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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.05.2004
C(2004) 1910 final

COMMISSION DECISION

of 26-05-2004

**relating to a proceeding under Article 81 of the EC Treaty (COMP/C-3/37.980 Souris -
Topps)**

COMMISSION DECISION

of 26-05-2004

relating to a proceeding pursuant to Article 81 of the EC Treaty

(COMP/C-3/37.980 Souris - Topps)

(Only the English text is authentic)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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, and in particular Article 7 and Article 23(2) thereof¹,

Having regard to the complaint lodged by SARL La Souris Bleue on 10 October 2000, alleging infringements of Article 81 of the Treaty by the Topps group headed by The Topps Company Inc, based in the USA, and the Nintendo group headed by Nintendo Corporation Ltd, based in Japan, and requesting the Commission to put an end to those infringements,

Having regard to the Commission decision of 16 June 2003 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty² and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty³,

Having regard to the final report of the hearing officer in this case⁴,

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

Whereas:

¹ OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L68, 6.3.2004, p. 1).

² OJ 13, 21.2.1962, p. 204/62. Regulation as repealed by Regulation (EC) No 1/2003.

³ OJ L 354, 30.12.1998, p. 18.

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1. THE FACTS

1.1. The parties to the proceedings

1.1.1. *The Topps group of companies*

- (1) Topps is a group of companies producing internationally marketed collectible products and candies.⁵ The ultimate parent company of the Topps group is The **Topps Company Inc** (“Topps USA”), a publicly held company established in the USA. The Topps group maintains offices in the USA, Canada, Europe, Brazil and Argentina. Annual net sales for the fiscal year ended 3 March 2001 were USD 439 268 000 (EUR 481 341 000) world-wide, and USD 180 909 000 (EUR 198 236 000) in Europe.⁶ The Topps group employs over 420 people world-wide.⁷
- (2) Topps USA has two fully owned European subsidiaries:
 - (a) **Topps Europe Ltd** (“Topps Europe”). Topps Europe had been known as Merlin Publishing International Ltd before it was acquired by Topps USA in July 1995. It is established in the United Kingdom. Topps Europe has, for its part, two fully owned subsidiaries:
 - (i) Topps UK Ltd (“Topps UK”) which is established in the United Kingdom,
 - (ii) Topps Italia SRL (“Topps Italia”) which is established in Italy,
 - (b) **Topps Ireland Ltd** (“Topps Ireland”) which was renamed Topps International Ltd in 2001. It is established in Ireland.

1.1.2. *Topps’ distribution system in the Member States*

- (3) During the period relevant for these proceedings, Topps distributed its products in sixty countries world-wide. In Europe, Topps had established subsidiaries in certain Member States, namely Topps Europe and Topps UK in the United Kingdom, Topps Ireland in Ireland and Topps Italia in Italy, and also operated through intermediaries, that is to say, distributors and agents.⁸ Topps’ distribution network was for the most part informal, except in France, Italy and Finland where the relationship was governed by written distribution agreements.

1.1.2.1. France

- (4) Topps’ key distribution channels in France were newsagents and sweet shops.

⁵ The term “Topps” in this decision may refer to any or all of the companies in the Topps group.

⁶ The conversion rate used here is 0,9126 which is the average exchange rate over the period 1 March 2000 until 28 February 2001.

⁷ Page 1716 of the Commission’s file. Topps’ web-site <http://www.topps.com/AboutTopps/index.html>.

⁸ See the list on pages 811 to 813 of the Commission’s file.

- (5) Pursuant to three distribution agreements, Topps granted Comptoir Commercial pour l'Exportation et l'Importation (CCEI), a subsidiary of Nouvelles Messageries de la Presse Parisienne (NMPP), the non-territorial exclusivity for the distribution of several Pokémon⁹ products in the press network exploited by NMPP in France.¹⁰ Accordingly, CCEI's exclusivity related solely to NMPP's press distribution network and Topps products could be sold through other distribution channels in France (for example, supermarkets or toy shops). For commercial and logistic reasons, CCEI entrusted NMPP with the distribution of Topps' products through the French press network as of 13 May 2000.¹¹
- (6) Topps cooperated with additional intermediaries for publishing (EDI, D'Arpeje, Pierre Deuge, Empreinte Dimage, Compagnie Européenne des Parfums, Eurogift and Topaze) and confectionery (Solinest Coberg).

1.1.2.2. Spain

- (7) Topps' official distributor in Spain for stickers and cards was Colecciones Este S.L. ("ESTE"). According to ESTE, the commercial relationship with Topps was not regulated by a formal written agreement.¹² ESTE has since gone out of business and sold its company to Panini, one of Topps' competitors. Topps' Spanish intermediaries for confectionery are Pepsi Snacks and Snack Ventures SA.

1.1.2.3. Germany

- (8) Topps' intermediaries for stickers and cards in Germany were Universal Cards and Partner Presse Vertrieb GmbH. Topps' official distributor for confectionery was DOK Handelsgesellschaft mbH ("DOK"). Topps also used Gemex Trading AG as an agent for the distribution of publishing and confectionery products.

1.1.2.4. Finland

- (9) Topps' distributor for publishing products in Finland was Rautakirja Oy Lehtipiste ("Rautakirja"). Rautakirja concluded distribution contracts with Topps Ireland¹³ and Topps Europe.¹⁴ Topps distributed confectionery through Alfmix Oy.

1.1.2.5. The United Kingdom

- (10) In the United Kingdom, Topps distributed its licensed products in various supermarkets, toyshops and sweet shops. There were several distributors for Topps products in the United Kingdom.

⁹ For an explanation of the Pokémon theme see below recitals (23) to (26).

¹⁰ See the distribution agreements between Topps Europe and CCEI of 12 December 1999 (signed on 5 June 2000 [...]) [...], at pages 1322-1329 of the Commission's file, of 15 December 1999 [...], at pages 1108-1115 of the Commission's file, and of 20 May 2000 [...], at pages 1119-1126 of the Commission's file.

¹¹ NMPP's submission of 16 March 2001, at page 1313 of the Commission's file.

¹² Page 66 of the Commission's file.

¹³ See the contract [...] of 31 December 1995, at pages 1141-1144 of the Commission's file.

¹⁴ See the contract [...] of 20 March 2000, at pages 1139-1140 of the Commission's file.

- (11) Cards Inc. Ltd (“Cards Inc”) was a distributor and wholesaler of collective trading cards, collective card games, sports and non-sports cards and various toy products usually associated with its cards products. It has acted as a distributor of Topps’ products in the United Kingdom and the rest of Europe. This relationship, which endured for a period of 6-7 years, was based on an oral agreement.
- (12) LDX-Marketing (“LDX”) was another distributor with offices in London and Leeds. Other intermediaries for publishing products included Topdraw, WH Smith and Surridge Dawson.

1.1.2.6. The Netherlands and Belgium

- (13) StarSweets Holland BV (“StarSweets”) was Topps’ official distributor for confectionery and publishing products in Belgium and the Netherlands. In Belgium, Topps also distributed publishing products through AMP and Fun Stickers Collection. Aldipress was another intermediary for publishing products in the Netherlands.

1.1.2.7. Italy

- (14) Topps’ official distributor in Italy for confectionery was Dolber SPA (“Dolber”). The commercial relationship was regulated by a formal written agreement, signed 1 March 2000¹⁵. Topps had relationships with other intermediaries (Wi.li, Giochi Preziosi, Panini S.P.A & AD/DPD, ID Immagine, Star Shop) for publishing products.

1.1.3. *Souris*

- (15) SARL La Souris Bleue (“Souris”) was a retailer for collectible products established in France. On 10 October 2000, Souris lodged a complaint under Article 3 of Regulation No 17 against Topps and Nintendo. It alleged that Topps and its distributors had, from September 2000, successfully hindered parallel trade from Spain into France of stickers and albums relating to the second Pokémon series by preventing Spanish distributor ESTE and its dealers from selling products to French dealers. Souris has since gone into liquidation.

1.2. The products

1.2.1. *Collectible products*

- (16) This case relates to collectibles. Collectibles are items like stickers, trading cards or removable tattoos, which normally follow a certain theme. The aim of a collector is to collect all items of one set. Collectibles are distributed either as lone products or in combination with candy products.

1.2.2. *The different themes of collectibles*

- (17) Collectibles can be divided into categories according to the general theme, for example, sports or entertainment. Sports collectibles, which mainly feature members of sports teams like football players, are usually licensed from the relevant sports body. Entertainment collectibles, which feature, for example, characters from movies,

¹⁵ Pages 1093-1096 of the Commission’s file.

comics or video games, are licensed from the owners of the relevant film, TV series or video game (for example, Warner or Nintendo).

1.2.3. The different types of collectibles

- (18) Collectibles can also be categorised according to their type. In the context of this decision, the following types should be distinguished.

1.2.3.1. Collectible stickers

- (19) Collectible stickers are images printed on adhesive paper so that one can stick them in an album. They are sold in packs that usually contain 4 to 6 stickers. There is usually an image (photo or drawing) on the front, while the sticker's number is indicated on the back so that it can be positioned correctly in a sticker album.

1.2.3.2. Trading cards

- (20) Trading cards are small collectible cards. They are stiff, non-adhesive and double-sided, with images and text on both the front and the back. They are sold in packs usually containing 6 to 10 cards. The cards can be collected as they come or placed in special folders with a transparent pocket for each card.

1.2.3.3. Albums and tins

- (21) There are also collectible products which are used to store other collectibles, for example, sticker albums or tins for trading cards. These products usually display pictures of the themes to which they relate.

1.2.3.4. Candy products

- (22) Candies and bubble gum products can be combined with collectibles, for example lollipops containing small collectible figurines or lollipops with stickers enclosed in the wrapper. These products themselves then become collectible products.

1.2.4. Pokémon collectibles

- (23) This case concerns collectibles of different types produced by Topps featuring characters of the Pokémon theme.

1.2.4.1. The Pokémon theme

- (24) Pokémon was launched in Japan as a role-playing game for the Nintendo 'Game Boy' hand held videogame console in early 1996. Pokémon is the general name given to the many characters found in the Pokémon universe. In 1998, the first Pokémon movie was launched, as was the Pokémon card game. The success of Pokémon was transferred to the USA and Australia in September 1998 and to Europe in autumn 1999.

- (25) There were 150 different Pokémon characters in the original version of the game. The number of characters has now increased to 250. Each type of Pokémon has a unique name (for example, 'Pikachu,' 'Charmander,' etc.).

- (26) Although it started with video games, the Pokémon theme now has a much broader scope: movies, television shows, card games, cartoons, stickers and other merchandise products featuring the characters of Pokémon are produced.

1.2.4.2. Topps' licensing agreement with Nintendo

- (27) Topps produces a range of different Pokémon collectibles on the basis of a licence granted by Nintendo. Subject to the terms and conditions of the Pokémon Merchandise License Agreement, signed on 4 June 1999 between Topps Europe and Nintendo,¹⁶ [Nintendo grants Topps Europe a non-exclusive license to use intellectual property associated with the name Pokémon to be used solely in connection with certain publishing and confectionary collectibles].

1.2.4.3. The different Pokémon collectibles produced by Topps

- (28) During the period relevant for this decision, Topps produced the following types of licensed Pokémon products:
- (a) Pokémon stickers of various series (for example, "Pokémon Series 1", "Pokémon Series 2" etc.). Pokémon stickers do not display any text;
 - (b) Pokémon trading cards of various series (for example, "Pokémon Series 1", "Pokémon the First Movie", "Pokémon Series 2", "Pokémon Chrome Series 1"). Pokémon trading cards contain images and text;
 - (c) Pokémon albums for storing stickers and "Pokémon Collector Tins" for storing trading cards. Each tin has a large picture of one particular Pokémon character on its lid. Pokémon albums contain text relating to the stickers to be stuck in the album;
 - (d) Pokémon candy products, such as lollipops containing small collectible Pokémon figurines (named "Popzoids") and lollipops with Pokémon stickers enclosed in the wrapper.

1.3. The relevant market definition

1.3.1. Product market definition

1.3.1.1. Topps' product market definition

- (29) In Topps' view, "*the relevant product market may well be as wide as pocket money products*"¹⁷ (that is to say, all items, which children fancy and can afford with their average pocket money). Topps identifies three types of competitive constraints: constraints from the overall pocket money expenditure, constraints from other licensees of the same licensor, and constraints from other potential licensees for the initial award of the licence.

¹⁶ Page 906 of the Commission's file.

¹⁷ Page 1541 of the Commission's file; reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraph 198, page 2508 of the Commission's file.

