EUROPEAN COMMISSION
Competition DG

CASE AT. 40432 - Character merchandise

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 09/07/2019

EUROPEAN
COMMISSION

Brussels, 9.7.2019
C(2019) 5087 final

PUBLIC VERSION

COMMISSION DECISION

of 9.7.2019

relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the Agreement on the European Economic Area

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decisions of 14 June 2017 and 29 May 2019 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty[2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case,

Whereas:

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[1] OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this decision.

[2] OJ L 123, 27.4.2004, p. 18.

1. INTRODUCTION

(1) This decision issued pursuant to Regulation (EC) No 1/2003 is addressed to Sanrio Company, Ltd., Sanrio GmbH and Mister Men Limited. Those addressees are referred to collectively in this decision as “the addressees”.

(2) This decision concerns direct and indirect restrictions on cross-border sales of licensed merchandise products sold both offline and online within the European Economic Area (“EEA”).

(3) The Commission finds that the undertaking comprising the addressees (referred to in this decision as “Sanrio”) participated in a single and continuous infringement of Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area (“the EEA Agreement”), spanning the period from 1 January 2008 to 21 December 2018 (“the relevant period”). The infringement involved the implementation and enforcement within the EEA of a series of agreements and/or concerted practices aimed at restricting active and passive cross-border sales of licensed merchandise. Such behaviour constitutes conduct which has as its object the restriction of competition within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

2. THE UNDERTAKING CONCERNED

(4) Sanrio Company, Ltd. is a Japanese company that designs, licenses, produces and sells products focusing on the Japanese "kawaii" artistic and cultural style. Sanrio Company, Ltd. has a number of subsidiaries across the world, including European entities. Sanrio’s products include stationery, school supplies, gifts and accessories that are sold worldwide and at Sanrio stores in Japan. Sanrio's best-known character is Hello Kitty, a little anthropomorphic cat girl. Other popular characters owned by Sanrio include My Melody, Little Twin Stars, Keroppi or Chococat. Besides selling character goods, Sanrio takes part in movie production and publishing.

(5) Sanrio GmbH, based in Wentorf bei Hamburg (Germany) and with offices in Milan (Italy) and London (United Kingdom), is the subsidiary of Sanrio Company, Ltd. with responsibility for the EEA. Sanrio GmbH grants licences of trade mark and non-trade mark intellectual property rights in respect of Sanrio characters to other undertakings (i.e. its licensees) allowing them to use its trade marks or other intellectual property rights for the production and distribution of merchandise products.

(6) Mister Men Limited, based in London (United Kingdom) is a wholly owned subsidiary of Sanrio Company, Ltd. Sanrio Company, Ltd. acquired Mister Men Limited in December 2011. Mister Men Limited, [details of Sanrio’s internal corporate structure], holds the intellectual property rights in the “Mr. Men” and “Little Miss” series of animated characters. Mister Men Limited also grants licences of its trademarked characters to other undertakings allowing them to use its trade marks or other intellectual property rights for the production and distribution of merchandise products.

(7) The Commission’s investigation has focused on conduct carried out by Sanrio GmbH and Mister Men Limited as the main Sanrio entities active within the EEA.

3. THE PRODUCTS AND GEOGRAPHIC AREA CONCERNED

(8) The products concerned by this decision are licensed merchandise products. These are products of a varied nature, for example toys, clothing, shoes or bags, onto which an image or text is applied during the manufacturing process. The aim of applying the image or text, which is typically subject to intellectual property rights, onto the products is to increase the products' attractiveness for consumers. The product manufacturer (licensee) may only use the image or text if it has signed a licensing agreement with the owner of the relevant intellectual property rights (licensor). The products concerned by this decision are further described in Section 5.1.

(9) The products concerned by this decision are distributed in the territories of all the Contracting Parties to the EEA Agreement.

4. PROCEDURE

(10) In September 2016, the Commission conducted unannounced inspections at Sanrio GmbH's office in Milan, in Italy.

(11) By decision of 14 June 2017[3], the Commission initiated proceedings in accordance with Article 2(1) of Commission Regulation (EC) No 773/2004[4] against Sanrio Company, Ltd. and all legal entities directly or indirectly controlled by it, including Sanrio GmbH, in order to further investigate whether Sanrio had in place agreements and/or applied practices preventing or restricting the sale of licensed merchandise in the EEA. On 29 May 2019, the Commission adopted a further decision to initiate proceedings in accordance with Article 2(1) of that Regulation against Mister Men Limited.

(12) On […], the addressees submitted a formal offer to cooperate in Case AT.40432 in view of the adoption of a decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 (their offer is referred to in this decision as "the settlement submission").[5] The settlement submission contained the following:

(1) an acknowledgement, in clear and unequivocal terms, by the addressees of their joint and several liability for the infringement described in the settlement submission, including the facts, their legal qualification, the addressees' roles in the infringement and the duration of their participation in the infringement;

(2) an indication of the maximum fine that the addressees would accept in the context of a cooperation procedure;

(3) confirmation that the addressees had been sufficiently informed of the objections the Commission envisaged raising against them and that they had been given sufficient opportunity to make their views known to the Commission;

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3 Commission decision of 14 June 2017 in Case AT.40432 - Character merchandise. See also Antitrust: Commission opens formal investigations into Nike's, Sanrio's and Universal Studios' licensing and distribution practices, European Commission, press release, 14 June 2017, http://europa.eu/rapid/press-release_IP-17-1646_en.htm, […].

4 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18).

5 […].

(4) confirmation that the addressees had been granted sufficient opportunity to access the evidence supporting the potential objections and all other documents in the Commission's file, and that they did not envisage requesting further access to the file or to be heard again in an oral hearing, unless the Commission did not reflect the settlement submission in the statement of objections ("SO") and the decision; and

(5) the addressees' agreement to receive the SO and the decision adopted pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English.

(13) The settlement submission was made conditional upon the imposition by the Commission of a fine not exceeding the amount specified in the settlement submission.

(14) On 29 May 2019, the Commission adopted an SO concerning the addressees' participation in the anticompetitive conduct that is the subject of this decision.

(15) On 11 June 2019, the addressees submitted their joint reply to the SO. All three addressees reiterated their commitment to follow the cooperation procedure and confirmed that the SO reflected the content of the settlement submission and that they did not wish to be heard again by the Commission.

5. CONDUCT UNDER INVESTIGATION

5.1. Overview of Sanrio's activities

(16) Sanrio's business includes the design, licensing, production and selling of products based on its own proprietary characters, including its best-known character Hello Kitty.

(17) Sanrio also licenses its characters to other undertakings that produce and distribute all kinds of merchandise products incorporating those characters. These merchandise products are of a varied nature, for example toys, clothing, shoes and bags, and are sold primarily, but not exclusively, for children.

(18) Sanrio typically licenses its proprietary characters either directly or indirectly:

(1) direct licensing is where Sanrio grants a direct licence over its intellectual property rights to a third party for the manufacture and sale of certain products incorporating the characters covered by those intellectual property rights. Although the licensing contracts normally provide for one or more specific territories granted to the licensee, the licences granted are normally non-exclusive. A common form of wording in the licensing contracts reads as follows:

[direct quote from confidential licensing agreement regarding licensed territory][6]

(2) At times Sanrio also appoints an agent for one or more specific territories. The contracts are concluded either on an exclusive or a non-exclusive basis.[7]

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[6] For example, see […].

