Commission imposes fine on Topps for preventing parallel imports of Pokémon stickers and cards

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1. Introduction

On 26 May 2004, the Commission adopted a decision finding that The Topps Company Inc and its European subsidiaries, Topps Europe Ltd, Topps International Ltd, Topps UK Ltd and Topps Italia SRL, (all referred to as ‘Topps’ if not indicated otherwise) infringed Article 81(1) of the Treaty. A fine of EUR 1.59 million was imposed. (1) The decision concluded that Topps entered into a series of agreements and concerted practices with several of its intermediaries in the United Kingdom, Italy, Finland, Germany, France and Spain with the object of restricting parallel imports of Pokémon collectibles from February 2000 until November 2000.

2. The company and the products

Topps is a group of companies (with annual net sales of EUR 481.34 million world-wide and EUR 198.24 million within the EEA for the fiscal year 2000) producing collectible products and confectionery popular with young children. Collectibles are items like stickers, trading cards or removable tattoos which follow certain themes (e.g. soccer players of Premier Leagues or characters of a particular cartoon series).

3. The case

The case originated with a complaint by a French retailer and concerned Pokémon collectibles. Pokémon is the name for a whole range of characters originally developed for the Nintendo ‘Game Boy’ videogame but also used, under a licence, by Topps to illustrate collectible products like stickers or trading cards. In 2000, there was a huge demand for such Pokémon collectibles while prices between Member States differed significantly. Families in high-price countries like Finland had to pay more than twice as much for the same Pokémon stickers as families in Portugal.

The evidence gathered by the Commission through a series of information requests showed that Topps initiated and co-ordinated a policy with the overall objective of preventing parallel imports of Pokémon collectibles in the EU. In this context, Topps actively involved its intermediaries in monitoring the final destination of Pokémon products and tracing parallel imports back to their source. Topps requested and received assurances that stock would not be re-exported to other Member States. In some cases where intermediaries did not co-operate, Topps threatened to terminate their supply.

Restrictions of parallel trade constitute by-object violations of Article 81(1) of the Treaty. They jeopardise a fundamental principle of the internal market and deprive consumers of its benefits by artificially reinforcing different price levels between Member States. They have been unequivocally condemned by the Commission many times in the past. (2)

The block exemption regulations No 1983/83 (applicable until 31 May 2000) and No 2790/1999 did not apply since the restrictions aimed at guaranteeing absolute territorial protection, thereby covering both active and passive sales. Nor could the agreements benefit from an individual exemption under Article 81(3) of the Treaty since they did not result in any improvement of the distribution of these products and were detrimental to consumers.

The decision was addressed to all four European Topps subsidiaries which participated in the anti-competitive agreements and concerted practices, and also to the ultimate US parent company. The latter was held liable because it was in a position to decisively influence the conduct of its wholly owned subsidiaries. In such cases, the Commission may, on the basis of the case law of the Court (3), legally presume that this power to influence had been actually exercised. Topps did not succeed in rebutting this legal presumption which

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(1) IP/04/682 of 26 May 2004.
(2) See, e.g., Commission decision of 30 October 2002 in Case number COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega, OJ L 255, 8.10.2003, p. 33.
was, on the contrary, confirmed by the parallel involvement of all European subsidiaries and by the dual position of one Topps employee as both Managing Director of the Irish subsidiary and Vice President (International) of the US parent company. The decision was not addressed to Topps’ intermediaries because their responsibility for the infringement was less significant.

4. Fine

In fixing the amount of the fine under Article 23(3) of Regulation (EC) No 1/2003, the Commission considered, on the one hand, that the prevention of parallel imports between Member States is by its nature a very serious violation of Article 81(1) of the Treaty. As regards the actual impact of the infringement, however, the evidence in the Commission file did not show that the restrictions of parallel imports were applied systematically to all intermediaries or products. Some of the agreements or concerted practices appear not to have been implemented in full and may have had a limited effect in terms of value of the goods concerned. Concerning the size of the relevant market, the Commission also took into account that the restrictive effects would have been mainly limited to the importing Member States. Therefore, the infringement committed by Topps was considered serious. The facts that Topps terminated the infringement after the first Commission intervention and that it co-operated with the Commission during the proceedings were considered as attenuating circumstances.

5. Conclusion

The present decision constitutes an addition to the list of precedents where the prevention of parallel trade between Member States has been condemned. On the basis of convincing evidence gathered at the very beginning of the proceedings, the Commission was able to prove the existence of a serious infringement of competition law. Topps did not appeal the decision within the timeframe set in Article 230 of the Treaty.