- (30) First, Topps includes in the market all items on which children spend their pocket money.¹⁸ In addition, Topps goes even further and argues that “*within the overall expenditure of children it is important to distinguish between those products which children buy regularly, like chocolate bars, comics, and cinema tickets, and those products for which they must save.*”¹⁹ As children can save the money they normally spend on small items (such as trading cards or stickers) in order to buy other goods (like mobile phones, tapes or CDs),²⁰ the relevant product market should also include such more expensive goods.
- (31) Secondly, Topps contends that the whole range of products (including non-collectibles) derived from the intellectual property licensed by the same licensor to other licensees constitutes a source of competition and, therefore, should be included in the relevant product market.²¹ Licences for the supply of Pokémon products have been granted to a wide range of licensees. According to Topps, “*there are over 800 Pokémon licensees world-wide, covering the rights to over 32,000 products*”.²² In the Member States, there are about 117 licensees.²³
- (32) Topps, thirdly, contends that the companies against whom Topps had to compete in order to obtain the licence for any collectible or candy product exert a substantial constraint.²⁴

1.3.1.2. The Commission’s product market definition

- (33) The Commission considers that the evidence available points to a more narrow definition of the relevant product market as the market for collectibles sold (as such or in combination with candies) to children aged 6 to 14. These are the type of products Topps sells and the target consumer group it addresses.²⁵ The Commission agrees with Topps in that such products “*are designed to tap into the discretionary expenditure of the children themselves. They are priced at a level that can be accommodated within the typical pocket-money budget and are distributed through retail outlets that are frequently visited by children, notably sweet shops, newsagents and street kiosks*”.²⁶
- (34) The Commission further agrees with Topps’ view that “*an important source of competition for any particular collectible will come from collectibles based on a different set of intellectual property*”.²⁷ Thus, the success of the Pokémon sticker series manufactured by Topps appears to have had a significant impact on the performance of [another sticker series].²⁸ The Commission, however, considers that products that are not fancied by children or not affordable for them, such as memorabilia, replicas or miniatures, do not constitute a source of competition for children’s collectibles. Even

¹⁸ Page 1505 of the Commission’s file.

¹⁹ Page 1506 of the Commission’s file.

²⁰ Page 1506 of the Commission’s file, [...].

²¹ Page 1513-1516 of the Commission’s file.

²² Page 1513 of the Commission’s file.

²³ Pages 1544-1549 of the Commission’s file.

²⁴ Pages 1516-1518 of the Commission’s file.

²⁵ Page 1501 of the Commission’s file.

²⁶ Page 1501 of the Commission’s file.

²⁷ Page 1507 of the Commission’s file.

²⁸ Page 1507 of the Commission’s file.

Topps does not seem to maintain that children's collectibles are substitutable to products which are usually only collected by adults.²⁹

- (35) However, on the basis of the available information, the Commission is not convinced about the additional competitive constraints put forward by Topps.
- (36) As regards competition for pocket money expenditure, the Commission notes that such a wide market definition would certainly encompass products and/or services with features and intended uses different from those of collectibles. In accordance with the Commission Notice on the definition of the relevant market for the purposes of Community competition law, “[a]n analysis of the product characteristics and its intended use allows the Commission, in a first step, to limit the field of investigation of possible substitutes”.³⁰ Moreover, the fact that a multitude of products and/or services compete for a limited budget does not in itself imply that all such products are necessarily substitutable to each other and, hence, belong to the same market. The Commission also notes that Topps itself admits that “the destination of pocket money expenditure is hard precisely to identify because it is so diverse”.³¹ Topps further refers to the “diffuse competition provided by substitutes within the wider pocket money market” to indicate that “competition between collectibles can be more easily tracked using data from within a single retail outlet”.³² In view of the above, it is not surprising that Topps emphasises that evidence like that concerning 2001 Premier League stickers, “supports the existence of competition between collectible products based on different intellectual properties, competition between trading cards and stickers, and between sports-based collectibles and entertainment-based collectibles”.³³
- (37) Nor does the Commission share Topps’ point of view that all products derived from the intellectual property licensed by the same licensor to other licensees constitute a competitive constraint. The Commission considers that the source of the licensing right is in general irrelevant for the purposes of the product market definition. Products under licence from the same licensor cannot be regarded as interchangeable on the sole ground of the licence origin. Indeed, these products do not all share the same characteristics, price and intended use.
- (38) As regards the competition from other potential licensees for the initial award of the license, the Commission holds the view that the market for the licences of the intellectual property rights relating to collectibles is *separate* from the market for the collectibles themselves. The former is upstream from the latter and competition on the former takes place before competition on the latter. Thus, during the period to which this decision relates and according to data provided by Topps,³⁴ most players already held the necessary licences and thus acted on the market. The very few companies still attempting to enter the market therefore could not represent a competitive constraint.

²⁹ See pages 1505-1507 of the Commission’s file.

³⁰ OJ C 372, 9.12.1997, p. 5, at point 36.

³¹ Page 1506 of the Commission’s file.

³² Page 1507 of the Commission’s file.

³³ Page 1510 of the Commission’s file.

³⁴ Page 1517 of the Commission’s file.

1.3.2. *The relevant geographical market*

- (39) Topps contends that the relevant geographic market for its collectibles is national because of important differences relating to licensed products among Member States,³⁵ notably in the conditions of supply and demand. According to Topps, these conditions are not homogeneous from Member State to Member State for the following reasons.
- (40) *Firstly*, certain licensed products will inevitably have an intrinsic appeal limited to particular Member States (for instance, a sports event might be of higher importance in one country than in other countries).
- (41) *Secondly*, Topps states that, even for collectibles with a wide appeal across Member States, the timing of the launch leads to different demand patterns. This factor is increased by the short-term and unpredictable nature of the demand for Topps' products. The timing of the launch of a licensed product is extremely sensitive to the timing of promotional activity surrounding the underlying film or TV series. Indeed, the timing of this activity lies outside the control of the licensees and will dictate the timing of the release of licensed products.
- (42) *Thirdly*, for many collectible products, the physical products will differ as between Member States with the exception of those sharing the same language. Thus, collectibles exist in different local languages. Accordingly, these products cannot, be regarded as substitutable with products produced in another language.³⁶ Topps also states that Pokémon characters have different names in different Member States.³⁷ For instance, Bulbasaur and Drowsee are the English Pokémon names for Bulbizarre and Soporifik in French, and Bisasam and Traumato in German, respectively.
- (43) Topps, *lastly*, states that there are differences in the manner of distribution of the products in different territories. In most territories, the distribution system is based on a sale-or-return basis, whereas the distributor in Spain takes the stock-holding risk.
- (44) The Commission agrees with Topps that certain facts, including those listed by Topps, are strong indicators that the markets are national. There are, indeed, substantial price differentials among Member States and among Topps' distributors and/or agents.³⁸ The Commission also considers that some collectibles have an intrinsic appeal in certain Member States due to the theme [...] ³⁹ and that the timing of the product launch is critical in order to determine the degree of consumer demand.
- (45) Nevertheless, the Commission also has some evidence supporting the conclusion that the scope of the geographic market could be larger than national.

³⁵ Pages 1518 and 2508 of the Commission's file.

³⁶ Page 1520 of the Commission's file.

³⁷ Page 1519 of the Commission's file.

³⁸ Page 1811 of the Commission's file.

³⁹ Page 1886 of the Commission's file.

- (46) *Firstly*, the information available about the distribution of Topps' market shares across Europe⁴⁰ does not show wide discrepancies, but seems to suggest similar patterns throughout the Community.
- (47) *Next*, the argument relating to local languages is not always valid. Thus, Wizards of the Coast pointed out that "[i]n the collectibles market I consider that local language issues will be less important as the product does not necessarily need accompanying instruction or general text."⁴¹ This is particularly true for stickers which only carry the picture of a character on one side and a number on the other side. They do not display the character's name; only the necessary albums do. Candy collectibles like 'Popzoids' and Pokémon tins do not contain written information about the characters displayed, either. Apart from the aforementioned albums, differences in local languages may only be relevant for trading cards. But even if names of Pokémon characters appear in an album or on a trading card, the market shows that they have been made available in only three European languages (English, French and German). As to the text on trading cards, it should also be borne in mind that some Member States share languages with others (for example, the Netherlands and France with Belgium or Germany with Austria).

1.3.3. *Conclusion as regards relevant market definition*

- (48) Most evidence available points to the relevant product market being the market for collectibles sold (as such or in combination with candies) to children aged 6 to 14 and, as regards the geographical scope of such a market, to the existence of national markets. The Commission notes, however, that the definition of the relevant market can be left open since this case concerns a restriction of competition by object, as will be developed below at recital (130).

1.4. **The procedure**

- (49) On 10 October 2000, the Commission received a complaint from Souris against Topps and Nintendo.⁴² In its complaint, Souris alleged that, since September 2000, Topps and its distributors had successfully prevented parallel trade from Spain into France of stickers and albums relating to the second Pokémon series by preventing Spanish distributor ESTE and its dealers from selling products to French dealers.
- (50) The Commission served several formal requests for information pursuant to Article 11 of Regulation No 17 to Topps Europe, Nintendo and a number of Topps' distributors and Topps' competitors.
- (51) On 16 June 2003, the Commission addressed statements of objections to Topps USA, Topps Europe, Topps International, Topps UK and Topps Italia.
- (52) Topps USA and its European subsidiaries submitted their responses on 18 September 2003. Upon their request, on oral hearing pursuant to Article 5 of Regulation (EC) No 2842/98 took place on 23 October 2003.

⁴⁰ See report by [independent economic consulting firm] in Topps' submission of 18 May 2001, pages 1522-1526 of the Commission's file.

⁴¹ Page 1896 of the Commission's file.

⁴² Page 1 of the Commission's file.

1.5. The behaviour of Topps

- (53) Topps stated that it “*learned of parallel trade from its agents or distributors (or occasionally its staff) through a variety of communications*”.⁴³ The following recitals describe in detail Topps’ behaviour and the behaviour of its intermediaries in each relevant territory and at various given times.

1.5.1. Events in the United Kingdom

1.5.1.1. The events concerning Cards Inc.

- (54) Being interested in the purchase of Pokémon products, Cards Inc. assured Topps UK’s Managing Director in an e-mail dated 4 February 2000: “*Dear [...]: Please be assured that all product that we are buying stays in the UK, and does not go out of the country.*”⁴⁴ Obviously, Topps expected its distributor to provide an assurance that products were not resold to other countries.
- (55) Further restrictions indirectly involving Cards Inc. are evidenced by internal correspondence of Topps. After German distributor Universal Cards told Topps at the beginning of August 2000 that it purchased Pokémon tins from Cards Inc. at a price lower than that applied by Topps, Topps’ officials envisaged, in an internal e-mail dated 3 August 2000, to block the sale: “*(...) please apologise to Universal there is no way this sale should have been made. Confirm to Universal that the sale will not take place (...).*”⁴⁵ But then Topps considered in another internal e-mail of the same day that a pure cancellation of the sale would be illegal: “*We are also blatantly preventing trade between two EU member states – could we in effect be abusing a dominant position?*”⁴⁶ Topps finally decided on 4 August 2000 to prevent Cards Inc. from consummating the sale and instead to effect a direct sale from Topps to Universal Cards, as a once off deal, at the price offered by Cards Inc.⁴⁷
- (56) This incident is confirmed by Cards Inc.’s first response to the Commission dated 13 March 2001: “*(...) there was one occasion, perhaps in June or July 2000, when Cards Inc was requested by Topps not to supply Universal Cards, Germany, with certain close-out merchandise (...). Cards Inc acceded to the request and did not consider it to be unreasonable in the circumstances.*”⁴⁸

1.5.1.2. The events concerning LDX

- (57) On 26 July 2000, Topps UK’s Managing Director responded to an order for Pokéball products, collectibles made of plastic to hold Pokémon figures, by LDX. He asked for a written assurance concerning the destination of the merchandise: “*I would like your written assurance as to where i.e. in which country(s) the product will be sold?*”⁴⁹

⁴³ Page 804 of the Commission’s file.

⁴⁴ Page 832 of the Commission’s file.

⁴⁵ Pages 855-856 of the Commission’s file.

⁴⁶ Page 855 of the Commission’s file.

⁴⁷ Page 855 of the Commission’s file.

⁴⁸ Page 1310 of the Commission’s file.

⁴⁹ Page 854 of the Commission’s file.

