



CASE AT.40424 - Capcom

(Only the English text is authentic)

ANTITRUST PROCEDURE Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 20/01/2021

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Brussels, 20.1.2021
C(2021) 72 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,

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.

Whereas:

1. INTRODUCTION

- (1) This Decision concerns Capcom Co., Ltd. (“Capcom Japan”), Capcom U.S.A., Inc. (“Capcom USA”) and CE Europe Ltd. (“Capcom Europe”). The undertaking comprising those three entities is referred to in this Decision as “Capcom”.
- (2) In this Decision, the Commission finds that Capcom engaged in bilateral agreements and/or concerted practices with Valve Corporation (“Valve”) to set-up activation restrictions and to provide the related geo-blocked Steam activation keys preventing the activation of some of Capcom’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, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia, based on the geographical location of the user (“geo-blocking”). These agreements/concerted practices, considered collectively, concerned five PC video games of Capcom⁵ and took place between 13 February 2013 and 17 November 2014 (see Section 8.1)
- (3) The agreements/concerted practices mentioned in Recital (2) aimed at restricting cross-border sales⁶ of such PC video games. They 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 Capcom is liable. The single and continuous infringement lasted from 13 February 2013 until 17 November 2014.

2. THE UNDERTAKING CONCERNED

- (4) Capcom is an international software and games developer and publisher headquartered in Japan. The legal entities concerned by this Decision are: Capcom Japan, based in Tokyo, Japan; Capcom U.S.A, based in San Francisco, USA; and Capcom Europe, based in London, United Kingdom. Capcom Europe and Capcom

⁴ For the purposes of this Decision, the EEA is understood to cover the 27 Member States of the European Union (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden) and the United Kingdom, as well as Iceland, Liechtenstein and Norway. Accordingly, any references made to the EEA in this Decision are meant to also include the United Kingdom (UK).

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

⁶ The term “restrictions of cross-border sales” refers to practices preventing or hindering companies from responding to unsolicited requests from outside a specific territory (“passive sales”). The Court of Justice has held that an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty’s objective of achieving the integration of those markets through the establishment of an internal market and must be regarded, in principle, as an agreement the object of which is to restrict competition within the meaning of Article 101(1) of the Treaty, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition (Judgment of the Court of Justice of 4 October 2011, *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) (hereinafter referred to as “Murphy”), Joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:631, paragraphs 139-142).

USA are wholly owned (100% of shares) by Capcom Japan. Capcom Europe manages all of Capcom's digital business in the EEA.

- (5) In the EEA, Capcom is active in the distribution of its PC video games at wholesale level only. At wholesale level, Capcom distributes its PC video games directly to retail distributors in the UK, Ireland, Germany and France. In certain EEA countries (mainly, Eastern Europe) Capcom's PC video games are manufactured and sold to physical distributors by a local licensee/wholesale distributor. Capcom's PC video games are distributed also digitally via online platforms and digital distributors.

3. OTHER UNDERTAKINGS RELEVANT FOR THE INFRINGEMENT

3.1. [...]

- (6) [...] is an international publisher and distributor of PC video games. It is part of [...] group of companies. [...] is one of Capcom's distributors in the EEA. With regard to the contractual relationship between Capcom and [...] (see Section 8.2), Capcom granted [...] a licence to distribute physically a number of its PC video games in the Czech Republic,⁷ Hungary, Poland and Slovakia. In 2011, [...] launched its own digital platform called "[...]" ([...].pl, [...].Hu and [...].Cz).
- (7) References to [...] in this Decision are made exclusively for the purposes of describing Capcom'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 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.⁸ 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).⁹
- (9) References to Valve in this Decision are made exclusively for the purposes of describing Capcom's liability for an infringement of Article 101 of the Treaty and of Article 53 of the EEA Agreement. This Decision is not addressed to Valve, nor does it establish any liability with respect to Valve.

4. THE PRODUCT AND GEOGRAPHIC MARKETS CONCERNED

- (10) This Decision concerns certain PC video games of Capcom of different genres/categories which are sold in the EEA with the Steam technology embedded

⁷ 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.

⁸ <http://www.valvesoftware.com/company/index.html>, printed on 2 August 2017, [...].

⁹ [...].

(so-called “Steam-enabled PC video games”)¹⁰ and are to be activated and played on Steam.¹¹

- (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 6.1.1.1).
- (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) In 2014, the Commission sent a request for information ("RFI") to Capcom.¹²
- (15) On 27 August 2015, Capcom submitted a statement pursuant to Article 19 of Regulation No 1/2003 (“Corporate Statement of 27 August 2015”).¹³
- (16) On 2 February 2017, the Commission initiated proceedings against Capcom and Valve pursuant to Article 2(1) of Commission Regulation (EC) No 773/2004 (“Regulation (EC) No 773/2004”).¹⁴
- (17) Subsequently, in the course of 2017, the Commission conducted a market investigation. In the context of this market investigation, the Commission sent a number of follow-up RFIs to Capcom¹⁵ as well as to a number of other relevant market players, including Valve and [...].
- (18) On 5 April 2019, the Commission adopted a Statement of Objections alleging that Capcom (and Valve) engaged in restrictive practices constituting an infringement of Article 101 of the Treaty.
- (19) On [...], Capcom 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 Capcom suspending the deadline for replying to the Statement of Objections.
- (20) On [...], Capcom Japan, Capcom USA and Capcom Europe submitted formal statements in which they acknowledged the infringement, the relevant facts and their respective liability for that infringement, (the "Settlement submissions"), in view of

¹⁰ For an explanation concerning Steam technology, see Section 6.1.1.1.

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

¹² [...].

¹³ [...].

¹⁴ 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.

¹⁵ [...].

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 Capcom Japan’s, of Capcom USA’s and of Capcom Europe’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 Capcom Japan, Capcom USA and Capcom Europe would accept in the context of a cooperation procedure;
 - the confirmation that Capcom Japan, Capcom USA and Capcom Europe 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;
- (21) On the same date as this Decision, the Commission adopted a decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 concerning the liability of Valve (the “Decision against Valve”).

6. FACTS

6.1. Industry concerned

- (22) A video game is usually defined as an electronic game played by manipulating images on a video display or television screen. In particular, a PC video game is 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 6.1.1.1), unless stated otherwise.

6.1.1. Overview of Valve’s business activity

- (23) Steam is one of the world's largest PC video gaming platforms offering more than 35 000 games and allowing more than 22 000 game developers on its platform. Steam provides users with an inter-active gaming experience that enables them to engage with each other by way of multiple features such as gaming communities; multi-player match-making;¹⁶ in-game events; social and chat features.
- (24) The contractual relationship between Valve and PC video games publishers for the purpose of PC video games distribution is defined by bilateral agreements referred to

¹⁶ 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.

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.

