

## JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

27 September 2023 (\*)

(Competition – Agreements, decisions and concerted practices – Market for PC video games – Platform – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Restriction of parallel imports – Concepts of ‘agreement’ and ‘concerted practice’ – Restriction of competition by object – Copyright)

In Case T-172/21,

**Valve Corporation**, established in Bellevue, Washington (United States), represented by L. Kjølbye, S. Völcker and G. Caldini, lawyers,

applicant,

v

**European Commission**, represented by M. Farley, C. Sjödin, J. Szczodrowski and L. Wildpanner, acting as Agents,

defendant,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of S. Papasavvas, President, A. Marcoulli, J. Schwarcz, V. Tomljenović (Rapporteur) and W. Valasidis, Judges,

Registrar: I. Kurme, Administrator,

having regard to the written part of the procedure,

further to the hearing on 18 January 2023,

gives the following

### Judgment

- 1 By its action under Article 263 TFEU, the applicant, Valve Corporation, seeks annulment of Commission Decision C(2021) 75 final of 20 January 2021 relating to a proceeding under Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) (Cases AT.40413 – Focus Home, AT.40414 – Koch Media, AT.40420 – ZeniMax, AT.40422 – Bandai Namco, and AT.40424 – Capcom) (‘the contested decision’).

#### Background to the dispute

- 2 The applicant is an undertaking active in the PC video games and entertainment technologies sector. It operates an online gaming platform for PC video games called Steam (‘the Steam platform’).
- 3 PC video games compatible with the Steam platform (‘Steam video games’) are developed by gaming publishers (‘publishers’), who hold the copyright on their respective games. In order to make Steam video games available on the Steam platform, publishers conclude a distribution agreement with the applicant, usually supplemented by specific provisions for the various games. In order to enable publishers to develop Steam video games, the applicant grants them a licence for Steam technology and

offers technical services and solutions ('the Steamworks services'). The publishers then upload their games to the applicant's servers and grant it non-exclusive licences. The Steam video games are then accessed via the applicant's servers.

- 4 Access to Steam video games can be purchased by users directly on the Steam platform in the Steam Store. Alternatively, Steam-enabled PC video games may be purchased from third-party distributors, on either tangible or intangible media. In the event of acquisition from a third-party distributor, the user must activate the game on the Steam platform by means of an activation key consisting of a single alphanumeric code ('the Steam keys'), in order to be able to access and play that game in the Steam environment. Once the user has activated the game in his Steam user account, he or she can play it in the same way as if the game had been purchased from the Steam Store.
- 5 The Steamworks services include, in addition to the Steam keys system, a territory control function ('geo-blocking' or 'geographical blocking'). There are two types of restrictions. In the case of activation restrictions, the video game can only be activated on the Steam platform in the authorised territory. Once activated, it is possible to play outside the authorised territory. In the case of run-time restrictions, the user can activate and play the video game only in the authorised territory.

### *Administrative procedure*

- 6 Acting on information received from market participants, in 2013 the European Commission began an *ex officio* investigation into the geographical blocking of certain PC video games on the basis of the geographical location of the user.
- 7 On 2 February 2017, the Commission initiated proceedings against the applicant and five publishers, namely Bandai, Capcom, Focus Home, Koch Media and ZeniMax ('the five publishers') pursuant to Article 2(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18).
- 8 Following the adoption of five Statements of Objections on 5 April 2019, the Commission granted the applicant access to its file in all five cases. On 17 July 2019, the applicant submitted responses to the five Statements of Objections.
- 9 In parallel, on 30 April 2019, the five publishers expressed their willingness to cooperate with the Commission beyond their legal obligation to do so. Between 28 October and 9 November 2020, they submitted formal statements in which they acknowledged the infringement, the relevant facts and their respective liabilities for the infringement.
- 10 On 20 January 2021, the Commission adopted the contested decision.
- 11 On the same day, the Commission also adopted five decisions concerning the infringement by each of the five publishers of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA).

### *Contested decision*

- 12 By the contested decision, the Commission found that the applicant had participated, together with each of the five publishers, in five single and continuous infringements of Article 101 TFEU and Article 53 of the EEA Agreement over various periods between 27 September 2010 and 9 October 2015. It describes those infringements as having taken the form of a group of anti-competitive agreements or concerted practices between the applicant and each of the five publishers in the territory of the EEA, intended to restrict cross-border sales of certain Steam video games ('the video games at issue') by preventing publishers' distributors from responding to unsolicited requests from distributors or users located outside the territory of certain EEA countries ('passive sales'). Those restrictions were put in place by means of geo-blocked Steam keys which prevented users located outside the designated EEA country or countries from activating the video games at issue.
- 13 In the first place, according to the analysis in Sections 6.1, 6.2, 7 and 8.1 of the contested decision, the Commission found that there were agreements or concerted practices between the applicant and each of

the five publishers consisting of the implementation of geographical restrictions, by means of the geo-blocking of Steam keys, in order to prevent passive sales of the video games at issue within the EEA ('the conduct at issue'). In each of the five cases, it considered that the contractual terms relating to the Steamworks services merely made it possible to geo-block the Steam keys. Thus, in its view, in order for the applicant to generate geo-blocked Steam keys, it was then necessary for the applicant and the publishers to reach an agreement to put in place the geographical restrictions.

- 14 In Bandai's case, the Commission found that Steam keys had been geo-blocked for five Steam video games for the Czech Republic, Hungary, Poland and Slovakia. It found that the restrictions had been implemented between 13 March 2012 and 22 April 2014, the date on which the applicant had lifted those restrictions, at Bandai's request.
- 15 In Capcom's case, the Commission found that Steam keys had been geo-blocked for five video games for the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Romania and Slovakia, although those games were sold throughout the EEA. It found that those restrictions had been implemented between 13 February 2013 and 17 November 2014, at Capcom's request. Furthermore, it noted that, in April 2014, the applicant had refused to implement additional activation restrictions requested by Capcom.
- 16 In the case of Focus Home, the Commission found that Steam keys had been geo-blocked, with activation restrictions and, in some cases, also run-time restrictions, for 19 video games for Estonia, Latvia, Lithuania, Hungary and Poland. It found that those restrictions had been implemented between 17 May 2013 and 9 October 2015, until the lifting of all the restrictions, at the request of Focus Home or on the applicant's own initiative.
- 17 As regards Koch Media, the Commission found that there had been geo-blocking of the Steam keys, with activation restrictions for five Steam video games for the Czech Republic, Hungary, Poland, Slovakia and, in the case of one of those games, the United Kingdom. It found that those restrictions had been implemented between 23 August 2011 and 9 October 2015, the date on which the applicant had lifted the restrictions on its own initiative.
- 18 As regards ZeniMax, the Commission found that there had been geo-blocking of the Steam keys, with activation restrictions for the localised version of five Steam video games for the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia and, in the case of one of those games, Romania. It found that those restrictions had been implemented between 27 September 2010 and 9 October 2015, the date on which the applicant had lifted those restrictions on its own initiative.
- 19 In the second place, in Section 6.3 of the contested decision, the Commission observed that four of the five publishers had supplemented the use of the geo-blocked Steam keys by concluding bilateral agreements with some of their distributors containing cross-border restrictions on sales. It nevertheless found that the applicant had not been aware of those cross-border sales restrictions or of the fact that the geo-blocked keys it had provided to the publishers were being used to reinforce restrictions contained in certain distribution agreements. Consequently, it found that the applicant could not be held liable for any infringement of Article 101 TFEU in connection with those distribution agreements.
- 20 In the third place, in Section 8.2 of the contested decision, the Commission found that the conduct of the applicant and of the five publishers constituted a restriction of competition by object.
- 21 Consequently, the Commission found that the applicant had participated in five separate single and continuous infringements by concluding and implementing bilateral agreements and/or concerted practices with each of the five publishers by setting up geographical activation and run-time restrictions and providing geo-blocked Steam keys in order to restrict passive sales of the video games at issue within the EEA.

### **Forms of order sought**

- 22 The applicant claims that the Court should:

- annul the contested decision in whole or in part in so far as it relates to it;
- order the Commission to pay the costs.

23 The Commission contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

## Law

24 The applicant puts forward two pleas in law in support of the action. The first plea alleges errors of law and errors in the assessment of the facts in the application of Article 101(1) TFEU in that the Commission found that the applicant and each of the five publishers had entered into an agreement or participated in a concerted practice in order to restrict passive sales of the video games at issue. The second plea alleges errors of law and errors in the assessment of the facts in the application of Article 101(1) TFEU in that the Commission characterised the applicant's conduct as a 'restriction of competition by object'.

### *First plea: errors of law and fact in the Commission's finding of agreements or concerted practices contrary to Article 101(1) TFEU*

25 The first plea is, in essence, divided into two parts. The applicant claims, first, that the Commission unduly broadened the scope of the concepts of 'agreement' and 'concerted practice' within the meaning of Article 101 TFEU. Second, it disputes the probative value of the evidence on the basis of which the Commission concluded that there was a concurrence of wills between the applicant and each of the publishers.

#### *First part of the first plea in law: errors of law and of assessment of the facts as regards the concepts of 'agreement' or 'concerted practice' and the possibility of catching the conduct at issue under Article 101 TFEU*

26 The applicant claims, in essence, that the Commission unduly broadened the scope of the concept of 'agreement' or 'concerted practice' within the meaning of Article 101(1) TFEU, so as to encompass conduct which was, in reality, purely unilateral.

27 First, the applicant claims that it acted merely as a service provider implementing technical measures at the request of the publishers. It states in that regard that, in order to catch conduct under Article 101 TFEU, it is necessary to demonstrate a concurrence of wills to engage in specific conduct on the market. In particular, it states that the fact that it provided Steam keys did not involve any conduct on its part in the market or the expression of any common intention in relation to the publishers' conduct on the market and their decisions as to the use of keys.

28 Second, the applicant argues that the Commission misapplied the case-law on 'passive modes of participation', 'tacit acceptance', 'distancing' and 'acquiescence to a unilateral policy or unilateral conduct', which may not be transposed to a vertical situation in which one of the undertakings acts as a provider of technical services. In particular, the applicant complains that the Commission introduced two new concepts into its analysis: first, 'awareness' of a contracting party's unilateral conduct and anti-competitive aim and, secondly, 'distancing' from a contracting party's unilateral conduct. Those concepts are not relevant to proving concertation within the meaning of Article 101 TFEU.

29 Third, the applicant claims that the Commission overlooked the fact that, according to the case-law, a unilateral request from a contracting party does not give rise to concertation simply because a service provider, which is unaware of the existence of concertation between the contracting party and third parties, is involved in implementing it.

30 In addition, the applicant submits that the Commission was wrong to take the view that the provision of geo-blocked Steam keys formed part of a commercial strategy pursued by it that was aimed at protecting its margins in the Steam Store or limiting passive sales.

31 The Commission disputes the applicant's arguments.

– *Preliminary considerations concerning the Commission's reasoning in the contested decision*

32 As a preliminary point, it should be noted that the conduct which is the subject of the contested decision does not concern the Steam video games sold by the applicant in the Steam Store, but only certain Steam video games distributed on a tangible or digital medium by third-party distributors by means of Steam keys. The geo-blocking measures examined by the Commission in that decision concern only those keys, which are used only for the sale of such video games by third-party distributors outside the Steam Store.

33 It should also be noted that, contrary to what the applicant maintains, the Commission did not conclude that there were agreements or concerted practices solely on the basis of the following factors, which are set out in recitals 251 to 272 of the contested decision, namely the fact that the publishers were each entitled to receive geo-blocked keys under the Steam distribution agreement, that they had to indicate to the applicant which games and territories were covered by the geo-blocking, that they made such requests and that the applicant provided the Steam keys. Such an assertion is the result of a partial reading of that decision and does not take account of the fact that the analysis of the existence of agreements or concerted practices between the applicant and the five publishers is based on three sections of the contested decision and not only on recitals 251 to 272 of that decision.

34 First, in Section 6.1 of the contested decision, entitled 'Overview of [the applicant's] business activity', the Commission examined the functioning of the Steam platform, the relationship that the applicant had with the publishers and users of that platform, and the functionalities of the Steam keys linked to geo-blocking. In particular, in Section 6.1.6 of that decision, entitled '[the applicant's] practice regarding geo-blocked keys', the Commission set out separately, for each of the five publishers, the evidence establishing that the applicant had advertised, made available and occasionally even proactively raised the possibility of using the geo-blocked Steam keys for the purpose of restricting passive sales. At the end of that analysis, it concluded, in recital 133 of that decision, that the evidence established that the applicant's practice consisted of providing such keys at the request of the publishers, that it had, on certain occasions, proactively raised the possibility of using the territorial control function, that it was aware (or ought to have been aware) that those keys were being used by the publishers to hinder passive sales and that the provision of those keys was consistent with its business strategy for the Steam platform.

35 Second, in Section 6.2 of the contested decision, entitled 'Agreements and/or concerted practices between [the applicant] and the publishers', the Commission set out the evidence establishing that the applicant and each of the five publishers had agreed to supply geo-blocked Steam keys for the various games in question. In that part of that decision, it sought primarily to establish that the applicant had acquiesced to each of the requests for the supply of geo-blocked Steam keys. In order to do so, it relied on statements by the applicant or the publishers confirming that such keys had indeed been provided, e-mail exchanges between the applicant and the publishers concerning orders for those keys or orders for those keys made by the publishers using the automated form put in place by the applicant.