- (58) LDX provided the requested assurance in a fax to Topps dated 28 July 2000: *“With reference to your e-mail, this is just to let you know that LDX effect deliveries primarily in the UK to its clients.”*⁵⁰

1.5.2. Italy

- (59) The second paragraph of clause 3 of the distribution contract between Topps Italia SRL and Dolber, signed on 1 March 2000, contains a prohibition of passive sales within the Community : *“Any request put forward by foreign operators will have to be sent promptly from DOLBER to TOPPS, in order for the latter to be able to take appropriate action.”*⁵¹ Topps apparently knew that this clause might raise competition concerns since it responded to the Commission’s request for information as follows: *“[a]rguably, Clause 3 of this brings it [the contract] within the Article 11 request (...).”*⁵² This is further evidenced by a letter which Topps sent to the Commission on 4 September 2001 and in which it described details of the measures it took in order to comply with the Community competition rules after the initiation of the Commission’s investigation. In that letter, Topps reported to the Commission that it had, in the meantime, waived the application and submitted a re-interpretation of the aforementioned provision: *“(…), Topps Italia wrote to its Italian confectionery distributor, Dobler, to confirm that it had waived the application of the second paragraph of Clause 3 of the Distribution Contract (...). In the same letter, Topps Italia also confirmed that Clause 3 did not cover the case of passive sales within the EU and that Dobler was free to meet unsolicited orders from operators located within the EU on the basis of its own commercial decisions.”*⁵³

1.5.3. Finland

- (60) In the period between March and December 2000, Rautakirja, Topps’ distributor in Finland, reported parallel imports into Finland. Once Topps became aware of parallel trade into that territory, its managers took action and tried to ensure that it would not happen again.
- (61) The first parallel imports of Pokémon trading cards into Finland happened at the beginning of March 2000. According to an e-mail from Rautakirja to Topps dated 8 March 2000, they were conducted by a US company based in Finland, which had bought them in Germany: *“The company who has imported the cards is called: USA VINCENTER, location in Järvenpää.”* Rautakirja expressed its concern in the same e-mail: *“Please confirm us that you have not sold this company in Finland these cards. What about rights? I thought that you only had the rights to sell this product in Finland. Is it parallel import? Can you contact directly this Vincenter who is acting as*

⁵⁰ Page 1584 of the Commission’s file.

⁵¹ Page 1094 of the Commission’s file. Translation by the Commission; Italian original read as follows: *“Eventuali richieste formulate da operatori stranieri dovranno essere trasmesse, tempestivamente, a cura di DOLBER a TOPPS, affinché questa possa prendere gli opportuni provvedimenti”*.

⁵² Page 809 of the Commission’s file. In its first formal request for information dated 07.11.2000, the Commission had asked for *“documents (...) that concern instructions from Topps to EEA-based distributors of Topps’ products regarding the resale of the Topps products to companies established in other EEA countries, to companies of which Topps or the distributor knew to resell or suspected of reselling the Topps products to other EEA countries or to companies that would do so.”*, page 46.

⁵³ Page 1899 of the Commission’s file.

*a wholesaler. They have probably sold elsewhere too. What we should do?”*⁵⁴ (sic) Topps responded promptly on 9 March 2000: *“Dear [...], I have just talked to the Vincenter company, he assures me he only purchased 100 boxes and that he was unaware of distribution rights. I made it very clear that we would take legal action should he do this again. My dg is he did not know much about our business, so I do not think it will happen again.”* (sic).⁵⁵ Those measures taken by Topps were confirmed in an internal e-mail dated 10 March 2000: *“I called him as you advised, basically he bought these from Germany as a package of goods. 100 boxes only. He has assured me it will not happen again.”*⁵⁶ Topps’ action was effective, as confirmed by Rautakirja in an e-mail to Topps dating 31 July 2000: *“[former Topps International Sales & Marketing Manager] earlier stopped one other parallel importer (...).”*⁵⁷

- (62) Later, in July 2000, a Finnish company named Sunwise started importing trading cards into Finland, either from the United Kingdom or the USA. Topps again attempted to prevent them by asking for the co-operation of Rautakirja. First, Topps tried to trace back the products that were parallel imported in an internal e-mail dated 31 July 2000: *“Have we any idea where these [trading cards] could come from? UK?”*⁵⁸ A subsequent internal e-mail of the same day suggests that the products could also have come from the USA: *“This is the item code 752-3H. This is the same as the Series 2 launched in UK (...). However, it is also the standard hobby configuration that the USA sell, so it could have come for anywhere”* (sic).⁵⁹ In another email of the same day, Topps further asked its distributor to co-operate by obtaining written evidence of the parallel trade: *“(…) if you are able to get any more information (preferably literature) we will act further.”*⁶⁰ Then, without having ascertained whether the cards imported by Sunwise came from the United Kingdom or from the USA, Topps contacted Sunwise by fax less than four hours later on the same day, 31 July 2000: *“(…) I am sure you are aware that Ruatakirja are our sole distributor for Cards and Stickers in Finland. It was brought to my attention that your company was the supplier of these Cards so I would like to ask you where you got them from and to ask you on behalf of Topps Europe Limited to suspend all future distribution of this product.”*⁶¹ Thus, Topps tried to prevent Sunwise from distributing any Pokémon cards in Finland, no matter whether they came from the USA or from the United Kingdom. At the same time, Topps knew that importing them from another Member State was legal, as it was told by Rautakirja on 3 August 2000: *“I guess from EU to Sunwise it [importing the products] is legal.”*⁶²

1.5.4. The Netherlands

- (63) On 8 June 2000, Topps Ireland’s International Sales & Marketing Manager was informed by German distributor DOK of the fact that some wholesalers were getting ‘Popzoids’ and ‘Pokéballs’ from the Netherlands. *“Dear [...], we get some information that some wholesalers get the booth articles (Popzoids and Ball) from*

⁵⁴ Page 877 of the Commission’s file.

⁵⁵ Page 878 of the Commission’s file.

⁵⁶ Page 880 of the Commission’s file.

⁵⁷ Page 896 of the Commission’s file.

⁵⁸ Page 896 of the Commission’s file.

⁵⁹ Page 896 of the Commission’s file.

⁶⁰ Page 897 of the Commission’s file.

⁶¹ Page 1290 of the Commission’s file.

⁶² Page 898 of the Commission’s file.

Netherland. In really high quantites.” (sic).⁶³ The clear reaction from Topps is evidenced by its fax to DOK dated 8 June 2000: *“I have met with our sales managers and we have determined the source of supply of Pokemon product being sold into Germany. We have informed these customers of the seriousness of this situation and we have put in place measures to ensure that this does not happen again.”*⁶⁴

- (64) It seems from Topps’ response to the Commission’s second formal request for information dated 19 January 2001 that Topps suspected StarSweets, its official confectionery distributor in the Netherlands and Belgium, of being responsible for the parallel trade referred to in the preceding recital.⁶⁵ This is confirmed by the correspondence regarding StarSweets. Prior to DOK’s fax of 8 June 2000, Topps had already raised the idea that StarSweets was misleading them to obtain more stock. On one occasion, [StarSweets’ representative] complained to Topps that large quantities of German Pokémon trading cards available in the Netherlands and in Belgium disturbed StarSweets’ sales while the company lacked sufficient supply from Topps. [Topps’ Managing Director] asserted his suspicion in an internal e-mail dated 12 April 2000: *“(…) or is just a ruse by [StarSweets’ representative] to get mote stock?”* (sic).⁶⁶ In internal e-mails dated 5 and 7 September 2000, Topps wondered about large orders of Pokémon stickers by StarSweets: *“Whilst I am not in the sales prevention business this is an enormous order at this stage of the collection and I would like to know its destination before we agree i.e. not just the country but the outlets.”*⁶⁷ - *“To whom is this going?”*⁶⁸ This behaviour shows that Topps repeatedly tried to confirm the destination of the stock supplied to StarSweets.

1.5.5. Spain and France

- (65) In August 2000, Topps’ French distributor NMPP heard about the existence of parallel imports from Spain. NMPP’s agent in Cambrai (France) informed [...], an employee at NMPP, about the distribution of Pokémon stickers of Spanish origin sold at lower prices in France. In a memo sent by e-mail on 4 August 2000, [employee at NMPP] informed other employees about this matter and requested that the information be passed along to the main distributor (Topps) to protect NMPP’s exclusivity: *“I thank you very much for transmitting this information to the departments concerned so that an intervention can be made before the distributor so that the latter respects our exclusive distribution agreement.”*⁶⁹ After that, the memo was passed on to Topps which later provided a copy to the Commission as part of its response to the first information request.⁷⁰ Thus, Topps was informed about the parallel imports to France.
- (66) On 11 September 2000, Topps transmitted the information contained in the memorandum of 4 August 2000 to its Spanish distributor ESTE and instructed [...],

⁶³ Page 848 of the Commission’s file.

⁶⁴ Page 846 of the Commission’s file.

⁶⁵ Page 323 of the Commission’s file.

⁶⁶ Page 886 of the Commission’s file.

⁶⁷ Page 859 of the Commission’s file.

⁶⁸ Page 861 of the Commission’s file.

⁶⁹ Page 899 of the Commission’s file. Original French: *“Je vous remercie de bien transmettre cette information auprès de services intéressés afin qu’une intervention auprès de la société de distribution soit effectuée afin que cette dernière respecte notre contrat d’exclusivité”*, translation by the Commission.

⁷⁰ Page 899 of the Commission’s file.

ESTE's Managing Director, to restrict parallel exports from Spain to France. [...], Topps' International Sales & Marketing Manager, stated: *"I have been told this morning that there are series 2 stickers in the French market. We will not launch until October. This causes me a major problem with my French distributor. I have heard that the product is coming from Spain. (...) You are buying stickers at half the price of France and your wholesalers can obviously sell into France cheaper than our distributor."*⁷¹

- (67) Obviously, Topps was concerned to preserve the launch in France, which was to take place later than the launch in Spain. In the same e-mail dated 11 September 2000, [Topps' International Sales & Marketing Manager] inquired and asked for written assurances about the final destination of these products: *"We have 3,801,600 packets available to deliver this week, but I will need assurances that this will not arrive in France."*⁷²
- (68) Lastly, again in the same e-mail dated 11 September 2000, Topps asked ESTE to help in tracing back the parallel imports to the French territory. *"You are buying stickers at half price of France and your wholesalers can obviously sell into France cheaper than our distributor. (...) Can you please try and find out who could be selling this in France. Can you please investigate for me."* Furthermore, Topps threatened to stop supplying ESTE: *"If Topps USA find out we will not be able to supply you any more stock."*⁷³ (sic).
- (69) Two days later, on 13 September 2000, [Topps' International Sales & Marketing Manager] sent a fax to ESTE stating clearly Topps' intentions: *"Further to my recent e-mail dated the 11th September 2000, regarding stickers sales into other markets, a response is still awaited. I would be obliged if you could provide a response/explanation immediately. I regret to inform you that until an explanation has been received, Topps will be unable to provide any further stock to Este."*⁷⁴
- (70) ESTE immediately reacted to the pressure and assured Topps, still on 13 September 2000, that it was willing to prevent further unwanted exports: *"Dear [Topps' International Sales & Marketing Manager], Here enclosed you find a copy of the letter we are going to send to our wholesalers. As you can see we are going to stop the distribution of Spanish stickers in France. It is very important for us to receive concrete and urgent information from Topps-Merlin in France. Looking forward to hearing from you. Best regards, [ESTE's Managing Director]"*⁷⁵.
- (71) All wholesalers were sent the following letter dated 13 September 2000: *"Dear friend and wholesaler, We have just received information – with great surprise – that Spanish display box Pokémon 2 are being sold in the French territory. Topps Merlin informed us with regret this fact that, in our opinion, is inadmissible. Taking into account this event, as well ask urgently Topps Merlin for more piece of information about the wholesaler that has made this sale, we make you know that is absolutely forbidden the sale of Pokémon's stickers at any wholesaler and/or French retailer. In*

⁷¹ Page 862 of the Commission's file (emphasis added).

⁷² Page 862 of the Commission's file.

⁷³ Page 862 of the Commission's file.

⁷⁴ Page 863 of the Commission's file.

⁷⁵ Page 864 of the Commission's file.