- (25) 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.¹⁷
- (26) In the framework of the contractual relationship between Valve and PC video games publishers, the following provisions of the SDAs and, where applicable, of the Steamworks Agreement are relevant:
- The PC video game publisher grants Valve a non-exclusive, worldwide (unless specified otherwise) licence "to use and to distribute via Steam [publishers] computer games [...] in exchange of compensation";¹⁸
 - The publisher's licence to Valve typically includes the rights to "[Direct quote from the license agreement]"¹⁹ 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;²⁰
 - The publisher "[Direct quote from the license agreement]" the publisher "[Direct quote from the license agreement]" and "[Direct quote from the license agreement]";²¹
 - 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]";²²
 - 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.²³ In addition, pursuant to the Steam Subscriber Agreement,²⁴ Valve acts as the merchant of record vis-à-vis users and takes responsibility for transactions vis-à-vis them.²⁵

¹⁷ [...].

¹⁸ [...].

¹⁹ [...].

²⁰ [...].

²¹ [...].

²² [...].

²³ [...].

²⁴ Available at https://store.steampowered.com/subscriber_agreement/, printed on 26 November 2019, [...].

²⁵ 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, [...].

- (27) By way of the Steamworks Agreement, Valve provides publishers with a Steam technology license and related software tools that enable them to create Steam-enabled PC video games as well as to benefit from digital rights management (“DRM”) and additional services (“Steamworks features”), all free of charge.²⁶ 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
- (28) 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).²⁷ Valve generates Steam activation keys for a particular game upon request by the publisher, free of charge. Valve undertakes to provide sufficient Steam activation keys to meet the publishers’ request within ten days after receiving the request.²⁸
- (29) 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 these alphanumeric codes (Steam activation keys) directly to the user.
- (b) Territory control
- (30) Valve defines “territory control” as: “[Direct quote from license agreement]”.²⁹ Such territory control function, therefore, enables the setting up of geographical restrictions on activation, thereby preventing the users from activating the game if they are not in a designated territory. Territory control features are not specific to the EEA and Steam’s default is always worldwide. The territory control function may be used to ensure regulatory compliance,³⁰ to manage IP (copyright) territorial limitations from the copyright right holder³¹ or for “windowing” purposes.³²
- (31) 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

²⁶ [...].

²⁷ [...].

²⁸ [...].

²⁹ [...].

³⁰ 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.

³¹ 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.

³² 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. [...].

credit card information. If the user employs territory-neutral payment systems, the territory is identified on the basis of the user's IP address only.

6.1.1.1. Sale and activation of PC video games on Steam

- (32) If a PC video game is purchased on the Steam Store, by opening the Steam client³³ 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.
- (33) 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.³⁴ This process is necessary to enable the user to access the game and play it within the Steam environment.
- (34) Valve's Steam technology provides for such authentication based on Steam activation keys created by Valve (described in further detail in Section 6.1.1.1).
- (35) From a practical perspective, when a user purchases a Steam-enabled PC video game outside Steam, irrespective of whether he/she does so through the digital or physical distribution channel, he/she receives the key necessary to activate it. The retail purchase price of the PC video game is typically linked to and advertised as the purchase price of the Steam activation key for that given PC video games (although technically there is no purchase price for the Steam activation key itself).
- (36) Distributors who pay royalties to the publishers to sell PC video games to users and/or to other distributors as per the term of their licence agreements, purchase Steam activation keys from the publisher to distribute the related PC video games (the royalties paid can be said to be the purchase price of Steam activation keys).³⁵

³³ 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.

³⁴ 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.

³⁵ 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.

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

- (37) Along with Steam activation keys, Valve offers a territory control function to publishers which enables the setting up of geographical restrictions upon activation, in other words which enables the PC video games to be geo-blocked as described in Section 6.1.1.1 letter b). During the users' activation process it not only controls whether the version of the PC video game is legitimate (i.e. not pirated) but also checks, on the basis of the Steam activation key, if such game can be activated in the particular territory where the user is located.
- (38) The geographic restrictions that have been deployed for Capcom's PC video games using Valve's Steam technology and that are relevant for the purposes of case are 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.
- (39) Activation restrictions are not set up automatically,³⁶ 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.
- (40) As a first step, in order to set up activation restrictions, the publisher needs to determine the countries/regions in which activation will be allowed, and decide how many different geographic packages (i.e. "subscription ID(s)") Valve will have to set up for the PC video game in question and in which countries/regions activation should be allowed for each geographic package.³⁷ The publisher then needs to tell Valve how many different geographic packages will have to be set up for the PC video game in question and in which countries/regions activation will be possible for each geographic unit.
- (41) After Valve has set up the different geographic units, the publisher can request that Valve generates and provides a given number of Steam activation keys that it then passes on to its distributors who will resell the PC video games (digitally and/or physically). The Steam activation keys that Valve generates will be geo-blocked to the territories indicated by the publisher and activation of a given geographic unit will be possible only in the relevant permitted geographic region (also referred to as "geo-blocked Steam activation keys").
- (42) The Steam activation process verifies whether the game is subject to an activation restriction and, if this is the case, whether it may be activated in the particular territory where the user is located. If the PC video game may not be activated in the user's territory, the activation will fail and Steam will prevent the user from accessing the PC video game.

³⁶ [...].

³⁷ [...].

- (43) Although the set-up of the activation restrictions (i.e., set-up of the geographic unit) and the generation of the related geo-blocked keys require two different technical actions in which the second (i.e. generation of the geo-blocked keys) logically follows the first, in practice the distinction between the two is often less clear in the publishers' requests. There are instances, for example, where the PC video game publisher's request to set up a geographic unit is implied in the request of the geo-blocked Steam activation keys.³⁸
- (44) Before [...], publishers ordered Steam activation keys "manually", i.e. by email. As of [...], ordering Steam activation keys became automated through a web form, in which publishers needed to specify how many keys they needed and for which geographic unit(s).³⁹ Conversely, the set-up of the activation restrictions described in Recitals (39) to (43) was never automated. In fact, the automated system concerns the ordering of Steam activation keys but not the preceding process of agreeing to set up activation restrictions. Therefore, evidence of orders for geo-blocked Steam activation keys via the automated system confirms that activation restrictions for these games were agreed between Valve and Capcom (see further Recital (66)).

7. RELEVANT MARKETS

7.1. Principles

- (45) The relevant product and geographic markets are determined according to two criteria, namely, demand-side substitution and supply-side substitution. Potential competition (i.e., competition from products outside the relevant market) is considered at a later stage when carrying out the overall assessment of competition.⁴⁰
- (46) For the purposes of applying Article 101(1) of the Treaty, a prior definition of the relevant market is not required where the agreement at issue has in itself an anti-competitive object.⁴¹ When interpreting the context of an agreement under Article 101 of the Treaty, it is nonetheless necessary to take into consideration the actual conditions of the functioning and the structure of the market or markets in question including for example potential competition, although a "detailed analysis" of the markets concerned is not necessary if the agreement has as its object the restriction of competition as indicated above.

7.2. Relevant product market

7.2.1. Substitutability of video games running on different electronic systems

- (47) In the Commission Decision 2003/675/EC of 30 October 2002 in Cases COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega — Nintendo (hereinafter, "*Nintendo*"),⁴² 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

³⁸ See by way of example the email exchange between Capcom and Valve of 7 February 2013 whereby Capcom informed Valve about its upcoming request for the PC video game [...].

³⁹ [...].

⁴⁰ 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.