[7] [Details of role of agents in managing relationships between Sanrio and licensees]. See for example […].

(19) Conclusion of a licensing contract usually involves several steps. During the first step, either Sanrio or the agent negotiates a so-called "Deal Memo" with the potential licensee. The Deal Memo is a short document describing the main provisions of the future contract. Once the Deal Memo is agreed, Sanrio (directly or via the agent) typically provides the licensee with a draft standard contract which includes the main provisions already contained in the Deal Memo. At times, however, the licensee may propose the initial draft terms of the contract. Once all details are sorted out, the contract is signed by the licensee and sent back to Sanrio.

(20) Regardless of the procedure followed for granting licences, agreements with licensees typically include provisions governing distribution of the products onto which the characters covered by the licensed intellectual property rights will be applied.

(21) In addition to granting a licence to use the intellectual property rights, Sanrio's merchandising agreements also set out the terms and conditions to be followed by the licensee when selling and distributing the products to wholesalers and retailers of the licensee’s choice, subject to certain limitations as regards territory, quality, etc.

(22) In other words, the licensee both manufactures (or further sub-contracts the manufacture of) licensed products and distributes those products.

(23) Other terms consistently included in Sanrio's merchandising agreements are the following:

(1) <u>character(s) licensed:</u> Sanrio’s licensing agreements normally list the character(s) that are subject to the licence agreement. A typical licence agreement will include the following wording:

[direct quote from confidential licensing agreement regarding licensed properties][8]*;*

(2) <u>type(s) of product(s) concerned:</u> Sanrio's licensing agreements for merchandising also often specify the types of product or categories of product onto which the licensee will be able to apply those characters for subsequent manufacture and/or sale. The types of product or categories of product covered by licensing agreements is usually broad.[9] The agreements also typically require the licensee to apply certain notices to each product, including labels guaranteeing that the product respects Sanrio’s standards;[10]

(3) <u>territorial scope:</u> Sanrio generally grants all licences in the EEA for one or more specific countries on a non-exclusive basis, […].[11] [Sanrio also sometimes reserves itself the right to purchase the licensed products from the licensee and to sell, market and distribute them itself. Sanrio also reserves itself

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8 […], Schedule […] or […] Section […].

9 See for example […], Schedule […] which provides for many different kinds of candies, […], Section […] which provides for a large range of toys or […], Section […] which provides for a wide range of products including, among other things, suitcases, document holders, brushes, combs, key rings or shower caps.

10 See for example […], Sections […] to […].

11 See for example […], Sections […] and […]; see also […], Section […] and […] and Schedule […]. See also […] corporate statement of […].

the right to manufacture, distribute and sell products identical or substantially similar to the licensed articles][12];

(4) channels for distribution of the products: Sanrio's licensing agreements typically include [details of Sanrio's policies in allocating licensed channels];[13]

(5) duration of the agreement: Sanrio's licensing agreements are typically for a term of [0-5] years[14], although agreements may be concluded for longer[15] periods of time;

(6) financial compensation to be paid by the licensee: Sanrio's licensing agreements provide for licensees to pay Sanrio a certain amount in consideration for the grant of the licence. The compensation paid by licensees to Sanrio is made up of two elements:

   (a) royalties: Sanrio's licensing agreements typically provide for licensees to pay royalties to Sanrio as compensation for the licence. The amount of the royalties to be paid is normally calculated as a percentage of the products' retail, wholesale or free-on-board ("FOB") price during a specified period [details of specified period], which also defines the frequency for payment of the royalties.[16] [Details of Sanrio's royalty arrangements].[17] Licensees would typically be required to report the sales and corresponding royalties periodically by means of so-called royalty reports;

   (b) minimum guarantee: Sanrio's licensing agreements generally also include a minimum royalty guarantee. This minimum guarantee (often referred to simply as "MG") is a payment calculated on the basis of the royalties forecast to be paid by the licensee for its sales within the territory throughout the contract duration. The timing of the payment of the MG (paid in full or in instalments) depends on the particular contract negotiated with the licensee. On the basis of those forecasts, the minimum guarantee for the territory will then be set at [details of Sanrio's royalty arrangements]. In some cases where the agreement includes a minimum guarantee to be paid in advance, the licensee will not need to pay royalties on sales in the contract territory until the sum of the royalties on the products sold exceeds the amount of the minimum guarantee. In such cases, once that threshold is reached, the usual royalties on each product will need to be paid.[18]

(24) Figure 1 provides an overview of the different parties involved in a typical agreement governing the licensing of Sanrio's intellectual property, including an illustration of the monetary and contractual relationships between them.

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12 See for example […], Section […]; see also […], Section […].

13 See for example […], Sections […].

14 See […] reply to the Commission RFI dated 20 June 2018, Q 3.

15 See for example […], Schedule […] and […], Section […].

16 See for example […], Section […] or […], Section […] and Schedule […].

17 See for example […], Section […] or […], Schedule […]. See also […] reply to Commission RFI dated 20 June 2018, Q 1.

18 See for example […], Section […] or […], Schedule […].

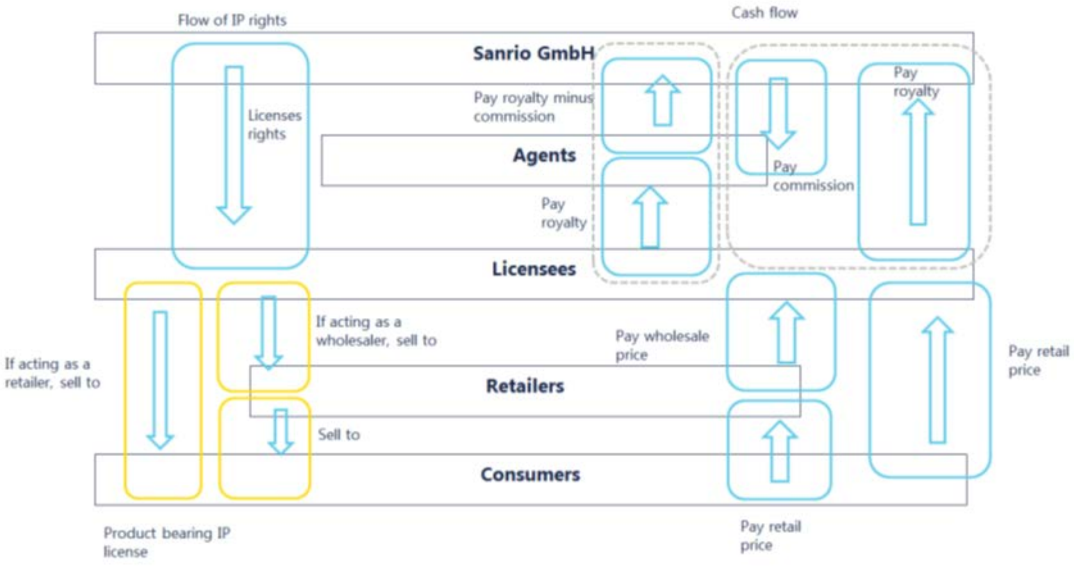

Figure 1: Illustrative overview of the licensing of the intellectual property rights in respect of Sanrio characters

(25) Sanrio, directly or through its agents, also maintains frequent contacts with its licensees by other means. One of the objectives of these contacts is to maintain oversight of the distribution of licensed merchandise products.

