



## ***CASE AT.40414 – Koch Media***

(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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Brussels, 20.1.2021  
C(2021) 74 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.40414 – Koch Media**

(Text with EEA relevance)

(Only the English text is authentic)

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## 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**

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(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union<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,

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

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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 “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.

Whereas:

## 1. INTRODUCTION

- (1) This Decision concerns Koch Media GmbH (Austria), Koch Media GmbH (Germany) and Koch Media Ltd (UK). The undertaking comprising those three entities is referred to in this Decision as “Koch Media”.
- (2) In this Decision, the Commission finds that Koch Media 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 of some of Koch Media’s personal computer (“PC”) video games outside of designated Member States and Contracting Parties to the European Economic Area (“EEA”) Agreement<sup>4</sup>, namely, the Czech Republic, Hungary, Poland, Slovakia and/or the UK, based on the geographical location of the user (“geo-blocking”). These agreements/concerted practices, considered collectively, concerned five of Koch Media’s PC video games<sup>5</sup> and took place between 23 August 2011 and 9 October 2015 (see Section 8.1);
  - (b) Bilateral distribution agreements between Koch Media and a number of its PC video game distributors, i.e., [...] and [...], containing cross-border sale restrictions.<sup>6</sup> These agreements, considered collectively, concerned 28 of Koch Media’s PC video games<sup>7</sup> and took place between 20 August 2010 and 27 July 2018 (see Sections 8.2 and 8.3).
- (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 Koch

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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) [...], and (5) [...].

<sup>6</sup> 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 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).

<sup>7</sup> Namely, the following PC video games covered either/and/or by any of the agreements mentioned in this Decision concluded between Koch Media and, respectively, [...] and [...] that is: (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) [...] and (28) [...].

Media is liable. The single and continuous infringement lasted from 20 August 2010 until 27 July 2018.

## **2. THE UNDERTAKING CONCERNED**

- (4) Koch Media is a German undertaking which produces, markets and distributes digital entertainment products, including video games. The legal entities concerned by this Decision are: Koch Media GmbH (Austria), Koch Media GmbH (Germany) and Koch Media Ltd (UK). In particular, Koch Media GmbH (Austria) is the operative mother company of the Koch Media Group. It controls several subsidiaries in Austria, France, Germany, Italy, Spain, Switzerland and the UK which form part of the Koch Media Group, including Koch Media GmbH (Germany) and Koch Media Ltd (UK). The group including Koch Media GmbH (Austria) and all of its subsidiaries is referred to as “Koch Media Group”.<sup>8</sup>
- (5) The Koch Media Group is a German multinational group which produces, markets and distributes digital entertainment products, such as video games, TV series and movies internationally, including in Europe and North America.
- (6) In the EEA, Koch Media distributes its PC video games (usually published under the Deep Silver and Ravenscourt labels) as well as third-party PC video games through its own subsidiaries and independent distributors (both brick & mortar distributors (wholesalers and retailers) as well as digital distributors), including [...] and [...].

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

### **3.1. [...]**

- (7) [...] is an international publisher and distributor of PC video games. It is part of [...] group of companies. [...] is one of Koch Media’s distributors in the EEA and is also in charge of the localization<sup>9</sup> of the PC video games that it distributes. In particular, [...] distributes Koch Media’s PC video games physically at wholesale level and, in a number of instances, digitally at the retail level in the Czech Republic,<sup>10</sup> Hungary, Poland and/or Slovakia.<sup>11</sup> In [...], [...] launched its own digital platform called “[...] Digital” ([...].pl, [...].Hu and [...].Cz).
- (8) References to [...] are made exclusively for the purposes of describing Koch Media’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 [...], nor does it establish any liability with respect to [...].

### **3.2. [...]**

- (9) [...] is a [...] developer of video games for various platforms, including PCs. [...] is one of Koch Media’s distributors and is also in charge of the localization of the PC

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<sup>8</sup> On 14 February 2018, the entire Koch Media Group was acquired by the THQ Nordic group, which was not an addressee of the Statement of Objections of 5 April 2019 and it is therefore not an undertaking liable for the infringement.

<sup>9</sup> The term localisation refers to the translation of software from one spoken language into another taking into account cultural considerations. [...]

<sup>10</sup> Reference is made to Czech Republic rather than “Czechia” in the interest of consistency with the terms used in the agreements/evidence quoted.

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



video games that it distributes. In particular, [...] distributes Koch Media's PC video games physically at wholesale level and, in a number of instances, digitally at the retail level in the Czech Republic, Hungary, Poland and Slovakia.<sup>12</sup> In particular, as regards digital distribution, at the time of the infringement [...] was also active online via its digital store called [...].

- (10) References to [...] are made exclusively for the purposes of describing Koch Media'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 [...], nor does it establish any liability with respect to [...].

### **3.3. Valve**

- (11) 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).
- (12) References to Valve are made exclusively for the purposes of describing Koch Media'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**

- (13) This Decision concerns certain PC video games of Koch Media of different genres/categories which are sold in the EEA with the Steam technology embedded (so-called "Steam-enabled PC video games")<sup>13</sup> and are to be activated and played on Steam.<sup>14</sup>
- (14) 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 6.1.1.1). "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 6.1.1.2.
- (15) The geographic area covered by this Decision is the entire EEA.

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

<sup>13</sup> For an explanation concerning Steam technology see Section 6.1.1.

<sup>14</sup> <http://www.valvesoftware.com/company/index.html>, printed on 2 August 2017, [...].

## 5. PROCEDURE

- (16) Based on information received from market participants, in 2013 the Commission started an *ex officio* investigation into the practices at issue.
- (17) The Commission sent a request for information (“RFI”) to Koch Media in 2015.<sup>15</sup>
- (18) On 2 February 2017, the Commission initiated proceedings against Koch Media and Valve pursuant to Article 2(1) of Commission Regulation (EC) No 773/2004 (“Regulation (EC) No 773/2004”).<sup>16</sup>
- (19) 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 Koch Media,<sup>17</sup> Valve<sup>18</sup> as well as to a number of other relevant market players.<sup>19</sup>
- (20) On 5 April 2019, the Commission adopted a Statement of Objections alleging that Koch Media (and Valve) engaged in restrictive practices constituting an infringement of Article 101 of the Treaty.
- (21) On [...], Koch Media 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 Koch Media suspending the deadline for replying to the Statement of Objections.
- (22) On [...], Koch Media GmbH (Austria), Koch Media GmbH (Germany) and Koch Media Ltd (UK) submitted formal statements in which they acknowledged the infringement, the relevant facts and their respective liability for that infringement (the “Settlement Submissions”), in view of the adoption of a decision pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003. The Settlement Submissions contain:
- an acknowledgment in clear and unequivocal terms of each of Koch Media GmbH (Austria), Koch Media GmbH (Germany) and Koch Media Ltd (UK)’s liability for the infringement summarily described as regards its object, the main facts, their legal qualification and the duration of each entity’s participation in the infringement;
  - an indication of the maximum amount of the fine that each of Koch Media GmbH (Austria), Koch Media GmbH (Germany) and Koch Media Ltd (UK) would accept in the context of a cooperation procedure;
  - the confirmation that Koch Media GmbH (Austria), Koch Media GmbH (Germany) and Koch Media Ltd (UK) had been sufficiently informed of the Commission’s objections through the Statement of Objections, that they had full access to the Commission’s file at the time of the Statement of Objections, that they do not envisage requesting further access to file and that they had

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

<sup>16</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>17</sup> [...].

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

<sup>19</sup> [...].

been given sufficient opportunity to make their 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 Submissions, and to refrain from any act or conduct having the same or equivalent object or effect.

(23) 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**

(24) 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 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*

(25) 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>20</sup> in-game events; social and chat features.

(26) 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.

(27) 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>21</sup>

(28) 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:

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<sup>20</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>21</sup> [...].

- 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>22</sup>
  - The publisher's licence to Valve typically includes the rights to "[Direct quote from the license agreement]"<sup>23</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>24</sup>
  - The publisher "[Direct quote from the license agreement]" the publisher "[Direct quote from the license agreement]" and "[Direct quote from the license agreement]";<sup>25</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>26</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>27</sup> In addition, pursuant to the Steam Subscriber Agreement,<sup>28</sup> Valve acts as the merchant of record vis-à-vis users and takes responsibility for transactions vis-à-vis them.<sup>29</sup>
- (29) 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>30</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
- (30) 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

<sup>22</sup> [...].

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

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

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

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

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

<sup>28</sup> Available at [https://store.steampowered.com/subscriber\\_agreement/](https://store.steampowered.com/subscriber_agreement/), printed on 26 November 2019, [...].

<sup>29</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>30</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.

Steam after an activation process (see Section 6.1.1.1 6.1.1.1).<sup>31</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>32</sup>

- (31) 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

- (32) Valve defines "territory control" as: "[Direct quote from license agreement]".<sup>33</sup> Such territory control function, therefore, enables the setting up of geographical restrictions on activation, thereby preventing the users from activating the game if they are not in a designated territory. Territory control features are not specific to the EEA and Steam's default is always worldwide. The territory control function may be used to ensure regulatory compliance,<sup>34</sup> to manage IP (copyright) territorial limitations from the copyright right holder<sup>35</sup> or for "windowing" purposes.<sup>36</sup>
- (33) 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.

6.1.1.1. Sale and activation of PC video games on Steam

- (34) If a PC video game is purchased on the Steam Store, by opening the Steam client<sup>37</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

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<sup>31</sup> [...].

<sup>32</sup> [...].

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

<sup>34</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>35</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>36</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. [...]. This Decision does not concern geo-blocking used to implement windowing.

<sup>37</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.

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>38</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.

- (35) 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).
- (36) 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>39</sup>

#### 6.1.1.2. Technical implementation of geo-blocking via Steam activation keys

- (37) 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 6.1.1.16.1.1, letter b). During the users' 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.
- (38) The geographic restrictions that have been deployed for Koch Media's PC video games using Valve's Steam technology and 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

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<sup>38</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.

<sup>39</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.

territory in which activation was allowed. Once activated, however, it can also be played outside the "allowed" territory.