⁴¹ Judgment of the General Court of 28 June 2016, *Telefónica, SA v Commission*, T-216/13, ECLI:EU:T:2016:369, paragraph 214.

⁴² OJ L 255, 8.10.2003, p. 33–100.

substitution. Similarly, in the Commission Decision of 12 February 2016 in case No COMP/M.7866 – *Activision Blizzard / King* (hereinafter, “*Activision Blizzard/King*”),⁴³ the Commission found that there were indications that PC video games and console video games were in separate markets given that console video games have higher retail prices, do not offer additional functionalities like PCs and are mostly sold through traditional retail outlets and online retailers, whereas the majority of PC video games are sold through digital download.

- (48) These findings were confirmed by the market investigation conducted in the present case.⁴⁴ 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 costs⁴⁵ and personal preferences.⁴⁶ From a supply-side perspective, the respondents indicated that each electronic system has different features, specific characteristics, and costs.⁴⁷ 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.⁴⁸ This has been confirmed by the market investigation.⁴⁹

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

- (49) Respondents to the market investigation indicated the growing importance of the digital sales channel (i.e., sales via downloading and streaming⁵⁰), especially for PC video games.⁵¹ However, they also pointed out that sales of PC video games on physical supports such as CDs and DVDs have an important role⁵² 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.⁵³
- (50) Many respondents also considered that typically PC video games are sold both digitally and physically.⁵⁴ Most respondents considered that prices tend to be similar for both digital and physical sales of the same PC video game.⁵⁵
- (51) From a demand-side perspective, the market investigation showed some degree of substitution between physical and digital games which confirms that these two channels⁵⁶ exert at least certain competitive constraint on each other.⁵⁷

⁴³ OJ C 12, 15.1.2016, p. 5.

⁴⁴ The Commission sought information from a number of video game publishers, including [...].

⁴⁵ [...].

⁴⁶ [...]. See also Market Definition Notice, paragraphs 13 and 20.

⁴⁷ [...].

⁴⁸ 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.

⁴⁹ [...].

⁵⁰ 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.

⁵¹ [...].

⁵² [...].

⁵³ [...].

⁵⁴ [...].

⁵⁵ [...].

- (52) From a supply-side perspective, virtually all PC video game publishers contacted agreed that it is very easy and relatively costless for them to switch from digital sales to physical sales, or vice versa.⁵⁸ Most PC video game publishers have established commercial relationships with physical distributors and outlets. The additional costs of selling physical products, due to cost items such as manufacturing, distribution and logistics, have been reported as being relatively limited⁵⁹ and estimated at between 0 and 5% of the retail price of a PC video game.⁶⁰ 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 straightforward⁶¹. This confirms that there is at least potential competition between physical and digital sales.

7.3. Relevant geographic market

- (53) From a demand-side perspective, there are two main ways in which video games might differ within the EEA. First, certain PC video games might need to be tailored to comply with specific regulations existing in Germany and Austria.⁶² Second, although most publishers typically produce one version of a video game with a function which allows users to choose the gaming language themselves,⁶³ some publishers create separate video game versions which contain different languages for different EEA countries⁶⁴. 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.⁶⁵ This is because translation of the game can considerably degrade the quality of the gaming experience because of the poor quality of translation.⁶⁶
- (54) In terms of supply-side substitution, all undertakings confirmed during the market investigation that they release essentially all video games across the entire EEA. Further, the market investigation has shown that creating separate video game versions with different languages is significantly more expensive than having a single version and including a function that allows users to choose the language from the game menu.⁶⁷

⁵⁶ For the avoidance of doubt, reference to digital distribution means sales via downloads or streaming only (i.e., it does not include sales of CDs and DVDs via internet).

⁵⁷ [...].

⁵⁸ [...].

⁵⁹ [...].

⁶⁰ [...].

⁶¹ [...].

⁶² 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.

⁶³ [...].

⁶⁴ [...].

⁶⁵ [...].

⁶⁶ [...].

⁶⁷ [...].

- (55) 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,⁶⁸ which appears not to require significant modifications to adapt PC video games to local market conditions.

7.4. Conclusion on relevant markets

- (56) In light of the above, while a precise market definition is not required in the present case, for the purposes of this Decision the relevant product market is the market for video games running on PCs and the geographic scope of the market for PC video games coincides with the EEA.
- (57) The market investigation provides indications that the market for PC video games encompasses PC video games sold both digitally and physically. However, for the purposes of this Decision, the question whether digital and physical distribution constitute separate product markets can be left open as it has no impact on the outcome of the competitive assessment of the cross-border sales restrictions. This is because the restrictions are anti-competitive regardless of the specific market definition as they have the object of artificially restoring the divisions between national markets.
- (58) In any event, even if there were separate product markets for digital and physical distribution, there would be at least potential competition between these two channels in view of the demand-side and supply-side considerations described in Section 7.2, which confirms that physical and digital sales exert at least some competitive constraints on each other.

8. THE RELEVANT CONDUCT

8.1. Agreements/concerted practices with Valve

8.1.1. The SDAs between Valve and Capcom

- (59) The contractual relationship between Valve and Capcom for the distribution of Capcom's PC video games on Steam is set out in the SDA of 11 October 2006 between Valve and Capcom Entertainment Inc.⁶⁹ and in the SDA of 1 February 2007 between Valve and Capcom Japan.⁷⁰ The SDAs have been amended multiple times in order to renew them and at the same time to update the list of Capcom's PC video games distributed by Valve. Valve distributes the five Capcom's PC video games concerned on the basis of the SDA of 1 February 2007 only. Therefore, the SDA of 11 October 2006 will not be discussed further.
- (60) On the basis of the 1 February 2007 SDA, Valve was granted a non-exclusive worldwide license (i.e. including the entirety of the EEA)⁷¹ to exploit, among others, the following Capcom PC video games on Steam: (1) "[...]", (2) "[...]", (3) "[...]", (4) "[...]" and (5) "[...]". Valve pays Capcom 70% of the adjusted gross revenues which Valve actually receives from its exploitation of Capcom's PC video games on Steam.⁷² Pursuant to the Steam Subscriber Agreement, Valve is the merchant of

⁶⁸ [...].

⁶⁹ [...].

⁷⁰ [...].

⁷¹ [...].

⁷² [...].

record *vis-à-vis* users purchasing such games on the Steam Store and is responsible for transactions taking place therein *vis-à-vis* those users. In addition, Valve also licensed to Capcom its Steam technology which includes the provision of Steam activation keys⁷³ for distribution outside Steam of those same PC video games. Valve is obliged to provide Steam activation keys within 10 days of receiving a request from Capcom.⁷⁴

- (61) While the 1 February 2007 SDA does not contain any clauses which per se restrict the distribution of Capcom's PC video games to a given territory, it created the possibility to geo-block Steam activation keys by means of the territory control function explained in Section 6.1.1.1. In order for Valve to generate geo-blocked keys it was necessary to reach an agreement with Capcom to set up activation restrictions on the basis of which geo-blocked Steam activation keys were generated. Valve and Capcom generally reached this agreement by exchange of emails as further evidenced in Section 8.1.2.

