

## COMMISSION DECISION

of 30 October 2002

relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement

(COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega — Nintendo)

(notified under document number C(2002) 4072)

(Only the English, Portuguese, Greek, German, Italian, and Swedish texts are authentic)

(Text with EEA relevance)

(2003/675/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

## 1. THE FACTS

Having regard to the Treaty establishing the European Community,

## 1.1. The parties to the proceeding

Having regard to the Agreement on the European Economic Area,

- (1) The parties will be referred to as follows in the present decision: in the factual part the authors of the infringement will be mentioned. In the legal assessment, reference will be made to the actual addressees of this Decision.

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup>, as last amended by Regulation (EC) No 1/2003 <sup>(2)</sup> and in particular Articles 3 and 15(2) thereof,

## 1.1.1. The Nintendo group of companies

Having regard to the complaint lodged by Omega Electro BV on 28 November 1996, alleging infringement of Articles 81 and 82 of the Treaty by Nintendo Netherlands BV and Nintendo UK Ltd and requesting the Commission to put an end to that infringement and to impose a fine,

- (2) The ultimate parent company of the Nintendo group of companies is Nintendo Corporation Ltd (NCL), a listed company established in Kyoto, Japan. Nintendo's business in the EEA is conducted by the following wholly-owned <sup>(3)</sup> subsidiaries:

Having regard to the Commission Decision of 25 April 2000 to initiate proceedings in this case,

— Nintendo of Europe GmbH (NOE). NOE is Nintendo's main EEA-based subsidiary. It coordinated certain business practices of Nintendo in Europe and was the exclusive distributor for Germany, at least from January 1991 <sup>(4)</sup> until 31 December 1997,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission in accordance with Article 19(1) of Regulation No 17 and with 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 Treaty <sup>(5)</sup>,

— Nintendo of America Inc (NOA), although not itself distributing Nintendo's products in the EEA, was also responsible for the coordination of certain of Nintendo's business practices in Europe during the period relevant for this Decision,

Having regard to the final report of the Hearing Officer in this case <sup>(6)</sup>,

— Nintendo Netherlands BV (NN). NN was the exclusive distributor for the Netherlands, at least from 1 January 1993 <sup>(7)</sup> until 31 December 1997. This company is currently called Nintendo Benelux BV,

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

— Nintendo France SARL (NF). NF was the exclusive distributor for France, at least from 31 December 1992 <sup>(8)</sup> until 31 December 1997,

WHEREAS:

<sup>(1)</sup> OJ L 13, 21.2.1962, p. 204/62.

<sup>(2)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(3)</sup> OJ L 354, 30.12.1998, p. 18.

<sup>(4)</sup> OJ C 241, 8.10.2003.

<sup>(5)</sup> See column 1(b) on pages 132 to 136 of the Commission's file.

<sup>(6)</sup> Page 415.

<sup>(7)</sup> Page 2667.

<sup>(8)</sup> Page 2216.

- Nintendo España SA (NE). NE was the exclusive distributor for Spain, at least from 1 January 1994<sup>(9)</sup> until 31 December 1997,
  - Nintendo Belgium SPRL (NB) was the exclusive distributor for Belgium and Luxembourg, from at least 1 January 1994 until April 1997<sup>(10)</sup>,
  - Nintendo UK Ltd (NUK) was the exclusive distributor for the United Kingdom and Ireland from at least March 1993 until 4 August 1995<sup>(11)</sup>.
- (3) The term 'Nintendo' may refer to any or all of those companies in the Nintendo group.

#### 1.1.2. *The independent Nintendo distributors*

- (4) In other territories, Nintendo had appointed independent exclusive distributors.
- (5) THE Games Ltd, a trading division of John Menzies Distribution Limited, which is a wholly-owned subsidiary of John Menzies plc, was appointed in August 1995 as independent exclusive distributor for the United Kingdom and Ireland, after NUK ceased performing this function (together referred to hereafter as THE). THE remained Nintendo's exclusive distributor for this territory until at least 31 December 1997.
- (6) Chaves Feist & Cia LDA, later called Soc. Rep. Concentra LDA and, since September 2001, Concentra — Produtos para crianças SA (hereafter referred to as Concentra) was Nintendo's exclusive distributor for Portugal, at least from 14 May 1991 until 31 December 1997<sup>(12)</sup>;
- (7) Linea GIG SpA (hereafter referred to as Linea) was Nintendo's exclusive distributor for Italy, at least from 1 October 1992<sup>(13)</sup> until 31 December 1997.
- (8) Bergsala AB (hereafter referred to as Bergsala) has been Nintendo's exclusive distributor for Sweden since 1981 and, since 1986, also for Denmark, Norway, Finland and Iceland<sup>(14)</sup>.
- (9) Itochu Hellas EPE (in correspondence often referred to as Itochu Hellas Ltd) was Nintendo's exclusive distributor for Greece at least from 14 May 1991 until February 1997. All shares in Itochu Hellas EPE were always held by Itochu Corporation or wholly-owned subsidiaries of Itochu Corporation<sup>(15)</sup>. Thus, Itochu

Hellas EPE is, ultimately, a wholly-owned subsidiary of Itochu Corporation (hereafter referred to Itochu). Itochu Corporation is headquartered in Tokyo, Japan.

- (10) Nortec AE (hereafter referred as to Nortec) was Nintendo's exclusive distributor for Greece subsequent to Itochu from at least 4 April 1997 until 31 December 1997<sup>(16)</sup>;
- (11) CD-Contact Data GmbH was Nintendo's exclusive distributor for Belgium and Luxembourg from at least April 1997 until 31 December 1997. For this purpose, it founded a wholly-owned subsidiary, Contact Data Belgium NV, for distributing the products in this territory<sup>(17)</sup> (referred to hereafter as Contact).
- (12) On 29 September 1998, Activision Inc, a company established under the laws of the State of Delaware (USA), gained control over CD-Contact Data GmbH by purchasing all its shares.
- (13) Subsequently, on 9 June 1999, CD-Contact Data GmbH founded a wholly-owned subsidiary, CD Contact data BV established in the Netherlands. All shares in Contact Data Belgium NV, previously held by CD-Contact Data GmbH, were then transferred to this newly founded company. CD-Contact Data GmbH continues to exist as a holding company<sup>(18)</sup>.

#### 1.1.3. *Omega*

- (14) Omega Electro BV (hereafter referred to as 'Omega') is a company established in the Netherlands that is active in the import and sale of electronic games. On 26 November 1996, it lodged a complaint under Article 3(2)(b) of Regulation No 17 that primarily concerned the distribution of Nintendo game cartridges and consoles and contained a variety of allegations, *inter alia*, the hindrance by Nintendo of parallel trade and its operation of a resale price maintenance policy in the Netherlands.

### 1.2. **Relevant product markets**

- (15) This case relates to **game consoles and video games or game cartridges**, which allow users to play games displayed on a screen.

<sup>(9)</sup> Page 136.

<sup>(10)</sup> Page 132.

<sup>(11)</sup> Pages 426, 313 and 279A.

<sup>(12)</sup> Page 244, letter of Concentra dated 17 September 2002.

<sup>(13)</sup> Page 200.

<sup>(14)</sup> See Bergsala's reply to the statement of objections.

<sup>(15)</sup> Itochu's reply to the statement of objections, paragraph 10. See also Itochu submission of 26 November 2001.

<sup>(16)</sup> Page 2595, 1622 to 1624.

<sup>(17)</sup> Pages 138 to 153. CD-Contact GmbH is 100 % owned by Contact Vermögensverwaltung GmbH. The latter company and Contact Belgium NV had identical owners and board of directors. Contact Data Belgium was created by CD-Contact Data GmbH on 27 March 1997. (pages 2531 to 2535 and 2618). That Contact Data Belgium BV was a wholly-owned subsidiary of CD-Contact Data GmbH also appears from Contact's submission of 19 November 2001.

<sup>(18)</sup> Contact's submission of 19 November 2001.

- (16) In the correspondence of the parties the term 'hardware' is often used as a synonym for 'game console'. In this Decision, the term 'game console' is used systematically, except for direct quotations. Similarly, in the correspondence of the parties the term 'software' is often used as a synonym for 'game cartridge'. In this Decision, the term 'game cartridge' is used systematically, except for direct quotations.

- (17) During the period of the infringement, Nintendo produced various types of game consoles (see table 1 below) and game cartridges for use with these game consoles. Collectively, they are referred to hereinafter as 'the products' <sup>(19)</sup>.

#### 1.2.1. The game consoles

- (18) Game consoles are electronic devices dedicated to and specifically designed for playing video games. The user interface is a simple pad or a control, such as a 'joy stick', which allows the user to control the movements of the characters on the screen. Game consoles can be divided into static and hand-held game consoles. The generations of static consoles during the period of the infringement were called 8-bit, 16-bit, 32-bit and 64-bit consoles, in ascending order of performance. The various consoles on the market during the period relevant for this Decision and their manufacturers are indicated in Table 1.

TABLE 1

**Consoles produced by the major game console producers during the period relevant for this Decision**

	Nintendo	Sega	Sony
Hand-held	Game Boy	Game Gear	None
Static 8-bit console	NES	Master System	None
Static 16-bit console	SNES	Mega Drive	None
Static 32-bit console	None	Sega Saturn	Sony Play-station

<sup>(19)</sup> Trade in the second-hand products is ignored. The products (in particular game cartridges) have a very short life cycle, meaning that they quickly lose their appeal to consumers (see recital 76). Indeed, a consumer survey conducted in the United Kingdom showed that very few consumers had bought second-hand games. (Monopoly of Mergers Commission report, page 196 (page 2591)). Consequently, as the volume of second-hand products is low when compared to newly sold products, they make no significant difference to the market share of new Nintendo products sold by the parties. This has not been contested by any of the parties.

	Nintendo	Sega	Sony
Static 64-bit console	Nintendo 64	None	None

#### 1.2.1.1. Personal computers and game consoles are not substitutable products

##### Demand side

- (19) Like game consoles, personal computers (PCs) allow games to be played. However, a PC cannot be regarded as a substitute for either a static or a hand-held game console for the following reasons.

- (20) PCs and game consoles are intended to fulfil different consumer needs:

— whereas PCs are, by definition, multitask devices, intended to satisfy a wide range of needs, including, but not necessarily, game-playing <sup>(20)</sup>; game consoles are designed solely, or at least optimised, to satisfy only the gaming needs, in particular of the younger generations,

— in addition, it is uncontested that the technical performance and characteristics of static game consoles for game-playing are substantially better than those of PCs. This can be illustrated by statements to this effect by THE and Nintendo's presidents <sup>(21)</sup>,

— furthermore, in contrast with static game consoles, PCs have only a short life span as a game-playing platform capable of playing the latest released games unless expensive upgrades are made <sup>(22)</sup>,

— the need to upgrade a PC makes it, in addition, a more complex game-playing device than a game console and reduces its attractiveness for consumers seeking only a gaming platform.

- (21) In addition, the average PC is five times more expensive than a game console <sup>(23)</sup>.

<sup>(20)</sup> See THE's 1997/1998 business plan (page 542). See also Mr Cean, founder of Titus Interactive, a game developing company, in *La tribune* of 9 April 1998 (p. 4, IV/35.7.706, page 116).

<sup>(21)</sup> From THE's 1997/1998 business plan (pages 541 and 542). For Nintendo's president, see Nintendo's annual report over 1995 (page 2341).

<sup>(22)</sup> See THE's 1997/1998 business plan (page 541). See also *Financial Times* of 2 December 1998 (IV/35.706 pages 115 and 116), where a spokesman of GT Interactive (a game publisher) is quoted.

<sup>(23)</sup> See THE's 1997/1998 business plan (page 541).

- (22) In view of the above elements, it is unlikely that users looking for a gaming device will switch to buying a PC as a result of a small but permanent increase in the price of game consoles. The reverse is also true: users looking for more than just a gaming device are unlikely to switch to buying a game console as a result of a small but permanent increase in the price of PCs.
- (23) This conclusion is supported by the results of consumer research: of the consumers who already owned a static game console and were planning to buy another, fewer than 15 % had considered purchasing a PC for this purpose <sup>(24)</sup>.

#### Supply side

- (24) The relevant criteria to assess supply side substitutability is whether alternative suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. In the present case, evidence shows that no PC manufacturer has ever tried to enter the market for game consoles. Inroads in the market have been made by a consumer electronics manufacturer (Sony) and by a software producer (Microsoft). It has to be added that this entry affected only the static game consoles market and that the entry by Microsoft occurred after the period of the infringement. Hence, supply side substitutability is not relevant for market definition <sup>(25)</sup>.
- (25) As regards hand-held consoles, the same arguments developed above in recital 20 are relevant to show that they are neither substitutable to PCs, nor to laptops. In terms of needs served, on top of playing games, hand-held consoles (contrary to PCs) are portable devices. They are not at all designed to perform any other task than playing games. In addition, PCs are between 10 and 15 times more expensive than hand-held consoles. The comparison with laptops will not change the conclusion that hand-held consoles are no substitute for PCs. Laptops are portable PCs and, hence, multitask devices intended to satisfy a wide range of needs. Furthermore, laptop computers are, for a given performance level, significantly more expensive than PCs. This is mainly due to the cost of certain components, notably the LCD screen and the energy-saving processor. In addition, laptops require the use of miniaturised components which also tend to be more expensive. In conclusion, PCs and laptops are not a substitute for static or hand-held game consoles and, hence, both PCs

and laptops belong to different markets <sup>(26)</sup>. The fact that PCs and laptops belong to a different product market from static and hand-held game consoles has not been contested by any party.

#### 1.2.1.2. Static game consoles and hand-held game consoles belong to different product markets

- (26) A distinction can be made between static game consoles and portable, hand-held game consoles. The following arguments support the conclusion that relevant distinct markets for hand-held and for static consoles have to be defined.
- (27) Both types of consoles are intended to fulfil different user needs, in particular as regards the requirement for portability. Static consoles are designed to be used in a fixed location with a normal TV set. Hand-held consoles are designed to be used anywhere. Hand-held consoles only need a game cartridge for use, while static consoles must be connected to a TV set.
- (28) Both types of consoles have substantially different technical capabilities. Static consoles offer greater picture resolution, more colours, more computing power (allowing users to play more sophisticated games) and, often, multi-player capabilities. The games that can be played on hand-held consoles are very unsophisticated in comparison with those that can be played on static consoles.
- (29) In addition, there are substantial price differentials between hand-held and static game consoles. The price of a portable console is much lower than a static console. For instance, for 1997/1998 THE planned a recommended retail price for N64, SNES (with one game) and Game Boy Classic of GBP 249,99, GBP 79,99 and GBP 39,99 respectively. Another Game Boy product line (Game Boy Pocket) had a recommended retail price of GBP 49,99 <sup>(27)</sup>. Nintendo's most popular static game console at the time, the N64, was therefore at least five times more expensive than Nintendo's hand-held console.
- (30) As a result, it is unlikely that a significant number of existing or new users of one or the other type of game console will switch to the other type as a result of a small, permanent increase in the price of any of them.

<sup>(24)</sup> Consumer research conducted by Sega mentioned in the MMC report on page 58, (page 2591).

<sup>(25)</sup> See Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5), point 23.

<sup>(26)</sup> Further substantiated by THE on page 542 where it states: 'The console's position is assured as the choice of gamers'.

<sup>(27)</sup> Page 573.

### Supply side

- (31) Competition among suppliers of static consoles is characterised by the fact that every three to four years, a new generation of static consoles with more advanced technology is introduced onto the market. With the introduction of a new generation of static consoles, sales of less advanced static consoles decline<sup>(28)</sup>. This phenomenon has not been visible in respect of hand-held game consoles<sup>(29)</sup>. During the period of the infringement and after it, only Nintendo introduced a new product, but it was just a new version of its existing hand-held console. Product innovation was primarily limited to reducing the size of the device and increasing the colours in which it was available.
- (32) Contrary to what occurred in respect of static consoles, entry by new producers did not take place in the hand-held game consoles market either during the period of the infringement or from that moment to date.
- (33) It is even more significant that the only competitor to Nintendo, Sega, had already ceased to be a viable competitor by 1995 (see Table 4 and recital 75). Since then no new product has been introduced in the market by a company other than Nintendo itself.
- (34) Consequently, as static consoles and hand held consoles are not substitute products, they are concluded to belong to different product markets. The fact that static and hand-held game consoles belong to different markets has not been contested by the parties.

### 1.2.2. *The games*

- (35) The purchase of a game console does not in itself allow a user to start playing games. The software which provides the gaming functionality is contained on game cartridges, which make the games directly usable on the game consoles. These game cartridges are distributed and sold to the end-users.
- (36) The technical specifications for the media and the software itself differ from brand to brand, and also between the various consoles produced by the same manufacturer. As a result, a cartridge with a game designed for a

specific console cannot be used with any other console<sup>(30)</sup> and, once a particular game console is chosen, only game cartridges compatible with the chosen console can be used.

- (37) As a result, in the event of a small, permanent increase in the price of a particular game cartridge, a user of a given game console is unlikely to switch to a game cartridge compatible with a different console. This is due to the fact that the user has to bear the cost not only of the new cartridge, but also that of buying a new console able to interoperate with that cartridge. It is uncontested that the number of game cartridges that need to be purchased to make switching worthwhile is far in excess of the average number of game cartridges owned by the average game console owner. Switching cost may be less important if interoperability between game consoles had existed but no interoperability existed between consoles of different brands or between different generations of Nintendo manufactured game consoles<sup>(31)</sup>.
- (38) In conclusion, available facts point to the existence of separate markets of game cartridges per game console and manufacturer. However, it is not necessary to precisely delineate markets any further as Nintendo has accepted: (a) the Commission's factual and legal findings as set out in the Statement of Objections; and (b) that the restrictions of competition identified by the Commission in the Statement of Objections had an appreciable effect on competition in the sense of Article 81(1) of the Treaty<sup>(32)</sup>.

### 1.2.3. *Nintendo's arguments concerning product market definition*

- (39) Although it did not contest the facts outlined in the Statement of Objections, Nintendo has argued for a broader definition of the relevant product markets. It maintains that competition takes place between 'systems' (i.e. the console and cartridges as a whole). As a result, the relevant product market should be defined as one comprising all game consoles and compatible game cartridges. Nintendo's argument is twofold.

<sup>(30)</sup> This does not preclude that the same game is available for different consoles. However, these must then be sold on different media, each compatible with a specific game console and incompatible with any other dedicated game consoles.

<sup>(31)</sup> Game cartridges designed to work with a game console of a particular generation, can sometimes be played on a different game console of the same make if a suitable adapter is used. An adapter, the 'Super Game Boy', allowed Game Boy cartridges to be used on a SNES console (Annual Report Nintendo 1995, page 15) (page 2341). These adapters do not exist between consoles of different brands, or even between most consoles of the same brand.

<sup>(32)</sup> See Nintendo's reply to the Statement of Objections at points 2.1 to 2.3.

<sup>(28)</sup> See for instance Screen Digest, July 1998 page 159 (page 2577).

<sup>(29)</sup> Nintendo's annual report for 1999.

- (40) First, it maintains that a manufacturer is discouraged from raising its prices for consoles, not only by the predictable loss in console sales, but also, since consoles and games are complementary products, by the related loss of sales in compatible game cartridges<sup>(33)</sup>. Since it follows from the definition of the relevant product market for consoles that the price elasticity between consoles of different manufacturers must be considerable, it also follows that the related loss in sales of game cartridges as a result of increasing console prices would be high. The loss of profits would be higher still because of the high margins on game cartridges.
- (41) Nintendo's second argument is that, since an increase in the price of the game console stimulates demand for competing consoles, hence for game cartridges compatible with those competing consoles, game consoles and compatible game cartridges share the same market. Nintendo furthermore argues that the Commission has recognised that changes in the price of game cartridges influence the demand for game consoles<sup>(34)</sup>.
- (42) The Commission notes first, that market definition in the present case is not decisive for the establishment of the infringement. Second, Nintendo has used the substitutability test in an incorrect manner. The relevant test for determining whether a product constitutes a separate market is whether users will switch to readily available substitutes in response to a small but permanent increase in prices of that product. However, in order to determine whether game cartridges compatible with a particular game console belong to the same market as game cartridges for different consoles, Nintendo uses a test based on a hypothetical increase in the price of game consoles, not of game cartridges.
- (43) Furthermore, as regards Nintendo's first argument, the Commission takes note that Nintendo accepts that game consoles and cartridges are complementary products. The Commission considers that the first argument by Nintendo just implies that static game consoles belong to a single product market, a view that also the Commission takes. If Nintendo's argument is true, then the conclusion may just be that market power by console manufacturers may not be very substantial.
- (44) As regards the second argument, the Commission considers that Nintendo is confusing the notions of substitutability between products, that is relevant for product market definition, and that of complementarity.
- The notion of complementarity between two products is not relevant for product market definition because it means by definition that demand for the two products is positively correlated, so that a price increase in one of them will result in a decrease of demand for both of them. Although this effect may well be taken into account by firms when designing their pricing policies for their products, it is not relevant for the purposes of product market definition.
- (45) The Commission considers that for a correct analysis of the demand for game cartridges and its interaction with the demand for game consoles, a distinction must be made between current game console owners at the one hand and new buyers of game consoles and consumers who are looking to replace an obsolete one at the other.
- (46) As indicated above in recital 37, current owners of a game console would face substantial switching costs if they switched to different game cartridges, and are generally 'locked in' for a period of at least three to four years, usually until their current game console becomes obsolete. For them, competition took place at the time of deciding what console to buy. Their reaction to a small, permanent price increase in game cartridges compatible with their console would be limited because buying an incompatible game only makes sense if the console associated with that new game is bought at the same time.
- (47) What happens in practice is that, according to NOE, 'When a customer has bought the hardware, for whatever reason, he will buy (...) the software anyhow'<sup>(35)</sup>. Thus, Nintendo recognises that current console owners are not expected to switch.
- (48) For consumers who do not yet own a console, or who own one that has become obsolete and are considering buying a new one, prices for game cartridges may be one of the competitive variables used by console manufacturers to compete in that market. However, there are no indications in the file to support that prices of games are more or less important than other elements such as the price of the console itself, its technical capabilities, the time between generations, the interoperability between successive generations of consoles by the same manufacturer, the availability and types of games<sup>(36)</sup> (\*) and the timing of new game releases.

<sup>(33)</sup> Namely, the sales of game cartridges for the extra game consoles that it would have sold if it had not raised its game console prices.

<sup>(34)</sup> Annex A to Nintendo's reply to the Statement of Objections, paragraph 5.

<sup>(35)</sup> Pages 1527 and 1528.

<sup>(36)</sup> Page 566. See also the *Frankfurter Zeitung* of 2 February 1999, based on an interview with [...] NOE, in which the relative success of Sony's Playstation is primarily attributed to the number of games available for this console (page 2590).

(\*) [...] representing text of a confidential nature.

(49) No precise calculation of price elasticities have been made by Nintendo. However, available evidence appears to show that demand for both game consoles and game cartridges is relatively inelastic<sup>(37)</sup>. Low price elasticities for game cartridges and game consoles indicate that consumers do not consider price the most important factor in their purchasing decisions.

(50) Indeed, although N64 compatible game cartridges were sold at slightly higher prices than, for instance, games compatible with Sony's Playstation, this did not prevent the N64 from achieving the fastest sales rate in game history after its launch<sup>(38)</sup>, indicating that the relative higher price level for N64 game cartridges had little, if any, influence on consumers' willingness to purchase the N64 console.

(51) If current owners of a game console will not switch to substitutes in response to a small, permanent price increase of game cartridges, and if such a price increase in game cartridges will not or will insufficiently induce consumers that do not yet own a game console or seek to replace an obsolete one to buy a different one, it has to be concluded that, contrary to Nintendo's argument about system's competition, game cartridges compatible with a particular game console belong to a different market than those compatible with another.

(52) In any event, the issue whether competition takes place between systems or whether the price of games has a significant influence in the decision of buying a new game console can be left open because Nintendo has accepted, firstly, the Commission's factual and legal

findings as set out in the Statement of Objections and, secondly, that the restrictions of competition identified by the Commission in the Statement of Objections had an appreciable effect on competition for the purposes of Article 81(1) of the Treaty<sup>(39)</sup>.

### 1.3. Geographical scope of the markets

#### 1.3.1. Technical compatibility

(53) The fact that static consoles must be used in conjunction with a TV set means that they may require adjustments to different standards of TV sets. The PAL standard is used in all EEA countries except France, where the SECAM standard is in use. According to Nintendo<sup>(40)</sup>, static consoles made to operate with the SECAM standard will not operate correctly in a PAL country (and vice versa). Different television systems therefore represent something of a technical barrier to trade in consoles. Consequently, as regards the geographic market for static consoles, a distinction must be made between France and the rest of the EEA.

(54) Within the PAL area, it appears that N64 consoles can operate anywhere within the EEA with few technical modifications<sup>(41)</sup>. As to other static consoles produced by Nintendo, it appears that they, too, can function anywhere within the PAL area with only minor, if any, modifications<sup>(42)</sup>. Consequently, it is not necessary, at least for compatibility reasons, to make a further subdivision of the geographic scope of the market within the PAL area in the EEA.

<sup>(37)</sup> A price-elasticity of demand is a measure for the responsiveness of the demand for a product if its price changes. The smaller the price elasticity of demand, the smaller the changes in consumer demand in response to a price change of the product and vice versa. When it is less than 1, the responsiveness of consumer demand is so small that a supplier that increases its prices will still increase its net revenues because the decline of its revenues as a result of the decrease of unit sales is outweighed by the increase of revenues as a result of the higher prices on its remaining unit sales.

That the price elasticity for consoles is smaller than one can be derived from pages 1527 and 1558. Here NOE estimates the impact of a price increase for the N64 console from [...] if any. This, still according to NOE, would substantially improve NF's gross margin. If consumers are price-insensitive when purchasing a console, they will be at least equally insensitive to the price of complementary products that may be purchased later. That the price elasticity of game cartridges is smaller than one can be derived from page 1527. Here it appears that increasing prices for N64 game cartridges will increase NF's gross margin, which is consistent with an inelastic demand for game cartridges.

<sup>(38)</sup> Nintendo's 1997 annual report, page 2249.

<sup>(39)</sup> See Nintendo's reply to the statement of objections at points 2.1 to 2.3 as well as annex A.

<sup>(40)</sup> Nintendo's submissions of 1 September 1998, page 24 (page 2329).

<sup>(41)</sup> See faxes from Nortec to NOE (page 1559), Bergsala to NOE (page 1574) and Linea to NOE (page 1579 and 1580). From this correspondence it appears that NOE consoles imported from the United Kingdom require at most the addition of a different SCART cable, a different power plug and a simple instruction booklet in the local language. This operation involves insignificant costs in comparison to the value of the console. Similarly, no technical barriers exist for imports into the United Kingdom (page 775).

<sup>(42)</sup> See Tribunal de Commerce of Brussels, in its judgment of 27 September 1995 in the case Nintendo Belgium — Horelec concerning parallel imported games from the United Kingdom. From this judgment it appears that the technical modifications to adapt consoles destined for the United Kingdom to Belgian TV standards, are both feasible and legal. The judgment, in view of its date, can only have concerned NES and/or SNES consoles (pages 2220 to 2228).

(55) Since there is no direct interaction between game cartridges and the TV screen (both connect via the game console), there are no similar technical compatibility problems with respect to game cartridges. Indeed, games for SNES consoles operate properly, whatever TV standard the consoles have been designed to meet<sup>(43)</sup>. Game cartridges for N64 consoles were parallel-traded from Belgium to France<sup>(44)</sup> and those for the NES console from Spain to France<sup>(45)</sup>. In Spain and Belgium, the PAL standard is used and in France SECAM. Since game-cartridges for static consoles functioned regardless whether the consoles on which they were used were created for use with the SECAM or PAL standard, technical barriers to trade for these products did not exist.

(56) Finally, hand-held consoles are technically identical worldwide. The game cartridges marketed to operate with these consoles are also technically identical worldwide.

### 1.3.2. *Other considerations relevant for the geographic market definition*

(57) As part of an overall remedy to avoid parallel trade, NOE deemed it necessary to 'shoot for prices within 10 % difference to trade within Europe after max. terms'<sup>(46)</sup>, implying that, in order to prevent retailers established in one territory to switch to suppliers established in another territory, price differentials of not more than 10 % were needed. This means that suppliers in different areas do constitute an actual alternative source of supply for the products. Already on this ground alone, it can be concluded that an EEA wide market exists for technically identical products. The above statement is consistent with the finding that demand conditions within the EEA were very homogeneous.

(58) To substantiate this further, it could be noted that the composition of the supply of products on each relevant product market is very similar throughout the EEA because game consoles manufactured by Nintendo, Sega and Sony are sold in every EEA country and the vast majority of available game cartridges for such consoles

are offered for sale everywhere in the EEA<sup>(47)</sup>. New products are often launched throughout the EEA on the same day<sup>(48)</sup>. Nintendo, Sony and Sega's market shares were broadly similar in different areas of the EEA and Sony's entry in the market for static consoles had a very similar impact on the Parties' market shares throughout the EEA<sup>(49)</sup>. Consequently, as far as the supply side is concerned, no substantial differences in competitive conditions existed either within the EEA.

(59) Moreover, transportation costs or other barriers to trade are not a significant impediment to trade in the products either, as game cartridges and consoles were parallel-traded on many occasions between different Member States. Any barriers to trade as regards the products would be even lower for game cartridges and hand-held consoles than for static consoles, in view of the very small volume and weight of game cartridges and hand-held consoles as well as the lack of any apparent need to adapt these products to local conditions.

(60) It can be noted further that the existence in certain countries of companies that actively offered parallel-traded products for sale to retailers confirms the fact that parallel trade and the reselling of parallel-traded products to final consumers was an activity with business potential, not requiring significant modifications to the product's technical characteristics or their packaging<sup>(50)</sup>. Also, the existence of parallel traders rendered the dealing in parallel-traded goods more transparent and more cost-effective for potential purchasers<sup>(51)</sup>, further lowering any impediments that may prevent dealers from switching to suppliers located in different areas.

(61) Nonetheless, substantial price differences existed between various EEA countries. Eventually, Nintendo did not align its prices to within limits that would prevent parallel trade but, instead, restricted parallel trade. In view of the above considerations, those price differentials do not suggest separate geographic markets, but simply emphasise the fact that the infringements had the actual effect of partitioning the single market.

<sup>(47)</sup> According to a survey commissioned by the MMC (see page 216 and 217 of the report (page 2591) of prices in the United Kingdom, Germany and France, the investigated game console bundles and game cartridges were widely available in the retail chain in all investigated countries and generally available from stock. Occasionally, the documents on the file allow a comparison between products available in different countries (see for instance pages 1272, 1306, 1307 and 1327 to 1333). From such comparisons it appears that all consoles and at least most game cartridges are available from the local official distributor as well as parallel traders, indicating that product offers are very similar between different EEA countries.

<sup>(48)</sup> Pages 1010 and 1229.

<sup>(49)</sup> See tables 2, 3 and 4 after recitals 73, 74 and 75.

<sup>(50)</sup> Pages 1120 and 1126. See again faxes from Nortec to NOE (page 1559) Bergsala to NOE (page 1574) and Linea to NOE (pages 1579 and 1580) regarding the limited need and the insignificant cost to adapt products to local market conditions.