36 Third, in Section 8.1 of the contested decision, entitled 'Agreements and concerted practices', the Commission considered that the conduct between the applicant and each of the five publishers was capable of constituting 'agreements' or 'concerted practices' within the meaning of Article 101 TFEU.

37 After observing that, according to the case-law, passive conduct could be caught by Article 101 TFEU, in particular where a party tacitly approves an unlawful practice without publicly distancing itself from it and where a party acquiesces in a unilateral policy by cooperating or providing assistance in the implementation of that policy, the Commission examined individually the conduct between the applicant and the five publishers.

38 In essence, for each of the publishers, the Commission considered that geo-blocking could not be put in place unilaterally, either by the applicant or by the publisher. It found that the evidence set out in Section 6.2 of the contested decision made it possible to establish that the applicant had, at the request of the publishers, provided geo-blocked Steam keys for each of the video games at issue. Thus, according to the Commission, those elements demonstrated a concurrence of wills between the applicant and each of the five publishers as regards setting up geographical restrictions, through the provision of such keys, which were used for the purpose of restricting passive sales.

39 Lastly, in recital 276 of the contested decision, the Commission stated that there was indeed a concurrence of wills between the applicant and the publishers with a view to restricting passive sales, since the applicant had chosen to make the geographical control function available to the publishers, had informed the publishers of that possibility, had complied with the publishers' requests to geo-block the video games at issue, could not have been unaware that the geo-blocked Steam keys were being used to restrict passive sales and had not distanced itself from that practice. It added that the applicant could not have been unaware of the fact that those keys were used to restrict passive sales, given that it itself promoted the use of those keys as a means of preventing 'grey imports' (parallel imports).

40 It is in the light of those factors concerning the Commission's reasoning in the contested decision that the applicant's arguments must be examined.

– *The possibility of catching the conduct at issue under Article 101 TFEU*

41 The applicant claims that the conduct at issue does not come within the scope of Article 101 TFEU, since it acted merely as a service provider supplying nothing more than technical means of geo-blocking to publishers.

42 In that regard, first, it should be borne in mind that Article 101(1) TFEU provides that all agreements between undertakings, all decisions by associations of undertakings and all 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 are incompatible with the internal market and prohibited.

43 According to settled case-law of the Court, in order for there to be an 'agreement' within the meaning of Article 101(1) TFEU, undertakings need only to have expressed their joint intention to conduct themselves on the market in a specific way (see judgment of 14 January 2021, *Kilpailu- ja kuluttajavirasto*, C-450/19, EU:C:2021:10, paragraph 21 and the case-law cited). In order for there to be an 'agreement', there must be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive (see judgment of 10 November 2017, *Icap and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 98 and the case-law cited).

44 As regards the term 'concerted practice', it is apparent from the case-law of the Court of Justice that Article 101(1) TFEU makes a distinction between that term and, in particular, the terms 'agreement' and 'decision by an association of undertakings', with the sole intention of catching various forms of collusion between undertakings which, from a subjective point of view, have the same nature and are distinguishable from each other only by their intensity and the forms in which they manifest themselves (see, to that effect, judgment of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 29 and the case-law cited).

45 In that context, it should also be noted that the main objective of the prohibition laid down in Article 101(1) TFEU is to ensure that competition remains undistorted within the common market and that its full effectiveness entails that the active contribution of an undertaking to a restriction of competition is caught even if that contribution does not relate to an economic activity forming part of the relevant market on which that restriction comes about or is intended to come about (see judgment of 10 November 2017, *Icap and Others v Commission*, T-180/15, EU:C:2017:795, paragraph 104 and the case-law cited).

46 Furthermore, it cannot be inferred from the case-law of the Court of Justice that Article 101(1) TFEU concerns only either (i) the undertakings operating on the market affected by the restrictions of competition or indeed on the markets upstream or downstream of that market or neighbouring markets,

or (ii) undertakings which restrict their freedom of action on a particular market under an agreement or as a result of a concerted practice. Indeed, it is apparent from the well established case-law of the Court of Justice that the text of Article 101(1) TFEU 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 (see judgments of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 35 and the case-law cited; of 26 January 2017, *Villeroy & Boch v Commission*, C-644/13 P, EU:C:2017:59, paragraph 51 and the case-law cited; judgment of 10 November 2017, *Icap and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 103).

47 Contrary to what the applicant maintains, the case-law set out in paragraph 46 above is indeed of general application and is not limited to cases in which the undertaking concerned played the role of ‘facilitator’ of the cartel among other undertakings active on another market. It is apparent from the wording of paragraphs 35 and 36 of the judgment of 22 October 2015, *AC-Treuhand v Commission* (C-194/14 P, EU:C:2015:717), in which the Court of Justice set out the considerations referred to in paragraph 46 above for the first time, and from the fact that the case-law referred to in paragraph 35 of that judgment does not concern facilitation, that the Court of Justice intended those considerations to be of general application.

48 It follows that conduct cannot escape Article 101 TFEU solely because it forms part of a relationship between an undertaking and its service provider. Moreover, contrary to what the applicant submits, the Commission’s analysis does not lead to any service provider supplying technical measures being found to be participating in an agreement or concerted practice under Article 101 TFEU. In order for conduct between a service provider and its contracting party to be capable of being scrutinised in the light of Article 101 TFEU, the conditions laid down for the application of that provision and, more particularly, the condition relating to the existence of a concurrence of wills, must also be satisfied.

49 Second, and in any event, it must be pointed out that, contrary to what the applicant claims, it was not acting as a mere service provider having no activity on the market in question or in connection with that market.

50 In fact, the applicant operated the Steam platform on which the video games at issue were accessible and without which it was not possible to play there. Furthermore, as stated by the applicant in its application, the Steam keys, which were the subject of the conduct at issue, could only be used on that platform. The applicant also stated at the hearing that the Steam video games sold by third-party distributors contained codes generated by it, which were stored on its servers and which had to be encrypted by it in order for them to correspond to the Steam keys supplied. Therefore, even if the Steam video games were distributed by third parties, they could not be used by the end user without a service provided by the applicant. The applicant therefore played a central role in the relationship between the publishers and the end users of the Steam video games, which, moreover, it confirmed at the hearing. Thus, the applicant acted as an operator which was fully part of the economic chain for the operation of Steam video games distributed by third-party distributors and involving the use of Steam keys. The fact, relied on by the applicant, that the Steam keys are provided free of charge to the publishers is not such as to call such a finding into question.

51 What is more, as observed by the Commission in recitals 81 to 83 of the contested decision, the applicant, who had concluded Steam distribution agreements with each of the publishers, also sold the video games at issue in the Steam Store and was therefore also active on the market. It is true, as the applicant points out and as stated in paragraph 32 above, that the conduct which is the subject of that decision does not concern the Steam video games sold by the applicant in the Steam Store, but only certain Steam video games, distributed on a tangible or digital medium by third-party distributors by means of Steam keys. However, for the purposes of assessing whether there is an agreement or concerted practice, regard must be had to all the relevant factors, as well as to the economic and legal context specific to each case (see, to that effect, judgment of 10 February 2011, *Activision Blizzard Germany v Commission*, C-260/09 P, EU:C:2011:62, paragraph 72). It cannot be disregarded that the Steam video games sold by third-party distributors were at least in potential competition with the Steam video games sold by the applicant on the Steam platform. Irrespective of the means of

acquisition, users accessed the Steam video games on the Steam platform and had access to the same content and experience.

52 It accordingly follows from the foregoing that the Commission did not err in finding that it could catch the conduct between the applicant and the five publishers under Article 101 TFEU.

– *The concepts of ‘agreement’ and ‘concerted practice’ and the demonstration of a ‘concurrence of wills’*

53 The applicant claims, in essence, that the Commission broadened the scope of the concept of ‘agreement’ and ‘concerted practice’ in finding that there was a concurrence of wills, and thus collusion, between the applicant and each of the five publishers.

54 In that regard, it should first of all be noted that it follows from the case-law set out in paragraphs 43 to 45 above that the existence of an ‘agreement’ or a ‘concerted practice’ is based on the expression of the concurrence of wills of two parties on the principle of a restriction of competition, irrespective of the form in which that concurrence of wills is manifested.

55 Moreover, the case-law draws a distinction 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) TFEU, 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 the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers (judgments of 26 October 2000, *Bayer v Commission*, T-41/96, EU:T:2000:242, paragraph 71, and of 9 July 2009, *Peugeot and Peugeot Nederland v Commission*, T-450/05, EU:T:2009:262, paragraph 173). The Commission cannot, however, hold that apparently unilateral conduct in reality forms the basis of an agreement between undertakings within the meaning of Article 101(1) TFEU, if it does not establish the existence of an acquiescence, express or implied, in that conduct on the part of the other undertakings involved (see, to that effect, judgment of 26 October 2000, *Bayer v Commission*, T-41/96, EU:T:2000:242, paragraph 72).

56 Next, it must be borne in mind that, according to the case-law of the Court, in most cases the existence of a concerted practice or an agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. Consequently, the principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent (see judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraphs 36 and 37 and the case-law cited).

57 Lastly, as a matter of principle, the standard of proof required to establish the existence of an anti-competitive agreement in the framework of a vertical relationship is not higher than that required in the framework of a horizontal relationship. Nevertheless, the fact remains that, for the purposes of assessing whether there is an illegal agreement, regard must be had to all the relevant factors, as well as to the economic and legal context specific to each case. The question whether it can be inferred from certain evidence that an agreement contrary to Article 101(1) TFEU has been concluded cannot therefore be addressed in abstract terms, according to whether the relationship involved is vertical or horizontal, with that evidence being considered separately from the context and the other factors characterising the case (judgment of 10 February 2011, *Activision Blizzard Germany v Commission*, C-260/09 P, EU:C:2011:62, paragraphs 71 and 72).

58 In the present case, as is apparent from paragraphs 34 to 39 above, the Commission found that there was a concurrence of wills between the applicant and each of the five publishers to restrict passive sales, in so far as the applicant had chosen to put in place territorial control functionalities, had informed the publishers of such a possibility, had complied with the publishers’ requests to geo-block the video games at issue, could not have been unaware that the geo-blocked Steam keys were intended



to restrict parallel imports, in particular since it had promoted the use of the geo-blocking for such purposes, and had not indicated that it distanced itself from that practice.

- 59 In particular, it should be noted, first, that the Commission found, in Section 6.1.6 of the contested decision, that the applicant had promoted the possibility of using the geo-blocking of Steam keys for the purpose of restricting parallel imports with the publishers and discussed with them the opportunity to implement that geo-blocking for territories where Steam video games are sold at a lower price and for which parallel import issues could be identified.
- 60 Second, the Commission found, in Sections 6.1.5 and 6.2 of the contested decision, that the applicant had indeed agreed, at the request of the publishers, to provide the geo-blocked Steam keys for the various games in question, which, moreover, the applicant does not dispute. It should be noted in that regard that the applicant itself explained, in the application, that it did not automatically fill requests for Steam keys for a batch of games defined by the publisher, but that it checked the publisher's request beforehand for consistency.
- 61 Moreover, as found by the Commission in recitals 137, 155, 170, 185 and 200 of the contested decision, the applicant's intervention and consent were necessary for the geo-blocking of the Steam keys to be set up. It is common ground that only the applicant was in a position to generate the geo-blocked Steam keys. The applicant was, moreover, free to choose whether or not to comply with the requests to supply geo-blocked Steam keys or to lift the geo-blocking of the Steam keys already provided. For example, as is apparent from recitals 524, 525, 529 and 530 of the contested decision, the applicant refused to implement new restrictions requested by certain publishers whilst maintaining in place other geographical restrictions set up for those publishers. It also unilaterally terminated some of the geographical restrictions (see, for example, recitals 174 and 188 of that decision). That evidence shows clearly that the applicant's participation and consent were necessary for the conduct at issue to be adopted and implemented and that it was, therefore, not unilateral.
- 62 Accordingly, the factors set out in paragraphs 58 to 61 above, taken together, are such as to establish the existence of a concurrence of wills between the applicant and the publishers regarding the implementation of geo-blocking for the purpose of restricting parallel imports and thus as regards the conduct to be adopted on the market.
- 63 It must be held that those elements, taken together, could constitute objective and consistent evidence that the applicant and each of the publishers had intended to restrict parallel imports or, at the very least, that the applicant, after having promoted to publishers the possibility of using geo-blocking to prevent parallel imports, had acquiesced in the requests made by the publishers for geo-blocked Steam keys for the purpose of implementing such a policy of restricting passive sales.
- 64 Contrary to the applicant's contention, the fact that the publishers did not undertake with it to adopt a certain course of conduct on the market, as well as the fact that it did not commit itself to the publishers, even if established, are irrelevant. As is apparent from the case-law referred to in paragraph 43 above, it is not necessary to demonstrate the existence of a formal commitment in order to establish the existence of an agreement or a concerted practice, but solely of a concurrence of wills as to the conduct to be adopted on the market.
- 65 Furthermore, in so far as the applicant criticises the Commission for having broadened the scope of the concept of 'agreement' by introducing the new concepts of 'awareness' of unilateral conduct on the part of a contracting party and 'distancing' from unilateral conduct, it should be noted that, as is apparent from paragraphs 58 to 61 above, the conduct at issue cannot be categorised as 'unilateral conduct'. For the same reasons, the applicant's arguments that the Commission took the case-law on passive modes of participation and acquiescence in a unilateral policy out of context so as to include conduct which is in fact purely unilateral must be rejected.
- 66 Furthermore, as is apparent from paragraphs 55 to 62 above, the Commission did not rely solely on knowledge of the objective pursued by the publishers or on the mere fact that it did not distance itself from that conduct, for the purpose of establishing the existence of an agreement or a concerted practice, but took those factors into account among a number of other factors constituting a body of evidence capable of demonstrating the existence of a concurrence of wills. In the light of the case-law set out in

paragraphs 56 and 57 above, the Commission was entitled to take that evidence into account as part of a body of evidence.

