The judgments in the Nintendo case

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1. Introduction

This article concerns the Commission Decision against Nintendo and seven of its distributors and, in particular, the judgments handed down on 30 April 2009 by the Court of First Instance (CFI) in the appeals against that Decision by Nintendo, Itochu Corporation (‘Itochu’), and CD-Contact Data GmbH (‘Contact Data’)(2).

The appealed Commission Decision dates back to 2002 and concerned the distribution of Nintendo manufactured game consoles, in particular the NES and SNES static game consoles that were superseded by the N64 console, as well as the portable Game Boy and game cartridges for these consoles. Nintendo was the manufacturer of these products, but acted in certain Member States also itself as the official exclusive distributor of its products to wholesalers and retailers. In other Member States it had appointed independent exclusive distributors.

On 30 October 2002, the Commission concluded its investigation by issuing a Decision finding that the addressees participated in a single and continuous infringement (1) 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 in practice. Nintendo’s independent distributors took an active part in, and benefited from, the prevention of parallel trade.

In this case, the Commission decided to use its discretionary powers (3) to fine also Nintendo’s exclusive distributors. 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 coopered with Nintendo in the prevention of parallel trade.

The infringement was deemed to be a very serious infringement of Article 81(1) EC and 53(1) EEA. The duration of the single infringement was from January 1991 until December 1997 (the length of participation of each of the addressees varied, however). The overall fines imposed were accordingly high, namely € 167.8 million. The fines on Nintendo, Itochu and Contact Data were, respectively, € 149.1 million, € 4.5 million and € 1 million.

The total fine and the individual fine for Nintendo were, and still are, the largest ever imposed in a vertical case (4). At the time of the Decision, they also ranked among the highest when all fining decisions of the Commission, including those in cartel cases, are considered (5).

The decision applied the 1998 guidelines on fines (6) (‘the 1998 Guidelines on fines’), which were superseded by new guidelines on fines adopted in 2006 (7) (‘the 2006 Guidelines on fines’). The appeals concerned numerous aspects of the manner in which the

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.

(2) Judgment of 30 April 2009 in Case T-12/03 Itochu Corp. v Commission, judgment of 30 April 2009 in Case T-13/03 Nintendo Co., Ltd and Nintendo of Europe GmbH v Commission, judgment of 30 April 2009 in Case T-18/03 CD-Contact Data GmbH v Commission.

(3) The infringement in the case 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 is fairly standard in ‘classical’ cartel-like infringements. This decision was the first one in which the concept of a ‘single and continuous’ infringement was applied to a vertical anti-competitive arrangement. Since then, the same approach was also followed in the Commission Decision of 26 May 2004 in Case COMP/C-3/37.980 — Souris/Toppers.

(4) 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 judgment in Joined Cases 100 and 103/80 S.A 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.

(5) Since the Nintendo decision, the Commission has imposed fines in two other vertical cases, both concerning parallel trade, namely: the Commission Decision of 16 July 2003 in Case COMP/37.975 — PO/Yamaha, where a fine of € 2 560 000 was imposed, and the Commission Decision of 26 May 2004 in Case COMP/C-3/37.980 — Souris/Toppers. In the latter case, a fine of € 1 590 000 was imposed.

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

(7) 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 (OJ C 9, 14.1.1998, p. 3).

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Commission had set the fines, but only those aspects that are more relevant today will be mentioned here.

2. The appeal by Nintendo

Nintendo decided not to contest the infringement, and its arguments focused primarily on the manner in which the Commission had calculated the fine imposed on it.

Role of Nintendo as manufacturer

When establishing the fine on Nintendo, the Commission had taken account of the fact that Nintendo was, apart from a distributor, also the manufacturer and had increased the fine in order to ensure a deterrent effect. This was challenged upon appeal by Nintendo.

The CFI accepted, however, that the fact that Nintendo was a manufacturer could be used. In the case of vertical infringements, this objective factor relates to the company’s effective capacity to cause significant damage to competition. In a vertical case, the manufacturer occupies a central position in the distribution system of its products and it must display particular vigilance and ensure that it observes the competition rules when concluding distribution agreements (11).

Moreover, using this fact for assessing gravity does not preclude the application of an aggravating factor on the grounds that Nintendo, in addition, was also the ringleader in the infringement. Nintendo argued that in a vertical case, these elements essentially amount to the same. However, the mere fact that the manufacturer plays a central role does not preclude the infringement being instigated by other parties to the infringement. The special role of a manufacturer in a vertical setting, an objective factor indicating its ability to cause harm, and the role as ringleader, a specific element characterising a company’s role in the infringement, are thus different aspects that may each lead to increases in fines.

This confirmation should warn manufacturers that also are active as distributors of their products to be particularly vigilant in their compliance with the competition rules.

