benefit from an exemption under Article 101(3) of the Treaty.

### **10.1. Concept of undertaking**

#### *10.1.1. Principles*

- (85) Article 101 of the Treaty applies to undertakings and associations of undertakings.<sup>148</sup> The notion "undertaking" covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.<sup>149</sup>

#### *10.1.2. Application to this case*

- (86) Focus Home, Valve and the Independent Distributors mentioned in Tables 1 and 2 are undertakings within the meaning of Article 101(1) of the Treaty.

### **10.2. Agreements and concerted practices**

#### *10.2.1. Principles*

- (87) The concept of agreement within the meaning of Article 101(1) of the Treaty centres around the existence of a concurrence of wills between at least two parties. For there to be an agreement between undertakings it is sufficient that the undertakings in question have expressed their common intention to conduct themselves on the market in a specific way.<sup>150</sup>
- (88) The case-law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article 101(1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by one party, nevertheless receive at least the tacit acquiescence of the other party. Tacit acquiescence to an alleged unilateral policy qualifies as an agreement under Article 101 of the Treaty, if the party setting out the policy requires assistance of the other party for its implementation and this

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<sup>148</sup> Judgment of the Court of 3 March 2011, *AG2R Prévoyance v Beaudout Père et Fils SARL* (hereinafter referred to as "*Prévoyance*"), C-437/09, ECLI:EU:C:2011:112, paragraph 40.

<sup>149</sup> Judgment of the Court of 11 July 2006, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission*, C-205/03 P, ECLI:EU:C:2006:453, paragraph 25.

<sup>150</sup> Judgment of the Court of 6 January 2004, *Bundesverband der Arzneimittel-Importeure eV and Commission of the European Communities v Bayer AG*, Joined cases C-2/01 P and C-3/01 P, ECLI:EU:C:2004:2, paragraphs 69, 97.

party complies with that requirement by implementing that alleged unilateral policy in practice.<sup>151</sup>

- (89) Although Article 101(1) of the Treaty draws a distinction between the concept of concerted practices and the concept of agreements between undertakings, the object is to bring within the prohibition of these Articles a form of coordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical cooperation between them for the risks of competition.<sup>152</sup> 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. A concerted practice can also exist in a vertical relationship.<sup>153</sup> The motive or the knowledge that the act is unlawful is irrelevant.<sup>154</sup>
- (90) 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 the parties needs be affected by the terms of the arrangements in question.<sup>155</sup>

#### 10.2.2. Application to this case

##### 10.2.2.1. Agreements and/or concerted practices between Focus Home and Valve

- (91) The conduct described in Sections 8.1.1 and 8.1.2 presents all the characteristics of agreements and/or concerted practices entered into between undertakings, namely between Focus Home and Valve.
- (92) As indicated in Section 8.1.1, 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 restrictions 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.
- (93) 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 8.1.2, Focus Home requested, by email, that Valve provide it with geo-blocked Steam activation keys for the following PC video games: “[...]”; “[...]”; “[...]”; “[...]”; “[...]”; “[...]”; “[...]”; “[...]”. In reaction to those emails, Valve provided Focus Home with Steam activation keys for those PC video games in the amounts/quantities requested and geo-blocked to the territories defined by Focus Home.

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<sup>151</sup> Judgment of the Court of First Instance of 9 July 2009, *Automobiles Peugeot SA and Peugeot Nederland NV v Commission*, T-450/05, ECLI:EU:T:2009:262, paragraphs 173-174; 177-180.

<sup>152</sup> Judgment of the Court of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, C-48/69, ECLI:EU:C:1972:70, paragraph 64.

<sup>153</sup> 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.

<sup>154</sup> Judgment of the Court of 8 July 1999, *Commission v Anic Partecipazioni SpA*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 8.

<sup>155</sup> Judgment of the Court of 22 October 2015, *AC-Treuhand AG v Commission* (hereinafter referred to as “*Treuhand*”), C-194/14 P, ECLI:EU:C:2015:717, paragraphs 34-35; 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.