(26) The first step towards distribution of the products normally involves the product approval process. Once an agreement is concluded, Sanrio and the licensee normally engage in a discussion on different aspects of the products to be manufactured and sold. These discussions typically cover the physical characteristics of the product, such as its style, its colours and its quality. The licensee is also required to submit a physical sample of the product in order to obtain Sanrio's final approval for commercialisation of the product.[19]

(27) Once approved, the licensee is entitled to distribute the product in the market as established in the agreement signed with Sanrio. Sanrio's licensees often distribute the products at wholesale level, although at times they also retail directly to consumers.

(28) Sanrio normally maintains the right to control the quality of the merchandise products incorporating the licensed intellectual property and to stop the sale of articles which are below the agreed standard.[20]

(29) Throughout the duration of the agreement, Sanrio also remains in contact with its licensees (either directly or through its agents) in relation to various issues. These usually relate to the interpretation or modification of certain aspects of the licensing agreements, such as questions regarding the launch of certain products, extension of territories, payment of royalties or to better understand potential licensing opportunities in other territories.

(30) Sanrio often retains a right to audit licensees as regards their compliance with the licensing agreement. The audits are conducted by external parties, their main aim

19 See for example […], Section […] and Schedule […] or […], Section […].
20 See for example […], Section […] and […], Section […].

being to confirm whether the royalty reports transmitted correspond to the actual net sales, i.e. to confirm that royalties are properly reported and paid.[21]

5.2. Practices restricting out-of-territory sales of licensed merchandise

(31) During the relevant period, a series of practices restricting active and passive cross-border sales of licensed merchandise were put in place throughout Sanrio's merchandising business. These practices concerned both offline and online sales of licensed merchandise products throughout the EEA.

(32) These practices were developed and implemented by contractual and non-contractual means discouraging, and at times explicitly preventing, licensees from distributing the licensed products to customers outside the territory.[22] Delivery of licensed products to customers who were established within the licensee's territory but could eventually sell the products outside the territory was also discouraged by Sanrio.

(33) In addition to explicit contractual restrictions, Sanrio would at times ask licensees to limit their activities to the territories assigned to them in their licensing agreements. For business opportunities involving cross-border sales, licensees would often contact Sanrio in order to request permission to engage in or accept such sales. Sanrio would at times ask licensees to cease any cross-border sales of licensed products to the territories of EEA Contracting Parties not falling within the territory assigned to them.

(34) Certain business tools, in particular in relation to the conduct of audits, or renewal of contracts, were at times applied in such a way as to ensure compliance with the restrictions concerning out-of-territory sales. They can be considered indirect measures applied to achieve the objective of restricting out-of-territory sales of Sanrio's licensed merchandise.

5.2.1. Direct measures restricting out-of-territory sales by licensees

(35) During the relevant period a series of practices directly restricting active, passive and online cross-border sales of licensed merchandise were implemented throughout Sanrio's merchandising business.

5.2.1.1. Prohibition of out-of-territory passive sales

(36) Since at least 2008, Sanrio's licensing agreements have generally contained clauses explicitly allowing for passive sales. An example of such clause is: *"Licensee…shall not be prohibited hereby from accepting and fulfilling any unsolicited orders (…)".*[23] A standard licensing contract between Sanrio and its licensees which was gradually introduced from 2011 onwards provides that *"In the event the Licensed Territory or a part thereof, now or hereafter, is a member state of the European Economic Area (the "EEA") nothing in this Agreement shall prevent Licensee from supplying orders, without having requested these orders, from unsolicited customers having registered*

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21 […], Section […] and […], Section […].

22 Throughout this decision, references to "out-of-territory", "outside the territory" or similar terms are to be understood as referring to transactions between a licensee and a third party who is located in the territory of one of the Contracting Parties to the EEA Agreement, but outside the territory(ies) allocated to the licensee in the licence agreement(s).

23 See for example […], Schedule […].

offices and located in countries of the EEA outside the Licensed Territory ("Passive Sale")".[24]

(37) However, the non-contractual evidence on file shows that, in practice, such passive sales were discouraged or even prevented.

(38) First of all, Sanrio appears to have at times reached what is referred to in internal correspondence as a "gentleman's agreement" with its licensees. These gentleman's agreements were aimed at preventing cross-border sales of merchandise products incorporating Sanrio's intellectual property.[25]

(39) Furthermore, there is evidence that Sanrio, at least from the end of 2008, intervened at times to ask licensees to avoid making cross-border sales in general and more specifically passive sales. These interventions were made at Sanrio's own initiative[26], following complaints by other licensees[27], or following requests by licensees to authorise specific passive sales[28].

(40) Finally, there is also evidence that licensees were made to understand that passive sales were to be avoided.[29]

5.2.1.2. Prohibition of out-of-territory active sales

(41) Sanrio's licensing agreements entered into between 2008 and the end of 2016 contained clauses explicitly requiring licensees not to *"actively solicit orders for the Licensed Products outside the Licensed Territory"*.[30]

(42) The draft standard contract introduced after 2011 also provided that *"Licensee shall not pursue an active policy of selling or marketing the Licensed Products and/or the Licensed Property in such countries. The Licensee specifically agrees that it will not seek customers outside the Licensed Territory for the Licensed Products; that it will not establish outside the Licensed Territory any branch for the sale of the Licensed Products; and that it will not maintain outside the Licensed Territory any distribution depot for the Licensed Products. Licensee shall only be entitled to exercise the licensed rights in the Licensed Territory and is prohibited from making or contributing to any direct or indirect use of the Licensed Products in any location outside the Licensed Territory except as specifically provided herein."*[31]

(43) In addition to these contractual clauses, there is also evidence of Sanrio taking steps at times to enforce contractual obligations in order to block active sales.[32]

(44) Besides the evidence of direct intervention by Sanrio to police or stop active cross-border sales by its licensees, there is evidence too of complaints by other licensees asking Sanrio to stop active sales in their allocated territories.[33]

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24 […], Section […].
25 See for example […], […], […], […].
26 […].
27 […].
28 […], […], […].
29 […].
30 See for example […], Schedule […] or […], Section […].
31 […], Section […].
32 […], […], […].
33 […], […].

5.2.1.3. Prohibition of online sales

(45) As regards online sales, Sanrio's licensing contracts throughout the relevant period either (i) prohibited online sales outright or (ii) only allowed online sales in the assigned territory.

(46) In particular, those contracts typically stated:

"The Licensee shall not have the right to sell Licensed Products via any home shopping channel, direct response television program or interactive media including Internet or as a "premium" or in connection with any marketing program unless differently stated in this schedule".[34]

(47) In some contracts concluded between 2011 and 2017, additional clauses appeared to allow for in-territory online sales but explicitly prohibit sales to addresses outside of the territory :

"Online retailers – delivery/shipment of the Licensed Articles to addresses located in the Licensed Territory only…"[35]

(48) E-mails exchanged during the contract negotiations confirm that Sanrio at times asked for internet sales to be removed from the contract[36] or for the clause quoted in recital (47) to be added limiting online sales channels to local delivery/shipment addresses only.[37] Moreover, at least from […] onwards, there is evidence of Sanrio using these contractual provisions in order to prevent out-of-territory online sales.[38]

5.2.1.4. Obligation to refer orders for out-of-territory sales to Sanrio

(49) In addition to the prohibitions on passive, active and online out-of-territory sales described in this Section, the licensing contracts concluded by Sanrio from around 2011 onwards also contained a clause providing that *"Licensee shall promptly notify Licensor of any unsolicited orders for Licensed Products from customers within the EEA."*[39]

(50) The non-contractual evidence on file shows that this kind of clause was given effect to by the parties with licensees sometimes requesting prior authorisation to service cross-border unsolicited purchase requests, i.e. a restriction on passive sales. Such authorisations were not always granted by Sanrio.[40]

5.2.1.5. Use of language requirements to restrict out-of-territory sales

(51) Furthermore, licensing contracts between Sanrio and its licensees for the whole relevant period often included clauses specifying the language to be used on products. Typically the languages allowed were the ones of the territory(ies) covered by the licensing contract. A typical clause covering language requirements read as follows: *"Territory: UK & EIRE. Language on product: local languages".*[41]

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34 See for example […], Article […] and Schedule […]; […], Article […] and Schedule […].
35 See for example […], Article […]; […], Article […].
36 See for example […].
37 See for example […].
38 […], […], […], […].
39 […], Section […].
40 […], […], […].
41 […], Section […].