- (39) Activation restrictions are not set up automatically,<sup>40</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 Steam activation 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.
- (40) 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 up for the PC video game in question and in which countries/regions activation should be allowed for each geographic package.<sup>41</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.
- (41) 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").
- (42) 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.
- (43) 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>42</sup>
- (44) 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>43</sup> Conversely, the set-up of the activation restrictions described in Recitals (39) to (43) 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

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<sup>40</sup> [...].

<sup>41</sup> [...].

<sup>42</sup> [...].

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

activation keys via the automated system confirms that activation restrictions for these games were agreed between Valve and Koch Media (see further Section 8.1.2).

## **7. THE RELEVANT MARKETS**

### **7.1. Principles**

- (45) The relevant product and geographic markets are determined according to two criteria, namely, demand-side substitution and supply-side substitution. Potential 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>44</sup>
- (46) 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>45</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*

- (47) 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>46</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>47</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.
- (48) These findings were confirmed by the market investigation conducted in the present case.<sup>48</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>49</sup> and personal preferences.<sup>50</sup> From a supply-side perspective, the respondents indicated

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<sup>44</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>45</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>46</sup> OJ L 255, 8.10.2003, p. 33–100.

<sup>47</sup> OJ C 12, 15.1.2016, p. 5.

<sup>48</sup> The Commission sought information from a number of video game publishers, including [...].

<sup>49</sup> [...].

<sup>50</sup> [...] See also Market Definition Notice, paragraphs 13 and 20.



that each electronic system has different features, specific characteristics, and production costs.<sup>51</sup> For example, in the *Activision Blizzard/King* merger decision, the Commission found that there were indications for a separate market for publishing video games for mobile platforms as opposed to video games for PCs and consoles.<sup>52</sup> This has been confirmed by the market investigation.<sup>53</sup>

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

- (49) Respondents to the market investigation indicated the growing importance of the digital sales channel (i.e., sales via downloading and streaming<sup>54</sup>), especially for PC video games.<sup>55</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>56</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>57</sup>
- (50) Many respondents also considered that typically PC video games are sold both digitally and physically.<sup>58</sup> Most respondents considered that prices tend to be similar for both digital and physical sales of the same PC video game.<sup>59</sup>
- (51) 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>60</sup> exert at least certain competitive constraint on each other.<sup>61</sup>
- (52) 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>62</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>63</sup> and estimated at between 0 and 5 % of the retail price of a PC video game.<sup>64</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>65</sup>. This confirms that there is at least potential competition between physical and digital sales.

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<sup>51</sup> [...].

<sup>52</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>53</sup> [...].

<sup>54</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>55</sup> [...].

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

<sup>57</sup> [...].

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

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

<sup>60</sup> For the avoidance of doubt, reference to digital distribution channel means sales via downloads or streaming only (i.e., it does not include sales of CDs and DVDs via internet).

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

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

<sup>63</sup> [...].

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

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

### 7.3. Relevant Geographic market

- (53) From a demand-side perspective, there are two main ways in which video games might differ within the EEA. First, certain PC video games might need to be tailored to comply with specific regulations existing in Germany and Austria.<sup>66</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>67</sup> some publishers create separate video game versions which contain different languages for different EEA countries<sup>68</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>69</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>70</sup>
- (54) 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>71</sup>
- (55) Moreover, the existence in certain EEA countries of companies that proactively offer parallel-traded PC video games for sale to users indicates that cross-border trade is an activity with business potential,<sup>72</sup> which appears not to require significant modifications to adapt PC video games to local market conditions.

### 7.4. Conclusion on relevant markets

- (56) 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.
- (57) 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

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<sup>66</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>67</sup> [...].

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

<sup>69</sup> [...].

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

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

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

definition as they have the object of artificially restoring the divisions between national markets.

- (58) 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 SDA/Steamworks Agreement between Valve and Koch Media*

- (59) The contractual relationship between Koch Media and Valve is governed by the 2008 SDA and following amendments (the "SDA/Steamworks Agreement")<sup>73</sup> on the basis of which Valve offers a number of Koch Media's PC video games on Steam including [...], [...], [...], [...] including [...] and [...].
- (60) On the basis of the 2008 SDA, Valve was granted a non-exclusive licence to exploit specified Koch Media's PC video games on Steam on a worldwide basis (i.e. including the entirety of the EEA). The 2008 SDA has been amended several times in order to renew it and at the same time update the list of Koch Media's PC video games distributed by Valve.<sup>74</sup> Valve pays Koch Media 70% of the adjusted gross revenues which Valve actually receives from its exploitation of Koch Media's PC video games on Steam.<sup>75</sup> Pursuant to the Steam Subscriber Agreement, Valve is the merchant of record vis-à-vis users purchasing Koch Media's PC video games on Steam Store and is responsible for transactions therein vis-à-vis those users. In addition, Valve also licenced to Koch Media its Steam technology which includes the provision of Steam activation keys<sup>76</sup> for distribution outside Steam of those same PC video games. Valve is obliged to provide Steam activation keys within 10 days after receiving a request from Koch Media.<sup>77</sup>
- (61) While the SDAs/Steamworks Agreement do not contain any clauses which per se restrict the distribution of Koch Media's PC video games to a given territory, they created the possibility to geo-block Steam activation keys by means of the territory control function explained in Section 6.1.1.1. In order for Valve to generate geo-blocked keys it was necessary to reach an agreement with Koch Media to set up activation restrictions on the basis of which geo-blocked Steam activation keys were generated. This agreement was generally reached by exchange of emails as further evidenced in Section 8.1.2.

#### *8.1.2. Koch Media's PC video games geo-blocked via Steam activation keys*

- (62) Through the use of geo-blocked Steam activation keys (see further Section 6.1.1.2) Koch Media and Valve restricted the possibility for users to activate five PC video

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

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

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

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

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

games<sup>78</sup> outside of specific EEA countries – namely: the Czech Republic, Hungary, Poland, Slovakia and the UK (only for [...]). Users located outside these EEA countries could not activate these games.

- (63) Koch Media requested that Valve put in place activation restrictions. In particular, Koch Media requested that Valve set up activation restrictions and provide geo-blocked Steam activation keys, which Koch Media then supplied to its EEA distributors (e.g. [...] and [...]),<sup>79</sup> for the mentioned five PC video games. The activation of those games was restricted by means of geo-blocked Steam activation keys. From a geographical perspective, the Steam activation keys for these PC video games were geo-blocked to the Czech Republic, Hungary, Poland and Slovakia so that such PC video games could not be activated by users located outside the above-mentioned EEA countries. In addition, and only for the PC video game [...] the keys were also geo-blocked to the UK so that such PC video game could not be activated by users located outside the UK. This meant in practice that for this PC video game two different sets of keys were generated: one set geo-blocked to the UK only and another set geo-blocked to the Czech Republic, Hungary, Poland and Slovakia only.
- (64) Valve has confirmed that the five PC video games at issue had activation restrictions in place. Valve provided a list of PC video games with activation restrictions in place<sup>80</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 6.1.1.2).<sup>81</sup>
- (65) Activation restrictions were in place between 23 August 2011 (start date<sup>82</sup> for “[...]”) and 9 October 2015, when Valve lifted any existing EEA activation restrictions in relation to the keys already put on the market.<sup>83</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.
- (66) The following contemporaneous evidence submitted by both Koch Media and Valve supports the fact that Koch Media and Valve agreed to restrict the Steam activation keys for these five PC video games to the Czech Republic, Hungary, Poland, Slovakia and/or the UK:<sup>84</sup>
- (i) [...]: in an email exchange dated 23 August 2011, Koch Media asked Valve to provide it with geo-blocked “*digital keys*” (i.e., keys to be used for digital distribution of [...] in channels other than Steam) for the UK.<sup>85</sup> On the same day, Valve provided by email forty thousand keys geo-blocked to the UK.<sup>86</sup> In

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<sup>78</sup> Namely: (1) [...], (2) [...], (3) [...], (4) [...], and (5) [...].

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

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

<sup>81</sup> For additional details of the orders of the games, see footnote 97.

<sup>82</sup> The start date is the date of the email in which Valve upon request of Koch Media agreed to set up activation restrictions and to provide activation keys. This evidence is available for the PC video games [...] and [...]. Conversely, for [...] and [...], the start date is when the geo-blocked Koch Media PC video games were first activated on Steam by a user who purchased the PC video game (restricted by Steam activation keys) from a distributor other than Valve – see [...].

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

<sup>84</sup> Namely, Koch Media submitted email exchanges regarding Steam activation keys; Valve submitted lists of geo-blocked games and automated reports.

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

<sup>86</sup> [...].

an email exchange of 24 October 2013 Koch Media asked Valve to provide it with geo-blocked Steam activation keys for its local distributor in the Czech Republic, Hungary, Poland and Slovakia as follows: *"can you set up an additional package for [...] for me please? Name: [...] (PL/HU/CZ/SK) restrictions: only PL, HU, CZ, SK. I would need keys that would work in either of the 4 territories for our partner there"*.<sup>87</sup> Valve replied on 24 October 2013 confirming that this additional package has been set up.<sup>88</sup> Both email exchanges evidence that for the PC video game [...] two different packages were set up: one on 23 August 2011 with activation restrictions in the UK only; and another one set up on 24 October 2013 with activation restrictions in the Czech Republic, Hungary, Poland and Slovakia.

