Commission fines Nintendo and seven of its European distributors for colluding to prevent parallel trade in Nintendo products

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1. Introduction

The Commission Decision commented here concerns the distribution of Nintendo manufactured game consoles (the NES and SNES static consoles, that were superseded by the N64 console, as well as the portable Game Boy) and game cartridges for these consoles. Apart from being the manufacturer of the products, in certain Member States Nintendo acted as the official exclusive distributor of its products to wholesalers and retailers itself. In other Member States it had appointed independent exclusive distributors.

In March 1995, an ex-officio procedure into the video games industry ([1]) was opened. On the basis of its initial findings, the Commission also opened in September 1995 an ex-officio investigations into the distribution system of Nintendo specifically ([2]). The final case in the saga ([3]) arose from a formal complaint lodged in November 1996 by Omega Electro b.v., a Dutch 'rack-jobber' ([4]) in video-game products. Following Omega's complaint, the Commission extended and intensified its investigation into Nintendo's distribution practises.

On 30 October 2002, the Commission concluded this long investigation by imposing a total fine of € 167,8 million on Japanese video games maker Nintendo and seven of its exclusive distributors in Europe.

The Decision finds that the addressees participated in a single and continuous infringement of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement with the object of restricting parallel exports in Nintendo's consoles and game cartridges throughout the EEA. The infringement was organised by Nintendo and actively enforced. Companies that resold the products abroad or to companies that would do so were sanctioned and, as a result, intra-EEA parallel trade was significantly reduced. Nintendo's independent distributors took an active part in, and benefited, from the prevention of parallel trade.

In line with similar cases concerning restrictions of parallel trade, this constitutes a very serious infringement of Article 81(1) EC and 53(1) EEA. This because of the nature of the infringement, its actual impact on the market and the fact that the infringement affected the EEA as a whole. The duration of the infringement was from January 1991 until December 1997. However, the length of participation of each of the addressees varied from slightly more than two months in the cases of Nortec S.A. and CD Contact Data GmbH to 6 years and 11 months in the case of Nintendo.

The following fines were imposed:

— Eur 149,128 million on the Nintendo group of companies;

— Eur 8,64 million on John Menzies plc, Nintendo's exclusive distributor for the United Kingdom and Ireland;

— Eur 0,825 million on Concentra — Produtos para crianças, S.A., the exclusive distributor for Portugal;

— Eur 1,5 million on Linea GIG S.p.A (Italy);

— Eur 1,25 million on Bergsala A.B., (Sweden, Finland, Denmark and Iceland);

— Eur 1 million on CD-Contact Data GmbH, that was responsible for distributing Nintendo's products in Belgium and Luxembourg;

— Eur 4,5 million on Itochu Corporation, responsible for distribution in Greece;

— Eur 1 million on Nortec A.E., that distributed Nintendo's products in Greece after Itochu Corporation had stopped being Nintendo's distributor there.

([1]) Case No IV/35.587 PO Video Games. The same investigation also gave rise to the Commission opening procedures against Nintendo, Sega and Sony with regard to their licensing practises for third party game producers. See also IP/97/676 and IP/97/757.

([2]) Case No IV/35.706 PO Nintendo Distribution.

([3]) Case No IV/36.321 Omega/Nintendo.

([4]) A 'rack-jobber' is essentially a wholesaler that also provides 'in-store' services (such a providing displays, rack-filling etc.) to retailers.

The total fine and the individual fine for Nintendo are the largest ever imposed in a vertical case. They also rank among the highest when all fining decisions of the Commission, including those in cartel cases, are considered ([1]).

The remainder of this article will be devoted to a number of questions that in view of their novelty deserve, in our opinion, to be highlighted.

2. Unilateral behaviour versus agreements for the purpose of Article 81(1) EC

As the Statement of Objections were issued around the time that the Judgement of the Court of First instance in *Adalat* ([2]) was given, it was probably inevitable that some companies would try to argue that their conduct did not constitute an agreement within the meaning of Article 81(1) EC but merely unilateral behaviour that would fell outside the scope of application of this Article. Indeed, John Menzies argued that, for a part of the alleged duration of its participation to the infringement, its trading policies towards it own customers that hindered parallel trade ([3]) constituted purely unilateral conduct within the meaning of Adalat.