(52) Non-contractual evidence on file from at least […] onwards reveals that such clauses were indeed used by Sanrio to prevent out-of-territory sales. In particular, in cases in which a licensee had received an unsolicited request to sell its merchandise products outside the contractually allocated territory, it would ask permission to use a different language on the products from the contractually agreed one(s), in order to fulfil regulatory requirements in the EEA Contracting Party where the product was to be sold. Sanrio would reject these language requests.[42] Even if at times Sanrio would exceptionally approve language requests in relation to individual passive sales orders[43], Sanrio was nonetheless making use of this process in order to restrict or at least control out-of-territory passive sales.

5.2.2. Indirect measures restricting out-of-territory sales by licensees

(53) In addition to explicitly prohibiting out-of-territory sales, certain contractual and non-contractual practices were implemented throughout Sanrio's licensing business as an indirect way to encourage compliance with the out-of-territory restrictions.

(54) When enforced in such a way, these practices allowed Sanrio to monitor and/or encourage compliance with the restrictions regarding out-of-territory sales within the EEA.

(55) All the mechanisms described in this Section represent tools generally used by companies in the normal course of their activities. The evidence on file, however, confirms that Sanrio used these tools also to ensure compliance with the restrictions concerning out-of-territory sales described in Section 5.2.1.

5.2.2.1. Conduct of audits to ensure compliance with out-of-territory sales restrictions

(56) As already mentioned in recital (30), Sanrio's licensing contracts typically contained clauses on audit rights[44], allowing Sanrio to examine the licensee's accounts and records with regard to the licensing agreement. In the event that discrepancies above a certain percentage were discovered, the licensee would have to pay a sum to Sanrio to cover, among other things, the cost of the audit. Under some contractual provisions, where there was a higher level of discrepancies, Sanrio had the right to terminate the contract.[45]

(57) The evidence on file reveals that Sanrio did actually conduct those kinds of audit into the business dealings of licensees. These audits were a routine check, carried out by a third party, to verify whether the royalty reports transmitted corresponded to the actual net sales. One of the aspects covered by the audits was whether or not the licensee had been selling outside its allocated territories beyond the level reported to Sanrio.[46]

5.2.2.2. Non-renewal of contracts due to out-of-territory sales

(58) Finally, it is clear from the evidence on the file that, with a view to discouraging out-of-territory sales, Sanrio would at times indicate to licensees that it may not renew

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42 […].

43 […] and […]. See also […], authorisation letter granted by Sanrio.

44 See for example […], Section […]: [direct quote from confidential licensing agreement in relation to auditing of licensee accounts].

45 See for example […], Section […]: [direct quote from confidential licensing agreement in relation to auditing of licensee accounts].

46 […], […], […], […].

their contracts.[47] There is also evidence that Sanrio did actually decide at times not to renew specific licence agreements due to the licensee having made out-of-territory sales.[48]

6. LEGAL ASSESSMENT

6.1. Legal context of licensing agreements

(59) Merchandising is a tool that is widely used in order to increase the attractiveness of a product or service. By means of a licensing agreement, one party (the licensor) allows another party (the licensee) to use one or more of its intellectual property rights in a certain product or service. The intellectual property rights most commonly used on merchandise products are trade marks, but other rights such as copyright, design rights or image rights may also be involved.

(60) Licences are generally granted on a non-exclusive basis in order to increase the number of merchandise products in circulation in the market and to increase territorial coverage. Exclusive licences are at times also granted, but they would normally be limited in scope, for example only granted for a limited period.

(61) Despite the use of non-exclusive licences, licensors often try to avoid overlaps between different territories. However, this attempt to avoid overlaps falls short of creating a *de facto* exclusive environment both because some overlaps still remain (albeit only a limited number) and because the licensor still retains the ability to appoint additional licensees in the territory.

(62) The Commission finds that the practices investigated in this case, including the restrictive clauses in agreements for the licensing and distribution of merchandise products, amount to restrictions prohibiting or limiting the cross-border supply of goods. Irrespective of whether intellectual property rights are exhausted,[49] such restrictions fall under Union competition law.

(63) In particular, Union courts have acknowledged their competence to assess the legality of such clauses under Union competition law and have found that a misuse of intellectual property rights may amount to an infringement of competition rules.[50] By reference to earlier case law concerning the distribution of pharmaceutical products, the Court of Justice has also found that restrictions on cross-border sales of broadcasting services constitute by object infringements, on the basis that they allow

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47 […] and […].

48 […].

49 The doctrine of regional exhaustion establishes that once products or services bearing a certain intellectual property right have been placed in the EEA by or with the consent of the rightholder, rightholders can no longer use their intellectual property rights to prevent a further distribution of those goods within the Area. Union Courts have a long standing tradition of recognising the exhaustion of trade mark rights. See in this respect Judgment of the Court of 16 July 1998, C-355-96, *Silhouette International Schmied v Hartlauer Handelsgesellschaft* EU:C:1998:374. Union Courts have also acknowledged that the distribution right enjoyed by the copyright holder is also exhausted with the first sale in the EEA of the original of a work or copies thereof by the rightholder or with his consent. See in this respect, Judgment of the Court of 3 July 2012, *UsedSoft v Oracle*, C-128/11, EU:C:2012:407.

50 Judgment of 23 May 1978, *Hoffman-La Roche v Centrafarm*, C-102/77, EU:C:1978:108.

"all competition between [licensees] in the field of those services to be eliminated".[51]

6.2. Application of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement

6.2.1. The Treaty and the EEA Agreement

(64) Article 101(1) of the Treaty prohibits as incompatible with the internal market agreements between undertakings, decisions by associations of undertakings and concerted practices that (i) may affect trade between Member States and (ii) have as their object or effect the prevention, restriction or distortion of competition within the internal market, unless they meet the conditions for an exemption set out in Article 101(3) of the Treaty.

(65) Article 53(1) of the EEA Agreement prohibits as incompatible with the functioning of the EEA Agreement agreements between undertakings, decisions by associations of undertakings and concerted practices that (i) may affect trade between Contracting Parties to the EEA and (ii) have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement, unless they meet the conditions for an exemption set out in Article 53(3) of the EEA Agreement.

(66) The conduct described in Section 5 of this decision concerns the territory of the Union and the EEA. Insofar as the conduct affected trade between Member States, Article 101 of the Treaty is applicable. As regards operation of those agreements and concerted practices in Norway, Iceland and Liechtenstein and its effect on trade between the Union and those countries, it falls within Article 53 of the EEA Agreement.