- 67 Moreover, contrary to what the applicant maintains, the Commission did not seek to establish the existence of a concurrence of wills solely on the basis of general knowledge that the geo-blocked Steam keys ‘could’ be used by the publishers for the purpose of restricting parallel imports. On the contrary, as is apparent, in particular, from recitals 109 to 133 and 276 of the contested decision, it based its analysis on specific knowledge of the way in which the publishers used that tool. It relied on the fact that the applicant had proactively raised the possibility of using the geo-blocking of Steam keys in order to limit parallel imports and that it was aware or ought to have been aware of the fact that the requests for geo-blocked Steam keys, specifically referred to in that decision, had been formulated precisely with the aim of restricting passive sales.
- 68 It follows that the factors taken into account by the Commission, without prejudice to the examination of their probative value, which is disputed in the context of the second part of the first plea, are capable of demonstrating the existence of a concurrence of wills between the applicant and each of the publishers.
- 69 That finding cannot be called into question by the applicant’s other arguments.
- 70 First, contrary to what the applicant maintains, it is not apparent from the contested decision that the Commission stated that the case-law on ‘passive modes of participation’, ‘acquiescence to a unilateral policy’ and ‘distancing’ makes it possible to identify a general principle that the provision of technical measures necessary for the implementation of specific conduct unilaterally sufficed to establish concertation. In particular, as is apparent from paragraphs 55 to 68 above, the Commission did take into account the fact that a concurrence of wills relating to the conduct restrictive of competition was necessary for a finding that there was an agreement.
- 71 Second, the applicant submits that the judgments of 6 January 2004, *BAI and Commission v Bayer* (C-2/01 P and C-3/01 P, EU:C:2004:2), and of 26 October 2000, *Bayer v Commission* (T-41/96, EU:T:2000:242), support its position that the Commission could not find that there was a concurrence of wills between it and each of the publishers. In the reply, it adds that the case-law on the ostensibly unilateral conduct at issue in those judgments was developed in the specific factual context of the relationship between a supplier and its distributors, and that the Commission considered, incorrectly, that it could apply it in the present case. Such arguments must be rejected.
- 72 It should be noted in that regard that, as observed by the applicant, it is apparent from the judgment of 6 January 2004, *BAI and Commission v Bayer* (C-2/01 P and C-3/01 P, EU:C:2004:2, paragraphs 101, 102 and 122), that the requirement of establishing a concurrence of wills implies demonstrating that there is a declared intention on the part of the contracting party to endorse the intention of the other contracting party to pursue an anti-competitive object, such as that of preventing parallel imports. However, contrary to what the applicant claims, such a condition is satisfied in the present case. The Commission devoted a part of the contested decision to an analysis of the fact that the applicant had, with the publishers, proactively referred to the possibility of using the geo-blocking of Steam keys to restrict parallel imports from the territories in which the games were sold at a lower price. It therefore sought to establish that the applicant shared the publishers’ objective of preventing parallel imports.
- 73 In addition, contrary to what the applicant claims in the reply, it is apparent from the judgment of 6 January 2004, *BAI and Commission v Bayer* (C-2/01 P and C-3/01 P, EU:C:2004:2, paragraphs 101, 102 and 122), that the requirement that proof be made out of the manifestation of a concurrence of wills between the contracting parties to pursue the joint attainment of an anti-competitive object may be transposed to any vertical relationship between commercial partners and, accordingly, that the scope of that judgment is not limited solely to relations between distributors and suppliers. In that context, the applicant’s arguments that, in accordance with that case-law, a concurrence of wills cannot arise merely because a contracting party implements a technical measure requested by the other contracting party must be rejected.
- 74 The fact that the conduct at issue consists in the implementation of technical measures, such as the geo-blocking of the Steam keys by an undertaking at the request of the other party to the contract, does

not preclude a finding that the contracting parties intended to pursue the joint attainment of an anti-competitive object. It cannot be ruled out that, in certain cases, the implementation of technical measures may reflect a commercial policy on the part of the contracting party, or at least a genuine intention on the part of that party to adhere to the unilateral policy defined by the other undertaking.

- 75 Third, the applicant's argument, to the effect that the case-law cited in recital 245 of the contested decision, relating to adherence to collusive devices which facilitate coordination, is irrelevant to the present case, is ineffective. In that recital, the Commission merely described the different situations in which the existence of a concerted practice may be found. It is not apparent from that decision that the Commission then went on to rely specifically on that case-law in order to find that there was a concerted practice between the applicant and each of the publishers.
- 76 Fourth, the applicant's arguments that the Commission found, incorrectly, that a contracting party's unilateral policy entails concertation solely because a service provider, who is unaware of the existence of concertation between the other contracting party and third parties, participates as a 'facilitator' in its implementation and disregarded the scope of the judgment of 10 November 2017, *Icap and Others v Commission* (T-180/15, EU:T:2017:795), must be rejected as ineffective. In that regard, suffice it to note that the applicant's alleged infringements of Article 101 TFEU concern only the conduct between it and each of the five publishers. Thus, the Commission did not find that the applicant had 'facilitated' agreements between four of the publishers and their third-party distributors. On the contrary, as is clear from recitals 232 to 234 of the contested decision, the Commission found that the applicant was not aware or could not reasonably be expected to have been aware of the fact that the geo-blocked Steam keys were used in addition to clauses restricting parallel imports contained in the distribution agreements concluded by four of the publishers with their third-party distributors.
- 77 Fifth, the applicant claims that the Commission erred in stating that it had acted to protect its own margins in the Steam Store and complains that the Commission failed to carry out a more thorough analysis of its business interests. In that context, it criticises the Commission in particular for having failed to establish that the locking of the Steam keys for the video games at issue prevented erosion of prices in those Member States where prices are high or that of prices in the Steam Store. Those arguments must be rejected as ineffective.
- 78 In that regard, it should be noted that, as stated by the Commission in recital 110 of the contested decision, it is not necessary, for a finding of infringement of Article 101 TFEU, to demonstrate that the undertaking benefits from the infringement. As is apparent from the case-law cited in paragraph 46 above, the text of Article 101(1) TFEU refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition in the internal market, irrespective of the market in which the parties operate, and the commercial conduct of only one of the parties need be affected by the terms of the arrangements in question. Moreover, in the context of an agreement whose object was to restrict competition, it makes no difference, as regards the existence of the infringement, whether or not the conclusion of the agreement was in the commercial interest of the parties (see, to that effect, judgment of 25 January 2007, *Sumitomo Metal Industries and Nippon Steel v Commission*, C-403/04 P and C-405/04 P, EU:C:2007:52, paragraphs 44 and 45).
- 79 Sixth, the applicant complains that the Commission failed to take account of the publishers' autonomy in managing the Steam video games. It claims that its role was limited to the technical implementation of the conduct at issue and that it did not play an essential role in determining the conduct per se (choice of territories, duration, etc.), which was determined unilaterally by each of the publishers. However, even if it were established that it was the publishers that decided on the 'content' of the conduct or, in other words, the parameters of the restrictions on passive sales, that fact is irrelevant for the purposes of the application of Article 101 TFEU, since the Commission was able to establish that the applicant had promoted that conduct, and then that it had freely provided the geo-blocked Steam keys in full knowledge of the fact that the publishers requested them for the purpose of restricting passive sales. It matters little who caused the conduct at issue, since a concurrence of wills can be established between the participants in the cartel (see, to that effect, judgment of 27 July 2005, *Brasserie nationale v Commission*, T-49/02 to T-51/02, EU:T:2005:298, paragraph 130).

80 Seventh, the applicant claims that the existence of a contractual framework between it and the publishers is not sufficient to establish an ‘agreement’ to restrict parallel trade. Such an argument is ineffective, however, since, as is apparent in particular from recitals 137, 155, 170, 185 and 200 of the contested decision, the Commission did not base proof of the existence of an agreement or a concerted practice solely on the contractual provisions governing the relations between the applicant and the publishers.

81 In the light of the foregoing, the first part of the first plea in law must be rejected.

*Second part of the first plea: incorrect assessment by the Commission of the evidence concerning the applicant and each of the five publishers*

82 The applicant claims that the evidence on which the Commission based itself does not establish to the requisite legal standard the existence of an agreement with each of the publishers. It submits in particular that the Commission stated, incorrectly, that it had engaged in promotion with the five publishers and proactively raised the possibility of geo-blocking the Steam keys in order to restrict passive sales. It maintains that the Commission erred in its assessment of the facts, relying on an incorrect, selective reading of just 13 documents, namely a Steamworks presentation and 12 e-mail exchanges between it and the five publishers about those keys for specific games amounting to only a few of those targeted by the contested decision.

83 The applicant disputes, for each of the five publishers, the probative value of the evidence examined by the Commission in Section 6.1.6 of the contested decision. It argues in particular that the publishers clearly informed the Commission, during the course of the administrative procedure, that the locking of Steam keys was a unilateral decision taken on their initiative and not that of the applicant. It submits that that much is also clear from the e-mail exchanges taken into account by the Commission, in which it did no more than respond to questions and requests for information from the publishers or ask routine questions in order to identify their needs. The applicant also argues that some of the documents taken into account by the Commission have no probative value, since they either concern areas outside the EEA or make no mention of the EEA and relate to only one or two games from each publisher. Lastly, it considers that the Steamworks service presentations do not in any way prove that it promoted the possibility of using geo-blocking in the EEA to restrict parallel imports and preserve margins.

84 The Commission disputes the applicant’s arguments.

85 In the present case, as is apparent from paragraphs 34 to 39 and 58 above, the Commission found that there was a concurrence of wills between the applicant and each of the five publishers to restrict passive sales of the video games at issue, in so far as the applicant had chosen to put in place territorial control functionalities, had informed the publishers of such a possibility, had complied with the publishers’ requests to geo-block the video games at issue, could not have been unaware that the geo-blocked Steam keys were intended to restrict parallel imports, in particular since it had promoted the use of the geo-blocking for such purposes, and had not indicated that it distanced itself from that practice. Thus, the reasoning on the basis of which the Commission concluded that there was a concurrence of wills between the applicant and each of the publishers is based, inter alia, on the finding that the applicant had agreed to provide the geo-blocked Steam keys, when it knew or could not have been unaware that those keys were being used for the purpose of restricting passive sales and thus parallel imports of the video games at issue.

86 As set out in paragraph 68 above, although such reasoning is capable of demonstrating that the applicant shared the publishers’ intention to prevent parallel imports, it is still necessary for the evidence taken into account by the Commission to establish that the applicant had indeed agreed to geo-block the video games at issue for the territories concerned, in the knowledge that the publishers were requesting the geo-blocked Steam keys with the objective of restricting passive sales.

87 The applicant does not dispute that it provided the geo-blocked Steam keys at the publishers’ request. It denies only having ‘agreed’ to geo-block the Steam keys in order to restrict parallel trade in the EEA, in full knowledge of that objective. Thus, it challenges principally the Commission’s analysis of the evidence set out in Section 6.1.6 of the contested decision and the finding that it promoted the possibility of using the geo-blocking of Steam keys to restrict parallel imports.