Application of Leniency Notices in vertical infringement cases

In this case, Nintendo initially tried to hide the infringement from the Commission after it had become aware of the Commission’s investigations. Once John Menzies, Nintendo’s distributor for the UK and Ireland, started to collaborate, Nintendo also decided to do so. The fact that Nintendo initially continued the infringement was taken as an aggravating factor, but its eventual collaboration also had to be taken into account as a mitigating circumstance.

The Nintendo decision was the first very serious infringement where cooperation by firms in the Commission proceedings outside the cartel field was substantially rewarded (10). The decision recognises that Nintendo (as well as John Menzies) 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.

The Commission took the view, however, that the vertical nature of the infringement meant that parties could not benefit from the application of the Commission Notice on the non-imposition or reduction of fines in cartel cases (12) in force at the time (‘the 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 was maintained in the subsequent leniency notices, the 2002 (13) and 2006 (14) Leniency Notices, which concern only agreements and/or concerted practices between ‘two or more competitors’.

Nintendo complained that the Commission denied it the benefit of the 1996 Leniency Notice and, thereby, the reductions in fines available for leniency applicants (14). The CFI, however, upheld the Commission’s view that the Leniency Notice did not apply, stressing that this notice seeks to encourage undertakings to disclose the existence of restrictive practices that are particularly difficult to detect and that is applicable only in cases involving horizontal restrictions.

(10) In 2000, Nathan’s effective cooperation 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 July 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (OJ L 54, 23.2.2001, p. 1).

(11) OJ C 207, 18.7.1996.


(14) In particular, submitting evidence before the statement of objections was issued and not substantially contesting the facts. Not challenging the facts is no longer recognised as a ground for a reduction in fines by later leniency notices. In any event, the application of this rebate would most likely have been barred in view of the use of coercion by Nintendo to ensure participation in the infringement. See in this regard paragraph 11(c) of the 2002 Leniency Notice.
Taking account of collaboration with the Commission’s proceedings outside the scope of the Leniency Notice

Even though the Leniency Notice did not apply to this case, the Commission took account of Nintendo’s collaboration during the proceedings. The Commission applied the mitigating circumstance provided for in the 1998 Guidelines on fines for this type of situation, namely, that of the effective cooperation by the undertaking in the proceedings, outside the scope of the 1996 Leniency Notice. This mitigating factor was maintained in the 2006 Guidelines on fines (15).

In order to decide the actual reductions to be granted, the Commission took into account the fact that, even if the volume of the information provided was less than that of Nintendo, John Menzies was the 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 was consistent with the 2002 (16) Leniency Notice (and would be with the 2006 Leniency Notice (17)).

The CFI argued however that, in order to be comparable, an undertaking’s collaboration does not necessarily have to commence on the same day, but it must commence at the same stage of the procedure. It thereby played down the importance of ‘being first’ to submit evidence, which is an essential element under the leniency notices. It could then conclude that both companies collaborated in a similar manner as they both rendered spontaneously the same decisive evidence (18) and at comparable moments in the procedure (even if not precisely at the same moment). Nintendo should therefore benefit from the same reduction, 40 %, that the Commission had granted to John Menzies.

After having made its own assessment of the additional evidence that Nintendo had submitted, the CFI followed the Commission’s assessment that, despite its volume, this evidence was not essential to enable the Commission to establish the existence of the infringement. Many of the documents were submitted in response to formal requests for information and had allowed the Commission to establish the geographic scope of the infringements and the identity of the distributors involved, also in the absence of the information submitted voluntarily. Consequently, whereas Nintendo was found entitled to the same reduction in fines as John Menzies, there were no grounds to grant it an even larger reduction.

Nintendo’s fine was accordingly reduced to €119.3 million. This fine still represents the largest fine ever imposed for a vertical infringement on a single company.

The Nintendo case shows that the Commission is ready to reward cooperation by firms in areas that go beyond the classical cartel field and the judgment provides some guidance as to how the Commission can and should take account of such collaboration.

3. The appeal by Itochu

Liability for conduct of 100 %-owned subsidiary

In the case of Itochu Corporation, the appeal centred inter alia on the question whether the Commission was right in addressing the decision to Itochu Corporation and in finding that it was liable for the conduct by its subsidiary Itochu Hellas. Itochu Corporation is a very large Japanese trading company and the Commission had increased the basic amount of the fine for Itochu from €1 million to €3 million (19) in order to ensure sufficient deterrent effect and in order to take account of the size and overall resources of Itochu. The question whether it could be found liable would therefore directly affect the manner in which the Commission had established the fine.

The CFI recalled, however, that under Community competition law different companies belonging to the same group (20) form an economic unit and therefore an undertaking within the meaning of Articles 81 and 82 EC if the companies concerned do not independently determine their own conduct on the market. In the specific case, Itochu Corporation held (directly and indirectly) 100 % of the shares in Itochu Hellas, implying that a (rebuttable) presumption exists that the parent company exercises decisive influence over the conduct of its subsidi-

(16) See in particular points 21 to 23.
(17) See in particular points 23 to 26.
(18) Essentially allowing the Commission to prove that John Menzies and Nintendo closely collaborated to prevent parallel trade from the UK in the first part of 1996, when parallel trade from the UK surged.