*any case, and from the same moment that is confirmed to us who has made the transaction, this wholesaler will be immediately cut out from the supply. Our respond is so hard because we will nip the problem in the bud. We entrust you will understand our position as well as we wish you an excellent sale in your natural distribution area. (...).” (sic).*⁷⁶

(72) Subsequently, on 25 September 2000, UDE, one of the wholesalers and distributors of Topps’ products in the Spanish territory, informed Souris that it would stop the supply of Pokémon products of Spanish origin: “COLECCIONES ESTE, the distributor for the Spanish territory of the POKÉMON stickers collection, has forbidden me to supply that collection to any person who we know is going to market it outside the Spanish territory. I do not know whether that action is legal or not, but I know very well that I must follow the instructions of my supplier.”⁷⁷

(73) It seems that Souris was one of the main parallel importers of Pokémon products from Spain. Thus, NMPP contacted Topps in October 2000 to communicate the names of firms suspected of parallel importing: “Concerning Pokemon S2 (“Series 2”) sold all over France, here are the different informations I have: Most important problem is located in the south of France, the firm: LA SOURIS VERTE, located now in Spain, and before in the city of Montpellier, is selling stickers and albums to our retailers. (...).” (sic).⁷⁸

⁷⁶ Page 865 of the Commission’s file.

⁷⁷ Page 5 of the Commission’s file. Spanish original: “COLECCIONES ESTE, la concesionaria para España de la colección de cromos POKÉMON, me tiene terminantemente prohibido el suministrar dicha colección a cualquier persona la cual sepamos va ha comercializar fuera del territorio español. Ignoro si dicha actuación es legal o deja de serlo, pero yo tengo muy claro que me debo a mi proveedor” Translation by the Commission.

⁷⁸ Page 903 of the Commission’s file.

2. LEGAL ASSESSMENT

2.1. Article 81 (1) of the Treaty

(74) Under Article 81(1) of the Treaty, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, are prohibited.

2.1.1. Undertakings

(75) Article 81(1) of the Treaty applies to agreements, decisions of associations and concerted practices between undertakings. Topps is an undertaking within the meaning of that Article.

(76) In accordance with the case law of the Court of Justice of the European Communities⁷⁹, Article 81(1) does not apply to the relationships within a single economic unit or undertaking, such as those between a parent company and its dependent subsidiaries. In this case, Article 81(1) does not, therefore, apply to relationships between Topps USA, the parent, and its four European subsidiaries, Topps Europe, Topps UK, Topps Italia and Topps Ireland.

(77) Topps' intermediaries (for example, Cards Inc, LDX, Dolber, Rautakirja, DOK, NMPP and ESTE) are also undertakings within the meaning of Article 81(1) of the Treaty.

2.1.2. The concepts of agreements and concerted practices

(78) Article 81(1) of the Treaty prohibits agreements, decisions of associations and concerted practices.

(79) An *agreement* within the meaning of Article 81(1) of the Treaty exists when the parties, expressly or implicitly, jointly adopt a plan determining the lines of their mutual action (or abstention) on the market. Thus, the critical element is the existence of a concurrence of wills, and neither the form of the agreement nor the existence of contractual penalties or enforcement measures are relevant.

(80) It is well established case-law that “in order for there to be an agreement within the meaning of Article 85 [now Article 81] of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way”.⁸⁰

⁷⁹ See Judgment in Case C-73/95 P *Viho Europe BV v Commission* [1996] ECR I-5457.

⁸⁰ Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, at paragraph 112; Joined cases 209/78 to 215/78 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, at paragraph 86; Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 256.

- (81) In that respect, a decision on the part of an undertaking, which constitutes unilateral conduct, is not covered by Article 81(1) of the Treaty.⁸¹
- (82) However, the Court of Justice has ruled that, in certain circumstances, measures adopted or imposed in an apparently unilateral manner by a manufacturer in the context of its continuing relations with its distributors can be regarded as an agreement within the meaning of Article 81(1) of the Treaty.⁸²
- (83) Thus, if the express or tacit acquiescence of the other parties can be established, an apparently unilateral conduct adopted by a manufacturer in the context of its contractual relations with its dealers can form the basis of an agreement between undertakings within the meaning of Article 81(1) of the Treaty.⁸³
- (84) Article 81(1) of the Treaty also covers the concept of concerted practices the object of which is “*to bring within the prohibition of that article a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition*”.⁸⁴
- (85) The criteria of *co-operation* or *co-ordination* laid down by the case-law, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such competitor the course of conduct which they have themselves decided to adopt or contemplate adopting on the market.⁸⁵
- (86) In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market. It is sufficient that, by its statement of intention, the competitor should

⁸¹ Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraph 38; Joined cases 25/84 and 26/84 *Ford and Ford Europe v Commission* [1985] ECR 2725, at paragraph 21; Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, at paragraph 56.

⁸² Joined cases 32/78, 36/78 to 82/78 *BMW Belgium and others v Commission* [1979] ECR 2435, at paragraphs 28 to 30; *AEG*, at paragraph 38; *Ford and Ford Europe*, at paragraph 21; Case 75/84 *Metro v Commission (Metro II)* [1986] ECR 3021, at paragraphs 72 and 73; Case C-277/87 *Sandoz v Commission* [1990] ECR I-45, at paragraphs 7 to 12; Case C-70/93 *BMW v ALD* [1995] ECR I-3439, at paragraphs 16 and 17.

⁸³ See *BMW Belgium*, at paragraphs 28 to 30; *AEG*, at paragraph 38; *Ford and Ford Europe*, at paragraph 21; *Metro II*, at paragraph 72 to 73; *Sandoz*, at paragraphs 7 to 12; *BMW v ALD*, at paragraphs 16 to 17.

⁸⁴ Judgment of the Court in Case 48/69, *Imperial Chemical Industries Ltd. v Commission (ICI)* [1972] ECR 619, at paragraph 64.

⁸⁵ Joined Cases 40-48/73 *Suiker Unie and others v Commission* [1975] ECR 1663, at paragraphs 173 and 174.

have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market.⁸⁶

- (87) Therefore, a conduct may fall under Article 81(1) of the Treaty as a so-called “concerted practice” even where the parties have not subscribed to a common plan defining their action in the market but adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour.⁸⁷
- (88) The reciprocity inherent in the concept of concerted practice is given where one party discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it.⁸⁸ Thus, the acceptance of complaints in relation to parallel imports may also give rise to a concerted practice.⁸⁹
- (89) It should be noted that the concept of a concerted practice, as it results from the actual terms of Article 81(1) of the Treaty, implies, besides undertakings’ “concerting” with each other, subsequent conduct on the market, and a relationship of cause and effect between the two. However, the Court of Justice has held that, subject to proof to the contrary, which the parties concerned must adduce, there is a presumption that the concerted action influenced the subsequent conduct.⁹⁰
- (90) Similarly, neither the motives for entering into an agreement nor the actual steps taken as a result thereof are relevant for the qualification of an agreement under Article 81(1) of the Treaty. Under established case-law, the actual effects of an agreement or concerted practice need not be taken into account when its object is the prevention, restriction or distortion of competition within the common market.⁹¹
- (91) It is not always necessary for the Commission to describe the infringement as being exclusively one or the other form of illegal conduct. The concepts of agreement and concerted practice evolve and sometimes overlap. Moreover, it will sometimes be impossible to make the distinction on a realistic basis since an infringement can have the characteristics of each of the forms of illegal conduct all at once whereas certain of its manifestations, taken in isolation, could be attached with precision to one of them rather than to another. However, in analytical terms, it would be artificial to subdivide into several discontinuous forms of infringement what is clearly a common continuous project pursuing one and the same overall objective. A restrictive practice can,

⁸⁶ Judgment of the Court of First Instance in Joined Cases T-25/95 and others *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraph 1852; upheld by the Court of Justice in its judgment of 7 January 2004 in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and other v Commission*, not yet published.

⁸⁷ See Judgment of the Court of First Instance in *Hercules*, at paragraphs 259 to 261.

⁸⁸ Judgment of the Court of First Instance in *Cimenteries CBR SA*, at paragraph 1849.

⁸⁹ See, as to this effect, the judgments in *Suiker Unie*, at paragraph 283; in Joined cases 100 to 103/80 *SA Musique Diffusion française and others v Commission* [1983] ECR 1825, at paragraphs 72-80; and in Case 86/82 *Hasselblad (GB) Limited v Commission* [1984] ECR 883, at paragraphs 24-29.

⁹⁰ Judgment of the Court of First Instance in *Cimenteries CBR SA*, at paragraph 1865.

⁹¹ Judgment of the Court of Justice in Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, at page 342; Judgment of the Court of Justice in *Sandoz*, at paragraphs 15-18; as far as concerted practices are concerned, see the judgment of the Court of Justice in Case C-199/92P *Hüls v Commission*, [1999] ECR I-4287, at paragraphs 164-165.

accordingly, be at once an agreement and a concerted practice. Article 81(1) of the Treaty lays down no specific category for a complex infringement of this type.⁹²

- (92) The reason why Article 81(1) of the Treaty refers to concerted practices as well as to agreements between undertakings and decisions by associations of undertakings is to bring different forms of coordination and collusion between undertakings within the prohibition of that Article. A comparison between the concepts of agreement and concerted practice within the meaning of that Article shows that, from a subjective point of view, they are intended to cover forms of collusion having the same nature and which are only distinguishable from each other by their intensity and the forms in which they manifest themselves. It follows that, whilst the concepts have partially different elements, they are not mutually incompatible. The Commission is therefore not required to categorise either as an agreement or as a concerted practice each form of conduct found but may characterise some of those forms of conduct as principally agreements and others as concerted practices.⁹³
- (93) It is established case law that a single infringement may be characterised as a complex infringement where it involves at one and the same time elements to be characterised as "agreements" and elements to be characterised as "concerted practices" and that, when faced with an infringement of this type, the Commission is entitled to characterise it as "an agreement and a concerted practice", this dual characterisation having to be understood, not as requiring, simultaneously and cumulatively, proof that each of those factual elements presented the constituent elements both of an agreement and of a concerted practice, but rather as referring to a complex whole comprising a number of factual elements some of which were characterised as agreements and others as concerted practices for the purposes of Article 81(1) of the Treaty.⁹⁴

2.1.3. *The agreements and concerted practices in the present case*

- (94) The Commission notes that Topps acknowledged that it “engaged in activities that have had the effect of impeding cross-border trade within the EU” and that its “behaviour had not been notified for exemption or comfort letter pursuant to Article 81(1) or (3).”⁹⁵ Topps, further, admitted that “a complete ban on exports and extensive territorial protection for its distributors in the circumstances described above is difficult to reconcile with Article 81”.⁹⁶
- (95) The Commission has identified, as will be shown in greater detail below (see recitals (105) to (121)), the existence of 7 agreements or concerted practices between Topps and the following intermediaries: Cards Inc, LDX, Dolber, Rautakirja, DOK, NMPP and ESTE.
- (96) Topps only acknowledges the existence of restrictive agreements or concerted practices within the meaning of Article 81(1) of the Treaty in the cases of the Italian distributor Dolber and the Spanish distributor ESTE: “Only two incidents involved an

⁹² *Hercules*, at paragraph 264.

⁹³ Judgment of the Court of Justice in Case C-49/92P *Commission v Anic* [1999] ECR I-4125, at paragraphs 131-132.

⁹⁴ *Anic*, at paragraph 43.

⁹⁵ Page 804 of the Commission’s file.

⁹⁶ Page 809 of the Commission’s file.

*agreement or a concerted practice and thus, to that extent, could fall within the scope of Article 81(1) EC: the agreement with Dolber (...) and the concerted practice with ESTE.”*⁹⁷ As regards the other 5 out of the 7 cases, Topps denies the existence of agreements or concerted practices. Topps does not contest the facts found by the Commission but suggests different interpretations.

2.1.3.1. Rautakirja and NMPP as agents

- (97) Topps argues that any agreements and/or concerted practices involving Topps and Rautakirja or NMPP fall, from the outset, outside the scope of Article 81(1) of the Treaty since these companies must be considered as “genuine agents” within the meaning of the Commission Notice on Guidelines on Vertical Restraints⁹⁸.
- (98) As regards Rautakirja, Topps maintains that, according to the business practice between itself and Rautakirja, it remains owner of the Pokémon collectibles throughout the transaction and that Rautakirja consequently does not bear the risk of their loss or destruction. Topps also claims that it bears all costs relating to supply and purchase. Topps further refers to Article 10 of its distribution contract with Rautakirja of 20 March 2000 which provides that Topps determines the level of the advertising/campaign budget and pays for advertising material. Topps also argues that Rautakirja is not obliged to maintain stock at its own cost or risk because distribution operates on the basis of “sale or return” which enables Rautakirja to return unsold goods to Topps. Finally, Topps maintains that Rautakirja is not responsible (except loss of commission) for customers’ non-performance and that payment by Rautakirja is only made 45 days after payments have been received from the customer.⁹⁹
- (99) Concerning NMPP, Topps considers NMPP to be a “société coopérative de messageries de presse” under French law and emphasises that intermediaries are commission agents for the editors in whose publications they deal under the French Commercial Code. According to Articles 1 and 2 of the distribution contracts between Topps and CCEI of 15 December 1999 and 20 May 2000¹⁰⁰, Topps remains owner of the contract goods vis-à-vis CCEI. Topps concludes that NMPP/CCEI do not bear the risk of loss or destruction of the goods. Topps also maintains that NMPP/CCEI do not contribute to the costs relating to the supply, purchase, transportation or advertising. Topps also argues that NMPP/CCEI do not hold stock at their own risk because of the “sale or return” distribution system provided for in Article 6 of the distribution contracts with CCEI.¹⁰¹
- (100) According to the Guidelines on Vertical Restraints, an agreement between a principal and an agent qualifies as a “genuine agency agreement” and, thus, falls outside the scope of Article 81(1) of the Treaty if the agent bears no or only insignificant financial

⁹⁷ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraph 180, page 2505 of the Commission’s file.