- 88 As a preliminary point, in so far as the applicant makes a general complaint that the Commission failed to comply with its duty of diligence by conducting a selective analysis of the evidence by basing the reasoning in Section 6.1.6 of the contested decision on 13 documents from among the thousands of documents in the file, the Court finds that the applicant merely identifies, among those thousands of documents which the Commission allegedly failed to take into account, about 10 documents. Those are statements made by the publishers during the administrative procedure, in which they stated that they decided unilaterally to implement the geographical restrictions for the video games at issue, as well as the evidence referred to in that decision confirming that it was the publishers who made requests for locking of the Steam keys.
- 89 First, the fact that the publishers explained that they had decided unilaterally to implement policies restricting passive sales is not incompatible with the existence of an agreement or concerted practice within the meaning of Article 101 TFEU. As stated in paragraph 61 above, the applicant's intervention and consent were necessary for the implementation of the geo-blocking of the Steam keys. Furthermore, as stated in paragraph 55 above, in the context of the examination of the first part of the present plea, a measure which is only ostensibly unilateral falls within the scope of Article 101 TFEU if it is established that an undertaking acquiesced, tacitly or expressly, in the conduct determined by the other party to the contract. Second, as is apparent from paragraph 77 above, the fact that the publishers were at the origin of the requests for geo-blocking of the Steam keys, even if proven, is not decisive.
- 90 As a further preliminary point, it should be noted that, contrary to what the applicant claims, it was not necessary for the evidence set out in Section 6.1.6 of the contested decision, showing that it was directly aware of the objective underlying the publishers' requests for the geo-blocked Steam keys, to relate to all the video games at issue or to the territory of the EEA.
- 91 It should be noted in that regard that, as stated in paragraph 56 above, the existence of a concerted practice or an agreement must, in most cases, be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. Although the Commission must produce firm, precise and consistent evidence in order to establish that there has been an infringement, it must be borne in mind that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by that institution, viewed as a whole, meets that requirement (see judgment of 26 January 2017, *Commission v Keramag Keramische Werke and Others*, C-613/13 P, EU:C:2017:49, paragraph 52 and the case-law cited, and judgment of 12 July 2018, *NKT Verwaltungs and NKT v Commission*, T-447/14, not published, EU:T:2018:443, paragraph 108).
- 92 Provided that it has been well established, first, for each of the video games at issue, that the applicant had responded positively to the publishers' requests and had provided them with geo-blocked Steam keys and, second, that the applicant had promoted the possibility of using geo-blocking to restrict passive sales with a publisher, so that it was aware of that publisher's expressed intention to use geo-blocking to restrict parallel imports, the Commission was fully entitled to draw the conclusion that the applicant was aware or ought to have been aware of the fact that the requests relating to other games also pursued that objective. Such conclusions could a fortiori be drawn since there were no other possible reasons justifying the requests, in particular since the requests did not relate to territories for which there were justifications relating to local rules. It was therefore not necessary for the evidence presented by the Commission in Section 6.1.6 of the contested decision to concern all the video games at issue, since other evidence, such as that relating to orders for geo-blocked Steam keys, makes it possible to establish that the restrictions on parallel imports did concern those games.
- 93 For the same reasons as those set out in paragraphs 90 to 92 above, the Court finds that it was not necessary for each piece of evidence submitted by the Commission to concern the territory of the EEA, since other evidence, such as that relating to orders for geo-blocked Steam keys, makes it possible to establish that the restrictions on parallel imports related to the territory of the EEA.
- 94 It is in the light of those considerations that it is appropriate to examine whether the evidence gathered by the Commission made it possible to establish the existence of a concurrence of wills between the

applicant and each of the five publishers for the purpose of restricting imports of the video games at issue originating from the territories concerned.

– *Bandai*

- 95 As regards the agreement or concerted practices between the applicant and Bandai, the conduct identified by the Commission relates to five Steam video games published by Bandai in the territory of four Member States: the Czech Republic, Hungary, Poland and Slovakia.
- 96 In the first place, the Commission found, in Sections 6.1.6.2 and 6.1.6.7 of the contested decision, that the applicant had actively raised the possibility of using geo-blocking to prevent parallel imports of Steam video games and that it knew or ought to have known that geo-blocked keys were being requested for the purpose of restricting passive sales of those games. It based that finding on two e-mail exchanges and a presentation of Steamworks services sent to Bandai on 10 June 2013.
- 97 First of all, as outlined by the Commission in recital 113 of the contested decision, the e-mail exchange of 5 January 2012 followed an e-mail from Bandai stating its intention to geo-block the Steam keys for the ‘Ridge Racer Unbounded’ game, without specifying the territories concerned. In response to that e-mail, the applicant had stated that if Bandai ‘plan[ned] to have significantly lower prices in certain regions, [it] recommend[ed] locking the [Steam] keys to only activate in those regions’. In addition, it is apparent from that exchange that the applicant had indicated that it was available to ‘talk through any regions [that Bandai thought] might require region locking to make sure we have a good plan’. In addition, the request for geo-blocking of the Steam keys for that game, intended for the Czech Republic, Hungary, Poland and Slovakia, was made on 12 March 2012, that is to say, after the e-mail exchange of 5 January 2012 in which the applicant discussed with Bandai the possibility of geo-blocking certain Steam keys in order to restrict parallel imports.
- 98 Next, as observed by the Commission in recital 114 of the contested decision, it is apparent from the exchanges of 19 June 2012 that the applicant had indicated, in response to a request for information from Bandai, that geo-blocking was recommended in order to avoid parallel imports and had suggested the possibility of applying those restrictions to Eastern Europe. Contrary to what the applicant maintains, it did not, in the exchanges of 19 June 2012, merely report that geo-blocking was generally used for the countries of Eastern Europe, it actually advised putting it in place for that area. Furthermore, it is worth noting that, as those exchanges continued, Bandai informed the applicant of its request for a batch of geo-blocked Steam keys, called ‘Eastern’, for the Czech Republic, Hungary, Poland and Slovakia, for the ‘Inversion’ game.
- 99 It must therefore be held that it is clear from the e-mail exchanges of 5 January and 19 June 2012 that the applicant proactively recommended that Bandai put in place geographical restrictions to hinder parallel imports, and that it was aware of the anti-competitive object being pursued by that publisher.
- 100 Lastly, as regards the presentation on the Steamworks services, as observed by the Commission in recital 115 of the contested decision, the fact that the reference to ‘no more ... grey marketing’ appeared in the context of presenting the territorial control function is an indication that the applicant was promoting the use of that function for the purpose of restricting passive sales. The applicant’s argument to the effect that it was perfectly legitimate for it, as a service provider and operator of the gaming platform, to provide technical measures to protect the publisher’s copyright cannot be upheld. In the light of the other evidence submitted by the Commission, the latter was justified in asserting that, in referring to ‘grey marketing’, the applicant was indeed referring to the possibility of limiting the impact of sales in territories where prices are lower and not only to the provision of technical measures to safeguard copyright. Thus, it did not err in taking that presentation into account from among the items of evidence constituting the body of evidence.
- 101 It follows that, contrary to the applicant’s assertions, the evidence set out in Section 6.1.6.2 of the contested decision clearly shows that it had expressly raised with Bandai the possibility of using geo-blocking to restrict parallel imports and, therefore, that it was aware of and shared Bandai’s objective of restricting passive sales.

- 102 In the second place, the Commission set out, in Section 6.2.1 of the contested decision, the evidence establishing that the applicant had indeed provided geo-blocked Steam keys for the Czech Republic, Hungary, Poland and Slovakia, for the five video games at issue published by Bandai. The applicant does not dispute that evidence.
- 103 Accordingly, in the light of the considerations set out in paragraphs 88 to 94 above, it is clear that, taken together, the various items of evidence submitted by the Commission constitute a firm, precise and consistent body of evidence making it possible to establish a concurrence of wills between the applicant and Bandai to restrict passive sales for the games at issue within the EEA. Accordingly, the Commission has established to the requisite legal standard the existence of an agreement or concerted practice between the applicant and Bandai having as its object the restriction of parallel imports.
- 104 None of the arguments put forward by the applicant is capable of calling that conclusion into question.
- 105 First, for the reasons set out in paragraph 88 above, the fact that Bandai stated, during the administrative procedure, that it had decided unilaterally on geographical restrictions is not such as to call into question the Commission's analysis. Similarly, the fact that the e-mail exchanges on which the Commission relied took place following a request for information from Bandai or that it was Bandai which determined the list of territories covered by the geographical restrictions is not such as to call into question the fact that the applicant knew or ought to have known what the reason behind Bandai's requests was.
- 106 Second, as is apparent from paragraph 79 above, the question of which party instigates the anti-competitive conduct is not relevant for the purposes of establishing an agreement within the meaning of Article 101 TFEU. In any event, it should be noted that, as is apparent from paragraphs 97 and 98 above, the e-mails in which the applicant raised the possibility of geo-blocking the Steam keys in order to restrict parallel imports pre-dated those in which Bandai had informed the applicant of its decision to geo-block those keys.
- 107 Third, the applicant's arguments that the evidence submitted by the Commission concerning Bandai does not relate to the EEA must be rejected. First, contrary to what the applicant claims, the e-mail exchange of 19 June 2012 does indeed relate to the EEA in so far as those e-mails refer to the use of geo-blocking for Eastern Europe. The batch of geo-blocked Steam keys, requested by Bandai, following those exchanges, for the Czech Republic, Hungary, Poland and Slovakia was entitled 'Eastern'. It must therefore be held that the reference to Eastern Europe indeed referred to the territory of the EEA. Second, the fact that the e-mail exchange of 5 January 2012 does not refer to the territory of the EEA, but that those e-mails deal, in general terms, with parallel imports, is not sufficient to reject that evidence. As held in paragraph 93 above, it is not necessary for each piece of evidence submitted by the Commission to concern the territory of the EEA, since it may be inferred from the body of evidence gathered by the Commission that the parties indeed intended to restrict parallel imports within the EEA. As observed by the Commission in recital 113 of the contested decision, the evidence set out in Section 6.2.1.3 of that decision makes it possible to establish that geo-blocked Steam keys for the Czech Republic, Hungary, Poland and Slovakia were actually provided for the 'Ridge Racer Unbounded' game following that exchange of e-mails of 5 January 2012.
- 108 Consequently, the applicant's complaint that the Commission has not established to the requisite legal standard the existence of a concurrence of wills and, therefore, of an agreement or, in any event, concerted practices between the applicant and Bandai, must be rejected.

– *Capcom*

- 109 As regards the agreement or concerted practices between the applicant and Capcom, the conduct identified by the Commission relates to five Steam video games published by Capcom and to the territory of eight Member States: the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Romania and Slovakia.
- 110 In the first place, the Commission found, in Sections 6.1.6.3 and 6.1.6.7 of the contested decision, that the applicant had occasionally proactively raised the possibility of using territorial control with Capcom and that it knew or ought to have known that geo-blocked keys were being used for the

purpose of restricting passive sales. It based that conclusion on three e-mail exchanges between the applicant and Capcom and a presentation of the Steamworks services provided to Capcom on 2 July 2013.

- 111 First of all, as stated by the Commission in recital 116 of the contested decision, it is indeed apparent from the e-mail exchanges of 5 December 2012 that the applicant had explicitly asked Capcom whether there was a need for geo-blocking in connection with territories where sales prices are lower, such as Russia. The fact that only Russian territory was mentioned does not call into question the relevance of that evidence, since it is clear from that exchange that it is merely one example. Similarly, the fact referred to by the applicant that it was merely asking routine questions is not such as to call into question the relevance of that exchange for the purpose of establishing that it had actively raised the issue of geo-blocking with Capcom. On the contrary, as noted by the Commission in recital 116 of the contested decision, the e-mail exchange of 5 December 2012 shows clearly that the applicant was in the habit of asking publishers whether they wanted to introduce geo-blocking for territories where the sale prices of video games are lower.
- 112 Next, as observed by the Commission in recital 117 of the contested decision, in an exchange of e-mails of 7 January 2014, the applicant indicated to Capcom, in the context of the launch of the game 'Resident Evil 4', that a geo-blocked pack 'Russia/CIS' could be useful if the products were sold there at a lower price and if Capcom wanted to prevent parallel imports. As observed by the Commission in that decision on the basis of an internal e-mail from the applicant, the term 'CIS' includes in that context, inter alia, Estonia, Latvia and Lithuania, which the applicant does not dispute. In addition, the applicant's e-mail of 7 January 2014 follows on from Capcom's statement that Capcom ultimately wished to have a single global batch for the launch of the PC video game in question.
- 113 Lastly, as stated by the Commission in recital 118 of the contested decision, in an exchange of e-mails of 7 February 2013, the applicant stated, in response to a question from Capcom, that it recommended that geo-blocking be activated for use if the prices of video games were significantly lower in Poland. It added that that 'prevents someone from loading a truck full of games in Poland and driving them to Germany for sale or the digital equivalent in online sales'. Contrary to what the applicant maintains, in those exchanges it did not confine itself to commenting on the reasons for Capcom's requests. On the contrary, it indeed proactively formulated recommendations. In that context, the fact that they were made in response to a request from Capcom is irrelevant. In any event, those e-mail exchanges demonstrate unequivocally that the applicant was well aware of the fact that the geo-blocking of the Steam keys, requested by Capcom, had as its object the restriction of parallel imports.
- 114 In addition, as observed by the Commission in recital 118 of the contested decision, the evidence set out in Section 6.2.2.3 of that decision makes it possible to establish that geo-blocked Steam keys for the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland and Slovakia were actually provided for the 'Resident Evil 6' game as a result of the exchange of 7 February 2013.
- 115 It is therefore clear from the e-mail exchanges examined in paragraphs 111 to 113 above and, in particular, from the e-mail of 7 February 2013, that the applicant proactively recommended that Capcom introduce geographical restrictions to restrict parallel imports and that it was aware of the objective pursued.
- 116 As regards the presentation of Steamworks services, referred to in recital 119 of the contested decision, for the same reasons as those set out in paragraph 100 above, it must be held that the Commission did not err in taking that document into account among the other items of evidence comprising the body of evidence.
- 117 It follows that, contrary to the applicant's assertions, the evidence set out in Section 6.1.6.3 of the contested decision clearly shows that it had expressly raised with Capcom the possibility of using geo-blocking to restrict parallel imports and, therefore, that it was aware of and shared Capcom's objective of restricting passive sales.
- 118 In the second place, the Commission set out, in Section 6.2.2 of the contested decision, the evidence establishing that the applicant had provided geo-blocked Steam keys for the Czech Republic, Estonia,



Latvia, Lithuania, Hungary, Poland, Romania and Slovakia for the five video games at issue published by Capcom. The applicant does not dispute that evidence.

