



CASE AT.40422 – Bandai Namco

(Only the English text is authentic)

ANTITRUST PROCEDURE Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 20/01/2021

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Brussels, 20.1.2021
C(2021) 57 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**

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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 Union¹,

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

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty², and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission 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 Treaty³,

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

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

Whereas:

¹ OJ, C 115, 9/5/2008, p.47.

² 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.

³ OJ L 123, 27.4.2004, p. 18.

1. INTRODUCTION

- (1) This Decision concerns Bandai Namco Holdings Inc., Japan and Bandai Namco Entertainment Europe S.A.S., France. The undertaking comprising those two entities is referred to in this Decision as “Bandai”.
- (2) In this Decision, the Commission finds that Bandai 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 Bandai’s personal computer (“PC”) video games outside of designated Member States and Contracting Parties to the European Economic Area (“EEA”) Agreement,⁴ namely the Czech Republic,⁵ Hungary, Poland and Slovakia, based on the geographical location of the user (“geo-blocking”). These agreements/concerted practices, considered collectively, concerned five of Bandai’s PC video games⁶ and took place between 13 March 2012 and 22 April 2014 (see Section 8.1);
 - (b) Distribution agreements with its distributor, i.e., [...] containing one or more clauses restricting or preventing cross-border sales⁷ of the affected PC video games within the EEA. These practices, considered collectively, concerned nine of Bandai’s PC video games,⁸ and took place between 1 April 2012 and 31 March 2015 (see Section 8.2).
- (3) The agreements/concerted practices mentioned in Recital (2)(a), together with the cross-border sales restrictions mentioned in Recital (2)(b) form a single and continuous infringement of Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area (“EEA Agreement”) for which Bandai is liable. The single and continuous infringement lasted from 13 March 2012 until 31 March 2015.

⁴ For the purposes of this Decision, references to the EEA should be understood as covering the 27 Member States of the European Union (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, 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).

⁵ For the purpose of this Decision, reference is made to Czech Republic rather than “Czechia” in the interest of consistency with the terms used in the agreements/evidence quoted.

⁶ Namely, [...], [...], [...], [...] and [...].

⁷ 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) TFEU, 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).

⁸ Namely, [...], [...], [...], [...], [...], [...], [...], [...] and [...].

2. THE UNDERTAKING CONCERNED

- (4) Bandai is a Japanese undertaking specialised in toys, arcades, anime, amusement parks and video games. The legal entities concerned by this Decision are: Bandai Namco Holdings Inc. (Japan) and Bandai Namco Entertainment Europe S.A.S. (France). Bandai Namco Holdings Inc. held 100 % of the shares in Bandai Namco Entertainment Europe S.A.S. at least from 13 March 2012 until 31 March 2015. Bandai is a publisher, developer and distributor of video games for platforms including all major video game consoles and PCs, with marketing and sales operations in fifty countries across Europe, the Middle East, Africa and Australasia.
- (5) In the EEA, Bandai has several subsidiaries based in France, the UK, Germany, Spain, Italy, Sweden and Greece. Until 2017, Bandai was active at wholesale level only (through its own subsidiaries); at retail level, it distributed its own and third-party PC video games through independent distributors only. In 2017, Bandai started distributing PC video games directly to users via its online store.

3. OTHER UNDERTAKINGS RELEVANT FOR THE INFRINGEMENT

3.1. [...]

- (6) [...] is an international publisher and distributor of PC video games. [...] is one of Bandai's distributors in the EEA. In particular, [...] distributes Bandai's PC video games physically at wholesale level and, in a number of instances, digitally at retail level in the Czech Republic,⁹ Hungary, Poland and Slovakia.¹⁰ In [...], [...] launched its own digital platform called "[...]" ([...].pl, [...].Hu and [...].Cz, hereafter referred to as [...]).
- (7) References to [...] are made exclusively for the purposes of describing Bandai'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. Valve

- (8) 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.¹¹ 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
- (9) References to Valve are made exclusively for the purposes of describing Bandai'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.

⁹ For the purpose of this Decision, reference is made to Czech Republic rather than "Czechia" in the interest of consistency with the terms used in the agreements/evidence quoted.

¹⁰ [...].

¹¹ <http://www.valvesoftware.com/company/index.html>, printed on 2 August 2017, [...].

¹² [...].

4. THE PRODUCT AND GEOGRAPHIC MARKETS CONCERNED

- (10) This Decision concerns certain PC video games of Bandai of different genres/categories which are sold in the EEA with the Steam technology embedded (so-called “Steam-enabled PC video games”)¹³ and are to be activated and played on Steam.¹⁴
- (11) 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.
- (12) The geographic area covered by this Decision is the entire EEA.

5. PROCEDURE

- (13) Based on information received from market participants, in 2013 the Commission started an *ex officio* investigation into the practices at issue.
- (14) The Commission sent requests for information (“RFIs”) to Bandai in 2014¹⁵ and 2015.¹⁶
- (15) On 2 February 2017, the Commission initiated proceedings against Bandai and Valve pursuant to Article 2(1) of Commission Regulation (EC) No 773/2004 (“Regulation (EC) No 773/2004”).¹⁷
- (16) 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 Bandai¹⁸ as well as to a number of other relevant market players.
- (17) On 5 April 2019, the Commission adopted a Statement of Objections alleging that Bandai (and Valve) engaged in restrictive practices constituting an infringement of Article 101 of the Treaty.
- (18) On [...], Bandai 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 Bandai suspending the deadline for replying to the Statement of Objections.
- (19) On [...], Bandai Namco Holdings Inc., and Bandai Namco Entertainment Europe S.A.S. submitted formal statements in which they acknowledged the infringement, the relevant facts and their respective liability for that infringement, (the “Settlement

¹³ For an explanation concerning Steam technology see Section 6.1.1.1.

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

¹⁵ [...].

¹⁶ [...]

¹⁷ 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.

¹⁸ [...]

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 Bandai Namco Holdings Inc.’s and Bandai Namco Entertainment Europe S.A.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 Bandai Namco Holdings Inc. and Bandai Namco Entertainment Europe S.A.S. would accept in the context of a cooperation procedure;
 - the confirmation that Bandai Namco Holdings Inc. and Bandai Namco Entertainment Europe S.A.S. 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 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;
- (20) 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

- (21) 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

- (22) 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;¹⁹ in-game events; social and chat features.

¹⁹ 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.

- (23) The contractual relationship between Valve and PC video games publishers for the purpose of PC video games distribution is defined by bilateral agreements referred to as Steam Distribution Agreements ("SDAs"). Contractual provisions that relate to one or more specific PC video games are usually included in annexes or schedules to the SDAs. In parallel, Valve usually licences a suite of software tools and technologies to the publishers either in the SDA or in a separate agreement referred to as the "Steamworks Agreement" so that the publishers can make their PC video games compatible with the Steam platform.²⁰
- (24) In the framework of the contractual relationship between Valve and PC video games publishers, the following provisions of the SDAs and, where applicable, of the Steamworks Agreement are relevant:
- The PC video game publisher grants Valve a non-exclusive, worldwide (unless specified otherwise) licence *"to use and to distribute via Steam [publisher's] computer games [...] in exchange of compensation"*,²¹
 - The publisher's licence to Valve typically includes the rights to "[Direct quote from the license agreement]"²² as well as to "[Direct quote from the license agreement]" the PC video games "[Direct quote from the license agreement]" of the PC video games;²³
 - The publisher "[Direct quote from the license agreement]" the publisher "[Direct quote from the license agreement]" and "[Direct quote from the license agreement]";²⁴
 - 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]";²⁵
 - 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.²⁶ In addition, pursuant to the Steam Subscriber Agreement,²⁷ Valve acts as the merchant of record vis-à-vis users and takes responsibility for transactions vis-à-vis them.²⁸
- (25) By way of the Steamworks Agreement, Valve provides publishers with a Steam technology license and related software tools that enable them to create Steam-

²⁰ [...].