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

- (62) Through the use of geo-blocked Steam activation keys Capcom and Valve restricted the possibility for users to activate five PC video games⁷⁵ outside of specific EEA countries – namely: Latvia, Lithuania, Estonia, the Czech Republic, Hungary, Poland, Slovakia and Romania. Users located outside these EEA countries could not activate these games.
- (63) Capcom requested that Valve put in place activation restrictions. In particular, Capcom requested Valve to set up activation restrictions and provide geo-blocked Steam activation keys, which Capcom then supplied to its distributor [...] for the mentioned five PC video games. The activation of those games was restricted by means of geo-blocked Steam activation keys concerning physical distribution. The Steam activation keys provided to Capcom were geo-blocked, for the PC video games at issue, to Latvia, Lithuania, Estonia, the Czech Republic, Hungary, Poland, Slovakia and Romania.
- (64) Valve has confirmed that four PC video games, namely (1) “[...]”, (2) “[...]”, (3) “[...]” and (4) “[...]” had activation restrictions in place.⁷⁶ With regard to “[...]”, the email evidence quoted in Recital (65)(b) demonstrates that an activation restriction was agreed between Capcom and Valve. In addition, Valve provided a list of PC video games with activation restrictions in place⁷⁷ as well as of several orders of geo-blocked Steam activation keys listed in the reports generated via the automated system that Valve introduced in [...] (see Section 6.1.1.2).⁷⁸
- (65) The following contemporaneous evidence submitted by Capcom⁷⁹ supports the fact that Capcom and Valve agreed to restrict the Steam activation keys for these five PC video games to Latvia, Lithuania, Estonia, the Czech Republic, Hungary, Poland, Slovakia and/or Romania:

⁷³ [...].

⁷⁴ [...].

⁷⁵ [...].

⁷⁶ [...].

⁷⁷ [...].

⁷⁸ [...].

⁷⁹ [...].

- (a) By email of 7 February 2013,⁸⁰ Capcom informed Valve about its upcoming request for geo-blocked keys for the PC video game [...]: *"These are region locked Steam keys for the worldwide master. They should only activate the game from within the specified countries: [...] Latvia, Lithuania, Estonia, Poland, Czech Republic, Slovakia, Hungary and Romania"* [emphasis added]. The actual request was sent to Valve by email of 8 February 2013⁸¹. Valve confirmed on 13 February 2013 that the *"keys are on the way"*⁸².
- (b) In an email exchange between 22 February 2013 and 1 March 2013,⁸³ Capcom requested that Valve provide it with a new batch of Steam activation keys for the PC video game [...] that were geo-blocked to a territory encompassing Estonia, Latvia and Lithuania, a number of non-EEA countries: *"[...] could we have 121K new Steam codes for [...] PC, which are activation locked to only work in the following regions: [...] Latvia, Lithuania, Estonia"*.⁸⁴ In the same email exchange, Capcom requested that Valve also retroactively geo-block a batch of Steam activation keys for the PC video game "[...]" that were already supplied to Capcom but were not yet activated, to the same territory as for "[...]" (i.e. Latvia, Lithuania, Estonia, plus a number of non-EEA countries). Capcom explained that it had identified that for "[...]", items sold to Capcom's [...] distributor⁸⁵ were being sold in Poland: *"What we found, unexpectedly, is that [...] has a lower price point than those extra territories, and the [...] keys we assigned for [...] are showing up in Poland and undercutting the distributor"*.⁸⁶ By email of 1 March 2013, Valve confirmed that the two batches of keys at issue (i.e., one for "[...]" and the other one for "[...]" *"...are all fixed up. They will only work in [...]"*.⁸⁷ Although Valve's confirmation refers simply to "[...]" countries in view of the explicit request by Capcom which included Latvia, Lithuania and Estonia, and as Valve systematically considered the three Baltic countries (Estonia, Latvia and Lithuania) as belonging to [...], it is likely that Valve's confirmation in this specific instance covered also these three Baltic EEA countries.⁸⁸
- (c) By email of 16 April 2013,⁸⁹ Capcom requested two batches of Steam activation keys for the PC video game "[...]" - one batch of 45,000 keys geo-blocked to Estonia, Latvia and Lithuania and another batch of 15,000 keys geo-blocked to Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia and Romania. Valve confirmed that Capcom's request had been approved by email of 16 April 2013.⁹⁰

80 [...].
81 [...].
82 [...].
83 [...].
84 [...].
85 [...].
86 [...].
87 [...].
88 [...].
89 [...].
90 [...].

- (d) By email of 3 May 2013,⁹¹ Capcom requested that Valve provide it with geo-blocked Steam activation keys for the PC video game “[...]”: *"Because there are locks specific to region and key type, I have spelt out the setup in the table below..."*. The table in question shows that Capcom ordered a batch of 50,000 Steam activation keys that were geo-blocked to Estonia, Latvia and Lithuania and another batch of 20,000 Steam activation keys that were geo-blocked to the "Eastern EU" which included, in addition to Estonia, Latvia and Lithuania, also Poland, the Czech Republic, Slovakia, Hungary and Romania. By email of 6 May 2013,⁹² Valve indicated to Capcom that the key request had to be submitted via the automated system in place as of [...] and later - by email of 8 May 2013⁹³ - confirmed to Capcom that Capcom's request to set up the activation restrictions described above had been approved (*"I have setup packages for these key requests. To order the keys [...] please use this link [...]"*) and indicated the steps that Capcom should follow to download the requested Steam activation keys with the requested activation restrictions: *"I approved these [= the keys] earlier today as they looked correct. You should be able to download them from the same page."*
- (e) By email of 16 August 2013,⁹⁴ Capcom requested that Valve provide it with Steam activation keys for the PC video game “[...]” by sending a similar table as for “[...]”, identifying different regions that should be subject to certain geographic-based activation restrictions. The table in question shows that Capcom ordered a batch of 45,000 Steam activation keys that were geo-blocked to Estonia, Latvia and Lithuania and another batch of 8,000 Steam activation keys that were geo-blocked to the "Eastern EU" which included, in addition to Estonia, Latvia and Lithuania, also Poland, the Czech Republic, Slovakia, Hungary and Romania. Valve confirmed that the activation restrictions that Capcom requested had indeed been created.⁹⁵
- (66) For four PC video games, namely “[...]”, “[...]”, “[...]” and “[...]”, there is also evidence of orders of geo-blocked Steam activation keys which were generated via Valve's automated system.⁹⁶ In light of the explanation provided in Section 6.1.1.2 concerning the automated system, the orders confirm that Valve and Capcom agreed on activation restrictions for these games.
- (67) Regarding “[...]”, for which the email evidence quoted in Recital (65)(b) demonstrates that an activation restriction to Estonia, Latvia and Lithuania was agreed between Capcom and Valve, Capcom acknowledged that the activation of physical items was geo-blocked not only to those three countries, but to all of the eight EEA countries mentioned above.⁹⁷
- (68) As of April 2014 (at the latest) Valve refused to set up additional activation restrictions unless this was required to comply with local legislation and to provide

⁹¹ [...].
⁹² [...].
⁹³ [...].
⁹⁴ [...].
⁹⁵ [...].
⁹⁶ [...].
⁹⁷ [...].

the related geo-blocked Steam activation keys for Latvia, Lithuania and Estonia.⁹⁸ On 7 November 2014, Capcom instructed Valve to ensure that any activation restrictions on the above-mentioned five PC video games that relate to Latvia, Lithuania, Estonia, the Czech Republic, Hungary, Poland, Slovakia and Romania be removed and Valve confirmed on 17 November 2014 that the restrictions had been removed.⁹⁹

- (69) The start date for each agreement/concerted practice is the date when Capcom and Valve agreed to geo-block the activation keys for a specific PC video game of Capcom.
- (70) The end date for each agreement/concerted practice is the date when Valve confirmed to Capcom that any activation restrictions relating to the EEA on the five Capcom PC video games at issue were removed.¹⁰⁰
- (71) It follows from the above description that the geo-blocked Steam activation keys were used by Valve and Capcom as a technical way to prevent cross-border sales of the above five Capcom's PC video games within the EEA.