- (94) In addition there is evidence that as of [...], when the system for ordering geo-blocked Steam activation keys became automated (see Section 6.1.3), Focus Home requested geo-blocked Steam activation keys through Valve's automated system for the following PC video games: "[...]"; "[...]"; "[...]"; "[...]"; "[...]"; "[...]"; "[...]"; "[...]"; "[...]".
- (95) As explained in more detail in Recitals (37) to (40), orders of geo-blocked Steam activation keys submitted via the automated system are the second step in the process for requesting Steam activation keys and this second step can take place only after the geographic scope of the activation restrictions was agreed between Valve and the publisher. Therefore, the fact that there were orders for geo-blocked Steam activation keys for the above-mentioned PC video games via the automated system demonstrates that activation restrictions for these games were agreed between Valve and Focus Home.
- (96) Moreover, regarding all the above-mentioned PC video games as well as the games "[...]" and "[...]", 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 games.
- (97) The evidence described above shows a concurrence of wills between Focus Home and Valve to set up activation restrictions and to provide the related geo-blocked Steam activation keys which were used to limit cross-border 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.

#### 10.2.2.2. Agreements between Focus Home and the Independent Distributors

- (98) The bilateral licensing and distribution agreements analysed in Section 8.2 concluded between Focus Home and the Independent Distributors listed in Table 2 concerning the (non-exclusive) physical and/or digital distribution of the 52 PC video games at issue constitute agreements between undertakings within the meaning of Article 101(1) of the Treaty.

### 10.3. Restriction of competition by object

#### 10.3.1. Principles

- (99) 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.<sup>156</sup> Such reasoning derives from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.<sup>157</sup>
- (100) To determine whether an agreement reveals such a sufficient degree of harm to competition regard must be had *inter alia* to:

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<sup>156</sup> 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.

<sup>157</sup> Case C-67/13 P *CB*, paragraph 50; Case C-286/13 P *Dole Food*, paragraph 114.

- The content of its provisions;
- The objectives it seeks to attain; and
- The economic and legal context of which it forms a part.<sup>158</sup> 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.<sup>159</sup>

(101) 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.<sup>160</sup> 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.<sup>161</sup>

#### 10.3.1.1. Restrictions of cross-border sales

(102) 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. Thus, 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.<sup>162</sup> In particular, restrictions on passive sales are capable of leading to absolute territorial protection and are designed to

<sup>158</sup> 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), 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.

<sup>159</sup> 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, 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*, C-8/08, ECLI:EU:C:2009:343, paragraph 43.

<sup>160</sup> 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.

<sup>161</sup> Judgment of the Court of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, ECLI:EU:C:2012:795 paragraph 37.

<sup>162</sup> 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 AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE*, 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.



prohibit or limit any cross-border distribution<sup>163</sup>. Therefore, they may be regarded, in principle, as agreements/concerted practices whose object is to restrict competition within the meaning of Article 101(1) of the Treaty.

- (103) According to settled case-law, competition may be distorted within the meaning of Article 101(1) of the Treaty not only by agreements 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.<sup>164</sup> 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.<sup>165</sup>

#### 10.3.1.2. IP rights and competition law assessment under Article 101 of the Treaty

- (104) In *Nintendo v PC Box*, the Court of Justice considered whether videogames, and/or their parts, could be protected under EU copyright rules.<sup>166</sup> The Court of Justice established that the legality of companies' conduct under EU competition rules is unrelated to their compliance or non-compliance with other legal rules.<sup>167</sup> 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.<sup>168</sup> In addition, an agreement is not exempted under EU competition law merely because it concerns an IP right.<sup>169</sup>
- (105) It is also settled case-law that agreements concluded by the copyright holder which contain clauses under which the right 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) of the Treaty.<sup>170</sup> The principles

<sup>163</sup> Judgment of the General Court of 12 December 2018, *Groupe Canal + v Commission* (hereinafter referred to as "*Canal Plus*"), Case T-873/16, ECLI:EU:T:2018:904, paragraph 45, confirmed on this point on appeal in the Judgment of the Court of 9 December 2020, *Groupe Canal + v Commission*, C-132/19 P [not yet reported], paragraphs 51-54.

<sup>164</sup> Judgment of 13 July 1966, *Établissements Consten S.à r.l. and Grundig-Verkaufs-GmbH v Commission* (hereinafter referred to as "*Grundig*"), Joined cases 56 and 58/64, ECLI:EU:C:1966:41, pages 492, 493; Case C-194/14 P *Treuhand*, paragraphs 34 and 35; Case C-642/13 P *Villeroy & Boch*, paragraphs 58-60.

<sup>165</sup> Joined cases 56 and 58/64 *Grundig*, page 339.