²¹ [...].

²² [...].

²³ [...].

²⁴ [...].

²⁵ [...].

²⁶ [...].

²⁷ Available at https://store.steampowered.com/subscriber_agreement/, printed on 26 November 2019, [...].

²⁸ 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, printed on 26 November 2019, [...].

enabled PC video games as well as to benefit from digital rights management (“DRM”) and additional services (“Steamworks features”), all free of charge.²⁹ 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

- (26) Steam activation keys are unique alphanumeric codes or sequences (Steam activation keys) that allow users to access a PC video game via the Internet and play it on Steam after an activation process (see Section 6.1.1.1).³⁰ 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.³¹
- (27) 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

- (28) Valve defines “territory control” as: “[Direct quote from license agreement]”.³² 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 territorial control function may be used to ensure regulatory compliance,³³ to manage IP (copyright) territorial limitations from the copyright right holder³⁴ or for "windowing" purposes.³⁵
- (29) 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.

²⁹ [...]. 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.

³⁰ [...].

³¹ [...].

³² [...].

³³ 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.

³⁴ For example, video game developers may want to carve out certain territories from the scope of a licence given to the publisher, e.g., if the developer wants to self-publish and distribute the game itself in such territories.

³⁵ 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.

6.1.1.1. Sale and activation of PC video games on Steam

- (30) If a PC video game is purchased on the Steam Store, by opening the Steam client³⁶ the user is taken to his/her “Library” within Steam which shows all the Steam-enabled video games that he/she has purchased. Within his/her Library, the user can purchase access to games through the Steam Store. Purchasing a PC video game directly on Steam automatically grants the subscriber the right to access and play it. Therefore, if a user purchases a PC video game online directly on Steam, the PC video game can be accessed and played within the Steam environment without any Steam activation key as the game does not need to be activated. Conversely, when a Steam-enabled PC video game is purchased outside the Steam platform, be it in an intangible or tangible support, the buyer has to go through an activation process on Steam in order to authenticate the game.³⁷ 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.
- (31) 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).
- (32) 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).³⁸

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

- (33) 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 6.1.1.1 letter b). During the activation process it not only controls whether the version of the PC video game is legitimate (i.e. not pirated) but also checks, on

³⁶ 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.

³⁷ 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.

³⁸ 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.

the basis of the Steam activation key, if such game can be activated in the particular territory where the user is located.

- (34) The geographic restrictions that have been deployed for Bandai'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 territory in which activation was allowed. Once activated, however, it can also be played outside the "allowed" territory.
- (35) Activation restrictions are not set up automatically,³⁹ i.e. the fact that there is a territory control function associated to the Steam activation keys does not mean that the activation of the PC video games is automatically restricted to a given territory. Instead, in order for Valve to generate geo-blocked keys it is necessary for Valve to reach an agreement with the publisher to first set up activation restrictions on the basis of which geo-blocked Steam activation keys are generated.
- (36) 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.⁴⁰ 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.
- (37) 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").
- (38) 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.
- (39) 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

³⁹ [...].

⁴⁰ [...].

publisher's request to set up a geographic unit is implied in the request of the geo-blocked Steam activation keys.⁴¹

- (40) 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).⁴² Conversely, the set-up of the activation restrictions described in Recitals (35) to (39) was never automated. In fact, the automated system concerns the ordering of Steam activation keys but not the preceding process of agreeing to set up activation restrictions. Therefore, evidence of orders for geo-blocked Steam activation keys via the automated system confirms that activation restrictions for these games were agreed between Valve and Bandai (see further Recital (62)).

7. THE RELEVANT MARKETS

7.1. Principles

- (41) 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.⁴³
- (42) 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.⁴⁴ 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

- (43) 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*”),⁴⁵ 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*”),⁴⁶ the Commission found that there were indications that PC video games and console video games were in separate markets given that console video

⁴¹ See by way of example Bandai's email to Valve dated 27 June 2012 concerning the PC video games [...]: “We received an additional key request from our EU team: [...] Eastern: 10,000 keys. This batch needs to be IP restricted to: Poland, Czech Republic, Slovakia, Hungary”). [...].

⁴² [...].

⁴³ 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.

⁴⁴ Judgment of the General Court of 28 June 2016, *Telefónica, SA v Commission*, T-216/13, ECLI:EU:T:2016:369, paragraph 214.

⁴⁵ OJ L 255, 8.10.2003, p. 33–100.

⁴⁶ OJ C 12, 15.1.2016, p. 5.

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.

- (44) These findings were confirmed by the market investigation conducted in the present case.⁴⁷ 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 costs⁴⁸ and personal preferences.⁴⁹ From a supply-side perspective, the respondents indicated that each electronic system has different features, specific characteristics, and production costs.⁵⁰ 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.⁵¹ This has been confirmed by the market investigation.⁵²

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

- (45) Respondents to the market investigation indicated the growing importance of the digital sales channel (i.e., sales via downloading and streaming⁵³), especially for PC video games.⁵⁴ However, they also pointed out that sales of PC video games on physical supports such as CDs and DVDs have an important role⁵⁵ 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.⁵⁶
- (46) Many respondents also considered that typically PC video games are sold both digitally and physically.⁵⁷ Most respondents considered that prices tend to be similar for both digital and physical sales of the same PC video game.⁵⁸
- (47) From a demand-side perspective, the market investigation showed some degree of substitution between physical and digital games which confirms that these two channels⁵⁹ exert at least certain competitive constraint on each other.⁶⁰
- (48) 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.⁶¹ Most PC video game publishers have established

⁴⁷ The Commission sought information from a number of video game publishers, including [...].

⁴⁸ [...].

⁴⁹ [...]. See also Market Definition Notice, paragraphs 13 and 20.

⁵⁰ [...].

⁵¹ 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.

⁵² [...].

⁵³ 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.

⁵⁴ [...].

⁵⁵ [...].

⁵⁶ [...].

⁵⁷ [...].

⁵⁸ [...].

⁵⁹ For the avoidance of doubt, reference to digital distribution in this Decision means sales via downloads or streaming only (i.e., it does not include sales of CDs and DVDs via internet).

⁶⁰ [...].

⁶¹ [...].

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 limited⁶² and estimated at between 0 and 5 % of the retail price of a PC video game.⁶³ 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.⁶⁴ This confirms that there is at least potential competition between physical and digital sales.

7.3. Relevant Geographic market

- (49) 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.⁶⁵ Second, although most publishers typically produce one version of a video game with a function which allows users to choose the gaming language themselves,⁶⁶ some publishers create separate video game versions which contain different languages for different EEA countries⁶⁷. 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.⁶⁸ This is because translation of the game can considerably degrade the quality of the gaming experience because of the poor quality of translation.⁶⁹
- (50) 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.⁷⁰
- (51) Moreover, the existence in certain EEA countries of companies that proactively offer parallel-traded PC video games for sale to users indicates that parallel trade is an activity with business potential,⁷¹ which appears not to require significant modifications to adapt PC video games to local market conditions.

7.4. Conclusion on relevant markets

- (52) 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

⁶² [...].