- 119 Accordingly, in the light of the evidence contained in paragraphs 88 to 94 above, it must be held that, taken together, the evidence set out in Sections 6.1.6.3 and 6.2.2 of the contested decision constitutes a firm, precise and consistent body of evidence making it possible to establish a concurrence of wills between the applicant and Capcom to restrict passive sales for the games in question within the EEA. Accordingly, the Commission has established to the requisite legal standard the existence of an agreement or concerted practice between the applicant and Capcom having as its object the restriction of parallel imports.
- 120 None of the arguments put forward by the applicant is capable of calling that conclusion into question. In particular, for the reasons set out in paragraph 88 above, the fact that Capcom stated, during the administrative procedure, that it had decided unilaterally on geographical restrictions is not such as to call into question the Commission's analysis. Similarly, the fact that the e-mail exchanges on which the Commission relied took place following a request for information from Capcom or that it was Capcom which determined the list of territories covered by the geographical restrictions is not such as to call into question the fact that the applicant referred to the possibility of restricting parallel imports with Capcom and knew or could not have been unaware of the reason for Capcom's requests for geo-blocked keys. Moreover, as is apparent from paragraph 79 above, the question of which party instigates the anti-competitive conduct is not relevant for the purposes of establishing an agreement within the meaning of Article 101 TFEU.
- 121 In the light of the foregoing considerations, the applicant's complaint that the Commission has not established to the requisite legal standard the existence of a concurrence of wills and, therefore, of an agreement or, in any event, of concerted practices between the applicant and Capcom must be rejected.

– *Focus Home*

- 122 As regards the agreement or concerted practices between the applicant and Focus Home, the conduct identified by the Commission relates to 19 Steam video games published by Focus Home, including the 'Magrunner' game, covering the territory of five Member States, namely, according to the games in question, Estonia, Latvia, Lithuania, Hungary and Poland.
- 123 In the first place, the Commission found, in Sections 6.1.6.4 and 6.1.6.7 of the contested decision, that the applicant had occasionally proactively raised the possibility of using territorial control with Focus Home and that it knew or ought to have known that the geo-blocked keys were being used for the purpose of restricting passive sales. It based that conclusion on two e-mail exchanges between the applicant and Focus Home and a presentation of Steamworks services provided to Focus Home on 26 July 2013.
- 124 First of all, as stated by the Commission in recital 120 of the contested decision, it is indeed apparent from the exchanges of 19 and 20 June 2013 concerning the 'Magrunner' video game that the applicant suggested that Focus Home geo-block the Steam keys for Poland both for activation and use as a means of resolving its concerns in relation to parallel imports and, therefore, that it was aware of the objective pursued by Focus Home. In particular, it is apparent from those exchanges that Focus Home expressly confirmed to the applicant that the purpose of its request was to restrict parallel imports due to differences in the sale prices of games between Poland and certain Western European countries. As noted by the Commission, the applicant clearly indicated to Focus Home that it wanted 'to help [Focus Home] solve [its] grey market concerns' and that it '[had] a lot of experience dealing with these issues'. It was following those clarifications that the applicant suggested to Focus Home that it geo-block the Steam keys for activation and use.
- 125 Similarly, as observed by the Commission in recital 123 of the contested decision, in the exchanges of 13 September 2013, the applicant suggested to Focus Home, following a request for geo-blocked Steam keys for the 'Cities XL Platinum', 'Of Orcs and Men' and 'A Game of Thrones' games, that the publisher did not have to concern itself with parallel imports since it geo-blocked the keys. It is therefore clear from the e-mail exchanges of 19 and 20 June 2013 and of 13 September 2013 that the

applicant had proactively recommended to Focus Home that it put in place geographical restrictions to restrict parallel imports.

- 126 That conclusion is not called into question by the applicant's arguments that it was concerned about the language restrictions requested by Focus Home and that the main objective of its exchange was to provide its users with a satisfactory experience. Although it cannot be ruled out that the applicant may also pursue such an objective, the fact remains that it expressly raised with Focus Home the possibility of using geo-blocking to combat parallel imports.
- 127 Lastly, as regards the presentation of Steamworks services, referred to in recital 124 of the contested decision, it must be held that such a document is not capable of demonstrating that the applicant had raised the possibility of using geo-blocking for the purpose of restricting parallel imports. First, the Commission merely found that the presentation referred to the territorial control function. Secondly, that presentation contained very general and limited information and made no mention of the possibility of using those functions for the purpose of restricting parallel imports. However, that finding is not such as to call into question the probative value of the other evidence gathered by the Commission, in particular the e-mail exchanges.
- 128 It follows that, contrary to what the applicant claims, the evidence set out in Section 6.1.6.4 of the contested decision, and in particular the e-mail exchanges, clearly shows that it had expressly raised with Focus Home the possibility of using the geo-blocking to restrict parallel imports and that it was thus aware of the objective pursued by Focus Home of restricting parallel imports and shared it.
- 129 In the second place, the Commission set out, in Section 6.2.3 of the contested decision, the evidence establishing that the applicant had indeed provided geo-blocked Steam keys for Estonia, Latvia, Lithuania and Poland for the 19 video games at issue published by Focus Home. The applicant does not dispute that evidence.
- 130 Accordingly, in the light of the evidence contained in paragraphs 88 to 94 above, it must be held that, taken together, the evidence set out in Sections 6.1.6.4 and 6.2.3 of the contested decision constitutes a firm, precise and consistent body of evidence making it possible to establish a concurrence of wills between the applicant and Focus Home with a view to restricting parallel imports for the games at issue within the EEA. Accordingly, the Commission has established to the requisite legal standard the existence of an agreement or concerted practice between the applicant and Focus Home having as its object the restriction of parallel imports.
- 131 None of the arguments put forward by the applicant is capable of calling that conclusion into question. In particular, for the reasons set out in paragraph 88 above, the fact that Focus Home stated, during the administrative procedure, that it had decided unilaterally on geographical restrictions is not such as to call into question the Commission's analysis. Similarly, the fact that the e-mail exchanges on which the Commission relied took place following a request for geo-blocked Steam keys from Focus Home or that it was Focus Home which determined the list of territories covered by the geographical restrictions is not such as to call into question the fact that the applicant knew or could not have been unaware of the reason behind Focus Home's requests. As is apparent from paragraph 79 above, the question of which party instigates the anti-competitive conduct is not relevant for the purposes of establishing an agreement within the meaning of Article 101 TFEU.
- 132 In the light of the foregoing, the Court must reject the applicant's complaint that the Commission has not established to the requisite legal standard the existence of a concurrence of wills and, therefore, of an agreement or, in any event, of concerted practices between the applicant and Focus Home.

– *Koch Media*

- 133 As regards the agreement or concerted practices between the applicant and Koch Media, the conduct identified by the Commission related to five Steam video games published by Koch Media, including the 'Dead Island' and 'Metro Last Night' games in the territory of five Member States, namely, according to the games in question, the Czech Republic, Hungary, Poland, Slovakia and the United Kingdom.

- 134 In the first place, the Commission found, in Sections 6.1.6.5 and 6.1.6.7 of the contested decision, that the applicant had occasionally proactively raised the possibility of using territorial control with Koch Media and that it knew or ought to have known that the geo-blocked keys were being used for the purpose of restricting passive sales. It based that conclusion on three e-mail exchanges between the applicant and Focus Home and on two presentations of Steamworks services provided to Koch Media on 13 March 2012.
- 135 First of all, as noted by the Commission in recital 125 of the contested decision, it is indeed apparent from the e-mail exchange of 18 March 2011 that Koch Media had indicated to the applicant, with a view to launching the ‘Dead Island’ game, that it intended to request separate batches of Steam keys for Western Europe (Germany, Spain, France and Italy), the United Kingdom and Eastern Europe (including Russia) because of lower sales prices in those latter countries. In response to that request, the applicant proposed creating two separate batches for Russia and the CIS, on the one hand, and for Eastern Europe on the other, a recommendation which was, moreover, followed by Koch Media in its requests for Steam keys. Furthermore, as noted by the Commission in recital 126 of that decision, it is clear that the applicant was well aware that the geo-blocking covered EEA territories. In its exchanges with Koch Media, the applicant clearly distinguished between the ‘Russia/CIS’ batch, the ‘Eastern Europe’ batch and the ‘United Kingdom’ batch. Given that the applicant subsequently provided Koch Media with a batch of geo-blocked Steam keys for the Czech Republic, Hungary, Poland and Slovakia and a batch of geo-blocked Steam keys for Russia, it can be inferred that the ‘Eastern Europe’ batch concerned those EEA Member States.
- 136 Next, as stated by the Commission in recitals 127 and 128 of the contested decision, on 17 May 2013 the applicant contacted, on its own initiative, Koch Media to inform it that a third-party distributor was selling two of its video games, namely ‘Metro Last Night’ and ‘Dead Island Riptide’, at very low prices. Koch Media, who was concerned that the facts as reported were harmful to sales on Steam, asked the applicant for advice. In that context, in an e-mail of 21 May 2013, the applicant proposed to Koch Media the introduction of geographical restrictions on activation for the territories from where the parallel imports were originating.
- 137 Moreover, as noted by the Commission in recital 129 of the contested decision, following on from those exchanges and internal exchanges of Koch Media indicating that the applicant could geo-block the Steam keys for the territory of ‘Eastern Europe’ (e-mails of 23 and 25 May 2013), the applicant further confirmed that it ‘[could] definitely help to restrict retail keys to only being activated in their specific set of territories to cut down on grey marketing’.
- 138 It is therefore clear from the e-mail exchanges of 18 March 2011 and May 2013 that the applicant had proactively recommended to Koch Media that it put in place geographical restrictions to restrict parallel imports. Contrary to what the applicant maintains, the fact that Koch Media had already envisaged introducing restrictions on activation and that it had itself decided on the territory cannot call those findings into question. In any event, it is clear from the e-mail exchanges with Koch Media that the applicant was aware of the fact that the requests for geo-blocked Steam keys for the Czech Republic, Hungary, Poland, Slovakia and the United Kingdom were aimed at restricting parallel imports.
- 139 Lastly, as regards the presentations of the Steamworks services, referred to in recital 130 of the contested decision, the Commission merely stated that the presentations referred to the territorial control function. The presentations thus contain very general and limited information and make no mention of the possibility of using those functions for the purpose of restricting parallel imports. However, that circumstance is not such as to call into question the probative value of the other evidence gathered by the Commission, in particular the e-mail exchanges.
- 140 It follows that, contrary to the applicant’s assertions, the evidence set out in Section 6.1.6.5 of the contested decision clearly shows that it had expressly raised with Koch Media the possibility of using geo-blocking to restrict parallel imports and, therefore, that it was aware of and shared Koch Media’s objective of restricting passive sales.

- 141 In the second place, the Commission set out, in Section 6.2.4 of the contested decision, the evidence establishing that the applicant had indeed provided, for the five video games at issue published by Koch Media, geo-blocked Steam keys for the Czech Republic, Hungary, Poland, Slovakia and, in the case of one of those games, the United Kingdom. The applicant does not dispute that evidence.
- 142 Accordingly, it must be held that, taken together, the evidence set out in Sections 6.1.6.5 and 6.2.4 of the contested decision constitutes a firm, precise and consistent body of evidence which makes it possible to establish a concurrence of wills between the applicant and Koch Media for the purpose of restricting passive sales for the games at issue within the EEA. Accordingly, the Commission has established to the requisite legal standard the existence of an agreement or concerted practice between the applicant and Koch Media having as its object the restriction of parallel imports.
- 143 None of the arguments put forward by the applicant is such as to call that conclusion into question. In particular, for the reasons set out in paragraph 88 above, the fact that Koch Media stated, during the administrative procedure, that it had decided on its own initiative on geographical restrictions and had already communicated that decision to the applicant is not such as to call into question the Commission's analysis. Similarly, the fact that, in response to requests for advice and information from Koch Media, the applicant raised the possibility of using the geo-blocking of the Steam keys to restrict parallel imports is not such as to call into question the finding that it was aware of the reason behind that publisher's requests. Second, as is apparent from paragraph 79 above, the question of which party instigates the anti-competitive conduct is not relevant for the purposes of establishing an agreement within the meaning of Article 101 TFEU.
- 144 Furthermore, contrary to what the applicant maintains, the fact that it did not object to Koch Media's requests does indeed establish the existence of a concurrence of wills between those two undertakings. As stated in paragraph 59 above, the applicant's intervention and consent were necessary for the implementation of the geo-blocking of the Steam keys. Thus, the fact that the applicant agreed to supply geo-blocked Steam keys even though it was aware, and had even recommended, the use of those keys for the purpose of restricting parallel imports did indeed make it possible to establish a concurrence of wills to implement restrictions on passive sales. Even if it were established that the applicant was not in a position to decide on the geo-blocking of the Steam keys of its own volition, that fact would not call that finding into question. On the contrary, it tends to show that an agreement between the applicant and Koch Media was necessary in order to geo-block the Steam keys and restrict parallel imports.
- 145 In the light of the foregoing, the applicant's complaint that the Commission has not established to the requisite legal standard the existence of a concurrence of wills and, therefore, of an agreement or, in any event, concerted practices between the applicant and Koch Media must be rejected.