<sup>(51)</sup> For instance, parallel traders were apparently providing the service of adapting the parallel traded products to local sales conditions, such as providing the necessary scart cables and adapted plugs if the parallel trade concerned static consoles.

<sup>(43)</sup> See submission of Nintendo of 5 October 1998 (page 2493).

<sup>(44)</sup> See pages 1229, 1566 and 1575.

<sup>(45)</sup> See page 1255.

<sup>(46)</sup> Page 1010.



### 1.3.3. Intellectual property rights

- (62) The Commission has considered the possibility of geographic markets wider than the EEA. However, this is not the case because Nintendo has a policy of actively prosecuting traders who parallel import Nintendo game consoles or game cartridges from outside the EEA, on the ground that this infringes intellectual property rights owned by Nintendo in the EEA <sup>(52)</sup>.

### 1.3.4. The geographical scope of the markets according to Concentra

- (63) Concentra argues that the Portuguese market should be considered as a separate market <sup>(53)</sup>. Concentra has not contested the Commission's analysis above of the geographical scope of the relevant product markets or the facts underlying this analysis. It argues that its situation stands out only because of the existence of Portuguese laws under which consumers have a right to information in the Portuguese language and companies operating in Portugal are required to provide information in Portuguese <sup>(54)</sup>.
- (64) However, the absence of parallel trade does not necessarily mean that distinct national markets exist. It can very well be consistent with an area where conditions of competition are sufficiently homogeneous to constitute a single geographic market.
- (65) Trading consoles within the EEA may require various operations but these are limited to any or all of the following: switching the power plug of the static console, adding a so-called Scart cable to connect the game console to a TV set as used in the country of destination and providing a simple booklet with instructions in the local language. The Commission's file contains several documents emanating from the Parties <sup>(55)</sup> that estimate the costs of these operations. These facts were not contested by Concentra, nor did it submit any additional facts. From these documents it is clear that these costs are insignificant by comparison

with the value of the console and, clearly, did not prevent parallel trade.

- (66) Thus, whilst trading in the EEA may involve certain costs, these costs are not such as to justify the existence of separate geographical markets in the present case.
- (67) The existence of a separate geographical market for Portugal is also contradicted by the fact that, contrary to Concentra's assertion, at least at certain times, parallel trade of game consoles and game cartridges into Portugal was substantial and no less in comparison with other territories <sup>(56)</sup>.
- (68) **In conclusion**, for static consoles, two geographical markets would have to be distinguished: France, on the one hand, and the rest of the EEA on the other. The geographical market for hand-held consoles is as wide as the EEA. The geographic scope of all the markets for the game cartridges compatible with the different Nintendo consoles is also EEA-wide.

## 1.4. The state of competition on the relevant markets

### 1.4.1. The markets for game consoles

- (69) There were only a limited number of significant suppliers of game consoles during the period of the infringement, namely, Nintendo, Sony and Sega. They are all Japanese-based companies. Other game platforms, such as 3DO, Commodore CD32, Philips CD-i and the Atari Jaguar, were not significant forces in the market <sup>(57)</sup>.
- (70) In the year ending 31 March 1997, Nintendo had a worldwide turnover of JPY 417,6 billion <sup>(58)</sup>, Sony's games business segment had a turnover of JPY 419 billion <sup>(59)</sup> and Sega's consumer equipment division JPY 114,5 billion <sup>(60)</sup>. Those turnover figures are equivalent, respectively, to EUR 2 990 million, EUR 3 001 million and EUR 820 million.

<sup>(52)</sup> Omega's complaint arose from court actions of Nintendo against Omega to this effect (page 3). NF threatened all its customers that it would actively prosecute any dealers, which illegally parallel imported the products, meaning from outside the EEA, without the consent of Nintendo. NF acted on explicit instructions from NCL (pages 1221 and 1222). NB also went to court in order to stop Horelec from importing from the USA (page 1303).

<sup>(53)</sup> See Concentra's reply to the statement of objections paragraphs 20 to 24.

<sup>(54)</sup> Law 24/96 of 31 July 1996, Decree-law No 238/86 of 19 August 1986 (as amended by Decree-law No 42/88 of 6 February 1988).

<sup>(55)</sup> See paragraph 25 and footnote 17 of the Statement of Objections, based on facts to be found on pages 1559, 1574, 1579, 1580 and pages 2220 to 2228. Page 1559 relates to the situation in Greece that, in terms of market size and relative location, is comparable with Portugal.

<sup>(56)</sup> Pages 1427, 1428, 1441 and 1442.

<sup>(57)</sup> The Commission asked Nintendo to provide figures on the EEA turnover regarding dedicated game consoles for Nintendo itself and Sony and Sega and any other supplier of such products. Nintendo did not provide any turnover figures for other suppliers of dedicated game consoles or even mention one (pages 2250 to 2268). See also CTW, 'A modern map of Europe' in Nintendo's submission of 1 September 1998 (page 2289).

<sup>(58)</sup> Annual report Nintendo for 1997. Nintendo realises over 90 % of its sales and income from operations in the same business segment (see annual report 1997 on page 58) (page 2249). Its overall turnover can therefore be compared with the turnover of the relevant business segments of Sega and Sony.

<sup>(59)</sup> See extract of Sony's Website as provided in Nintendo's submission of 1 September 1998 (page 2276).

<sup>(60)</sup> See Agence France Presse 22 May 1998 (page 2334).

(71) In 1994, Nintendo held substantial market shares in all types of consoles then on the market, in France as well as in other EEA countries (see Tables 2 and 4 below). In fact, before September 1995, Sega and Nintendo sold virtually 100 % of all game consoles in the EEA<sup>(61)</sup>. At the end of September 1995, Sony entered the EEA market(s) for game consoles with its 32-bit Sony Playstation and obtained a significant market share. Sega in turn launched a 32-bit console (Saturn), which was less successful. Nintendo's response to this challenge, the N64 console, was not introduced in the EEA until March 1997. However, according to Nintendo's annual reports for 1995 and 1996, Nintendo remained the single largest producer of home video products in the world<sup>(62)</sup>. In 1997, Nintendo's overall worldwide turnover fell only just short of that of Sony's games business segment.

(72) According to Datamonitor<sup>(63)</sup>, Sony's 1997 European sales of static consoles were worth USD 673 million or EUR 530 million at retail prices. Nintendo's EEA turnover in consoles was about Eur [...] \* at wholesale prices in the year ending March 1998<sup>(64)</sup>. Sega's European-wide turnover for consoles only is not known. However, sales of Sega's consoles are widely believed to be significantly lower than those of Sony and Nintendo. In fact, Sega's European turnover for consoles and games, for the financial year 1996/1997, was GBP 173 million or EUR 250 million<sup>(65)</sup>, that is, Sega's overall EEA turnover was less than Nintendo's EEA sales for consoles alone. Therefore, Nintendo's share of the EEA market(s) for game consoles was still at least [...] \* % in 1997<sup>(66)</sup>.

#### 1.4.1.1. The market for static game consoles

(73) The figures in Table 2 demonstrate that Nintendo held substantial market shares for all types of static game consoles on the market in 1994, both in the French market and in the market comprising other EEA countries (except the United Kingdom).

TABLE 2

**Market shares in volume terms of Nintendo and Sega by type of static console and country in 1994**

	UK	D	E	F
Nintendo static 8-bit consoles (NES)	35	55	67	73
Sega static 8-bit consoles (Master system)	65	45	33	27

	UK	D	E	F
Nintendo static 16-bit consoles (SNES)	37	69	37	53
Sega static 16-bit consoles (Mega drive)	63	31	63	47

Source: GFK, Nielsen<sup>(67)</sup>.

(74) According to figures obtained from Screen Digest, Nintendo's market share in 1997, if measured in volume terms and over advanced static consoles alone, excluding Nintendo's sales of the 16-bit SNES console, was 31 % in the French market for static game consoles and 37 % in the market for static game consoles comprising all other EEA countries (see Table 3). Itochu has confirmed that the competitive situation of Nintendo as regards static consoles in Greece was similar to that in other EEA countries<sup>(68)</sup>. Consequently, although Nintendo's importance as a supplier of static game consoles may have decreased since Sony's entry into the market, it can still be concluded that Nintendo has remained a significant supplier of static game consoles in France as well as elsewhere in the EEA.

TABLE 3

**Market share in volume terms for sales of advanced (32 and 64-bit) static consoles in 1997<sup>(69)</sup>**

	B, L, NL	D	IRL	I	Scandinavia	E, P	GR, A	UK	Europe (excluding France)	F
N64	38	48	31	32	43	28	66	32	37	31

<sup>(61)</sup> According to Durlacher & Co. 'A survey of the video and computer games industry', page 36, in 1994, 4 % of console sales worldwide were attributed to companies other than Sega and Nintendo (page 2378).

<sup>(62)</sup> See pages 1 and 24 of Nintendo's 1995 annual report and page 8 of Nintendo's 1996 annual report (pages 2341 and 2248).

<sup>(63)</sup> CTW 22 September 1997, 'Datamonitor's five year review' in Nintendo's submission of 1 September 1998 p. 3 (page 2253).

<sup>(64)</sup> Submission of Nintendo of 1 September 1998 p. 16 (page 2266).

<sup>(65)</sup> Submission of Nintendo of 1 September 1998 p. 4 (page 2254).

<sup>(66)</sup> 'At least' as, if Sony's and Sega's turnover would be measured at wholesale prices and Sega's sales of consoles only would be taken into account, Nintendo's market share would necessarily be higher.

<sup>(67)</sup> See Case 35.587 volume VIII pages 2143 to 2169.

<sup>(68)</sup> See Itochu's reply to the statement of objections paragraph 19.

<sup>(69)</sup> See pages 2575 and 2576. By 1997, sales of less advanced 16-bit static consoles did not represent a significant share of the sale of static consoles any more. From the table contained in CTW 'UK market soars to £890m' (page 2293) it is possible to deduce a Nintendo UK market share for advanced consoles only of 31,7 %. This figure is very close to the figure mentioned for the United Kingdom in Table 2, but derived from a different source, which strengthens the credibility of the figures presented in Table 2. From the same table it appears that 16-bit console sales constituted about 6 % of the UK sales of dedicated game consoles.

	B, L, NL	D	IRL	I	Scandi- navia	E, P	GR, A	UK	Europe (excl- uding France)	F
Saturn	3	1	2	3	2	4	2	7	4	3
Playsta- tion	60	51	66	65	55	68	32	62	59	66

Source: Derived from figures provided by Screen Digest. Due to rounding-up, not all columns add up to 100 %.

#### 1.4.1.2. The market for hand-held game consoles

- (75) In 1994 Nintendo held (see Table 4) an important share of the EEA market for hand-held consoles. Since then, its market share has increased considerably. By 1995, Nintendo Game Boy held [...] % of the hand-held market in Germany, [...] % in Spain and [...] % in France<sup>(70)</sup>. In the United Kingdom, according to THE's 1997/1998 business plan, 'the demise of the Game Gear leaves Game Boy dominating the portable market with a share of [...] %'<sup>(71)</sup>. Therefore, it can also be concluded that Nintendo is by far the most important supplier in the EEA market for hand-held game consoles. Again, Itochu has confirmed that the competitive situation of Nintendo as regards handheld consoles in Greece was similar to that in other EEA countries<sup>(72)</sup>.

TABLE 4

#### Market shares in volume terms of Nintendo and Sega for hand-held consoles by country in 1994

	UK	D	E	F
Nintendo hand-held consoles (Game Boy)	73	87	63	73

<sup>(70)</sup> Pages 2449 and 2450.

<sup>(71)</sup> Page 531.

<sup>(72)</sup> See Itochu's reply to the Statement of Objections paragraph 19.

	UK	D	E	F
Sega hand-held consoles (Game Gear)	27	13	37	27

Source: GFK, Nielsen <sup>(73)</sup>.

#### 1.4.2. The markets for game cartridges

- (76) For each console, a wide range of game cartridges is available. In fact, the availability of a significant number of games is one of the main factors contributing to the success of any game console. The game cartridges are developed/marked either by the console producer itself or by third parties, normally under licence from the console manufacturers. Third party game publishers may use distribution channels for their game cartridges independent of the Nintendo channels<sup>(74)</sup>.
- (77) Game cartridges are sold for use on the installed base of game consoles. According to Nintendo's 1997 annual report, the worldwide installed base at the end of April 1997 of Game Boy consoles was 55 million units whereas 235 million units of compatible game cartridges had been sold. The equivalent figures for SNES consoles and compatible game cartridges were 46 million and 359 million units respectively<sup>(75)</sup>.
- (78) Competition in the different separate markets for game cartridges is primarily driven by quality in terms of the use of popular characters (such as Nintendo's 'Mario' character), the quality of graphics, the uniqueness of each game in its genre<sup>(76)</sup> and its price by comparison with other games available for the console in question. The demand for a particular game is usually relatively short-lived and limited to three to 12 months only. Whereas a large number of games compatible with a certain console may exist at any particular point in time, sales of game cartridges are often concentrated on a very few recently released games. According to THE<sup>(77)</sup>, [...] % of game sales concern the 10 most popular games at the time. Only the most successful games may be in demand for several years. Once the demand for a particular game has subsided, remaining stocks are cleared out at lower prices, creating a premium and budget structure for game cartridges. Recommended retail prices for budget games are approximately half of those of premium items<sup>(78)</sup>.

- (79) It is not possible to provide exact market share figures for Nintendo products in each of the markets for cartridges compatible with its consoles for each and

<sup>(73)</sup> See Case 35.587 volume VIII pages 2143 to 2169.

<sup>(74)</sup> For instance, Omega and Itochu distributed cartridges of third party developers (page 2 and Itochu's reply to the statement of objections paragraph 20).

<sup>(75)</sup> Page 2249.

<sup>(76)</sup> Page 567.

<sup>(77)</sup> Page 532 as well as 554 where it is stated that [...] % of the sales are made with [...] % of the titles.

<sup>(78)</sup> Pages 575 and 576.

every year<sup>(79)</sup>. However, Nintendo's importance as a publisher of games is reflected by the fact that it is listed as second in the United Kingdom Top 20 publishers for 1997 by Charttrack<sup>(80)</sup>. If measured over the combined sales of game cartridges for all types of games consoles, that is, over a turnover significantly larger than that of the combined turnover of the relevant markets for games compatible with Nintendo-produced consoles<sup>(81)</sup>, Nintendo's market share amounts to 18,5 %. Its market shares in the relevant markets for games compatible with Nintendo consoles must therefore be significantly larger, because Nintendo manufactures only cartridges compatible with its own consoles. In Germany, Nintendo's market share, if measured over all games media for game consoles, is 54 %<sup>(82)</sup>.

- (80) Nintendo's importance as a game-publisher can also be illustrated by the facts outlined in sections 1.4.2.1 to 1.4.2.3. These facts demonstrate that Nintendo was the largest supplier in each market for game cartridges compatible with the Nintendo-produced SNES, N64 and Game Boy consoles.

#### 1.4.2.1. The market for SNES compatible game cartridges

- (81) If measured against the total European sales of game cartridges for 16-bit consoles, Nintendo's sales in 1995 and 1996 would appear at first sight to indicate market shares of [...] % and [...] % respectively<sup>(83)</sup>. These figures, however, still underestimate the market share of Nintendo on the relevant market for game cartridges compatible with the SNES consoles within the EEA. First, Nintendo produces only game cartridges compatible with its own consoles, whereas these percentages relate to the aggregate of the market for SNES compatible game cartridges and the one for game cartridges compatible with Sega's 16-bit console. Therefore, Nintendo's share of the market that is relevant here, the market for SNES compatible game cartridges, must necessarily be higher than its share of a more

widely defined market. Second, the figures for the market as a whole are in retail prices whereas the 'share of Nintendo' is calculated in terms of Nintendo's turnover at prices to trade; no account is taken of margins of retailers and independent distributors.

- (82) According to Gallup, in the United Kingdom, Nintendo had a market share in volume terms in the market for games cartridges compatible with the SNES console of 43,0 % in the quarter ending 31 December 1994. During the same period, Nintendo's most important competitors in this market were Virgin, Acclaim, Ocean and Sony with market shares of, respectively, 9,5, 9,1, 7,9 and 4,2 %. Nintendo's market share in volume terms during the quarter ending 31 March 1995 was 29,4 %. During that same period, the market shares of Virgin, Acclaim, Ocean and Sony were 11,4, 9,5, 8,5 and 8,9 % respectively<sup>(84)</sup>. Nintendo's market share in the United Kingdom stayed fairly stable during the period of the infringement<sup>(85)</sup>.

#### 1.4.2.2. The market for N64 compatible game cartridges

- (83) In the United Kingdom, sales of cartridges compatible with Nintendo's N64 console were GBP 63 million or EUR 91 million at retail prices in 1997<sup>(86)</sup>. Nintendo's United Kingdom 1997 turnover at wholesale prices was EUR [...] in the financial year ending March 1998<sup>(87)</sup>. That means that Nintendo's 1997 market share in the market of cartridges compatible with the N64 console was at least [...] %<sup>(88)</sup>. For the second half of 1998, 17 third party game publishers were expected to have published a total of 33 games for the N64 platform other than those marketed by Nintendo. The most important of these were Acclaim and Infogrames with five and six games respectively<sup>(89)</sup>. These figures relate to the United Kingdom only. However, it is uncontested that the market share in the EEA market for N64 cartridges cannot be lower.

<sup>(79)</sup> The Commission had requested Nintendo to provide figures allowing to do so (page 2249), but Nintendo was also unable to provide such figures (pages 2260 to 2266.).

<sup>(80)</sup> CTW 9 February 1998, page 8 of Nintendo's submission to the Commission dated 1 September 1998 (page 2258).

<sup>(81)</sup> The denominator that Charttrack uses to calculate the percentage figure also includes turnover of games compatible with Sega's and Sony's dedicated game consoles, that is not part of the relevant markets.

<sup>(82)</sup> Page 2590.

<sup>(83)</sup> These figures are calculated by taking, for the relevant years, the figures for dedicated 16-bit consoles from Table 2 from Nintendo's submission of 1 September 1998 (page 6) and Nintendo's EEA turnover in games for the SNES console from tables 16 and 18 of the same submission (pages 14 and 15) (pages 2256, 2264 and 2265).

<sup>(84)</sup> IV/35.587 pages 305 and 321. At the time Sony had not yet introduced its own console but acted as a game publisher. Not too much importance should be attached to differences in quarterly market shares. Sales of game cartridges are rather volatile and may vary substantially in the short run, depending on whether in a particular quarter a successful game was released or not (see also recital 76). However, market shares remain fairly stable when a longer term perspective is taken.

<sup>(85)</sup> Page 881.

<sup>(86)</sup> CTW, 'Record year right on track' in Nintendo's submission of 1 September 1998 (page 2296).

<sup>(87)</sup> Table 18 of Nintendo's submission of 1 September 1998 (page 2265).

<sup>(88)</sup> Yet again 'at least' as the sales figures of Nintendo are expressed in prices to trade whereas the denominator is expressed in retail prices.

<sup>(89)</sup> Screen Digest, July 1998 (page 2574A).

#### 1.4.2.3. The market for Game Boy compatible game cartridges

- (84) According to Gallup, in the United Kingdom, Nintendo had a market share in volume terms in the market for games compatible with the Game Boy console of 57,0 % in the quarter ending 31 December 1994 and 53,6 % in the quarter ending 31 March 1995. Its most important competitors in this market were Ocean and Acclaim. The average market shares of these two companies during those two quarters were 8 % and 6,3 % respectively <sup>(90)</sup>.

### 1.5. The procedure

- (85) In March 1995, the Commission opened an investigation into the video games industry (Case IV/35.587 PO Video Games). In September 1995, as a result of its preliminary findings, the Commission opened an additional investigation into the distribution system of Nintendo specifically (Case No IV/35.706 PO Nintendo Distribution). Case No IV/36.321 Omega — Nintendo arose from a formal complaint under Article 3(2)(b) of Regulation No 17 lodged in November 1996 by Omega.

#### 1.5.1. Contacts between Nintendo and the Commission during the investigation

- (86) In June 1995 <sup>(91)</sup>, the Commission sent Nintendo a request for information pursuant to Article 11 of Regulation No 17 asking, *inter alia*, for information regarding Nintendo's distributors and subsidiaries within the EEA as well as for copies of its formal distribution agreements with those undertakings active in France, Germany, Italy and the United Kingdom. In its reply of 31 July 1995 <sup>(92)</sup>, NOE provided the names of Nintendo's main distributors and subsidiaries within the EEA and a copy of the formal distribution agreement with the Italian distributor, Linea. NOE stated that no agreements existed in relation to the other territories specified as the undertakings active on those markets were wholly-owned subsidiaries of Nintendo.
- (87) On 19 September 1995, the Commission also requested a copy of NOE's general terms and conditions of sale <sup>(93)</sup>. It was stated that these terms were in the process of being reviewed and that copies of the new terms would be forwarded to the Commission as soon

as they became available. In a supplementary response to the Article 11 request of 26 June 1995, copies of the formal distribution agreements with the Greek and Portuguese distributors were sent to the Commission on 26 September 1995 <sup>(94)</sup>. On 9 October 1995 <sup>(95)</sup>, the Commission sent a request for information regarding certain terms in those agreements. On 20 November 1995 <sup>(96)</sup>, Nintendo informed the Commission that it was currently reviewing its distribution agreements and would forward specific proposals on any modifications to the Commission.

- (88) Subsequently, on 19 January 1996 <sup>(97)</sup>, a meeting was held between the Commission and Nintendo representatives. The Commission requested a description of Nintendo's distribution policy. Nintendo stated that the agreements were under review and that a final draft of the agreements would be forwarded to the Commission when completed. Nintendo indicated that this version would become the standard agreement and would be used by all distributors. It assured the Commission that all concerns relating to distributors' obligations would be addressed in the new draft of the distribution agreement.

- (89) On 19 April 1996 <sup>(98)</sup>, Nintendo submitted its new draft agreement for independent distributors, as discussed in the meeting of 19 January 1996. A meeting between the Commission and Nintendo representatives was held on 24 April 1996 <sup>(99)</sup>. At that meeting, the Commission requested clarification of a number of points, such as the terms relating to 'authorised dealers' and the status of the old agreements. Nintendo informed the Commission that the agreement with the Italian distributor had expired and that the others were still in force. Nintendo also explained on this occasion that an 'authorised dealer' was free to sell to anyone. Nintendo confirmed that the new agreement was applicable to the EEA as a whole.

- (90) The revised draft agreement for all EEA distributors was sent to the Commission on 27 November 1996 <sup>(100)</sup>. This agreement incorporated those elements that had been dealt with at the meeting of 24 April 1996. Agreements modelled on that version of the standard agreement were eventually implemented at the beginning of 1997.

<sup>(90)</sup> IV/35.587 pages 305 and 321.

<sup>(91)</sup> Case 35.587 Vol. X Page 2737.

<sup>(92)</sup> Case 35.587 Vol. X, page 2747.

<sup>(93)</sup> Case 35.587 Vol. XI, page 2908.

<sup>(94)</sup> Case 35.587 Vol. XI, page 2926.

<sup>(95)</sup> Case 35.706, pages 1 to 3.

<sup>(96)</sup> Case 35.706, page 12.

<sup>(97)</sup> Case 35.706, pages 13 and 14.

<sup>(98)</sup> Case 35.706, page 20.

<sup>(99)</sup> Case 35.706, page 37.

<sup>(100)</sup> Case 35.706, pages 95 to 109.

- (91) Subsequent to Omega's complaint in late 1996 <sup>(101)</sup>, the Commission extended its investigation. On 7 March 1997 <sup>(102)</sup> Nintendo was requested, pursuant to Article 11 of Regulation No 17, to submit its distribution agreements with independent exclusive distributors, as well as its general terms and conditions of sale and its distribution agreements with customers for those countries where Nintendo subsidiaries acted as exclusive distributors for the period 1994 to 1996.
- (92) In its reply of 16 May 1997 <sup>(103)</sup> Nintendo admitted that some of its distribution agreements and general terms and conditions had contained certain restrictions on parallel trade within the EEA. In so far as the agreements had not at that time expired, they were altered so as to put an end to this. In particular, on 15 May 1997 <sup>(104)</sup>, NOA instructed NE to delete from its general terms and conditions of sale any terms that prohibited sales outside NE's territory. In addition, on 15 May 1997, NOA wrote to its EEA-based subsidiaries reminding them of the requirements of Community law regarding intra-EEA parallel trade <sup>(105)</sup>.
- (93) As indicated above <sup>(106)</sup>, Omega's complaint contained the allegation that Nintendo operated a policy of resale price maintenance in the Netherlands <sup>(107)</sup>. In Nintendo's reply to Omega's complaint dated 11 April 1997, Nintendo stated that 'Nintendo does not enforce its recommended retail price' <sup>(108)</sup>. In a letter dated 22 October 1997 from the Commission to NOE, the Commission suggested sending a circular letter to Nintendo's Dutch dealers to clarify that they were able to set their resale prices freely <sup>(109)</sup>. On 30 October 1997, Nintendo agreed to send this circular letter <sup>(110)</sup>.
- (94) On 23 December 1997, Nintendo wrote to the Commission stating that it had become aware of 'a serious issue in relation to parallel trade within the Community' <sup>(111)</sup>. It expressed the wish to cooperate voluntarily with the Commission, to inform it about the way it had operated certain aspects of its distribution policy in Europe and to provide a written account of relevant matters.

Nintendo submitted hundreds of documents to the Commission in submissions received on 21 January, 1 April and 15 May 1998 <sup>(112)</sup>.

- (95) Subsequent to its admission, Nintendo also took what seem to have been credible steps to ensure compliance with Community law in the future. Those steps included presentations on 25 February 1998 to its senior management, three seminars, in two of which not only Nintendo's EEA subsidiaries participated, but also its independent distributors, and instructions to its EEA subsidiaries. Nintendo continues to organise such representations <sup>(113)</sup>.

#### 1.5.2. Correspondence between THE and the Commission during the investigation and THE's admission

- (96) The Commission sent THE a formal request for information dated 7 March 1997, prompted by information received indicating that dealers might have been prevented from purchasing in other Member States <sup>(114)</sup>. THE replied on 25 April 1997 that it did not restrict parallel trade by its dealers and that it had never refused a dealer supplies of Nintendo products on the ground that the Products would be exported <sup>(115)</sup>.
- (97) Subsequently, the Commission received new information that parallel trade was nonetheless being hampered, in particular from the United Kingdom. As a result, the Commission sent THE a new request for information, which it received on 10 October 1997 <sup>(116)</sup>. On 1 December 1997, THE's reply <sup>(117)</sup> to that request showed that THE, Nintendo and some other parties were involved in hindering parallel trade illegally. On 13 January 1998 THE spontaneously provided further evidence <sup>(118)</sup>.
- (98) Subsequently, THE took various steps to prevent any more breaches of competition law. Those steps included a formalised competition law compliance programme, entailing compliance reports, presentations to the managing directors and financial directors of all John Menzies subsidiaries, site visits and the introduction of standing instructions for the review of any arrangements or practices that might give cause for concern in relation to competition law.

<sup>(101)</sup> Pages 1 to 66.

<sup>(102)</sup> Pages 88 to 90.

<sup>(103)</sup> Pages 105 to 108.

<sup>(104)</sup> Pages 116 and 118.

<sup>(105)</sup> Page 110 to 113.

<sup>(106)</sup> See recital 14 above.

<sup>(107)</sup> Pages 10 to 12.

<sup>(108)</sup> Page 639. The information provided in this letter corresponded to explicit instructions of NOE (page 656).

<sup>(109)</sup> Page 757.

<sup>(110)</sup> Pages 758 and 759 and 760 to 764.

<sup>(111)</sup> Pages 1638 to 1641.

<sup>(112)</sup> Pages 988, 1236 and 1668.

<sup>(113)</sup> See Nintendo's submission of 9 August 2001 and its reply to the statement of objections paragraph 4.4.

<sup>(114)</sup> Page 437.

<sup>(115)</sup> Pages 446 and 447.

<sup>(116)</sup> Page 804.

<sup>(117)</sup> Pages 807 and following.

<sup>(118)</sup> Pages 956 to 987.

### 1.5.3. *Contacts between the Commission and other distributors during the procedure*

- (99) Prior to the notification of the statement of objections, the Commission had no contact with distributors other than Nintendo and THE, except for correspondence concerning the confidentiality of certain documents in the Commission's files. In that correspondence, exchanged with Soc. Rep. Concentra Lda (now called Concentra — Produtos para crianças SA), Linea Gig SpA, Nortec AE, Bergsala AB, Itochu Hellas EPE and CD-Contact Data GmbH and dated 9 June 1999, the Commission also stated that it was considering opening formal proceedings against those companies (as well as against Nintendo and THE) <sup>(119)</sup>.

### 1.5.4. *The administrative procedure*

- (100) On 25 April 2000 the Commission addressed a statement of objections to Nintendo Corporation Ltd (copied to Nintendo of Europe GmbH), John Menzies plc (copied to THE Games Ltd), Soc. Rep. Concentra Lda (now called Concentra — Produtos para crianças SA), Linea GIG Spa, Nortec AE, Bergsala AB, Itochu Corporation (copied to Itochu Hellas EPE) and CD-Contact Data GmbH (copied to Contact-Data Belgium NV).
- (101) None of the parties requested a formal hearing pursuant to Regulation (EC) No 2842/98 and, consequently, no formal hearing was organised.

## 1.6. **Events in the United Kingdom and Ireland**

- (102) Starting with the United Kingdom and Ireland below, the behaviour of Nintendo and its independent distributors will be described in detail. The facts are given for each territory separately and, if relevant, for the different parties that have been active in such a territory at various times.

<sup>(119)</sup> Pages 2679 to 2682 (Itochu), 2683 to 2686 (Concentra), 2690 to 2692 (Bergsala) 2687 to 2692 (Contact), 2700 to 2703 (Linea) and 2725 A-D (Nortec).

### 1.6.1. *The events concerning Nintendo UK Ltd*

- (103) From at least March 1993 <sup>(120)</sup> until 4 August 1995 <sup>(121)</sup> Nintendo's exclusive distributor for the United Kingdom and Ireland was NUK.
- (104) Prices to trade in the United Kingdom were low in comparison with Germany and parallel-exported products were offered to German retailers at prices lower than those offered by NOE <sup>(122)</sup>. The existence of substantial parallel trade into Germany and other EEA countries during 1994 and 1995 is also an indicator of price differentials <sup>(123)</sup>.
- (105) In several letters sent during April and May 1995, NOE demanded [...] <sup>(124)</sup> [...] to give instructions to all Nintendo subsidiaries because: 'Grey imports are becoming a real major problem (...) The following decisions are needed from your side: (...) B. There should be a strict instruction to all subsidiaries (...) — to clearly eliminate customers who are known or are likely to export products to other countries. (...) The UK (...) is not giving that subject the necessary attention (...) we have to stop these grey export activities with all measurements possible immediately'.
- 'Dear [...]\*, I would appreciate if you could give instructions (...) to all subsidiaries (...) with the target to stop any further grey exports and control bigger numbers immediately with all customers' <sup>(125)</sup>.

<sup>(120)</sup> See page 426.

<sup>(121)</sup> Pages 313 and 297A.