⁶³ [...].

⁶⁴ [...].

⁶⁵ 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.

⁶⁶ [...].

⁶⁷ [...].

⁶⁸ [...].

⁶⁹ [...].

⁷⁰ [...].

⁷¹ [...].

video games running on PCs and the geographic scope of the market for PC video games coincides with the EEA.

- (53) The market investigation provides indications that the market for PC video games encompasses PC video games sold both digitally and physically. However, for the purposes of this Decision, the question whether digital and physical distribution constitute separate product markets can be left open as it has no impact on the outcome of the competitive assessment of the cross-border sales restrictions. This is because the restrictions are anti-competitive regardless of the specific market definition as they have the object of artificially restoring the divisions between national markets.
- (54) 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, 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 and the Steamworks Agreement between Valve and Bandai*

- (55) The contractual relationship between Valve and Bandai is governed by the SDA⁷² (together with its amendments⁷³) and the Steamworks Agreement⁷⁴ which were signed on 22 March 2012. On the basis of the SDA, Valve was granted a non-exclusive licence to exploit specified Bandai's PC video games on a worldwide basis (i.e. including the entirety of the EEA). Valve pays Bandai 70% of the adjusted gross revenues which Valve actually receives from its exploitation of Bandai's PC video games on Steam.⁷⁵ Pursuant to the Steam Subscriber Agreement, Valve is the merchant of record vis-à-vis users purchasing Bandai PC video games on Steam Store and is responsible for transactions therein vis-à-vis those users. In addition, under the Steamworks Agreement, Valve also licenced to Bandai its Steam technology which includes the provision of Steam activation keys⁷⁶ for distribution outside Steam of those same PC video games. Valve is obliged to provide Steam activation keys within 10 days after receiving a request from Bandai.⁷⁷
- (56) While the Steamworks Agreement does not contain any clauses which per se restrict the distribution of Bandai's PC video games to a given territory, it created the possibility to geo-block Steam activation keys by means of the territory control function explained in Section 6.1.1.1, letter b). In order for Valve to generate geo-blocked keys it was necessary to reach an agreement with Bandai to set up activation restrictions on the basis of which geo-blocked Steam activation keys were generated. This agreement was generally reached by exchange of emails as further evidenced in Section 8.1.2.

⁷² [...].

⁷³ [...].

⁷⁴ [...].

⁷⁵ [...].

⁷⁶ [...].

⁷⁷ [...].

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

- (57) Through the use of geo-blocked Steam activation keys Bandai and Valve restricted the possibility for users to activate five PC video games⁷⁸ outside of specific EEA countries – namely: the Czech Republic, Hungary, Poland and/or Slovakia. Users located outside these EEA countries could not activate these games.
- (58) Bandai requested that Valve put in place activation restrictions. In particular, Bandai requested Valve to set up activation restrictions and provide geo-blocked Steam activation keys, which Bandai then supplied to its EEA distributors (e.g. [...])⁷⁹ for the mentioned five PC video games. The activation of those games was restricted by means of geo-blocked Steam activation keys, which Bandai acknowledges were used interchangeably for the physical and digital distribution by [...].⁸⁰ From a geographical perspective, the Steam activation keys for these PC video games were geo-blocked to the Czech Republic, Hungary, Poland and/or Slovakia.
- (59) 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 place⁸¹ as well as of several orders of geo-blocked Steam activation keys listed in the reports generated of geo-blocked Steam activation keys listed in the reports generated via the automated system Valve introduced in [...] (see Section 6.1.1.2).⁸²
- (60) Activation restrictions were in place between 13 March 2012 (date when Valve provided to Bandai geo-blocked Steam activation keys for the game [...])⁸³ and 22 April 2014, when Valve lifted any existing EEA activation restrictions.⁸⁴ 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.
- (61) The following contemporaneous evidence submitted by both Bandai and Valve supports the fact that Bandai and Valve agreed to restrict the Steam activation keys for these five PC video games to the Czech Republic, Hungary, Poland and/or Slovakia:
- [...]: in an email exchange dated 12 March 2012, Bandai addressed to Valve the following request of geo-blocking and order of geo-blocked Steam activation keys: "*Concerning the [...] Poland batches, could you lock them to the following countries? [...] Poland: Poland, Czech Republic, Hungary, Slovakia [...]*". The same email exchange reveals that Valve provided those keys by email the following day on 13 March 2012;⁸⁵
 - [...]: in an email dated 27 June 2012, Bandai addressed to Valve the following request of geo-blocking: "*We received an additional key request from our EU team: [...] _Eastern: 10,000 keys. This batch needs to be IP restricted to: Poland, Czech Republic, Slovakia, Hungary*";⁸⁶

⁷⁸ Namely, (1) [...], (2) [...], (3) [...], (4) [...] and (5) [...].

⁷⁹ [...].

⁸⁰ [...].

⁸¹ [...].

⁸² [...].

⁸³ [...].

⁸⁴ [...].

⁸⁵ [...].

⁸⁶ [...].

- [...]: in an email dated 18 October 2013, Bandai addressed to Valve the following request of geo-blocking and order of geo-blocked Steam activation keys: "[...] is missing 2 packages with the territories limitations [...] for PL/HU/CZ/SK. We need to order 3 batches with those limitations with 500 keys in each for [...] (PL/HU/CZ/SK)";⁸⁷
 - [...]: in an email dated 3 December 2013, Valve confirmed to Bandai that an activation restriction was in place for this PC video game: "For [...] [...], we have packages which are locked to [...] PL/HU/CZ/SK [...]".⁸⁸
 - [...], Bandai and Valve agreed to set up activation restrictions for this PC video game for the Czech Republic, Hungary, Poland and Slovakia.⁸⁹ Orders of geo-blocked Steam activation keys were generated via Valve's automated system (see further Recital (62)).⁹⁰
- (62) For four PC video games, namely, [...], [...], [...] and [...] (for which there are no emailed orders), there is evidence of orders of geo-blocked Steam activation keys which were generated via Valve's automated system.⁹¹ In light of the explanation provided in Section 6.1.1.2 above concerning the automated system, such orders confirm that Valve and Bandai agreed on activation restrictions for these games.
- (63) On 22 April 2014, Valve lifted, upon request of Bandai,⁹² activation restrictions in relation to keys already put on the market.⁹³
- (64) The following Table 1 provides an overview of the five PC video games of Bandai that were restricted via geo-blocked Steam activation keys.

Table 1: Geo-blocked Steam activation keys per PC video game

Name of the PC video game	EEA countries to which the activation restriction applies (i.e., EEA countries in which the PC video game is to be activated by means of the geo-blocked keys)	Start Date ⁹⁴	End Date
[...]	Czech Republic / Hungary / Poland / Slovakia	23/10/2013	22/04/2014
[...]	Czech Republic / Hungary / Poland / Slovakia	27/07/2012	22/04/2014
[...]	Czech Republic / Hungary / Poland / Slovakia	10/10/2013	22/04/2014
[...]	Czech Republic / Hungary / Poland / Slovakia	13/03/2012	22/04/2014
[...]	Czech Republic / Hungary / Poland / Slovakia	19/04/2013	22/04/2014

- (65) These geo-blocked Steam activation keys were used by Valve and Bandai as a technical way to prevent cross-border sales of the above five Bandai PC video games (see Table 1). In certain instances, Bandai complemented the use of these activation keys with cross-border sale restrictions provided in distribution agreements between Bandai and [...] (see Section 8.2.2).