⁹⁸ OJ C 291, 13.10.2000, p. 1, points 12 to 20.

⁹⁹ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 74 to 79, pages 2486 to 2487 of the Commission’s file.

¹⁰⁰ Articles 1 and 2 of the distribution contracts provide that the publisher (i.e. Topps) remains owner until the sale to the public (“L’éditeur reste propriétaire de son titre jusqu’à la vente au public.”), see pages 1108-1129 of the Commission’s file.

¹⁰¹ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 82 and 83, pages 2487 to 2488 of the Commission’s file.

or commercial risk relating to the contract and market-specific investments. The risk must be assessed on a case-by-case basis taking into account the economic realities rather than the legal form. The Commission generally considers that an agent bears no significant risk where the property in the contract goods does not vest in the agent and where the agent does not incur certain risks or costs, such as the costs for supply and promotion or the risk of stockholding.¹⁰² According to the Court of Justice, the fact that an agent acts for a number of companies may indicate that he is independent and no auxiliary organ forming part of the principal's undertaking.¹⁰³ The Court has also pointed out that “[r]epresentatives can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal's undertaking”.¹⁰⁴

- (101) Taking this into account, Rautakirja does not appear to be a genuine agent. On the basis of the available evidence, Rautakirja seems at least to bear the risk of loss or destruction of the contract goods. Topps' assertion in this respect that Topps itself remains owner of the collectibles throughout the transaction is not supported by the distribution contract of 20 March 2000 which does not contain any such clause. Neither does the distribution contract support Topps' assertions that it bears all costs relating to the supply and purchase and that Rautakirja is not responsible for customers' non-performance. Furthermore, Topps stated that Rautakirja also acts as the Finnish agent for Topps' competitor Panini.¹⁰⁵ This may also indicate that Rautakirja is independent and not an integral part of Topps. Finally, it is worth noting that the distribution contract refers to Rautakirja as “Distributor” rather than agent.¹⁰⁶ The same follows from a fax from Topps to a third company in which Topps referred to Rautakirja as “our Finnish publishing distributor” and emphasised that “I am sure you are aware that Rautakirja are our sole distributor for Cards and Stickers in Finland”.¹⁰⁷
- (102) As regards NMPP, any qualification of NMPP or CCEI under French law is irrelevant for the assessment of the financial and commercial risk they bear. Contrary to Topps' assertion, the available evidence, and in particular the distribution contracts between Topps and CCEI, does not support that Topps alone bears the costs relating to the supply, purchase, transportation or advertising. Thus, NMPP/CCEI do not appear to be excluded from all costs or risks resulting from the contracts. In fact, it follows from Topps' submission that NMPP/CCEI do bear significant risks in relation to the distribution of Pokémon collectibles, and the administration of the bar code system in

¹⁰² Commission Notice on Guidelines on Vertical Restraints, points 13 to 16.

¹⁰³ Judgment of the Court in Case C-311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, at paragraph 20.

¹⁰⁴ Judgment of the Court in Case C-266/93 *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH* [1995] ECR I-3477, at paragraph 19 (emphasis added).

¹⁰⁵ See Topps' submission of 18 May 2001, at Annex D, page 1468 of the Commission's file.

¹⁰⁶ Pages 1137 and 1138 of the Commission's file.

¹⁰⁷ Fax Topps Europe to Sunwise of 31 July 2000, page 1290 of the Commission's file (emphasis added).

particular.¹⁰⁸ It is in line with this that Topps did not refer to NMPP as its agent but as “my French distributor”.¹⁰⁹

- (103) Even if one considered Rautakirja and NMPP generally as genuine agents, the specific behaviour identified above (at recitals (60) to (62) and (65) to (73)) would not qualify as an inherent part of any agency agreement. According to the Guidelines on Vertical Restraints, only “obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal” or certain exclusive agency provisions fall outside the scope of Article 81(1) of the Treaty.¹¹⁰ The relevant behaviour, however, did not concern the imposition of obligations on the alleged agents, that is to say, Rautakirja or NMPP. It rather aimed at imposing restrictions on third parties, in particular on parallel importers in Finland and France. Furthermore, those restrictions do not correspond to any of the obligations which relate to the ability of the principal to fix the scope of activity of the agent in relation to the contract goods and which are, therefore, mentioned in paragraph 18 of the Guidelines. Neither do they concern exclusive agency provisions within the meaning of paragraph 19 of the Guidelines.
- (104) Therefore, the agreements or concerted practices between Topps and Rautakirja and Topps and NMPP cannot be characterised as concerning behaviour falling outside the scope of Article 81(1) of the Treaty.

2.1.3.2. Agreement and/or concerted practice between Topps and Cards Inc

- (105) As regards Cards Inc (see recitals (54) to (56)), Topps argues that the communication between Cards Inc and Topps UK of 4 February 2000 did not concern an assurance by Cards Inc not to export to other Member States but an assurance not to grey export to countries outside the Community. An acquiescence not to export to other Member States would not have been genuine since Cards Inc did in fact export to other Member States, and Topps was aware of this.¹¹¹
- (106) Topps interpretation is not corroborated by the facts. It is not plausible that Cards Inc’s assurance of 4 February 2000 should concern grey exports since all other communication with Topps referred to above in the preceding recital concerns trade in Pokémon products within the Community. The fact that Cards Inc did export to other Member States does not exclude an assurance vis-à-vis Topps not to do so, particularly since there is no proof that Topps was aware of such parallel exports. Assurances can be breached as cheating can be advantageous.
- (107) The Commission, therefore, considers that Topps and Cards Inc reached an *agreement*, or at least, a *concerted practice* with the object of restricting the resale of products from the United Kingdom, particularly into Germany. It lasted from 4 February 2000 until, at least, 4 August 2000 (recitals (54)-(56)).

¹⁰⁸ See the reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraph 154, page 2500 of the Commission’s file: “(...), NMPP was concerned at the risk it might be obliged to take back returns of product it had not supplied (...)”

¹⁰⁹ E-mail Topps UK to ESTE of 11 September 2000, page 862 of the Commission’s file (emphasis added).

¹¹⁰ Point 18 (emphasis added) and point 19.

¹¹¹ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 101 to 108, pages 2491 to 2492 of the Commission’s file.

2.1.3.3. Concerted practice between Topps and LDX

- (108) Topps argues that its request of 26 July 2000 for a written assurance concerning the destination of products (see recitals (57) and (58)) was motivated by its objective to optimise its supply and distribution chains. The request does not express any desire that LDX should abstain from supplying customers outside the United Kingdom. Consequently, Topps understood LDX's wide answer ("*primarily in the UK*") to mean that LDX would also supply customers in other Member States. When LDX gave the assurance, it intended to supply such customers, in particular OTC GmbH in Germany, and actually did so. In Topps' view, LDX was under no pressure from Topps UK to supply in the United Kingdom only.¹¹²
- (109) Contrary to Topps' view, the evidence in the Commission file shows that LDX was under urgent pressure not to supply customers outside the United Kingdom. In its response to a Commission request for information, LDX described the parallel imports by OTC and admonished that "[t]his information given to the EU is very damaging to LDX Marketing, as it would be made known that LDX Marketing effect grey exports for OTC GMBH, and this relationship needs to be kept secret in order for the Company to survive, and effect further trade on behalf of OTC"¹¹³. Against this background, it seems that Topps's request was not as open-ended as suggested by Topps. Topps, in fact, asked for an "assurance" and not just for "some information". Even if LDX had, at the time it gave the assurance, internal reservations and planned to help OTC circumventing Topps' official distribution system and the higher prices in Germany, such internal reservations do not mean that no concerted practice existed.
- (110) The Commission concludes that there was a *concerted practice* aiming at the restriction of parallel trade between Topps and LDX. The communication occurred on 26 July 2000 and 28 July 2000 (recitals (57) to (58)).

2.1.3.4. Agreement between Topps and Dolber

- (111) The distribution agreement between Topps Italia SRL and Dolber, signed on 1 March 2000, constituted an *agreement* which aimed at restricting the resale of products to other territories by preventing Dolber from engaging in passive export sales. Topps told the Commission on 4 September 2001 that it had waived the application of the relevant clause of the distribution agreement as part of its compliance program after the initiation of the Commission investigation (recital (59)).

2.1.3.5. Agreement between Topps and Rautakirja

- (112) Besides claiming that Rautakirja is a genuine agent, Topps also denies the existence of an agreement between Topps UK and Rautakirja. As regards the communication of 8 and 9 March 2003 (see recital (61)), Topps argues that there was no concurrence of wills since its request vis-à-vis USA Vincenter to cease selling in Finland went beyond Rautakirja's request limited to the question whether its own or Topps' distribution rights were being violated. As regards Topps' intervention against Sunwise (see recital

¹¹² Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 109 to 114, pages 2492 to 2493 of the Commission's file.

¹¹³ LDX's submission of 20 May 2001, at page 1558 of the Commission's file.

(62)), Topps also argues that this was unilateral because Topps again went beyond what had been requested by Rautakirja.¹¹⁴

- (113) The construction that Topps' intervention vis-à-vis USA Vincenter and Sunwise went beyond what Rautakirja had requested is based on an overly narrow interpretation of these requests. In both cases, Rautakirja clearly asked Topps to contact the companies. It would seem artificial to assume that Rautakirja wanted Topps to contact the companies but not to prevent further parallel imports. Thus, a proper interpretation leads to the result that Topps' activity is not an over-reaction but corresponds to Rautakirja's request. Consequently, Rautakirja expressly approved of Topps' intervention against USA Vincenter in its e-mail to Topps dated 10 March 2000: *"Dear [former Topps International Sales & Marketing Manager], We appreciate your co-operation in this matter. However, I know that this is only the start. During years 1994-95 we had lots of problems with parallel importers (...)."*¹¹⁵ Therefore, there was a concurrence of wills between Topps and Rautakirja.
- (114) The Commission, therefore, considers that Topps and its Finnish distributor Rautakirja entered into an *agreement* with the object of preventing parallel imports into Finland. The infringement lasted from 8 March 2000 until, at least, 31 July 2000. Parallel imports stopped (see recitals (60) to (62)).

2.1.3.6. Concerted practice between Topps and DOK

- (115) As regards the German distributor DOK (see recital (63)), Topps again argues that its behaviour was unilateral, going beyond what DOK had requested. DOK's request of 8 June 2000 must be understood as merely asking Topps Ireland to get priority in the subsequent deliveries of products needed for its planned marketing campaign in Germany, but not to investigate the source of parallel imports into Germany or to interfere with those imports. Accordingly, Topps Ireland went beyond that limited request when it reported, in its fax of 8 June 2000, that it had traced the source of parallel imports, contacted it and threatened it to stop parallel importing. Furthermore, the behaviour reported in the fax was not even unilateral; it did not take place at all. Topps maintains that the described activity was just a "white lie" or "PR exercise" in order to reassure DOK.¹¹⁶
- (116) Topps' interpretation is contradictory. If Topps understood DOK as not wanting any intervention against the parallel importer, pretending to have made such an intervention does not appear to be a proper "PR exercise". It rather follows from DOK's e-mail highlighted by Topps in its response to the statement of objections¹¹⁷ that DOK disapproved of the ability of its customers to parallel import Pokémon products, a situation which could only be remedied through Topps' intervention against these parallel traders. Therefore, Topp's intervention against one parallel

¹¹⁴ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 115 to 122, pages 2493 to 2494 of the Commission's file.

¹¹⁵ Page 878 of the Commission's file.

¹¹⁶ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 210 to 222, pages 2510 to 2512 of the Commission's file.

¹¹⁷ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraph 212, page 2511 of the Commission's file, citing DOK's e-mail of 8 June 2000: "(...) We want to point out that the idea to sell fist combo packs can't be realise when our customers have a change to buy single articles in other countries." (sic, emphasis added).

importer as reported in its fax to DOK appears not to be unilateral but to correspond to DOK's wishes.