<sup>(122)</sup> NOE was the Nintendo subsidiary responsible for distributing the Products in Germany. Page 1000, point A.4 from which it can be deduced that the HW bundle (Gameboy with one game) was offered to German retailers by parallel traders for [...]\*. See also page 1023 where NOE stated: 'This means a price difference between UK merchandise and lowest offer from NOE of [...] %'. Some important NOE customers were retailing parallel imported Game Boy Games at less than half the price of those obtained from NOE. The existence of price differentials can also be confirmed by the fact that, according to a letter dated 11 April 1996 from THE to NOE, (pages 975 to 979 and 1135 to 1147) the price differences in 1996 between the United Kingdom and the rest of the EEA had already existed for some time.

<sup>(123)</sup> Pages 1441 to 1443. The table on these pages was drawn up on the basis of the replies from Nintendo distributors. See also a letter dated 22 May 1995 from NOA to NUK (page 1676).

<sup>(124)</sup> See letters dated 11 April 1995 (page 1000 to 1008), 19 April 1995 (page 1009 to 1019) and 4 May 1995 (pages 1022 to 1024).

<sup>(125)</sup> See pages 1000 to 1002.

(106) The instructions that NOE sought were further clarified in a letter from NOE to NOA dated 19 April 1995 <sup>(126)</sup>. Of the measures proposed in this letter, which included not supplying exporting clients, buying parallel-imported stock from retailers, and the coordination of prices to trade, the most successful were the measures to stamp out parallel trade at its source; these were standard business practice throughout the EEA. More specifically, the requested instructions were:

I. Strict order to all subsidiaries to take all measurements to stop grey exports.

This means:

1. Do not supply customers and especially distributors who are not 100 % safe and clean.

2. Check out regular customer orders before shipment to make sure quantities are in line with customers potential.

II. Right to subsidiaries to buy out grey imports and send back to supplying countries in Europe at purchasing price to be paid to importer/customer provided minimum quantity exceeds 500 respectively 1 000 pieces.

III. Advance info between subsidiaries on:

— product lowest price and quantities available at reduced prices,

— new items planned for sale at reduced prices to regular customers. (...)

D. Price and availability coordination on Europe

As per your (i.e. NOA's) suggestion/plan we should target (...)

## II. Pricing

1. Shoot for prices within 10 % difference to trade within Europe after maximum terms (...)

2. Product in actual line we should try to narrow differences beyond 10 % at least to maximum 15 % where unavoidable due to current commitments.

3. Price comparison to the made for all key products (...).

All this however will only work, if one company/person carries the ball and coordinates' (sic).

(107) On 22 May 1995, soon after the conception of the plan, NOA stated in a letter to NUK that, 'During our meetings with other European distributors, we learned that the grey market problem has increased significantly over this past year and made it almost impossible for our distributors and subsidiaries to sell their inventories in their respective markets' <sup>(127)</sup>. From this quote, it is clear that the 'problem' of parallel trade was discussed not only within the Nintendo group, but also with Nintendo's independent distributors at the time. In particular, during a meeting between Bergsala and NOA that took place during the E3 exhibition approximately a week before 22 May 1995, Bergsala discussed with NOA the problems that Bergsala had as a result of the large amounts of grey imports being supplied by a UK-based parallel exporter, [...]\*, into Sweden. As a result, NOA instructed NUK by the same letter dated 20 May 1995 already quoted above to 'determine whether Nintendo sells its products to [...]\*' or to a customer who does business with them'(sic) <sup>(128)</sup>.

<sup>(126)</sup>

See pages 1009 to 1012.

<sup>(127)</sup> See page 1676.

<sup>(128)</sup> See page 1676.



### 1.6.2. *The events concerning THE*

- (108) On 4 August 1995 THE<sup>(129)</sup> acquired from Nintendo the exclusive distributorship for Ireland and the United Kingdom. THE remained Nintendo's exclusive distributor for this territory at least until 31 December 1997. Nintendo remained present in the United Kingdom via its wholly-owned subsidiary Nintendo Services Ltd. This subsidiary had, however, no direct responsibility for the distribution of the products in the United Kingdom.

#### 1.6.2.1. The formal distribution agreements between Nintendo and THE

- (109) Up to 1 January 1998, THE had three successive agreements with Nintendo<sup>(130)</sup>. Under each of these agreements, THE undertook to buy the products exclusively from Nintendo, and Nintendo in turn was to sell the products only to THE within the United Kingdom and Ireland. The products covered were Nintendo-manufactured game consoles and the game cartridges that Nintendo manufactured for these consoles.
- (110) Until 1 January 1997, the agreements contained provisions to the effect that THE could sell only to certain categories of customers, in particular retailers which specialise in retail to consumers<sup>(131)</sup>. Parallel trade was severely restricted as a result of these provisions because resale of the products by THE's customers to other traders, including those established outside the United Kingdom, was prohibited. As will be shown below, this provision was applied in practice to prevent parallel exports by THE's customers.
- (111) The various successive formal distribution agreements between THE and Nintendo ostensibly gave THE the right to export the Products to any country outside its territory, although THE was prohibited from actively

seeking export sales. The facts show that de facto this right had no meaning, as Nintendo forced THE to take measures to prevent any exports from its territory. (See in more detail in recitals 162 to 169).

#### 1.6.2.2. 'THE games commercial policy regarding authorised customer'

- (112) With its letter of 1 December 1997, THE submitted to the Commission a copy of 'THE games commercial policy regarding authorised customer', that contains various policy statements<sup>(132)</sup>. In particular:

- (1) 'THE Games are only prepared to sell products to companies who will directly market the product to the end-consumer (i.e. retailers, mail order companies and catalogue stores)' (...);
- (2) 'THE Games will refer any approach from a retailer outside of the United Kingdom and Ireland initially to the local distributor, but will not refuse to supply if the retailer makes further requests'. The stated commercial rationale for this policy is that 'The practice of a UK product being sold to a retailer in a territory outside the United Kingdom and Ireland is not a desirable practice (...);
- (3) 'THE Games will not sell products to other wholesalers or subdistributors'. The stated commercial rationale for this policy is that 'If we (THE) were to supply Nintendo products to wholesalers they would by definition, either sell these to UK retailers or to retailers from outside our territory (...)'. THE recognises in its rationale to the third policy statement that sales to wholesalers and subdistributors would also mean a violation of its first and also second policy statements.

<sup>(129)</sup> Page 297A.

<sup>(130)</sup> Up to 1 January 1998, THE had three successive agreements with Nintendo. One valid from 4 August 1995 until 31 December 1996, one valid from 1 January 1996 until 31 December 1996 and one valid from 1 January 1997 until 31 December 1998.

<sup>(131)</sup> Clause 3.2. (pages 299 and 454) Nintendo 'appoints distributor as its exclusive independent and authorised distributor for the sale of covered products to authorised dealers in the territory' and, clause 2.2 (pages 298b and 453) 'authorised dealers shall mean and be limited to those persons which specialise in selling consumer products at retail to consumers and which are competent and possess sales facilities appropriate to the covered products and employ staff trained in the covered products'. These provisions read together imply that only sales to retailers are allowed. Clause 4.3. (page 299a and 456) does also imply this: 'Distributor shall sell covered products at wholesale to competent retailers possessing sales facilities appropriate to the covered products and employing staff trained in the covered products'. See also page 814.

<sup>(132)</sup> See pages 861 to 863.

- (113) THE admits that its policy restricted parallel trade<sup>(133)</sup>. According to THE, the rationale for these policies is apparent from the exchanges with [...] and [...]\*, referred to in recitals 114, 135 and 158. As THE's correspondence with [...] is dated 14 August 1995, THE's policy must have been established before that date<sup>(134)</sup>.

#### 1.6.2.3. THE's actions against [...]\*

- (114) One of the first actions THE took after acquiring the distributorship of the products concerned a company called [...]\*. [...] was a UK-based wholesaler of the products and part of the [...] Group, a retail chain. Apart from supplying [...] shops, it also acted as an independent wholesaler. In a letter dated 14 August 1995, THE wrote to [...]\*, 'THE Games has been appointed the exclusive distributor of Nintendo first party product in the UK to "authorised dealers" (i.e. qualifying Retailers). The terms of this appointment preclude us from supplying other intermediate distributors. Therefore, although we are more than happy to supply [...] with Nintendo products on behalf of [...] retail outlets, we are unable to supply [...] with Nintendo products on any other basis'<sup>(135)</sup>. From a letter from [...] to THE dated 25 August 1995, it appears that [...] had been made to understand that THE 'was no longer happy for [...] to act as distributor of this product to any of our customers except [...]\*'<sup>(136)</sup>.

#### 1.6.2.4. The deteriorating business relations between THE and Nintendo

- (115) In February 1996, THE launched a promotional campaign in which THE offered its products at substantially lower prices than other Nintendo distributors. Consequently, parallel exports from the United Kingdom became an even more attractive option for suppliers. THE's promotional prices were also advertised in a trade journal called CTW on 19 February 1996, and were referred to as 'The Big Deal'. THE justified its price reductions by reference to the competitiveness of the United Kingdom retail market, the unsatisfactory shelf

position it occupied and the intention to extend the life cycle of SNES and Game Boy products<sup>(137)</sup>.

- (116) The prices THE offered were significantly lower than those offered in other EEA countries such as Germany<sup>(138)</sup>, Italy<sup>(139)</sup>, the Netherlands<sup>(140)</sup>, Greece<sup>(141)</sup>, France<sup>(142)</sup> and Spain<sup>(143)</sup>. The price difference in relation to game consoles in Germany ranged from 20 to 31 % and for game cartridges from 4 to 65 %<sup>(144)</sup>. In comparison with the wholesale prices charged by Linea, prices to trade for SNES consoles offered by parallel importers were 18 % lower. The differences in wholesale prices for SNES compatible games ranged from 3 to 30 % and for Game Boy compatible game cartridges from 13 to 39 %<sup>(145)</sup>. Consumer prices for SNES games in the United Kingdom were 7 to 66 % lower than in the Netherlands, 26 % lower for a Game Boy console bundled with one game cartridge and about 35 % for one bundled with two Game Boy compatible games<sup>(146)</sup>. United Kingdom parallel traders offered Game Boy consoles to Spanish retailers 18 % below the wholesale price charged by NE<sup>(147)</sup>. A Game Boy console bundled with a compatible game was offered to trade at a price that was even 35 % lower than the lowest price that NE would charge its customers for the same bundle<sup>(148)</sup>. Differences in retail prices for Game Boy game cartridges were 46 % and for SNES game cartridges differences in retail prices ranged from 10 to 39 %<sup>(149)</sup>. Bergsala estimated that, overall, parallel imported products sold at retail prices 10 to 30 % lower than the products supplied to retailers by Bergsala itself<sup>(150)</sup>. According to NOE<sup>(151)</sup>, substantial grey imports from the United Kingdom had also taken place in Denmark, Norway and Finland. It may be concluded that prices in

<sup>(137)</sup> See page 881, a letter dated 22 February 1996 from THE to [...] of NOA.

<sup>(138)</sup> Letter from NOE to THE, dated 4 April 1996 (page 963) and letter from NOE to NOA dated 1 January 1996 (page 1119).

<sup>(139)</sup> Pages 1097, 1104 and 1105 and 1124 and 1125.

<sup>(140)</sup> Pages 1049, 1050 and 1051.

<sup>(141)</sup> Pages 1387 to 1389.

<sup>(142)</sup> Pages 1255, 1257 and 1258. From page 1257 it appears that parallel exporters offered products to NF's customers at prices lower than those charged by NE.

<sup>(143)</sup> Letter dated 22 February 1996, pages 1040, 1042, 1156 and 1157.

<sup>(144)</sup> Pages 1106 and 1123. Console prices relate to Game Boy products. NOE expressed the price differences in terms of consumer prices. This is an indirect measure for differences in prices to trade. However, also NOE also used these figures to draw conclusions as regards to prices to trade practised by THE (page 1098).

<sup>(145)</sup> See pages 1104, 1105 and 1124 and 1125.

<sup>(146)</sup> See page 1050 and 1051. These comparisons are made between the recommended resale prices that NN planned as from April 1996 onwards and the RRP of THE in February 1996. The price differences that can be calculated if NN's RRP in February 1996 would be used are substantially higher.

<sup>(147)</sup> See page 1040.

<sup>(148)</sup> See page 1042.

<sup>(149)</sup> See page 1157.

<sup>(150)</sup> See page 1425.

<sup>(151)</sup> See page 1097, a letter from NOE to NOA dated 1 April 1996.

<sup>(133)</sup> See John Menzies's reply to the Statement of Objections, page 8 as well as the policy statement itself (pages 861 to 863).

<sup>(134)</sup> Page 864, confirmed by John Menzies's reply to the Statement of Objections paragraph 2.2.

<sup>(135)</sup> See page 864.

<sup>(136)</sup> See page 869.

these countries where parallel imports took place were also higher than in the United Kingdom <sup>(152)</sup>. These price differences had apparently existed for a considerable length of time <sup>(153)</sup>. As a result of the lower price levels in the United Kingdom, incentives for parallel trade in the products from the United Kingdom to other EEA territories existed.

explained to THE: 'that these orders would be put on hold until such times as he [...] fully understood whether any stock from the United Kingdom had found its way into any other European country' <sup>(158)</sup>. At least at that time, NOA apparently thought that its written agreement with THE implied that THE was to prevent exports from its territory. NOA has also admitted this to the Commission <sup>(159)</sup>.

(117) In a letter from Nintendo's Greek distributor, Itochu, to NOE dated 22 February 1996, Itochu estimated that the prices THE was charging to United Kingdom retailers were actually lower than the price Itochu itself paid for supplies from Nintendo and that, as a result, 'any Greek retailer can purchase from the United Kingdom and "compete" with Nintendo local distributor; all these with the blessings of Nintendo' <sup>(154)</sup>.

(120) This action on the part of Nintendo had a considerable impact on THE's business. The five orders put on hold involved [...] units of game consoles and [...] game cartridges with a total purchase value of about GBP [...] <sup>(160)</sup>. These volumes represented about [...] % respectively of the expected sales volumes of THE in the year 1996/1997 <sup>(161)</sup>. A further purchase THE was about to make, of approximately GBP [...], was also affected. According to THE, these orders were essential to meet customer demand, which was exceeding its available stock. A stock shortage risked jeopardising THE's relations with important and influential customers. In fact, at the time THE considered that it was in danger of losing its distribution agreement <sup>(162)</sup>.

(118) Two days after the launch of the 'Big Deal' campaign, on 21 February 1996, [...] of NOA became directly involved in the matter. THE reassured NOA that: 'it is not our intention to supply Europe' <sup>(155)</sup>. Similarly, THE reassured its colleagues in other EEA countries. THE stated: 'I can give you the following information about prices that we are offering to retailers in the United Kingdom, and for UK sale only' (emphasis added) and 'we will try at all costs, to prevent product arriving in Europe' <sup>(156)</sup>.

(121) Unsurprisingly, THE wrote on 5 March 1996 to [...] of NOA that 'it will not happen again, (...) because we have taken every possible precaution to ensure that no product whatsoever reaches any country outwith our authorised territory' <sup>(163)</sup>.

#### 1.6.2.5. Nintendo's boycott of THE

(119) THE could not convince Nintendo, because on 27 February 1996, [...] NOA and [...] NCL, gave the following instructions to [...] of Nintendo Services Ltd: 'NCL is very concerned that THE Games Limited is currently aggressively marketing Super NES and Game Boy hardware and software contrary to various terms of its Distributorship Agreement. (...) Please do not accept any orders for product from THE until the results of THE's current marketing efforts are evaluated and the issue is resolved to NCL's satisfaction' <sup>(157)</sup>. [...] subsequently informed THE of these instructions and

(122) In order to verify whether THE was really taking action, NOA made a survey of its European distributors. When the results of this survey were known, on 20 March 1996, a meeting was held between [...] of NOA, in particular [...]; representatives of NOE, in particular [...]; and THE. The measures which THE took were apparently to the (initial) satisfaction of Nintendo. As a result, Nintendo's suspension of THE's purchase orders was lifted. Nintendo's boycott lasted from 26 February 1996 until 21 March 1996 <sup>(164)</sup>.

<sup>(152)</sup> In Greece, wholesale prices were indeed substantially higher than in the United Kingdom. See pages 1272 and 1273.

<sup>(153)</sup> As stated by THE in a letter of 11 April 1996 from THE to NOE, pages 975 to 979 and 1135 to 1147.

<sup>(154)</sup> See page 1272 and 1273.

<sup>(155)</sup> See page 881, a letter dated 22 February 1996 from THE to [...] of NOA.

<sup>(156)</sup> See pages 1062 and 1063, a letter dated 26 February 1996 from THE to NB, which was forwarded to NN and by NN to NF.

<sup>(157)</sup> See page 1275.

<sup>(158)</sup> Letter dated 5 March 1996 from THE to [...] of NOA, pages 883 and 884. See also a letter from NOA to THE dated 7 March 1996, page 1750.

<sup>(159)</sup> See page 1640.

<sup>(160)</sup> Letter dated 8 March 1996 from THE to NOA, pages 886 and 887.

<sup>(161)</sup> Comparison with the year end sales forecasts (April 1996 to May 1997) contained in THE business plan presented to Nintendo (page 539).

<sup>(162)</sup> Page 816 as well as THE's reply to the Statement of Objections paragraphs 4.1 and 4.2.

<sup>(163)</sup> Pages 883 and 884.

<sup>(164)</sup> Page 1293, 1750, 1759, and 1762.

## 1.6.2.6. Further pressure on THE

- (123) With the acquisition of the distributorship for the United Kingdom and Ireland, THE also acquired the right to 'supply to [...] for the purposes of distribution in South Africa only until such time as an NCL distributor has been appointed in such country' <sup>(165)</sup>. No NCL distributor was appointed for South Africa until April 1996. THE intended to acquire these rights on a permanent basis and to extend them to other African countries.

- (124) Soon after 21 March 1996, when Nintendo's supply boycott of THE ended, NOE checked whether the level of parallel exports from the United Kingdom had been reduced. On 1 April 1996, NOE sent an identical questionnaire to 'Nintendo distributors and subsidiaries' [concerning] 'actual grey market offers, especially from the United Kingdom and the United States of America', [intended] 'to improve coordination of Nintendo's business' <sup>(166)</sup>. The questionnaire requested information on 'offers which are in your markets which are very different from your own offers with respect to: A. Product [with] (...) special attention to products as per CTW report enclosed. B. Prices — price comparison: 1. With your own price to trade 2. Retail prices in comparison' <sup>(167)</sup>. The CTW report mentioned as well as THE's advertisements that were also attached to this questionnaire describe in detail the price reductions that were offered to United Kingdom retailers on certain Nintendo products and clearly identify THE as the distributor directly responsible for this price policy. Thus, the questionnaire clearly linked the existence of lower prices in the United Kingdom with parallel exports from the United Kingdom to other EEA territories and identified THE as the distributor responsible for this. The reply was required on the same day. Apart from Nintendo's own subsidiaries, Nintendo's independent distributors Linea, Concentra, and Itochu also replied <sup>(168)</sup>. Linea also added to its reply a copy of an offer that [...] had made to one of its customers.

- (125) This survey had direct consequences. In a letter dated 1 April 1996, NOE wrote to [...] of NOA on the

subject, 'Grey Exports from the United Kingdom — non-effective Control by THE — requested rights by THE to export to South Africa (and maybe other countries).[...] I have checked out the situation in the meantime with almost every European country and came to the following results: A. Grey exports are happening in general and especially based on the special new offers from THE as per enclosed CTW report of issue No 3 from February 19, 1996. (...) D. Strong recommendation: (...) 6. They definitely should not get clearance to export to any country [...] <sup>(169)</sup>. NOE believed that THE's behaviour should lead to short-term consequences and asked NOA for immediate action.

- (126) Apparently, THE perceived that the acquisition of the distribution rights for (South) Africa was dependent on satisfying the concerns of NOE. THE wrote to NOE on 11 April 1996 saying: 'we are keen to acquire the Nintendo distribution rights in Africa (...). I was planning to put a formal request and application for the distributorship licence through to [...]'. However, I have decided to leave this submission until after you and I have met (...) <sup>(170)</sup>.

## 1.6.2.7. Nintendo's concerns and THE's reactions

- (127) Nintendo's concerns covered various aspects of THE's business behaviour, *inter alia*, THE's pricing policy and THE's lack of control over exporting customers. Complaints about this were set out in letters from NOE to THE of 4 April 1996 <sup>(171)</sup> and from NOE to NOA dated 1 April 1996 <sup>(172)</sup>. The letter from NOE to THE dated 4 April 1996 starts off by stating 'As we agreed we both want to cooperate to maximise our mutual benefit and in the interest of the total European market place for Nintendo' <sup>(173)</sup>, indicating that THE and NOE had agreed to resolve their conflict and that NOE was representing the interests of all the other European

<sup>(165)</sup> See page 300, concerning the period from the acquisition of the distributorship in August 1995 until 1 January 1996, and page 320, for the subsequent period.

<sup>(166)</sup> Pages 1296 to 1302.

<sup>(167)</sup> Pages 1296 to 1302.

<sup>(168)</sup> Pages 1326 to 1333 (Linea, fax dated 1 April 1996), page 1386 (Concentra, fax dated 1 April 1996), pages 1387 to 1389 (Itochu, fax dated 2 April 1996).

<sup>(169)</sup> Page 1097 to 1109, in particular pages 1100 and 1109.

<sup>(170)</sup> Pages 975 to 979 and 1135 to 1147.

<sup>(171)</sup> Pages 963 and 1119.

<sup>(172)</sup> Pages 1097 to 1109.

<sup>(173)</sup> Pages 963 and 1119.

distributors. That NOE was representing other parties' interests can also be deduced from the fact that this letter to THE contained a flowchart<sup>(174)</sup> depicting flows of parallel trade that NOE considered to exist and the names and place of establishment of numerous parallel traders. The parallel traders were established in Belgium, the Netherlands, the United Kingdom, Germany, Sweden, Italy, France, Austria and Switzerland. This means that THE must have known that NOE was not only seeking a solution to stop parallel imports into its own territory (Germany) but also for the rest of the EEA, including territories of other independent exclusive distributors.

'undermining European coordination: — product, — price'<sup>(179)</sup>. According to NOE 'It cannot be allowed (...) that they (...) put the whole European market in jeopardy due to products floating out to other European countries at prices nobody else can understand or afford'<sup>(180)</sup>. NOE also insisted that: 'THE must control their market and their customers, what they obviously do not at the time being.'<sup>(181)</sup>. However, THE did not raise its prices<sup>(182)</sup>.

#### 1.6.2.9. THE's control of exports by its customers

- (128) In the same letter, NOE used information that it had collected by means of the questionnaire it had sent out on 1 April 1996 to EEA subsidiaries and independent distributors to underpin its criticisms of THE. This included the information provided by Linea in its reply to NOE dated 1 April 1996<sup>(175)</sup>.

#### 1.6.2.8. THE's pricing behaviour

- (129) With regard to THE's pricing policy, NOE complained to [...] of NOA in a letter dated 1 April 1996<sup>(176)</sup> that THE had 'lower prices released than everybody else'<sup>(177)</sup> as 'Low prices in the United Kingdom and for grey exports force reduction of margins (...) in other countries'<sup>(178)</sup>. In addition, THE's low prices would result in

- (130) Regarding NOE's criticism of THE's pricing policy, THE explained on 11 April 1996 to NOE: 'I fully understand the difficulty that this differential pricing creates for other mainland European countries where the market can clearly stand a much higher price than that which the market can stand here in the United Kingdom. (...) I am sure that we can, by working closely together, better control the situation on grey imports and find a much better way of isolating our products and our prices to within the shores of the United Kingdom, thus reducing the impact that this differential pricing has upon mainland Europe'<sup>(183)</sup>. Clearly, THE undertook to collaborate closely with NOE to control exports from its territory. 'I (THE) am determined that we will do everything we can to stamp out/limit grey imports into mainland Europe from the UK (...)'<sup>(184)</sup>.

<sup>(174)</sup> Page 967 and 1126.

<sup>(175)</sup> Compare pages 1331 and 1332 with 1124 and 1125. See also page 1119 where NOE states that it used information provided by Linea.

<sup>(176)</sup> Pages 1097 to 1110.

<sup>(177)</sup> Page 1098.

<sup>(178)</sup> Page 1107.

<sup>(179)</sup> Page 1108.

<sup>(180)</sup> Page 1099.

<sup>(181)</sup> See letter dated 1 April 1996 from NOE to NOA, page 1098.

<sup>(182)</sup> John Menzies' reply to the statement of objections, Annex A.

<sup>(183)</sup> See pages 975 to 979 and 1135 to 1147.

<sup>(184)</sup> Page 1136. Similar statements were also made in other correspondence. A letter dated 19 April 1996 from THE to NOE reads: 'You can rest assured in the fact that we have taken what I believe to be all the necessary actions to stem the supply of grey imports from the United Kingdom into mainland Europe' (page 1410). A letter dated 25 May 1996 from THE to NOA stated: 'we (THE) have to compete on price to sustain the Nintendo brand market share and as a consequence grey importing into continental Europe from the United Kingdom is an attractive one. However, we have taken all the action so far that we possibly can to put a stop to this practice. (...) (page 890)'. A fax from THE to [...] dated 28 June 1996 stated: 'Let me assure you that we are doing everything we possibly can to confine our product to our territory and any help we can get from our European partners/colleagues would be very much appreciated. I am sure we can work together in regard to this matter and between us, minimise the level of grey import', (page 1198).

(131) NOE listed in its letter of 1 April 1996 to THE<sup>(185)</sup> a number of specific inquiries about supplies to certain known parallel traders. In its reply to NOE dated 11 April 1996, THE reported on the measures it had already taken to control the situation, in particular the actions it had taken against four of its customers ([...]\*, [...]\*, [...]\* and [...]\*) and promised a progress report during a meeting between NOE and THE in the near future<sup>(186)</sup>. At NOE's request, THE had also investigated whether it or its customers could have supplied [...]\*, [...]\* and [...]\*, three known parallel traders. THE reassured NOE<sup>(187)</sup> that it had never supplied these traders. THE presumed that these companies had been supplied by [...]\*, [...]\*, [...]\* and [...]\* and that, therefore, as it had taken action against these companies, the problem had already been addressed. Therefore, on 11 April 1996, THE had started an extensive collaboration with NOE to tighten the control of parallel exports from THE's territory.

#### 1.6.2.10. The actions THE took against exporting customers

(132) The actions which THE undertook against exporting customers were well summarised by THE itself in a letter to [...]\* of NOA dated 24 May 1996: 'I can tell you that a significant amount of activity has been undertaken by THE since January/February this year with a view to stopping the grey exporting of products from the United Kingdom into the continental European market. Our major activities in this regard have been to either shut off supplies completely or to really control/restrict the supply of product into the UK market place, to certain questionable retailers. We are no longer selling to anyone who cannot prove that they operate a bona fide UK retail/mail order business. (...) The companies involved and in which we have curtailed our business are: [...]\*, [...]\*<sup>(188)</sup>, [...]\* and [...]\* along with a handful of others. I have proved that these companies have been supplying products into continental Europe via such companies as [...]\* and [...]\*,

and as result of this we have closed their accounts'<sup>(189)</sup>. During this period THE also ceased trading with a company called [...]\*'whom we suspected of shipping outside the United Kingdom'<sup>(190)</sup>.

(133) These actions amounted to a systematic business policy. As can be seen from later correspondence, THE actively pursued this business policy throughout the whole of 1996. In a fax dated 20 January 1997 THE wrote to NN: 'We have over the last 12 months actively sought to ensure that we only supply bona fide UK retailers<sup>(191)</sup>. We also review all orders from our retailers to check that the quantities are appropriate in regard to the number of retail outlets that they operate'<sup>(192)</sup>.

(134) The Commission possesses correspondence between THE and [...]\*, [...]\* and [...]\*, three of the companies to which THE referred in recital 132<sup>(193)</sup>. This correspondence confirms that THE did indeed take measures against those companies, either during, or immediately after, the boycott of THE by Nintendo. In particular, it is clear from the two examples below, regarding [...]\* and [...]\*, that (i) THE actively tried to trace parallel exporters, (ii) it did so by comparing the orders placed by particular customers with their potential for retail sales in the United Kingdom, (iii) THE invoked its agreement with Nintendo to justify the steps it took against exporting customers, (iv) the obligation on its customers to sell only at retail level within the United Kingdom was effectively an export ban; and (v) the ban was enforced by a supply boycott.

(135) The correspondence between THE and [...]\*<sup>(194)</sup>, a parallel trader, also shows that THE maintained effective control over parallel traders during 1996 and in 1997<sup>(195)</sup>. For instance, on 30 April 1996 [...]\* wrote to THE saying: 'you mentioned that your concern was that stock was being sold and that SEGA of America [meaning NOA, in view of the context of letter] had come down on you quite hard. For your information any stock purchased from you will be sold by us in the United Kingdom' (sic)<sup>(196)</sup>. Similar incidents took place during 1997 (see recital 158).

<sup>(185)</sup> Pages 963 and 1119.

<sup>(186)</sup> Page 1136.

<sup>(187)</sup> Pages 976 and 1136.

<sup>(188)</sup> This must mean [...]\*.

<sup>(189)</sup> Pages 1150 and 1151.

<sup>(190)</sup> From material presented by THE to NOE dated 25 June 1996. Page 1170.

<sup>(191)</sup> From the context of this and other correspondence it is clear that bona fide retailers are retailers which sell their stock solely to final consumers, that is, not to foreign-based traders. See for instance also pages 1150 and 1151, 1114, 1112 and 918.

<sup>(192)</sup> Page 1510.

<sup>(193)</sup> Pages 773, 1112 and 1114.

<sup>(194)</sup> For example page 908.

<sup>(195)</sup> Pages 913 and 917.

<sup>(196)</sup> Page 906.

[...]\*

(136) The events concerning [...]\* are summarised by THE in a letter to [...]\* of NOA dated 4 April 1996 <sup>(197)</sup>.

‘1. [...]\* placed large orders for certain products, quantities of which seemed excessive for his three retail outlets.

2. These orders were reduced to appropriate levels for his three retail outlets

3. [...]\* spoke to [...]\* (of THE) regarding our reduction in his order, and [...]\* intimated that this was due to his export activities. (...)

4. [...]\* (of THE) (...) finally gained evidence that [...]\* was linked to [...]\* who were exporting product <sup>(198)</sup>.

5. [...]\* was told that he could only place orders to levels appropriate for his retail activities since we are only able to supply to bona fide retailers.

6. [...]\* placed daily orders up to his maximum order level and upon identification of this we ceased trading with him. (...)’ <sup>(199)</sup>.

(137) In order to justify its supply boycott, THE invoked its formal distribution agreement with Nintendo. In a letter dated 28 March 1996 from THE to the lawyers of [...]\*, THE explained that: ‘THE Games have a distributorship agreement with Nintendo. However, we are only allowed to supply bonafide retailers in the UK. (...) Whilst [...]\* has three retail outlets the level of orders that we have received suggests that all products are not going through these outlets. (...) THE Games would be

delighted to supply [...]\* if we can be satisfied that all product is for retail purposes. I am sure that you appreciate that we must comply with our distributor agreement. I hope that your client can satisfy us of this fact and that we can re-establish our trading relationship’ <sup>(200)</sup> (emphasis added). From the reply of [...]\*’s lawyers, dated 19 April 1996 <sup>(201)</sup> it appears that [...]\* was prepared to enter into an undertaking to that effect. Eventually, THE asked [...]\* on 23 April 1996 to give a written undertaking <sup>(202)</sup> that the Products would only be offered for sale to consumers from outlets to be agreed with THE and not be offered for sale to [...]\* or to any other person whom [...]\* knew or suspected might be buying the products for resale purposes. [...]\* had to undertake not to buy the products from [...]\* in the future. These undertakings were given and THE re-established supplies at the latest by 28 June 1996 <sup>(203)</sup>.