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

8.2. Agreements with [...]

8.2.1. Overview of agreements

- (66) The contractual relationship between Bandai and [...] is governed by numerous non-exclusive licence agreements for the physical and digital distribution of a number of PC video games.
- (67) On 1 April 2012, Bandai and [...] concluded a non-exclusive licence agreement for the digital distribution of the following Bandai PC video games in the Czech Republic, Hungary, Poland and Slovakia: [...],⁹⁵ [...],⁹⁶ [...],⁹⁷ [...]⁹⁸ and [...].⁹⁹
- (68) This distribution agreement, which had an initial duration of two years until 31 March 2014, consists of a master agreement which sets out the overarching terms for the digital distribution of Bandai's PC video games by [...] including provisions on the grant of rights, geographic scope of the licence, termination and royalties. The actual list of Bandai's PC video games distributed by [...] is contained in the schedule to the master agreement. In this way, when Bandai agreed to grant [...] a licence for the distribution of additional PC video games only the schedule to the master licence agreement needed to be amended - by means of addenda to it. The master licence agreement was not amended unless the parties wished to change the terms and conditions of their distribution relationship.
- (69) On 25 January 2013, Bandai and [...] added to the digital distribution agreement of 1 April 2012 a first addendum, according to which Bandai granted [...] the non-exclusive licence to distribute digitally two additional PC video games: [...]¹⁰⁰ and [...].¹⁰¹
- (70) Bandai has confirmed¹⁰² that on 25 October 2013, [...] also commenced the digital distribution of two additional Bandai PC video games, namely, [...] and [...], although at that time Bandai and [...] did not sign an addendum to include such games under the digital distribution agreement.¹⁰³ Nonetheless, Bandai confirmed that both PC video games were distributed on the basis of the terms and the conditions set out in the digital distribution agreement.¹⁰⁴ Therefore, the distribution of both PC video games is to be assessed on the basis of the provisions of that agreement.
- (71) On 15 April 2014, [...] and Bandai added a second addendum to the digital distribution agreement. According to this addendum, Bandai and [...] agreed to extend the duration of the digital distribution agreement from 1 April 2014 until 31 March 2015.¹⁰⁵

⁹⁵ [...].

⁹⁶ [...].

⁹⁷ [...].

⁹⁸ [...].

⁹⁹ [...].

¹⁰⁰ [...].

¹⁰¹ [...].

¹⁰² [...].

¹⁰³ [...].

¹⁰⁴ [...].

¹⁰⁵ [...].

- (72) The digital distribution agreement between [...] and Bandai of 1 April 2012 as well as all the addenda mentioned in the Recitals (66) to (71) of this Section will be referred to hereafter as "Bandai/[...] Digital Distribution Agreement".
- (73) On the basis of the Bandai/[...] Digital Distribution Agreement, Bandai (as publisher and licensor) granted to [...] (as distributor and licensee) the non-exclusive copyright licence to distribute digitally each of the PC video games listed in Recitals (67) to (70). [...] was also granted a non-exclusive right to use Bandai's trademarks for advertising, marketing and promotion of the PC video games.¹⁰⁶

8.2.2. *The restrictive clauses in the agreements*

- (74) Under Clause 6 of the Bandai/[...] Digital Distribution Agreement,¹⁰⁷ [...] was bound to use Steam activation keys¹⁰⁸ to distribute Bandai's PC video games, and Bandai was bound to provide such keys to [...].¹⁰⁹ While the Bandai/[...] Digital Distribution Agreement provides for the obligation for [...] to use Steam activation keys for the distribution of Bandai's PC video games (Clause 6) there is no clause setting out that these keys were geo-blocked.
- (75) Technically, the fact that [...] is bound to use Steam activation keys to distribute Bandai's PC video games means in practice that if a user purchases a digital PC video game online via [...]’s digital distribution platform [...] he/she receives from [...] a Steam activation key (which was previously supplied by Valve to Bandai and then by Bandai to [...]). In order to download and activate the PC video game, the user needs to go on the Steam website where the code contained in the activation key will have to be entered to unlock, download and play the PC video game.¹¹⁰
- (76) With regard to the geographic scope of the agreement, [...] rights and obligations were limited to the "Territory",¹¹¹ which was defined as: "*Poland, Czech, Slovakia, Hungary only*".¹¹²
- (77) Clause 3 of the Bandai/[...] Digital Distribution Agreement included an explicit prohibition on [...] (and its "indirect distributors") to service users outside its territory: "*Distributor agrees that the Download Services shall be carried out in the Territory [i.e., the Czech Republic, Hungary, Poland, and Slovakia] only. The parties agree that Distributor shall only serve and respond to requests from End Users that are located in the Territory [i.e., the Czech Republic, Hungary, Poland, and Slovakia], it being agreed and understood that Distributor and/or its Indirect Distributors (i) shall clearly mention this restriction to End-users on its/their websites, (ii) shall not advertise, market and/or promote the Products, Product Materials and/or NBP Marketing Materials outside of the Territory [i.e. outside the Czech Republic, Hungary, Poland, and Slovakia]*".¹¹³
- (78) As the Bandai/[...] Distribution Agreement sets out the obligation for [...] to distribute the PC video games by means of Steam activation keys, the download of

¹⁰⁶ [...].

¹⁰⁷ [...].

¹⁰⁸ [...].

¹⁰⁹ [...].

¹¹⁰ [...].

¹¹¹ [...].

¹¹² [...].

¹¹³ [...].

the PC video game did not take place on [...]. Bandai has confirmed that,¹¹⁴ on the basis of the Bandai/[...] Digital Distribution Agreement, [...] offered Steam activation keys for sale on [...]. Once the user had purchased the activation key on [...], it could activate and play the PC video game on Steam.

- (79) The following Table 2 provides an overview of the PC video games distributed on the basis of the Bandai/[...] Digital Distribution Agreement.

Table 2: Bandai/[...] Digital Distribution Agreement

Name of the PC video game	Name of the digital distribution agreement	Effective Date¹¹⁵	Termination Date
[...]	Digital distribution agreement of 1 April 2012 ¹¹⁶	01/04/2012	31/03/2015
[...]	Digital distribution agreement of 1 April 2012 ¹¹⁷	01/04/2012	31/03/2015
[...]	Digital distribution agreement of 1 April 2012 ¹¹⁸	01/04/2012	31/03/2015
[...]	Digital distribution agreement of 1 April 2012 ¹¹⁹	01/04/2012	31/03/2015
[...]	Digital distribution agreement of 1 April 2012 ¹²⁰	24/08/2012	31/03/2015
[...] ¹²¹	Addendum No 1 of 25 January 2013 to Digital distribution agreement of 1 April 2012	25/01/2013	31/03/2015
[...]	Addendum No 1 of 25 January 2013 to Digital distribution agreement of 1 April 2012 ¹²²	26/04/2013	31/03/2015
[...]	Digital distribution agreement of 1 April 2012 ¹²³	25/10/2013 ¹²⁴	31/03/2015

¹¹⁴ [...].

¹¹⁵ [...].

¹¹⁶ [...].

¹¹⁷ [...].

¹¹⁸ [...].

¹¹⁹ [...].

¹²⁰ [...].

¹²¹ [...].

¹²² [...].

¹²³ [...].

¹²⁴ [...].