- (ii) [...]: in an email exchange dated 14 June 2013, Koch Media asked Valve to set up a new package with a view to ordering geo-blocked Steam activation keys as follows: *"Hi [...], we [...] want to restrict the batch to POL/HUN/CZ/SK. Could you set up a new package for that, so that I can request keys for it? [...] The specifications are as followed: key batch POL/HUN/CZ/SK, activation locked to: only redeemable in POL/HUN/CZ/SK"*.<sup>89</sup> Valve replied on the same day confirming that this new package has been set up according to Koch Media's request.<sup>90</sup>
  - (iii) [...]: in an email exchange dated 17 July 2013 Koch Media asked Valve to set up a new package with a view to ordering geo-blocked Steam activation keys as follows: *"I would need more packages for the different territories for [...]. Could you create the following ones please? [...] PO//HU/CZ/SK: only redeemable in POL, HUN/CZ/SK"*.<sup>91</sup> Valve replied on the same day: *"I've got these all set up now"*.<sup>92</sup>
  - (iv) [...]: in an email exchange dated 16 July 2013 Koch Media asked Valve to set up a new package with a view to ordering geo-blocked Steam activation keys as follows: *"we need a new package for [...] for PL/HU/CZ/SK, can you please set the following up [...] activation lock to PL/HU/CZ/SK?"*.<sup>93</sup> Orders of geo-blocked Steam activation keys were generated via Valve's automated system which was introduced in [...] (see further Recital (67)).
  - (v) [...]: Koch Media and Valve agreed to set up activation restrictions for this PC video game for the Czech Republic, Poland and Slovakia.<sup>94</sup> Orders of geo-blocked Steam activation keys were generated via Valve's automated system (see further Recital (67)).<sup>95</sup>
- (67) For all five PC video games, namely, [...], [...], [...], [...]and [...] (for which there are no emailed orders), orders of geo-blocked Steam activation keys were generated

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87 [...].  
88 [...].  
89 [...].  
90 [...].  
91 [...].  
92 [...].  
93 [...].  
94 [...].  
95 [...].

via Valve's automated system.<sup>96</sup> In light of the explanation provided in Section 6.1.1.2 concerning the automated system, such orders confirm that Valve and Koch Media agreed on activation restrictions for these games.

- (68) By email of 11 September 2015, Valve informed Koch Media that it would remove, as of 9 October 2015, any existing territorial restrictions by lifting the EEA activation locks.<sup>97</sup>
- (69) These geo-blocked Steam activation keys were used by Valve and Koch Media as a technical way to hinder cross-border sales for the above five Koch Media PC video games. In certain instances, Koch Media complemented the use of these activation keys with cross-border sale restrictions provided in distribution agreements between Koch Media and, respectively, [...] and [...] (see Sections 8.2 and 8.3).

## **8.2. Agreements with [...]**

### **8.2.1. Overview of agreements**

- (70) The contractual relationship between Koch Media and [...] is governed by numerous licence and distribution agreements. On 22 December 2006, Koch Media and [...] concluded the "Koch/[...] Framework Agreement". Koch Media's PC video games to be distributed by [...] under such agreement were listed in separate schedules. While each schedule always covers the physical - and where applicable the digital - distribution of PC video games, restrictive clauses concern digital distribution only.
- (71) Between 2014 and 2015, [...] and Koch Media concluded non-exclusive agreements for the digital distribution of Koch Media's PC video games listed in Table 1 below (the "Koch/[...] Digital Distribution Agreements"). Koch Media holds EEA-wide rights for all of these games (except for [...], [...], [...], [...] and [...] in respect of which Koch Media did not hold the rights in these PC video games for Poland).
- (72) As regards the granting of the rights, all the digital distribution agreements included the following wording "*right included: ESD*".<sup>98</sup> As confirmed by Koch Media,<sup>99</sup> this meant that [...] was granted non-exclusive digital distribution rights for the concerned PC video game.<sup>100</sup>
- (73) The geographic scope of the licence granted by Koch Media to [...] covered the Czech Republic, Hungary, Poland and Slovakia. By way of exception the licence to [...] for [...],<sup>101</sup> [...],<sup>102</sup> [...],<sup>103</sup> [...]<sup>104</sup> and [...]<sup>105</sup> did not include Poland and covered only the Czech Republic, Hungary and Slovakia. This is consistent with the fact that Koch Media did not hold itself licence rights for Poland in relation to these PC video games.

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

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

<sup>98</sup> ESD stands for Electronic Software Distribution.

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

<sup>100</sup> [...].

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

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

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

<sup>104</sup> [...].

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

- (74) All the digital distribution agreements for the twenty-three PC video games listed in Table 1 included the following statement: "*in the case that the title will use the Steam Registration, keys will be provided to the Publisher upon request*". "Steam Registration" is Koch Media's terminology to indicate the Steam technology and the "keys" referred to in the agreements are Steam activation keys. Consequently, Steam activation keys are to be used in order to distribute such PC video games in channels other than Steam (see Section 6.1.1.1). The fact that Steam activation keys are used for the distribution of Koch Media's PC video games does not mean that such keys are automatically geo-blocked. While it is true that the activation of such keys could be technically limited to certain EEA countries (i.e., geo-blocked to a given EEA country or number of EEA countries), this required additional technical operations that Valve carried out in agreement with Koch Media. In practical terms, [...] offered Steam activation keys for sale on its website ([...]). Once the user had purchased the activation key (which was previously supplied by Valve to Koch Media and then by Koch Media to [...]) on [...], he/she had to activate them on Steam in order to play the game.<sup>106</sup>
- (75) The agreement concerning PC video games [...] and [...] contains the following obligation: "*ESD (non-exclusive and geoblocked)*" (emphasis added). This clause means that geo-blocking was to apply as regards the digital distribution of the PC video game [...]. The schedule does not contain any definition of geo-blocking and any additional indication of how to implement this measure. Geo-blocking could therefore be technically implemented in two ways, either by means of geo-blocked Steam activation keys or by applying the GeoIP technology to the [...] website on which [...] sold the Steam activation keys so that users located outside [...] licensed territories were prevented from accessing this website.<sup>107</sup> In case of geo-blocked Steam activation keys users located outside [...] licensed territories could buy the PC video game but they could not activate and play it, while the GeoIP applied to [...]’s website means that users did not have the possibility to access this website and therefore buy the PC video game. Therefore the geo-blocked Steam activation keys made the sale of PC video games meaningless from a commercial perspective, while the GeoIP made it technically impossible. The ultimate result was however the same: [...] was prevented from serving users outside its licensed territories.
- (76) The evidence confirms that Koch Media provided [...] with geo-blocked Steam activation keys generated by Valve for the distribution of [...] <sup>108</sup> so the obligation to geo-block was implemented by means of geo-blocked Steam activation keys with regard to this PC video game.
- (77) The agreements for the following fifteen PC video games: (1) [...],<sup>109</sup> (2) [...],<sup>110</sup> (3) [...],<sup>111</sup> (4) [...],<sup>112</sup> (5) [...],<sup>113</sup> (6) [...],<sup>114</sup> (7) [...],<sup>115</sup> (8) [...],<sup>116</sup> (9) [...],<sup>117</sup> (10)

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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>118</sup> (11) [...],<sup>119</sup> (12) [...],<sup>120</sup> (13) [...],<sup>121</sup> (14) [...]<sup>122</sup> and (15) [...],<sup>123</sup> all included the following obligation for [...]: *"any keys supplied and then found for sale outside the Territory may, at Koch sole discretion, result in a review and potential withdrawal of ESD rights"*. This was a threat that any keys sold by [...] outside its licenced territories may lead to a withdrawal of [...] digital distribution licence at Koch Media 's sole discretion.

- (78) The withdrawal of the digital copyright licence meant in practice the early termination of the underpinning digital distribution agreement given that PC video games are copyright protected works and therefore a licence is needed in order to legally distribute the products. Therefore any sales of keys by [...] outside its licensed territories entitled Koch Media to unilaterally terminate the related digital distribution agreements. This means in practice that [...] was not permitted to sell any Steam activation keys outside its licensed territories (including in response to unsolicited requests) given that for each sale it could face the risk of contract termination by Koch Media.
- (79) As indicated in Section 6.1.1.1, and as also confirmed by Koch Media,<sup>124</sup> given that the Steam activation keys are trackable in the sense that it can be seen when and where they are activated, Koch Media had the technical means to monitor where [...] sold the keys and therefore to sanction it by withdrawing the digital licence if it sold them outside its licence territories. In this respect, there is evidence that Koch Media asked Valve for this tracking information.<sup>125</sup> However, Koch Media proactively started tracking (i.e., tagging according to Koch Media terminology) the activation keys supplied to [...], when, as of October 2014, Valve refused to set up additional activation restrictions for new releases<sup>126</sup>. At that point in time, Koch Media realised that it could use the keys as a tracking tool to check whether such keys were sold by Koch Media's distributors outside their licensed territories and if so take possible retaliatory actions. This is confirmed by the following internal email in which Koch Media said: *"be aware that now [that] we have the Steam activation reports,<sup>127</sup> we are able to take action against those who are reselling keys, we are in the process of combatting these partners. While we can never stamp this out entirely, EU free trade*

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

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

<sup>118</sup> [...].

<sup>119</sup> [...].

<sup>120</sup> [...].

<sup>121</sup> [...].

<sup>122</sup> [...].

<sup>123</sup> [...].

<sup>124</sup> [...].

<sup>125</sup> See Koch Media's internal email of 21 May 2013 h 21:36: "Hi [name of Koch's employees], can you please ask Steam [emphasis added] to give us some data on the [...] batches for [...]: 1) how many codes of the [...] batch have been redeemed, 2) where were they activated country by country?", [...]. Before the introduction by Valve of the automated system in [...], to track the activation keys provided to certain local distributors (including [...] and [...]) Koch Media had to ask Steam to provide this information. With the introduction of the automated system in [...] Koch Media was able to extract this information by itself. However, Koch Media indicated that only in August 2013, ([...]), Koch Media realised that it no longer needed to ask Valve for the information about where the keys were activated. This explanation is consistent with the date of the email quoted in this footnote, i.e., in May 2013.

<sup>126</sup> [...].

<sup>127</sup> [...].



rules prevent us region locking in the EU, we are closing down the other avenues [emphasis added]".<sup>128</sup>

- (80) In light of the above the non-geo-blocked keys provided by Koch Media to [...] were used by Koch Media as a tracking tool for the enforcement of the contractual prohibition on [...] to sell Steam activation keys outside its licensed territories.
- (81) On 27 July 2018, Koch Media and [...] agreed to amend the Koch Media/[...] Framework Agreement ("*Amendment of 27 July 2018*") clarifying that the clause appearing in a number of schedules according to which any Steam activation keys sold outside [...] licensed territory may result at Koch Media discretion in a review and potential withdrawal of the licence was deemed to be null and void.<sup>129</sup> As a result of the Amendment of 27 July 2018, this clause was removed from the Koch/[...] Digital Distribution Agreements which were still in force at that time (i.e., the schedule for the PC video game [...]) The term of all Koch/[...] Digital Distribution Agreements was three years<sup>130</sup> as of the release date of the PC video game on the market which means that these agreements expired after 3 years from the release of the PC video game on the market.