(67) In this case, the Commission is the competent authority to apply both Article 101 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the conduct had an appreciable effect on trade between Member States.

(68) References in the succeeding recitals of this Section to Article 101 of the Treaty, to effect on trade between Member States, or to competition within the internal market are to be taken to include, respectively, Article 53 of the EEA Agreement, effect on trade between Contracting Parties to the EEA Agreement, and competition within the territory covered by the EEA Agreement.

6.2.2. Concept of undertaking

6.2.2.1. Principles

(69) Article 101(1) of the Treaty applies to undertakings and associations of undertakings.[52] The notion of an "undertaking" covers any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed.[53]

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[51] Judgment of 4 October 2011, *Football Association Premier League and Others v QC Leisure and Others*, C-403/08, and *Karen Murphy v Media Protection Services*, C-429/08, EU:C:2011:631, paragraph 142; Judgment of 12 December 2018, *Groupe Canal + v Commission*, T-873/16 EU:T:2018:904, paragraph 50.

[52] Judgment of 3 March 2011, *AG2R Prévoyance*, C-437/09, EU:C:2011:112, paragraph 40.

6.2.2.2. Application to this case

(70) Sanrio and the licensees with which it has concluded licensed agreements described in Section 5 carry out independent economic activities and therefore qualify as undertakings for the purposes of Article 101(1) of the Treaty.

6.2.3. Agreements and/or concerted practices between undertakings

6.2.3.1. Principles

(71) In order for there to be an agreement for the purposes of Article 101(1) of the Treaty, it is sufficient that at least two undertakings have expressed their joint intention to conduct themselves on the market in a specific way.[54] Although Article 101(1) draws a distinction between the concept of concerted practices and agreements between undertakings, the object is to bring within the prohibition of that Article a form of co-ordination between undertakings by which, without having reached the stage where an agreement has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.[55]

(72) The concepts of an agreement and a concerted practice are fluid and may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other.[56]

6.2.3.2. Application to this case

(73) The conduct described in Section 5 presents all the characteristics of agreements and/or concerted practices entered into between undertakings, namely between Sanrio on the one hand and licensees on the other. Sanrio enforced the out-of-territory restrictions by means of contractual agreements spanning the whole duration of the infringement. Moreover, as explained in recital (37) for instance, even in the absence of explicit contractual clauses Sanrio and its licensees agreed to behave, and/or engaged in concerted practices, in such a manner as to restrict out-of-territory sales.

6.3. Restrictions of out-of-territory active and passive sales as restrictions of competition by object

6.3.1. Principles

(74) 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

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53 Judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission,* Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 112; Judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 107; and Judgment of 11 July 2006, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission*, C-205/03 P, EU:C:2006:453, paragraph 25.

54 Judgment of 11 January 1990, *Sandoz Prodotti Farmaceutici v Commission*, C-277/87, EU:C:1990:6, paragraph 13; Judgment of 26 October 2000, *Bayer v Commission*, T-41/96, EU:T:2000:242, paragraphs 67 and 173.

55 Judgment of 14 July 1972, *ICI v Commission*, C-48/69, EU:C:1972:70, paragraph 64; Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 26.

56 Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 81.

effects.[57] Such reasoning derives from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.[58]

(75) Consequently, certain types of conduct such as those limiting parallel trade or partitioning the EEA along national markets,[59] may be considered so likely to have negative effects, in particular on the price, choice, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) of the Treaty, to prove that they have actual effects on the market.[60]

(76) In *Consten and Grundig*[61], the Court established a distinction between the existence and the exercise of intellectual property rights with regard to an agreement for the assignment of a trade mark aimed at partitioning the internal market. The Court held that rights under national trade mark law, such as the right to assign the trade mark, cannot be exercised so as *"to frustrate the Community's law on cartels"*.

(77) In the same case the Court held that agreements restricting out-of-territory active and passive sales make it possible for undertakings to charge for the products in question prices which are sheltered from all effective competition by artificially maintaining separate national markets within the EEA.[62]

(78) Union Courts have held that agreements aimed at partitioning national markets along national borders or making the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) of the Treaty.[63] Moreover, the fact that the clauses are not strictly enforced is irrelevant since the very existence of those clauses may create a *"visual and psychological"* background contributing to the division of the markets.[64]

(79) Even an agreement which does not explicitly contain an export ban or confer absolute territorial protection on a distributor may be found to restrict competition if such is its purpose or if it makes parallel imports more difficult by subjecting them to treatment less favourable than that reserved for official imports or by restricting the buyer's freedom to use the goods supplied in accordance with his own economic

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57 Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 113.

58 Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 114.

59 Judgment of 4 October 2011, *Football Association Premier League and Others v QC Leisure and Others*, C-403/08, and *Karen Murphy v Media Protection Services Ltd*, C-429/08, EU:C:2011:631, paragraph 139.

60 Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 115.

61 Judgment of 13 July 1966, *Consten and Grundig v Commission of the EEC*, Joined cases C-56/64 and C-58-64/64, EU:C:1966:41, p.346.

62 Judgment of 13 July 1966, *Consten and Grundig v Commission of the EEC*, Joined cases C-56/64 and C-58-64/64, EU:C:1966:41, p.343.

63 Judgment of 4 October 2011, *Football Association Premier League and Others v QC Leisure and Others*, C-403/08, and *Karen Murphy v Media Protection Services*, C-429/08, EU:C:2011:631, paragraph 139.

64 Judgment of 1 February 1978, *Miller v Commission*, C-19/77, EU:C:1978:19, paragraph 7.

interests.[65] In this respect, Union Courts and the Commission's decisional practice have found that certain types of conduct falling short of an outright prohibition on out-of-territory sales also constitute anticompetitive infringements. These include situations where letters are sent discouraging or prohibiting exports,[66] where export is permitted only if the consent of the producer is obtained,[67] where the producer must be contacted before exporting via the internet,[68] where an agreement requires a distributor to pass on any customer enquiries coming from outside the contract territory to the producer,[69] where discounts are reduced or additional fees charged in the event of sales outside the destination territory,[70] or where a producer threatens to terminate or actually terminates contractual arrangements with distributors or dealers which sell outside their allocated territory.[71]

6.3.2. Application to this case

(80) Through the set of practices restricting out-of-territory sales described in Section 5.2, Sanrio restricted the ability of its licensees to sell licensed merchandise cross-border, thereby restoring the divisions between national markets.

(81) Sanrio engaged in that restrictive behaviour by different direct means, including putting into practice different measures prohibiting or preventing licensees of its licensed merchandise products from concluding active and passive out-of-territory sales, both online and offline. Such practices, by their very nature, have as their object the restriction of competition within the meaning of Article 101(1) of the Treaty.

(82) Through those direct measures, Sanrio aimed at ensuring a compartmentalisation of its licensing network so as to prevent cross-border sales between territories and customers within the EEA. All these practices are liable to frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market.

(83) In addition to those direct measures restricting out-of-territory sales, Sanrio at times used a series of indirect measures to support the out-of-territory restrictions, as described in Section 5.2.2. Sanrio's use of these measures as an indirect means to support and reinforce the direct measures restricting out-of-territory sales constitutes conduct that, by its very nature, in the context of the underlying territorial restrictions, has as its object the restriction of competition within the meaning of Article 101(1) of the Treaty.