<sup>166</sup> Judgment of the Court of 23 January 2014, *Nintendo Co Ltd and Others v PC Box Srl and 9Net Srl*, C-355/12, ECLI:EU:C:2014:25, paragraph 22.

<sup>167</sup> Judgment of the General Court of 1 July 2010, *AstraZeneca AB and AstraZeneca plc v Commission* (hereinafter referred to as "*AstraZeneca*"), 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*, C-457/10 P, ECLI:EU:C:2012:770, paragraph 132.

<sup>168</sup> Case T-321/05 *AstraZeneca*, paragraph 677, confirmed on appeal, Case C-457/10 P, paragraph 132.

<sup>169</sup> Judgment of the Court of 27 September 1988, *Bayer AG and Maschinenfabrik Hennecke GmbH v Heinz Sülhörer*, 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.

<sup>170</sup> Case T-873/16, *Canal Plus*, paragraph 45, point confirmed on appeal, Case C-132/19 P, paragraphs 51-54; Joined cases C-403/08 and C-429/08 *Murphy*, paragraphs 139-142.

established in this case-law apply equally in the context of non-exclusive distribution and licensing agreements to the extent that those agreements restrict passive sales.

- (106) Moreover, according to settled case-law, an agreement can be considered to restrict competition by object even if it also pursues legitimate objectives.<sup>171</sup> 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.
- (107) 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.<sup>172</sup>
- (108) 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 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.<sup>173</sup> 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.<sup>174</sup>
- (109) 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.

### 10.3.2. Application to this case

#### 10.3.2.1. Agreements and/or concerted practices between Focus Home and Valve

- (110) The email exchanges and other evidence detailed in Section 8.1.2 above show that Focus Home asked Valve to provide it with geo-blocked Steam activation keys for the 19 PC video games listed in Table 1 above. It follows from this evidence that Focus Home defined the territories in which such Steam activation keys could be used to activate (and run/play<sup>175</sup>) 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.

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<sup>171</sup> 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.

<sup>172</sup> 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 250.

<sup>173</sup> Case C-307/18 *Generics (UK)*, paragraph 210.

<sup>174</sup> of the General Court of 8 September 2016, *H. Lundbeck A/S and Lundbeck Ltd v Commission*, T-472/13, ECLI:EU:T:2016:449, paragraph 380.

<sup>175</sup> [...].

- (111) The 19 games concerned could not be activated (and, moreover, two of those games could also not be run/played<sup>176</sup>) outside of those countries. Focus Home's distributors in those EEA countries (namely, [...], [...], [...], [...], [...]), or any other distributor in those EEA countries to whom the 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.
- (112) As explained in Section 8.1.2 above, 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 PC video games mentioned above with respect to Estonia, Latvia, Lithuania, Hungary and/or Poland.
- (113) Rather than being inherent to the nature of the licence itself, the agreements on the use of geo-blocked Steam activation keys between Focus Home and Valve are designed to ensure that Independent Distributors receiving the keys, i.e. [...], [...], [...], [...], [...], comply with the contractually defined territorial scope of their respective distribution licence, covering the above-mentioned EEA countries.<sup>177</sup> These obligations contributed to the artificial maintenance of separate national markets. The artificial nature of such separation is, in particular, illustrated by the fact that Focus Home was the copyright holder for all the relevant games for the whole of the EEA and granted Valve a non-exclusive worldwide license to exploit these PC video games on Steam (see Section 8.1.1 above).
- (114) In addition, in line with the case-law quoted in Section 10.2.1 above, 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.
- (115) On the basis of the above, the objective of the agreements/concerted practices between Focus Home and Valve was to technically restrict the distribution of the 19 Focus Home PC video games 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.
- (116) Therefore, the agreements/concerted practices described in Sections 8.1.1 and 8.1.2 had the object of restricting competition within the meaning of Article 101(1) of the Treaty.

#### 10.3.2.2. Agreements between Focus Home and the Independent Distributors

- (117) As indicated in Section 8.28.2 above, Focus Home and the Independent Distributors listed in Table 2 above concluded licensing and distribution agreements concerning the distribution of 52 PC video games of Focus Home, each of which contains one or more clauses falling within one or more of the categories of anticompetitive restrictions described in Section 8.2.2 above.

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<sup>176</sup> [...].

<sup>177</sup> [...].