#### 8.2.2. Koch Media's PC video games affected by contractual restrictions

- (82) The following Table 1 provides an overview of Koch Media's PC video games that were affected by the restrictive clauses described above.

**Table 1: Koch/[...] Digital Distribution Agreements**

Name of the PC video game	Date of the Agreement (i.e. schedule) <sup>131</sup>	Licensed Territory	Effective Date <sup>132</sup>	Termination Date <sup>133</sup>
[...]	Schedule of 16 January 2015	Czech Republic, Hungary, Poland and Slovakia	20/01/2015	19/01/2018
[...]	Schedule of 27 February 2015	Czech Republic, Hungary, Poland and Slovakia	15/05/2015	14/05/2018
[...]	Schedule of 29 June 2015	Czech Republic, Hungary, and Slovakia	07/05/2015	06/05/201x8
[...]	Schedule of 29 June 2015	Czech Republic, Hungary, and Slovakia	22/05/2015	21/05/2018

<sup>128</sup> [...].

<sup>129</sup> [...].

<sup>130</sup> [...].

<sup>131</sup> [...].

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

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

Name of the PC video game	Date of the Agreement (i.e. schedule) <sup>131</sup>	Licensed Territory	Effective Date <sup>132</sup>	Termination Date <sup>133</sup>
[...]	Schedule of 29 June 2015	Czech Republic, Hungary, and Slovakia	28/11/2014	27/11/2017
[...]	Schedule of 29 June 2015	Czech Republic, Hungary, and Slovakia	28/11/2014	27/11/2017
[...]	Schedule of 29 June 2015	Czech Republic, Hungary, Poland and Slovakia	28/11/2014	27/11/2017
[...]	Schedule of 29 June 2015	Czech Republic, Hungary, Poland and Slovakia	28/11/2014	27/11/2017
[...]	Schedule of 29 June 2016	Czech Republic, Hungary, and Slovakia	28/11/2014	27/11/2017
[...]	Schedule of 19 October 2015	Czech Republic, Hungary, Poland and Slovakia	16/10/2015	27/07/2018 <sup>134</sup>
[...]	Schedule of 28 March 2015	Czech Republic, Hungary, Poland and Slovakia	20/04/2014	19/04/2017
[...]	Schedule of 28 March 2015	Czech Republic, Hungary, Poland and Slovakia	20/04/2014	19/04/2017
[...]	Schedule of 27 July 2014	Czech Republic, Hungary, Poland and Slovakia	01/08/2014	31/08/2017
[...]	Schedule of 18 August 2014	Czech Republic, Hungary, Poland and Slovakia	14/08/2014	27/07/2018 <sup>135</sup>

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

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

Name of the PC video game	Date of the Agreement (i.e. schedule) <sup>131</sup>	Licensed Territory	Effective Date <sup>132</sup>	Termination Date <sup>133</sup>
[...]	Schedule of 19 December 2014	Czech Republic, Hungary, Poland and Slovakia	28/11/2014	27/11/2017
[...]	Schedule of 26 September 2014	Czech Republic, Hungary, Poland and Slovakia	22/04/2015 <sup>136</sup>	21/04/2018 <sup>137</sup>
[...]	Schedule of 24 September 2014	Czech Republic, Hungary, Poland and Slovakia	18/11/2014	17/11/2017

- (83) Koch Media also granted [...] a license for the physical distribution of a number of PC video games including [...], [...] and [...] in the Czech Republic, Hungary, Poland and/or Slovakia.<sup>138</sup> These licensing agreements for physical distribution did not contain any restrictive clauses. While on the basis of such agreements [...] was bound to use Steam activation keys, there was no contractual clause in these agreements setting out that these keys had to be geo-blocked. As these agreements were not affected by contractual restrictions they will not be analysed further for purposes of contractual geo-blocking. However the PC video games [...],<sup>139</sup> [...],<sup>140</sup> [...] will be further assessed for the purpose of technical geo-blocking as geo-blocked Steam activation keys generated by Valve were passed on by Koch Media to [...] for the physical distribution of such games.

### 8.3. Koch Media's Agreements with [...]

#### 8.3.1. Overview of agreements

- (84) The contractual relationship between Koch Media and [...] is governed by a number of licence and distribution agreements. On 12 March 2004, Koch Media and [...] concluded the "*Koch/[...] Framework Agreement of 2004*".<sup>141</sup> Koch Media's PC video games to be distributed by [...] under such agreement were listed in separate schedules which covered physical distribution only (Clause A - "*Right Included: Retail, DVD Box, Right excluded ESD (on prior approval by Koch)*"), ("*Koch/[...] Physical Distribution Agreements*").<sup>142</sup> 20 August 2010 is the effective date of the first agreement which contains cross-border sales restrictions (Koch/[...] Physical Distribution Agreement for the PC video game [...]).
- (85) According to Clause 1.1 of the Koch/[...] Framework Agreement of 2004, the licence granted to [...] under the Koch/[...] Physical Distribution Agreements is exclusive.

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

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

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

<sup>139</sup> [...].

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

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

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

These agreements concern the following PC video games: (1) [...], (2) [...], (3) [...], (4) [...], (5) [...], (6) [...] and (7) [...]. The territorial scope of such agreements includes the Czech Republic, Poland and Slovakia (Clause B – "Territory: Czech Republic, Poland and Slovakia"<sup>143</sup>).

- (86) Clause 4.11 of the Koch/[...] Framework Agreement of 2004 sets out the following obligation for [...]: "[...]. *Distributor guarantees that it will not sell to any customer it may reasonably expect to resell the product out-with the Region. In the event that the Distributor is made aware by Koch Media, or that it discovers itself that any of its customers is involved in such practice, it shall immediately cease to supply to that customer informing Koch Media in writing of its action*". This Clause restrained [...] from selling PC video games in physical format (e.g. DVDs) to retailers who might sell them outside its licensed territory. In particular, if [...] found out that any of its customers was involved in such practice, it was contractually required to immediately cease to supply that customer and to inform Koch Media in writing. Clause 4.11 of the Koch/[...] Framework Agreement of 2004 applied to each of the Koch/[...] Physical Distribution Agreements. For this reason, this clause will be deemed to form part of the Koch/[...] Physical Distribution Agreements and will therefore hereinafter be referred to as "Clause 4.11 of the Koch/[...] Physical Distribution Agreements" for ease of reference.

### 8.3.2. Koch Media's PC video games affected by contractual restrictions

- (87) Table 2 below provides an overview of Koch Media's PC video games affected by the restrictive clauses described above.

**Table 2: Koch/[...] Physical Distribution Agreements**

Name of the PC video game	Licensed Territory	Effective Date <sup>144</sup>	Termination Date <sup>145</sup>
[...]	Czech Republic, Poland and Slovakia <sup>146</sup>	06/09/2011 <sup>147</sup>	05/03/2015 <sup>148</sup>
[...]	Czech Republic, Hungary and Poland <sup>149</sup>	23/04/2013 <sup>150</sup>	26/02/2016 <sup>151</sup>
[...]	Czech Republic, Poland and Slovakia <sup>152</sup>	30/11/2010 <sup>153</sup>	29/05/2014 <sup>154</sup>
[...]	Czech Republic, Poland and Slovakia <sup>155</sup>	20/08/2010 <sup>156</sup>	19/02/2014 <sup>157</sup>
[...]	Czech Republic, Poland and	29/10/2010 <sup>159</sup>	28/04/2014 <sup>160</sup>

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

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

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

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

<sup>147</sup> [...].

<sup>148</sup> [...].

<sup>149</sup> [...].

<sup>150</sup> [...].

<sup>151</sup> [...].

<sup>152</sup> [...].

<sup>153</sup> [...].

<sup>154</sup> [...].

<sup>155</sup> [...].

<sup>156</sup> [...].

<sup>157</sup> [...].

Name of the PC video game	Licensed Territory	Effective Date <sup>144</sup>	Termination Date <sup>145</sup>
	Slovakia <sup>158</sup>		
[...]	Czech Republic, Poland and Slovakia <sup>161</sup>	01/01/2012 <sup>162</sup>	30/06/2015 <sup>163</sup>
[...]	Czech Republic, Poland and Slovakia <sup>164</sup>	25/07/2012 <sup>165</sup>	24/01/2016 <sup>166</sup>

- (88) On the basis of the evidence, geo-blocked Steam activation keys generated by Valve were passed on by Koch Media to [...] for the physical distribution of the PC video games [...] and [...].
- (89) The Koch/[...] Framework Agreement of 2004 was replaced by a new licence and distribution agreement on 27 February 2016 ("*Koch/[...] Framework Agreement of 2016*").<sup>167</sup> Clause 4.11 of the Koch/[...] Framework Agreement of 2004 does not appear in the Koch/[...] Framework Agreement of 2016. As a result, as from the entry into force of the Koch/[...] Framework Agreement of 2016 [...] was no longer prohibited from selling the DVDs to customers who would be likely to resell them outside its licensed territories.
- (90) The schedules to the Koch/[...] Framework Agreement of 2016, which for the purpose of this Decision are considered as separate agreements, always cover physical and in certain cases also digital distribution of a number of PC video games. However, while the Koch/[...] Framework Agreement of 2016 removed restrictive clauses with respect to physical PC video games, two of the schedules to the Koch/[...] Framework Agreement of 2016 contained restrictive clauses for the digital distribution of two PC video games. The two PC video games concerned are: [...] (hereinafter, "Schedule of 27 February 2016")<sup>168</sup> and [...] (hereinafter, "Schedule of 6 July 2016").<sup>169</sup> For the purpose of this Decision, both schedules are referred to as "*Koch/[...] Digital Distribution Agreements*".
- (91) Under these agreements, [...] is provided with Steam activation keys and is bound to use them for the distribution of both PC video games. This means in practice that if a user purchased digitally a PC video game online via [...] (i.e., [...] online store), he/she received a Steam activation key from [...].<sup>170</sup> However, there is no clause in the agreements setting out that the keys were geo-blocked.
- (92) As regards [...], the Schedule of 6 July 2016 contains the following clause: "*Any keys supplied and then found for sale outside the Territory may at Koch sole discretion result in a review and potential withdrawal of ESD rights*". Similar to Clause D of the Koch/[...] Digital Distribution Agreements explained above, this clause prohibits

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<sup>159</sup> [...].