- (117) The Commission concludes that a *concerted practise* existed between Topps and German distributor DOK. DOK's request and Topps' response occurred on 8 June 2000 (recital (63)).

2.1.3.7. Agreement or concerted practice between Topps and NMPP

- (118) While Topps acknowledges the existence of a restrictive concerted practice in the case of ESTE, it denies such collusion in the case of NMPP. Topps again argues that it went beyond what was requested by the distributor in question. In Topps view, NMPP did not ask it to contact ESTE and to ask ESTE to trace back parallel imports and threaten to otherwise cut supplies. Topps considers the memorandum of 4 August 2000 to be as unilateral as NMPP's e-mail to Topps of 19 October 2000 in which NMPP identified Souris as the source of parallel imports into France.¹¹⁸
- (119) Contrary to what Topps suggests, NMPP's memorandum does not appear to be unilateral since it was passed on to Topps, which later provided a copy to the Commission as part of its response to the first information request.¹¹⁹ Topps' activity vis-à-vis ESTE on 11 and 13 September 2000, therefore, constitutes a reaction to NMPP's memorandum and forms, thus, the second element of the collusion between NMPP and Topps. This activity by Topps corresponds to what NMPP wanted, namely protection against cheap parallel imports from Spain. The e-mail from NMPP of 19 October 2000 confirms this concurrence of wills.
- (120) Consequently, the Commission considers that there existed an *agreement* or, at least, a *concerted practice* between Topps and NMPP with the objective of restricting parallel imports from Spain to France. The agreement and/or concerted practice started on 11 September 2000 and lasted, at least, until 20 October 2000 (recitals (65)-(71)).

2.1.3.8. Agreement or concerted practice between Topps and ESTE

- (121) The *agreement* or, at least, *concerted practice* between Topps and ESTE aimed at restricting parallel imports from Spain to France. The agreement or concerted practice started on 11 September 2000 and lasted, at least, until 20 October 2000 (recitals (65)-(71)).

2.1.3.9. Single and continuous infringement

- (122) In Topps' view, its interaction with its intermediaries does not constitute a "policy" of restricting parallel trade. Topps argues that the alleged agreements or concerted practices were isolated "incidents" and that it did not systematically collect information on parallel trade, involve its intermediaries in tracing it back, ask for re-assurances or threaten to cut supplies. Topps also suggests that its role was reactive rather than proactive since it had to cope with an unexpected craze for Pokémon

¹¹⁸ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 123 to 129, pages 2495 to 2496 of the Commission's file.

¹¹⁹ Page 899 of the Commission's file.

products. Topps, finally, refers to three intermediaries which it did not force to abstain from parallel trade with Pokémon products.¹²⁰

- (123) The Commission disagrees with Topps' assumption of isolated "incidents". There are more than 30 instances of explicit communication between Topps and the seven intermediaries in question relating to the prevention of parallel trade between 4 February 2000 and 9 October 2000. These appear to be more than isolated "incidents", particularly in view of the very limited number of people working for Topps.¹²¹
- (124) Nevertheless, the Commission does not have to prove that Topps pursued all instances of parallel trade in order to find a single and continuous infringement. A single and continuous infringement requires that the different acts pursue an identical anti-competitive object,¹²² that similar instruments and mechanisms are used in the different cases, and that the company in question was, in all cases, aware of all the constituting elements of the infringement.
- (125) In the present case, all the agreements and concerted practices aimed, from Topps' perspective, at the same overall objective of restricting parallel trade.¹²³
- (126) *Secondly*, Topps and its different intermediaries pursued this objective with similar instruments and mechanisms. In order to achieve the overall objective of preventing parallel trade, Topps actively collected information (recitals (62), (68)) so that it "*learned of parallel trade from its agents or distributors (or occasionally its staff) through a variety of communications.*"¹²⁴ Topps monitored the final destination of Pokémon products (recitals (62), (64), (68)). When Topps knew from its intermediaries about instances of parallel trade, it asked them for help in order to trace back parallel imports to their source (recital (68)). Topps also involved its intermediaries by requesting and receiving assurances that stock would not be re-exported to other Member States (recitals (54), (57), (58), (67)). In some cases where Topps had the impression that its intermediaries did not cooperate, it threatened to cut the supply (recitals (68), (69)).
- (127) *Finally*, Topps was, in all cases, aware of all the constituting elements of the infringements.
- (128) Therefore, it is concluded that the agreements and concerted practices identified above constitute a single and continuous infringement.

¹²⁰ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 173 to 195, pages 2504 to 2508 of the Commission's file.

¹²¹ [The four European Topps subsidiaries have altogether less than 70 employees], see reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 13 to 19, pages 2476 to 2477 of the Commission's file; Topps Europe emphasised that it only has [...] sales managers, see Slide 74 of the Presentation given by Topps Europe, Topps UK and Topps Italia at the Oral Hearing on 23 October 2003.

¹²² Judgment of the Court of Justice of 7 January 2004 in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S etc. v Commission*, at paragraph 258.

¹²³ For additional behaviour aiming at the same objective see the events described in paragraphs 92 to 96 of the statement of objections dated 16 June 2003, at pages 839, 842-843, 867-868 and 895 of the Commission's file.

¹²⁴ Page 804 of the Commission's file.

2.1.4. Appreciable restrictive effect on competition and on trade between Member States

- (129) Topps argues that the alleged infringement does not appreciably restrict competition or impact on trade between Member States. Topps argues that the existence of national markets and stock shortages only gave limited incentive to parallel trade. Topps also maintains that the alleged infringements were ineffective and of very short duration.¹²⁵
- (130) The agreements and concerted practices between Topps and its distributors or agents are **restrictive by object**. They aim at preventing intermediaries from exporting, both actively and passively, Pokémon products outside their respective contractual territories. As the object of the agreements and concerted practices in this case is to restrict competition, it is not necessary to consider their actual effects on competition. Notwithstanding this, the evidence on the Commission file shows that parallel imports were, in fact, prevented.¹²⁶
- (131) Concerning the effects on intra-Community trade, the Court of Justice has stated that “(...) in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States”¹²⁷ and whilst Article 81(1) of the Treaty “(...) does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it to be established that the agreements are capable of having that effect”.¹²⁸ The effect must moreover be appreciable.¹²⁹ By their very nature, provisions in agreements or concerted practices, which are designed to prevent a buyer from exporting goods he has bought, are liable to partition the markets and consequently to affect trade between Member States.¹³⁰
- (132) The agreements and concerted practices in the present case, which have the object of partitioning the internal market by limiting cross-border sales, are capable of appreciably affecting trade between Member States.

2.2. Inapplicability of Article 81(3) of the Treaty

- (133) Agreements subject to Article 81(1) of the Treaty which contribute 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, without imposing restrictions which are not indispensable and affording the possibility of eliminating

¹²⁵ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 201 to 209, pages 2508 to 2510 of the Commission’s file.

¹²⁶ See e.g. the communication relating to cases of effective prevention of parallel imports in recitals (56), (61) and (71).

¹²⁷ Judgment of the Court in Joined Cases C-215 and 216/96 *Bagnasco* [1999] ECR I-135, at paragraph 47.

¹²⁸ Judgment of the Court in Case C-219/95P *Ferriere Nord v Commission* [1997] ECR I-4411, at paragraph 19.

¹²⁹ Judgment of the Court in Case C-306/96 *Javico International and Javico AG v Yves Saint Laurent Parfums SA* [1998] ECR I-1983.

¹³⁰ Judgments in Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö and others v Commission (Wood Pulp II)* [1993] ECR I-1307, at paragraph 176; *Miller*, at paragraph 131.

competition in respect of a substantial part of the products in question, may be exempted under Article 81(3) of the Treaty.

2.2.1. Inapplicability of Regulation (EEC) 1983/83 and Regulation (EC) 2790/1999

- (134) Regulation No 19/65/EEC of 2 March of the Council on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices¹³¹ empowered the Commission to adopt “block exemption” regulations defining certain categories of agreements fulfilling generally the conditions of Article 81(3) of the Treaty, which are, thus, exempted from the prohibition under Article 81(1) of the Treaty. The most recent block exemption regulation concerning distribution agreements, Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices¹³², entered into force on 1 January 2000. Article 12 of Regulation (EC) No 2790/1999 provides that the previous block exemption regulation, Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements¹³³, continued to apply to exclusive distribution agreements until 31 May 2000. As some agreements/concerted practices in this case took place before that date, the Commission will examine the applicability of both Regulations.

2.2.1.1. Regulation (EEC) No 1983/83

- (135) Articles 2(2) and 3(D) of Regulation (EEC) No 1983/83 expressly excluded from the scope of the Regulation agreements where absolute territorial protection was given to the reseller in his territory so that he was the customers’ only source of the goods. Nor did the Regulation apply where the parties to the agreement made it difficult for customers to obtain the goods from other legitimate sources. The Commission emphasised in its Notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements that : “*The block exemption ceases to apply as from the moment either of the parties takes measures to impede parallel imports into the contract territory. Agreements in which the supplier undertakes with the exclusive distributor to prevent his other customers from supplying into the contract territory are ineligible for the Block exemption from the outset.*”¹³⁴ As the agreements and concerted practices in this case aimed at **guaranteeing absolute protection**, they are not covered by the block exemption set forth in Regulation (EEC) No 1983/83.

2.2.1.2. Regulation (EC) No 2790/1999

- (136) According to Article 4(b) of Regulation No 2790/1999, the block exemption does not apply to vertical agreements if they, firstly, have as their object “*the restriction of the territory into which, (...), the buyer may sell the contract goods or services (...)*” and,

¹³¹ OJ P 36, 6.3.1965, p. 533. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

¹³² OJ L 336, 29.12.1999, p. 21. Regulation as amended by the 2003 Act of Accession.

¹³³ OJ L 173, 30.6.1983, p.1. Regulation as last amended by Regulation (EC) No 1582/97 (OJ L 214 , 6.8.1997, p. 27).

¹³⁴ OJ C 101, 13.4.1984, p. 2.

secondly, do not merely aim at “*the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer (...).*”.

- (137) In this case, the first condition is met. The agreements and/or concerted practices between Topps and its intermediaries aimed at restricting the territory into which intermediaries and resellers could sell Pokémon products. The second condition is also fulfilled. The agreements and/or concerted practises did not have the object of merely restricting active sales into territories which had been exclusively allocated to certain distributors.
- (138) As regards most intermediaries, there is no indication of exclusivity. A territory is exclusively allocated when the supplier agrees to sell his product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into his territory or to his customer group by the supplier and all the other buyers of the supplier inside the Community.¹³⁵ As regards the burden of proof, it is for the undertaking invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied.¹³⁶ Topps has not provided such evidence. The distribution contract between Topps and Dolber, signed on 1 March 2000, does not contain any commitment by Topps not to appoint another company for the distribution of Topps’ collectibles in Italy.¹³⁷ Nor do the distribution contracts concluded between Topps and CCEI. The latter grant CCEI exclusivity to distribute Pokémon products in the press network exploited by NMPP in France, but not territorial exclusivity nor total exclusivity for the entire press network in France.¹³⁸ This is in line with the fact that Topps had eight additional intermediaries in France.¹³⁹ Furthermore, nothing in the informal relationship between Topps and DOK indicates

¹³⁵ Commission Notice on Guidelines on Vertical Restraints, point 50.

¹³⁶ Judgment of the Court of Justice of 7 January 2004 in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland A/S etc. v Commission, at paragraph 78.

¹³⁷ See pages 1093-1096 of the Commission’s file.

¹³⁸ See Article 2 which is the same in all three distribution agreements: “(...) *Il est expressément convenu entre les parties que l’exclusivité de distribution au profit du CCEI concerne uniquement la diffusion du produit par l’intermédiaire du réseau des dépositaires centraux de presse/diffuseurs de presse.*”, pages 1109, 1120, 1324. Translation by the Commission: “The parties explicitly agree that CCEI’s exclusivity only concerns the distribution of the product through the intermediary of the network of central press depositories/press distributors.” The limited scope of the exclusivity granted to CCEI by Topps was underlined by NMPP in its response to an Article 11 request dated 16.03.2001: “*Il ne s’agit pas d’une exclusivité territoriale, mais uniquement d’une exclusivité liée au réseau d’ores et déjà exploité par les NMPP en France pour la distribution de la presse. (...) L’éditeur, la société anglaise Topps, a parallèlement contracté avec d’autres opérateurs en France pour commercialiser les produits Pokemon par le biais d’autres réseaux. C’est ainsi qu’elle diffuse ses produits dans le réseau des magasins de jouets mais également par l’intermédiaire de sociétés telles que Mac Donald ou Kellog’s.*”, page 1313 of the Commission’s file. Translation by the Commission: “This is no territorial exclusivity but only exclusivity linked to the network which NMPP already exploits in France for press distribution. (...) The editor, the English company Topps, has in parallel concluded agreements with other operators in France in order to distribute Pokémon products through other networks. Thus, it distributes its products through toyshops and also through intermediaries like McDonalds or Kellogg’s.”