Name of the PC video game	Name of the digital distribution agreement	Effective Date ¹¹⁵	Termination Date
[...]	Digital distribution agreement of 1 April 2012 ¹²⁵	25/10/2013 ¹²⁶	31/03/2015

- (80) The Bandai/[...] Digital Distribution Agreement was renewed and amended respectively on 1 April 2015¹²⁷ and 1 April 2016.¹²⁸
- (81) In particular, the amendment of 1 April 2015¹²⁹ renewed the Bandai/[...] Digital Distribution Agreement by one year until 31 March 2016 and at the same time enlarged the geographic scope of the agreement so as to include (at least)¹³⁰ the entire EEA. Therefore, although clause 3 was still in the agreement, it read as follows: *Distributor agrees that the Download Services shall be carried out in the Territory* [which now covers the entire EEA]. *The parties agree that Distributor shall only serve and respond to requests from End Users that are located in the Territory* [i.e. which now covers the entire EEA], *it being agreed and understood that Distributor and/or its Indirect Distributors (i) shall clearly mention this restriction to End-users on its/their websites, (ii) shall not advertise, market and/or promote the Products, Product Materials and/or NBP Marketing Materials outside of the Territory* [i.e. which now covers the entire EEA].
- (82) Conversely, the amendment of 1 April 2016¹³¹ renewed the Bandai/[...] Digital Distribution Agreement by one year until 31 March 2017 and at the same time restricted the geographic scope of the agreement so as to include again only Poland, the Czech Republic, Slovakia, and Hungary. However, Clause 3 referred to in Recital (77) was deleted in this amendment. As a result, the licence to distribute digitally the games concerned was limited to the above-mentioned EEA countries with no additional restrictions on [...].
- (83) As a result of both amendments, the prohibition on [...] to service users outside the Czech Republic, Hungary, Poland and Slovakia (i.e., its licensed territories) has been removed from the Bandai/[...] Digital Distribution Agreement which expired on 30 April 2017.¹³²
- (84) On 1 May 2017 [...] and Bandai entered into a new digital distribution agreement which was in force until 31 March 2018. The geographic scope of this new agreement was again limited to Poland, the Czech Republic, Slovakia, and Hungary with no additional restrictions on [...]. In particular Clause 3, referred to in Recital (77) does not appear in this new agreement.

8.3. Conclusion on the agreements/concerted practices entered into by Bandai

- (85) For the five PC video games described in Section 8.1.2, Valve provided geo-blocked Steam activation keys to Bandai who passed them on to its distributor [...] in the

¹²⁵ [...].

¹²⁶ [...].

¹²⁷ [...].

¹²⁸ [...].

¹²⁹ [...].

¹³⁰ [...].

¹³¹ [...].

¹³² [...].

Czech Republic, Hungary, Poland and/or Slovakia. [...] resold them to users in those territories. The geo-blocked Steam activation keys for the five relevant PC video games were in place – overall – between 13 March 2012 and 22 April 2014. The same PC video games for which Valve provided geo-blocked Steam activation keys were also sold on Steam across the entire EEA during the same period.

- (86) For the nine PC video games described in Section 8.2.2, the Bandai/[...] Digital Distribution Agreement contained restrictions on cross-border sales. The relevant overall duration of this agreement is from 1 April 2012 to 31 March 2015.

9. LEGAL ASSESSMENT

- (87) 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.
- (88) 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*".¹³³
- (89) 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.
- (90) 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.
- (91) 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.

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

- (92) 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

¹³³ 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.

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

- (93) Article 101 of the Treaty applies to undertakings and associations of undertakings.¹³⁴ The notion "undertaking" covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.¹³⁵

10.1.2. Application to this case

- (94) Bandai, Valve and [...] are undertakings within the meaning of Article 101(1) of the Treaty.

10.2. Agreements and concerted practices

10.2.1. Principles

- (95) 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.¹³⁶
- (96) 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 party complies with that requirement by implementing that alleged unilateral policy in practice.¹³⁷
- (97) 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

¹³⁴ 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.

¹³⁵ 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.

¹³⁶ 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.

¹³⁷ 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.

properly so-called has been concluded, they knowingly substitute practical cooperation between them for the risks of competition.¹³⁸ 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.¹³⁹ The motive or the knowledge that the act is unlawful is irrelevant.¹⁴⁰

- (98) 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.¹⁴¹

10.2.2. Application to this case

10.2.2.1. Agreements and/or concerted practices between Bandai and Valve

- (99) The conduct described in Section 8.1 presents all the characteristics of agreements and/or concerted practices entered into between undertakings, namely between Bandai and Valve.
- (100) As indicated in Recital (55), on the basis of the Steamworks Agreement Bandai was entitled to receive Steam activation keys that included territory controls. Bandai had to indicate to Valve the territories in which activation restrictions were to be set up for each PC video game package. Activation restrictions were therefore not set up unilaterally either by Valve or Bandai.
- (101) Bandai 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 Bandai's requests. In practice Bandai would ask 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 a given PC video game. All the email exchanges quoted in Section 8.1.2 by which Bandai asked Valve to provide geo-blocked Steam activation keys, refer 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.
- (102) The evidence in Section 8.1.2 shows that Bandai requested, by email, that Valve set up activation restrictions and generate Steam activation keys for the PC video games [...], [...], [...] and [...], geo-blocked to the Czech Republic, Hungary, Poland and/or Slovakia. Valve provided such keys by email for the PC video games [...] only.¹⁴²

¹³⁸ Judgment of the Court of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, C-48/69, ECLI:EU:C:1972:70, paragraph 64.

¹³⁹ 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.

¹⁴⁰ Judgment of the Court of 8 July 1999, *Commission v Anic Partecipazioni SpA*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 8.

¹⁴¹ 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.

¹⁴² [...].

Regarding the PC video games [...], [...], [...] 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 [...].¹⁴³

- (103) 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 mentioned PC video games via the automated system demonstrates that activation restrictions for these games were agreed between Valve and Bandai.
- (104) The evidence described above shows a concurrence of wills between Bandai and Valve to set up activation restrictions and to provide the related geo-blocked Steam activation keys which were used to limit cross-border sales in respect of the mentioned five Bandai PC video games. This conduct therefore constitutes an agreement or in any event a concerted practice between undertakings within the meaning of Article 101(1) of the Treaty.

10.2.2.2. Agreement between Bandai and [...]

- (105) The Bandai/[...] Digital Distribution Agreement described in Section 8.2 constitutes 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

- (106) The Court of Justice has clarified that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effect.¹⁴⁴ 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.¹⁴⁵
- (107) 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.¹⁴⁶ When determining that context, it is also necessary to take into consideration the nature of the

¹⁴³ [...].

¹⁴⁴ 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.

¹⁴⁵ Case C-67/13 P CB, paragraph 50; Case C-286/13 P *Dole Food*, paragraph 114.

¹⁴⁶ 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 (EAEP) v Commission* (C-515/06 P) and *Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission* (C-519/06 P), Joined

goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.¹⁴⁷

- (108) 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.¹⁴⁸ 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.¹⁴⁹

10.3.1.1. Restrictions of cross-border sales

- (109) It is settled case-law that an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of an internal market. Thus, agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) of the Treaty.¹⁵⁰ In particular, restrictions on passive sales are capable of leading to absolute territorial protection and are designed to prohibit or limit any cross-border distribution¹⁵¹. 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.
- (110) 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.¹⁵² This applies all the more since,

cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECLI:EU:C:2009:610, paragraph 58; Judgment of the Court of 8 November 1983, *NV IAZ International Belgium and others v Commission* (hereinafter referred to as “IAZ”), Joined cases 96-102, 104, 105, 108 and 110/82, ECLI:EU:C:1983:310, paragraphs 23-25.