– *ZeniMax*

- 146 As regards the agreement or concerted practices between the applicant and ZeniMax, the conduct identified by the Commission relates to five Steam video games published by ZeniMax on the territory of eight Member States, according to the games at issue: the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia and Romania.
- 147 In the first place, the Commission found, in Sections 6.1.6.6 and 6.1.6.7 of the contested decision, that the applicant had occasionally proactively raised the possibility of using territorial control with ZeniMax and that it knew or ought to have known that the geo-blocked keys were being used for the purpose of restricting passive sales. It based that conclusion on two e-mail exchanges between the applicant and ZeniMax and on a presentation on Steamworks provided to ZeniMax in January 2014.
- 148 As stated by the Commission in recital 131 of the contested decision, it is indeed apparent from the e-mail exchanges of 2 September 2010 that the applicant had indeed raised with ZeniMax the possibility of geo-blocking Steam keys for territories such as Russia, where prices are low. In those exchanges, the applicant informed ZeniMax that, with certain exceptions, it recommended that the Steam keys be capable of activation without any territorial restriction. As regards those exceptions, the applicant stated, for example, that 'if you are selling a low price version in a territory like Russia, we would set up those keys to only activate in that territory'.

- 149 Similarly, in an exchange of e-mails of 29 June 2010, referred to in footnote 167 of the contested decision, the applicant stated to ZeniMax that the main reason for the geo-blocking was to prevent parallel imports of its video games, in the context of which they would probably be sold at very low prices. It added that, for example, it created specific Steam keys for its own games, which could be activated only in Russia.
- 150 The fact, referred to by the applicant, that the e-mail exchanges of 29 June 2010 and 2 September 2010 mention the possibility of geo-blocking in order to limit parallel imports solely in connection with the territory of Russia does not call into question the probative value of the evidence. First, it is clear from the exchanges in question that Russia was identified only as an example and that the applicant did indeed recommend, more generally, using geo-blocking for those territories where games were sold at lower prices in order to avoid parallel imports into territories where sales prices are higher. Second, as stated in paragraph 93 above, it is not necessary for each piece of evidence submitted by the Commission to concern the territory of the EEA, since it may be inferred from the body of evidence gathered by the Commission that the parties indeed intended to restrict parallel imports within the EEA. In Section 6.2.5 of the contested decision, the Commission submitted several other items of evidence showing that ZeniMax had requested the geo-blocking of Steam keys for several EEA territories, namely the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia and Romania, and that the applicant had indeed agreed, following those requests, to provide the geo-blocked Steam keys. There was, however, no apparent justification for the geo-blocking of those keys, other than the lower prices charged in those territories.
- 151 Furthermore, the fact, referred to by the applicant, that it is apparent from the e-mail exchange of 29 June 2010 that it advised against geo-blocking the Steam keys for several EU countries also does not call into question the probative value of that document. In that exchange of e-mails, the applicant merely recommended not to geo-block a specific batch of Steam keys ‘in various EU countries’, on the ground that those keys concerned users who were ‘paying close to the same price’. It is apparent from the list of territories accompanying the e-mail exchange of 29 June 2010 that the Steam keys referred to in those exchanges were intended solely for Spain, France, Italy, Austria, the United Kingdom, the ‘Nordic countries’ and the ‘Benelux countries’. The Steam keys concerned by that e-mail exchange were therefore not intended to be sold in the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia and Romania. It is thus apparent from that exchange that the applicant advised against geo-blocking for the territory of the European Union in that specific case only because such geo-blocking was not useful for the purposes of combating parallel imports.
- 152 In addition, even if the interpretation of the exchanges of 29 June 2010 proposed by the applicant could be accepted, it must be noted that, as is apparent from paragraph 150 above, the applicant did indeed provide geo-blocked Steam keys for the territories within the EEA, whereas, as held in paragraph 59 above, it was perfectly able to refuse to do so.
- 153 Lastly, as regards the presentation of the Steamworks services, referred to in recital 132 of the contested decision, the Commission merely stated that that presentation mentioned the territorial control function. The presentation thus contains very general and limited information and makes no mention of the possibility of using those functions for the purpose of restricting parallel imports. However, that circumstance is not such as to call into question the probative value of the other evidence gathered by the Commission, in particular the e-mail exchanges.
- 154 In the second place, in Section 6.2.5 of the contested decision, the evidence establishes that the applicant had agreed to provide geo-blocked Steam keys for the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia and Romania for the five video games at issue, published by ZeniMax, evidence which the applicant does not dispute.
- 155 It must be held, in the light of the evidence referred to in paragraphs 88 to 94 above, that, taken together, the evidence presented in Sections 6.1.6.6 and 6.2.5 of the contested decision constitutes a firm, precise and consistent body of evidence making it possible to establish that the applicant had promoted the possibility of using the geo-blocking of Steam keys for the purpose of restricting parallel imports and that it was aware of the fact that ZeniMax’s requests for Steam keys were aimed at restricting parallel imports in the EEA. Accordingly, the Commission has established to the requisite

legal standard the existence of an agreement or concerted practice between the applicant and ZeniMax having as its object the restriction of parallel imports.

156 In the light of the foregoing, the applicant's complaint that the Commission has not established to the requisite legal standard the existence of an agreement or, in any event, of concerted practices between the applicant and ZeniMax, must be rejected.

157 Consequently, the second part of the first plea and, therefore, that plea in law as a whole, must be rejected.

***Second plea in law: errors of law and errors in the assessment of the facts in the finding of a restriction of competition by object, contrary to Article 101 TFEU***

158 The applicant claims that the Commission infringed Article 101 TFEU and made errors of law and errors in the assessment of the facts by categorising the applicant's conduct with the five publishers as a restriction of competition by object. It complains, in essence, that the Commission (i) failed to take sufficient account of the novelty of the case, (ii) incorrectly assessed the legal context of the conduct at issue and (iii) failed to take proper account of the economic context.

159 First and foremost, it should be noted that the Commission's analysis in which it concluded that the conduct of the applicant and of the five publishers constituted a restriction by object is set out in Section 8.2 of the contested decision.

160 First, in Section 8.2.1 of the contested decision, the Commission set out the principles relating to restrictions by object and restrictions on passive sales. It recalled that conduct aimed at fragmenting the EEA into national markets and at prohibiting or limiting parallel imports and thus passive sales had, in principle, to be categorised as a restriction by object within the meaning of Article 101 TFEU. It added that intellectual property rights could not be exercised in such a way as to contravene the creation and protection of the internal market and that the same conclusion applied to non-exclusive licensing agreements and distribution agreements.

161 Second, in Section 8.2.2.2 of the contested decision, the Commission analysed the content and objective of the agreements or concerted practices between the applicant and each of the five publishers. It found that that objective was to restrict passive sales for the video games at issue.

162 Third, in Section 8.2.2.3, the Commission analysed the legal and economic context of the agreements or concerted practices between the applicant and each of the five publishers. It considered that there were no circumstances falling within that context that prevented it from finding that those agreements or concerted practices constituted restrictions by object within the meaning of Article 101 TFEU.

*The novelty of the case*

163 The applicant complains that the Commission failed to take sufficient account of the novelty of the case and of the unprecedented context in which it and the publishers operated.

164 The applicant submits that the Commission was wrong to take the view that it could rely on the case-law in order to categorise the conduct at issue as a restriction of competition by object, whereas it was the first time that it examined conduct consisting of the provision, by a third party, of technological measures provided for by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10; 'the Copyright Directive'). In particular, it considers that the Commission is seeking to include it in the scheme of parallel trade cases, when it was not acting, in the context of the conduct which is the subject of the contested decision, as a reseller or distributor of the publishers' Steam video games, but rather as a supplier of digital services. Furthermore, it claims that, contrary to the Commission's finding in that decision, it had no financial interest in locking Steam keys or any strategy to protect the Steam Store's sales or its margins. Thus, the existing case-law on parallel imports does not constitute relevant 'experience' for the purpose of categorising the agreements in question as a restriction by object. In order to categorise a novel practice as a restriction of competition by object, the Commission ought to have carefully assessed the circumstances of the case in order to

ascertain that the practice presents a sufficient degree of harm, which meant that an individual and detailed examination of the conduct at issue ought to have been conducted. The applicant emphasises that the concept of a restriction of competition by object must be applied restrictively and that a high standard of proof must be met.

165 The Commission disputes the applicant's arguments.

166 In order to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement, a decision by an association of undertakings or a concerted practice must have 'as [its] object or effect' the prevention, restriction or distortion of competition in the internal market.

167 In that regard, it is apparent from the case-law of the Court of Justice 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 effects. Certain forms of coordination between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (see judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 35 and the case-law cited).

168 As regards agreements categorised as 'restrictions by object', there is no need to investigate their effects nor a fortiori to demonstrate their effects on competition in order to categorise them as 'restrictions of competition', within the meaning of Article 101(1) TFEU, in so far as experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 64 and the case-law cited). In order for it to have an anti-competitive object, it is therefore sufficient that the agreement be capable in an individual case of resulting in the prevention, restriction or distortion of competition within the internal market (see, to that effect, judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 38).

169 It is clear from the case-law of the Court of Justice that the concept of restriction of competition 'by object' must be interpreted strictly and can be applied only to some concerted practices between undertakings which reveal, in themselves and having regard to the content of their provisions, their objectives, and the economic and legal context of which they form part, a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects, since some forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraphs 67 and the case-law cited). The essential legal criterion for ascertaining whether an agreement involves a restriction of competition 'by object' is the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects (see judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 37 and the case-law cited).

170 When determining that legal and economic context, it is 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 (see judgments of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 117).

171 First of all, it is also apparent from the case-law that, for agreements which constitute particularly serious infringements of competition, the analysis of the economic and legal context of which the practice forms part may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object (see judgment of 27 April 2017, *FSL and Others v Commission*, C-469/15 P, EU:C:2017:308, paragraph 107 and the case-law cited).

172 In the first place, it should be noted that the Commission examined the content of the agreements or concerted practices between the applicant and the five publishers and the objectives which they pursued, in order to conclude that they constituted a restriction of competition by object. In Section 8.2.2.2 of the contested decision (recitals 310 to 345 of the contested decision), the Commission examined the content and objective of those agreements or concerted practices. It referred, in that

regard, to the various items of evidence on the basis of which it found the existence of those agreements or concerted practices, and in particular to the various exchanges between the applicant and the publishers. Following that analysis, the Commission concluded that the object of those agreements or concerted practices at issue was to place technical restraints on the circulation of the video games at issue, outside certain EEA territories, so as to restrict passive sales of those games.

- 173 As found in the context of the examination of the first plea, it is apparent from the exchanges between the applicant and each of the publishers, as set out in Section 6.1.6 of the contested decision, that the supply of geo-blocked Steam keys did indeed have the object of restricting parallel imports of the video games at issue, by making any passive sales outside the territory of certain EEA countries practically impossible. More specifically, the geo-blocking sought to prevent those video games, distributed through Steam keys in the territory of EEA countries at low prices, from being purchased by distributors or users located in the territory of other EEA countries where the prices at which those video games are distributed were much higher. In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (see judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 54 and the case-law cited).
- 174 As correctly observed by the Commission in recitals 280 to 292 of the contested decision, since the judgment of 13 July 1966, *Consten and Grundig v Commission* (56/64 and 58/64, EU:C:1966:41), and in accordance with settled case-law, it is accepted that agreements having as their object the restriction of parallel trade (see judgments of 28 April 1998, *Javico*, C-306/96, EU:C:1998:173, paragraph 14 and the case-law cited, and of 6 October 2009, *GlaxoSmithKline Services and Others v Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 59 and the case-law cited), including when they tend to prevent users from purchasing products or services on account of their geographical location, are sufficiently harmful to constitute a restriction by object within the meaning of Article 101 TFEU (see, to that effect, judgments of 6 July 2000, *Volkswagen v Commission*, T-62/98, EU:T:2000:180, paragraphs 115 and 178, and of 9 July 2009, *Peugeot and Peugeot Nederland v Commission*, T-450/05, EU:T:2009:262, paragraph 282).
- 175 Agreements which are intended to make the interpenetration of national markets more difficult, to partition national markets according to national borders or to artificially segment the internal market are liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of a single market (judgment of 13 July 1966, *Consten and Grundig v Commission*, 56/64 and 58/64, EU:C:1966:41, p. 497; see also, to that effect, judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 139 and the case-law cited).
- 176 Moreover, as the Commission observed in recitals 299 and 300 of the contested decision, restrictions on passive sales and, in particular, additional measures to ensure compliance with the territorial limitations contained in exclusive licensing agreements may be regarded as having as their object the restriction of competition (see, to that effect, judgment of 9 December 2020, *Groupe Canal + v Commission*, C-132/19 P, EU:C:2020:1007, paragraphs 51 to 54 and the case-law cited).
- 177 Thus, in principle, an agreement intended to prohibit or limit parallel trade has as its object the prevention of competition (see judgment of 6 October 2009, *GlaxoSmithKline Services and Others v Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 59 and the case-law cited) unless other circumstances falling within its economic and legal context support the conclusion that such agreements are not liable to harm competition (see, to that effect, judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 140).
- 178 It is true that, unlike the present case, the case-law relating to restrictions on passive sales was developed mainly in relation to agreements or concerted practices forming part of an exclusive distribution or licence agreement. However, it is clear from that case-law that it is not the existence of an exclusive distribution or licence agreement as such that has been considered harmful to competition, but rather the establishment of contractual obligations or additional measures preventing passive sales



and resulting in partitioning of the internal market (see, to that effect, judgments of 13 July 1966, *Consten and Grundig v Commission*, 56/64 and 58/64, EU:C:1966:41, pp. 497 and 498; of 1 February 1978, *Miller International Schallplatten v Commission*, 19/77, EU:C:1978:19, paragraph 7; and of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 138 and 139).