[...]\*

(138) On 26 March 1996, [...]\* wrote to THE that, because of: ‘The recent troubles that you (THE) have experienced with certain accounts, i.e. those companies who you know export into Europe (...)’ [...]\* will guarantee THE Games that no stock shall be wholesaled across Europe (...) I trust we can once again start to trade with immediate effect (...)’ <sup>(204)</sup> (emphasis added).

(139) Yet again THE invoked its formal distribution agreement in order to justify the measures it took. THE explained to [...]\* on 1 April 1996 that: ‘Our Nintendo distributorship agreement is extremely clear and very precise in that we are only allowed to sell our products to multiple retailers and bona fide independent computer games shops within the UK market. In addition, we are able to supply products to known mail order companies, and catalogue retailers (...). We do not have the

<sup>(197)</sup> Page 1132.

<sup>(198)</sup> [...]\* holds a 50 % interest in [...]\* (page 918).

<sup>(199)</sup> Pages 1132 and 1133. These events are confirmed by correspondence between THE and representatives of [...]\*. Pages 918 to 924 inclusive.

<sup>(200)</sup> See pages 1112 and 918. This letter was written in reply to a letter dated 14 March 1996 from the legal representatives of [...]\*. THE’s actions against this company therefore commenced during the boycott of THE by Nintendo. THE used similar explanations in its letter to the legal representatives of [...]\* on 23 April 1996 page 923.

<sup>(201)</sup> Pages 920 and 921.

<sup>(202)</sup> See the letter of 23 April 1996 from THE to the legal representative of [...]\*, pages 923 and 924.

<sup>(203)</sup> That these signed undertakings were provided is apparent from a letter of the legal representatives of [...]\* to THE dated 17 July 1996 (page 926) and a letter from THE to [...]\* dated 28 June 1996, (page 925). It can be inferred from the same letters that supplies had been re-established at a date before 28 June 1996.

<sup>(204)</sup> Pages 1115 and 1116.

right to sell our products to either wholesalers or distributors within the UK market place (...). I read the contents of your letter to me with interest and perhaps you would let me have full details of your multiple retail stores group and mail order companies that you would like to supply with our product' <sup>(205)</sup>.

#### 1.6.2.11. The effects of THE's measures on the market

- (140) On 29 May 1996, NOE wrote again to 'All EEA-based Nintendo distributors and subsidiaries' [on the] 'Subject: Volumes of "grey" imports into your country (...) We urgently need, for top management review, info on intercountry trans-shipments (grey) outside Nintendo's control and influence' <sup>(206)</sup>. In this letter, all subsidiaries and independent distributors were asked to provide detailed figures on the volume of parallel traded Products for the years 1994, 1995 and 1996, the precise product items involved while specifying the volume and countries of origin separately for each parallel traded product item as well as the price differences at retail level between those parallel traded product items and the same product item when sold by the distributor itself. Attached to the same letter of 29 May 1996 from NOE was a detailed standardised questionnaire also requesting information about the volume of grey imports, the product items involved and the country of origin, the retail prices of grey imported products, and price differences between grey imports and products supplied by the subsidiary or distributor in the territory of the addressees over the period 1994 to 1996. All Nintendo subsidiaries as well as Nintendo's independent distributors Linea, Bergsala, Concentra and Itochu replied to this standardised questionnaire <sup>(207)</sup>.

<sup>(205)</sup> Page 1114.

<sup>(206)</sup> Pages 1431 to 1434 and also 1152 to 1154. Page 1434 is a fax machine print confirming that the questionnaire had successfully been faxed to all distributors (subsidiaries and independent distributors). THE was not among the addressees of this fax.

<sup>(207)</sup> See pages 1420 to 1422 (Linea), 1423 to 1425 (Bergsala), 1426 (NE), 1427 to 1428 (Concentra), 1435 to 1437 (NB), 1155 to 1157 (NE), 1429 and 1430 (Itochu) and 1158 to 1160 (NN). From the tables dated 30 and 31 May 1996 (pages 1438 to 1440 and 1441 to 1444), it appears that NOE also received information concerning the United Kingdom, but the source cannot be established.

- (141) Nintendo has provided the Commission with a synoptic table entitled: 'Volume of grey imports' <sup>(208)</sup>, apparently drawn up on the basis of the replies to NOE's questionnaire. From this table and the replies to the questionnaires, it appears that in nearly all countries and for every Nintendo product line at the time, SNES consoles and SNES compatible game cartridges and Game Boy consoles and compatible game cartridges <sup>(209)</sup>, parallel imports were significantly reduced during 1996 <sup>(210)</sup>. THE, in its reply to the Statement of Objections, provided statistics showing that indeed, sales by THE to parallel traders as identified by the Commission tailed off markedly from March 1996 onwards <sup>(211)</sup>.

- (142) This fact was also recognised by NOE, as on 20 June 1996 it wrote to THE stating 'I would like to compliment you for dramatically reducing parallel exports which everybody around Europe has realised and compliments' <sup>(212)</sup>. Later, on 26 June 1996 NOE wrote to THE: 'Thanks for your fine cooperation and keeping your promise on the grey market exports control, which like everybody feels around Europe, makes you finally a member of the family' <sup>(213)</sup>.

#### 1.6.2.12. THE's collaboration

- (143) It was now clear to THE that 'What we must all do now is to continue to monitor the situation and (...) communicate to our other European partners, both subsidiaries and distributors, of the action we have taken, and to ask them to communicate with me directly if they find any grey imports believed to have come from the United Kingdom in the future' <sup>(214)</sup>.

<sup>(208)</sup> Pages 1441 to 1443.

<sup>(209)</sup> The N64 console had not yet been introduced in 1996.

<sup>(210)</sup> For instance, the volume of parallel imported Game Boy consoles and Game Boy compatible game cartridges into the Netherlands decreased from approximately [...] to [...] and from [...] to [...] respectively. Parallel imported SNES consoles and SNES compatible game cartridges into Italy decreased from about [...] to [...] and that of SNES compatible game cartridges from about [...] to [...].

<sup>(211)</sup> John Menzies' reply to the Statement of Objections, paragraph 3.1 and annex D.

<sup>(212)</sup> Page 1456.

<sup>(213)</sup> Page 1195.

<sup>(214)</sup> Page 1410, a letter dated 19 April 1996 from THE to NOE. See also letter from THE to NOE re CD Contact Data, dated 14 August 1996 (page 1490).



The boycott of [...]\*

we can continue in our diligent efforts to overcome this problem' <sup>(220)</sup>.

(144) As already explained in recitals 136 and 137 above, [...] Director of both [...] and [...], had given written undertakings to the effect that all Product supplied by THE would be resold in the United Kingdom. However, on 27 June 1996, THE received information that [...] had advertised products outside the United Kingdom <sup>(215)</sup>. The next day, THE took decisive action. It wrote to [...] stating that, as it had breached the undertaking [...] had given, its account with THE would be closed with immediate effect. THE explained that 'any stock supplied to [...] was only for retail stores in the United Kingdom. This latest advertisement (...) in Continental Europe is a breach of that agreement' <sup>(216)</sup>. THE investigated this matter thoroughly as, in its reply to a fax from [...] dated 27 June 1996, it stated 'we suspect they [...] may have received some stock from a company called [...]. (...) We are currently looking to undertake further investigations into [...] but if our suspicions are confirmed, we will stop supplying them with product also [...]' <sup>(217)</sup>. In the same letter it wrote 'if you come across any grey import product which you suspect has come from the United Kingdom, then I would ask you to purchase samples, together with any details you can gather so that we can trace the ultimate source of supply to [...]\*' <sup>(218)</sup>.

(146) A further letter dated 3 December 1996, from THE to Linea stated: 'We are certainly not supplying any of the three people mentioned in your letter, so it must be coming from some alternative route. If you can do anything at your end to place this source then that would be most useful, in the meantime we will continue with our investigations at this end. (...) I am sorry that you are having trouble with grey imports, particularly as we are working very hard over here to stop this from happening, so anything more you can do to help us in our endeavours would be appreciated' <sup>(221)</sup>. This collaboration continued into 1997 <sup>(222)</sup>.

NN and [...]\*THE's collaboration with Linea

(145) On 10 July 1996, after an inquiry by Linea concerning parallel imports into Italy that requested 'prompt actions to stop this phenomenon' <sup>(219)</sup>, THE stated that: 'We have no record of ever having dealt with [...], but if you can give me further details we may be able to trace it back to see whether we supplied any dubious dealers who may have done a deal with [...]'. (...) in order that

(147) Apparently, offers of parallel traded products from the United Kingdom continued. NOE suspected a United Kingdom-based company called [...] of exporting the products. THE reassured [...] of NOE on 20 November 1996 that: 'we are not dealing with [...] [but] 'having done so much work in trying to eliminate grey imports from the United Kingdom I very much want now to try to find out where he is getting this stock. Can we try and arrange for someone to purchase some stock and see if we can trace it back (...)?' <sup>(223)</sup>.

(148) NOE followed this suggestion and instructed NN to buy some parallel traded product. In a letter from NN to THE dated 6 December 1996, NN wrote: 'Regarding the discussion with [...] (from NOE) concerning parallel trade you requested some examples. Therefore we have checked some game shops and found Super Metroid including Giant Players guide. (...) we also found Winter

<sup>(215)</sup> See page 1197. This is implied by a letter from THE of 28 June 1996. This letter also contains a detailed account of measures THE took against [...], and reassurances that it would take the necessary steps to limit the sale of THE products to the UK market.

<sup>(216)</sup> Page 925. The information on which THE acted was provided by Nintendo's Swiss distributor, so related to exports to a non-EEA country. However, THE did not merely criticise [...] for having exported outside the EEA but for having exported to Continental Europe (that is, outside THE's territory). Thus, the fact that THE acted on exports to a non-EEA country is irrelevant.

<sup>(217)</sup> Pages 1197 and 1198.

<sup>(218)</sup> Pages 1197 and 1198.

<sup>(219)</sup> Pages 1201 and 1202.

<sup>(220)</sup> Pages 1471 and 1472.

<sup>(221)</sup> Page 1505.

<sup>(222)</sup> See letter of NOE to THE re Linea dated 7 November 1997, page 1591.

<sup>(223)</sup> Page 1504. See also page 819.

Gold (...), [I] will keep you informed of further finding' <sup>(224)</sup>. In a letter dated 10 December 1996, NN supplied further details to THE concerning offers of parallel traded products of United Kingdom origin, made to two of its most important customers, [...] and [...] <sup>(225)</sup>.

reference gives you a clue who is the customer concerned' <sup>(229)</sup>.

(149) Apparently, these measures were deemed insufficient and more sophisticated measures were required. On 10 December 1996, NN wrote to THE to let them know that 'Your input will be appreciated as working "in concierto" on these matters may avoid problems' <sup>(226)</sup>. Shortly thereafter, in a fax dated 20 January 1997, THE wrote to NN that: 'we are now individually marking the security film that covers the boxes for a number of customers in order to try and identify if any of these are the source of your problem. (...) please send any new offending packages to me. Once we know the source of the problem, we can take any necessary action. (...) Please be assured that we are doing all that we can to assist you in this matter and let me reiterate we only wish to supply customers for UK retailing activities' <sup>(227)</sup>.

(151) According to THE's reply to a Commission request for information, no action was taken against any customer as a result of the tagging system it had introduced. The tagging system was introduced on 2 January 1997 <sup>(230)</sup> and discontinued in April 1997 <sup>(231)</sup>.

(152) The continuing efforts of THE were recognised by NOE, as the latter wrote to Linea on 6 November 1997 that: 'since January of this year, hardly any offers of merchandise were coming out of the United Kingdom which I do hope will also finally be the case with N64 hardware' <sup>(232)</sup>. NOE expected this collaboration to continue and expected THE to address any remaining parallel trade problems.

#### Renewed parallel trade in N64 Products

(150) In February of 1997, THE again worked closely with NN to ensure that [...] would not be supplied with Nintendo products <sup>(228)</sup>. In March of 1997, NN requested THE to investigate matters and provided information based on the above tagging system in order to assist THE in this regard. On 26 March 1997 it wrote to THE stating 'A quick tour through some major cities to appreciate N64 presentation lead to finding substantial quantities of THE material (...). At one address, the products were still in the original packaging and we found reference number 02 06 01 97. Hopefully this

(153) The possibility of parallel trade from the United Kingdom again became an issue on 22 October 1997 as a result of THE's latest pricing policy regarding N64 products, both N64 consoles and compatible games <sup>(233)</sup>. On that date NOE informed all European Distributors and sister companies that: 'THE, our UK distributor, will reduce recommended retail prices' [and] 'the United Kingdom is an isolated situation, definitely no price changes planned or even considered for continental Europe.' <sup>(234)</sup>. NOE justified this step by referring to the fact that N64s were 'overpriced' in comparison with the price of Sony's Play Station and other recently improved Sony product offerings in the United Kingdom <sup>(235)</sup>. The recommended retail price for the N64 console decreased from GBP [...] (approximately EUR [...]) at that time to GBP [...] (approximately EUR [...]), about 33 %.

<sup>(224)</sup> Page 1506.

<sup>(225)</sup> Page 1509.

<sup>(226)</sup> Page 1509.

<sup>(227)</sup> Page 1510.

<sup>(228)</sup> Page 1511.

<sup>(229)</sup> Page 1218.

<sup>(230)</sup> Page 1218.

<sup>(231)</sup> Page 819.

<sup>(232)</sup> Page 1582.

<sup>(233)</sup> See for instance pages 1588, 1589, 1607 and 1619.

<sup>(234)</sup> Pages 1556, 1557 and 1558.

<sup>(235)</sup> Pages 1557 and 1558.

- (154) As a result, parallel importers in Greece, Italy, Denmark, Norway and Portugal<sup>(236)</sup> offered local retailers prices that were lower than those the local exclusive distributors obtained from Nintendo. The only reasonable explanation for such differences is that Nintendo charged substantially lower prices to THE than to its other independent distributors<sup>(237)</sup>. Evidently, important price differentials between the United Kingdom and other EEA countries would create incentives for parallel trade and/or make it more difficult to sustain an efficient control of parallel exporters.
- (155) The exclusive distributors for Greece<sup>(238)</sup>, Italy<sup>(239)</sup>, Norway<sup>(240)</sup>, Sweden<sup>(241)</sup> and Denmark<sup>(242)</sup> all reported, within two weeks, to NOE about the problems which the United Kingdom price reductions had caused on their markets due to the consequent surge in parallel imports from the United Kingdom in the expectation that Nintendo would address these problems. Apparently NOE was of the opinion that it could rely on the continuing collaboration of THE. In this respect, it wrote<sup>(243)</sup>, in response to the complaint from Linea<sup>(244)</sup> that no parallel trade had come from the United Kingdom that year and that it expected this to continue.
- (156) NOE requested Linea to provide detailed proof of parallel traded products into Italy from the United Kingdom, including indications as to the source of the parallel trade<sup>(245)</sup>. It received such proof as, in a fax dated 7 November 1997 from NOE to THE it is stated: 'please find enclosed fax dated November 7, 1997 from our Italian distributor, Linea GIG, with copy of advertisement for your information and "action"'<sup>(246)</sup>. Annexed was an offer of Nintendo products which [...] made to clients of Linea that had been sent to NOE by Linea that same day.
- (157) Nortec also provided NOE with detailed information about parallel imported Products in Greece, did a test purchase to establish the origin of the parallel trade<sup>(247)</sup> and requested NOE's assistance<sup>(248)</sup>. Subsequently, NOE apparently transmitted this information to THE with the instruction to deal with these instances of parallel exports from its territory. A fax dated 3 November 1997 from the Greek distributor to NOE stated: '1. I must admit that your instructions to "THE" not to supply any customer who would export to "[...]", the Greek Parallel importer' has worked and has delayed things for a while. (...) They were told to wait for a while until things will settle down'<sup>(249)</sup>. The letter also names four United Kingdom-based companies that were about to supply [...]. The situation is crucial, so kindly keep a close eye on it and advise us how to cope with it'<sup>(250)</sup>. NOE also requested and obtained proof from Bergsala's Norwegian subdistributor which also undertook to make a test purchase<sup>(251)</sup>.
- (158) On 24 June 1997 THE wrote to [...] regarding 'Nintendo 64 Discount structure'<sup>(252)</sup> saying that it would only be prepared to supply [...] mail order operations in accordance with its policy to supply bona fide retailers and direct to consumer mail order operators only and not to secondary distributors (see also recitals 112 and 113). THE requested information on the likely turnover of [...] mail-order operation. Not long before 8 July 1997, THE apparently reduced substantially its supplies to [...] (253). In a letter to [...] dated 7 November 1997<sup>(254)</sup>, THE reiterated its position that it would not supply distributors and required from [...] a written undertaking that any stock it would be supplied would be for its Console Plus mail order operation. THE reserved the right to cease supplies should [...] not be able provide this reassurance.
- (159) Despite Nortec's assertion to the contrary (recital 157) and the incidents regarding [...], THE has denied taking any action against parallel exports when parallel exports in N64 consoles surged in October 1997<sup>(255)</sup>.

<sup>(236)</sup> Page 1580 (Italy), pages 1560, 1561, 1569 (Greece), page 1597, (Norway), page 1601 (Portugal), page 1576 (Denmark).

<sup>(237)</sup> The view that, at least in 1997, parallel imports resulted from Nintendo's own pricing policy was also shared by Nortec (pages 1600 and 1622), Bergsala's Norwegian subdistributor, Unsaco (page 1603) and NE (as NE expected that changing Nintendo's pricing policy would avoid grey imports from the Community) (page 1516).

<sup>(238)</sup> Pages 1559 to 1561 (dated 23 October 1997) and 1568 and 1569 (dated 26 October 1997).

<sup>(239)</sup> Pages 1578 (dated 3 November 1997), 1582 (dated 3 November 1997), and 1579 (dated 3 November 1997).

<sup>(240)</sup> Pages 1567 (dated 24 October 1997) and 1583 (dated 6 November 1997).

<sup>(241)</sup> Page 1574 (dated 27 October 1997).

<sup>(242)</sup> Page 1576 (dated 28 October 1997).

<sup>(243)</sup> Page 1582.

<sup>(244)</sup> Page 1579.

<sup>(245)</sup> Pages 1578 and 1582.

<sup>(246)</sup> Page 1591.

<sup>(247)</sup> Page 1604.

<sup>(248)</sup> Pages 1568 and 1569.

<sup>(249)</sup> Page 1577.

<sup>(250)</sup> Page 1577.

<sup>(251)</sup> Page 1583.

<sup>(252)</sup> Page 913.

<sup>(253)</sup> Page 914 and THE's reply to the statement of objections, Annex D.

<sup>(254)</sup> Page 917.

<sup>(255)</sup> See THE's reply to the statement of objections, Annex A, comments to paragraphs 124 and 125.

### 1.6.2.13. Parallel Imports into the United Kingdom

(160) After Nintendo's boycott, THE started to collaborate and control exports from its territory (recital 130). THE also saw advantages for itself in doing so. In a letter dated 11 April 1996 to NOE, it wrote, while providing information to NOE about parallel imported products in the United Kingdom, that 'by working close together in the future, (with NOE) we can limit both our market places being damaged by grey imports' <sup>(256)</sup> (emphasis added). In a letter to [...]\*, dated 5 June 1996, THE stated '(...) we have learnt over the past few days that one of our key retailers has been illicitly offered supply of Killer Instinct on SNES at a price of £[...]\* [...] we are assured that the stock available is the correct UK version. This was offered by [...]\* who in addition offered a variety of French and Portuguese SNES and Game Boy products. (...) I hope these points provide some assistance with your investigations' <sup>(257)</sup>. Apparently, THE felt that NOE would be able to give assistance in the matter and put an end to these imports, just as it had done for the distributors in other territories when the product originated in the United Kingdom.

(161) According to THE, these letters were written to divert some of the criticism of THE, and it did not expect any action to be taken <sup>(258)</sup>.

### 1.6.2.14. Passive export sales by THE

(162) The various successive formal distribution agreements between THE and Nintendo ostensibly gave THE the right to export the Products to any country outside its territory, although THE was not allowed to actively seek export sales.

(163) However, de facto, the underlying premise of THE's business relation with Nintendo was that THE would not exercise its supposed right to supply companies outside its territory in response to unsolicited requests for exports. Nintendo has expressly admitted this. According to Nintendo, during the conflict early in 1996 with THE, it had focused on the distinction between active and passive selling, but it admitted that these considerations 'were not accorded the follow-up

that, in hind sight, [were] necessary to ensure compatibility between our written agreements and practices in the market' <sup>(259)</sup>.

(164) Indeed, it would not have made sense for Nintendo to force THE to exercise a strict control over its customers to prevent them from exporting if THE itself was still permitted to export, albeit passively. Nintendo's concern was that any product from the United Kingdom was exported to other EEA countries, not that such exports resulted from THE actively acquiring customers abroad. THE repeatedly had to reassure Nintendo and different distributors that it had not supplied companies outside its territory <sup>(260)</sup>. No consideration was given to whether such exports might have been the result of passive export sales.

(165) Thus, when [...]\*, a Belgium-based parallel importer, approached THE for supplies of product it was told by THE that the latter was not allowed to supply products to companies outside its territory <sup>(261)</sup>. [...]\* then proposed obtaining supplies through [...]\*, a United Kingdom-based trader, which would purchase the products on [...]\*'s account. Several important orders were delivered in this way. THE was aware that this proposal was actually being implemented. This may be deduced from the fact that on 28 February 1996, only one day after Nintendo had started its boycott of THE, [...]\* was told by THE that it could not export the Products to countries within the EEC <sup>(262)</sup>. When [...]\* tried to reorder products, THE required [...]\* to furnish proof of the destination of the products as a condition for supply <sup>(263)</sup>. This demonstrates that THE must have been aware that it was not allowed to respond positively to unsolicited requests for supplies from companies outside its territory as, otherwise, the arrangement into which THE and [...]\* entered would be inexplicable.

(166) In this context it should also be noted that, until 31 December 1996, THE was required, under the terms of its agreement, to submit 'a current customer list' to Nintendo as part of its semi-annual marketing plan. This type of information could be used to control whether THE was exporting. In its reply to a letter sent pursuant to Article 11 of Regulation No 17 THE stated that the requirement to submit 'a current customer list' had not been enforced as it had not supplied nor been asked to supply such a customer list <sup>(264)</sup>.

<sup>(259)</sup> Page 1640.

<sup>(260)</sup> See for instance pages 1119 to 1122, 1135 to 1139, 1504, 1471 to 1472, and 1505.

<sup>(261)</sup> Page 743.

<sup>(262)</sup> Page 773.

<sup>(263)</sup> Page 743.

<sup>(264)</sup> Letter dated 25 April 1997, page 444. Nintendo, in a letter dated 30 October 1995, said that this is also the case for the other independent distributors that had similar clauses in their agreements (see below).

<sup>(256)</sup> Pages 1398 and 1137. From the context of this phrase it is clear that THE meant that NOE would prevent parallel imports into the United Kingdom.

<sup>(257)</sup> Page 1444.

<sup>(258)</sup> THE's reply to the statement of objections, Annex A point 126.

(167) While it might, strictly speaking, be correct that THE never supplied a list as part of a semi-annual marketing plan, the relationship between Nintendo and THE implied that Nintendo could require THE to explain at any time whether it was supplying specific customers, either inside or outside the United Kingdom<sup>(265)</sup>. During late February until March 1996, when Nintendo exercised pressure on THE because, according to Nintendo, THE was not controlling exports from its territory, NOE based its allegation that products were being exported from the United Kingdom specifically on information obtained from THE regarding its sales to customers<sup>(266)</sup>. THE was confronted with this information and required to justify its conduct<sup>(267)</sup>.

(168) The above is not contradicted by the fact that THE provided the Commission with a list of 10 companies, established outside its territory but within the EEA, to which it had sold Products during the period from 1 January 1996 to 30 November 1997<sup>(268)</sup>. Nine of these companies are either Nintendo subsidiaries or exclusive distributors appointed by Nintendo<sup>(269)</sup>. The 10th company, [...]\*, is a sister company of THE, active in Switzerland and Austria<sup>(270)</sup>. No other company outside THE's territory had been supplied with products by THE. Sales to these companies cannot be considered regular passive export sales. In fact, the example of [...]\* shows that passive export sales were not allowed as THE was criticised by Nintendo for having supplied this company<sup>(271)</sup> and refrained from supplying it thereafter<sup>(272)</sup>.

(169) According to THE, during the course of the boycott and subsequent events in 1996, it had been accused of actively seeking export sales. This was because the 'Big Deal' promotion had been advertised in CTW, a trade magazine that was also read outside the United Kingdom. If the advertisement in CTW in fact amounted to THE actively seeking export sales<sup>(273)</sup>, the situation would have been remedied by THE once it had ensured that its advertising would not reach traders outside the United Kingdom and Ireland. THE did, in fact, stop such advertisements immediately after it

became aware of Nintendo's criticism<sup>(274)</sup>. It did not export to any companies as a consequence of the CTW publicity campaign, but referred inquiries to the Nintendo subsidiary or independent exclusive distributor in the territory where the potential customer was established<sup>(275)</sup>.

## 1.7. Events in Spain

### 1.7.1. Nintendo España, barriers to parallel exports from Spain

(170) From at least 1 January 1994<sup>(276)</sup> to 31 December 1997, Nintendo España SA (NE), a 100 % subsidiary of Nintendo, acted as exclusive distributor in Spain for SNES, Gameboy and, after they were introduced, N64 products.

(171) The general terms and conditions of sale between NE and its customers, that constituted an integral part of the contractual relations between NE and its customers<sup>(277)</sup>, contained an obligation on the part of customers to sell Nintendo products only within Spain<sup>(278)</sup>. Nintendo has not contested that these terms and conditions existed from January 1993 until April 1997.

(172) An internal memo of NE, dated 14 November 1995, contains specific instructions<sup>(279)</sup> from NE regarding exporting customers. From this memo it can be deduced that NE had installed measures to enforce its export ban in particular to prevent further exports to Italy. 'In any case, in order to avoid the possibility that Italian importers might be able to get it [SN + SMAS products] through other clients, this letter forbids you to bill any client other than supermarkets, for quantities above 100 units of this configuration, without your authorised signature on the above request. I ask that any time that the accounts department send you an order for SN + SMAS for your authorisation, you are reasonably assured that the said product is for national consumption'<sup>(280)</sup>.

<sup>(265)</sup> Pages 301 and 458.

<sup>(266)</sup> Pages 1097 to 1100. NOE's allegation was based on the large share of sales to what THE classified as 'other customers' and which NOE suspected included sales by THE to parallel traders.

<sup>(267)</sup> Page 1762.

<sup>(268)</sup> Page 829.

<sup>(269)</sup> Compare page 829 with pages 132 to 136. See also page 817. It is noted that THE's list, 'Chaves Portugal' is in fact Concentra (see page 136) whereas [...] is an employee of Unsaco, Bergsala's subdistributor for Norway (see page 1696).

<sup>(270)</sup> See the two invoices dated 9 January 1996 and 23 February 1996 on pages 830, 831 and 832.

<sup>(271)</sup> Page 891.

<sup>(272)</sup> Page 820.

<sup>(273)</sup> Page 810. THE denies this assertion on the basis that the advertisement was not directed at non-UK dealers.

<sup>(274)</sup> Page 882.

<sup>(275)</sup> See page 1752 and 817, five companies had made inquiries (see page 1752). In the absence of non-exempted restrictions THE could have supplied these companies under Commission Regulation (EEC) No 1983/83 (OJ L 173, 30.6.1983, p. 1). A prohibition on active sales relates only to the acquisition of customers.

<sup>(276)</sup> Page 136.

<sup>(277)</sup> See Article 1 of these general conditions of sale.

<sup>(278)</sup> Pages 107 and 108. The general conditions of sale read: 'Los clientes pueden vender los productos de Nintendo, solo en el territorio Español' (page 420A).

<sup>(279)</sup> For similar instructions, see page 1251.

<sup>(280)</sup> Page 1028 Original text: 'En cualquier caso, y para evitar que los importadores italianos se puedan surtir [SN + SMAS products] a través de otros clientes, por la presente se prohíbe la facturación a cualquier cliente, que no sea una gran superficie, de cantidades superiores a 100 uds. de esta configuración, sin la autorización firmada por tu parte de dicho pedido. Tu ruego que cada vez que te pase el departamento de facturación un pedido de SN+SMAS para tu autorización, tengas la seguridad razonable de que dicho producto sea para consumo nacional.'