It was however established that John Menzies plc's behaviour towards it own customers could not be characterised as purely unilateral. Firstly, it could be shown that John Menzies plc's policy represented the practical implementation of contractual provisions between Nintendo and John Menzies that fell within the scope of Article 81(1) of the Treaty. Indeed, in correspondence with its customers, John Menzies explicitly referred to these contractual provision to justify its conduct and, thus, a direct causal link could be established between the provisions restricting parallel exports in John Menzies plc's agreement with Nintendo and John Menzies plc's conduct vis-à-vis its customers. In addition, John Menzies plc's assertion was inconsistent with its actual conduct in the market.

3. First application of the concept of single and continuous infringement to a vertical case

The infringement was characterised as a single and continuous infringement of Article 81(1) of the EC Treaty and Article 53 of the EEA Agreement.

The application of the concept of a single and continuous infringement has become fairly standard in 'classical' cartel-like infringements. Cartel cases are horizontal in the sense that all participants are direct or potential competitors that market substitutable products in the same relevant market. The present case is however characterised by the fact that Nintendo first and foremost is acting as a supplier to a network of distributors that are, thus, present at a different level of the production or distribution chain. This decision is the first one in which the concept of a 'single and continuous' infringement has been applied to a vertical anti-competitive arrangement.

The application of this concept in the present case can be understood if one looks closer at the kind of relationships that existed between the parties.

For instance, during the earlier part of the infringement formal distribution agreements were in place that restricted parallel exports from territories. These formal distribution agreements were complemented and ultimately even replaced by a closely knit practical collaboration in which all parties actively participated to trace parallel trade and traders. Once traced, supplies to the suspected parallel exporters were limited or cut off completely by the exclusive distributor in the territory were it was established.

In this collaboration, a variety of means were employed to trace the origin of parallel trade and to identify the parallel trader: questionnaires sent off to all distributors about the incidence and origin of parallel trade into their territories, tagging systems, centralised reporting if and when parallel imports into a territory occurred and statistical methods that used product ratios or comparisons of the size of an order to the sales potential of the buyer inside the territory to identify orders for product that were likely to be parallel exported.

The fact that various means were employed over a considerable period of time to pursue the same object favoured the application of the concept of a single and continuous infringement. The same applies to the fact that, over the course of the duration of the infringement, the parties to it varied as a result of several reorganisations of Nintendo's distribution network.

The use of this concept implies that, if the Commission wants to make a party responsible for the illegal conduct of other parties in the context of

([1]) For more details about the calculation of fines see IP/02/1584 of 30.10.2002.

([2]) Judgement of the Court of First Instance in case T-41/96 Bayer AG v Commission.

([3]) John Menzies plc had admitted that this policy towards its customers restricted parallel trade. It was only necessary to investigate whether its conduct was purely unilateral or not.

the same infringement, it must show that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk. ([1])

To show this, the Commission relied on direct evidence from the correspondence between the parties that they were well aware that the object of the arrangements was to restrict parallel trade. In particular, the various questionnaires that Nintendo used to monitor parallel trade are strong evidence that all parties were aware of the larger infringement. It also relied on a large body of indirect evidence that meant that when a party communicated information that parallel imports into its territory occurred it knew that this information would or could be used to restrict these parallel imports by restricting parallel exports from another territory. All parties could therefore be made responsible for the overall infringement, and not just for the part they were directly involved in themselves.

4. Fining distributors

In this case, the Commission decided to use its large discretionary powers ([2]) to fine also the exclusive distributors. Although this is certainly not unique in the decisional practise of the Commission ([3]), it is the first time that fines are imposed on independent distributors since the *Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty* ([4]) (the Guidelines on fines) entered into force. In the present case there was abundant evidence to show that the distributors — all of them wholesalers familiar with cross-border trading — were neither the victims nor passive spectators of what Nintendo was doing. On the contrary, they actively and willingly co-operated with Nintendo in the prevention of parallel trade.

This must be a warning to distributing companies, in particular those that regularly trade products across borders. The mere fact that they are in a dependent position relative to their suppliers does not mean that they will not be fined. If that was the case then it would mean that distributing companies would be, *de facto,* discharged from complying with EU competition law because, if they would be caught participating in an anti-competitive infringement, no fines would be imposed on them anyway. Evidently, this cannot be allowed.