<sup>160</sup> [...].

<sup>158</sup> [...].

<sup>161</sup> [...].

<sup>162</sup> [...].

<sup>163</sup> [...].

<sup>164</sup> [...].

<sup>165</sup> [...].

<sup>166</sup> [...].

<sup>167</sup> [...].

<sup>168</sup> [...].

<sup>169</sup> [...].

<sup>170</sup> [...].

[...] from selling Steam activation keys outside its licenced territories for this game (i.e., the Czech Republic, Hungary, Poland, Slovakia).

- (93) As regards [...], the Schedule of 27 February 2016 contains the following clause: *"ESD rights only through [...], [...] own end consumer digital store only, whereby only one key per customer is granted and only for the region of Poland (customer check via IP Address will be ensured and enforced by [...])"*. According to this clause, the digital distribution rights (i.e. in practice the possibility to sell Steam activation keys not included in any physical support) were granted to [...] for Homefront the Revolution only in relation to its online store, [...], and only for Poland. Pursuant to the additional obligation for [...] to geo-localise the customers via the IP address (*"customer check via IP address"*), in practice users outside Poland (i.e., outside [...] licensed territory) were prevented from purchasing the Steam activation keys which were necessary to activate and play the game.
- (94) On 12 July 2018, Koch Media and [...] agreed to terminate the Koch/[...] Digital Distribution Agreements<sup>171</sup> which were due to expire, respectively, on 19 May 2019 (Schedule of 27 February 2016) and on 20 June 2019 (Schedule of 6 July 2016). 12 July 2018 is therefore the termination date of such agreements.
- (95) Table 3 below provides an overview of Koch Media's PC video games affected by the restrictive clauses contained in the Koch/[...] Digital Distribution Agreements.

**Table 3: Koch/[...] Digital Distribution Agreements**

Name of the PC video game	Licensed Territory	Effective Date <sup>172</sup>	Termination Date <sup>173</sup>
[...]	Poland	20/05/2016	12/07/2018
[...]	Czech Republic, Hungary, Poland and Slovakia	21/06/2016	12/07/2018

#### **8.4. Conclusion on the agreements/concerted practices entered into by Koch Media**

- (96) For the 5 PC video games described in Section 8.1.2, Valve provided geo-blocked Steam activation keys to Koch Media who passed them on to, respectively, [...] and [...]. [...] and [...] resold them to users/distributors in the Czech Republic, Hungary, Poland and/or Slovakia. Valve also provided geo-blocked Steam activation keys for [...] which were passed on by Koch Media to unknown distributor(s) selling this PC video game in the UK. The geo-blocked Steam activation keys for the five relevant PC video games were in place - overall - between 23 August 2011 and 9 October 2015. The same PC video games for which Valve provided geo-blocked Steam activation keys were also sold on Steam across the entire EEA during the same period.
- (97) For 26 PC video games i.e. the 17 PC video games described in Section 8.2.2 (Table 1), the seven PC video games described in Section 8.3.2 (Table 2), and the two PC video games described in the same Section (Table 3), the Koch/[...] Digital Distribution Agreements, the Koch/[...] Physical Distribution Agreements and the

<sup>171</sup> [...].

<sup>172</sup> [...].

<sup>173</sup> [...].

Koch/[...] Digital Distribution Agreements contained cross-border sales restrictions. These restrictions were in place between 20 August 2010 and 27 July 2018. 20 August 2010 is the effective date of the first agreement which contains cross-border sales restrictions (Koch/[...] Physical Distribution Agreement for the PC video game [...]). This start date is appropriate in light of the fact that it is the earliest date on which a PC video game was geo-blocked by means of a restrictive clause in the relevant distribution agreements (see Section 8.3), and it also comes before the date on which Valve and Koch Media started to set up activation restrictions for a number of PC video games. In turn, the end date is 27 July 2018, which is when the contractual restrictions in the Koch/[...] Digital Distribution Agreements that were still in force at that time were removed (see Section 8.2).<sup>174</sup> This end date comes after the date in which Valve lifted the geo-blocking imposed by virtue of activation keys.

## 9. LEGAL ASSESSMENT

- (98) 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.
- (99) 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>175</sup>
- (100) 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.
- (101) 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.
- (102) 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>174</sup> [...].

<sup>175</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**

- (103) 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*

- (104) Article 101 of the Treaty applies to undertakings and associations of undertakings.<sup>176</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>177</sup>

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

- (105) Koch Media, Valve, [...] and [...] are undertakings within the meaning of Article 101(1) of the Treaty.

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

#### *10.2.1. Principles*

- (106) 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>178</sup>
- (107) 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>176</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>177</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>178</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>179</sup>

- (108) 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>180</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>181</sup> The motive or the knowledge that the act is unlawful is irrelevant.<sup>182</sup>
- (109) 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>183</sup>

#### 10.2.2. Application of the principles to this case

##### 10.2.2.1. Agreements and/or concerted practices between Koch Media and Valve

- (110) The conduct described in Section 8.1 presents all the characteristics of agreements and/or concerted practices entered into between undertakings, namely between Koch Media and Valve.
- (111) As indicated in Recital (61), on the basis of the SDAs/Steamworks Agreement Koch Media was entitled to receive Steam activation keys that included territory controls. Koch Media had to indicate to Valve the territories in which activation restrictions were to be set up for each PC video game package. Activation restrictions were therefore not set up unilaterally either by Valve or Koch Media.
- (112) Koch Media also had to indicate how many keys it needed and the package(s) to which the geo-blocked Steam activation keys related. Although the set-up of the activation restrictions and the generation of the related keys require two different technical actions by Valve in which the second is the logical follow-on to the first, in practice the boundaries between the two are often blurred in Koch Media's requests. For the PC video game [...], for example, Koch Media asked Valve in one go, via the same email exchange, for the setting up of the activation restrictions along with the geo-blocked Steam activation keys for this PC video game. In this email exchange by

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<sup>179</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>180</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>181</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>182</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>183</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.

which Koch Media asked Valve to provide geo-blocked Steam activation keys, Koch Media referred to the EEA countries to which the activation keys were to be geo-blocked so that the PC video game could not be activated in the rest of the EEA.<sup>184</sup>

- (113) The evidence in Section 8.1.2 shows that Koch Media requested (generally by email) that Valve set up activation restrictions and provide it with geo-blocked Steam activation keys for the PC video games [...], [...], [...], [...] and [...] to be restricted to the following EEA countries: the Czech Republic, Hungary, Poland and/or Slovakia. Koch Media also requested, by email, that Valve set up activation restrictions and provide it with geo-blocked Steam activation keys restricted to the UK for the PC video game [...]. In relation to the PC video game [...] the evidence set out in Section 8.1.2 does not include emails, rather other type of evidence from which it is possible to deduce that Koch Media and Valve agreed to set up activation restrictions which concerned the Czech Republic, Hungary, Poland, Slovakia.
- (114) The evidence set out in Section 8.1.2 indicates that Valve agreed to set up such activation restrictions for [...], [...] and [...] by email.<sup>185</sup> Conversely for the [...] and [...], the evidence that activation restrictions were set up consists of several orders of geo-blocked Steam activation keys listed in the report generated via the automated system introduced by Valve in [...].<sup>186</sup>
- (115) As explained in more detail in Section 6.1.1.2, 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 Koch Media.
- (116) The evidence described above shows a concurrence of wills between Koch Media and Valve to set up activation restrictions and to provide the related geo-blocked Steam activation keys which were used to restrict cross-border sales in respect of the above-mentioned five Koch Media's 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 Koch Media and its distributors ([...] and [...])

- (117) The Koch/[...] Digital Distribution Agreements and the Koch/[...] Physical and Digital Distribution Agreements constitute an agreement between undertakings within the meaning of Article 101(1) of the Treaty.

### 10.3. Restriction of competition by object

#### 10.3.1. Principles

- (118) 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

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<sup>184</sup> [...].

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

<sup>186</sup> [...].

that there is no need to examine their effect.<sup>187</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>188</sup>

- (119) To determine whether an agreement reveals such a sufficient degree of harm to competition regard must be had *inter alia* to:
- The content of its provisions;
  - The objectives it seeks to attain; and
  - The economic and legal context of which it forms a part.<sup>189</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>190</sup>
- (120) 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>191</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>192</sup>

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

- (121) 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

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<sup>187</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>188</sup> Case C-67/13 P CB, paragraph 50; Case C-286/13 P *Dole Food*, paragraph 114.

<sup>189</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 (EAEPC) 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, *NVIAZ 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>190</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>191</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>192</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.

the meaning of Article 101(1) of the Treaty.<sup>193</sup> In particular, restrictions on passive sales are capable of leading to absolute territorial protection and are designed to prohibit or limit any cross-border distribution<sup>194</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.

- (122) 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>195</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>196</sup>

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

- (123) In *Nintendo v PC Box*, the Court of Justice considered whether videogames, and/or their parts, could be protected under EU copyright rules.<sup>197</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>198</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

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<sup>193</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.

<sup>194</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>195</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>196</sup> Joined cases 56 and 58/64 *Grundig*, page 339.

<sup>197</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>198</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.

law in such constellations.<sup>199</sup> In addition, an agreement is not exempted under EU competition law merely because it concerns an IP right.<sup>200</sup>

- (124) 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>201</sup> The principles 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.
- (125) Moreover, according to settled case-law, an agreement can be considered to restrict competition by object even if it also pursues legitimate objectives.<sup>202</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.
- (126) 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>203</sup>
- (127) 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>204</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>205</sup>
- (128) 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

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<sup>199</sup> Case T-321/05 *AstraZeneca*, paragraph 677, confirmed on appeal, Case C-457/10 P, paragraph 132.