¹³⁹ Topps’ list of its intermediaries includes [eight companies], see the reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at Annex 2.2, pages 2548 to 2551 of the Commission’s file.

that Topps would have been prevented from appointing additional distributors in Germany.¹⁴⁰

- (139) As regards Topps' Finnish distributor Rautakirja, the situation is less clear. On the one hand, there is one distribution contract giving Rautakirja "sole distribution rights in Finland"¹⁴¹. The doubts about exclusivity expressed in the e-mails between Topps and Rautakirja referred to above (see paragraphs (61) and (62)) could also indicate the existence of an exclusive territory. On the other hand, the more recent distribution contract, which concerned the very products (Pokémon "First Movie" trading cards) the parallel import of which Topps and Rautakirja agreed to prevent, allows Topps to appoint other distributors for Finland under certain conditions.¹⁴² Nevertheless, the agreement between Topps and Rautakirja (see recital (114)) is not covered by the first indent of Article 4(b) of Regulation (EC) No 2790/1999 because nothing indicates that it only aimed at the restriction of active sales. The fact that Topps and Rautakirja agreed without qualification that Topps would prevent Finnish companies from parallel importing Pokémon products rather suggests that the prohibition also concerned passive sales. This is in line with Topps' acknowledgement that it imposed "*a complete ban on exports and extensive territorial protection for its distributors*".¹⁴³
- (140) Consequently, the agreements and/or concerted practises in this case contain restrictions covered by Article 4(b) of Regulation (EC) No 2790/1999 and are, therefore, not covered by the block exemption set forth in Regulation (EC) No 2790/1999.

2.2.2. No individual exemption under Article 81(3) of the Treaty possible

- (141) The Commission may, pursuant to Article 81(3) of the Treaty, under certain conditions, grant an individual exemption from the prohibition set out in Article 81(1) of the Treaty.
- (142) No such exemption was requested in this case, as neither the formal distribution agreements nor the informal agreements were notified. The agreements would not, in any case, have qualified for an exemption. The prohibition of passive sales and market partitioning through measures such as threat of contract termination or monitoring devices constitute restrictions by object which do not result in any improvement in the distribution of the products. Nor do consumers get any benefit. Restrictions of passive sales impede consumers from taking advantage of the Single Market and from benefiting from the price differences between Member States. Topps implicitly acknowledged that the measures it took were disproportionate to the implementation of an effective distribution system.¹⁴⁴

¹⁴⁰ Topps, in fact, had three other intermediaries in Germany [...] besides DOK, see the reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at Annex 2.2, pages 2548 to 2551 of the Commission's file.

¹⁴¹ See Article 1 of the distribution contract dated 31 December 1995 between Topps Ireland and Rautakirja, page 1141 of the Commission's file.

¹⁴² See Article 3 of the contract on the distribution of "Pokémon The First Movie Trading Cards" dated 20 March 2000 between Topps Europe and Rautakirja, page 1137 of the Commission's file.

¹⁴³ Page 809, emphasis added by the Commission.

¹⁴⁴ Page 809 of the Commission's file, at point 23.

2.2.3. *Topps' arguments*

- (143) The various arguments presented by Topps in order to justify its conduct by legitimate business concerns relating to the specifics of distributing licensed publishing products,¹⁴⁵ are not convincing.

2.2.3.1. Protection of Nintendo's intellectual property rights

- (144) Topps maintains that its behaviour vis-à-vis Cards Inc. and the two Finnish companies, USA Vincenter and Sunwise, in the case of Rautakirja was motivated by concerns about the protection of Nintendo's intellectual property rights.¹⁴⁶
- (145) Whereas it may well be that Topps and Nintendo were generally concerned about counterfeit products and grey imports during the Pokémon craze in 2000, the facts in the Commission file do not support Topps' assertion that these concerns motivated the behaviour in question. The Commission notes at the outset that, because of the principle of intra-Community exhaustion, parallel imports cannot be prevented on the basis of intellectual property rights where goods have been put on the market in the Community or the EEA with the consent of the rightholder.¹⁴⁷
- (146) Intellectual property issues were not mentioned in the e-mail from Cards Inc of 4 February 2000 containing the assurance that products were not resold to countries other than the United Kingdom (see recital (54)) or in any other communication between Topps and Cards Inc.
- (147) The same goes for the communication between Topps and Rautakirja concerning the Finnish company USA Vincenter from 8 March to 10 March 2000 (see recital (61)) which contains no reference to the question whether the parallel imported Pokémon cards might be counterfeit or originate from third countries. Rautakirja's question in its e-mail of 8 March 2000 ("What about rights? I thought that you only have the rights to sell this product to Finland?") can, therefore, not be understood to refer to any legitimate intellectual property rights concerns.
- (148) Nor was Topps' intervention against Sunwise (see recital (62)) motivated by the concern to prevent grey imports from the United States. Although Topps internally deliberated on 31 July 2000 whether the cards imported by Sunwise could have come from the United Kingdom or the USA, it sent a fax to Sunwise some hours later, that is to say, before ascertaining the origin of the cards, asking "to suspend all future distribution". This prohibition was not made conditional on the question whether the imported cards were grey imports from the United States. This timing and the formulation "our Pokemon Series 2 Cards" (emphasis added) which rules out a US origin since Topps, according to the licensing agreement with Nintendo,¹⁴⁸ did not have a licence to produce in the USA both suggest that Topps' intervention was not

¹⁴⁵ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 130 to 159, pages 2496 to 2501 of the Commission's file.

¹⁴⁶ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 132 to 135 and 148 to 150, pages 2496 to 2497 and page 2499 of the Commission's file.

¹⁴⁷ For trademarks see Article 7 of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ L40, 11.2.1989, p. 1. Directive as amended by Decision 92/10/EEC (OJ L 6, 11.1.1992, p.35).

¹⁴⁸ See page 913 of the Commission's file.

motivated by grey import concerns but by the objective to prevent intra-Community parallel trade.

2.2.3.2. Fair allocation of stock

- (149) Topps argues that it prevented Cards Inc. from supplying Pokémon tins to German distributor Universal Cards and instead stepped into the deal in order to “maintain and develop **customer goodwill** with Universal Cards” and that “the cross-border element was never a motivating factor”.¹⁴⁹ In Topps’ view, this is supported by Cards Inc’s assertion that “Topps has never suggested that Cards Inc should not supply EEA based companies based outside the UK” and that Topps’ intervention because of the tins “had nothing to do with the fact that Universal Cards is based in Germany”¹⁵⁰.
- (150) The documents in the Commission file show, however, that the cross-border aspect was in fact crucial for Topps’ intervention for two reasons. First, Topps was concerned about the fact that Cards Inc undercut the price Topps charged to German customers.¹⁵¹ Second and in spite of concerns that its behaviour could be unlawful,¹⁵² Topps did not tolerate the fact that Cards Inc ignored its assurance of 4 February 2000 that “*all product that we are buying stays in the UK, and does not go out of the country*”¹⁵³ and engaged in parallel trade.¹⁵⁴
- (151) The same intention to prevent parallel imports also appears to have motivated Topps when it asked LDX to provide a written assurance as regards the countries to which it delivered (see recitals (57) and (58)). Topps’ argument that the assurance was a means to ensure fair allocation of stock¹⁵⁵ cannot explain the evident cross-border aspect in both the request and the assurance provided. Thus, it rather appears to be a means for Topps to maintain the price differences it had imposed between Member States and which were the main factor for LDX’s order.¹⁵⁶
- (152) Topps’ intervention against the Finnish companies USA Vincenter and Sunwise upon request by Rautakirja was in fact intended to control the allocation of products. But even if Topps made this intervention in order to show that it took Rautakirja’s concern about parallel imports in times of scarce supply seriously,¹⁵⁷ the prohibition of parallel

¹⁴⁹ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 138, page 2497 of the Commission’s file.

¹⁵⁰ Page 1310 of the Commission’s file.

¹⁵¹ E-mail of Topps Ireland dated 2 August 2000, page 856: “(...) apparently Cards Ink are selling Pokemon Tins into Germany at a price less than we sell them to Germany”.

¹⁵² E-mail of Topps Ireland dated 3 August 2000, page 855: “We are also blatantly preventing trade between two EU member states – could we in effect be abusing a dominant position?”

¹⁵³ Page 832 of the Commission’s file.

¹⁵⁴ See e-mail of Topps UK dated 4 August 2000, page 855: “(...) I must be missing something, I was under the impression that Universal were upset because Cards Inc were encroaching on their territory. evidently the situation is even worse i.e. Universal who are our customer are buying direct from another of our customers. Why are we not selling the tins to them rather than Cards Inc?”

¹⁵⁵ See the reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 140 to 142, pages 2497 to 2498 of the Commission’s file.

¹⁵⁶ See LDX’s submission of 20 May 2001, page 1557, where LDX sets out that the German company OTC had “asked if LDX Marketing would buy on its behalf Pokemon (and other) products for OTC, as it would be cheaper to buy from the UK and transport the goods to Germany, than to buy directly from the subsidiary in that country”.

¹⁵⁷ See the reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 151 to 152, pages 2499 to 2500 of the Commission’s file.

imports cannot be regarded as a “fair” allocation, and can, therefore, not justify the infringement of Article 81(1) of the Treaty.

- (153) Therefore, it is concluded that Topps’ behaviour cannot be justified on the ground that it wanted to ensure a fair allocation of stock.

2.2.3.3. Food safety concerns

- (154) Topps argues that the clause in the distribution agreement with Dolber prohibiting passive sales (see recital (59)) was introduced as a precautionary food safety measure because food safety authorities in some Member States considered certain candy products unsafe.¹⁵⁸ Topps submitted documentation according to which “Pushpop Lollipops” had been once withdrawn from the French market and re-admitted for distribution only after a warning label that the product was not suitable for little children had been affixed to them.¹⁵⁹

- (155) Neither the wording of the clause in question nor the fact that Topps waived its application after the Commission had started its investigation (see recital (59)) suggest that the clause was intended to primarily address food safety concerns. The clause would, in any event, have been disproportionate for that purpose since it is not limited to particular products.

2.2.3.4. Protection of NMPP’s sale-or-return based distribution system and the timely launch in France

- (156) As regards NMPP and ESTE (see recitals (65) to (73)), Topps argues that it intended to preserve a timely and orderly launch of Pokémon Series 2 stickers in France. In Topps’ view, a distribution of Pokémon Series 2 stickers in France in September 2000 would have been premature since French language albums for this sticker series were not available until late November. Topps also argues that it wished to protect the integrity of the sale-or-return distribution system.¹⁶⁰

- (157) Topps’ desire to prevent Pokémon Series 2 stickers from being imported to France before the official launch of this series and the availability of the corresponding French albums cannot justify a complete ban on exports from Spain to France. As Topps repeatedly admitted in the course of the hearing, Pokémon stickers do not contain any text. This explains why stickers of Spanish origin could be parallel traded and were popular among French children at the time.

- (158) The same goes for the alleged intention to protect itself against an abuse of the sale-or-return system. A significant abuse of the sale-or-return system was highly improbable when demand was in a state of “craze” as repeatedly emphasised by Topps. In such a situation, resellers would have made more money by selling to end users than by returning products for which there was a huge demand.

¹⁵⁸ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at paragraphs 143 to 147, pages 2498 to 2499 of the Commission’s file.

¹⁵⁹ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at Annex 5.1, pages 2595 to 2596 of the Commission’s file.

¹⁶⁰ Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at points 153 to 159, pages 2500 to 2501 of the Commission’s file.