- (173) It can be understood from the same internal memo that the reason NE instituted these measures was that, on the basis of analyses of the purchases made by its customers, it suspected certain customers of exporting products. NE had apparently confronted two of these customers with this allegation, but they had denied exporting the products. Nonetheless, 'A detailed analysis of the sales of this configuration to our clients leads us to the inevitable conclusion that there is a high degree of probability that those responsible for these exports are one or both of these clients. Consequently sales of SN + SMAS to [...] and [...] are prohibited except when expressly authorised and signed by me' <sup>(281)</sup>. NE's employees were furthermore instructed to pay special attention to two other customers which NE, also on the basis of an analysis of their purchases, suspected of exporting products.
- (174) An undated fax addressed to NE by [...]\*, one of the four customers which NE suspected of exporting, states: 'Clarification note: According to the conversation that we had with you yesterday, I bring to your attention the fact that the video consoles that I am requesting by the present letter, are to be sold in Spain. I trust that with this clarification, you will be fully satisfied as regards the destination of the consoles referred to' <sup>(282)</sup>. In the margin a handwritten comment was added: 'I don't believe they are not going to export at least part of it. Send only 500, telling the client that we are awaiting more stock' <sup>(283)</sup>. This letter confirms that NE asked for assurances from its customers that the Products supplied by NE would not be exported. If in doubt, it would not sell the requested quantities.
- (175) In a memo dated 10 June 1996, NOE instructed NE to reinforce its controls, because: 'As I mentioned already to you several times before, there are pretty clear indications that one or several of your customers are involved in grey exports, especially Super Nintendo hardware. (...) Clear indication: A. Software/hardware ratio is out of balance with these customers. B. Your orders between Super Nintendo software and hardware, especially in the last time, are in total and with specific customers completely out of line. C. You make, rightfully so, a lot of noise on grey imports which from time to time come from the outside and expect respective support. Obviously you must give the same support to other countries in the same way. May I kindly ask you to have this subject again checked out thoroughly and take the necessary precautions and control instruments to avoid these obvious problems' <sup>(284)</sup>.
- (176) In a letter dated 15 May 1997, NOA instructed NE to remove the obligation on the part of its customers to sell the products only in Spain from its general terms and conditions and to provide a copy of the amendments to all customers that had received the previous terms <sup>(285)</sup>. Also on 15 May 1997, NOA issued instructions to NN, NF, NOE and NE <sup>(286)</sup> to the effect that Community law does not allow suppliers to oblige their customers to resell the products only within a given geographical territory.
- (177) Nonetheless, in a letter from NOE to NE dated 3 July 1997 concerning N64 exports from Spain into France it is stated: 'Received yesterday an invoice copy as per enclosure showing items, prices and quantities having been shipped, as [...] (of NF) claims, into France. Could you investigate and inform 1. who that company is, 2. whether it is your customer, 3. what kind of business they have, 4. to whom they sell and, 5. whether the indication from France is correct' <sup>(287)</sup>. The attached invoice was from a company called [...]\*.
- (178) NE apparently acted on the instructions and information received from NOE. On 7 July 1997 NE wrote to [...] concerning: 'Exports of products, (...) I am addressing you because we have detected that [...] has been sending product from Nintendo Spain to some distributors of video games in France. As you know, the product that Nintendo Spain supplies to you is intended to be sold exclusively on the national market and exporting this product to France or to any other country is a practice of which we do not approve of in any case. I am requesting you to stop any kind of
- 
- <sup>(281)</sup> Page 1028. Original text: 'Un detallado análisis de las ventas de esta configuración a nuestros clientes nos lleva irremediablemente a la conclusión que, con un alto grado de probabilidad, los responsables de esta exportación son uno ó ambos de estos clientes. En consecuencia, queda prohibida la venta a [...] de SN+SMAS, salvo autorización expresa y firmada por mí'
- <sup>(282)</sup> Page 1027: Original text: 'Nota Aclaratoria: Según la conversación mantenida con Vd. en el día de ayer, pongo en su conocimiento que las Vídeo Consolas que les estoy pidiendo en la presente, son para venderlas aquí en España. (...) Confío que con esta aclaración, quede totalmente satisfecho en lo que al destino que voy a dar a las consolas se refiere.'
- <sup>(283)</sup> Page 1027: Original text: 'No me creo que no vengán a exportar, por lo menos una parte. Servir únicamente 500, diciendo al cliente que estamos a la espera de recibir mas stock.'
- 
- <sup>(284)</sup> Page 1161.
- <sup>(285)</sup> Pages 116 and 118.
- <sup>(286)</sup> See pages 110, 118, 119 and 120.
- <sup>(287)</sup> Pages 1224 and 1225.

dealings with clients which do not belong to the national market or else we will be obliged to take measures that, we believe your company does not deserve in any event' <sup>(288)</sup>.

- (179) On 29 October 1997, NE also provided information to NF in order to enable NF to identify grey exports from Spain into France <sup>(289)</sup>. Apparently, NF had found parallel imported Products in its territory and investigated the origin of these products. The information supplied by NE would have allowed NF to establish whether Spain was the origin of the Product that was parallel imported into France.

#### 1.7.2. NE, parallel imports into Spain

- (180) At least during the period between January 1996 and April 1997, NE provided NOE with information regarding the incidence and origin of parallel trade on a regular basis <sup>(290)</sup>. In particular, on 17 January 1996 NE wrote to NOE concerning a company called [...]\*. It informed NOE that 'We have detected (and bought) Killer Instinct (SNES) and Yoshi's Island (SNES) originating from Bergsala (Sweden), in stores located throughout the country. We believe that this product is being imported and sold by [...]\*. Could you please talk to Bergsala and ask them to control the situation' <sup>(291)</sup>. This was taken seriously, as, on 26 January 1996 Bergsala reported back to NOE 'Ref your fax of today about Spain (...) [...]\*. We have received faxes from this company offering us various software but we have done no business whatsoever with them' <sup>(292)</sup>.
- (181) From the above, and in particular a letter dated 10 June 1996 from NOE to NE <sup>(293)</sup>, it appears that NE regularly requested NOE to take measures to prevent parallel imports which originated in the territories of other exclusive distributors. Other letters in the possession of the Commission also confirm that NE provided information regarding parallel trade to NOE. It did this to protect the interests of the Nintendo group as parallel imported products and the prices at which such goods

were sold 'COMPLETELY DESTROYS THE SPANISH MARKET' <sup>(294)</sup>. At one point, NE estimated its maximum financial risk from parallel trade to be as large as ESP 220,6 million (about EUR 1,4 million at the time) <sup>(295)</sup>. NE, referring to parallel trade from the United Kingdom, stated the opinion that 'We absolutely can not allow this kind of thing' <sup>(296)</sup>.

### 1.8. Events in the Netherlands

#### 1.8.1. NN, parallel exports from the Netherlands

- (182) The Commission is not aware of restrictions in formal written agreements between NN and its customers that hampered exports by NN's customers from the Netherlands <sup>(297)</sup>. However, a letter of NN to NF dated 13 February 1996, reads: 'Regarding export please note that this represents no serious problem. Our customers will as usual keep small stocks and will concentrate on retailing' <sup>(298)</sup>. From this letter it can be deduced that NN had a practice, which had at least the effect of preventing parallel exports by its customers.
- (183) The existence of such a practise can also be deduced from a statement by [...]\*. regarding events that took place during the period 1992 until 1995. [...]\*. was a customer of NN whom NN suspected was reselling the products to Omega, a parallel trader of the products: 'Several times, Nintendo has made remarks that [...]\*. was reselling to Omega. This could be seen statistically according to Nintendo. Several times Nintendo delayed and blocked deliveries. Several times it required an inspection of the administration of [...]\*. ' <sup>(299)</sup>. From this statement it can be deduced that NN supplied this customer on the condition that the products would not be resold to parallel exporters. It is also apparent from this statement that NN enforced this condition with supply blockages and restraints and that it used, at least several times between 1992 and 1995, a statistical method to trace suspected parallel traders.

<sup>(288)</sup> Page 1226: 'Exportación de producto (...) Me dirijo a ti, ya que hemos detectado que [...]\*. SL ha estado enviando producto de Nintendo España s.a. a algún distribuidor de videojuegos en Francia. Como tu ya sabes, el producto que Nintendo España s.a. te suministra, es exclusivamente para vender en el mercado nacional y el hecho de exportar este producto a Francia o a cualquier otro país, no es una práctica que nosotros aprobemos en ningún caso. Te ruego dejes de efectuar cualquier tipo de operación con clientes que no pertenecen al territorio nacional, o nos veremos en la obligación de tomar medidas que en ningún caso creemos que tu empresa se merezca.'

<sup>(289)</sup> Page 1230.

<sup>(290)</sup> See letters on pages 1040 and 1041 (dated 17 January 1996), 1042 (undated), 1044 and 1045 (dated 22 January 1996), 1155 (dated 30 May 1996), 1161 and 1162 (dated 10 June 1996), 1266 (dated 28 January 1996) 1280 and 1281 (dated 28 February 1996), 1336 and 1337 (dated 1 April 1996), 1492 (dated 5 September 1996), 1498 (dated 21 October 1996), 1515 and 1516 (dated 1 April 1997) and 1554 (dated 21 October 1997). The quotes and example come from pages 1042, 1044 and 1281.

<sup>(291)</sup> Page 1041. [...]\*. is a parallel trader established in Sweden (page 1126).

<sup>(292)</sup> Page 1267.

<sup>(293)</sup> Page 1161.

<sup>(294)</sup> Page 1042.

<sup>(295)</sup> Page 1045.

<sup>(296)</sup> Page 1281.

<sup>(297)</sup> The formal contractual relationship between NN and its customers consists of general terms and conditions of sale (pages 417 and 418).

<sup>(298)</sup> Page 1049.

<sup>(299)</sup> Page 632. Original text: 'Meerdere malen heeft Nintendo opmerkingen gemaakt dat [...]\*. doorleverde aan Omega. Dit was statistisch te zien, volgens Nintendo. Verschillende keren heeft Nintendo de levering opgeschort, alsmede geblokkeerd. Meerdere malen heeft men inzage gevorderd in de administratie van [...]\*. '.

- (184) Furthermore, if products that might have come from the Netherlands were found in another territory, NN would be asked to assist in tracing the exporting company and take appropriate measures. Thus, in an instruction from NOE to NN dated 28 October 1994 concerning the sale of parallel imported products into Germany, it is stated: 'I would appreciate if you could thoroughly check out whether and which of your customers might be behind this offer and interfere immediately to stop delivery of the merchandise if still possible' <sup>(300)</sup>.

#### 1.8.2. NN, parallel imports into the Netherlands

- (185) On numerous occasions during the period from October 1994 until December 1996, NN provided information regarding parallel imports into its territory to NOE, NOA and independent distributors to assist the exclusive distributor in the territory of origin with stopping parallel trade which was causing price erosion in the Netherlands and threatening NN's relations with its customers. Various letters in the possession of the Commission are evidence of this <sup>(301)</sup>.

### 1.9. Events in France

#### 1.9.1. NF, parallel imports into France

- (186) Nintendo France SARL (NF) was the exclusive distributor for France at least from 31 December 1992 <sup>(302)</sup> until 31 December 1997.
- (187) At least during the period from October 1994 until October 1997, NF collected information on the incidence and origin of parallel imports and provided this information to NOE. Various letters in the possession of the Commission are evidence of this <sup>(303)</sup>. For instance, on the basis of information regarding parallel exports by [...] of Spain, acquired by NF and transmitted via NOE with the appropriate instructions, NE took measures against that company (see recitals 177 and 178). NF also urged NOE to check whether clients of Contact exported N64 game cartridges into France from Belgium

or Luxembourg. NOE subsequently sought reassurances from Contact that it had taken appropriate steps to prevent exports (see also below recital 195).

#### 1.9.2. NF, exports from France

- (188) In September 1997 <sup>(304)</sup>, Contact reported that consoles from France were offered to Contact's customers below the price that Contact had to pay to Nintendo for its own supplies, implying that significant price differentials existed between France and Belgium. Despite these price differences, no large scale exports from France appear to have occurred except for this incident. This is explained by the existence of the technical barriers to trade as a result of different TV standards. Adapting static consoles from SECAM to PAL standard is too difficult or expensive.
- (189) However, technical barriers to trade exist only for static consoles and not for hand-held consoles or game cartridges. Parallel exports from France to other EEA countries were nonetheless hampered as well. In a memo from NF to NOE dated 24 October 1997, NF stated: 'considering our sales terms there is no risk of export from France' <sup>(305)</sup>. In its agreements with retailers and wholesalers NF used a rebate structure based on retroactive rebates as a function of the customers' turnover with NF over the contractual period on software only <sup>(306)</sup>. As a result of this, the greater part of a retailer's overall gross profit on the sale of Nintendo products was realised only after the sales period <sup>(307)</sup>. It was therefore unavoidable that NF's sales terms prevent parallel exports, as exporting customers would run into liquidity problems. Exporters would get an end-of-year rebate from NF, but would have to offer an immediate cash-rebate to foreign based companies in order to be competitive. The retroactive rebate was given on purchases of game cartridges only, that is, they were concentrated on a category of products where parallel trade from France was not hampered by technical barriers to trade.

<sup>(300)</sup> Page 998. From NB's reply to NOE to the same letter it becomes clear that the products in question originated from the United Kingdom. NB at the time then took up this matter with NUK.

<sup>(301)</sup> See pages 998 (dated 28 October 1994) 1020 and 1021 (dated 27 April 1995), 1049 (dated 13 February 1996), 1050 and 1051 (dated 21 February 1996), 1058 and 1059 (dated 26 February 1996), 1061 (dated 26 February 1996), 1078 (dated 18 March 1996), 1088 (dated 27 March 1996), 1158 (dated 30 May 1996), 1216 (dated 28 October 1996), 1218 (dated 26 March 1997), 1220 (dated 25 April 1996), 1334 (dated 1 April 1996), 1412 (dated 23 May 1996), 1445 (dated 5 June 1996), 1500 (dated 28 October 1996), 1506 (dated 6 December 1996) and 1509 (dated 10 December 1996). That NN feared price erosion can for instance be deduced from pages 1021, 1049, 1051, 1058. Customer relations are mentioned on pages 1051 and 1058.

<sup>(302)</sup> Page 2216.

<sup>(303)</sup> See pages 998 (dated 28 October 1994) 1031 (dated 27 December 1995), 1049 (dated 13 February 1996), 1052 (dated 23 February 1996), 1060 (26 February 1996), 1219 (14 April 1997), 1221 (dated 29 April 1997), 1224 and 1225 (dated 3 July 1997), 1227 to 1229 (dated 24 October 1997), 1255 (undated), 1257 (dated 29 December 1995), 1258 (dated 8 January 1996) and 1259 (dated 9 January 1996). NF did also control by statistical means whether its customers carried parallel imported products (see below).

<sup>(304)</sup> See letter from Contact to NOE dated 4 September 1997 (pages 1536 to 1538).

<sup>(305)</sup> Page 1566.

<sup>(306)</sup> Page 1228.

<sup>(307)</sup> Prior to 1998, these retroactive rebates were paid by NF after the annual duration of the agreement and per 1998 partly retroactively every semester and partly after the end of the annual term of the agreement. See the 1995 and 1996 versions of these standard agreements (pages 361 to 413), page 2234 for 1997 versions and page 1546 regarding 1998.



### 1.10. Events in Belgium and Luxembourg

#### 1.10.1. NB, contractual barriers to export from Belgium and Luxembourg

(190) At least from 1 January 1994 until April 1997, Nintendo of Belgium (NB), held exclusive distribution rights for Nintendo products for Belgium and Luxembourg<sup>(308)</sup>.

(191) According to Nintendo, NB imposed obligations on certain dealers to the effect that Nintendo products should be supplied by those dealers only to end customers<sup>(309)</sup>. Nintendo has not contested that these obligations were imposed from January 1994 until April 1997. This provision was implemented. By letter of 28 October 1994 from NOE to NN, NB and NF concerning the sale of parallel imported products into Germany, NOE wrote: 'I would appreciate if you could thoroughly check out whether and which of your customers might be behind this offer and interfere immediately to stop delivery of the merchandise if still possible'<sup>(310)</sup>. From a reply dated 31 October 1994 from NB to NOE<sup>(311)</sup> it appears that NB investigated the matter<sup>(312)</sup>.

#### 1.10.2. NB, parallel imports into Belgium and Luxembourg

(192) Equally, NB requested similar support from NOE. On 24 June 1996 it wrote to NOE: 'Our customers in Luxembourg are complaining about the enclosed advertisement of grey Game Boy (German packaging) (...). The goods are coming from the [...] chain. (...). Could you please investigate this matter further [...]?'<sup>(313)</sup>. In its reply of 24 June 1996 NOE informed NB<sup>(314)</sup> about the results of its investigations.

<sup>(308)</sup> Page 132.

<sup>(309)</sup> The standard agreements for retailers read: 'De produkten van Nintendo Belgium zijn uitsluitend bestemd voor verkoop aan particulieren' (page 355) and 'Les produits Nintendo sont uniquement destinés à la vente au particuliers' (page 351) (The products of Nintendo (Belgium) are destined solely for sale to final consumers).

<sup>(310)</sup> Page 998.

<sup>(311)</sup> Page 1245.

<sup>(312)</sup> NB did not take action because the outcome of its investigation was that the products were imported from the United Kingdom, and not from Belgium. Subsequently, NB took the matter up with NUK.

<sup>(313)</sup> Page 1460.

<sup>(314)</sup> Page 1462.

(193) In fact, during the period October 1994 until November 1996, NB corresponded with NOE on various occasions regarding the incidence and origin of parallel trade, apparently in the expectation that this 'problem' would be addressed. This is substantiated by various letters in the possession of the Commission<sup>(315)</sup>.

#### 1.10.3. Contact, parallel exports from Belgium and Luxembourg

(194) In March 1997, NB went into liquidation. In April 1997, CD-Contact Data GmbH was appointed as an independent exclusive distributor of Nintendo's products for Belgium and Luxembourg and entered into a distribution agreement with Nintendo to this effect<sup>(316)</sup>. CD-Contact Data GmbH entrusted at least part of the task of distributing the products to Contact Data Belgium NV.

(195) It was clear to Contact that it was bound to ensure that its customers did not parallel export. Following suggestions made by NF<sup>(317)</sup>, NOE asked Contact whether one of its customers, [...]\*, might have sold game cartridges to customers of NF. Contact's response on 28 October 1997 to NOE stated: '1. [...]s received until now in different deliveries 960 pieces of Lylat Wars. This is just enough to deliver his approximatively 100 customers in the French part of Belgium. 2. Following the fact that in the start of Contact Data Belgium, he delivered some hardware in France, we are very cautious with this customer and would never deliver him this big quantities. (...) As we discussed last week with you, we are very cautious in our deliveries as we do not want to have any export [...]'<sup>(318)</sup>.

(196) The text of the distributor agreement between Contact and Nintendo allowed Contact to export passively<sup>(319)</sup>. However, Contact reassured Nintendo that it did not want any (thus including passive) exports<sup>(320)</sup>.

<sup>(315)</sup> See pages 998 (dated 28 October 1994) 1245 (dated 2 February 1996), 1303 (dated 1 April 1996), 1435 (dated 30 May 1996) 1460 (dated 24 June 1996), 1462 (dated 24 June 1996), 1482 (dated 24 July 1996), 1501 (dated 6 November 1996).

<sup>(316)</sup> Pages 138 to 153.

<sup>(317)</sup> Pages 1229 and 1566 and in particular hand written notes on page 1564. See also recital 131.

<sup>(318)</sup> Page 1575.

<sup>(319)</sup> Page 141 paragraph 4.6.

<sup>(320)</sup> Page 1575.

#### 1.10.4. *Contact, parallel imports into Belgium*

(197) From September 1997 until December 1997, Contact corresponded on various occasions with NOE about parallel imports into its territory in the expectation that this 'problem' would be addressed <sup>(321)</sup>.

— On 3 November 1997 it wrote to NOE stating that 'The following proposal is now on the Belgian market: 1 420 pieces of N64 HW at [...] with German manual.' <sup>(322)</sup>.

— On another occasion Contact, in a letter dated 4 December 1997 <sup>(323)</sup>, informed NOE of parallel imported Nintendo products from Germany <sup>(324)</sup> sold by [...]\*, a Luxembourg-based retailer. NOE replied promptly, and on the same day requested further information about the parallel imported goods from Contact <sup>(325)</sup>. In the same letter NOE inquired whether Contact had registered any parallel imports from France into Luxembourg in general and by [...] (a Luxembourgish retailer) in particular.

— Similarly, Contact complained to NOE about parallel imports into its territory from France. Contact explicitly asked NOE for help: '(...) Our customers are cancelling their orders for the N64 console because they apparently can get them cheaper in France. From the 8 000 backorders we received, 6 000 have been cancelled. This is definitely the main priority for our discussion in Monaco. Immediate action in this context is no doubt mandatory' <sup>(326)</sup>. This issue was subsequently discussed in a telephone conference with NF <sup>(327)</sup> on 5 September 1997, the next day.

— Contact also contacted NF on 12 November 1997 in connection with some suspected 'grey' imported game cartridges <sup>(328)</sup>.

### 1.11. **Events in Germany**

#### 1.11.1. *NOE, parallel exports from Germany*

(198) Nintendo of Europe GmbH (NOE) was the subsidiary of Nintendo with the exclusive distribution rights for the products within Germany.

<sup>(321)</sup> Pages 1536 (dated 4 September 1997), 1575 (dated 28 October 1997), 1581 (dated 3 November 1997), 1595 (dated 12 November 1997), 1605 (dated 4 December 1997), 1608 (dated 4 December 1997).

<sup>(322)</sup> Page 1581.

<sup>(323)</sup> Pages 1605, 1606 and 1607.

<sup>(324)</sup> Page 1610.

<sup>(325)</sup> Page 1608.

<sup>(326)</sup> Page 1536 to 1538.

<sup>(327)</sup> Pages 1539 to 1542.

<sup>(328)</sup> Page 1595.

(199) According to Nintendo, the general terms and conditions of sale between NOE and its customers contained the following obligation: 'Contract area (...) Customers may only sell Nintendo products within the German Federal Republic to end-users' <sup>(329)</sup>. Nintendo interprets this section as meaning that 'the general terms and conditions of sale between NOE and its customers, which were in place until August 1995, contained an obligation on NOE's customers not to supply Nintendo products outside Germany' <sup>(330)</sup>. These general terms and conditions of sale were effective from January 1991 until August 1995 and, according to Article 1, would be part of all agreements between the parties. This obligation was enforced by means such as the analysis of customer orders, as becomes clear from a letter from NOE to NOA of 11 April 1995 in which NOE states that 'we can control our customers well enough that any bigger number that would show up for any product, which is not within the normal framework of the customer, could be localised and shipments stopped' <sup>(331)</sup>.

(200) At least from 1 January 1996 until 31 December 1997, NOE also used an agent called [...] <sup>(332)</sup> to distribute the products on its behalf. Parallel exports via this agent were equally controlled. [...] was contacted by a company called [...] established in Aachen (Germany) for supplies. A report of a conversation between [...] with this company dated 14 March 1997 stated: 'The contact with [...] made clear that the products are destined for foreign countries. I have subsequently refused the matter' <sup>(333)</sup>.

#### 1.11.2. *NOE, parallel imports into Germany*

(201) NOE took an active role in preventing parallel imports into Germany when these occurred. For example, by letters dated 28 October 1994, NOE sent to NF, NB and NN <sup>(334)</sup> an offer made to several of NOE's customers and gave instructions to investigate which of their customers might have been behind this offer and to intervene immediately to stop the delivery of these products (see also recitals 184 and 191).

<sup>(329)</sup> Page 415 'Vertragsgebiet (...) Die Kunden dürfen Nintendo-Produkte nur in der Bundesrepublik Deutschland an Endverbraucher verkaufen'.

<sup>(330)</sup> Page 107.

<sup>(331)</sup> Pages 1001 and 1002.

<sup>(332)</sup> See submission of Nintendo dated 1 September 1998, page 22 (page 2302).

<sup>(333)</sup> Pages 1512, 1513 and 1514. 'Die Kontaktaufnahme mit [...] ergab, daß die Ware fürs Ausland vorgesehen ist. Ich habe daraufhin die Angelegenheit abgelehnt.'

<sup>(334)</sup> Page 998.

(202) NOE also played an important role in ensuring that NUK would take appropriate measures to stop parallel exports from the United Kingdom. It took the initiative in April/May 1995 to draw up a detailed plan to stop parallel trade that ultimately lead to the instructions given to NUK to determine the source of supply to [...] From April/May 1995 onwards, NOE played an increasingly important and active role in coordinating Nintendo's day-to-day efforts to stop parallel trade leading to the boycott of THE and the measures to monitor and enforce measures to stop parallel trade, both from the United Kingdom and from other countries. NOE's role is described in more detail in recitals 228 to 238.

(203) NOE's efforts to stop parallel trade within the EEA also served the more limited purpose of stopping parallel trade into its own territory, Germany. Thus, NOE's actions to ensure that parallel trade did not occur in the EEA must be interpreted as efforts to stop parallel trade into its own territory (see also recital 127).

### 1.12. Events in Greece

#### 1.12.1. Itochu and parallel exports from Greece

(204) From at least 14 May 1991<sup>(335)</sup> to 28 February 1997<sup>(336)</sup>, Itochu Hellas EPE, a wholly-owned subsidiary of a group of companies of which the ultimate parent is a Japanese company trading under the name of Itochu Shoji KK<sup>(337)</sup> (together referred to here as 'Itochu'), was the independent exclusive distributor of Nintendo products in Greece. The distributor agreement valid during that period contained the following provisions:

'3.2. (...) Nintendo appoints a distributor as its exclusive independent and authorised distributor for the sale of covered products to authorised dealers in the territory [...] and authorised an distributor to purchase

covered products from Nintendo for importation into Greece and for distribution and sale therein'<sup>(338)</sup>.

'3.3. (...) The distributor may not sell the covered products through subdistributors'<sup>(339)</sup>.

'4.3. (...) The Distributor shall not sell any covered products to any person who is not an authorised dealer, nor sell any covered products to any person if the distributor has reason to believe that such person intends to or will export such covered products to any country outside of the European Community or sell or transfer such covered products to anyone other than a retail customer purchasing such products in the ordinary course of business'<sup>(340)</sup>.

'2.2. (...) The term "authorised dealers" shall mean and be limited to those persons who specialise in selling consumer products at retail to consumers and who have been authorised by Nintendo to deal in the covered products, (...) At least annually during the term, of the distributor's distributorship Nintendo and the distributor shall mutually agree on a list of authorised dealers in the territory'<sup>(341)</sup>.

Clause 4.5 required Itochu to provide, twice a year, a list of current customers to Nintendo<sup>(342)</sup>.

'8.2. (...) Nintendo (...) shall have the right at any time during the term of the distributorship to make such examination of such books, records, and correspondence as Nintendo may deem appropriate'<sup>(343)</sup>.

(205) The Commission's reading of these provisions, not contested by Itochu in its reply to the statement of objections, is that Itochu could only sell to dealers established in Greece and approved by Nintendo, thus excluding passive sales to companies established elsewhere in the EEA. Itochu was also explicitly prohibited from reselling the products to customers other than those which specialised in reselling the products at retail to consumers and to anyone intending to resell the products to anyone other than a retail customer. Consequently, also intra-EEA parallel exports by Itochu's customers were severely restricted as Itochu could not resell to customers that would resell the products to other traders, including traders that were established outside Greece. Exports by customers of Itochu to countries which were EEA countries but not EC Member States were expressly prohibited.

<sup>(335)</sup> Page 157.

<sup>(336)</sup> Page 154.

<sup>(337)</sup> Pages 2501, 2502 and 2506.

<sup>(338)</sup> Page 157.

<sup>(339)</sup> Page 157.

<sup>(340)</sup> Page 159.

<sup>(341)</sup> Page 156.

<sup>(342)</sup> Page 160.

<sup>(343)</sup> Page 171.

1.12.2. *Itochu, parallel imports into Greece*

- (206) Itochu provided NOE or NOA with information regarding the incidence and origin of parallel trade in the expectation that NOE would address this problem<sup>(344)</sup>. According to Itochu, this was crucial 'for the survival of Nintendo business in Greece'<sup>(345)</sup> and 'to protect our market'<sup>(346)</sup>. On at least one occasion, this resulted in the distributor in the territory of origin, namely THE, cutting off supplies to a parallel trader. On 8 March 1996, THE wrote to [...] of NOA to inform it that 'As you are aware, the distributor in Greece contacted me by fax about an issue (...) We have traced the source of this problem to a long established NUK/THE games customer. I do not believe that this problem should reoccur since his recent order has not been fulfilled. I have notified this to [...] (from Itochu) and we have agreed that he will keep me directly in touch with the situation on an ongoing basis'<sup>(347)</sup>. The day before<sup>(348)</sup>, THE had informed Itochu that it had never supplied [...], the company that parallel exported Products from the United Kingdom into Greece, and had given details about its efforts to find the source of supply to [...].

1.12.3. *Nortec, parallel imports into Greece*

- (207) Nortec AE (Nortec) was established in April 1997 and started trading as Nintendo's exclusive distributor for Greece in September 1997 and entered into a distribution agreement with Nintendo to this effect. Nortec remained Nintendo's distributor for Greece at least until 1 January 1998<sup>(349)</sup>.

- (208) From October 1997 until January 1998, Nortec provided NOE with information regarding the incidence and origin of parallel imports into its territory, continued to monitor any cases of parallel imports and regularly

informed NOE of the latest developments in its territory<sup>(350)</sup>. It did so at least after THE had significantly reduced its prices for N64 consoles in October 1997 and, as a result, parallel imports from the United Kingdom into Greece had become a serious threat to the interests of Nortec. Nortec performed test purchases<sup>(351)</sup> and made efforts to trace the sources of supply of parallel traders in the hope that NOE would address the problem. In various letters to NOE, Nortec stressed that parallel imports 'completely destroy what we tried to build'<sup>(352)</sup> and 'jeopardise our efforts to control and clean the local market'<sup>(353)</sup>. Parallel imports 'will be a disaster for Nintendo products in Greece (...). I urge you to realise this situation and assist our efforts in this country'<sup>(354)</sup>. 'This situation is killing us [...]'<sup>(355)</sup>. Nortec stressed that NOE's 'immediate reaction (...) is absolutely indispensable for us to survive'<sup>(356)</sup>.

- (209) On at least one occasion this resulted in THE, upon instructions from NOE, cutting off supplies to a parallel exporting customer. Nortec was well aware of this. On 3 November 1997, Nortec wrote to NOE regarding 'N64 parallel import from the United Kingdom (...) I must admit that your instructions to THE not to supply any customer who would export to [...], (the parallel importer) has worked and has delayed things for a while (...) The company which was about to supply products to [...] is [...]. It is impossible for us to get a written proof for this, but the man who gave us the information was well paid by us, so I believe him. Nevertheless [...] is negotiating with other UK sources at present (...) Kindly check it out'<sup>(357)</sup>. This passage demonstrates the efforts Nortec made to obtain information regarding the origin of parallel imports. In a letter dated 5 January 1998, Nortec could finally report to NOE that now 'having solved the headaches of the parallel importers, (...), 1998 will be a bright year for N64 in Greece'<sup>(358)</sup>.

<sup>(344)</sup> Pages 1066 (dated 6 March 1996), 1272 (dated 22 February 1996), 1387 (dated 2 April 1996), 1290 (dated 1 April 1996), 1429 (dated 30 May 1996), 1674 (dated 2 August 1993), 1675 (dated 27 March 1993) and 1749 (7 March 1996).

<sup>(345)</sup> Page 1066.

<sup>(346)</sup> Page 1675.

<sup>(347)</sup> Page 886.

<sup>(348)</sup> Page 1749.

<sup>(349)</sup> Page 2595 to 2610, 1622 to 1624, Nortec's reply to the Statement of Objections paragraph 1.

<sup>(350)</sup> Pages 1559 (dated 23 October 1997), 1560 (dated 23 October 1997), 1561 (dated 23 October 1997), 1568 and 1569 (dated 26 October 1997), 1577 (dated 3 November 1997), 1587 (dated 7 November 1997), 1596 (dated 17 November 1997), 1600 (dated 20 November 1997), 1604 (dated 3 December 1997), 1612 (dated 11 December 1997), 1614 (dated 16 December 1997), 1622 (dated 5 January 1998) and 1789 (dated 7 November 1997). In order to appreciate the efforts Nortec made to trace the parallel exporters, see in particular page 1577.

<sup>(351)</sup> Page 1604.

<sup>(352)</sup> Page 1561.

<sup>(353)</sup> Page 1560.

<sup>(354)</sup> Page 1569.

<sup>(355)</sup> Page 1596.

<sup>(356)</sup> Page 1600.

<sup>(357)</sup> Page 1577.

<sup>(358)</sup> Page 1622.

### 1.13. Events in Portugal

#### 1.13.1. Concentra, parallel exports from Portugal

(210) From 14 May 1991<sup>(359)</sup> until at least the end of 1997, Chaves Feist & Cia LDA, later called Sociedade de Representacoes Concentra LDA and, since September 2001, Concentra, Produtos Para Crianças SA<sup>(360)</sup>, (Concentra) was the exclusive distributor of Nintendo products in Portugal.

(211) The formal distribution agreement between Nintendo and Concentra that was in force from 14 May 1991 to 28 February 1997<sup>(361)</sup> contained identical provisions to those in the agreement between Nintendo and Itochu, described in recitals 204 and 205 above<sup>(362)</sup>. Consequently, for the same reasons and to the same extent as the agreement between Nintendo and Itochu, the agreement between Concentra and Nintendo restricted passive export sales by Concentra and parallel exports by Concentra's customers from Portugal.