<sup>200</sup> Judgment of the Court of 27 September 1988, *Bayer AG and Maschinenfabrik Hennecke GmbH v Heinz Süllhöfer*, C-65/86, ECLI:EU:C:1988:448, paragraph 15; Judgment of the General Court of 8 September 2016, *Generics (UK) Ltd v Commission*, T-469/13, ECLI:EU:T:2016:454, paragraph 209.

<sup>201</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.

<sup>202</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>203</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>204</sup> Case C-307/18 *Generics (UK)*, paragraph 210.

<sup>205</sup> Judgment 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.

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 of the principles to this case*

#### *10.3.2.1. Agreements and/or concerted practices between Koch Media and Valve*

- (129) The email exchanges and other evidence detailed in Section 8.1.2 show that Koch Media asked Valve to provide it with geo-blocked Steam activation keys for the following five PC video games [...], [...], [...], [...] and [...].
- (130) It follows from this evidence that Koch Media defined the territories in which such Steam activation keys could be used to activate and play a PC video game. The Steam activation keys that Valve provided to Koch Media following Koch Media's request were geo-blocked, depending on Koch Media's request, to one or more of the following EEA countries: the Czech Republic, Hungary, Poland, Slovakia and (for one game only) the UK.
- (131) The five games concerned could not be activated outside of those countries. Koch Media's distributors (e.g. [...] and [...]), or any other distributor in those EEA countries to whom the geo-blocked Steam activation keys were provided, were effectively prevented from providing the games to users based in EEA countries other than the Czech Republic, Hungary, Poland, Slovakia and/or the UK (as the case may be), because the games could not be activated outside the EEA countries concerned.
- (132) As explained in Section 8.1.2, Koch Media and Valve agreed to put in place, and Valve did put in place, such restrictions on the Steam activation keys of the five Koch Media's PC video games mentioned above with respect to the Czech Republic, Hungary, Poland, Slovakia and/or the UK.
- (133) Rather than being inherent to the nature of the licence itself, the agreements on the use of geo-blocked Steam activation keys between Koch Media and Valve are designed to ensure that distributors receiving the keys (e.g. [...] and [...]) comply with the contractually defined territorial scope of their respective distribution licence, covering the Czech Republic, Hungary, Poland, Slovakia and/or the UK. 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 Koch Media 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).
- (134) In addition, and in line with the case-law quoted in Section 10.3.1, competition may be distorted within the meaning of Article 101(1) of the Treaty not only by agreements/concerted practices which limit it as between the parties but also by agreements which prevent or restrict the competition which might take place between one of them and third parties.
- (135) On the basis of the above, the objective of the agreements/concerted practices between Koch Media and Valve was to technically restrict the distribution of the five Koch Media's PC video games from certain EEA countries, namely the Czech Republic, Hungary, Poland, Slovakia, and/or the UK into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.
- (136) Therefore, the agreements/concerted practices described in Section 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 Koch Media and [...]

(137) As indicated in Section 8.2, the Koch/[...] Digital Distribution Agreements concerning the digital distribution of Koch Media's PC video games listed in Table 1 include the following clauses:

- Clause A – *"Right Included: [...] ESD [...] inside the Territory during the Term";*
- Clause B – *"Territory: Czech Republic, Hungary, Poland and Slovakia"*<sup>206</sup>
- Clause C – *"Copy Protection: In case the title will use the Steam registration, keys will be provided by the publishers upon request".*
- Clause D – has the following two variants:
  - Clause D1 – *"Any Keys supplied and then found for sale outside the Territory may at Koch sole discretion result in a review and potential withdrawal of ESD rights" – or alternatively the following variant:*
  - Clause D2: *"ESD (non-exclusive and geo-blocked)".*

(138) On the basis of Clause A, Koch Media grants to [...] rights to distribute digitally the PC video games listed in Table 1. Clause B sets out that [...] non-exclusive digital distribution rights were limited to the Czech Republic, Slovakia, Hungary and Poland. Clause C means in practice that [...] is bound to use Steam activation keys provided by Koch Media for the digital distribution of Koch Media's PC video games.

(139) Clause D contains two variants: the first one, Clause D1 (which appears in all Koch/[...] Digital Distribution Agreements except the ones for the PC video games [...] and [...]) in the event that Koch Media found a key, which it has previously supplied to [...], outside [...] licensed territories, Koch Media was entitled to decide whether to withdraw [...] digital distribution licence. On the basis of the explanation provided in Section 8.2.2 and the case-law quoted in Section 10.3.1, the threat of the license withdrawal is an indirect measure that has *de facto* the same effect as an export ban<sup>207</sup> on the sale of activation keys. For the games covered by Clause D1, while Koch Media provided to [...] non-geo-blocked Steam activation keys, these keys were used by Koch Media as a tracking tool (by way of geo-location using the user's IP address)<sup>208</sup> for the enforcement of the contractual prohibition on [...] to sell Steam activation keys outside its licensed territories.

(140) Clause D2 (which appears in the Koch/[...] Digital Distribution Agreements for the PC video games [...] and [...]) prevented or limited [...] from selling the PC video games to users and parallel traders located outside its licensed territories. This clause

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<sup>206</sup> For the PC video games [...], [...], [...], [...] Clause B read: "Czech Republic, Hungary and Slovakia".

<sup>207</sup> Although the concept of export ban as well as parallel trade is normally used in relation to physical distribution only, it equally applies in this Decision since digital distribution means in practice sale of activation keys rather than a download (which conversely takes place when the key is activated on Steam as explained in Section 6.1.1.1) and in fact, there are companies active in the parallel trade of keys as indicated above. This is also confirmed by the wording of Clause D, ("any keys [...] found for sale outside the Territory") which covers not only the case in which the key is sold by [...] itself outside its licensed territory but also the case in which [...] has sold it within its licence territory to, e.g., a parallel trader of keys who then resold it outside.

<sup>208</sup> [...]

sets out that the digital distribution (ESD) had to be geo-blocked without specifying how this geo-blocking had to be implemented.

- (141) Geo-blocking could be technically implemented in two ways, either by means of geo-blocked Steam activation keys or by GeoIP technology preventing access to [...] website by users located outside [...] licensed territory. The evidence set out in Section 8.2.2 confirms that this clause was implemented by means of geo-blocked Steam activation keys for the PC video game [...]. Irrespective of how the obligation to geo-block was implemented, Clause D2 constitutes a contractual restriction preventing [...] from passively selling to users and parallel traders located outside its (non-exclusive) licensed territory (i.e., the Czech Republic, Hungary, Poland and Slovakia).
- (142) Although the language of these two provisions of Clause D is different, the ultimate result is the same, i.e., they both lead to a *de facto* prohibition on [...] to sell Koch Media's PC video games outside its licensed territories, including in response to unsolicited requests.
- (143) On the basis of the above, the objective of the Koch/[...] Digital Distribution Agreements, namely Clause D (both variants), was to restrict the distribution of the 17 Koch Media's PC video games described in Section 8.2.2 and Table 1 from the Czech Republic, Slovakia, Hungary and Poland into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.
- (144) Therefore, the agreements/concerted practices described in Section 8.2.2 had the object of restricting competition within the meaning of Article 101(1) of the Treaty.

#### 10.3.2.3. Agreements between Koch Media and [...]

##### (a) Koch/[...] Physical Distribution Agreements

- (145) As described in Section 8.3 and Table 2, the Koch/[...] Physical Distribution Agreements concern the physical distribution of a number of PC video games. The relevant clauses of these agreements are the following:
- Clause A of the Koch/[...] Physical Distribution Agreements – "*Right Included: Retail, DVD Box, Right excluded ESD (on prior approval by Koch)*";
  - Clause B of the Koch/[...] Physical Distribution Agreements – "*Territory: Czech Republic, Poland and Slovakia*";<sup>209</sup>
  - Clause 4.11 of the Koch/[...] Physical Distribution Agreements: "*Distributor guarantees that it will not sell to any customer it may reasonably expect to resell the product [PC video games listed in the schedules to this agreement] out-with the Region. In the event that the Distributor is made aware by Koch Media, or that it discovers itself that any of its customers is involved such practice, it shall immediately cease to supply to that customer informing Koch Media in writing of its action*".
- (146) On the basis of Clause A of the Koch/[...] Physical Distribution Agreements Koch Media granted to [...] rights to distribute PC video games only physically ("Retail, DVD Box" according to the terminology used by Koch Media). Clause B sets out that [...] physical distribution rights were limited to Poland, the Czech Republic and

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[...].



Slovakia. Clause 4.11 of the Koch/[...] Framework Distribution Agreement of 2004 contains two obligations. It restrained [...] from selling PC video games in physical format to retailers who might sell them outside its licensed territory (first obligation). If [...] found out that any of its customers was involved in such practice, it was contractually required to immediately cease to supply to that customer and to inform Koch Media in writing (second obligation). The first obligation and the second obligation are to be read together to understand the overall mechanism of Clause 4.11. The second obligation is in fact a back-up in case [...] has failed to comply with the first obligation.

- (147) On the basis of the *Tipp-Ex* judgment quoted in Section 10.3.1, which assessed a similar clause<sup>210</sup> these kind of obligations are designed to prevent or, at least, severely curtail the concerned distributor's/retailers' ability to engage in cross-border sales.
- (148) The evidence set out in Section 8.3.2 show that for two PC video games, namely [...]and [...], the restrictions in Clause 4.11 were reinforced through the use of the geo-blocked Steam activation keys provided by Koch Media to [...].
- (149) These clauses were designed to effectively prevent or limit [...] customers (i.e., retailers) from selling Koch Media's PC video games to users located outside the licensed territory, including in response to unsolicited requests. Consequently, these obligations contributed to the artificial maintenance of separate national markets and have as their object the prevention, restriction and/or distortion of competition within the meaning of Article 101(1) of the Treaty.
- (150) Therefore, the agreements described in Sections 8.3.1 and 8.3.2 had the object of restricting competition within the meaning of Article 101(1) of the Treaty (Table 2).