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65 Opinion of Advocate General Tizzano delivered on 25 October 2005, *General Motors v Commission*, C-551/03 P, EU:C:2005:639, paragraph 72, quoting Joined Cases C-96/82 to C-102/82, C-104/82, C-105/82 and C-110/82, *IAZ and Others v Commission*, EU:C:1983:310, paragraph 6.

66 Judgment of 26 October 2000, *Bayer v Commission*, T-41/96, EU:T:2000:242.

67 Judgment of 14 July 1994, *Parker Pen v Commission*, T-77/92, EU:T:1994:85, paragraphs 37 and 44 ; Judgment of 14 December 1983, *Société de Vente de Ciments v Kerpen & Kerpen*, C-319/82, EU:C:1983:374, paragraph 6.

68 Commission Decision of 16.07.2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement in Case No COMP/37.975 PO/Yamaha.

69 Judgment of 19 May 1999, *BASF Lacke + Farben v Commission*, T-175/95, EU:T:1999:99, paragraph 87.

70 Judgment of 9 July 2009, *Peugeot Nederland v Commission*, Case T-450/05, EU:T:2009:262, paragraph 47.

71 Judgment of 6 July 2000, *Volkswagen v Commission*, T-62/98, EU:T:2000:180.

6.4. Single and continuous infringement

6.4.1. Principles

(84) An infringement of Article 101 of the Treaty can result not only from an isolated act, but also from a series of acts or from a course of conduct, even if one or more aspects of that series of acts or continuous conduct could also, in itself and taken in isolation, constitute an infringement of that Article. It follows from the express terms of Article 101 of the Treaty that an agreement may consist of a series of acts or a course of conduct[72].

(85) The Court has also held that when: *"[…] the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole".*[73] It also held that the existence of an "overall plan" (and thus a single infringement) can be established by a finding that the participants in a series of practices and/or agreements collusively aimed at restricting competition between them.[74]

(86) Accordingly, if the different actions form part of an "overall plan" because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[75] Furthermore, a complex infringement may properly be viewed as a single and continuous infringement for the time during which it existed.[76]

6.4.2. Application to this case

(87) The Commission concludes that the conduct described in Section 5 constitutes a single and continuous infringement of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement throughout the EEA.

(88) The restrictions implemented by Sanrio were all adopted in pursuit of an overall anti-competitive objective, namely to ensure a compartmentalisation of its licensing network in order to prevent cross-border sales to territories and customers of different EEA Contracting Parties.

(89) The evidence described in Section 5.2 demonstrates that Sanrio's practices formed part of an overall business strategy by Sanrio aimed at controlling the territories in which the licensees could sell the products, to the detriment of competition. Those practices led to a reduction in the choice available to consumers and, potentially, increased prices for certain products as a direct result from the lower level of competition.

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[72] Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92P, EU:C:1999:356, paragraph 81.

[73] Judgments of 7 January 2004, *Aalborg and others v Commission*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 258; Judgment of 21 September 2006, *Technische Unie v Commission*, C-113/04 P, EU:C:2006:593, paragraph 178.

[74] Judgment of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, EU:C:2006:592, paragraphs 162-163.

[75] Judgment of 24 June 2015, *Fresh Del Monte Produce v Commission*, Joined Cases C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 156.

[76] Judgment of 15 March 2000, *Cimenteries CBR v Commission*, Joined Cases T-25/95 and others, EU:T:2000:77, paragraph 3699.

(90) The existence of a single and continuous infringement in this case is further supported by the fact that Sanrio's conduct followed a similar pattern throughout the whole infringement and throughout the territories of all EEA Contracting Parties.

6.5. Effect on trade between Member States and between Contracting Parties to the EEA Agreement

6.5.1. Principles

(91) Article 101(1) of the Treaty is aimed at agreements and concerted practices which might harm the attainment of an internal market between Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market.[77] Article 53(1) of the EEA Agreement is similarly aimed at agreements and concerted practices which might harm the attainment of an internal market between Contracting Parties to the EEA Agreement.

(92) The Court of Justice has held that an agreement affecting trade between Member States and having an anticompetitive object by its nature constitutes an appreciable restriction of competition in violation of Article 101(1) of the Treaty, independently of any concrete effect that it may have.[78]

6.5.2. Application to this case

(93) Notwithstanding the non-exclusive nature of Sanrio's licensing agreements, by implementing a series of prohibitions on out-of-territory sales during the relevant period, Sanrio prevented its licensees from selling licensed merchandise products to customers outside their allocated territories, even if those sales were geared towards the territories of other EEA Contracting Parties.

(94) In addition to the outright prohibitions, certain other practices were implemented that allowed Sanrio to monitor and/or encourage compliance with those limitations.

(95) The Commission concludes that Sanrio's conduct affected trade between Member States and had an anticompetitive object. Therefore, by its nature and independently of any concrete effect that it may have had, the conduct constituted an appreciable restriction of competition in violation of Article 101(1) of the Treaty.

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

6.6.1. Principles

(96) Article 101(1) of the Treaty may be declared inapplicable pursuant to Article 101(3) of the Treaty where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and the agreement or concerted practice does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, and (b) afford those undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

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[77] Judgment of 15 March 2000, *Cimenteries CBR v Commission*, Joined Cases T-25/95 and others, EU:T:2000:77, paragraph 3930; Judgment of 28 April 1998, *Javico v Yves Saint Laurent Parfums*, Case C-306/96, EU:C:1998:173, paragraphs 16-17. See also Judgment of 13 July 1966, *Consten and Grundig v Commission of the EEC*, Joined Cases C-56/64 and C-58-64/64, pp. 341-342.

[78] Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795 paragraph 37.

(97) The Commission is empowered to apply Article 101(3) of the Treaty by regulation to certain categories of agreement falling within Article 101(1) of the Treaty, which can be regarded as normally satisfying all the conditions laid down in Article 101(3) of the Treaty. Commission Regulation (EU) No 330/2010[79] ("the Vertical Block Exemption Regulation") and Commission Regulation (EU) No 316/2014[80] ("the Technology Transfer Block Exemption Regulation") were adopted under that empowerment.

(98) Even where a restriction by object within the meaning of Article 101(1) of the Treaty is established and the Vertical Block Exemption Regulation and the Technology Transfer Block Exemption Regulation are not applicable, there is in principle the possibility of an exemption from the prohibition in Article 101(1) if the parties prove that the agreement or concerted practice fulfils the four conditions for exemption set out in Article 101(3) of the Treaty.[81]

6.6.2. Application to this case

(99) Given that the agreements governing Sanrio's licensed merchandise products govern both the licensing of intellectual property rights and the distribution of the products incorporating those rights, the Vertical Block Exemption Regulation and the Technology Transfer Block Exemption Regulation could provide guidance on the assessment of the restrictions in this case. However, the hardcore nature of these restrictions means that the exemptions in the Vertical Block Exemption Regulation[82] and in the Technology Transfer Block Exemption Regulation[83] would not apply in this case.

(100) The Commission also concludes that Sanrio's conduct does not meet the conditions for exemption set out in Article 101(3) of the Treaty itself.

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79 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1-7.

80 Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93, 28.3.2014, p. 17-23.

81 Judgment of 15 July 1994, *Matra Hachette v Commission*, T-17/93, EU:T:1994:89; Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paragraph 59.