(212) There is no evidence that Concentra has itself actively prevented or tried to prevent third parties established in Portugal from parallel exporting from Portugal.

#### 1.13.2. Concentra, parallel imports into Portugal

(213) No evidence exists that Concentra prevented or tried to prevent its own customers from parallel importing the products. However, there is evidence that Concentra reported parallel imports into Portugal to NOE and also asked NOE for help in this matter. Indeed:

— Concentra, in a letter to NOA dated 4 January 1996 with which Concentra replied to a questionnaire of NOA [...]\*, also reported that there was still '(...) an important market share of parallel products (around [...]\* %) coming mainly from European Community Countries (...)'<sup>(363)</sup>,

— Concentra also replied to the questionnaires sent out by NOE already mentioned above in recitals 124 and 140. On 1 April 1996, Concentra reported in response to NOE's first questionnaire, that, at that moment in time, it was not affected by parallel imports from the United Kingdom<sup>(364)</sup>. However, this situation must subsequently have changed as its reply on 30 May 1996 to NOE's second questionnaire mentions that during 1996, parallel imports had occurred from the United Kingdom, Spain and the Netherlands<sup>(365)</sup>,

— On 21 November 1997 Concentra reported to NOE offers made to its customers by [...]\*, stating 'Unfortunately we are sure that some retailers will not resist to this opportunity of making additional margin on N64 [and asked NOE for help as] We hope Nintendo can find a solution for this situation, in the very near future'<sup>(366)</sup>.

### 1.14. Events in Italy

#### 1.14.1. Linea, parallel exports from Italy

(214) From 1 October 1992<sup>(367)</sup> until the end of 1997, Linea GiG SpA (Linea) was the exclusive distributor of Nintendo products for Italy.

(215) During the period between 1 October 1992 and 29 February 1996<sup>(368)</sup> the distributor agreement contained identical provisions to those in the agreements with Itochu and Concentra, with one difference, namely, that Linea was allowed to sell through certain approved subdistributors<sup>(369)</sup>. 'The term "authorised distributors" shall mean and be limited to those persons, companies or other entities which specialise in selling consumer products at the wholesale level and which have been authorised by Nintendo to resell the covered products to authorised dealers'<sup>(370)</sup>. In addition it is stipulated at '3.3 Subdistributors. Distributor intends to sell part of the covered products through subdistributors but may do so only if Nintendo has given prior written approval for each and every of such subdistributors. Such granting of an approval is in Nintendo's full discretion and any approval may be revoked by Nintendo at any time and any reason without notice'<sup>(371)</sup>. Prior to appointment, subdistributors had to undertake to respect the same obligations as Linea regarding, *inter alia*, authorised sales and authorised dealers<sup>(372)</sup>. Linea and the subdistributors whom Linea was allowed to supply were allowed to sell only to customers, also to be agreed upon with Nintendo, who were able to, in turn, resell the products only to consumers.

<sup>(359)</sup> Page 244.

<sup>(360)</sup> Page 136. Letter from Concentra dated 17 September 2002.

<sup>(361)</sup> Page 241.

<sup>(362)</sup> Pages 243, 244 and 245.

<sup>(363)</sup> Page 1746.

<sup>(364)</sup> Page 1386.

<sup>(365)</sup> Page 1428.

<sup>(366)</sup> Page 1601.

<sup>(367)</sup> Page 200.

<sup>(368)</sup> Page 196.

<sup>(369)</sup> Page 200.

<sup>(370)</sup> Page 199.

<sup>(371)</sup> Pages 200, 201 and 202.

<sup>(372)</sup> Pages 240 and 201.

- (216) Linea has submitted <sup>(373)</sup> that it never actually took steps to prevent parallel trade from Italy because, in view of the fact that Italy was a high-price territory, there was little or no demand for parallel exports from Italy.

#### 1.14.2. *Linea, parallel imports into Italy*

- (217) Linea provided NOE and, occasionally, THE with information on the incidence and origin of parallel imports into its territory in the expectation that the recipient would address this problem which was resulting in order cancellations and causing it to lose face with its customers <sup>(374)</sup>.
- (218) In particular, on 8 July 1996, it wrote to NOE, NB, NE and THE to inform them of developments concerning an Italian parallel importer. In this letter it stated:

‘We got proofs that [...]\*, one of the well-known parallel importers of Nintendo in Italy, sourced products from the following suppliers/countries:

##### 1. Germany

[...]\* (...)

##### 2. UK

[...]\* (...)

[...]\* (...)

[...]\* (...)

[...]\* (...)

[...]\* (...)

[...]\* (...)

##### 3. Belgium

[...]\* (...)

##### 4. Spain

[...]\*(...)

[...]\*(...)

We rely on your prompt actions to stop this phenomenon which is massively impeding the regular spreading of our business. We strongly hope you undertake as soon as possible the significant step to interrupt it’ <sup>(375)</sup> (sic).

- (219) In its reply of 10 July 1996, THE reassured Linea that THE itself had never dealt with this company ‘but if you can give me further details we may be able to trace it back to see whether we supplied any dubious dealers who may have done a deal with [...]’ <sup>(376)</sup>. According to Linea, it provided no further information that might have identified the origin of the exports to THE or any other party <sup>(377)</sup>. Similar events occurred in December 1996 <sup>(378)</sup>.

- (220) It was also on the basis of information received from Linea regarding the export of N64 consoles and cartridges from the United Kingdom that NOE instructed THE on 7 November 1997 to take action (see recital 156 above).

- (221) Linea admits that, in this way, it attempted to keep Italy free from parallel imports but argues that these attempts had no success as the products nevertheless arrived in Italy <sup>(379)</sup>.

#### 1.15. **Events in Denmark, Norway, Sweden, Finland and Iceland**

##### 1.15.1. *Bergsala, parallel exports*

- (222) Since 1981, Bergsala was Nintendo’s exclusive distributor for Sweden and, since 1986 also for Denmark, Norway, Finland and Iceland <sup>(380)</sup>. No written agreement existed between Bergsala and Nintendo until May 1997 <sup>(381)</sup>. For the distribution of the products within its territory, Bergsala uses a subsidiary in Finland, Bergsala Fun Oy and independent subdistributors in Denmark and Norway. These were Electronic Fun I/S and Unsaco AS <sup>(382)</sup> respectively.

<sup>(375)</sup> Page 1201.

<sup>(376)</sup> Page 1471.

<sup>(377)</sup> Linea’s reply to the Statement of Objections paragraph 4.1.

<sup>(378)</sup> Page 1505.

<sup>(379)</sup> Linea’s reply to the Statement of Objections paragraph 4.2.

<sup>(380)</sup> Bergsala’s reply to the Statement of Objections.

<sup>(381)</sup> Page 2300.

<sup>(382)</sup> Bergsala’s reply to the Statement of Objections.

<sup>(373)</sup> See Linea’s reply the Statement of Objections paragraph 4.1.

<sup>(374)</sup> Pages 1201 (dated 8 July 1996), 1326 to 1333 (dated 1 April 1996), 1420 to 1422 (dated 29 May 1996), 1471 (dated 10 July 1996), 1505 (dated 3 December 1996), 1578 (dated 3 November 1997), 1579 and 1580, (dated 3 November 1997) 1582 (dated 6 November 1997) and 1592 (dated 7 November 1997).

(223) Bergsala also cooperated with Nintendo in order to control parallel trade. NCL stated in a letter dated 25 January 1996 to Bergsala: 'We received a letter from our subsidiary in Spain, in which they are complaining that they have detected Killer Instinct (SNES) and Yoshi's Island (SNES) originating from you. They believe that these products are being imported and sold by [...]\*' <sup>(383)</sup>. Is it possible for you to control this situation? Please let us have your comments about this matter' <sup>(384)</sup>. In its reply dated 25 January 1996, Bergsala denied that it had done any business with [...]\*' <sup>(385)</sup>.

(224) In a letter to [...]\*' of NOE dated 30 April 1997 entitled: 'Parallel export of Scandinavian N64 hardware to Greece' Bergsala reassured NOE: 'I have checked with our agents in every country and all of them can swear that they have sold nothing to Greece or outside the territory. (...) Of course I can guarantee for Bergsala in Sweden. If you find some more info like some shipping docks please let me know and I will of course fully cooperate with you to keep Europe clean from parallel goods' <sup>(386)</sup>. From this quote it is clear that not only did Bergsala take it upon itself to prevent exports from Sweden, the part of its territory for which it was directly responsible for the distribution of the Products, but also from the other countries within its territory. However, no direct evidence exists as to whether Bergsala actually prevented parallel exports from Sweden or, directly or indirectly by giving instructions to its subdistributors, from other countries within its territory.

#### 1.15.2. Bergsala, parallel imports

(225) As a direct result of a complaint from Bergsala to NOA that parallel imports threatened its market and its relations with retailers, NOA instructed NUK in May 1995 to investigate whether it or one of its customers had supplied [...]\*', which had, in turn, supplied customers of Bergsala in Sweden <sup>(387)</sup>.

<sup>(383)</sup> [...]\*' is a parallel trader established in Sweden. (page 1126).

<sup>(384)</sup> Page 1264. This letter was sent by NE to NOE, who then forwarded it to NCL (page 1266).

<sup>(385)</sup> Page 1265.

<sup>(386)</sup> Page 1518.

<sup>(387)</sup> Page 1676.

(226) Subsequently, from January 1996 until November 1997, Bergsala <sup>(388)</sup> and its independent subdistributors Unsaco AS <sup>(389)</sup> and Electronic Fun I/S <sup>(390)</sup> respectively, provided information to NOE on the incidence and origin of parallel trade into Bergsala's territory, Sweden, Denmark, Norway, Finland and Iceland.

(227) Bergsala transmitted this information in the expectation that NOE would take the appropriate steps to prevent parallel imports into its territory. For instance, in a letter dated 8 October 1996, Bergsala wrote to NOE. 'We are facing a problem with grey import from England! The company is [...]\*' and I'll fax their fax to you. Is there any thing we can do to prevent this problem?' (sic) <sup>(391)</sup>.

### 1.16. The leading role of Nintendo

(228) The efforts to control parallel trade were coordinated and enforced by the Nintendo group (comprised of NCL and its wholly-owned subsidiaries NOE, NOA, NF, NE, NN and, up to certain dates, NB and NUK (recital 2), the members of which are distinguished for the purpose of describing the facts only.

(229) Being the manufacturer of the products as well as the distributor thereof in France, the Netherlands, Germany, Spain, until August 1995 in the United Kingdom and until April 1997 in Belgium and Luxembourg, the group was in a unique position. It could effectively monitor the existence of parallel trade, enforce the measures required to prevent it and directly benefit from their implementation.

#### 1.16.1. Monitoring

##### 1.16.1.1. Methods used for monitoring parallel trade

(230) Nintendo implemented procedures to monitor parallel trade within the Nintendo group.

<sup>(388)</sup> Pages 1264 (dated 25 January 1996), 1266 (dated 25 January 1996), 1423 (dated 30 May 1996), 1497 (dated 8 October 1996), 1517 and 1518 (dated 30 April 1997), 1574 (dated 27 October 1997), 1576 (dated 28 October 1997) and 1795 (dated 17 November 1997).

<sup>(389)</sup> Pages 1567 (dated 24 October 1997), 1583 (dated 6 November 1997), 1597 (dated 17 November 1997), and 1603 (dated 28 November 1997).

<sup>(390)</sup> Page 1576 (dated 28 October 1997).

<sup>(391)</sup> Page 1497.

- (231) The measures included statistical methods. These relied on the fact that if a trader resold the products only to final consumers, the product mix purchased by that trader would satisfy certain ratios. Most times, the incentive for parallel trade did not exist for the whole of Nintendo's product range. If a trader resold products to a parallel trader or parallel imported Products himself, this could be traced, as the ratio of the products purchased by that trader compared with other deals would change. One ratio that was monitored systematically was the ratio of console to cartridge sales, referred to in the relevant correspondence as the 'hardware/software ratio'.
- (232) The overall plan proposed by NOE and discussed with NOA during early 1995<sup>(392)</sup> already envisaged that the purchases made by customers were to be monitored in order to trace parallel traders (recitals 105 and 106). Examples of the implementation of monitoring devices are:
- NE put in place administrative procedures<sup>(393)</sup> to trace suspected parallel traders, which it identified on the basis of the pattern of their purchases,
  - in 1997, NE was instructed by NOE to reinforce its controls<sup>(394)</sup> by increasing its use of hardware/software ratios,
  - NOE itself used these procedures to trace potential parallel traders in its territory. NOE monitored the amount of purchases made by its customers, and, if an order was outside the normal range, NOE would stop that shipment<sup>(395)</sup>,
  - NN used statistical methods on several occasions during the period 1992 to 1995 to trace the customer that sold products to Omega<sup>(396)</sup>,
  - NF used an analysis of the ratio of game console purchases to purchases of game cartridges to trace parallel importers in its own territory with a view to taking measures against such parallel importers, as can be deduced from its memo dated 13 October 1997<sup>(397)</sup>.
- (233) Nintendo also used similar statistical methods to find out whether independent distributors or their customers
- also parallel exported products. Indeed, NF requested NOE to verify the ratios of Contact for certain game cartridge purchases in order to see whether Contact or one of its customers was exporting the products Belgium to France<sup>(398)</sup>. NOE also used these methods to control other Nintendo subsidiaries, as is shown by the example of NE (recital 175).
- (234) In addition to these statistical measures, Nintendo collected information regarding parallel imports from all subsidiaries and independent distributors within the EEA, systematically and on Nintendo's own initiative, on several occasions. For instance:
- on 1 April 1996, NOE sent a questionnaire to all EEA-based Nintendo distributors and subsidiaries. The questionnaire referred to '(...) our effort to improve coordination of Nintendo's business'<sup>(399)</sup>, and concerned parallel trade and prices. On the basis of the information received, NOE accused THE of not controlling parallel exports by its customers, which threatened THE's efforts to expand its export rights to the whole of Africa (recitals 124 to 126),
  - on 29 May 1996<sup>(400)</sup>, NOE again sent an extensive questionnaire to all EEA-based subsidiaries and independent distributors, 'for top management review'<sup>(401)</sup> requesting information regarding parallel trade into their territories. It was on the basis of the responses to this questionnaire that NOE concluded that THE had taken appropriate action against its exporting customers (recitals 140 and 141).
- In addition,
- during early 1995, NOA discussed the issue of parallel exports from the United Kingdom with its European distributors before it issued its instructions to NUK<sup>(402)</sup> (recital 107),
  - during the boycott of THE, NOA made a survey of its distributors in Europe to see whether THE had taken effective measures to stop parallel exports from the United Kingdom (recital 122). NOA was not prepared to lift Nintendo's boycott of THE before the results were known<sup>(403)</sup>,

<sup>(392)</sup> Pages 1009 to 1012.

<sup>(393)</sup> Pages 1028 and 1251.

<sup>(394)</sup> Page 1161.

<sup>(395)</sup> Pages 1001 and 1002.

<sup>(396)</sup> Page 632.

<sup>(397)</sup> Page 1544. 'Certain shops must import given their ratios. Recall them that the cooperation agreements will be broken if this is the case'. From the letter it is clear that NF meant the ratio of game console sales to compatible game cartridges sales.

<sup>(398)</sup> Pages 1229 and 1566.

<sup>(399)</sup> Pages 1296 to 1302.

<sup>(400)</sup> Pages 1431 to 1434 and 1152 to 1154.

<sup>(401)</sup> Page 1431.

<sup>(402)</sup> Page 1676.

<sup>(403)</sup> Page 1750.



— in late 1997, when parallel trade reappeared and several distributors had complained about this, several distributors provided evidence, also at NOE's request, that the products which were parallel imported into their territories originated from the United Kingdom<sup>(404)</sup> (recitals 155 to 157).

(235) On numerous other occasions, Nintendo subsidiaries and independent distributors spontaneously communicated information to NOE about parallel imports into their territories. Whereas, occasionally, such information was also sent to NOA and NCL, NOE was clearly perceived by other subsidiaries and independent distributors as the entity for coordinating the efforts to prevent parallel trade in the products. This is illustrated by the fact that the great majority of the above-described correspondence between NOE, other Nintendo subsidiaries and independent distributors regarding parallel trade did not concern exports from or imports into Germany but, in fact, concerned parallel trade from or into other territories.

(236) NCL was well informed about the details of the system to restrict parallel trade. In January 1996, NOE, in response to a complaint from NE regarding parallel imports into Spain from Scandinavia, forwarded the complaint to NCL which, in turn, verified that Bergsallawas not responsible for those imports (recital 223).

#### 1.16.2. Implementation

(237) Nintendo's coordinating role was not limited to the collection of information regarding parallel trade but extended to the implementation of measures to stop

any incidences of parallel trade that had occurred. It is useful to recall here that:

— in May 1995 NOA intervened on behalf of, in particular, Bergsala to stop parallel trade from the United Kingdom into Sweden (recital 107)<sup>(405)</sup>,

— in June of 1996, THE turned to NOE in order to stop parallel imports into its territory (recital 160)<sup>(406)</sup>,

— it was NOE that, in November/December 1996, instructed NN to make test purchases in order to trace the origin of parallel traded goods into the Netherlands (recitals 147 and 148),

— after a complaint by NOE<sup>(407)</sup>, THE introduced a tagging system to trace the parallel exporter(s) that were active during the period from November 1996 to March 1997 (recitals 149 to 151),

— NOE intervened on behalf of NF and instructed NE to control its customers selling products into France (recitals 177, 178 and 187),

— after having received information from NF, NOE asked Contact about possible exports from Belgium to France (recitals 187 and 195),

— when parallel imports reappeared towards the end of 1997, it was NOE that told THE to take 'action' on the basis of information received by NOE concerning Italy (recital 156),

— in September 1997, NOE discussed with NF the situation as regards parallel trade from France into Belgium following a complaint by Contact (recital 197),

— NOE issued instructions to THE regarding parallel exports to Greece in November 1997 (recital 209)<sup>(408)</sup>.

<sup>(404)</sup> On 3 November 1997 NOE asked Linea (page 1578): '(...) Is it possible that you research about the importer of Italy and exporter of UK of these products?' A letter three days later stated: (page 1582) 'we would need from you: A. names and addresses of main "grey importers" in the past, B. same for companies who might be offering N64 from UK, C. quantities, price and delivery dates of offers in the market place right now or in the future, D. any indication of the source of course would be perfect.' A fax dated 6 November 1997 from [...] to NOE (page 1583) stated: 'As promised I give you all the information I have regarding the parallel import from the UK'. In a letter from Nortec to NOE dated 20 November 1997 (page 1600) it is stated *inter alia*: 'As I have promised to [...]\*, I am sending you by courier today, all evidence we have from various exporters regarding N64 hardware (...)'. Nortec also sent detailed information on the origin of parallel trade in its territory in a letter dated 7 November 1997, pages 1587 and 1592 and in a letter dated 17 November 1997, page 1596).

<sup>(405)</sup> Page 1676.

<sup>(406)</sup> Page 1444.

<sup>(407)</sup> Page 1218.

<sup>(408)</sup> In order to access NOE role, the following pages may also be relevant: 996, 1000, 1022, 1071, 1081, 1085, 1097, 1112, 1119, 1132, 1135, 1152, 1158, 1163, 1188, 1203, 1209, 1216, 1220, 1247, 1249, 1296, 1390, 1396, 1409, 1444, 1455, 1504, 1506, 1511, 1526, 1529, 1539 and 1556.

1.16.3. *Compliance*

- (238) If NOE concluded that measures were needed in order to ensure (continuing) compliance, it did not take such measures independently but had to turn to other Nintendo companies, in particular NOA and NCL. Indeed:

— whereas NOE conceived in April/May 1995 the overall plan regarding parallel trade, it discussed this plan on at least three occasions with, and requested the necessary instructions for its implementation from, [...]\*. [...] NOA and [...] NCL [...]\*. NOA then gave instructions following this plan to NUK (recitals 105 and 106);

— when in early 1996 the conflict between Nintendo and THE arose, NOE was the prime critic of THE's business behaviour. However, it was [...] who subsequently ensured compliance by launching the boycott of THE (recital 119) <sup>(409)</sup>;

— it was NCL that assessed the impact of THE's CTW advertisement <sup>(410)</sup>. [...] participated personally in the meeting on 20 March 1996 between THE and Nintendo that led to the resolution of their conflict (recital 122). NCL's [...] issued the instructions lifting the boycott of supplies to THE only after [...] had decided to do so after having met with THE <sup>(411)</sup>.

## 2. LEGAL ASSESSMENT

2.1. *Jurisdiction*

- (239) The agreements and concerted practices applied to all Member States together with Norway and Iceland for which Bergsala was the exclusive independent distributor.
- (240) In so far as the practices affected competition and trade between Member States, Article 81 of the Treaty is applicable. As regards the effects on competition in Norway and Iceland and the effects on trade between the Community and these countries as well as between these two countries, Article 53 of the EEA Agreement applies.
- (241) Nintendo Corporation Ltd/Nintendo of Europe GmbH's distribution policy as expressed by practices involving Nintendo Corporation Ltd/Nintendo of Europe GmbH

and independent distributors and wholesalers and retailers of the Products had an appreciable effect on competition and trade between Member States. Consequently, according to Article 56(1)(c) and (3) of the EEA Agreement, the Commission is competent in the present case to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

2.2. *Application of Article 81 of the Treaty and Article 53 of the Agreement on the European Economic Area (EEA Agreement)*2.2.1. *Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement*

- (242) Under Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States or between contracting parties and which have as their object or effect the prevention, restriction or distortion of competition within the common market or within the territory covered by the EEA agreement, respectively, shall be prohibited.

2.2.2. *Undertakings*

- (243) Article 81(1) of the Treaty <sup>(412)</sup> applies to agreements, decisions of associations and concerted practices between undertakings. The term 'undertaking' is not defined in the Treaty. The Court of First Instance of the European Communities has found that 'Article 81(1) of the Treaty is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision' <sup>(413)</sup>
- (244) For the purposes of Article 81(1) of the Treaty the following undertakings within the meaning of Article 81(1) of the Treaty can be identified in this case:
- Nintendo Corporation Ltd, Nintendo of Europe GmbH, Nintendo of America Inc, Nintendo Netherlands BV (now called Nintendo Benelux BV), Nintendo France SARL, Nintendo España SA, Nintendo Belgium SPRL, and Nintendo UK Ltd,

<sup>(409)</sup> Page 1275.

<sup>(410)</sup> Page 1750.

<sup>(411)</sup> Page 1760.

<sup>(412)</sup> In order to prevent unnecessary repetition, any references to Article 81 of the Treaty also refer to Article 53 of the EEA Agreement.

<sup>(413)</sup> Case T-352/94 *Mo Och Domsjö AB v Commission* [1998] ECR II-1989, at paragraph 87.

- John Menzies plc and THE Games Ltd,
- Concentra — Produtos para crianças SA,
- Linea GIG SpA,
- Nortec AE,
- Bergsala AB,
- Itochu Hellas EPE and Itochu Corporation, and
- CD-Contact Data GmbH and Contact Data Belgium NV.

The customers of these undertakings, retailers and wholesalers are also undertakings for the purposes of Article 81(1) of the Treaty.

- (245) In accordance with the case-law of the Court of Justice of the European Communities <sup>(414)</sup>, Article 81(1) of the Treaty does not apply to relationships within a single economic unit or undertaking, such as those between a parent company and its dependent subsidiaries. In the present case, Article 81(1) does not apply to relationships between Nintendo Corporation Ltd, the parent, and its wholly-owned subsidiaries (Nintendo España SA, Nintendo Netherlands BV, Nintendo France SARL, Nintendo of Europe GmbH, Nintendo of America Inc and, at some stage, Nintendo UK Ltd (recital 103) and Nintendo Belgium SPRL (recital 190)). The same applies to relationships between CD-Contact Data GmbH and Contact Data Belgium NV, to relationships between Itochu Corporation and its (ultimately) wholly-owned subsidiary Itochu Hellas EPE, and to relationships between John Menzies plc and its wholly-owned subsidiary THE Games Ltd.

### 2.2.3. Agreements and/or concerted practices

- (246) Article 81(1) of the Treaty prohibits agreements, decisions of associations and concerted practices.
- (247) An agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. The agreement need not be made in writing, no formalities are necessary, and no contractual penalties or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties.
- (248) It is well established in the case-law that ‘in order for there to be an agreement within the meaning of 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’ <sup>(415)</sup>.

- (249) According to established case-law, a decision on the part of an undertaking which constitutes unilateral conduct is not caught under the prohibition provided by Article 81(1) of the Treaty <sup>(416)</sup>.
- (250) However, the Court of Justice has made clear 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 constituting an agreement within the meaning of Article 81(1) of the Treaty <sup>(417)</sup>.
- (251) In this respect the Court of First Instance clarified in *Adalat*, paragraph 71, that a ‘distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article 85(1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers’.
- (252) Article 81(1) of the Treaty <sup>(418)</sup> ‘draws a distinction between the concept of “concerted practices” and that of “agreements between undertakings” or of “decisions by associations of undertakings”; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.’ <sup>(419)</sup>

<sup>(414)</sup> See Judgment of the Court of Justice in Case C-73/95 P *Viho v Commission*, [1996] ECR I-5457.

<sup>(415)</sup> Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 112 and Joined cases 209/78 to 215/78 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, paragraph 86 and the Judgment of the Court of First Instance in Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 256 and Judgment of the Court of First Instance in case T-41/96 *Bayer AG v Commission (Adalat)*, paragraph 67.

<sup>(416)</sup> Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 38; Joined cases 25/84 and 26/84 *Ford and Ford Europe v Commission* [1985] ECR 2725, paragraph 21; Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 56.

<sup>(417)</sup> Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium and Others v Commission* [1979] ECR 2435, paragraph 28 to 30; *AEG*, paragraph 38; *Ford and Ford Europe*, paragraph 21; Case 75/84 *Metro v Commission (Metro II)* [1986] ECR 3021, paragraphs 72 and 73; Case C-277/87 *Sandoz v Commission* [1990] ECR I-45, paragraphs 7 to 12; Case C-70/93 *BMW v ALD* [1995] ECR I-3439, paragraphs 16 and 17; *Adalat*, paragraph 72.

<sup>(418)</sup> The case-law of the Court of Justice and Court of First Instance in relation to the interpretation of Article 81 of the EC Treaty also applies to Article 53 of the EEA Agreement. References to Article 81 of the EC Treaty therefore apply also to Article 53 of the EEA Agreement.

<sup>(419)</sup> (Judgment in Case 48/69, *ICI v Commission* [1972] ECR 619 at paragraph 64).

- (253) The criteria of coordination and cooperation laid down by the case-law of the Court, 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 a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market <sup>(420)</sup>.
- (254) Thus conduct may fall under Article 81(1) of the Treaty as a 'concerted practice' even where the parties do not explicitly subscribe to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour <sup>(421)</sup>.
- (255) Although, in terms of Article 81(1) of the Treaty, the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period <sup>(422)</sup>.
- (256) It is not necessary, particularly in the case of a complex infringement of long duration, for the Commission to characterise it as exclusively one or other of those forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible realistically to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while, considered in isolation, some of its manifestations could accurately be described as one rather than the other. It would indeed be artificial analytically to subdivide what is clearly a continuing common enterprise having one and the same overall objective into several discrete forms of infringement. Such a common enterprise might therefore be an agreement and a concerted practice at the same time <sup>(423)</sup>.
- (257) In *Limburgse Vinyl Maatschappij*, paragraph 696, the Court of First Instance has stated that '[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article 81 of the Treaty'.
- (258) In its judgment in Case C-49/92 P *Commission v Anic* <sup>(424)</sup>, the Court of Justice, upheld the judgment of the Court of First Instance and pointed out that it follows from the express terms of Article 81(1) of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.
- (259) A complex agreement may properly be viewed as a single continuing infringement for the time frame in which it existed. The term 'agreement' can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments.
- (260) Although an agreement is a joint enterprise, each participant in the agreement may play its own particular role. One or more participants may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur. The precision and scope of the arrangements may vary over time and among participants; they may be progressively expanded to cover more markets or their mechanisms may be adapted or strengthened. However, this will not prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.

<sup>(420)</sup> Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission* [1975] ECR 1663.

<sup>(421)</sup> See judgment of the Court of First Instance in Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 256.

<sup>(422)</sup> Judgment in Case C-199/92P *Hüls v Commission*, [1991] ECR page I-4287 paragraph 158-166.

<sup>(423)</sup> See *Hercules*, paragraph 264.

<sup>(424)</sup> [1999] ECR I-4125, paragraph 81.

2.2.4. *The nature of the alleged infringement in the present case*

- (261) The alleged infringement consisted of a combination of agreements and concerted practises, different means employed over a considerable lapse of time to achieve the common objective of restricting parallel trade. Together, they form a single and continuous infringement that comprised the three categories of agreements and/or concerted practices distinguished hereafter.

2.2.4.1. *The agreements and/or concerted practices between Nintendo Corporation Ltd/Nintendo of Europe GmbH and its independent distributors*

- (262) Agreements existed between Nintendo Corporation Ltd/Nintendo of Europe GmbH and John Menzies plc (recitals 109 to 111), Concentra — Produtos para crianças SA (recital 211), Linea GIG SpA (recital 215), Nortec AE (recital 207), Bergsala AB (recital 222), Itochu Corporation (recital 204) and CD-Contact Data GmbH (recital 194). By virtue of all the distribution agreements with all of these distributors, Nintendo Corporation Ltd/Nintendo of Europe GmbH agreed on exclusive distributorship in the contract territories.
- (263) Each exclusive distributor (whether a Nintendo subsidiary or independent distributor) was supposed to prevent parallel exports, whether directly, or indirectly via their customers, from its territory.
- (264) Those restrictions were initially incorporated in formal distribution agreements. The formal distribution agreements between Nintendo Corporation Ltd/Nintendo of Europe GmbH and Concentra — Produtos para crianças SA (in force from May 1991 until February 1997, recital 210), Nintendo Corporation Ltd/Nintendo of Europe GmbH and Linea GIG SpA (in force between October 1992 until February 1997, recital 215) and Nintendo Corporation Ltd/Nintendo of Europe GmbH and Itochu Corporation (in force from May 1991 until February 1997, recitals 204 and 205) expressly restricted the ability of the parties and their customers to parallel export the Products.
- (265) The two formal distribution agreements between John Menzies plc and Nintendo Corporation Ltd/Nintendo of Europe GmbH which were in force from 4 August 1995 until 1 January 1997 restricted John Menzies plc to selling only to retailers who sold the products to final consumers. Parallel trade was severely restricted as a

result because resale of the products by John Menzies plc's customers to other traders, including those established outside the United Kingdom, was prohibited (recitals 110, 114, 137 and 139) <sup>(425)</sup>.