(b) The Koch/[...] Digital Distribution Agreements

- (151) As described in Section 8.3.2 and Table 3, [...] distributes digitally two Koch Media's PC video games on the basis of the Koch/[...] Digital Distribution Agreements. The relevant clauses of these agreements are the following:
  - Clause A – "*Right Included: [...] ESD [...] inside the Territory during the Term*".
  - Clause B – "*Territory: Czech Republic, Hungary, Poland and Slovakia*"<sup>211</sup>
  - Clause C – "*Platform: PC (Steamworks integrated)*".
  - Clause D – has the following two variants:
    - Clause D1: "*Any Keys supplied and then found for sale outside the Territory may at Koch sole discretion result in a review and potential withdrawn of ESD rights*"; or alternatively

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<sup>210</sup> Clause of the contracts between Tipp-Ex and its exclusive distributors reads "Sales Outside the Contract Territories: [...] the Authorised Dealer undertakes not to sell the contract goods to customers who to his knowledge intend to resell them in areas outside the contract territory".

<sup>211</sup> For the PC video game [...], the wording of Clause D2 which reads "ESD rights only through [...], [...], whereby only one key per customer is granted and only for the region of Poland [emphasis added]" means in practice that digital distribution rights were granted only for Poland.

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

- (152) On the basis of Clause A, the Koch/[...] Digital Distribution Agreements grant [...] rights to distribute digitally both PC video games. Clause B sets out that [...] digital rights were limited to the Czech Republic, Hungary, Poland and Slovakia for the PC video game [...] and to Poland only for the PC video game [...]. The digital distribution licence granted by Koch Media to [...] was not exclusive. Clause C means that the PC video game is Steam-enabled and therefore, in practice, that [...] is bound to use Steam activation keys provided by Koch Media for digital distribution. There is no clause setting out that these keys were geo-blocked.
- (153) Clause D contains two different provisions: the first one, i.e., Clause D1 (which appears in the Koch/[...] Digital Distribution Agreement for the PC video game [...]) provides that Koch Media may decide unilaterally to terminate the underpinning digital distribution agreement early if [...] sold any keys outside its licenced territories (Czech Republic, Hungary, Poland and Slovakia as the case may be), including in response to unsolicited requests. Clause D1 is identical to Clause D1 of the Koch/[...] Digital Distribution Agreements described in Section 8.2 and therefore all the explanations provided in Section 10.3.2.2 equally apply to this agreement.
- (154) The second provision, Clause D2, (which appears in the Koch/[...] Digital Distribution Agreement for the PC video game [...]), means in practice that for each user who accessed its online store [...], [...] was bound to check the location of this user by means of his/her IP address. If the IP address showed that the user was located outside Poland, [...] was not entitled to sell him/her the keys.
- (155) Although the language of these two provisions of Clause D is different, the ultimate result is the same, i.e., the application of geo-location technology based on the IP address of the user in order to prevent/restrict sales of Steam activation keys outside [...] licensed territories.
- (156) These clauses were designed to effectively prevent or limit the distributors from selling Koch Media’s PC video games to users located outside the licensed territory, including in response to unsolicited requests (passive sales). Consequently, these obligations contributed to the artificial maintenance of separate national markets and have as their object the prevention, restriction and/or distortion of competition within the meaning of Article 101(1) of the Treaty.
- (157) Therefore, the agreements described in Section 8.3.2 (Table 3) 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*

- (158) 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.

- (159) 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 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>212</sup>
- (160) 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>213</sup>
- (161) 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>214</sup> Finally, the concept of single and continuous infringement applies to vertical agreements/concerted practices that restrict competition within the internal market<sup>215</sup> which has also been recognised by the Court of Justice.<sup>216</sup>

#### 10.4.2. Application to this case

- (162) As indicated in Sections 8.1, 8.2 and 8.3, the agreements/concerted practices between Valve and Koch Media for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys for each of Koch Media's PC video games and for each geographic area concerned, on the one hand, and the licensing and distribution agreements between Koch Media and, respectively, [...] and [...] 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.
- (163) According to the case-law quoted in Section 10.4.1, when two sets of agreements share an overall plan pursuing a common objective they can be characterized as constituting a single and continuous infringement, even if each of them constitutes in itself a separate infringement.
- (164) The evidence set out in Section 8 demonstrates that Koch Media wanted to achieve the anticompetitive objective of restricting cross-border sales within the internal market and, for this purpose, it had a two-pronged strategy combining technical restrictions via the Steam activation keys with contractual restrictions agreed with [...] and [...]. In this regard, the agreements/concerted practices between Koch Media

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<sup>212</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>213</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>214</sup> Case C-642/13 P *Villeroy & Boch*, paragraphs 59-60.

<sup>215</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>216</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.

and Valve regarding geo-blocked Steam activation keys, on the one hand, and the bilateral agreements between Koch Media and respectively [...] and [...] containing cross-border sale restrictions, on the other hand, shared the common objective of restricting cross-border sales of certain PC video games of Koch Media. This shows the existence of an identity of purposes between these two separate infringements.

- (165) In addition, for certain of Koch Media's PC video games<sup>217</sup> the activation restrictions and the related geo-blocked Steam activation keys that Valve provided to Koch Media were used in combination with cross-border sales restrictions set out in the Koch/[...] Physical and Digital Distribution Agreements and in the Koch/[...] Digital Distribution Agreements. This further confirms that the use of geo-blocked Steam activation keys along with the underlying activation restrictions on the one hand and the contractual cross-border sales restrictions on the other hand both pursued the same anti-competitive aim of preventing the physical and digital distribution of PC video games to users located outside the [...] and [...]s respective licensed territories. Koch Media was a party to, and therefore participated in and was aware of, both elements of the single and continuous infringement.
- (166) In any event, even if the agreements/concerted practices between: (i) Valve and Koch Media, on the one hand; and (ii) the anticompetitive clauses in the bilateral agreements between Koch Media and its distributors, respectively [...] and [...] 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**

- (167) 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.
- (168) As indicated in Sections 10.3.2.1, 10.3.2.2 and 10.3.2.3, the agreements/concerted practices between Valve and Koch Media on the one hand and the agreements between Koch Media and, respectively, [...] and [...] on the other hand, seek to restrict or prevent trade between EEA countries as they restrict the ability of Koch Media's distributors to engage in cross-border sales of Koch Media's PC video games.

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<sup>217</sup> For the PC video games [...] and [...] the geo-blocked keys provided by Koch Media to [...] reflected the prohibition applicable to the Koch/[...] Physical Distribution Agreements to sell Koch Media's PC video games outside [...]s licensed territories. Likewise for the PC video games [...] the geo-blocked keys provided by Koch Media to [...] reflected the prohibition on the latter from servicing users outside its licensed territories as set out in Koch/[...] Digital Distribution Agreements.

- (169) By their very nature, those restrictive agreements are liable to partition the internal market and consequently to affect trade between Member States.<sup>218</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.

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

- (170) 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.
- (171) The Technology Transfer Block Exemption Regulation ("TTBER")<sup>219</sup> and the Vertical Block Exemption regulation ("VBER")<sup>220</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.
- (172) Without it being necessary to determine whether (i) SDA/Steamworks Agreement and the agreement/concerted practice to set up activation restrictions and to provide geo-blocked Steam activation keys between Valve and Koch Media (which are all part of the same conduct as described in Section 8.1), and (ii) the distribution agreements between Koch Media and, respectively, [...] (described in Section 8.2) and [...] (described in Section 8.3) 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 Koch Media's distributors (including in certain

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<sup>218</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.

<sup>219</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>220</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")).

instances its "indirect distributors")<sup>221</sup> from engaging in passive sales to users based outside those territories.

- (173) 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 restriction of cross-border sales resulting from the use of geo-blocked Steam activation keys and/or from the restrictive clauses in the distribution agreements with [...] and [...], respectively, were indispensable for the improvement of production or distribution of the PC video games at stake or the promotion of technical progress within the meaning of Article 101(3)(i) of the Treaty.

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

### **11.1. Product scope**

- (174) The infringement relates to the distribution of 28 of Koch Media'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) [...] and (28) [...].

### **11.2. Geographic scope**

- (175) 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**

- (176) The duration of the infringement is calculated from 20 August 2010 which is the effective date<sup>222</sup> of the first agreement which contains a cross-border sales restriction (i.e., the Koch/[...] Physical Distribution Agreement for the PC video game [...]), until 27 July 2018, which is when the cross-border sales restrictions contained in the Koch/[...] Digital Distribution Agreements that were still in force at that time were removed.<sup>223</sup>
- (177) Therefore, the single and continuous infringement started on 20 August 2010 and ended on 27 July 2018.

## **12. LIABILITY**

### **12.1. Principles**

- (178) Article 101 of the Treaty and Article 53 of the EEA Agreement apply to undertakings and associations of undertakings.<sup>224</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.

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<sup>221</sup> According to Art 4.11 of the Koch/[...] Physical Distribution Agreements [...] was forced to impose limitations on the sale possibilities (including passive sales) of its customers (i.e., retailers). Therefore, this clause indirectly prevents or, at least, severely curtails [...]’s retailers ability to engage in passive sales and limits the possibility for cross-border sales.

<sup>222</sup> [...].

<sup>223</sup> [...]

<sup>224</sup> Case C-437/09, *Prévoyance*, paragraph 40.