8.2. Agreements with [...]

- (72) Capcom and [...] concluded agreements (including respective addenda and amendments) concerning the distribution in the EEA of various Capcom PC video games. Two of these agreements, of 1 June 2012¹⁰¹ and 1 May 2013,¹⁰² are relevant to the extent that they govern the physical distribution by [...] of the five PC video games for which activation restrictions to a number of EEA countries were agreed between Capcom and Valve. In particular, the 1 June 2012 agreement covers the PC video games "[...]", "[...]" and "[...]" whereas the 1 May 2013 agreement covers the PC video games "[...]" and "[...]". For each of these games there is evidence that Capcom provided geo-blocked Steam activation keys to [...].
- (73) On the basis of these two agreements, Capcom granted to [...] an exclusive¹⁰³ licence to localise, promote, publish, produce, market and sell each of the five above-mentioned PC video games of Capcom. [...] obtained the right to adapt and modify these PC video games only for the purpose of localising and translating them into Polish, Czech and Hungarian (and original English if needed).
- (74) As regards their territorial scope, both agreements provide that the right to manufacture, market, sell localised versions of the relevant PC video games covers only four EEA countries, i.e. "*Poland, Czech Republic, Hungary and Slovakia*". Both agreements covered a period of one year.¹⁰⁴ The Steam activation keys that Capcom

⁹⁸ [...].

⁹⁹ [...].

¹⁰⁰ [...].

¹⁰¹ [...].

¹⁰² [...].

¹⁰³ [...].

¹⁰⁴ [...].

received from Valve were passed on to [...] ¹⁰⁵ for each of “[...]”, ¹⁰⁶ “[...]”, ¹⁰⁷ “[...]”, ¹⁰⁸ “[...]”, ¹⁰⁹ and “[...]”. ¹¹⁰

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

- (75) For the five PC video games at issue, namely “[...]”, “[...]”, “[...]”, “[...]” and “[...]”, Valve’s Steam technology was used to restrict the physical distribution of the above mentioned Capcom’s PC video games distributed by [...]. In particular, Capcom passed the geo-blocked Steam activation keys on to its distributor [...], who resold them to users in its licensed territories (i.e., the Czech Republic, Hungary, Poland and Slovakia). Those keys were typically geo-blocked to eight EEA countries, namely Latvia, Lithuania, Estonia, the Czech Republic, Hungary, Poland, Slovakia and Romania. ¹¹¹ This concerned solely the physical distribution of these PC video games. As a result, Capcom’s PC video games distributed by [...], and purchased by users in physical items, could not be activated by users outside of Latvia, Lithuania, Estonia, the Czech Republic, Hungary, Poland, Slovakia and Romania. The geo-blocked Steam activation keys for such five PC video games were in place – overall – between 13 February 2013 and 17 November 2014. The same PC video games for which Valve provided geo-blocked Steam activation keys were also sold on Steam across the entire EEA during the same period.

9. LEGAL ASSESSMENT

- (76) 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.
- (77) 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*.” ¹¹²
- (78) 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

¹⁰⁵ [...].

¹⁰⁶ [...].

¹⁰⁷ [...].

¹⁰⁸ [...].

¹⁰⁹ [...].

¹¹⁰ [...].

¹¹¹ [...].

¹¹² 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.

effect on trade between the Union and those countries, it falls within Article 53 of the EEA Agreement.

- (79) 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.
- (80) 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

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

10.1. Concept of undertaking

10.1.1. Principles

- (82) Article 101 of the Treaty applies to undertakings and associations of undertakings.¹¹³ The notion "undertaking" covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.¹¹⁴

10.1.2. Application to this case

- (83) Valve and Capcom are undertakings within the meaning of Article 101(1) of the Treaty.

10.2. Agreements and concerted practices

10.2.1. Principles

- (84) 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.¹¹⁵

¹¹³ 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.

¹¹⁴ 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.

¹¹⁵ 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.

- (85) 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.¹¹⁶
- (86) Although Article 101(1) of the Treaty draws a distinction between the concept of concerted practices and the concept of agreements between undertakings, the object is to bring within the prohibition of these Articles a form of coordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical cooperation between them for the risks of competition.¹¹⁷ 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.¹¹⁸ The motive or the knowledge that the act is unlawful is irrelevant.¹¹⁹
- (87) 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 need be affected by the terms of the arrangements in question.¹²⁰

10.2.2. Application to this case

- (88) The conduct described in Section 8.1.2 presents all the characteristics of agreements and/or concerted practices entered into between undertakings, namely between Capcom and Valve.
- (89) As outlined in Recital (60), on the basis of the 1 February 2007 SDA Capcom was entitled to receive Steam activation keys that included territory controls. Capcom had to indicate to Valve the territories in which activation restrictions were to be set up

¹¹⁶ 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.

¹¹⁷ Judgment of the Court of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, C-48/69, ECLI:EU:C:1972:70, paragraph 64.

¹¹⁸ 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.

¹¹⁹ Judgment of the Court of 8 July 1999, *Commission v Anic Partecipazioni SpA*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 8.

¹²⁰ 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.

for each PC video game package. Activation restrictions were therefore not set up unilaterally either by Valve or Capcom.

- (90) Capcom also had to indicate how many keys it needed and the package(s) to which the geo-blocked Steam activation keys should be related. As indicated in Section 8.1.2, Capcom requested, by email, that Valve provide it with geo-blocked Steam activation keys for the PC video games “[...]”, “[...]”, “[...]”, “[...]” and “[...]”. In reaction to those emails, Valve provided Capcom with Steam activation keys for those PC video games in the amounts/quantities requested and geo-blocked to the territories defined by Capcom.
- (91) In addition, there is evidence that as of [...], when the system for ordering geo-blocked Steam activation keys became automated (see Section 6.1.1.2), Capcom requested geo-blocked Steam activation keys through Valve’s automated system for the following PC video games: “[...]”, “[...]”, “[...]” and “[...]”.
- (92) As explained in more detail in Recitals (39) to (43), orders of geo-blocked Steam activation keys submitted via the automated system are the second step in the process for requesting Steam activation keys and this second step can take place only after the geographic scope of the activation restrictions was agreed between Valve and the publisher. Therefore, the fact that there were orders for geo-blocked Steam activation keys for the above-mentioned PC video games via the automated system demonstrates that activation restrictions for these games were agreed between Valve and Capcom.
- (93) Moreover, regarding all five PC video games mentioned above, both Capcom and Valve acknowledged that they had activation restrictions in place and, in addition, Capcom acknowledged that its distributor [...] was provided with geo-blocked Steam activation keys for those games.
- (94) The evidence described in Section 8.1.2 shows a concurrence of wills between Capcom and Valve to set up activation restrictions and to provide the related geo-blocked Steam activation keys which were used to limit cross-border sales in respect of the above-mentioned five Capcom PC video games. This conduct therefore constitutes an agreement or in any event a concerted practice between undertakings within the meaning of Article 101(1) of the Treaty.