- (266) In addition, whereas the formal distribution agreements ostensibly allowed John Menzies plc itself to supply (EEA-based companies) outside its territory in response to unsolicited requests for export sales (recital 111), in practice John Menzies plc was barred from engaging in passive export sales (recitals 162 to 169).
- (267) Indeed, the infringement also meant that distributors would not sell products themselves to foreign-based companies, even in those cases where the contractual terms in the formal distribution agreements between Nintendo Corporation Ltd/Nintendo of Europe GmbH and the exclusive distributor provided for such a right.
- (268) Controlling parallel trade became a priority for the parties when, during early 1995, parallel trade from the United Kingdom increased substantially. In response, Nintendo Corporation Ltd/Nintendo of Europe GmbH conceived a detailed plan to implement the infringement including the active enforcement of the related restrictions on parallel trade (recitals 104 to 106). The conception of the plan by Nintendo Corporation Ltd/Nintendo of Europe GmbH did not constitute a change in the object of restricting parallel trade; it merely provided for the stricter enforcement and reinforcement of the measures restricting parallel trade already in place. Therefore, as events in 1995 are part of the same pre-existing single continuous infringement, Itochu Corporation's argument <sup>(426)</sup> that the infringement only started in 1995 must be rejected.
- (269) The detailed plan conceived by Nintendo Corporation Ltd/Nintendo of Europe GmbH to combat parallel trade was discussed with Nintendo Corporation Ltd/Nintendo of Europe GmbH's (then existing) independent distributors. Only in Bergsala AB's case can participation in those discussions be established for certain, namely at a meeting around 15 May 1995. This meeting resulted in Nintendo Corporation Ltd/Nintendo of Europe GmbH instructing NUK, its United Kingdom subsidiary, to cut off supplies to a parallel trader (recitals 105 to 107).

<sup>(425)</sup> In this sense, John Menzies' agreement was very similar the those of Concentra, Itochu and Linea Compare recitals 110, 114, 137, 138 (John Menzies) with recitals 204 and 205 (Itochu) recital 211 (Concentra) and recital 215 (Linea).

<sup>(426)</sup> Itochu's reply to the Statement of Objections paragraph 33.

- (270) John Menzies plc and Nintendo Corporation Ltd/Nintendo of Europe GmbH agreed by April 1996 on an intensified and more extensive collaboration to prevent further parallel exports from the United Kingdom. This collaboration complemented the already existing provisions restricting parallel exports in the formal distribution agreement between John Menzies plc and Nintendo Corporation Ltd/Nintendo of Europe GmbH (recital 265). As a result, the control over parallel trade was strengthened to a substantial degree (recitals 118, 121, 127 to 131 and 143).
- (271) The aim of preventing parallel trade from John Menzies plc's territory was an essential element of the relationship between Nintendo Corporation Ltd/Nintendo of Europe GmbH and John Menzies plc as can be demonstrated most clearly by pointing to the consequences of non-compliance. Nintendo Corporation Ltd/Nintendo of Europe GmbH did not hesitate to use its leverage as a supplier to its independent distributors to enforce (continuing) compliance with the plan such as, if need be, by withholding supplies (recitals 119 to 126).
- (272) When the formal distribution agreements that hindered parallel trade between Nintendo Corporation Ltd/Nintendo of Europe GmbH, on the one hand, and John Menzies plc, Linea GIG SpA and Concentra — Produtos para crianças SA, on the other, were replaced by different formal distribution agreements that did not contain restrictions on parallel trade (recitals 109 and 110, 214 and 215, 210 and 211), the infringement nonetheless persisted, characterised by the shared understanding that exclusive distributors had to prevent parallel trade from their territories. Their practice on the market did not change and the practical collaboration and information exchange with the object of restricting parallel exports went on as before. Indeed, Nintendo Corporation Ltd/Nintendo of Europe GmbH<sup>(427)</sup>, John Menzies plc<sup>(428)</sup>, Bergsala AB<sup>(429)</sup>, Concentra — Produtos para crianças SA<sup>(430)</sup> and Linea GIG SpA<sup>(431)</sup> (that is, all parties for which this consideration is relevant<sup>(432)</sup>) have all admitted that their participation in the infringement lasted until the end of December 1997 and, thus, accepted that they continued the infringement after the formal distribution agreements restricting parallel exports to which they were a party expired.
- (273) When Nintendo Corporation Ltd/Nintendo of Europe GmbH devised the detailed plan to combat parallel trade, also a system of practical collaboration and information exchange on parallel trade developed, comprising Nintendo Corporation Ltd/Nintendo of Europe GmbH, John Menzies plc, Concentra — Produtos para crianças SA, Linea GIG SpA, Bergsala AB, Itochu Corporation and, later, Nortec AE and CD-Contact Data GmbH. This system complemented the already existing provisions restricting parallel exports in formal distribution agreements (recitals 264 and 265). The complementary system of collaboration and information exchange was fully developed when Nintendo of Europe GmbH did its first systematic investigation by questionnaire on 1 April 1996 on the incidence of parallel trade with the EEA (recital 234).
- (274) The information exchange and practical collaboration entailed that, if territories were affected by parallel imports, the distributor in the territory where they occurred would report to Nintendo Corporation Ltd/Nintendo of Europe GmbH (or, occasionally, directly to the distributor in the territory of origin). Nintendo Corporation Ltd/Nintendo of Europe GmbH would forward the information to the distributor in the territory where the parallel exports were supposed to have originated, who would then investigate whether one of its customers was the source of the parallel exports. Often the necessary information would be collected through close collaboration between distributors, using various methods, such as test purchases, dedicated tagging systems, statistical methods, special questionnaires and surveys among distributors.
- (275) The distributor reporting the presence of parallel imports in its territory would and could expect that appropriate measures would be taken and such imports stopped. A distributor that found that its territory was the source of parallel exports would take appropriate measures to prevent those exports. A variety of measures were used to stop parallel exports such as export bans, the imposition of general terms and conditions of sale, formal distribution agreements, informal 'undertakings', supply blockages and restrictions and threats to the same end.
- (276) By means of that system, all parties collaborated to trace sources of parallel exports and reported on such incidents to Nintendo Corporation Ltd/Nintendo of Europe GmbH or directly to the distributor in the territory where the parallel trade was suspected to have originated<sup>(433)</sup>.

<sup>(427)</sup> See Nintendo's reply to the Statement of Objections paragraph 6.2.

<sup>(428)</sup> See John Menzies' reply to the Statement of Objections, cover letter point 4 and paragraph 9.2.

<sup>(429)</sup> See Bergsala's reply to the Statement of Objections paragraph 1.3 together with paragraph 358 of the statement of objections.

<sup>(430)</sup> See Concentra's reply to the Statement of Objections paragraph 3 together with paragraph 358 of the statement of objections.

<sup>(431)</sup> See Linea's reply to the statement of objections paragraph 2 together with paragraph 358 of the Statement of Objections.

<sup>(432)</sup> This consideration is irrelevant for Itochu (as it stop being an exclusive distributor for Nintendo when its formal distribution agreement expired) and for Nortec and Contact (as their participation to the infringement commenced after February 1997, when the last formal distribution agreement restricting parallel trade had expired).

<sup>(433)</sup> Recitals 107, 124, 127, 131, 140, 142, 143, 145, 146, 147 to 150, 155 to 157, 160, 180, 181, 184, 185, 187, 191, 192, 193, 195, 197, 200, 201, 206, 208, 209, 213, 217 to 221, 223, 224, 225 to 227.

- (277) The practical collaboration and information exchange greatly facilitated the tracing of the sources of parallel trade, thereby turning the plan into an efficient tool for the restriction of such trade. The fact that the practical collaboration and information exchange served the object of tracing parallel trade and traders can be demonstrated most clearly by the role played by surveys and questionnaires in verifying John Menzies plc's compliance (recitals 122, 124, 140 and 234).
- (278) The original formal distribution agreements also established a mechanism enabling Nintendo Corporation Ltd/Nintendo of Europe GmbH to monitor compliance with the provisions restricting parallel trade. Until February 1997, the formal distribution agreements between Nintendo Corporation Ltd/Nintendo of Europe GmbH and Linea GIG SpA (recital 215) and Itochu Corporation (recitals 204 and 205) and Concentra — Produtos para crianças SA (recital 211) stipulated that those distributors had to agree with Nintendo Corporation Ltd/Nintendo of Europe GmbH on a list of customers in their territory that could be supplied. Concentra — Produtos para crianças SA, Linea GIG SpA and Itochu Corporation were contractually obliged to submit a list of current customers to Nintendo Corporation Ltd/Nintendo of Europe GmbH at regular intervals. John Menzies plc was also required to do so at regular intervals until 31 December 1996 (recitals 166 and 167). Even if these contractual provisions were not applied in practice, as John Menzies plc (recital 167) and Itochu Corporation<sup>(434)</sup> have argued, this does not modify the conclusion that John Menzies plc and Itochu Corporation have participated in an agreement having as an object the restriction of competition. In addition, for an agreement/concerted practice to exist it is not necessary for it to have been implemented or given effect<sup>(435)</sup>.
- (279) The practical collaboration and information exchange between distributors for tracing parallel trade and traders also made it easier to verify that all participants were complying with the plan, i.e. included effective measures to restrict parallel trade from their territories.
- (280) Nintendo Corporation Ltd/Nintendo of Europe GmbH also carried out dedicated surveys and used statistical methods for the same purpose of monitoring compliance, including compliance within the Nintendo group itself (recitals 230 to 235).
- (281) Newly appointed distributors were simply integrated into the pre-existing plan. This is what happened with John Menzies plc, CD-Contact Data GmbH and Nortec AE, which did not become distributors until August 1995, April 1997 and April 1997 respectively. In this respect, John Menzies plc<sup>(436)</sup> and Nortec AE<sup>(437)</sup> have not contested that they entered into an agreement/concerted practise with Nintendo Corporation Ltd/Nintendo of Europe GmbH restricting parallel trade from their respective territories (recitals 110, 207 to 209). CD-Contact Data GmbH also entered into an agreement/concerted practise with Nintendo Corporation Ltd/Nintendo of Europe GmbH with the object of restricting parallel trade from its territory, Belgium and Luxembourg (recital 195).
- (282) Export bans only need to be enforced in low-price territories and not in high price territories. However, even if certain distributors did not have to take steps to prevent exports from their territories they were fundamental to the infringement's efficient operation, as they regularly warned Nintendo Corporation Ltd/Nintendo of Europe GmbH that parallel imports were taking place into their respective territories (recitals 274 to 276).
- 2.2.4.2. Agreements and/or concerted practices between John Menzies plc and its respective customers
- (283) John Menzies plc required from certain customers written undertakings that supplies from John Menzies plc would be resold only to final consumers in the United Kingdom and various other conditions such as a condition that the products would not be exported, would not be resold to exporters and/or would be resold only to final consumers (recitals 114, 132 to 139, 143 and 158).
- (284) The relationship between John Menzies plc and its customers must be seen together with the agreements and/or concerted practices between Nintendo Corporation Ltd/Nintendo of Europe GmbH, Itochu Corporation, Concentra — Produtos para crianças SA, Linea GIG SpA, Bergsala AB, John Menzies, Nortec AE and CD-Contact Data GmbH as part of the same overall plan of restricting parallel trade. By imposing export bans or conditions with equivalent effect on their customers John Menzies plc gave effect to these agreements and/or concerted practices.

<sup>(434)</sup> Itochu's reply to the statement of objections, footnote 12.

<sup>(435)</sup> Case C-49/92 *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 122.

<sup>(436)</sup> Cover letter to John Menzies' reply to the Statement of Objections together with paragraphs 81 and 268 of the Statement of Objections.

<sup>(437)</sup> Nortec's reply to the Statement of Objections paragraph 3 together with paragraphs 81 and 189 and 190 of the statement of objections.

2.2.4.3. Agreement and/or concerted practices between Nintendo Corporation Ltd/Nintendo of Europe GmbH and its retail and wholesale customers

(285) In Germany (from January 1991 until August 1995, recitals 199 and 200), Belgium (from January 1994 until April 1997, recital 191) and Spain (from January 1993 until April 1997, recitals 171 to 179), Nintendo Corporation Ltd/Nintendo of Europe GmbH imposed explicit export bans or equivalent conditions on its customers, retailers and wholesalers, by means of formal distribution agreements or general terms and conditions for sale. In Germany and Spain, after the deletion from their written terms and conditions of the export ban imposed on their customers, Nintendo of Europe GmbH and Nintendo España SA continued trying to make supplies conditional upon their respective customers not exporting the products. In the Netherlands (recitals 182 and 183) Nintendo Netherlands BV tried to make supplies dependent upon customers not reselling the products to parallel traders. By these means, customers of the Nintendo group were prevented from exporting the products or reselling the products to parallel exporters. Furthermore, Nintendo's subsidiaries acting as exclusive distributors on numerous occasions provided information to stop parallel trade into their respective territories (recitals 107, 124, 140, 175 to 177, 179, 180 and 181, 184, 185, 187, 192, 193).

(286) By imposing export bans or equivalent conditions or trying to do so Nintendo Corporation Ltd/Nintendo of Europe GmbH gave effect to the infringement in which it participated together with Bergsala AB, Itochu Corporation, Nortec AE, Linea GIG SpA, Concentra — Produtos para crianças SA, John Menzies plc and CD-Contact Data GmbH. Exports to the territories of the other participants were prevented. By the same means, parallel trade between the territories assigned to different subsidiaries of Nintendo Corporation Ltd/Nintendo of Europe GmbH was prevented.

2.2.5. The parties awareness of the unlawful conduct of the other participants

(287) As the Court of First Instance held in its recent judgment in the case *Sigma v Commission* <sup>(438)</sup>: 'It is settled case-law that an undertaking which has participated in a multiform infringement of the competition rules by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 85(1) of the Treaty and was intended to help bring about the infringement as a

whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk'.

(288) For Nintendo Corporation Ltd/Nintendo of Europe GmbH <sup>(439)</sup>, Itochu Corporation (recital 206), Linea GIG SpA (recitals 145 and 146, 217), Nortec AE (recitals 208 and 209) and John Menzies plc (recital 160) direct evidence exists that when each transmitted information about parallel imports into its territory, it knew that that information would be or had already been used by other distributors to control parallel exports from their territory.

(289) Restricting parallel exports would only be rational if the distributor knew or at least expected that, should parallel trade into his own territory occur, other distributors would act likewise and protect his territory in turn <sup>(440)</sup>.

(290) Bergsala AB (recitals 223 and 224), CD-Contact Data GmbH (recital 195), John Menzies plc (recitals 131, 132, 133, 134, 143 to 150, 156) and Nintendo Corporation Ltd/Nintendo of Europe GmbH (recitals 172 to 179, 184, 191, 199 and 200) upon receipt of information that their territory was the source of parallel trade, knew that they were to trace the source of parallel export and take appropriate measures. It is therefore reasonable to say that when they were to report on parallel trade into their territories, they expected that the same meaning would be attached to that information by other distributors, but took that risk. Bergsala AB (recitals 225 to 227), CD-Contact Data GmbH (recital 197), John Menzies plc (recital 160) and Nintendo Corporation Ltd/Nintendo of Europe GmbH (recitals 127, 128, 131, 147 to 150, 156, 157, 175, 177, 178, 180, 184, 187, 191, 195, 206, 209, 223, 224) did all report parallel trade to other parties.

(291) Similarly, John Menzies plc (recitals 109 to 111), Concentra — Produtos para crianças SA (recitals 211 and 213), Itochu Corporation (recitals 204 and 205) and Linea GIG SpA (recital 215) had agreed to a formal distribution agreement that meant that parallel trade from their territories had to be restricted. Consequently, when they reported on parallel trade into their territories, they could foresee that that information would be used to stop that parallel trade, but took that risk.

<sup>(439)</sup> See for instance the instances referred to in recital 237, the conflict between John Menzies and Nintendo, its resolution and the collaboration that developed subsequently (recitals 130 and 131, 147 to 150, 155 to 158), Nintendo's contacts with Contact (recitals 195 and 197) and Bergsala (recitals 223 and 224).

<sup>(440)</sup> The existence of a mutual interest among distributors was even recognised by John Menzies (recitals 160 and 161), despite the fact that, in view of the low prices to trade in the United Kingdom, it was unlikely to gain in the short run from the infringement.

<sup>(438)</sup> Case T-28/99 *Sigma v Commission*, Judgment of 20 March 2002, not yet reported, paragraph 40. *Anic*, paragraph 203).



(292) In early 1995, when Nintendo Corporation Ltd/Nintendo of Europe GmbH conceived the detailed plan to stop parallel trade, the problem of parallel trade had been with Bergsala AB (recitals 107 and 225). It can therefore be reasonably argued that Bergsala AB was privy to the infringement<sup>(441)</sup>. Indeed, Bergsala AB knew that the object of its collaboration with Nintendo Corporation Ltd/Nintendo of Europe GmbH was to keep Europe clean from parallel trade (recitals 222 to 224).

(293) Despite the fact that, on account of its central position, it was obliged to display particular vigilance in order to prevent practices contrary to the competition rules<sup>(442)</sup>, Nintendo Corporation Ltd/Nintendo of Europe GmbH played a central role in the infringement. It coordinated the efforts to control parallel trade, monitored the compliance of the participants with the infringement and, when necessary, would take disciplinary action to ensure (continuing) compliance by the participants (recitals 228 to 238). Also as a result of this leading role, Nintendo Corporation Ltd/Nintendo of Europe GmbH was privy to all manifestations of the infringement.

(294) Direct evidence that all undertakings were aware or could reasonably have known of the illegal behaviour of other distributors are the questionnaires that Nintendo of Europe GmbH sent on 1 April 1996 (recitals 124 and 213) and 29 May 1996 (recitals 140 and 213) to its independent distributors.

(295) The addressees of the questionnaires knew or, at least, could have known that their conduct contributed to the implementation of a coordinated effort having as the object the elimination of parallel traded products throughout the EEA.

(296) Finally Nintendo Corporation Ltd/Nintendo of Europe GmbH<sup>(443)</sup>, John Menzies plc<sup>(444)</sup>, Linea GIG SpA<sup>(445)</sup>, Nortec AE<sup>(446)</sup>, Bergsala AB<sup>(447)</sup>, and Itochu Corporation<sup>(448)</sup> have not disputed in their replies to the Statement of Objections that the infringement in which they participated is one single and continuous infringement. However, some of the more detailed arguments of these undertakings, as well as CD-Contact Data GmbH and

Concentra — Produtos para crianças SA are discussed below.

#### 2.2.6. Arguments by the parties about the existence of agreements and about the scope of the infringement

##### John Menzies plc

(297) John Menzies plc has admitted that its conduct infringed Article 81(1) of the Treaty from February 1996 and throughout 1997. With regard to the period before February 1996, John Menzies plc argues that its commercial policies that hindered parallel trade (reference was made to *THE Games commercial policy regarding authorised customer*, referred to in recitals 112 and 113 above) formed no part of any arrangement to restrict parallel trade but unilateral conduct not falling within the scope of Article 81(1) of the Treaty.

(298) John Menzies plc admits that this policy restricted parallel trade<sup>(449)</sup>. The issue therefore is not whether John Menzies plc had, prior to February 1996, a policy of restricting parallel exports but whether this policy was, as John Menzies plc claims, purely unilateral.

(299) John Menzies plc's behaviour prior to February 1996 cannot be characterised as purely unilateral.

(300) First, it should be recalled that John Menzies plc's various formal distribution agreements with Nintendo Corporation Ltd/Nintendo of Europe GmbH, valid from 4 August 1995 until 1 January 1997<sup>(450)</sup>, contained provisions to the effect that John Menzies plc could only sell to retailers specialising in sales to consumers. This contractual obligation upon John Menzies plc is identical to the first policy statement in *THE Games commercial policy regarding authorised customer* (recital 112). Those provisions severely restricted parallel exports because they implied that resale of the Products by John Menzies plc's customers to other traders, including those established outside the United Kingdom, was prohibited. They were identical to John Menzies plc's third policy statement (recitals 112 and 113).

<sup>(441)</sup> Anic, paragraphs 95 and 96.

<sup>(442)</sup> Judgment in Joined Cases 100 and 103/80 *SA Musique Diffusion Française v Commission* [1983] ECR 1825, paragraph 75.

<sup>(443)</sup> Nintendo's reply to the statement of objections paragraphs 2.1 and 2.2.

<sup>(444)</sup> John Menzies reply to the statement of objections, cover letter, point 4 on page 2, and paragraph 4.4.

<sup>(445)</sup> Linea's reply to the statement of objections paragraphs 2 and 4.2.

<sup>(446)</sup> Nortec's reply to the statement of objections paragraphs 2 and 3.

<sup>(447)</sup> Bergsala's reply to the statement of objections paragraphs 1, 2 and 4.1.

<sup>(448)</sup> Itochu's reply to the Statement of Objections, section C.

<sup>(449)</sup> See John Menzies' reply to the Statement of Objections, page 8 as well as the policy statement itself (pages 861 to 863).

<sup>(450)</sup> Up to 1 January 1998, John Menzies had three successive agreements with Nintendo of which the first two, the one valid from 4 August 1995 until 31 December 1995 and the one valid from 1 January 1996 until 31 December 1996, contained the provisions referred to here. (The former agreement was, due to a clerical error, erroneously dated in footnote 88 of the Statement of Objections. However, it was clearly referred to as the basis of the Commission's assertion that John Menzies participated in the plan from August 1995 onwards (see recital 358(b)). The dates are also correctly referred to in paragraph 259 of the Statement of Objections).

- (301) Thus, John Menzies plc's policy restricting parallel exports was not unilaterally adopted and planned but represented the implementation of contractual provisions restricting parallel exports. Those provisions are an integral part of formal distribution agreements which constitute agreements within the meaning of Article 81(1) of the Treaty. The existence of a 'concurrence of wills' between John Menzies plc and Nintendo Corporation Ltd/Nintendo of Europe GmbH flows from John Menzies plc's signing of its formal distribution agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH on 4 August 1995 <sup>(451)</sup>.
- (302) Secondly, the correspondence dated 14 August 1995 (recital 114), between [...] and John Menzies plc expressly mentions that John Menzies plc's refusal to supply for wholesale purposes is a direct consequence of John Menzies plc's formal distribution agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH. The same letter shows that John Menzies plc interpreted the term 'authorised retailers' (a term used in John Menzies plc's formal distribution agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH) as meaning that it was only entitled to supply retailers, and not for wholesale purposes. Thus, a direct causal link can be established between the provisions restricting parallel exports in John Menzies plc's agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH, *THE Games commercial policy regarding authorised customer* and John Menzies plc's conduct vis-à-vis its customers <sup>(452)</sup>.
- (303) Thirdly, John Menzies plc's assertion that, prior to February 1996, the *THE Games commercial policy regarding authorised customer* restricting parallel trade was imposed unilaterally is also inconsistent with the events concerning [...] (recital 165). Even prior to the boycott by Nintendo Corporation Ltd/Nintendo of Europe GmbH in February 1996, John Menzies plc was not prepared to enter into a direct business relationship with [...] but was ready to do so via an intermediary established within the United Kingdom, namely [...]. This way of proceeding rendered John Menzies plc's involvement with export sales more opaque and, hence, less visible to Nintendo Corporation Ltd/Nintendo of Europe GmbH.
- (304) Consequently, John Menzies plc's assertions <sup>(453)</sup> that its relations with [...] had nothing to do with a policy of restricting parallel trade and that the *THE Games commercial policy regarding authorised customer* was unilaterally imposed must be rejected <sup>(454)</sup>.
- (305) Despite John Menzies plc's claims that its formal distribution agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH only took effect on 15 September 1996, the date of 4 August is retained as this date is clearly mentioned in John Menzies plc's first formal distribution agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH restricting parallel trade as the effective date of this agreement as well as the date at which the agreement was signed <sup>(455)</sup>.
- (306) John Menzies plc further argues that it is not appropriate to characterise the relationship between itself and the independent distributors as an agreement and/or concerted practice for the purposes of Article 81(1) of the Treaty, independent of the agreements and/or concerted practices with Nintendo Corporation Ltd/Nintendo of Europe GmbH. It argues that, if an agreement/concerted practice existed that could be viewed in isolation from the one with Nintendo Corporation Ltd/Nintendo of Europe GmbH, the question must be asked why it was with Nintendo Corporation Ltd/Nintendo of Europe GmbH that the independent distributors raised their concerns with respect to parallel trade from the United Kingdom, rather than with John Menzies plc direct. Essentially, John Menzies plc argues that it only entered into an agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH.
- (307) John Menzies plc has not contested that it participated in one single and continuous infringement.
- (308) For a finding that a party participated in a wider infringement, it is sufficient to establish that it knew or should have known about its broader scope; it is not necessary to establish that the undertaking has entered into agreement with all participants to the infringement. John Menzies plc knew or could have known that the infringement had an EEA-wide dimension, as is clear from:
- John Menzies plc's letter to Nintendo of America Inc dated 21 February 1996, which referred to Europe (recital 118),

<sup>(451)</sup> See page 297A, 313 and also 298A.

<sup>(452)</sup> A direct causal link between John Menzies' agreement and its behaviour towards its customers can also be deduced from the correspondence between John Menzies and [...] and John Menzies and [...], that took place subsequent to February 1996. (recitals 137, 138 and 144).

<sup>(453)</sup> John Menzies' reply to the statement of objections, section 2 and Annex A, reference to paragraph 83.

<sup>(454)</sup> As it was not unilateral set, *THE Games commercial policy regarding authorised customer* does not bear resemblance, as John Menzies argued (John Menzies' reply to the statement of objections, Section 1), to the conduct of Bandai UK against which John Menzies had previously complained about to the Monopoly and Mergers Commission.

<sup>(455)</sup> See page 297A, 313 and also 298A.

- Nintendo of Europe's GmbH's letter of 1 April 1996, which referred to parallel traders throughout the EEA (recital 127),
- John Menzies plc's reply of 4 April 1996 in which John Menzies plc expressed its willingness to collaborate in the interest of the 'total European Market place' (recital 127),
- John Menzies plc's letter of 11 April 1996, in which John Menzies plc recognised the impact that parallel trade would have on mainland Europe and expressed its intention to stop parallel trade into mainland Europe (recital 130),
- John Menzies plc's letter of 24 May 1996 in which again reference was made to the continental European market (recital 132),
- Nintendo of Europe's letter to John Menzies plc in which John Menzies plc was complimented for its efforts to stop parallel trade on behalf of 'everybody around Europe' (recital 142),
- John Menzies plc's letter to Nintendo of Europe GmbH dated 19 April 1996 that referred to their other European partners, meaning both other subsidiaries of the Nintendo group and independent distributors (recital 143).

#### Linea GIG SpA

- (309) Linea GIG SpA has submitted that it never took direct steps to monitor the incidence of parallel trade within its territory<sup>(456)</sup>. This argument has to be rejected: Linea GIG SpA regularly provided information to NOE and John Menzies plc regarding parallel imports into Italy (recitals 124, 128, 145 and 146, 155, 156, 217 to 221).

Concentra — Produtos para crianças, SA, Itochu Corporation and Nortec AE

- (310) Concentra — Produtos para crianças, SA<sup>(457)</sup> has admitted that its formal distribution agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH infringed Article 81(1) of the Treaty. However, it denies that it had intention to restrict parallel imports into its territory when it communicated information regarding such parallel imports to Nintendo Corporation Ltd/Nintendo of Europe GmbH. As indicated in recitals 291 and 294 above, there is direct and indirect evidence which shows that this company participated in a single and continuous infringement.

- (311) Itochu Corporation<sup>(458)</sup> and Nortec AE<sup>(459)</sup> have argued that the motive underlying the correspondence in which they reported to Nintendo Corporation Ltd/Nintendo of Europe GmbH the existence of parallel trade was not to restrict parallel trade, but to improve their purchase price from Nintendo Corporation Ltd/Nintendo of Europe GmbH.

- (312) It has already been established that these three undertakings knew or could reasonably have known about the overall infringement. Thus, they merely explain the reasons why they committed it. This is of course irrelevant for the purpose of applying Article 81(1) of the Treaty.

#### CD-Contact Data GmbH

- (313) CD-Contact Data GmbH<sup>(460)</sup> has also argued that it tried to get a better purchase price from Nintendo Corporation Ltd/Nintendo of Europe GmbH. The same consideration as in recital 312 also applies in this case.
- (314) CD-Contact Data GmbH has further contested that it entered into an agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH that exports from its territory were to be prevented.
- (315) CD-Contact Data GmbH considers that, in view of the Court of First Instance's judgment in *Adalat*, no agreement for the purposes of Article 81(1) existed between CD-Contact Data GmbH and Nintendo Corporation Ltd/Nintendo of Europe GmbH.
- (316) In *Adalat*, the Court of First Instance investigated the conditions that have to be met for finding an agreement for the purposes of Article 81 of the Treaty in cases where there is no direct documentary evidence of the conclusion of an agreement (*Adalat* paragraph 71). However, in this instance, CD-Contact Data GmbH's explicitly acquiesced to Nintendo Corporation Ltd/Nintendo of Europe GmbH's expectations as laid out in CD-Contact Data GmbH's letter to NOE dated 28 October 1997.
- (317) This letter shows that CD-Contact Data GmbH and Nintendo Corporation Ltd/Nintendo of Europe GmbH had arrived at a 'concurrence of wills' no exports from CD-Contact Data GmbH's territory were to occur and that CD-Contact Data GmbH would monitor supplies to customers, such as [...]\*, from whom exports could be expected (recital 195).

<sup>(456)</sup> Linea's reply to the Statement of Objections paragraph 3.

<sup>(457)</sup> Concentra's reply to the Statement of Objections paragraph 4.

<sup>(458)</sup> Itochu's reply to the Statement of Objections paragraph 30.

<sup>(459)</sup> Nortec's reply to the Statement of Objections, paragraph 3.

<sup>(460)</sup> Contact's reply to the Statement of Objections paragraph 30.