- 179 The object of the conduct at issue is to make it practically impossible to use the Steam keys outside the territory of certain EEA countries and to introduce a genuine restriction on passive sales of the video games at issue outside those territories. Thus, like the additional measures referred to in paragraph 178 above, that conduct leads to a reconstruction of the partitioning of national markets and an artificial segmentation of the internal market liable to frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market.
- 180 Furthermore, contrary to what the applicant maintains, the fact that the case-law relating to restrictions on parallel imports was developed in the context of relations between distributors and suppliers does not call into question the relevance of that case-law for the purpose of finding that the conduct at issue was restrictive by object.
- 181 As observed by the Commission in recitals 314, 321, 328, 335 and 342 of the contested decision, the geo-blocking of the Steam keys prevented the distributors of the publishers to whom those keys were supplied from selling the video games at issue (in particular in response to unsolicited requests from potential users) to users located in EEA countries other than those covered by the restrictions. Such conduct leads to the elimination of competition, in countries where prices are higher, between passive sales of the video games at issue distributed by means of the geo-blocked Steam keys and sales of the games at issue in the Steam Store. Similarly, the conduct at issue leads to the elimination of competition, in countries where prices are higher, between passive sales of the video games at issue distributed by means of the geo-blocked Steam keys and those distributed by the publishers' distributors in the territories where the prices are highest. Thus, the agreements or concerted practices at issue may be treated in the same way as the additional measures examined in the case-law relating to parallel imports cited in paragraph 178 above, which restricted competition between the supplier's various distributors.
- 182 Moreover, according to settled case-law, Article 101 TFEU covers any active contribution by an undertaking to a restriction of competition, even if that contribution does not relate to an economic activity forming part of the relevant market on which that restriction comes about or is intended to come about (see judgment of 10 November 2017, *Icap and Others v Commission*, T-180/15, EU:C:2017:795, paragraph 104 and the case-law cited). Thus, the fact that the applicant and the publishers were not in a distributor-supplier relationship in the context of the conduct at issue is irrelevant, since the conduct in itself has as its object the prevention of parallel imports and the restriction of competition between the publishers' various distributors.
- 183 In any event, although the applicant was not acting as a distributor of the video games at issue by means of geo-blocked Steam keys, it should be noted that, as observed by the Commission in recitals 111, 112, 357 and 358 of the contested decision, the applicant was selling the same video games in the Steam Store. It therefore definitely had an interest in the Steam keys being geo-blocked for the territories in which the games at issue were being sold by third-party distributors at a lower price. The video games being sold in the Steam Store, for which the applicant retained 30% of the amounts received, were at least potentially in competition with the Steam video games sold by third-party distributors by means of the geo-blocked Steam keys. Thus, the restrictions on parallel imports of the geo-blocked Steam keys were such as to be capable of influencing sales in the Steam Store and thus the margins earned by the applicant as a result of those sales, and thus potentially benefited the applicant.
- 184 In the light of all the foregoing, the Commission did not err in concluding that there was sufficiently solid and reliable experience to support a finding that, in principle, the agreements or concerted practices in question were, by their very nature, harmful to the proper functioning of competition. In the light of the case-law set out in paragraphs 171 and 177 above, the Commission was thus entitled to confine itself to examining whether or not there were circumstances in the legal and economic context

which supported a finding that the agreements or concerted practices in question were not liable to harm competition.

*Analysis of the legal context*

- 185 The applicant submits that the Commission failed to take account of the fact that intellectual property rights and the Copyright Directive were essential elements of the legal context which must be taken into account in the application of Article 101 TFEU.
- 186 First, the applicant argues that the Commission misapplied the distinction drawn in the case-law between the existence of copyright and the exercise of that right. That distinction means simply that EU competition law may preclude the exercise of copyright in certain circumstances, but it does not mean that copyright is irrelevant to the assessment of whether specific conduct constitutes a restriction of competition.
- 187 Second, the applicant argues that, in order to ensure a balance between intellectual property law and competition law, the competition rules must be interpreted in a way that is consistent with the rules on free movement. The Court of Justice has had recourse to the principle of the exhaustion of rights in order to determine the moment at which a barrier to trade caused by the exercise of intellectual property rights becomes artificial and arbitrary and thus incompatible with the internal market. The applicant submits in that regard that, in accordance with the Copyright Directive, the publishers' copyrights on the video games at issue were not subject to exhaustion in the European Union.
- 188 Third, the applicant argues that the contested decision undermines the effectiveness of the Copyright Directive. Technical measures, such as the geo-blocking of Steam keys, are expressly authorised by Article 6 of the Copyright Directive and cannot be categorised as a restriction by object. Thus, in its submission, the publishers were perfectly entitled to use territory control measures to prevent unauthorised communication to the public of their Steam video games in part of the territory of the EEA.
- 189 The Commission disputes the applicant's arguments.
- 190 In the present case, the Commission devoted recitals 347 to 355 of the contested decision to an examination of the legal context. In addition, in recitals 293 to 309 of that decision, it carried out a detailed analysis of the case-law relating to the application of Article 101 TFEU in the context of intellectual property rights.
- 191 First, as correctly noted by the Commission in recitals 293 and 294 of the contested decision, it is settled case-law that the mere fact that an agreement involves intellectual property rights does not preclude the application of Article 101 TFEU. Although the Treaty does not affect the existence of intellectual property rights, in particular copyright, the exercise of those rights may nevertheless fall within the prohibitions laid down by the Treaty, in particular by Article 101 TFEU. Thus, the exercise of an intellectual property right may fall within the prohibition laid down in Article 101 TFEU whenever it appears to be the object, the means or the consequence of an agreement (see, to that effect, judgments of 8 June 1971, *Deutsche Grammophon Gesellschaft*, 78/70, EU:C:1971:59, paragraphs 6 and 10, and of 6 October 1982, *Coditel and Others*, 262/81, EU:C:1982:334, paragraph 17), notwithstanding the fact that it may constitute a legitimate expression of that right authorising its holder, inter alia, to oppose any unauthorised use (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 79 and the case-law cited).
- 192 In addition, as rightly observed by the Commission in recital 295 of the contested decision, the distinction between the existence of intellectual property rights and the exercise of such rights also applies where those rights are exploited in intangible form, namely in the form of a service rather than on a physical medium. In the judgment of 6 October 1982, *Coditel and Others* (262/81, EU:C:1982:334, paragraphs 14 and 17), referred to by the Commission in that recital, the Court of Justice expressly envisaged that the exercise of the copyright on a film and the right of exhibition which derives from copyright could distort competition and be caught by the prohibition laid down in Article 101 TFEU (judgment of 9 December 2020, *Groupe Canal + v Commission*, C-132/19 P, EU:C:2020:1007, paragraph 52). In particular, the Court pointed out that that could be the case

irrespective of the fact that making a film available by way of exhibition may be repeated ad infinitum, that the copyright holder could require royalties for any exhibition of that film and that the copyright holder could grant a single licensee the exclusive right to exhibit that film, and thus prohibit its exhibition by others, in the territory of a Member State for a specified period of time (see, to that effect, judgment of 6 October 1982, *Coditel and Others*, 262/81, EU:C:1982:334, paragraphs 11, 12 and 15). It accordingly follows from the case-law of the Court of Justice that the fact that the copyright holder may continue to exercise his or her rights, in particular in order to require a fee for each exhibition of a film or for the prohibition of successive exhibitions by others, does not preclude such an exercise of copyright from being caught by Article 101 TFEU, where that exercise could constitute a disguised restriction on trade between Member States (see, to that effect, judgment of 6 October 1982, *Coditel and Others*, 262/81, EU:C:1982:334, paragraphs 13 and 17).

193 It follows that the question of whether or not the intellectual property right is exhausted does not in itself preclude the application of Article 101 TFEU or the conduct at issue from constituting a restriction by object where the exercise of that right is liable to constitute a disguised restriction on trade between Member States.

194 In the light of the foregoing, it must be held that, contrary to the applicant's assertions, the Commission did not err in finding that the applicant's arguments relating to non-exhaustion of the copyright in the video games at issue were not relevant for the purposes of its analysis. Thus, the applicant's arguments criticising the Commission for having failed to examine whether the sale of the Steam video games by means of the Steam keys came within the distribution right (Article 3 of the Copyright Directive) or the right of communication to the public (Article 4 of that directive) and the inferences to be drawn from the judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18, EU:C:2019:1111), as regards the application of the rule of exhaustion of copyright to the video games at issue, are ineffective. Furthermore, in the light of the case-law cited in paragraphs 191 and 192 above, the applicant's argument that the case-law on free movement is based on the principle of exhaustion of the intellectual property right in order to determine whether a commercial barrier is artificial cannot lead to a different conclusion and must therefore be rejected on the same grounds.

195 Second, contrary to what the applicant claims, the Commission did not fail to take account of the Copyright Directive and, more specifically, Article 6 thereof, or deprive it of practical effect.

196 It is true that the Commission did not expressly refer to either the Copyright Directive or Article 6 of that directive in the contested decision, even though that question had been raised by the applicant in its replies to the Statements of Objections.

197 However, it is clear, first of all, that, as stated by the Commission in recital 347 of the contested decision, that decision does not call into question the possibility for publishers to grant their distributors licences which are limited to the territory of certain EEA countries. The conduct at issue relates to the additional measures, adopted by the applicant and each of the publishers, intended to ensure compliance with such territorial limitations by making any sale or any use of the video games at issue outside the territory of certain EEA countries impossible. In addition, as is apparent from paragraphs 191 to 196 above, the Commission analysed in detail the case-law relating to the interaction between copyright and Article 101 TFEU. It did take into account the existence of copyright in the video games at issue and took that into account in its assessment of whether there was a restriction of competition by object.

198 In that regard, in the light of the case-law set out in paragraphs 191 and 192 above, the Court finds that, contrary to what the applicant claims, the mere fact that recital 29 and Article 6 of the Copyright Directive provide for the possibility of adopting 'technological measures' does not preclude such measures from being taken under Article 101 TFEU when they are the object, the means or the consequence of conduct which infringes that article. Moreover, Article 9 of that directive expressly states that the provisions of that directive are not to affect the application of the law on restrictive practices and unfair competition.

- 199 As stated in paragraph 176 above, the Commission correctly observed that, according to the case-law, while the very grant of licences, including exclusive licences, is not contrary to Article 101 TFEU, additional measures aimed at ensuring compliance with the territorial limitations on the exploitation of those licences, and in particular the obligation to take measures making it impossible to access the protected subject matter from outside the territory covered by the licence agreement concerned, may have an anti-competitive object and be caught by Article 101 TFEU (see, to that effect, judgments of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 141 to 143, and of 9 December 2020, *Groupe Canal + v Commission*, C-132/19 P, EU:C:2020:1007, paragraphs 51, 53 and 54).
- 200 Contrary to what the applicant claims, the fact that the judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631), was delivered in the specific context of the application of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15) does not call into question the possibility of adopting the same solution in the present case.
- 201 In the case which gave rise to the judgment of 9 December 2020, *Groupe Canal + v Commission* (C-132/19 P, EU:C:2020:1007, paragraphs 51 to 54), delivered in the context of pay TV services involving internet transmission, which are not subject to the specific regime of the Satellite Broadcasting Directive, the Court of Justice held, irrespective of the question of exhaustion of copyright, that the conclusions contained in the judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631), could be applied to the measures at issue in that case, since the situations were comparable in commercial and competitive terms.
- 202 Next, it must be held that, in the present case, the exercise of the publishers' copyright was indeed the object, the means or the consequence of an agreement within the meaning of the case-law set out in paragraph 191 above. As is apparent from paragraphs 172 and 173 above, the geo-blocking of the Steam keys did not pursue an objective of protecting the publishers' copyright, but was used to eliminate parallel imports in order to protect sales of the video games at issue and the high royalty amounts collected by the publishers, or by the applicant, as regards the Steam Store, in certain EEA countries. As observed by the Commission in recitals 347 and 356 of the contested decision, the fact that the publishers are copyright holders in the video games at issue, at least for the entire territory of the EEA, confirms such a finding.
- 203 Moreover, as is apparent from recitals 305 to 309 and 352 to 354 of the contested decision, the question whether or not publishers' copyright was subject to the rule of the exhaustion of copyright and whether passive sales by the publishers' distributors could be the subject of legal proceedings before the competent national courts is not decisive for the purposes of the application of Article 101 TFEU. Moreover, irrespective of whether passive sales by distributors were liable to be penalised before the competent national courts for infringement of the publishers' copyrights, it must be noted, as stated by the Commission at the hearing, that it is apparent from the e-mail exchanges between the applicant and the publishers identified in Section 6.1.6 of the contested decision that the publishers were confronted with passive sales issues and that the geo-blocking of the Steam keys was implemented in order to respond to the phenomenon of passive sales actually found by the publishers and the applicant. Thus, the object of the conduct at issue was to make passive sales impossible, thereby eliminating the actual or potential competition which those sales represent. In addition, as stated in paragraph 183 above, the applicant indeed received a remuneration of 30% on sales of the video games at issue in the Steam Store, so that it had an interest in preventing parallel imports liable to affect sales in the Steam Store. It follows that the agreements or concerted practices between the applicant and the five publishers were capable in practice of preventing, restricting or distorting competition within the internal market within the meaning of the case-law referred to in paragraph 168 above.
- 204 Lastly, it should be noted that, in the judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraphs 108 to 115), the Court of Justice emphasised that copyright is intended only to ensure for the right holders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject

matter, by the grant of licences in return for payment of remuneration; it does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration or to engage in conduct such as to lead to artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference to which it gives rise are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market (judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 108 to 115 and 145). As stated in paragraph 196 above, the geo-blocking of the Steam keys did not pursue an objective of protecting the publishers' copyright, but was clearly used to eliminate parallel imports entirely and thus protect the high royalty amounts collected by the publishers, or by the applicant, as regards the Steam Store, in certain EEA countries.