82 In accordance with Article 2(3) of the Vertical Block Exemption Regulation, the block exemption applies to vertical agreements containing provisions which relate to the use of intellectual property rights provided the licensing of intellectual property rights is not the 'primary object' of the agreement. Article 4 of that Regulation provides that, in the absence of an exclusive distribution agreement, restrictions of both active and passive sales are 'hardcore' restrictions. Where such hardcore restrictions are included in an agreement, that agreement is presumed to fall within Article 101(1) of the Treaty. See paragraph (47) of the Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1.

83 The licensing agreements in this case do not fall under the Technology Transfer Block Exemption Regulation as they concern the licensing of trade marks and other intellectual property rights and distribution of related contract products. Paragraph (48) of the Technology Transfer Guidelines ("TTGL") provides that, while the Technology Transfer Block Exemption Regulation does not cover licensing of copyright other than software copyright, it will be applied as a general rule to the licensing of copyright for the production of contract products under Article 101 of the Treaty. Moreover, restrictions of passive sales fall under the list of 'hardcore' restrictions in article 4 of that Regulation. According to paragraph (96) of the TTGL, the mere presence of these hardcore restrictions in an agreement results in the whole agreement falling outside the scope of the block exemption and constitutes a presumption that the restriction falls under Article 101(1) of the Treaty.

(101) There are no indications that Sanrio's conduct was indispensable to induce retailer investment in certain territories or to alleviate the repercussions of free-riding between licensees. Moreover, as shown in Section 5, the restrictions implemented by Sanrio throughout its network of licensees resulted in reduced competition between licensees and distributors of the products bearing Sanrio characters, reducing the possibility of wider choice and lower prices for consumers.

7. DURATION OF THE INFRINGEMENT

(102) The first agreement containing the territorial restrictions described in Section 5 entered into force as of 1 January 2008.[84]

(103) The contractual evidence is corroborated by non-contractual evidence (such as, for example, e-mails) spanning the period from 1 January 2008 to September 2016 when the Commission conducted unannounced inspections at the premises of Sanrio GmbH in Milan (Italy).

(104) Following the unannounced inspections, Sanrio modified the interpretation of its licensing agreements in order to address the Commission's concerns as understood by Sanrio at that time.

(105) In particular, on 16 December 2016, Sanrio sent a document to all of Sanrio's European-based employees in Sanrio's offices in Hamburg, Milan and London to provide guidance on Union competition law, in which it stated, inter alia, that:

(1) licensees and their distributors are allowed to fulfil customer orders from outside the licensee's territory;

(2) no permission is required to make passive sales;

(3) licensees are not to be penalised for making passive sales;

(4) no "gentleman's agreement" should be entered into with regard to passive sales; and

(5) online sales are allowed.

(106) Moreover, for contracts signed on or after 24 January 2017, Sanrio adopted a revised template for licensing agreements which omitted the clauses restricting competition, including:

(1) the clauses restricting active sales;

(2) the obligations to notify orders for out-of-territory sales to Sanrio; and

(3) the use of language requirements to restrict out-of-territory sales.

(107) On 20 and 21 December 2018, Sanrio GmbH and Mister Men Limited sent letters to their remaining licensees whose licensing contracts had not yet been modified to reflect the revised template for licensing agreements[85]. These letters set out that:

(1) nothing in the licensing agreements should prevent licensees from selling both actively and passively anywhere in the EEA;

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84 […].

85 […].

(2) contractual clauses containing obligations to notify out-of-territory orders to Sanrio are no longer applicable;

(3) requests for derogation from contractual clauses indicating which languages should be on the products will in principle be granted[86];

(4) nothing in the licensing agreements should prevent licensees or their retailers from selling online, including out-of-territory.

(108) Following the sending of those letters to the remaining licensees, all territorial restrictions ceased to apply, hence bringing the infringement to an end on 21 December 2018.

8. ADDRESSEES OF THIS DECISION

8.1. Principles

(109) Union competition law applies to the activities of undertakings. The notion of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status or the way in which it is financed.[87]

(110) When an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. However, the infringement must be imputed unequivocally to a legal person on whom fines may be imposed, and the decision must be addressed to that person. Where several legal persons may be held liable for an infringement committed by one and the same undertaking, they must be regarded as jointly and severally liable for the infringement.

(111) The conduct of a subsidiary may be imputed to the parent company, even though the parent company does not participate directly in the infringement, if the parent company and the subsidiary form a *"single economic unit"* and therefore form a single *"undertaking"* for the purposes of Union competition law. In particular, that may be the case where a subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities.[88]

(112) In the specific case, however, in which a parent holds all or almost all of the capital in a subsidiary that has committed an infringement of Union competition rules, there is a rebuttable presumption that that parent company in fact exercises a decisive influence over its subsidiary. In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption applies.[89]

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86 Sanrio will only deviate from this principle in exceptional and objectively justified circumstances, such as when the packaging dimension does not allow the presence of a longer text.

87 Judgment of 13 June 2013, *Versalis v Commission*, C-511/11 P, EU:C:2013:386, paragraph 51.

88 Judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 54.

89 Judgment of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 60.

8.2. Application to this case

(113) Having regard to the conduct restricting out-of-territory sales in Sanrio's non-exclusive agreements as described in Section 5, the Commission concludes that liability for the infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement should be imputed to the addressees as follows:

(1) to Sanrio GmbH for its direct participation in the infringement for the whole period of infringement from 1 January 2008, being the date of the first licensing agreement containing the territorial restrictions, until 21 December 2018 when the infringement ended;

(2) to Mister Men Limited for its direct participation in the infringement for the period from 5 December 2011, being the date when it was acquired by Sanrio Company, Ltd., until 21 December 2018 when the infringement ended;

(3) to Sanrio Company, Ltd. for its participation in the infringement for the whole period of infringement from 1 January 2008, being the date of the first licensing agreement containing the territorial restrictions, until 21 December 2018 when the infringement ended, in its capacity as the ultimate parent company holding directly or indirectly 100% of the shares of Sanrio GmbH and Mister Men Limited.

9. REMEDIES AND FINES

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

(114) Where the Commission finds that there is an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003. For this purpose, it may also impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

(115) The requirement that a remedy has to be effective also empowers the Commission to require the undertaking concerned to refrain from repeating the act or conduct in question and to refrain from any act or conduct having the same or a similar object or effect.[90]

(116) As explained in Section 7, by 21 December 2018 Sanrio had already brought the infringement to an end. However, it is necessary for the Commission to require Sanrio to refrain from any agreement or concerted practice which might have the same or a similar object or effect.

9.2. Article 23(2) of Regulation (EC) No 1/2003

(117) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty and/or Article 53 of the EEA Agreement. For each

[90] See e.g., Judgment of 6 October 1994, *Tetra Pak v Commission*, T-83/91, EU:T:1994:246, paragraph 220; Judgment of 27 October 1994, *Fiatagri and New Holland Ford v Commission*, T-34/92, EU:T:1994:258, paragraph 39; Judgment of 20 April 1999, *LVM v Commission*, Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 1254.

undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.

(118) In this case, the Commission considers that, based on the facts described in Section 5, the infringement has been committed intentionally. The infringement consists of restrictions on out-of-territory sales of licensed merchandise products within the EEA. Moreover, as explained in recital (37) for instance, even if Sanrio's licensing agreements since at least 2008 generally contained clauses explicitly allowing for passive sales, Sanrio and its licensees agreed to behave, and/or engaged in concerted practices, in such a manner as to restrict out-of-territory sales. Sanrio employees at times intervened to ask licensees to avoid making cross-border sales. If not intentionally, the infringement has been committed at least negligently.