¹⁴⁷ 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.

¹⁴⁸ 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.

¹⁴⁹ 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.

¹⁵⁰ 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.

¹⁵¹ 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.

¹⁵² 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;

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.¹⁵³

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

- (111) In *Nintendo v PC Box*, the Court of Justice considered whether videogames, and/or their parts, could be protected under EU copyright rules.¹⁵⁴ 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.¹⁵⁵ Therefore, the fact that the very same conduct may be allowed from a copyright law point of view (i.e. on the basis that the copyright holder could seek to prohibit the cross-border provision of digital services) is not material to the EU competition law assessment of such conduct and does not exclude the application of EU competition law in such constellations.¹⁵⁶ In addition, an agreement is not exempted under EU competition law merely because it concerns an IP right.¹⁵⁷
- (112) 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.¹⁵⁸ 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.
- (113) Moreover, according to settled case-law, an agreement can be considered to restrict competition by object even if it also pursues legitimate objectives.¹⁵⁹ 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.

Case C-194/14 P *Treuhand*, paragraphs 34 and 35; Case C-642/13 P *Villeroy & Boch*, paragraphs 58-60.

¹⁵³ Joined cases 56 and 58/64 *Grundig*, page 339.

¹⁵⁴ 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.

¹⁵⁵ 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.

¹⁵⁶ Case T-321/05 *AstraZeneca*, paragraph 677, confirmed on appeal, Case C-457/10 P, paragraph 132.

¹⁵⁷ 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.

¹⁵⁸ 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.

¹⁵⁹ 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.

- (114) 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.¹⁶⁰
- (115) 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.¹⁶¹ 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.¹⁶²
- (116) Therefore, the fact that a given business conduct (e.g. passive sales by the licensee outside its licensed territory in the context of a non-exhausted IP right) may be potentially "risky" for the licensee because it may be subject to legal action (since the IP holder may resort to IP infringement action in courts to block such sales), the merits of which have to be determined by the relevant courts, does not preclude the application of Article 101 of the Treaty as, at the very least, such conduct represents potential competition which may be restricted by means of an agreement.

10.3.2. *Application to this case*

10.3.2.1. Agreements and/or concerted practices between Bandai and Valve

- (117) The email exchanges and other evidence detailed in Section 8.1.2 show that Bandai asked Valve to provide it with geo-blocked Steam activation keys for the following five PC video games: [...], [...], [...], [...] and [...].
- (118) It follows from this evidence that Bandai 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 Bandai following Bandai's request were geo-blocked, depending on Bandai's request, to one or more of the following EEA countries: the Czech Republic, Hungary, Poland and Slovakia.
- (119) The five games concerned could not be activated outside those countries. Bandai's distributor [...], or any other distributor in those EEA countries to whom the geo-blocked Steam activation keys were provided, was effectively prevented from providing the games to users based in EEA countries other than the Czech Republic, Hungary, Poland and/or Slovakia as the case may be, because the games could not be activated outside these countries.
- (120) As explained in Section 8.1.2, Bandai and Valve agreed to put in place, and Valve did put in place, such restrictions on the Steam activation keys of the five Bandai's PC video games mentioned above with respect to the Czech Republic, Hungary, Poland and/or Slovakia.

¹⁶⁰ 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.

¹⁶¹ Case C-307/18 *Generics (UK)*, paragraph 210.

¹⁶² 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.

- (121) Rather than being inherent to the nature of the licence itself, the agreements on the use of geo-blocked Steam activation keys between Bandai and Valve are designed to ensure that distributors receiving the keys (e.g. [...]) comply with the contractually defined territorial scope of their respective distribution licence, covering – in the case of [...] – the Czech Republic, Hungary, Poland and Slovakia. 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 Bandai 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).
- (122) In addition, 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.
- (123) On the basis of the above, the objective of the agreements/concerted practices between Bandai and Valve was to technically restrict the distribution of the five Bandai's PC video games from certain EEA countries, namely the Czech Republic, Hungary, Poland, and/or Slovakia into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.
- (124) 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 Bandai and [...]

- (125) As indicated in Section 8.2, Bandai and [...] concluded the Bandai/[...] Digital Distribution Agreement which includes the following clauses:
- (126) Clause 1 – “*“Territory”: means Poland, Czech [Republic], Slovakia, Hungary only”; “Key(s)”: means the trackable activation key attached to each download of the Product which allows the End-User to unlock and play the Product*”
- (127) Clause 2 – “[Bandai] grants to [...] [...] a non-exclusive and non-transferable right and licence to: (a) use, sell, and distribute each Product to End Users through the Internet, in connection with or related to the Download Services in digital download form (i) from [...] Sites [...] and (ii) from Indirect Distributor websites approved by [Bandai]”;
- (128) Clause 3: “[...] agrees that the Download Services shall be carried out in the Territory only. The parties agree that [...] shall only serve and respond to requests from End Users that are located in the Territory, it being agreed and understood that [...] and/or its Indirect Distributors (i) shall clearly mention this restriction to End-users on its/their websites, (ii) shall not advertise, market and/or promote the Products, Product Materials and/or [Bandai] Marketing Materials outside of the Territory”;
- (129) Clause 6.1: “[Bandai] shall provide the Master Game Copy [...] at least ten (10) business days prior to the launch date [...]. With the delivery of the Master Game Copy, [Bandai] shall provide [...] with trackable activation keys (“Keys”)”.
- (130) On the basis of Clause 2, Bandai grants to [...] rights to distribute digitally the PC video games listed in Table 2. Clause 1 sets out that [...] non-exclusive digital distribution rights are limited to the Czech Republic, Hungary, Poland and Slovakia.

Clause 3 contains an explicit prohibition on [...] (and its "indirect distributors") to respond to (solicited and unsolicited) requests from users outside the Czech Republic, Hungary, Poland, Slovakia. Cross-border sales were therefore contractually prohibited.

- (131) Clause 6 imposes on [...] the use of "trackable" keys. These Steam activation keys were passed on by Bandai to [...] for the digital distribution of Bandai's PC video games on [...]’s website [...]. Once purchased on [...], the user had to activate the keys on Steam in order to play the game.
- (132) The principles set out in *Javico*¹⁶³ and *Murphy*¹⁶⁴ are applicable, *mutatis mutandis*, to Clause 3 of the Bandai/[...] Digital Distribution Agreement.
- (133) Clause 3 imposes additional obligations on [...] designed to ensure compliance with the territorial limitations set out in Clauses 1 and 2 upon the exploitation of [...] non-exclusive licence to distribute Bandai's PC video games only in the Czech Republic, Hungary, Poland and/or Slovakia and contributed to the artificial maintenance of separate national markets as no exports could take place in response to unsolicited requests from users located outside [...] licensed territories (passive sales). The fact that the clause concerns the exercise of non-exhausted IP rights does not prevent the application of Article 101 of the Treaty as it imposes additional obligations designed to ensure compliance with territorial limitations.¹⁶⁵ Clause 3 prevented [...] from making its "download services" available in response to unsolicited requests from users or parallel traders located in the EEA but outside the Czech Republic, Hungary, Poland or Slovakia.
- (134) On the basis of the above, the objective of the Bandai/[...] Digital Distribution Agreement was to restrict the distribution of the nine Bandai’s PC video games listed in Table 2 from the Czech Republic, Hungary, Poland and Slovakia into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.
- (135) Therefore, the agreements described in Section 8.2 had the object of restricting competition within the meaning of Article 101(1) of the Treaty.