2.3. Addressees

- (159) In this case, the Commission considers it appropriate to address the decision to Topps. For the reasons stated above, Topps is responsible for the infringement of Article 81 of the Treaty. Topps initiated and co-ordinated a distribution policy which aimed at the prevention of parallel trade between Member States.
- (160) This decision should be addressed to:
- Topps USA
 - Topps Europe
 - Topps International
 - Topps UK
 - Topps Italia
- (161) Topps USA argues that it should not be held liable for the infringement. It stresses that it was not directly involved in any infringing behaviour and considers that there is no sufficient basis for imputing the liability of its European subsidiaries to Topps USA. In the view of Topps USA, an imputation of liability cannot be based on the sole ground that a parent company is a 100% owner of the subsidiary. Topps USA interprets the case law of the Court of Justice as requiring additional factors. Topps USA rejects the factors referred to by the Commission, namely the parallel behaviour of the European subsidiaries and the dual officership of [...] as Managing Director of Topps Ireland (now Topps International) and Vice President-International of Topps USA in 2000¹⁶¹. Topps USA argues that there is no link between the alleged infringement committed by the subsidiaries and Topps USA. As regards [Managing Director of Topps Ireland and Vice President-International of Topps USA], Topps USA maintains that he was unaware of any infringements and could, therefore, not communicate them to Topps USA. Topps USA maintains that its European subsidiaries acted with operational autonomy which is, according to Topps USA, reflected by the fact that they alone concluded agreements and handled the relations with the intermediaries in Europe. Topps USA also refers to the fact that itself and the European subsidiaries have been represented independently during the administrative proceedings before the Commission.¹⁶²
- (162) On the basis of the case law developed by the Community courts, a parent company can be held liable for the infringement committed by its subsidiary if two conditions are fulfilled: The parent must, first, have the power to exercise decisive influence over the subsidiary and must, secondly, have actually exercised this power.¹⁶³
- (163) As regards the first condition, it is undisputed that Topps USA is in a position to decisively influence the conduct of its wholly owned European subsidiaries. At the time of the infringement, Topps UK and Topps Italia were wholly owned by Topps

¹⁶¹ See Topps Annual Reports 2000 and 2001, at the inside back covers.

¹⁶² Topps USA's submissions of 18 September and 27 October 2003.

¹⁶³ Judgment in *AEG*, at paragraph 50.

Europe. The latter and Topps Ireland (now Topps International) were wholly owned by Topps USA.

- (164) As regards the second condition, in the case of wholly owned subsidiaries, the Commission may, in line with the case law of the Court, presume that the power to influence has been exercised.¹⁶⁴ This presumption can only be rebutted if the parent company submits evidence proving that the subsidiary carried on its business on the market as an autonomous legal entity which determined its commercial policy largely on its own.¹⁶⁵
- (165) In this case, the Commission presumes that Topps USA exercised decisive influence over the activities of its European subsidiaries as regards the matter at stake. Topps USA has not submitted sufficient evidence to show that its European subsidiaries acted autonomously and implemented their own commercial policy despite the fact that they were wholly owned by Topps USA. The presumption that wholly owned subsidiaries are not autonomous cannot be rebutted on the basis of general assertions. A successful rebuttal must rather be based on precise explanations on how the relationship between the parent and its subsidiaries is governed. Thus, the general assertion of Topps USA that it was not aware of the prevention of parallel trade in Europe is not sufficient. Nor is the presumption of liability rebutted by the fact that the European subsidiaries and Topps USA chose different legal counsel and sent in independent submissions during the proceedings before the Commission. Finally, the presumption is not rebutted by the fact that the European subsidiaries and not Topps USA concluded distribution agreements and handled relationships with the European intermediaries. The mere fact that the European subsidiaries communicated with customers in Europe reflects a regional division of work but does not indicate their commercial autonomy vis-à-vis their US parent.
- (166) On the contrary, the parallel involvement of all European subsidiaries, that is to say, Topps Europe plus its subsidiaries and Topps Ireland, and the existence of the policy of restricting parallel trade across the whole of Europe as well as the personal link through the dual officership of [...] as Managing Director of Topps Ireland (now Topps International) and Vice President-International of Topps USA in 2000 rather confirm the legal presumption that Topps USA exercised its power to influence the conduct of its wholly owned European subsidiaries. The e-mail of 11 September 2000 from [International Sales & Marketing Manager of Topps Europe] to ESTE concerning parallel imports into France, “*If Topps USA find out we will not be able to supply you any more stock.*”¹⁶⁶ (sic), indicates that Topps Europe perceived that this policy was dictated by Topps USA.
- (167) Therefore, all European subsidiaries which participated in the anti-competitive agreements and/or concerted practices, and the ultimate US parent company, should be held jointly and severally liable for the infringement in this case.

¹⁶⁴ Judgment in *AEG*, at paragraph 50.

¹⁶⁵ Judgment of the Court of First Instance in Case T-354/94 *Stora v Commission* [1998] ECR II-2111, at paragraph 80; upheld by the Judgment of the Court of Justice in Case C-286/98 P, *Stora v Commission* [2000] ECR I-9925, at paragraphs 27 to 29.

¹⁶⁶ Page 862 of the Commission’s file.

- (168) The Commission considers it appropriate to address this decision to Topps only, and not to its intermediaries. The mere fact that the latter were party to anti-competitive agreements and/or concerted practices does not automatically entail their significant responsibility for the infringement. The restrictive agreements and/or concerted practices in this case formed part of Topps' larger strategy to restrict parallel trade. This strategy apparently conflicted with the interests of some of Topps' intermediaries who wanted to profit from price differentials in Pokémon products or tried to import stock which was lacking in their respective countries.

2.4. Remedies

2.4.1. Article 7(1) of Regulation (EC) No 1/2003

- (169) Pursuant to Article 7(1) of Regulation (EC) No 1/2003, the Commission can, if an infringement has been established, order the undertakings concerned to bring the infringement to an end. Although an infringement has been established in this case under Article 81(1) of the Treaty, it is not necessary for the Commission to make such an order.
- (170) Since 29 November 2000, Topps has been aware of the requirements of Community competition law and has taken steps to bring its distribution arrangements into a situation of compliance by ensuring that its subsidiaries and independent distributors are well aware of their legal obligations regarding parallel trade.¹⁶⁷ Furthermore, on 4 September 2001, Topps provided the Commission with further details on the measures Topps had adopted to bring to an end any infringement of Community competition rules. Consequently, the Commission considers that the hindrance of parallel trade by Topps and its intermediaries, at least by means of imposing exports bans on its customers, has come to an end.

2.4.2. Article 23(2) and (3) of Regulation (EC) No 1/2003 (Article 15(2) of Regulation No 17)

2.4.2.1. General considerations

- (171) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 81 of the Treaty. Under Article 15(2) of Regulation No 17 which was applicable at the time of the infringement, the fine for each undertaking participating in the infringement could not exceed 10% of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.
- (172) Pursuant to both Article 15(2) of Regulation No 17 and Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the fine, have regard to the gravity and duration of the infringement. The fine imposed must reflect any aggravating or attenuating circumstances.

¹⁶⁷ Page 805 of the Commission's file.

2.4.2.2. Basic amount of the fine

- (173) The basic amount of the fine is determined on the basis of the gravity and the duration of the infringement.

Gravity of the infringement

- (174) In its assessment of gravity, the Commission takes account of the nature of the infringement, the actual impact on the market and the size of the geographical market.
- (175) Concerning the nature of the infringement, it follows from the facts that the infringement had the objective of preventing parallel imports between Member States. It, thus, had the objective of artificially partitioning the single market, thereby jeopardising a fundamental principle of the Treaty. Such restrictions have been clearly condemned by the Commission on numerous occasions in the past, especially since the judgment in *Consten and Grundig* in 1966.¹⁶⁸ Restrictions of this kind are by their nature very serious violations of Article 81(1) of the Treaty.
- (176) As regards the actual impact of the infringement, the Commission considers that Topps held a significant share of the relevant market.¹⁶⁹ The Commission, however, has no evidence that the restrictions of parallel imports were applied systematically to all intermediaries or products. The available evidence only covers a limited number of intermediaries in the Community.¹⁷⁰ In Italy, the restrictive agreement only concerned confectionery whereas the agreements or concerted practices in most other countries only concerned non-candy collectibles. Some of the agreements or concerted practices appear not to have been implemented in full and may have had a limited effect in terms of value of the goods concerned. The Commission has no evidence of substantial effects of the restrictions on the market.
- (177) Concerning the size of the relevant market, the agreements or concerted practices identified in this Decision concerned seven national markets: United Kingdom, Germany, Italy, Finland, the Netherlands, Spain and France. Because of its nature, the conduct involved may also have affected dealers and end-consumers located in other Member States. However, the restrictive effects of the prohibition of parallel imports were mainly felt in the importing Member States, that is to say, Finland, Germany and France.
- (178) Consequently, in the light of these considerations, the infringement committed by the addressees is serious. In the light of the seriousness of the infringement, EUR 2 650 000 is an appropriate amount to take as a basis for calculating the fine.

¹⁶⁸ Judgment of the Court of Justice in Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

¹⁶⁹ See Topps' submission of 18 May 2001, according to which Topps had, in 2000, a market share of 16% in the combined markets for collectibles and candies in the UK and of 39-61% in the collectibles market in Italy while Topps believed "the pattern of sales across Europe to be similar to that seen in the UK and Italy", at pages 1521-1526 of the Commission's file. The Commission estimates that the relevant market was worth more than EUR 600 million in the EEA in 2000.

¹⁷⁰ Compare the seven anti-competitive agreements/concerted practices identified in the present Decision with the 53 intermediaries in the Community identified in the reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, in Annex 2.2, pages 2548 to 2551 of the Commission's file.

Duration of the infringement

(179) Topps participated in the infringement from 4 February 2000 (see recital (54)) until 29 November 2000¹⁷¹, that is to say, for 10 months. As the infringement is of short duration, the basic amount of the fine should not be increased.

2.4.2.3. Aggravating circumstances

(180) The Commission does not take into account aggravating circumstances in this case.

2.4.2.4. Attenuating circumstances

(181) Topps emphasises that, as soon as it became aware of the investigation, it introduced compliance programs in order to ensure that its business and those of its intermediaries would be conducted in accordance with Community competition law.¹⁷² While the Commission welcomes all steps taken by an undertaking to raise awareness amongst its employees of existing competition rules, these initiatives cannot relieve the Commission of its duty to penalise its serious infringement of competition rules.

(182) On the other hand, Topps did terminate the infringement after the first Commission intervention. In view of this, the basic amount of the fine should be reduced by 20% (EUR 530 000).

(183) The Commission also considers that Topps has cooperated effectively with the Commission during the proceedings. Topps went beyond what was legally necessary to comply with the obligations under Article 11 of Regulation No 17, does not contest the facts upon which the infringement is based and contributed significantly to establishing the infringement. Therefore, the basic amount of the fine should be reduced by an additional 20% (EUR 530 000).

(184) No other attenuating circumstances apply.

2.4.2.5. The amount of fines imposed in these proceedings

(185) In view of the above considerations, the final amount of the fine to be imposed on Topps should be EUR 1 590 000.

HAS ADOPTED THIS DECISION:

Article 1

The Topps Company Inc., Topps Europe Limited, Topps International Limited, Topps UK Limited and Topps Italia SRL have infringed Article 81(1) of the Treaty by participating in a

¹⁷¹ See page 805 of the Commission's file. By that day, Topps told the Commission that it "*is now aware of the requirements of Community competition law and will be taking urgent steps to put its distribution arrangements on a compliant basis*". The Commission presumes that Topps has actually complied with EC competition law since that moment.

¹⁷² Reply of Topps Europe, Topps UK, Topps Italy and Topps International to the statement of objections, at point 243, page 2517 of the Commission's file.

complex of agreements and concerted practices with the object of restricting parallel imports of Pokémon stickers, trading cards and other collectibles from 4 February 2000 until 29 November 2000.

Article 2

For the infringement referred to in Article 1, a fine of EUR 1 590 000 is imposed on the companies listed in that article, jointly and severally.

The fine shall be paid in EURO, within three months of the date of notification of this Decision, to the following account: No. 001-3953713-69 of the European Commission with FORTIS BANK S.A., Rue Montagne du Parc 3, B-1000 Brussels (IBAN code: BE 71 0013 9537 1369; SWIFT code: GEBABEBB).

After the expiry of that period, interest shall automatically be payable at the rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 5,50%.

Article 3

This Decision is addressed to:

- The Topps Company, Inc., One Whitehall Street, New York, NY 10004, USA
- Topps Europe Limited, 18 Vincent Avenue, Crownhill - Milton Keynes - MK8 OAW, United Kingdom
- Topps International Limited, Innishmore, Ballincollig, County Cork, Republic of Ireland
- Topps UK Limited, 18 Vincent Avenue, Crownhill - Milton Keynes - MK8 OAW, United Kingdom
- Topps Italia SRL, Via Villorese 13, 20143 Milano, Italy

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 26-05-2004

For the Commission
Mario Monti
Member of the Commission