- (118) These clauses and their variations under each category were designed to effectively prevent or restrict the Independent Distributors from selling Focus Home's PC video games to users located outside the licensed territory in response to unsolicited requests ("passive sales"). Consequently, they were aimed at contributing to the artificial maintenance of separate national markets.
- (119) According to settled case-law (see Sections 10.3.1.1 and 10.3.1.2 above), 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 (i.e. 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.<sup>178</sup> The same applies in relation to agreements which prevent/restrict parallel trade.<sup>179</sup> The case-law confirms the anticompetitive nature of such type of agreements/concerted practices.
- (120) On the basis of the above, the objective of the agreements between Focus Home and the Independent Distributors listed in Table 2 was to restrict the distribution of 52 of Focus Home's PC video games from one or more EEA countries which included, depending on the cases, 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, into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.
- (121) Therefore, the distribution agreements described in Sections 8.2.1 and 8.2.2 had the object of restricting competition within the meaning of Article 101(1) of the Treaty.

#### **10.4. Single and continuous infringement**

##### *10.4.1. Principles*

- (122) An infringement of Article 101(1) of the Treaty may consist not only of an isolated act but also of a series of acts or a course of 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. Accordingly, if the different actions form part of an "overall plan", because their identical object distorts competition within the internal market, responsibility for those actions can be imputed on the basis of participation in the infringement considered as a whole.
- (123) Liability can also be attributed 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

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<sup>178</sup> Judgment of the Court of 24 October 1995, *Bayerische Motorenwerke AG v ALD Auto-Leasing D GmbH*, C-70/93, ECLI:EU:C:1995:344, paragraphs 19 and 21; 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.

<sup>179</sup> 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; 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.

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.<sup>180</sup>

- (124) 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.<sup>181</sup>
- (125) 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.<sup>182</sup> Finally, the concept of single and continuous infringement applies to vertical agreements/concerted practices that restrict competition within the internal market<sup>183</sup> which has also been recognised by the Court of Justice.<sup>184</sup>

#### 10.4.2. Application to this case

- (126) As indicated in Sections 10.3.2.1 and 10.3.2.2 above, 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 Focus Home's PC video games and for each geographic area concerned, on the one hand, and the licensing and distribution agreements between Focus Home and the 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, each agreement/concerted practice constitutes an infringement of Article 101(1) of the Treaty.
- (127) According to the case-law quoted in Section 10.4.1 above, 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 constitutes in itself a separate infringement.
- (128) The evidence set out in Sections 8.1 and 8.2 above demonstrates that Focus Home had a two-pronged strategy combining technical restrictions via the Steam activation keys with contractual restrictions agreed with the Independent Distributors in order to restrict cross-border sales. 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 the Independent Distributors containing cross-border sale restrictions, on the other hand, shared the

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<sup>180</sup> Judgment of the Court of 24 June 2015, *Fresh Del Monte Produce Inc. v Commission and Commission v Fresh Del Monte Produce Inc.*, Joined cases C-293/13 P and C-294/13 P, ECLI:EU:C:2015:416, paragraph 156.

<sup>181</sup> Judgment of the General Court of 15 December 2016, *Infineon Technologies AG v Commission*, T-758/14, ECLI:EU:T:2016:737, paragraph 226.

<sup>182</sup> Case C-642/13 P *Villeroy & Boch*, paragraphs 59-60.

<sup>183</sup> Commission Decision 2003/675/EC of 30 October 2003 *Nintendo*, paragraph 261 and ff. Commission Decision 2006/895/EC of 26 May 2004 in case No COMP/C-3/37.980 — *Souris-Toppis* (OJ L 353, 13.12.2006, p. 5–6), paragraphs 122–128.

<sup>184</sup> 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.

common objective of restricting cross-border sales of certain PC video games of Focus Home. This shows the existence of an identity of purposes between these two separate infringements.

- (129) In addition, for certain of Focus Home's PC video games such as "[...]", "[...]", "[...]", "[...]", "[...]", "[...]", the three "[...]" games, "[...]" and "[...]", the activation restrictions and the related geo-blocked Steam activation keys that Valve provided to Focus Home were used in combination with cross-border sales restrictions set out in agreements between Focus Home and certain Independent Distributors, including [...], [...] and [...].<sup>185</sup> 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 the Independent Distributors' licensed territories, including Estonia, Hungary, Latvia, Lithuania and/or Poland.
- (130) Focus Home was a party to, and therefore participated in and was aware of, both elements of the single and continuous infringement.
- (131) In any event, even if the agreements/concerted practices between: (i) Valve and Focus Home, on the one hand; and (ii) the anticompetitive clauses in the bilateral agreements between Focus Home and the Independent Distributors on the other hand, were considered separately, each set of practices in its own right would still constitute a single and continuous infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement.