10.4. Single and continuous infringement

10.4.1. Principles

- (136) 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.

¹⁶³ Case C-306/96, *Javico* paragraphs 13-14. 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 on [...]’s online store [...] rather than a download itself (which conversely takes place on Steam when the key is activated as explained in Section 6.1.1.1 above).

¹⁶⁴ Joined cases C-403/08 and C-429/08 *Murphy*, paragraphs 140-142, 144.

¹⁶⁵ Joined cases C-403/08 and C-429/08 *Murphy*, paragraph 141.

- (137) 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.¹⁶⁶
- (138) 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.¹⁶⁷
- (139) 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.¹⁶⁸ Finally, the concept of single and continuous infringement applies to vertical agreements/concerted practices that restrict competition within the internal market¹⁶⁹ which has also been recognised by the Court of Justice.¹⁷⁰

10.4.2. *Application to this case*

- (140) As indicated in Section 10.3.2, the agreements/concerted practices between Valve and Bandai for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys for each of Bandai's PC video games and for each geographic area concerned, on the one hand, and the Bandai/[...] Digital Distribution Agreement including contractual restrictions (Clause 3), 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.
- (141) In any event, regardless of whether [...] was also contractually restricted from exporting the relevant PC video games, Bandai wanted to achieve the anticompetitive objective of restricting cross-border sales within the internal market and, for this purpose, it had a two-pronged strategy combining technical restrictions via the Steam activation keys with contractual restrictions imposed on its distributor [...].
- (142) 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.
- (143) Bandai had two-pronged strategy combining technical restrictions via the Steam activation keys with contractual restrictions agreed with [...]. In this regard, the

¹⁶⁶ Joined Cases C-286/13 and C-294/13 P, *Dole*, paragraph 156.

¹⁶⁷ Judgment of the General Court of 15 December 2016, *Infineon Technologies AG v Commission*, T-758/14, ECLI:EU:T:2016:737, paragraph 226.

¹⁶⁸ Case C-642/13 P *Villeroy & Boch*, paragraphs 59-60.

¹⁶⁹ Commission Decision 2003/675/EC of 30 October 2020 *Nintendo*, paragraph 261 and ff. Commission Decision 2006/895/EC of 26 May 2004 in case No COMP/C-3/37.980 — *Souris-Topps* (OJ L 353, 13.12.2006, p. 5–6), paragraphs 122–128.

¹⁷⁰ 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.

agreements/concerted practices between Bandai and Valve regarding geo-blocked Steam activation keys, on the one hand, and the Bandai/[...] Digital Distribution Agreement containing contractual restrictions, on the other hand, shared the common objective of restricting cross-border sales of certain PC video games of Bandai. This shows the existence of an identity of purposes between these two separate infringements.

- (144) In addition, for certain of Bandai's PC video games¹⁷¹ the activation restrictions and the related geo-blocked Steam activation keys that Valve provided to Bandai were used in combination with contractual restrictions set out in Clause 3 of the Bandai/[...] Digital Distribution Agreement. 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 restriction in Clause 3 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 [...] licensed territories.
- (145) Bandai was a party to, and therefore participated in and was aware of, both elements of the single and continuous infringement.
- (146) In any event, even if the agreements/concerted practices between: (i) Valve and Bandai, on the one hand, and (ii) the anticompetitive clause in Bandai/[...] Digital Distribution Agreement 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

- (147) 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.
- (148) As indicated in Sections 8.1.2 and 8.2.2, the agreements/concerted practices between Valve and Bandai on the one hand and the agreement between Bandai and [...] on the other hand, seek to restrict or prevent trade between EEA countries as they restrict the ability of [...] (and its indirect distributors) to engage in cross-border sales of Bandai's PC video games.
- (149) By their very nature, those restrictive agreements are liable to partition the internal market and consequently to affect trade between Member States.¹⁷² 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.

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

¹⁷² Judgment of the Court of 31 March 1993, *A. Ahlström Osakeyhtiö and others v Commission*, Joined cases 89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, ECLI:EU:C:1993:120 paragraph 176.

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

- (150) 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.
- (151) The Technology Transfer Block Exemption Regulation ("TTBER")¹⁷³ and the Vertical Block Exemption regulation ("VBER")¹⁷⁴ 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.
- (152) Without it being necessary to determine whether (i) the SDA and the Steamworks Agreement and the agreement/concerted practice to set up activation restrictions and to provide geo-blocked Steam activation keys between Bandai and Valve (which are all part of the same conduct as described in Section 8.1), and (ii) the Bandai/[...] Digital Distribution Agreement described in Section 8.2 fall within the scope of (a) the 2004 TTBER and/or (b) 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 2004 TTBER and on the basis of Article 4(b) of the VBER preventing Bandai's distributor from engaging in passive sales to users based outside those territories.
- (153) 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 the restrictive clauses in the distribution agreement with [...] (namely, Clause 3 of the Bandai/[...] Digital Distribution Agreement) 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)(a) of the Treaty.

¹⁷³ 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")).

¹⁷⁴ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p.1. The VBER applies to distribution agreements entered into as of 1 June 2010; earlier agreements remain subject to the old VBER (Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999 ("1999 VBER")).

11. SCOPE AND DURATION OF THE INFRINGEMENT

11.1. Product scope

- (154) The infringement relates to the distribution of nine of Bandai's PC video games, namely: (1) [...], (2) [...], (3) [...], (4) [...], (5) [...], (6) [...], (7) [...], (8) [...] and (9) [...].

11.2. Geographic scope

- (155) 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

- (156) The duration of the infringement is calculated from 13 March 2012, which is the effective date when Valve upon request of Bandai agreed to set up activation restrictions in four EEA countries and provided geo-blocked Steam activation keys for the PC video game [...], until 31 March 2015, which is the date when the Bandai/[...] Digital Distribution Agreement containing territorial restrictions expired.
- (157) Therefore, the infringement started on 13 March 2012 and ended on 31 March 2015.

12. LIABILITY

12.1. Principles

- (158) Article 101 of the Treaty and Article 53 of the EEA Agreement apply to undertakings and associations of undertakings.¹⁷⁵ 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.
- (159) 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.
- (160) 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.
- (161) 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.¹⁷⁶
- (162) 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.¹⁷⁷ In such a situation, it is sufficient for

¹⁷⁵ Case C-437/09, *Prévoyance*, paragraph 40.

¹⁷⁶ 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.

¹⁷⁷ 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

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.¹⁷⁸

- (163) 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

- (164) Bandai Namco Holdings Inc. has been the 100 % parent company of Bandai Namco Entertainment Europe S.A.S. throughout the duration of the infringement. Bandai Namco Holdings Inc. has not raised that it did not exercise decisive influence over Bandai Namco Entertainment Europe S.A.S.¹⁷⁹
- (165) On this basis the Commission concludes that Bandai Namco Holdings Inc. and Bandai Namco Entertainment Europe S.A.S. form one undertaking and that liability for the single and continuous infringement should be imputed to the following legal entities:
- Bandai Namco Entertainment Europe S.A.S. for its direct participation in the infringement;
 - Bandai Namco Holdings Inc. as the parent company holding 100% of the shares in Bandai Namco Entertainment Europe S.A.S.¹⁸⁰

13. REMEDIES AND FINES

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

- (166) 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.
- (167) The requirement that a remedy has to be effective¹⁸¹ 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.¹⁸²

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.

¹⁷⁸ 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.