9.3. Calculation of the fine

9.3.1. General methodology

(119) Under Article 23(3) of Regulation (EC) No 1/2003, in fixing the amount of a fine the Commission must have regard to a number of elements, in particular the gravity and the duration of the infringement. The Commission will also refer to the principles laid down in its Guidelines on the Method of Setting Fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 ("the Guidelines on Fines").[91]

(120) In calculating the fine the Commission will first determine a basic amount. The basic amount of the fine is set by reference to the value of sales to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.[92] The basic amount consists of a percentage of the value of sales up to a maximum percentage of 30%,[93] depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.[94] The Commission may also include in the basic amount an additional amount of up to 25% of the value of sales (an "entry fee") to deter undertakings from entering into anticompetitive agreements.[95]

(121) Second, the Commission may increase or decrease the basic amount to take into account any aggravating or mitigating circumstances in accordance with points 28 and 29 of the Guidelines on Fines. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.[96]

(122) Third, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect.[97]

9.3.2. Value of sales

(123) For calculating the value of sales, the Commission will normally take the sales made by the undertaking during the last full business year of the undertaking's participation in the infringement.[98] If the turnover of the undertaking during that

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91 OJ C 210, 1.9.2006, p. 2.
92 Point 13 of the Guidelines on Fines.
93 Point 21 of the Guidelines on Fines.
94 Point 19 of the Guidelines on Fines.
95 Point 25 of the Guidelines on Fines.
96 Point 27 of the Guidelines on Fines.
97 Point 30 of the Guidelines on Fines.
98 Point 13 of the Guidelines on Fines.

year is not sufficiently representative of its annual turnover during the infringement, the Commission may use some other year for calculating the value of sales.

(124) In this case, the value of sales generated by Sanrio's licensed merchandise business during the last full year of the infringement, namely 2017, should constitute the starting point for calculating the fine.

(125) Given the nature of the merchandising business, the value of sales should be based on the royalties received by Sanrio from its licensees for sales of licensed merchandise products in the EEA. These royalties (including minimum guarantees) represent Sanrio's revenues from its licensed merchandise business and are paid to Sanrio in exchange for the use of the intellectual property rights licensed.

(126) Based on the assessment in this Section, the value of sales to be taken into account in this case amounts to EUR [10 000 000 – 20 000 000].

9.3.3. Gravity

(127) The gravity of the infringement determines the percentage of the value of sales to be taken into account in setting the fine. In assessing the gravity of the infringement, the Commission will have regard to a number of factors, such as the nature of the infringement, the market share of the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.[99]

(128) Out-of-territory restrictions by their very nature, restrict competition within the meaning of Article 101(1) of the Treaty. However, vertical restraints are generally less harmful than horizontal ones. Taking into account these factors and the EEA-wide impact of the restrictions on out-of-territory sales, the percentage of the value of sales to be used for calculating the fine in this case should therefore be set at 8%.

9.3.4. Duration

(129) The total duration of the infringement, as set out in Section 7, was 4008 days.

9.3.5. Calculation of the basic amount

(130) Applying the criteria explained in recitals (119) to (129), the basic amount of the fine to be imposed in this case therefore amounts to EUR [10 000 000 – 20 000 000].

9.3.6. Additional amount

(131) The Commission considers that no additional amount should be included in the basic amount.

9.3.7. Aggravating or mitigating factors

(132) The Commission considers that there are no aggravating or mitigating circumstances applicable in this case.

9.3.8. Deterrence

(133) Point 30 of the Guidelines on Fines provides for the possibility of increasing the fine to ensure that fines have a sufficiently deterrent effect in the case of undertakings which have a particularly large turnover beyond the sales of goods and services to which the infringement relates.

[99] Point 22 of the Guidelines on Fines.

(134) The Commission does not apply a deterrence multiplier because Sanrio's worldwide turnover levels do not warrant it.

9.3.9. Application of the 10% turnover limit

(135) The fine does not exceed 10% of Sanrio's total turnover relating to the business year preceding the date of adoption of this decision in accordance with Article 23(2) of Regulation (EC) No 1/2003.

9.3.10. Reduction of the fine in view of cooperation

(136) Point 37 of the Guidelines on Fines allows the Commission to depart from the methodology set out in those Guidelines if the particularities of the case justify it. In view of the effective and timely cooperation provided by the addressees in this case, the basic amount of the fine should be reduced by 40% pursuant to point 37 of the Guidelines on Fines.

(137) As explained in Section 7, before formal proceedings were opened, Sanrio provided guidance on practices compliant with Union competition law to Sanrio's European-based employees and changed its template agreement, removing the clauses restricting competition. Sanrio also sent clarification letters to all licensees whose licensing contracts had not yet been modified to reflect the revised template. Finally, Sanrio also provided additional evidence lengthening the duration of the infringement and acknowledged the existence of a single and continuous infringement for the whole period.

9.3.11. Final amount of the fine

(138) The Commission concludes that the final amount of the fine to be imposed pursuant to point (a) of the first subparagraph of Article 23(2) of Regulation (EC) No 1/2003 should be EUR 6 222 000. Sanrio Company, Ltd. and Sanrio GmbH should be held jointly and severally liable for the total amount of this fine, while Mister Men Limited should only be held jointly and severally liable for a proportion of that amount reflecting the part of the relevant period starting on 5 December 2011, being the date on which Mister Men Limited was acquired by Sanrio Company, Ltd.,

HAS ADOPTED THIS DECISION:

Article 1

The undertaking comprising the legal entities Sanrio Company, Ltd., Sanrio GmbH and Mister Men Limited has infringed Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area by participating, during the period indicated below, in a single and continuous infringement regarding licensed merchandise. The infringement covered the whole European Economic Area, and consisted in the implementation and enforcement of a series of agreements and/or concerted practices aimed at restricting cross-border sales of that licensed merchandise, both offline and online, through the relevant legal entities as follows:

(a) through Sanrio GmbH, from 1 January 2008 until 21 December 2018;

(b) through Mister Men Limited, from 5 December 2011 until 21 December 2018;

(c) through Sanrio Company, Ltd., from 1 January 2008 until 21 December 2018.

Article 2

For the infringement referred to in Article 1, the following fines, totalling EUR 6 222 000, are imposed:

(a) Sanrio Company, Ltd. and Sanrio GmbH, jointly and severally: EUR 2 229 000;

(b) Sanrio Company, Ltd., Sanrio GmbH and Mister Men Limited, jointly and severally: EUR 3 993 000.

The fines shall be credited, in euro, within three months from the date of notification of this decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI/AT.40432

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this decision is adopted, plus 3.5 percentage points.

Where the undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council[100].

Article 3

The undertaking referred to in Article 1 shall immediately bring to an end the infringement referred to in that Article insofar as it has not already done so.

The undertaking referred to in Article 1 shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or a similar object or effect.

Article 4

This decision is addressed to:

Sanrio Company, Ltd., 1-6-1 Osaki, Gate City Osaki West Tower 14F, Shinagawa-Ku, Tokyo, Japan

Sanrio GmbH, Zwischen den Toren 9, 21465 Wentorf bei Hamburg, Germany

Mister Men Limited, Unit 3/4 70 Weston Street, London, SE1 3QH, United Kingdom

This decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the Agreement on the European Economic Area.

100 OJ L 193, 30.7.2018, p. 80.

Done at Brussels,

For the Commission

Margrethe VESTAGER
Member of the Commission