- (179) Where several legal entities may be held liable for the participation in an infringement of one and the same undertaking, they must be regarded as jointly and severally liable for that infringement.
- (180) The conduct of a subsidiary may be imputed to the parent company, even if the parent company does not participate directly in the infringement, where the parent company and the subsidiary form a “single economic unit” and therefore form a single “undertaking” for the purposes of Union competition law.
- (181) In particular, that may be the case where a subsidiary, although having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities.<sup>225</sup>
- (182) In the specific case in which a parent company holds all or almost all of the capital in a subsidiary that has committed an infringement of Union competition rules, there is a rebuttable presumption that the parent company in fact exercises a decisive influence over the conduct of its subsidiary.<sup>226</sup> In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption applies.<sup>227</sup>
- (183) 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

- (184) On this basis the Commission concludes that liability for the single and continuous infringement should be imputed to the following legal entities:
- Koch Media GmbH (Germany) for its direct participation in the infringement from 23 August 2011 until 9 October 2015;<sup>228</sup>
  - Koch Media Ltd (UK) for its direct participation in the infringement from 20 August 2010 until 27 July 2018;<sup>229</sup>
  - Koch Media GmbH (Austria) for its participation in the infringement as direct participant from 20 May 2016 until 12 July 2018;<sup>230</sup> as well as the parent company holding 100% of the shares in both Koch Media GmbH (Germany) and Koch Media Ltd (UK) for the entire duration of the infringement and Koch

<sup>225</sup> Judgement of the Court of 29 September 2011, *Elf Aquitaine v Commission* (hereinafter referred to as “*Elf Aquitaine*”), C-521/09 P, ECLI:EU:C:2011:620, paragraph 54.

<sup>226</sup> Judgment of the Court of 10 September 2009, *Akzo Nobel NV and Others v Commission* (hereinafter referred to as “*Akzo*”), C-97/08 P, ECLI:EU:C:2009:536, paragraph 60 and the case law referred to in that paragraph; Judgment of the Court of First Instance of 30 September 2009, *Elf Aquitaine SA v Commission*, T-174/05, ECLI:EU:T:2009:368 (summary publication), paragraphs 125, 155-156 and the case law referred to in those paragraphs; Judgment of the Court of First Instance (Seventh Chamber) of 30 September 2009, *Arkema SA v Commission*, T-168/05, ECLI:EU:T:2009:367 (summary publication), paragraphs 69-70 and the case law referred to therein; paragraph 100.

<sup>227</sup> Case C-97/08 P, *Akzo*, paragraph 61 and the case law referred to in that paragraph; Case T-174/05, *Elf Aquitaine SA v Commission*, paragraph 156 and Case T-168/05 *Arkema SA v Commission*, paragraph 70.

<sup>228</sup> [...].

<sup>229</sup> [...].

<sup>230</sup> [...].

Media GmbH (Austria) has not argued that it did not exercise decisive influence over Koch Media GmbH (Germany) and Koch Media Ltd (UK).

### **13. REMEDIES AND FINES**

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

- (185) Where the Commission finds that there is an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003. For this purpose, it may also impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.
- (186) The requirement that a remedy has to be effective<sup>231</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>232</sup>
- (187) While Koch Media has already brought the infringement to an end, it is appropriate to require Koch Media 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**

- (188) 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>233</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.
- (189) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the 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>234</sup> ("the Guidelines on Fines").
- (190) 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

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<sup>231</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>232</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>233</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>234</sup> OJ C 210, 1.9.2006, p. 2.



indirectly relates in the relevant geographic area within the EEA.<sup>235</sup> The basic amount consists of a percentage of the value of those sales up to a maximum percentage of 30%<sup>236</sup>, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.<sup>237</sup> In assessing the gravity of the infringement, the Commission has regard to a number of factors, such as the nature of the infringement, the market share of the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.<sup>238</sup>

- (191) 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>239</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.
- (192) The Commission may also include in the basic amount an additional amount of a sum up to 25% of the value of sales<sup>240</sup> to deter undertakings from entering into anticompetitive agreements.
- (193) 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>241</sup>
- (194) 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>242</sup>

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

- (195) 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>243</sup> It is sufficient that the undertaking could not have been unaware that its conduct was aimed at restricting competition.<sup>244</sup>
- (196) The Commission concludes that, based on the facts described in Section 8, the single and continuous infringement was committed intentionally or at the very least negligently.

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<sup>235</sup> Point 13 of the Guidelines on Fines.

<sup>236</sup> Point 21 of the Guidelines on Fines.

<sup>237</sup> Point 19 of the Guidelines on Fines.

<sup>238</sup> Point 22 of the Guidelines on Fines.

<sup>239</sup> Point 13 of the Guidelines on Fines.

<sup>240</sup> Point 25 of the Guidelines on Fines.

<sup>241</sup> Point 27 of the Guidelines on Fines.

<sup>242</sup> Point 30 of the Guidelines on Fines.

<sup>243</sup> Case C-19/77 *Miller*, paragraph 18; Case T-62/98 *Volkswagen*, paragraph 334.

<sup>244</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, *Bundeswettbewerbsbehörde and Bundeskartellamt v Schenker & Co. AG and Others*, C-681/11, ECLI:EU:C:2013:404, paragraph 37 and the case-law cited.

- (197) On the basis of this evidence and the evidence quoted in Sections 8.2 and 8.3, the Commission considers that Koch Media entered into agreements with [...] and [...] respectively (i.e., Koch/[...] Digital Distribution Agreements, Koch/[...] Physical and Digital Distribution Agreements) that contain the cross-border sales restrictions described in Sections 10.3.2.2 and 10.3.2.3.
- (198) Koch Media also agreed with Valve to set up activation restrictions and create geo-blocked activation keys with the express purpose of restricting cross-border sales within the EEA where Koch Media's distributors (e.g., [...] and [...]) could sell certain of Koch Media's PC video games as evidenced in Section 10.3.2.1.

### 13.4. Calculation of the fine

#### 13.4.1. Value of sales

- (199) 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>245</sup> The concept of the "value of sales" must be understood as referring to sales on the market concerned by the infringement.<sup>246</sup>
- (200) The relevant value of sales include the turnover generated by the sales of the Koch Media's PC video games concerned by the infringement described in Sections 10.3.21, 10.3.2.2, 10.3.2.3, generated both by physical and digital distribution. This includes also the 70% of the gross revenue generated by the sale of the concerned PC video games on Steam.
- (201) Irrespective of whether the infringements described in Sections 10.3.2.1, 10.3.2.2, 10.3.2.3 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 7.2.2).
- (202) Based on the principles outlined in this Section and on the information provided by Koch Media, the value of sales should be based on Koch Media's sales in the EEA of the PC video games directly and indirectly concerned with the infringement<sup>247</sup> in the financial year 2017 (running from 1 April 2017 to 31 March 2018), which was the last full business year of its participation in the single and continuous infringement.
- (203) Accordingly, the value of sales to be taken into account is EUR [1 600 000 – 2 300 000].

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<sup>245</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>246</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.

<sup>247</sup> Namely, the following PC video games covered either/and/or by any of the agreements mentioned in this Decision concluded between Koch Media and, respectively, [...] and [...] that is: (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) [...] and (28) [...].

#### 13.4.2. Gravity

- (204) 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 Guidelines on Fines, 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.
- (205) 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 damaging to competition than horizontal agreement.<sup>248</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, 8.2 and 8.3, the percentage of the value of sales should be set at 7%.

#### 13.4.3. Duration

- (206) The duration of the infringement, as set out in Section 11.3, was 2899 days (7.93 years).

#### 13.4.4. Calculation of the basic amount

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

#### 13.4.5. Aggravating or mitigating factors

- (208) 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

- (209) The fine for the infringement does not exceed 10% of Koch Media'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.
- (210) The fine for the infringement sets out in Recital (207) does not exceed 10% of Koch Media's total turnover in the business year preceding the date of the adoption of this Decision.

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

- (211) In order to reflect that Koch Media 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 on Fines, be reduced by 10%. On 3 November 2020, Koch Media submitted Settlement Submissions to the Commission, acknowledging the infringement and agreeing to pay a fine. Koch Media co-operated with the Commission by acknowledging an infringement of

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<sup>248</sup> Case C-32/11 *Allianz Hungária*, paragraph 43. Guidelines on vertical restraints, OJ C 130, 19.5.2010, p.1. Vertical Guidelines, para. 6 and 225. A similar distinction was already made in the 1998 Fining Guidelines where vertical restraints were clearly distinguished from horizontal agreements in terms of gravity.

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*

(212) In conclusion, the final amount of the fine to be imposed on Koch Media pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 for the infringement amounts to EUR 977 000.

HAS ADOPTED THIS DECISION:

*Article 1*

Koch Media GmbH (Austria), Koch Media GmbH (Germany) and Koch Media Ltd (UK) infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating 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 [...] and with [...] containing clauses which restricted cross-border sales of PC video games within the EEA, for the following periods:

- Koch Media GmbH (Germany) from 23 August 2011 until 9 October 2015;
- Koch Media Ltd (UK) from 20 August 2010 until 27 July 2018;
- Koch Media GmbH (Austria) from 20 August 2010 until 27 July 2018.

*Article 2*

The following fines totalling EUR 977 000 are imposed on Koch Media for the infringement referred to in Article 1:

(a) Koch Media GmbH (Germany), Koch Media Ltd (UK), Koch Media GmbH (Austria), jointly and severally: EUR 509 000; and

(b) Koch Media Ltd (UK) and Koch Media GmbH (Austria), jointly and severally: EUR 468 000.

The fines shall be credited, in euros, within six months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

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

IBAN: LU02 0019 3155 9887 1000  
BIC: BCEELULL  
Ref.: EC/BUFI/AT.40414

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>249</sup>

### *Article 3*

Koch Media GmbH (Austria), Koch Media GmbH (Germany) and Koch Media Ltd (UK) 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

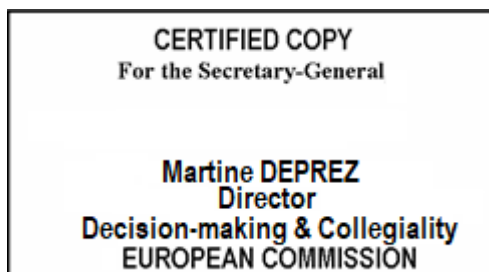
- Koch Media GmbH (Austria), Gewerbegebiet 1, 6604 Höfen, Austria
- Koch Media GmbH (Germany), Lochhamer Str. 9, 82152 Planegg b. München, Germany
- Koch Media Ltd (UK), Building 1230 Waterside, Arlington Business Park, RG7 4SA Theale, Reading, United Kingdom

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

Done at Brussels,

*For the Commission*

*Margrethe VESTAGER*  
*Executive Vice-President*



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<sup>249</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).