#### **10.5. Appreciable effect on trade between Member States and between the EEA Contracting Parties**

- (132) Article 101(1) of the Treaty is aimed at agreements and concerted practices which might harm the achievement of the internal market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market. Similarly, Article 53(1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogenous European Economic Area.
- (133) As indicated in Section 10.3.2 above, the agreements/concerted practices between Valve and Focus Home on the one hand and the agreements between Focus Home and the Independent Distributors on the other hand, seek to restrict or prevent trade between EEA countries as they restrict Focus Home's distributors' ability to engage in cross-border sales of Focus Home's PC video games.
- (134) By their very nature, those restrictive agreements are liable to partition the internal market and consequently to affect trade between Member States.<sup>186</sup> Therefore, they are capable of having an appreciable effect on trade between the Member States within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement.

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<sup>185</sup> [...].

<sup>186</sup> Judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission*, Joined cases 89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, ECLI:EU:C:1993:120 paragraph 176.

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

- (135) Article 101(1) of the Treaty may be declared inapplicable pursuant to Article 101(3) of the Treaty where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and the agreement or concerted practice does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objects; and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- (136) The Technology Transfer Block Exemption Regulation ("TTBER")<sup>187</sup> and the Vertical Block Exemption regulation ("VBER")<sup>188</sup> exempt, under certain conditions, from the application of Article 101(1) of the Treaty certain categories of vertical agreements which can be regarded as normally satisfying all the conditions laid down in Article 101(3) of the Treaty.
- (137) Without it being necessary to determine whether (i) the SDAs/Steamworks Agreement and the agreement/concerted practice to set up activation restrictions and to provide geo-blocked Steam activation keys between Valve and Focus Home (which are all part of the same conduct as described in Section 8.1), and (ii) the distribution agreements between Focus Home and the Independent Distributors described in Section 8.2 fall within the scope of (a) the TTBER; (b) the 2004 TTBER; (c) the 1999 VBER; and/or (d) the VBER, those agreements/concerted practices would not, in any event, benefit from an exemption since they contain hardcore restrictions on the basis of Article 4(1)(c) and of Article 4(2)(b) of the TTBER (and of the 2004 TTBER) and on the basis of Article 4(b) of the VBER (and of the 1999 VBER) preventing Focus Home's distributors from engaging in passive sales to users based outside those territories.
- (138) Similarly, the conduct does not meet the conditions for exemption provided in Article 101(3) of the Treaty. In particular, there are no indications that the cross-border restrictions resulting from the use of geo-blocked Steam activation keys and/or from the restrictive clauses in the distribution agreements with the Independent Distributors were 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.

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<sup>187</sup> 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. The TTBER applies to licence agreements entered into force as of 1 May 2014. Earlier agreements remain subject to the previous TTBER (Commission Regulation 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 ("2004 TTBER")).

<sup>188</sup> Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p.1. The VBER applies to distribution agreements entered into as of 1 June 2010; earlier agreements remain subject to the old VBER (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 ("1999 VBER")).

## **11. SCOPE AND DURATION OF THE INFRINGEMENT**

### **11.1. Product scope**

- (139) The infringement relates to the distribution of the following Focus Home's PC video games, 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) "[...]";<sup>189</sup> (43) "[...]"; (44) "[...]"; (45) "[...]"; (46) "[...]"; (47) "[...]"; (48) "[...] / [...] / [...]"; (49) "[...]"; (50) "[...]"; (51) "[...]"; (52) "[...]".

### **11.2. Geographic scope**

- (140) The Commission considers, that the infringement covered the entire EEA as the relevant agreements/concerted practices restricted cross-border sales throughout the entire EEA.

### **11.3. Duration of the infringement**

- (141) The duration of the infringement is calculated from 14 March 2007 when the agreements between Focus Home and four Independent Distributors for the distribution of the game "[...]" in seven EEA countries started, until 8 November 2018 when the last bilateral agreement between Focus Home and one Independent Distributor (for the distribution of the game "[...]" in two EEA countries) containing cross-border sales restrictions expired.
- (142) Therefore, the infringement started on 14 March 2007 and ended on 8 November 2018.