10.3. Restriction of competition by object

10.3.1. Principles

- (95) 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.¹²¹ 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.¹²²

¹²¹ 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.

¹²² Case C-67/13 P CB, paragraph 50; Case C-286/13 P *Dole Food*, paragraph 114.

- (96) 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.¹²³ When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.¹²⁴
- (97) 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.¹²⁵ 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.¹²⁶

10.3.1.1. Restrictions of cross-border sales

- (98) 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.¹²⁷ In particular, restrictions on passive sales are capable of leading to absolute territorial protection and are designed to

¹²³ Case C-67/13 P *CB*, paragraph 53; Joined cases C-403/08 and C-429/08 *Murphy*, paragraph 136; Judgment of the Court of 6 October 2009, *GlaxoSmithKline Services Unlimited v Commission* (C-501/06 P) and *Commission v GlaxoSmithKline Services Unlimited* (C-513/06 P) and *European Association of Euro Pharmaceutical Companies (EAEPIC) v Commission* (C-515/06 P) and *Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission* (C-519/06 P), Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECLI:EU:C:2009:610, paragraph 58; Judgment of the Court of 8 November 1983, *NV IAZ International Belgium and others v Commission* (hereinafter referred to as “IAZ”), Joined cases 96-102, 104, 105, 108 and 110/82, ECLI:EU:C:1983:310, paragraphs 23-25.

¹²⁴ 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.

¹²⁵ 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.

¹²⁶ 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.

¹²⁷ Joined cases C-403/08 and C-429/08 *Murphy*, paragraph 139; Judgment of the Court of 16 September 2008, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton*, formerly *Glaxowellcome AEVE*, Joined cases C-468/06 to C-478/06, ECLI:EU:C:2008:504, paragraph 65; Joined cases 96-102, 104, 105, 108 and 110/82 *IAZ*, paragraphs 23 to 27; Judgment of the Court of 28 April 1998, *Javico International and Javico AG v Yves Saint Laurent Parfums SA (YSLP)* (hereinafter referred to as “Javico”), C-306/96, ECLI:EU:C:1998:173, paragraphs 13 and 14; Judgment of the Court of 6 April 2006, *General Motors BV v Commission*, C-551/03 P, ECLI :EU:C:2006:229, paragraphs 67 to 69.

prohibit or limit any cross-border distribution¹²⁸. 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.

- (99) 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.¹²⁹ This applies all the more since, by such an agreement, the parties might seek, by preventing or limiting the competition of third parties in respect of the products, to create or guarantee for their benefit an unjustified advantage at the expense of the user, contrary to the general aims of Article 101 of the Treaty.¹³⁰

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

- (100) In *Nintendo v PC Box*, the Court of Justice considered whether videogames, and/or their parts, could be protected under EU copyright rules.¹³¹ 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.¹³² 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.¹³³ In addition, an agreement is not exempted under EU competition law merely because it concerns an IP right.¹³⁴
- (101) 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.¹³⁵ The principles

¹²⁸ 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.

¹²⁹ Judgment of 13 July 1966, *Établissements Consten S.à r.l. and Grundig-Verkaufs-GmbH v Commission* (hereinafter referred to as "*Grundig*"), Joined cases 56 and 58/64, ECLI:EU:C:1966:41, pages 492, 493; Case C-194/14 P *Treuhand*, paragraphs 34 and 35; Case C-642/13 P *Villeroy & Boch*, paragraphs 58-60.

¹³⁰ Joined cases 56 and 58/64 *Grundig*, page 339.

¹³¹ 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.

¹³² 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.

¹³³ . Case T-321/05 *AstraZeneca*, paragraph 677, confirmed on appeal, Case C-457/10 P, paragraph 132.

¹³⁴ 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.

¹³⁵ Case T-873/16, *Canal Plus*, paragraph 45, point confirmed on appeal, Case C-132/19 P, paragraphs 51-54; Joined cases C-403/08 and C-429/08 *Murphy*, paragraphs 139-142.

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

- (102) Moreover, according to settled case-law, an agreement can be considered to restrict competition by object even if it also pursues legitimate objectives.¹³⁶ 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.
- (103) 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.¹³⁷
- (104) 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.¹³⁸ 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.¹³⁹
- (105) 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 has 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

- (106) The email exchanges and other evidence detailed in Section 8.1.2 show that Capcom asked Valve to provide it with geo-blocked Steam activation keys for the following five PC video games: "[...]", "[...]", "[...]", "[...]" and "[...]".
- (107) It follows from this evidence that Capcom defined the territories in which such Steam activation keys could be used to activate a PC video game. The Steam activation keys that Valve provided to Capcom following Capcom's request were geo-blocked, depending on Capcom's request, to one or more of the following eight EEA countries: Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia and Romania.
- (108) The five games concerned could not be activated outside of those countries. [...], or any other Capcom's distributor in those EEA countries to whom the geo-blocked

¹³⁶ 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.

¹³⁷ 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.

¹³⁸ Case C-307/18 *Generics (UK)*, paragraph 210.

¹³⁹ 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.

Steam activation keys were provided, were effectively prevented from providing (in particular in response to unsolicited requests from a potential user) those games to users based in EEA countries other than Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia and Romania, because those games could not be activated outside these countries.

- (109) As explained in Section 8.1.2, Capcom and Valve agreed to put in place, and Valve did put in place, such restrictions on the Steam activation keys of the five Capcom's PC video games mentioned above with respect to Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia and Romania.
- (110) Rather than being inherent to the nature of the licence itself, the agreements on the use of geo-blocked Steam activation keys between Capcom and Valve are designed to ensure that the distributors receiving the keys (e.g. [...]) comply with the contractually defined territorial scope of their respective distribution licence, covering – in the case of [...] – four of the above-mentioned EEA countries.¹⁴⁰ 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 Capcom was the copyright holder for all the relevant games for the whole of the EEA and granted Valve a non-exclusive worldwide license to exploit these PC video games on Steam (see Section 8.1.1).
- (111) In addition, in line with the case-law quoted in Section 10.3, 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.
- (112) On the basis of the above, the objective of the agreements/concerted practices between Capcom and Valve was to technically restrict the distribution of the five Capcom's PC video games from certain EEA countries, namely Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia and Romania into the rest of the EEA, thereby restricting cross-border sales in respect of the PC video games concerned.
- (113) 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.