(19) in order to ensure sufficient deterrent effect and in order to take account of the size and overall resources of Itochu.
(20) The overall fine of €4.5 million followed after taking account of duration.

The grouping of undertakings that were involved in the infringement for the purpose of determining the basic amount of the fine (before taking account of aggravating and mitigating circumstances and duration) was usual under the guidelines applicable at the date of the decision, the 1996 Guidelines on fines. The practice of grouping has been abandoned under the subsequent 2006 Guidelines on fines.
In the present case, Itochu failed to rebut this presumption. Its conduct during the administrative procedure, the decentralised organisation of the Itochu group and the fact that the distribution of Nintendo products was not part of the core business of the Itochu group, failed to convince the CFI that Itochu Hellas acted independently.

4. The appeal by Contact Data

Evidence of participation in the infringement

Contact Data became Nintendo’s distributor for Belgium only in April 1997, i.e. towards the end of the infringement. In reaction to the launch of the Commission’s investigations, Nintendo had already by that time altered its distribution agreements (but not its effective conduct) in a way that meant that they no longer contained restrictions to parallel export. Consequently, the Commission had to rely on evidence of a different nature to demonstrate that the infringement had nonetheless continued and that Contact Data was involved in this continuing infringement. This concerned a fairly limited number of fax communications between Contact Data and Nintendo (24).

After scrutinising in detail the available evidence, the CFI concluded that the Commission had rightly concluded that Contact Data reached a ‘concurrence of wills’ and entered into an agreement with the object of limitation of parallel trade. In this context it is useful to stress that the Commission decision was taken not long after the Court had criticised the Commission’s view of what constitutes an agreement within the meaning of Article 81 EC (23) in vertical arrangements.

This judgment consequently sheds some light on the evidence required to find an ‘agreement’ in a vertical context.

Exclusively passive role in the infringement

The Commission had characterised Contact Data’s role in the infringement as active and had not granted it a reduction in fine for an exclusively passive role (25). The Commission’s assessment had essentially been based on the participants’ pro-active role in giving practical effect to the infringement agreements by reporting parallel trade in their territory to Nintendo (that in turn would organise a follow-up by ensuring that the distributor in the territory where this trade originated would stop it).

Apart from the fact that the CFI considered that, on these grounds, no material differences appeared to exist between Concentra and Contact Data in reporting parallel trade, it took the view that Contact Data’s participation was much shorter in time and that Concentra had signed, unlike Contact Data, a formal agreement restricting parallel trade. Consequently, the fine was reduced by the same percentage awarded to Concentra, 50%, and set at €500,000.

The ground that Concentra, contrary to Contact Data, had entered into a formal agreement restricting parallel trade is puzzling in view of the fact that the CFI upheld the Commission’s finding that Contact Data entered into an agreement, although not formalised, restrictive to parallel trade. Form may thus matter (26).

Role of the Hearing Officer

In this case, no formal oral hearing had been organised because none of the addressees of the statement of objections had requested one. As it happened, Contact Data was the last addressee that had to inform the Commission during the administrative procedure whether it wished an oral hearing. The case handler in question inquired of Contact Data, whilst stating that all other parties had already decided not to exercise their right to an oral hearing, whether Contact Data wished to have one organised.

It was subsequently claimed before the CFI that the way the Commission proceeded (i) infringed Contact Data’s rights of defence as the Commission had implicitly (27) pressured Contact Data to waive its rights to an oral hearing, and (ii) violated Article 10 of Regulation No 2842/98, as supplemented by Article 4 of Decision 2001/462, which stipulate that it is the Hearing Officer (and not the case handler) that organises and conducts oral hearings.

Both arguments were rejected. The facts do not constitute proof of an infringement of Contact Data’s rights of defence and, moreover, the letter accompanying the statement of objections clearly stipulated

(24) The fact that in previous cases, in particular Case C-285/98 P Stora Kopparbergs Bergslags v Commission (paragraph 35), the CFI had also relied on other elements was deemed irrelevant.

(25) The evidence against Nortec, the exclusive distributor that Nintendo appointed for Greece after Itochu, was of a similar nature. This company did not appeal the decision, however.

that, in accordance with Regulation No 284/98, it was for the parties to request an oral hearing. In addition, it does not follow from the above-mentioned Regulation and Decision that only Hearing Officers can contact the undertaking concerned in order to discuss and inform them of the possibility of an oral hearing. Such contact, as part of the day-to-day administrative activities, does not encroach on the tasks of the Hearing Officer.

5. Conclusion

Even though the CFI reduced somewhat the fines that had been imposed on Nintendo and Contact Data, the Commission’s decision was endorsed by the CFI. The Nintendo decision is a further indication that the Commission remains active and is ready to impose large fines also in the case of vertical infringements.