## **12. LIABILITY**

### **12.1. Principles**

- (143) Article 101 of the Treaty and Article 53 of the EEA Agreement apply to undertakings and associations of undertakings.<sup>190</sup> 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.
- (144) In cases of restructuring or other legal or organisational changes within a group of undertakings, it may be necessary to hold the purchaser liable so as to ensure that the undertaking does not evade liability for the infringement and thereby ensure effective enforcement of competition law. When the undertaking in question ceases to exist, for example, upon being merged with a purchaser, such that the latter takes on the initial undertaking's assets and liabilities for infringements of Union law, the liability

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<sup>189</sup> [...].

<sup>190</sup> C-437/09, *Prévoyance*, paragraph 40.



for the infringement committed by the undertaking taken over may be attributed to the purchaser.<sup>191</sup>

- (145) Whilst on the date of the transfer of the economic activities there must be structural links between the transferor and the transferee on the basis of which it may be considered, in accordance with the principle of personal responsibility, that the two entities form a single undertaking, those links need not, in view of the purpose of the principle of economic continuity, subsist throughout the rest of the infringement period or until the adoption of a decision penalising the infringement.<sup>192</sup> In particular, when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, this change does necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed those rules when, from an economic point of view, the two entities are identical.<sup>193</sup> Therefore, according to the case law, in such cases the “absorbing” entity is liable for the infringement committed by the entity that ceased to exist.<sup>194</sup>
- (146) The same principles hold true, *mutatis mutandis*, for the purposes of the application of Article 53 of the EEA Agreement.

## **12.2. Application to this case**

- (147) Focus Home has undergone, during the relevant period of the infringement indicated in Section 11.3, some corporate restructuring and reorganisation.<sup>195</sup> On the basis of the case-law mentioned in Section 12.1 above, the liability for the infringement committed by Focus Home Interactive S.A.S. until its “transformation” on 6 January 2015 should therefore be attributed to the successor entity Focus Home Interactive S.A. Therefore, Focus Home Interactive S.A. is liable for the infringement committed by Focus Home Interactive S.A.S.
- (148) The Commission concludes that liability for the single and continuous infringement should be imputed to Focus Home Interactive S.A. for its participation (as direct participant or legal successor) in the infringement.

## **13. REMEDIES AND FINES**

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

- (149) Where the Commission finds that there is an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with

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<sup>191</sup> Judgment of the General Court of 14 December 2006, *Raiffeisen Zentralbank Österreich v Commission*, Joined Cases T-259/02 to T-264/02 and T-271/02, ECLI:EU:T:2006:396, paragraph 326 and the case-law cited. See also Judgment of the Court of the General Court 16 June 2011, *SNIA v Commission*, T-194/06, ECLI:EU:T:2011:279, paragraph 62.

<sup>192</sup> Judgment of the Court of First Instance of 12 July 2018, *Prysmian and others v Commission*, T-475/14, ECLI:EU:T:2018:448, paragraph 135 and Judgment of the Court of 18 December 2014, *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13, ECLI:EU:C:2014:2456, paragraph 51.

<sup>193</sup> Case T-475/14, *Prysmian and others v Commission*, paragraph 128 and Case C-434/13, *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, paragraph 40 and the case-law cited.

<sup>194</sup> See Judgment of the Court of 5 December 2013, *SNIA v Commission*, C-448/11, ECLI:EU:C:2013:801, paragraphs 28-30.

<sup>195</sup> [...].

Article 7(1) of Regulation (EC) No 1/2003. For this purpose, it may also impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

- (150) The requirement that a remedy has to be effective<sup>196</sup> also empowers the Commission to require the undertaking concerned to refrain from repeating the act or conduct in question and to refrain from any act or conduct having the same or a similar object or effect.<sup>197</sup>
- (151) While Focus Home has already brought the infringement to an end, it is appropriate to require Focus Home to refrain from any future agreement and/or concerted practice which might have the same or an equivalent object or effect.