10.4. Single and continuous infringement

10.4.1. Principles

- (114) 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.
- (115) 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

¹⁴⁰ I.e. Poland, Hungary, Czech Republic and Slovakia.

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.¹⁴¹

- (116) 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.¹⁴²
- (117) 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.¹⁴³ Finally, the concept of single and continuous infringement applies to vertical agreements/concerted practices that restrict competition within the internal market¹⁴⁴ which has also been recognised by the Court of Justice.¹⁴⁵

10.4.2. Application to this case

- (118) As indicated in Section 8.1.2, the agreements/concerted practices between Valve and Capcom for the setting up of activation restrictions and the provision of geo-blocked Steam activation keys for each of Capcom's PC video games and for each geographic area concerned have as their object a 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.
- (119) According to the case-law quoted in Section 10.3.1, when different 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.
- (120) The evidence set out in Section 8.1.2 demonstrates that Capcom had a strategy of restricting cross-border sales via Steam activation keys. In this regard, the agreements/concerted practices between Capcom and Valve regarding geo-blocked Steam activation keys shared the common objective of restricting cross-border sales of certain PC video games of Capcom. This shows the existence of an identity of purposes.
- (121) Capcom was a party to, and therefore, participated in and was aware of, the single and continuous infringement.

¹⁴¹ Judgment of the Court of 24 June 2015, *Fresh Del Monte Produce Inc. v Commission and Commission v Fresh Del Monte Produce Inc.*, Joined cases C-293/13 P and C-294/13 P, ECLI:EU:C:2015:416, paragraph 156.

¹⁴² Judgment of the General Court of 15 December 2016, *Infineon Technologies AG v Commission*, T-758/14, ECLI:EU:T:2016:737, paragraph 226.

¹⁴³ Case C-642/13 P *Villeroy & Boch*, paragraphs 59-60.

¹⁴⁴ 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-Toppis* (OJ L 353, 13.12.2006, p. 5–6), paragraphs 122–128.

¹⁴⁵ 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.

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

- (122) 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.
- (123) As indicated in Section 8.1.2, the agreements/concerted practices between Valve and Capcom seek to restrict or prevent trade between EEA countries as they restrict Capcom's distributors' ability to engage in cross-border sales of Capcom's PC video games.
- (124) By their very nature, those restrictive agreements are liable to partition the internal market and consequently to affect trade between Member States.¹⁴⁶ Therefore, they are capable of having an appreciable effect on trade between the Member States within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement.

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

- (125) 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.
- (126) The Technology Transfer Block Exemption Regulation ("TTBER")¹⁴⁷ and the Vertical Block Exemption regulation ("VBER")¹⁴⁸ 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.

¹⁴⁶ 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.

¹⁴⁷ 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")).

¹⁴⁸ 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")).

- (127) Without it being necessary to determine whether the SDA of 1 February 2007 and the agreement/concerted practice to set up activation restrictions and to provide geo-blocked Steam activation keys between Valve and Capcom (which are all part of the same conduct as described in Section 8.1.2) fall within the scope of (a) the TTBER; (b) the 2004 TTBER; (c) the 1999 VBER; and/or (d) the VBER, those agreements/concerted practices would not, in any event, benefit from an exemption since they contain hardcore restrictions on the basis of Article 4(1)(c) and of Article 4(2)(b) of the TTBER (and of the 2004 TTBER) and on the basis of Article 4(b) of the VBER (and of the 1999 VBER) preventing Capcom's distributors from engaging in passive sales to users based outside those territories.
- (128) 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 were indispensable for the improvement of production or distribution of the PC video games at stake or the promotion of technical or economic progress within the meaning of Article 101(3)(i) of the Treaty.

11. SCOPE AND DURATION OF THE INFRINGEMENT

11.1. Product scope

- (129) The infringement relates to the distribution of five of Capcom's PC video games – namely: (1) “[...]”, (2) “[...]”, (3) “[...]”, (4) “[...]” and (5) “[...]”.

11.2. Geographic scope

- (130) 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

- (131) The duration of the infringement is calculated from 13 February 2013 when Valve agreed to set up activation restrictions on the PC video game “[...]” in eight EEA countries, until 17 November 2014 when Valve confirmed to Capcom that any activation restrictions on the five Capcom PC video games concerned were removed.
- (132) Therefore, the infringement started on 13 February 2013 and ended on 17 November 2014.

12. LIABILITY

12.1. Principles

- (133) Article 101 of the Treaty and Article 53 of the EEA Agreement apply to undertakings and associations of undertakings.¹⁴⁹ 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.

¹⁴⁹ Case C-437/09, *Prévoyance*, paragraph 40.

- (134) 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.
- (135) 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.
- (136) 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.¹⁵⁰
- (137) 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.¹⁵¹ In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption applies.¹⁵²
- (138) 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

- (139) On this basis the Commission concludes that liability for the single and continuous infringement should be imputed to the following legal entities:
- CE Europe Ltd. for its direct participation in the infringement;¹⁵³
 - Capcom U.S.A., Inc. for its direct participation in the infringement;¹⁵⁴
 - Capcom Co., Ltd. for its participation in the infringement as the parent company holding 100% of the shares in both CE Europe Ltd. and Capcom U.S.A., Inc. for the entire duration of the infringement. Capcom Co., Ltd. has not argued that it did not exercise decisive influence over CE Europe Ltd. and Capcom USA.

¹⁵⁰ 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.

¹⁵¹ Judgment of the Court of 10 September 2009, *Akzo Nobel NV and Others v Commission* (hereinafter referred to as “*Akzo*”), C-97/08 P, ECLI:EU:C:2009:536, paragraph 60 and the case law referred to in that paragraph; Judgment of the Court of First Instance of 30 September 2009, *Elf Aquitaine SA v Commission*, T-174/05, ECLI:EU:T:2009:368 (summary publication), paragraphs 125, 155-156 and the case law referred to in those paragraphs; Judgment of the Court of First Instance (Seventh Chamber) of 30 September 2009, *Arkema SA v Commission*, T-168/05, ECLI:EU:T:2009:367 (summary publication), paragraphs 69-70 and the case law referred to therein; paragraph 100.

¹⁵² 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.

¹⁵³ [...].

¹⁵⁴ [...].

13. REMEDIES AND FINES

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

- (140) 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.
- (141) The requirement that a remedy has to be effective¹⁵⁵ 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.¹⁵⁶
- (142) While Capcom has already brought the infringement to an end, it is appropriate to require Capcom 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

- (143) 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.¹⁵⁷ For each undertaking participating in the infringement, the fine cannot exceed 10% of its total turnover in the business year preceding the Commission decision.
- (144) 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 1/2003¹⁵⁸ ("the Guidelines on Fines").
- (145) 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.¹⁵⁹ The basic amount consists of a percentage of the value of those sales up to a maximum

¹⁵⁵ 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.

¹⁵⁶ 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, *Fiatarci UK Ltd and New Holland Ford Ltd v Commission*, T-34/92, ECLI:EU:T:1994:258, paragraph 39; Judgment of the Court of First Instance of 20 April 1999, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission*, Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, ECLI:EU:T:1999:80, paragraph 1254.