On the contrary, the current case shows that even companies whose compliance to an infringement was ensured by the use of heavy pressure cannot automatically escape a fine. For instance, John Menzies was fined despite the that that Nintendo used for some time a supply boycott to ensure its compliance with the infringement. Companies that are subjected to such pressures should not collaborate with the infringement but report it to the Commission instead.

5. Reduction of fines for co-operating with the Commission proceedings outside the scope of the Leniency Notice

The Nintendo decision has been the first very serious infringement where the co-operation by firms in the Commission proceedings outside the cartel field has been substantially rewarded ([5]). The decision recognises that both John Menzies and Nintendo submitted information that went beyond their obligation to reply to previous requests for information and that the information received allowed the Commission to bring forward the case.

In fact, the vertical nature of the infringement ment that parties could not benefit from the application of the *Commission Notice on the non-imposition or reduction of fines in cartel cases* ([6]) (the 1996

([1]) Case T-28/99 *Sigma v. Commission* paragraph 40. See also Case C-49/92 *Commission v. Anic,* paragraph 203.

([2]) The Commission has wide discretionary powers when determining the amount of fines to be imposed, including the power not to impose a fine at all or merely a symbolic fine or, on the contrary, to raise the general level of fines. (see Judgement in Joined Cases 100 and 103/80 *SA Musique Diffusion Française v Commission*, paragraph 109). Evidence that an undertaking, even if negligently, has been responsible for an infringement of Article 81(1) of the Treaty is by itself sufficient to justify imposing a fine.

([3]) As it was the case in:
Pioneer Hi-Fi Equipment. Commission Decision of 14.12.1979. OJ L 60, 5.3.80, p. 21.
Hasselblad. Commission Decision of 2.12.1981. OJ L 161, 12.3.82, p. 18.
Basf Lacke + Farben AG and Accinauto. Commission Decision of 12.7.1995. OJ L 272, 15.11.1995, p. 16.

([4]) OJ C 9, 14.1.98.

([5]) In 2000, the effective co-operation by Nathan with the Commission was also rewarded. However, the infringement in the Nathan-Bricolux case was only of minor gravity. *Nathan — Bricolux.* Commission decision of 5.7.2000 relating to a proceeding pursuant to Article 81 of the EC Treaty. OJ L 54, 23.2.2001, p. 1-18.

([6]) OJ C 207, 18.7.1996.

Leniency Notice). The first paragraph of the 1996 Leniency Notice limited its application to 'secret cartels', that is, to a sub-category of agreements falling under Article 81(1) of the Treaty, namely those that are secret and horizontal. This limitation has been maintained in the *Notice on immunity from fines and reduction of fines in cartel cases* ([1]) (the 2002 Leniency Notice), which concerns only *'secret cartels between two or more competitors'* and is also the line taken in most if not all other leniency programs in force worldwide.

Instead, the Commission applied the attenuating circumstance foreseen in the Guidelines on fines for this type of situation, namely that of the effective co-operation by the undertaking in the proceedings, outside the scope of the Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases.

In order to decide the actual reductions to be granted, the Commission took into account that, even if the quality of the information provided was less than that of Nintendo, John Menzies was first to provide valuable evidence to the Commission. Thus, John Menzies was granted a quite significant reduction of 40%, while that for Nintendo was 25%. This line is fully consistent with that in the 2002 Leniency Notice ([2]) and shows that the Commission is ready to reward co-operation by firms in areas beyond the classical cartel field.

6. Financial compensation of victims of the abuse

The Decision explains that subsequent to the start of its co-operation and with the support of the Commission, Nintendo offered and paid substantial financial compensations to third parties identified in the Statement of Objections as having suffered financial harm from the infringement.

In recognition of that, a reduction of € 300 000 was granted to Nintendo. The reduction was lower than the actual amount paid, but was substantially larger in percentage terms than that granted to ABB in the *Pre-insulated Pipes cartel case* ([3]), the only precedent so far of this type of reduction. This shows that the Commission is willing to take account of concrete steps taken by firms to correct the damage created by their anticompetitive actions.

([1]) OJ C 45, 19.2.2002, p. 3–5.
([2]) See in particular points 21 to 23.
([3]) *Pre-insulated Pipes.* Commission decision of 21.10.1998 relating to a proceeding pursuant to Article 81 of the EC Treaty. OJ L 24, 30.1.1999.