### **13.2. Fines under Article 23(2) of Regulation (EC) No 1/2003 – principles**

- (152) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty.<sup>198</sup> For each undertaking participating in the infringement, the fine cannot exceed 10% of its total turnover in the business year preceding the Commission decision.
- (153) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of fine, have regard both to the gravity and to the duration of the infringement. The Commission will also refer to the principles laid down in its Guidelines on the Method of Setting Fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003<sup>199</sup> ("the Guidelines on Fines").
- (154) First, the Commission must determine a basic amount. The basic amount of the fine is to be set by reference to the value of sales to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.<sup>200</sup> The basic amount consists of a percentage of the value of those sales up to a maximum percentage of 30%<sup>201</sup>, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.<sup>202</sup> In assessing the gravity of the infringement, the Commission has regard to a number of factors, such as the

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<sup>196</sup> 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 46.

<sup>197</sup> Namely, Judgment of the Court of First Instance of 6 October 1994, *Tetra Pak International SA v Commission*, T-83/91, ECLI:EU:T:1994:246, paragraph 220; Judgment of the Court of First Instance of 27 October 1994, *Fiataagri UK Ltd and New Holland Ford Ltd v Commission*, T-34/92, ECLI:EU:T:1994:258, paragraph 39; 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 1254.

<sup>198</sup> 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 of the Treaty] of the EC Treaty [...] shall apply mutatis mutandis." (OJ L 305, 30.11.1994, p. 6).

<sup>199</sup> OJ C 210, 1.9.2006, p. 2.

<sup>200</sup> Point 13 of the Guidelines on Fines.

<sup>201</sup> Point 21 of the Guidelines on Fines.

<sup>202</sup> Point 19 of the Guidelines on Fines.

nature of the infringement, the market share of the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.<sup>203</sup>

- (155) For calculating the value of sales, the Commission normally takes the sales made by the undertaking during the last full business year of its participation in the infringement.<sup>204</sup> If the turnover of the undertaking during that year is not sufficiently representative of its annual turnover during the infringement, the Commission may use some other year for calculating the value of sales.
- (156) The Commission may also include in the basic amount an additional amount of a sum up to 25% of the value of sales<sup>205</sup> to deter undertakings from entering into anticompetitive agreements.
- (157) Second, the Commission may increase or decrease the basic amount to take into account any aggravating or mitigating circumstances in accordance with points 28 and 29 of the Guidelines on Fines. It does so on the basis of an overall assessment which takes account of all the relevant circumstances.<sup>206</sup>
- (158) The Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect. To that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.<sup>207</sup>

### **13.3. The intentional or negligent nature of the infringement**

- (159) According to established case law, intention or negligence do not require the relevant undertaking to have been aware that it was infringing competition law.<sup>208</sup> It is sufficient that the undertaking could not have been unaware that its conduct was aimed at restricting competition.<sup>209</sup>
- (160) The Commission concludes that, based on the facts described in Sections 8.1 and 8.2, the single and continuous infringement was committed intentionally or at the very least negligently.
- (161) On the basis of this evidence and the evidence quoted in Section 8.2.2 above, the Commission considers that Focus Home entered into agreements with its Independent Distributors as explained in Section 8.2.1 that contain the cross-border sales restrictions described in Section 10.3.2.2.
- (162) Focus Home also agreed with Valve to set up activation restrictions and create geo-blocked activation keys with the express purpose of restricting cross-border sales

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<sup>203</sup> Point 22 of the Guidelines on Fines.

<sup>204</sup> Point 13 of the Guidelines on Fines.

<sup>205</sup> Point 25 of the Guidelines on Fines.

<sup>206</sup> Point 27 of the Guidelines on Fines.

<sup>207</sup> Point 30 of the Guidelines on Fines.

<sup>208</sup> Case C-19/77 *Miller*, paragraph 18; Case T-62/98 *Volkswagen*, paragraph 334.

<sup>209</sup> 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, *Bundswettbewerbsbehörde and Bundeskartellamt v Schenker & Co. AG and Others*, C-681/11, ECLI:EU:C:2013:404, paragraph 37 and the case-law cited.

within the EEA where Focus Home's Independent Distributors could sell certain of Focus Home's PC video games as evidenced in Section 10.3.2.1.