¹⁵⁷ 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).

¹⁵⁸ OJ C 210, 1.9.2006, p. 2.

¹⁵⁹ Point 13 of the Guidelines on Fines.

percentage of 30%¹⁶⁰, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.¹⁶¹ 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.¹⁶²

- (146) 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.¹⁶³ 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.
- (147) The Commission may also include in the basic amount an additional amount of up to 25% of the value of sales¹⁶⁴ to deter undertakings from entering into anticompetitive agreements.
- (148) 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.¹⁶⁵
- (149) 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.¹⁶⁶

13.3. The intentional or negligent nature of the infringement

- (150) According to established case law, intention or negligence do not require the relevant undertaking to have been aware that it was infringing competition law.¹⁶⁷ It is sufficient that the undertaking could not have been unaware that its conduct was aimed at restricting competition.¹⁶⁸
- (151) The Commission concludes that, based on the facts described in Section 8, the single and continuous infringement was committed intentionally or at the very least negligently.
- (152) On the basis of this evidence and the evidence quoted in Section 8, Capcom 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

¹⁶⁰ Point 21 of the Guidelines on Fines.

¹⁶¹ Point 19 of the Guidelines on Fines.

¹⁶² Point 22 of the Guidelines on Fines.

¹⁶³ Point 13 of the Guidelines on Fines.

¹⁶⁴ Point 25 of the Guidelines on Fines.

¹⁶⁵ Point 27 of the Guidelines on Fines.

¹⁶⁶ Point 30 of the Guidelines on Fines.

¹⁶⁷ Case C-19/77 *Miller*, paragraph 18; Case T-62/98 *Volkswagen*, paragraph 334.

¹⁶⁸ Judgment of the General Court of 5 October 2011, *Romana Tabacchi Srl v Commission*, T-11/06, ECLI:EU:T:2011:560, paragraph 227; Judgment of the Court of First Instance of 14 May 1998, *Enso Española SA v Commission*, T-348/94, ECLI:EU:T:1998:102, paragraph 277; Judgment of the Court of 18 June 2013, *Bundswettbewerbsbehörde and Bundeskartellamt v Schenker & Co. AG and Others*, C-681/11, ECLI:EU:C:2013:404, paragraph 37 and the case-law cited.

Capcom's distributor [...] could sell certain of Capcom's PC video games as evidenced in Section 10.3.2.

13.4. Calculation of the fine

13.4.1. Value of sales

- (153) 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.¹⁶⁹ The concept of the "value of sales" must be understood as referring to sales on the market concerned by the infringement.¹⁷⁰
- (154) The relevant value of sales include the turnover generated by the EEA sales of the Capcom PC video games concerned by the infringement described in Section 8.1.2 and 10.3.2, generated both by physical and digital distribution. This includes also 70% of the gross revenues generated by the sale of the concerned PC video games on Steam.
- (155) Irrespective of whether the infringement described in Section 8.1 concern physical or digital distribution of the concerned PC video games the turnover generated by both types of distribution is considered relevant for determining the value of sales given that there is at least potential competition between physical and digital distribution of PC video games (see Section 7.2).
- (156) Based on the principles outlined in this Section and on the information provided by Capcom, the value of sales should be based on Capcom's sales in the EEA of the PC video games directly and indirectly concerned with the infringement, i.e., (1) "[...]", (2) "[...]", (3) "[...]", (4) "[...]" and (5) "[...]", in the financial year 2013 (running from 1 April 2013 to 31 March 2014), which was the last full business year of its participation in the single and continuous infringement.
- (157) Accordingly, the value of sales to be taken into account is EUR [3 500 000 – 5 400 000].

13.4.2. Gravity

- (158) 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 Guidelines on Fines, the percentage for gravity will be set at a level up to 30% of the value of sales and towards the higher end of that scale for the most serious infringements. In assessing the gravity of the infringement, the Commission has regard to a number of factors.
- (159) 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

¹⁶⁹ 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.

¹⁷⁰ Judgment of the Court of 1 February 2018, *Deutsche Bahn AG and Others v Commission*, C-264/16 P, ECLI:EU:C:2018:60 paragraph 50.

damaging to competition than horizontal agreements.¹⁷¹ Taking into account this factor, the fact that the restriction of cross-border sales in this case covered the whole EEA, and the scope of the infringement,¹⁷² the percentage of the value of sales should be set at 6%.

13.4.3. Duration

- (160) The duration of the infringement, as set out in Section 11.3, was 643 days (1.76 years).

13.4.4. Calculation of the basic amount

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

13.4.5. Aggravating or mitigating factors

- (162) 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

- (163) The fine for the infringement does not exceed 10% of Capcom'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.
- (164) The fine for the infringement set out in Recital (161) does not exceed 10% of Capcom'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

- (165) In order to reflect that Capcom has effectively cooperated with the Commission beyond its legal obligation to do so, the fine that would otherwise have been imposed should, pursuant to point 37 of the Guidelines of fines, be reduced by 15%. On 27 August 2015, Capcom submitted a Corporate Statement,¹⁷³ including evidence and explanations concerning the geo-blocking practices, which strengthened the Commission's ability to prove the infringement. In particular, the Corporate Statement included: pertinent background explanations on Capcom's relationship with Valve; details of how the system of geo-blocking via Steam keys worked, thereby facilitating the Commission's understanding of the types of restrictions concerned; and explanations of specific pieces of evidence, which impacted on the geographic scope of the infringement. Moreover, on [...] Capcom submitted Settlement Submissions to the Commission, acknowledging the infringement and agreeing to pay a fine. Capcom 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.

¹⁷¹ 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.

¹⁷² Namely the fact that the geo-blocking practices consisted only in agreements/concerted practices between Capcom and Valve and not, in addition, between Capcom and [...].

¹⁷³ [...].

13.4.8. Conclusion: final amount of the fine

(166) In conclusion, the final amount of the fine to be imposed on Capcom pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 for the infringement amounts to EUR 396 000,

HAS ADOPTED THIS DECISION:

Article 1

Capcom Co., Ltd., Capcom U.S.A., Inc. and CE Europe Ltd. infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, from 13 February 2013 until 17 November 2014, in a single and continuous infringement covering the whole of the EEA consisting in 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.

Article 2

For the infringement referred to in Article 1, a fine of EUR 396 000 is imposed on Capcom Co., Ltd., Capcom U.S.A., Inc. and CE Europe Ltd., 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.40424

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.¹⁷⁴

Article 3

Capcom Co., Ltd., Capcom U.S.A., Inc. and CE Europe Ltd. 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.

¹⁷⁴ 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).

Article 4

This Decision is addressed to:

- Capcom Co., Ltd., 48th Floor, Shinjuku Mitsui Building 2-1-1 Nishi Shinjuku, Shinjuku-ku Tokyo 163-0448 Japan
- CE Europe Ltd., Metro Building 2nd Floor 1 Butterwick London, W6 8DL United Kingdom
- Capcom U.S.A., Inc. 185 Berry Street, Suite 1200, CA 94107, San Francisco, United States of America

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