205 In the light of the foregoing, it must be held that the Commission did not err in finding that the publishers' copyright on the video games at issue did not preclude the application of Article 101 TFEU to the conduct at issue or its categorisation as a restriction by object. Accordingly, the Commission was correct in finding, in the light of the relevant legal context, that the establishment, by means of the geo-blocked Steam keys, of a practical impossibility of activating or using the video games at issue in other EEA territories, and thus of importing them into other EEA territories, constituted a restriction of competition by object.

#### *Analysis of the economic context*

206 The applicant criticises the Commission for having failed to examine sufficiently the economic context in which the conduct at issue occurred. It maintains that the Commission ought to have considered whether the restriction of passive sales was, by its very nature, harmful to the proper functioning of competition in that it reduced output and increased prices, to the detriment of consumers. Those conditions are not met in the present case.

207 First, the applicant complains that the Commission failed to take account of the nature of the goods and services affected. It submits that digital products and on-line services are fundamentally different from tangible goods.

208 Second, the applicant criticises the Commission for having failed to take account of the fact that geographical blocking benefited consumers, since it enabled the publishers to build an audience and increase output and also ensured supply in countries where prices are lower. The applicant submits in particular that, in its responses to the Statement of Objections, it demonstrated the potential pro-competitive effects to the requisite legal standard.

209 Consequently, the applicant submits that it demonstrated the existence of a reasonable doubt as to the allegedly sufficient degree of harm to competition caused by the agreements or concerted practices and, therefore, as to their anti-competitive object.

210 The Commission disputes the applicant's arguments.

211 It should be noted that recitals 356 to 366 of the contested decision contain the analysis of the economic context. The Commission's principal observation was that there was no specific obligation or justification for the geo-blocking of the Steam keys other than the restriction of potential passive sales in order to create artificial barriers to trade within the EEA. Thus, the agreement to block the Steam keys was not inherent in the nature of the licence itself, but was envisaged for the purpose of ensuring that third-party distributors receiving the keys complied with the territorial limits of their respective licences. As a secondary point, the Commission stated that the provision of the geo-blocked Steam keys had to be examined in the context of the business relations between the applicant and each of the publishers as a whole. Thus, it found that, in so far as the applicant also acted as a distributor of the video games at issue, it was in competition with the distributors of the Steam keys and could use the geo-blocking of the Steam keys in order to protect its margins in the Steam Store.

212 First, as regards the applicant's complaint that the Commission did not examine whether the conduct at issue was sufficiently harmful because it led to reductions in output and price increases to the detriment of consumers, it must be noted that the Court of Justice has held that Article 101 TFEU was intended not to protect only the interests of competitors or consumers, but also to protect the structure of the

market and, in so doing, competition per se. Therefore, in order to find that an agreement has an anti-competitive object, it is not necessary for final consumers to be deprived of the advantages of effective competition in terms of supply or price (judgment of 6 October 2009, *GlaxoSmithKline Services and Others v Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 63).

- 213 Second, the applicant complains that the Commission failed to take account of the nature of the Steam keys. In that regard, it should be noted, first, that, in recital 4 of the contested decision, the Commission did examine in detail the functioning of the PC video games industry and the manner in which those games are distributed. Second, it is apparent in particular from recitals 349 to 355 of that decision, relating to the legal context, that the Commission responded to the applicant's arguments that the products or services at issue were not tangible goods, but in reality consisted in the acquisition, by the end user, of a licence to access and play a game on Steam. It is, moreover, in that context that the Commission considered that the question of the exhaustion of copyright was not relevant for the purposes of concluding that there was a restriction by object. As has been examined in paragraphs 191 to 194 above, the fact that the conduct at issue relates to intangible goods or digital services, covered by copyright which has not been exhausted, does not preclude that conduct from being found to be a restriction by object.
- 214 Third, none of the applicant's arguments to the effect that the nature of the Steam keys or the functioning of the video games market justifies departing from the case-law according to which agreements designed to prevent or limit parallel imports have, in principle, as their object the restriction of competition, can succeed.
- 215 First of all, the applicant's arguments that, in essence, the fact that the resale of the Steam keys is easy, inexpensive and frictionless calls into question the general point of view of European competition law that parallel trade is likely to exert pressure on prices and create financial benefits for consumers, must be rejected.
- 216 As stated in paragraph 177 above, according to the case-law, an agreement intended to limit parallel trade must, in principle, be regarded as having as its object the restriction of competition. However, it is not apparent either from the wording of Article 101(1) TFEU or from the case-law that that finding is based solely on the fact that it is presumed that such an agreement deprives end consumers of the advantages of effective competition in terms of supply or price. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price (see, to that effect, judgment of 6 October 2009, *GlaxoSmithKline Services and Others v Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraphs 62 and 63).
- 217 Moreover, the applicant's assertions that the case-law on the harmful nature of restrictions on parallel imports is developed on the basis of the finding that there are 'frictions' which limit such parallel trade and prevent it from creating a shortage or significantly higher prices in the exporting Member State are in no way substantiated.
- 218 Next, the applicant's arguments that the Commission could not ignore the fact that the EU legislature had taken into account the particular characteristics of digital products and online services by excluding them from the scope of Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ 2018 L 60 I, p. 1) must also be rejected. That regulation was not in force at the material time. In any event, as is apparent from the review clause introduced in Article 9 of that regulation, the EU legislature expressly envisaged the possibility of extending the scope of the prohibition on geo-blocking to electronically supplied services the main feature of which is to provide access to copyright-protected works, provided that the seller or supplier has the rights required for the territories concerned.
- 219 Furthermore, the applicant's argument that geo-blocking enabled the publishers to pursue a commercial policy of increasing production in a given territory by charging lower prices, in order to

actually reach a target price, could apply to any type of product or service, whether tangible or digital. Thus, even if that were true, that argument cannot justify departing, in the present case, from the case-law relating to restrictions on parallel imports for digital goods or services.

- 220 Lastly, as regards the applicant's arguments that PC video games are 'semi-perishable' products, with the result that price differentiation takes place over time, the applicant does not explain how that factor is capable of calling into question the Commission's finding that the restrictions on parallel imports of the Steam keys are harmful to competition.
- 221 Fourth, in so far as the applicant disputes that it has an interest in the geo-blocking of the Steam keys, it should be noted, first, that, as held in paragraph 77 above, it is not necessary, for the purposes of establishing an infringement of Article 101 TFEU, to demonstrate that the undertaking benefits from the infringement. Second, and in any event, as held in paragraph 183 above, the applicant indeed received a remuneration of 30% on sales of the video games at issue in the Steam Store, so that it had an interest in preventing parallel imports liable to affect sales in the Steam Store.
- 222 Fifth, the fact that the geo-blocking of Steam keys concerns only certain games and represents only 3% of the total sales of the Steam video games is irrelevant in the context of the analysis of restrictions by object. The fact that only a small percentage of the Steam video games are affected by the geo-blocking, even if that were established, is not capable of calling into question the harmfulness of the conduct at issue or, in particular, the finding that the conduct is, by its nature, contrary to the very objective of protecting the internal market pursued by the Treaty.
- 223 It must be borne in mind in that regard that undertakings which conclude an agreement whose object is to restrict competition cannot, in principle, escape the application of Article 101(1) TFEU by claiming that their agreement should not have an appreciable effect on competition (see judgment of 28 June 2016, *Telefónica v Commission*, T-216/13, EU:T:2016:369, paragraph 216 and the case-law cited). Article 101(1) TFEU draws a clear distinction between the concept of 'restriction by object' and that of 'restriction by effect', each being subject to different rules of evidence. As regards the practices categorised as 'restrictions by object', there is no need to investigate nor, a fortiori, to demonstrate their effects on competition in order to categorise them as a 'restriction of competition' within the meaning of Article 101(1) TFEU. On the other hand, where the anti-competitive object of an agreement, a decision by an association of undertakings or a concerted practice is not established, it is necessary to examine its effects in order to prove that competition has in fact been prevented or restricted or distorted to an appreciable extent (judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraphs 62 to 66).
- 224 Sixth, the applicant claims that the Commission failed to take account of the pro-competitive effects of the geo-blocking of the Steam keys, even though it had referred to the existence of such effects in the context of the administrative procedure.
- 225 It is true that, where the parties to an agreement rely on its pro-competitive effects, those effects must, as elements of the context of that agreement, be duly taken into account for the purposes of its characterisation as a 'restriction by object', in so far as they are capable of calling into question the overall assessment of whether the concerted practice concerned revealed a sufficient degree of harm to competition. Taking account of those effects is intended not to undermine characterisation as a 'restriction of competition' within the meaning of Article 101(1) TFEU, but merely to appreciate the objective seriousness of the practice concerned (judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraphs 103 and 104).
- 226 However, taking into consideration such matters presupposes that the pro-competitive effects are not only demonstrated and relevant, but also specifically related to the agreement concerned. Further, the mere existence of such pro-competitive effects cannot as such preclude characterisation as a 'restriction by object'. If such effects are demonstrated, relevant and specifically related to the agreement concerned, those pro-competitive effects must be sufficiently significant, so that they justify a reasonable doubt as to whether the agreement concerned caused a sufficient degree of harm to competition and, therefore, as to its anti-competitive object (judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraphs 105 to 107). Thus, a mere unsubstantiated

claim of pro-competitive effects of the agreements at issue is not sufficient to rule out a finding of a restriction by object (see judgment of 25 March 2021, *Lundbeck v Commission*, C-591/16 P, EU:C:2021:243, paragraph 137 and the case-law cited).

227 In the present case, the applicant stated in its replies to the Statements of Objections, annexed to the application, that the conduct at issue could not constitute a restriction of competition by object because of its pro-competitive effects. However, it merely asserted, without substantiating its claims, that, in the absence of geo-blocking of the Steam keys, the keys intended to be sold at lower prices would be transferred to the other EEA countries. Thus, in its submission, in the absence of geo-blocked keys, the Member States targeted by the differentiated pricing strategy would no longer be provided with Steam keys. That would lead to prices being adjusted upwards and in no way to an overall fall in prices.

228 First, as is apparent from the case-law referred to in paragraph 226 above, the mere unsubstantiated claim of pro-competitive effects of the agreements at issue cannot suffice to rule out their characterisation as a ‘restriction by object’.

229 Moreover, contrary to what the applicant claims, no conclusion can be drawn, specifically as regards the present case, from the Commission’s inquiry report of 10 May 2017 on the e-commerce sector (COM(2017) 229 final). The statement in that report that ‘if price discrimination enables the company to serve a market that would otherwise not be served, the effect on the overall well-being of the consumer should normally be positive’ is general and abstract, and, moreover, it is qualified, as is shown by the use of the term ‘normally’. Such an assertion does not therefore in any way establish the existence of demonstrated, significant pro-competitive effects specific to the agreement between the applicant and the publishers. Moreover, it has in no way been established that, in the absence of the geo-blocking of the Steam keys, the publishers would have been prevented from practising a pricing differentiation policy in order to penetrate a new market more effectively.

230 Second, and in any event, price reductions for consumers do not necessarily constitute a pro-competitive effect sufficient to raise reasonable doubts as to whether the agreements or concerted practices in question are sufficiently harmful (see, to that effect, judgment of 12 January 2023, *HSBC Holdings and Others v Commission*, C-883/19 P, EU:C:2023:11, paragraphs 198 to 205).

231 Therefore, in the light of the requirements set out in paragraphs 220 and 226 above, it must be held that the applicant’s claims are general and unsubstantiated, and do not establish that the pro-competitive effects on which it relies have been proven or that they are specific to the conduct at issue and sufficiently significant. The fact that the applicant referred to those pro-competitive effects during the administrative procedure is accordingly not sufficient to demonstrate that the Commission made an error of assessment in concluding that the conduct at issue was sufficiently harmful, nor, a fortiori, in categorising the conduct at issue as a restriction by object.

232 Moreover, the other paragraphs of the replies to the Statements of Objections to which the applicant refers in its pleadings do not concern the question whether the Commission was entitled to consider that the conduct at issue constituted a restriction by object, but rather the question whether the Commission could apply Article 101(3) TFEU.

233 In the light of all the foregoing, it must be held that the Commission did not err in finding that the legal and economic context in which the agreements or concerted practices between the applicant and the publishers had been concluded was not such as to call into question its finding that those agreements or concerted practices, in so far as they were intended to restrict parallel imports, constitute restrictions of competition by object.

234 In the light of the foregoing, the second plea must be rejected and, therefore, the action must be dismissed in its entirety.

## Costs

235 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the



applicant has been unsuccessful, it must be ordered to pay, in addition to its own costs, the costs incurred by the Commission, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**
2. **Orders Valve Corporation to bear its own costs and to pay those incurred by the European Commission.**

Papasavvas

Marcoulli

Schwarcz

Tomljenović

Valasidis

Delivered in open court in Luxembourg on 27 September 2023.

V. Di Bucci

S. Papasavvas

Registrar

President

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