### **13.4. Calculation of the fine**

#### *13.4.1. Value of sales*

- (163) 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.<sup>210</sup> The concept of the "value of sales" must be understood as referring to sales on the market concerned by the infringement.<sup>211</sup>
- (164) The relevant value of sales include the turnover generated by the EEA sales of the relevant Focus Home's PC video games concerned by the infringement, generated both by physical and digital distribution. This includes also the 70% of the gross revenues generated by the sale of the concerned PC video games on Steam.
- (165) Irrespective of whether the infringements described in Sections 8.1 and 8.2 above concern physical or digital distribution of the concerned PC video games the turnover generated by both types of distribution is considered relevant for determining the value of sales given that there is at least potential competition between physical and digital distribution of PC video games (see Section 7 above).
- (166) Based on the principles outlined in this Section and on the information provided by Focus Home, the value of sales should be based on Focus Home's sales in the EEA of the PC video games listed in Section 11.1 and in Tables 1 and 2 above, for which the Commission has direct evidence, concerned with the infringement in the financial year 2017 (running from 1 January 2017 to 31 March 2018), which was the last full business year of its participation in the single and continuous infringement.
- (167) Accordingly, the value of sales to be taken into account is EUR [3 100 000 – 4 700 000].

#### *13.4.2. Gravity*

- (168) The gravity of the infringement determines the percentage of the value of sales to be taken into account in setting the fine. According to points 21 and 23 of the 2006 Guidelines, the percentage for gravity will be set at a level up to 30% of the value of sales and towards the higher end of that scale for the most serious infringements. In assessing the gravity of the infringement, the Commission has regard to a number of factors.
- (169) Restrictions of cross-border sales, by their very nature, restrict competition within the meaning of Article 101(1) of the Treaty and Article 53 of the EEA Agreement. However, vertical agreements and concerted practices are, by their nature, often less

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<sup>210</sup> 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.

<sup>211</sup> 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.

damaging to competition than horizontal agreements.<sup>212</sup> Taking into account this factor and the fact that the restriction of cross-border sales covered the whole EEA in the case of both infringements described under Sections 8.1 and 8.2 above, the percentage of the value of sales should be set at 7%.

*13.4.3. Duration*

(170) The duration of the infringement, as set out in Section 11.3, was 4258 days (11.65 years).

*13.4.4. Calculation of the basic amount*

(171) The basic amount of the fine to be imposed in this case therefore amounts to EUR [...] (rounded figure).

*13.4.5. Adjustments to the basic amount*

(172) 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 to be imposed in this case.

*13.4.6. Application of the 10% turnover limit*

(173) The fine for the infringement does not exceed 10% of Focus Home's total turnover relating to the business year preceding the date of adoption of this Decision pursuant to Article 23(2) of Regulation (EC) No 1/2003.

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

(174) In order to reflect that Focus Home has effectively cooperated with the Commission beyond its legal obligation to do so, the fine that otherwise would have been imposed should, pursuant to point 37 of the Guidelines of fines, be reduced by 10%. On [...], Focus Home submitted a Settlement Submission to the Commission, acknowledging the infringement and agreeing to pay a fine. Focus Home co-operated with the Commission by acknowledging an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement and waiving certain procedural rights, resulting in administrative efficiencies.

*13.4.8. Conclusion: final amount of the fine*

In conclusion, the final amount of the fine to be imposed on Focus Home pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 for the infringement amounts to EUR 2 888 000,

HAS ADOPTED THIS DECISION:

*Article 1*

Focus Home Interactive S.A. infringed Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area by participating, from 14 March 2007 until 8 November 2018,

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<sup>212</sup> Case C-32/11 *Allianz Hungária*, paragraph 43. Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1, paragraphs 6 and 225. A similar distinction was already made in the 1998 Guidelines on Fines (Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ C 9, 14.1.1998, p. 3-5) where vertical restraints were clearly distinguished from horizontal agreements in terms of gravity.

in a single and continuous infringement covering the whole of the EEA and consisting in: (i) agreements/concerted practices with Valve Corporation 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; and (ii) distribution agreements with independent third party distributors containing clauses which restricted cross-border sales of PC video games within the EEA.

### *Article 2*

For the single and continuous infringement referred to in Article 1, a fine of EUR 2 888 000 is imposed on Focus Home Interactive S.A.

The fine 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.: EC/BUFI/AT.40413 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.<sup>213</sup>

### *Article 3*

Focus Home Interactive S.A. shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

### *Article 4*

This Decision is addressed to

- Focus Home Interactive S.A., Parc Pont de Flandre, Bâtiment 28 « Le Beauvaisis » 11 Rue de Cambrai, 75019 Paris, France.

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<sup>213</sup> 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).

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

Done at Brussels,

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