¹⁷⁹ The documents on the Commission's file do not show a direct participation of Bandai Namco Holdings Inc. in the infringement described above. Bandai Namco Holdings Inc. is therefore solely held liable as the parent company of Bandai Namco Entertainment Europe S.A.S.
[...].

¹⁸¹ 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.

¹⁸² 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, *Fiatagri UK Ltd and New Holland Ford Ltd v Commission*, T-34/92,

- (168) While Bandai has already brought the infringement to an end, it is appropriate to require Bandai 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**

- (169) 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.¹⁸³ For each undertaking participating in the infringement, the fine cannot exceed 10% of its total turnover in the business year preceding the Commission decision.
- (170) 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 1/2003¹⁸⁴ ("the Guidelines on Fines").
- (171) First, the Commission must determine a basic amount. The basic amount of the fine is to be set by reference to the value of sales to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.¹⁸⁵ The basic amount consists of a percentage of the value of those sales up to a maximum percentage of 30%¹⁸⁶, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.¹⁸⁷ 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.¹⁸⁸
- (172) 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.¹⁸⁹ 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.

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.

¹⁸³ 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).

¹⁸⁴ OJ C 210, 1.9.2006, p. 2.

¹⁸⁵ Point 13 of the Guidelines on Fines.

¹⁸⁶ Point 21 of the Guidelines on Fines.

¹⁸⁷ Point 19 of the Guidelines on Fines.

¹⁸⁸ Point 22 of the Guidelines on Fines.

¹⁸⁹ Point 13 of the Guidelines on Fines.

- (173) The Commission may also include in the basic amount an additional amount of a sum up to 25% of the value of sales¹⁹⁰ to deter undertakings from entering into anticompetitive agreements.
- (174) 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.¹⁹¹
- (175) 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.¹⁹²

13.3. The intentional or negligent nature of the infringement

- (176) According to established case law, intention or negligence do not require the relevant undertaking to have been aware that it was infringing competition law.¹⁹³ It is sufficient that the undertaking could not have been unaware that its conduct was aimed at restricting competition.¹⁹⁴
- (177) The Commission concludes that, based on the facts described in Sections 8.1 and 8.2, the single and continuous infringement was committed intentionally or at the very least negligently.
- (178) On the basis of this evidence and the evidence quoted in Section 8.2, the Commission considers that Bandai entered into agreements with [...] that contain the cross-border sales restriction described in Section 10.3.2.2.
- (179) Bandai 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 Bandai's distributor, [...], could sell certain of Bandai's PC video games as evidenced in Section 10.3.2.1.

13.4. Calculation of the fine

13.4.1. Value of sales

- (180) 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.¹⁹⁵ The concept of the "value of

¹⁹⁰ Point 25 of the Guidelines on Fines.

¹⁹¹ Point 27 of the Guidelines on Fines.

¹⁹² Point 30 of the Guidelines on Fines.

¹⁹³ Case C-19/77 *Miller*, paragraph 18; Case T-62/98 *Volkswagen*, paragraph 334.

¹⁹⁴ Judgment of the General Court of 5 October 2011, *Romana Tabacchi Srl v Commission*, T-11/06, ECLI:EU:T:2011:560, paragraph 227; Judgment of the Court of First Instance of 14 May 1998, *Enso Española SA v Commission*, T-348/94, ECLI:EU:T:1998:102, paragraph 277; Judgment of the Court of 18 June 2013, *Bundswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others*, C-681/11, ECLI:EU:C:2013:404, paragraph 37 and the case-law cited.

¹⁹⁵ 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.

sales" must be understood as referring to sales on the market concerned by the infringement.¹⁹⁶

- (181) The relevant value of sales include the turnover generated by the sales of the Bandai's PC video games concerned by the infringement, generated both by physical and digital distribution. This includes also the 70% of the gross revenues generated by the sale of the concerned PC video games on Steam.
- (182) Irrespective of whether the infringements described in Sections 8.1 and 8.2 concern physical or digital distribution of the concerned Bandai's 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).
- (183) Based on the principles outlined in this Section and on the information provided by Bandai, the value of sales should be based on Bandai's sales in the EEA of the PC video games directly and indirectly concerned¹⁹⁷ with the infringement in the financial year 2014 (running from 1 April 2014 to 31 March 2015), which was the last full business year of its participation in the single and continuous infringement.
- (184) Accordingly, the value of sales to be taken into account is EUR [1 500 000 – 2 100 000].

13.4.2. Gravity

- (185) The gravity of the infringement determines the percentage of the value of sales to be taken into account in setting the fine. According to points 21 and 23 of the 2006 Guidelines, the percentage for gravity will be set at a level up to 30% of the value of sales and towards the higher end of that scale for the most serious infringements. In assessing the gravity of the infringement, the Commission has regard to a number of factors.
- (186) 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.¹⁹⁸ Taking into account this factor and the fact that the restriction of cross-border sales covered the whole EEA in the case of both infringements described under Sections 8.1 and 8.2, the percentage of the value of sales should be set at 7%.

13.4.3. Duration

- (187) The duration of the infringement as set out in Section 11.3 was 1114 days (3.04 years).

13.4.4. Calculation of the basic amount

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

¹⁹⁶ 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.

¹⁹⁷ Namely, [...], [...], [...], [...], [...], [...], [...], [...] and [...].

¹⁹⁸ 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.

13.4.5. Adjustments to the basic amount

- (189) 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

- (190) The fine for the infringement does not exceed 10% of Bandai'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.
- (191) The fine for the infringement sets out in Recital (188) does not exceed 10% of Bandai'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

- (192) In order to reflect that Bandai 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 [...], Bandai submitted Settlement Submissions to the Commission, acknowledging the infringement and agreeing to pay a fine. Bandai co-operated with the Commission by acknowledging an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement and waiving certain procedural rights, resulting in administrative efficiencies.

13.4.8. Conclusion: final amount of the fine

- (193) In conclusion, the final amount of the fine to be imposed on Bandai pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 for the infringement amounts to EUR 340 000.

HAS ADOPTED THIS DECISION:

Article 1

Bandai Namco Holdings Inc. and Bandai Namco Entertainment Europe S.A.S infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, from 13 March 2012 to 31 March 2015, 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 [...] containing clauses which restricted cross-border sales of PC video games within the EEA.

Article 2

For the infringement referred to in Article 1, a fine of EUR 340 000 is imposed on Bandai Namco Holdings Inc. and Bandai Namco Entertainment Europe S.A.S., jointly and severally.

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

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

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: EC/BUFI/AT.40422

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.¹⁹⁹

Article 3

Bandai Namco Holdings Inc. and Bandai Namco Entertainment Europe S.A.S. 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

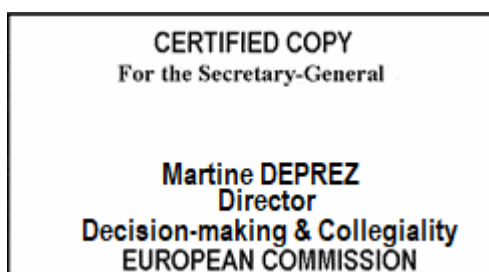
This Decision is addressed to

- Bandai Namco Holdings Inc. Mirai-Kenkyusho, 5-37-8, 108-0014 Shiba, Minato-ku, Tokyo Japan
- Bandai Namco Entertainment Europe S.A.S. 49-51 rue des Docks 69009 Lyon France.

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

Done at Brussels,

For the Commission
Margrethe VESTAGER
Executive Vice-President



¹⁹⁹ 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).