- (318) In support of its argument that no agreement for the purposes of Article 81(1) of the Treaty existed, CD-Contact Data GmbH submits that it had no interest in entering into an agreement to restrict parallel trade from its territory. However, this argument must be rejected because by agreeing to do so, CD-Contact Data GmbH ensured that other parties would continue to restrict parallel trade, thereby preventing parallel imports into its own territory.
- (319) CD-Contact Data GmbH has further submitted evidence that it did not adhere to the agreement that parallel trade was to be restricted<sup>(461)</sup>. According to CD-Contact Data GmbH, it exported the products itself and/or sold products to companies that it knew would export the same products.
- (320) It is established case-law that there is no need to take account of the concrete effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market<sup>(462)</sup>.
- (321) CD-Contact Data GmbH has nevertheless accepted that the Court of First Instance's decisions in Case T-7/89 *Hercules v Commission*<sup>(463)</sup> and Case T-9/89 *Hüls v Commission*<sup>(464)</sup> imply that a party to an agreement that infringes Article 81 of the Treaty does not cease to be a party to that agreement merely because its subsequent actual behaviour is not in all respects in line with the anti-competitive agreement. Likewise, CD-Contact Data GmbH accepts that it follows from this case-law that a mere inner reservation does not suffice to show that an undertaking that takes part in an anti-competitive horizontal agreement was not party to that agreement<sup>(465)</sup>.
- (322) CD-Contact Data GmbH argues that the Commission cannot rely in the present case on the above case-law on the ground that the cases referred to concern horizontal agreements whereas the present case concerns a vertical agreement.
- (323) When assessing the concept of 'agreement', the Community judicature does not make a distinction between horizontal and vertical infringements. In paragraph 67 of the judgment in *Adalat*, a case which concerned the concept of agreements in the context of vertical relationships, the Court of First Instance used an identical definition of the concept of agreement and relies on the same case-law as the Commission has cited here.
- (324) It is well established case-law that Article 81(1) refers in a general way to all agreements that distort competition within the single market and does not distinguish between agreements between competitors operating on the same level in the economic process and those between non-competing undertakings operating at different levels<sup>(466)</sup>.
- (325) CD-Contact Data GmbH further argues that there is a material difference between horizontal and vertical infringements. In a horizontal anti-competitive agreement, all parties stand to gain from the arrangement, even, or perhaps especially, those undertakings that do not ultimately act in accordance with the anti-competitive arrangement and decide, for instance, in a price-fixing cartel, to sell at a lower price than agreed. By contrast, CD-Contact Data GmbH argues, parties to a vertical infringement have no possibility of 'cheating'.
- (326) However, the fact that CD-Contact Data GmbH allowed parallel exports to occur shows that it 'cheated' itself. An undertaking which, despite its concertation with other parties, pursues a independent policy on the market may simply be trying to use the agreement for its own benefit<sup>(467)</sup>.
- (327) CD-Contact Data GmbH also claims that the judgment of the Court of First Instance in Case T-9/89 *Hüls v Commission*<sup>(468)</sup>, in particular paragraphs 125 to 127, supports the view that undertakings can exculpate themselves merely by providing a plausible explanation that their presence at a meeting where anti-competitive agreements were concluded was without anti-competitive intent. CD-Contact Data GmbH argues that the fact that it had no commercial interest in restricting parallel trade and, indeed, the fact that it allowed parallel trade from its territory to occur constitutes in itself evidence that there was no 'will' on its part to participate in the anti-competitive arrangement and constitutes exculpatory evidence in this context.
- (328) In fact, also in *Hüls*, at paragraphs 126 and 127, the Court of First Instance expressly rejected the argument that actual conduct in the market constitutes exculpatory evidence. The Court of First instance held in *Sarrio*<sup>(469)</sup> that 'even assuming that the applicant's conduct on the market was not in conformity with the conduct agreed, that in no way affects its liability for an infringement of Article 85(1) of the Treaty'. Consequently, CD-Contact Data GmbH cannot rely on the fact that, in reality, it allowed parallel exports to occur.

<sup>(461)</sup> Contact's reply to the Statement of Objections paragraph 12 and annexes 1 and 2 as well as Contact's submission of 6 November 2000 under 'question 1' and 'question 2' and annexes 1 to 4.

<sup>(462)</sup> Judgment in Case T-148/89 *Tréfilunion SA v Commission* [1995] ECR 1995 page II-1063 paragraph 79, referred to in Judgment in Case T-308/94 *Cascades SA v Commission*, [2002] ECR II-813, paragraph 106.

<sup>(463)</sup> [1991] ECR II-1711.

<sup>(464)</sup> [1992] ECR II-499.

<sup>(465)</sup> Contact's submission of 6 November 2000, under 'question 5'.

<sup>(466)</sup> Judgment in Joined Cases 56 and 58/64 *Consten and Grundig v Commission*, [1966] ECR English Special Edition p. 299.

<sup>(467)</sup> Judgment in Case T-308/94 *Cascades v Commission*, paragraph 230.

<sup>(468)</sup> [1992] ECR II-499.

<sup>(469)</sup> Judgment in Case T-334/94 *Sarrió SA v Commission* [1998] ECR II-1439.

(329) CD-Contact Data GmbH finally argues that, since it was economically dependent on Nintendo Corporation Ltd/Nintendo of Europe GmbH<sup>(470)</sup>, it had no option but to leave them under the impression that it would not export or would make sales that could lead to exports. Nintendo products accounted for more than 50 % of CD-Contact Data GmbH's turnover in the relevant period.

(330) CD-Contact Data GmbH has submitted no concrete evidence that Nintendo Corporation Ltd/Nintendo of Europe GmbH actually exerted effective pressure on CD-Contact Data GmbH to comply with its instructions regarding parallel exports. In any event, even if CD-Contact Data GmbH were able to show that Nintendo Corporation Ltd/Nintendo of Europe GmbH exerted effective pressure, it would not be able to rely on that circumstance to justify having committed an infringement of Article 81(1) of the Treaty. Instead of participating in the anti-competitive conduct, it could always have complained to the competent authorities about the pressure brought to bear on it and lodged a complaint with the Commission under Article 3 of Regulation No 17<sup>(471)</sup>. Therefore CD-Contact Data GmbH's arguments have to be rejected.

#### 2.2.7. Restriction of competition

(331) The infringement **had the object** of restricting all passive sales, regardless of whether these were the result of unsolicited requests from EEA-based companies outside the exclusive territory or the result of exports by wholesaler/retailers established within such a territory<sup>(472)</sup>. Contrary to the Commission's policy in respect of exclusive distribution that passive sales are always to be allowed, the territorial protection awarded to exclusive distributors was thereby enhanced to a state of absolute territorial protection and in each territory all competition facing the distributor of the products in that territory was eliminated. As a result, intra-brand competition was severely restricted and the single market was partitioned.

(332) On the basis of the above, it is concluded that the agreements and/or concerted practices that formed the infringement constitute together a restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. Because their object is to restrict competition, it is not necessary to consider their actual effects upon competition in order

to conclude that Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply.

(333) In any event, the following elements show that the restriction had an appreciable effect on competition:

— the active enforcement of the infringement throughout the Community and the EEA. There have been many examples where parallel exports from a territory were hindered (recitals 114, 132 to 142, 144, 157, 158, 165, 172, 174, 178, 183, 191, 199, 200, 206 and 209),

— the practical arrangements to trace parallel exports and exporters that took place between Nintendo Corporation Ltd/Nintendo of Europe GmbH and all its independent distributors (recitals 107, 124, 127, 131, 140, 142, 143, 144 to 146, 147 to 150, 155 to 157, 160, 180 and 181, 184, 185, 187, 191, 192, 193, 195, 197, 200, 201, 206, 208 and 209, 213, 217 to 221, 223, 224 and 225 to 227), reinforced by the ongoing controls with a permanent character introduced by John Menzies plc (recitals 133 and 149) and Nintendo Corporation Ltd/Nintendo of Europe GmbH (recitals 230 and 232) in order to monitor whether their customers were exporting products,

— the high value of sales of the products and the significant position of Nintendo Corporation Ltd/Nintendo of Europe GmbH in that trade.

#### 2.2.8. Effect on trade between Member States and between EEA Contracting Parties

(334) The infringement had an effect upon trade between Member States and between Contracting Parties of the EEA.

(335) Article 81(1) of the Treaty is aimed at agreements with, like the present one, might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Equally, Article 53(1) of the EEA Agreement is directed at agreements that undermine the realisation of a homogeneous European Economic Area.

(336) The infringement, by its nature, had the object of partitioning the internal market because limited cross-border sales of the products. Thus it had an effect on trade between Member States<sup>(473)</sup>.

<sup>(470)</sup> Contact's reply to the Statement of Objections, paragraphs 16, 17, 29 and 35.

<sup>(471)</sup> See *Hüls*, paragraph 128, and *Tréfilunion*, paragraph 58.

<sup>(472)</sup> However, to the extent that this behaviour concerned a Nintendo subsidiary that would not supply customers established in a territory in which another Nintendo subsidiary had been made responsible for the distribution of the products, it does not fall within the scope of Article 81(1) (see *VIHO*).

<sup>(473)</sup> See Judgment, 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 *Ahlström and others v Commission* (Woodpulp), [1993] ECR I-1307, paragraph 176 or Judgment in Case 19/77 *Miller v Commission* [1978] ECR 131.

### 2.2.9. Inapplicability of Regulation (EEC) No 1983/83

(337) Each EEA-based subsidiary of the Nintendo group and each independent Nintendo distributor was awarded an exclusive territory. It is generally accepted that exclusive distribution agreements can contribute to technical and economic progress by improving the distribution of goods. Exclusive distribution systems in force during the period relevant for this Decision could therefore, in principle, have benefited from the block exemption provided for in Regulation (EEC) No 1983/83, as last amended by Regulation (EC) No 1582/97<sup>(474)</sup> then in force.

(338) However, it is well established in the case-law of the Court of Justice, starting with the judgment of 13 July 1966, in *Joined Cases 56 and 58/64, Grundig-Consten*<sup>(475)</sup> that enhancing the exclusivity granted by virtue of distribution agreements, to a state of absolute territorial protection, by completely prohibiting distributors from making any sales outside the territories assigned to them or from selling to customers who intend to export, is not indispensable to realise the potential benefits of an exclusive distribution system. Instead, in regard to the goods in question territories are hermetically sealed off, making interpenetrating of national markets impossible, thereby, bringing to nought economic integration.

(339) The agreements which are the subject of the present proceedings constitute however a restriction of parallel trade by object and thus cannot be covered by Regulation (EEC) No 1983/83.

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

(340) 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).

(341) No such exemption has been requested in the present case, as the agreement was not notified. The agreements would not, in any case, have qualified for an exemption. Exclusive territorial protection constitutes a hardcore restriction that did not result in any improvement of the distribution of the products. Nor did consumers get any benefit. Exclusive territorial protection impeded consumers from taking advantage of the single market and from benefiting from the price differences between

Member States. Absolute territorial protection is not indispensable to a distribution system based on exclusive territories either.

### 2.2.11. The duration of the infringement

(342) By letter dated 23 December 1997, Nintendo Corporation Ltd/Nintendo of Europe GmbH informed the Commission that it was willing to collaborate with the Commission's proceedings (recital 94). A mere expression of intent to collaborate is insufficient to conclude that the infringement has come to an end.

(343) One of the prime reasons why intra-EEA parallel trade in the products occurred, was Nintendo Corporation Ltd/Nintendo of Europe GmbH's policy of price competition in the United Kingdom alone<sup>(476)</sup>, where the Products met substantially more competition than elsewhere in the EEA<sup>(477)</sup>. Nintendo Corporation Ltd/Nintendo of Europe GmbH charged substantial lower prices for supplies to John Menzies plc than to other exclusive distributors; resulting in parallel exports from the United Kingdom to other EEA territories (recitals 117, 129, 130, 154 and 155). However, by the latest on 5 January 1998<sup>(478)</sup>, Nintendo Corporation Ltd/Nintendo of Europe GmbH aligned its prices for supplies to exclusive distributors in the EEA, eliminating one of the prime causes of intra-EEA parallel trade.

(344) It is therefore concluded that Nintendo Corporation Ltd/Nintendo of Europe GmbH had terminated the infringement by January 1998. This does not indicate that other parties to the infringement also terminated the infringement.

### 2.2.11.1. Nintendo Corporation Ltd/Nintendo of Europe GmbH

(345) In January 1991, NOE introduced general terms and conditions that restricted parallel exports from Germany (recital 199). Nintendo Corporation Ltd/Nintendo of Europe GmbH has not contested that they infringed Article 81(1) of the Treaty from January 1991 until the end of December 1997<sup>(479)</sup>.

<sup>(476)</sup> Nintendo initially contended that the prices at which the products were supplied from Japan to subsidiaries and independent distributors in Europe were similar. Nintendo attributed the price differentials and the parallel trade that developed to (undefined) local market conditions and exchange rate fluctuations within Europe (pages 1640 and 1641). However, Nintendo has not contested the Commission's rebuttal of this argument in the Statement of Objections (see recitals 324 to 337 thereof).

<sup>(477)</sup> Pages 881 and 882 (letter from John Menzies to NOA dated 22 February 1996), 890 (letter from John Menzies to NOA dated 24 May 1996) pages 975 to 979 and 1135 to 1147. See also John Menzies' business plan (pages 1163 to 1187) as presented to NOE which contains various references to strong price competition in the United Kingdom.

<sup>(478)</sup> Page 1622.

<sup>(479)</sup> Nintendo's reply to the Statement of Objections paragraph 6.2.

<sup>(474)</sup> OJ L 214, 6.8.1997, p. 27.

<sup>(475)</sup> [1966] ECR 429.

## 2.2.11.2. John Menzies plc

- (346) John Menzies plc has recognised that its conduct infringed Article 81(1) of the Treaty already from February 1996 and continued to do so until the end of December 1997<sup>(480)</sup>. For the time period from 4 August 1995 until February 1996, the Commission has demonstrated that John Menzies plc had participated in the infringement.

## 2.2.11.3. Concentra — Produtos para crianças, SA

- (347) Concentra — Produtos para crianças, SA has recognised<sup>(481)</sup> that its participation to the infringement lasted from 14 May 1991 (recital 211) until the end of December 1997 (recital 213).

## 2.2.11.4. Linea GIG SpA

- (348) Linea GIG SpA has recognised<sup>(482)</sup> that its participation in the infringement lasted from 1 October 1992, until the end of December 1997.

## 2.2.11.5. Nortec AE

- (349) Nortec AE participated in the infringement from 23 October 1997 until the end of December 1997 (recitals 207 to 209).

## 2.2.11.6. Bergsala AB

- (350) Bergsala AB's participated in the infringement from 15 May 1995 until December 1997 (recitals 105 to 107, 225 and 269).

## 2.2.11.7. Itochu Corporation

- (351) The effective date of Itochu Corporation's formal agreement restricting parallel trade with Nintendo Corporation Ltd/Nintendo of Europe GmbH (recitals 204 and 205) is 14 May 1991<sup>(483)</sup>. However, Itochu Corporation has argued that it only signed this agreement on 16 December 1991<sup>(484)</sup> and that, consequently, there was no agreement for most of 1991. As there is no evidence to establish participation of Itochu Corporation before December 1991, Itochu Corporation's participa-

tion lasted from 16 December 1991 until 28 February 1997, when Itochu Corporation's distributorship came to an end (recital 204).

## 2.2.11.8. CD-Contact Data GmbH

- (352) CD-Contact Data GmbH participated in the infringement from 28 October until December 1997 (recitals 194 to 197).

## 2.3. Addressees of the Decision

- (353) It must be established what legal entity or entities are the appropriate addressee(s) of this Decision within each of the undertakings in the sense of Article 81(1) of the Treaty defined in recital 244. In the case of Concentra — Produtos para crianças, SA, Linea GIG SpA, Nortec AE and Bergsala AB, they themselves must be the addressees of this Decision, as they constitute in themselves the 'undertaking' for the purposes of Article 81(1) of the Treaty. For the other undertakings defined in recital 244, a choice has to be made between the various legal entities that constitute these undertakings.

- (354) As regards the attribution of liability within an undertaking consisting of several legal entities, the Court of Justice has established that 'the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company'<sup>(485)</sup>.

- (355) In the case of wholly-owned subsidiaries, the decision is addressed to the parent company given that the parent exerts a decisive influence over the subsidiary's commercial policy<sup>(486)</sup>.

- (356) Nintendo Corporation Ltd, John Menzies plc and CD-Contact Data GmbH have not contested that they exert decisive influence over their wholly-owned subsidiaries Nintendo of Europe GmbH, Nintendo Netherlands BV, Nintendo France SARL, Nintendo España SA, Nintendo Belgium SPRL, Nintendo UK Ltd and Nintendo of America Inc., respectively THE Games Ltd and Contact Data Belgium NV.

<sup>(480)</sup> John Menzies' reply to the Statement of Objections, paragraph 4.

<sup>(481)</sup> Concentra's reply to the Statement of Objections paragraph 3.

<sup>(482)</sup> Linea's reply to the Statement of Objections paragraphs 2 and 5.

<sup>(483)</sup> Page 157.

<sup>(484)</sup> Page 181.

<sup>(485)</sup> Judgment in Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission*, [2000] ECR I-9925, paragraph 26.

<sup>(486)</sup> Judgment in AEG paragraph 50, judgment in *Stora* paragraphs 22 to 30; see also the opinion of Advocate General Mischo in *Stora*, paragraph 48.



- (357) Nintendo of Europe GmbH submitted the reply to the Statement of Objections for and on behalf of itself and of Nintendo Corporation, Nintendo of America Inc., Nintendo France SARL, Nintendo Benelux BV (formerly called Nintendo Netherlands BV) and Nintendo España SA. The Statement of Objections was only addressed to Nintendo Corporation Ltd, Nintendo of Europe GmbH merely receiving a copy. Nintendo Corporation Ltd/Nintendo of Europe GmbH has not contested that the Commission could address this Decision to Nintendo Corporation Ltd. It has, however, requested the Commission to address the Decision not to Nintendo Corporation Ltd, but to Nintendo of Europe GmbH. Alternatively, it requested that the Decision be sent to Nintendo of Europe GmbH and possibly other EEA subsidiaries of the Nintendo group, Nintendo of America Inc as well as Nintendo Corporation Ltd. It argued that this would better reflect the respective responsibilities of the various companies within the Nintendo group.
- (358) Given that Nintendo of Europe GmbH replied to the Statement of Objections, addressed to Nintendo Corporation Ltd, also in the name of Nintendo Corporation Ltd, the Commission considers that both Nintendo Corporation Ltd and Nintendo of Europe GmbH had the opportunity to make their views known on the facts and legal assessment provided in the Statement of Objections. The same does not apply for the other Nintendo subsidiaries. This Decision should therefore be addressed to Nintendo Corporation Ltd and Nintendo of Europe GmbH.
- (359) With regard to CD-Contact Data GmbH, although Activision Inc. acquired control over it in 1998, CD-Contact Data GmbH has existed for the entire duration of the infringement and still exists today as a separately identifiable legal entity<sup>(487)</sup> Therefore the Decision should be addressed to CD-Contact Data GmbH.
- (360) The reply to the Statement of Objections was submitted by Itochu Corporation on behalf of Itochu Corporation and Itochu Hellas EPE. In its reply, Itochu Corporation maintains that the Commission may not impute the conduct of Itochu Hellas EPE to Itochu Corporation, since Itochu Hellas EPE acted autonomously. To substantiate that contention Itochu refer to the facts that (1) Itochu Corporation was only indirectly the parent company of Itochu Hellas EPE, (2) Itochu Hellas EPE's direct parent company, Itochu Europe plc only supervised its activities and financial performance but did not intervene in its day-to-day operations, (3) it was Itochu Hellas EPE that signed the distribution agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH, (4) Itochu Hellas EPE employed autonomously a relatively high number of local staff and (5) Itochu Hellas EPE created a network dedicated to the sale of the products by investing in a Nintendo fan club and in merchandising in retail outlets, an activity distinct of the core business of the Itochu group of companies<sup>(488)</sup>.
- (361) First, the reply to the Statement of Objections was given in the name of Itochu Corporation as well as of Itochu Hellas EPE. Second, during the administrative procedure, Itochu Corporation was the sole interlocutor of the Commission (*Stora* paragraphs 27 to 29). Finally, the fact that Itochu Hellas EPE signed the distribution agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH, that Itochu Europe plc 'only' supervised Itochu Hellas EPE's (marketing) activities and financial performance without interfering in its day-to-day activities and that it employed substantial numbers of personnel, by themselves, does not constitute evidence of Itochu Hellas EPE's autonomous behaviour on the market. Consequently, Itochu Corporation should be the addressee of the Decision.

## 2.4. Remedies

### 2.4.1. Article 3(1) of Regulation No 17 and Article 3(1) of EEA Act No 362 R 17

- (362) Pursuant to Article 3(1) of Regulation No 17 and Article 3(1) of EEA Act No R 17, the Commission may, if an infringement has been established, require the undertakings concerned to bring the infringement to an end.
- (363) As indicated in recital 343 above, Nintendo Corporation/Nintendo Europe GmbH terminated the infringement in January 1998.
- (364) However, the infringement also affected the customers of Nintendo Corporation Ltd/Europe GmbH and those of independent distributors, on whom various restrictions hindering parallel imports and exports were imposed. Even if Nintendo Corporation Ltd/Nintendo of Europe GmbH and its distributors no longer apply such restrictions, customers who have not been so informed could still consider themselves bound by the restrictions on parallel exports and imports of the products.
- (365) Nintendo Corporation Ltd/Nintendo of Europe GmbH, John Menzies plc and Bergsala AB have sent letters to all their customers informing them in writing of their rights to parallel export and import the products and to purchase and resell parallel-traded products. Only Concentra — Produtos para crianças, SA and Nortec AE have not done so.

<sup>(487)</sup> See Contact's submission of 16 November 2001.

<sup>(488)</sup> Itochu's reply to the Statement of Objections, paragraphs 23 and 24 as well as its submission of 26 November 2001.



2.4.2. Article 15(2) of Regulation No 17 and Article 15(2) of EEA Act No 362 R 17

2.4.2.1. General considerations

(366) Under Article 15(2) of Regulation No 17 and Article 15(2) of EEA Act No 362, the Commission may, by decision, impose upon undertakings fines from EUR 1 000 to EUR 1 000 000 or a sum in excess thereof, but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement.

(367) In fixing the amount of the fine, the Commission must have regard to the gravity and duration of the infringement.

(368) The role played by each undertaking party to the infringement should be assessed on an individual basis. In particular, the fine imposed should reflect any aggravating or attenuating circumstances.

(369) Fines should be imposed not only on Nintendo Corporation Ltd/Nintendo of Europe GmbH but also on Nintendo's independent distributors John Menzies plc, Concentra — Produtos para crianças, SA, Linea GIG SpA, Nortec AE, Bergsala AB, Itochu Corporation and CD-Contact Data GmbH.

(370) CD-Contact Data GmbH contends that, in its case, the Commission should not impose a fine because CD-Contact Data GmbH did not actively collaborate with Nintendo Corporation Ltd/Nintendo of Europe GmbH, upon which it was economically dependent. Contact refers to previous Commission Decisions<sup>(489)</sup> in which, it submits, the Commission did not impose fines on undertakings in similar circumstances.

(371) However, the Commission has wide discretionary powers when determining the amount of fines to be imposed, including the power not to impose a fine at all or merely a symbolic fine or, on the contrary, to raise the general level of fines<sup>(490)</sup>. Consequently, as sufficient evidence exists to hold CD-Contact Data GmbH responsible for an infringement of Article 81(1) of the Treaty, a fine should be imposed on CD-Contact Data GmbH.

<sup>(489)</sup> In particular, Tipp-ex (Commission Decision 87/406/EEC in Cases IV/31.192 and IV/31.507 (OJ L 222, 10.8.1987 p. 1)), Tretorn and others (Commission Decision 94/987/EC in Cases IV/32.948 — IV/34.590 (OJ L 378, 31.12.1994 p. 45)) and Volkswagen I (Commission Decision 98/273/EC in Case IV/35.733 (OJ L 124 of 25.4.1998 p. 60)).

<sup>(490)</sup> SA Musique Diffusion Française, [1983] ECR, paragraph 109.

2.4.2.2. The basic amount of fines

(372) The basic amount of the fine is determined, according to the gravity and duration of the infringement.

Gravity

(373) In its assessment of gravity, the Commission takes account of the nature of the infringement, the actual impact on the market (where this can be measured) and the size of the geographical market.

Nature of the infringement

(374) It follows from the facts that the infringement had the object of enhancing the territorial protection awarded to exclusive distributors to a state of absolute territorial protection and eliminating in each territory all competition with the distributor of the products in that territory. It also had the object of artificially partitioning the single market, thereby jeopardising a fundamental principle of the Treaty<sup>(491)</sup>. Restrictions of this kind are by their nature very serious violations of Article 81(1) of the Treaty and 53(1) of the EEA Agreement.

(375) Events described in the present case constitute a single continuous and deliberate infringement of Articles 81(1) of the Treaty and 53(1) of the EEA Agreement.

(376) Nintendo Corporation Ltd/Nintendo of Europe GmbH, Linea GIG SpA, Itochu Corporation, Concentra — Produtos para crianças, SA, CD-Contact Data GmbH and Nortec AE<sup>(492)</sup> infringed Article 81(1) of the Treaty and Article 53 of the EEA Agreement intentionally.

(377) John Menzies plc has argued that by participating in the infringement, it merely infringed Article 81 of the Treaty negligently as it was unaware of the illegal nature of its behaviour. However, the Court of Justice has held (*inter alia*, in its judgment in *Miller*), that it is not necessary for an undertaking to have been aware that it was infringing Article 81 of the Treaty for an infringement to be regarded as having been committed intentionally. It is sufficient that the undertaking was aware that the contested conduct had as its object the restriction of competition. As it has been demonstrated that John Menzies plc was aware that its behaviour had the object of restricting competition (recitals 118, 130, 131, 145, 146, 147 to 149 and 206), it infringed Article 81 of the Treaty intentionally.

<sup>(491)</sup> SA Musique Diffusion Française, [1983], ECR 1825, paragraph 107.

<sup>(492)</sup> See Nortec's reply to the Statement of Objections, page 3.

(378) Bergsala AB<sup>(493)</sup> has argued that it had confused legal intra-EEA parallel trade with unlawful trade in counterfeit Products and unauthorised Products (Products imported into the EEA without Nintendo Corporation Ltd/Nintendo of Europe GmbH's consent). However, the file contains a number of questionnaires sent by Nintendo of America Inc. and the replies from Nintendo subsidiaries and independent distributors regarding the legal proceedings in which the latter were involved<sup>(494)</sup>. Bergsala AB's Finnish subsidiary, Bergsala OY, in replies to Nintendo of America dated 15 November 1995 and 2 December 1997<sup>(495)</sup> also clearly distinguishes counterfeit and grey trade. Consequently, Bergsala AB's contention that it had confused the relevant legal concepts is not tenable. In any event, Bergsala AB cannot maintain that it was unaware that its behaviour had the object of restricting competition (recitals 223, 224 and 227). Thus, it is concluded that Bergsala AB infringed Article 81 of the Treaty intentionally.

(379) Nintendo Corporation Ltd/Nintendo of Europe GmbH<sup>(496)</sup> also argued initially that it had confused legal intra-EEA parallel trade with unlawful trade in counterfeit products and unauthorised products (products imported into the EEA without Nintendo Corporation Ltd/Nintendo of Europe GmbH's consent). However, Nintendo Corporation Ltd/Nintendo of Europe GmbH has not contested the Commission's rebuttal that, on the contrary, the documents on the file support the view that Nintendo Corporation Ltd/Nintendo of Europe GmbH was perfectly aware of these legal distinctions (which ultimately it has expressly admitted<sup>(497)</sup>) that, in any event, what matters is that a party has the deliberate aim of restricting competition, not that it knows which specific legal provision is being infringed<sup>(498)</sup>.

(380) The present infringement constituted by its nature a very serious infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

#### The actual impact of the infringement

(381) According to Itochu Corporation, the fact that game cartridges compatible with Nintendo game consoles are not only available from Nintendo Corporation Ltd/Nintendo of Europe GmbH but also from independent game publishers should be taken into account when assessing the effects of the infringement, as this would mitigate the effects of the restriction of parallel trade in the products<sup>(499)</sup>. However, there is no evidence in the file supporting that the availability of game cartridges of

other manufacturers than Nintendo Corporation Ltd/Nintendo of Europe GmbH reduced the impact of the infringement.

(382) The infringement had the object of restricting parallel trade within the EEA. Events described in the factual part show that parties took steps to carefully implement it. On that basis, the infringement had a significant impact on the market.

#### The size of the relevant geographical market

(383) The infringement restricted parallel trade throughout the entire EEA (recitals 333 and 118, 126, 127, 130, 132, 142 and 143).

#### Conclusion on gravity

(384) After taking account of the nature of the infringement its impact on the market and the fact that it restricted parallel trade throughout the EEA, it must be concluded that the undertakings concerned have committed a very serious infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, for which the likely fine is above EUR 20 million.

#### Differential treatment

(385) Where a single and continuous infringement involves several undertakings, it might be necessary in some cases to apply weightings to the amounts determined within each of the categories of gravity in order to take account of the specific weight of each undertaking and, accordingly, the real impact of its offending conduct on competition, particularly when there is considerable disparity between the sizes of the undertakings committing infringements of the same type.

(386) In this case, the considerable disparity in the size of the undertakings participating in the infringement justifies differential treatment. For this purpose, undertakings concerned can in principle be divided into three groups established according to the relative importance of each firm with regard to Nintendo Corporation Ltd/Nintendo of Europe GmbH as a distributor of the products (and those products only) in the EEA measured on the basis of each Party's share in the total volume of Nintendo game consoles and cartridges purchased for distribution in the EEA in the year 1997, the last year of the existence of the infringement.

<sup>(493)</sup> See Bergsala's reply to the Statement of Objections paragraph 4.1.3.

<sup>(494)</sup> See pages 1686 to 1694, 1699 to 1702, 1705 and 1706, 1714 to 1716, 1720 and 1721, 1727 to 1734, 1737 to 1739, 1743, 1746 and 1806.

<sup>(495)</sup> See pages 1720 and 1806.

<sup>(496)</sup> Argument made in letter of NOA to the Commission dated 16 April 1998, page 1633.

<sup>(497)</sup> Pages 1638 to 1641.

<sup>(498)</sup> See Judgment in Case, T-66/92 *Herlitz v Commission* [1994] ECR p. II-531, paragraph 45.

<sup>(499)</sup> See Itochu's reply to Statement of Objections, paragraph 20.

(387) By using figures relating only to Nintendo Corporation Ltd/Nintendo of Europe GmbH manufactured products when assessing the parties' disparity in size, account is taken of the fact that certain parties also distributed game cartridges from manufacturers other than Nintendo Corporation Ltd/Nintendo of Europe GmbH. As all Parties were involved in the trade of both cartridges and consoles, the average of their respective market share in each product is taken as the basis for the calculation.

(388) Nintendo Corporation Ltd/Nintendo of Europe GmbH had an EEA-wide average share of sales of the Products of [...] % . It should then be placed alone in the first group.

(389) John Menzies plc had an EEA-wide average share of sales of the Products of [...] % . It should then be placed alone in the second group.

(390) Concentra — Produtos para crianças, SA, Linea GIG SpA, Nortec AE, Bergsala AB, Itochu Corporation and CD-Contact Data GmbH had EEA-wide average share of sales of the Products ranging from [...] % to [...] % . Consequently, they all should be placed in the third group.

(391) On that basis, the preliminary starting amount of the fines determined for gravity is set as follows:

— Nintendo Corporation Ltd/Nintendo of Europe GmbH: EUR 23 million,

— John Menzies plc: EUR 8 million,

— Concentra — Produtos para crianças, SA, Linea GIG SpA, Nortec AE, Bergsala AB, Itochu Corporation and CD-Contact Data GmbH: EUR 1 million.

#### The need to ensure a sufficient deterrent effect

(392) When calculating the starting amount of the fine, account should be taken of the necessity of setting the fine at a level that ensures that it has a sufficiently deterrent effect. In order to do so, it is necessary to determine whether any adjustment of the starting amount is needed for any addressee.

(393) In the present case, in the cases of Nintendo Corporation Ltd/Nintendo of Europe GmbH, John Menzies plc and Itochu Corporation, the appropriate starting point of the fine requires further upwards adjustment to take account of their size and overall resources.

(394) Itochu Corporation has argued that, as it has meanwhile ceased to be a distributor of the products, there would be no grounds to increase its fine on the ground of deterrence<sup>(500)</sup>. However, deterrence has to be ensured whether or not the undertaking, after the end of the infringement, maintained or not bilateral relations with other participants to the infringement.

(395) It is particularly necessary to ensure sufficient deterrence as regards Nintendo Corporation Ltd/Nintendo of Europe GmbH as, apart from its size (which is significantly smaller than Itochu Corporation's), also account must be taken of the fact that it is the manufacturer of the products subject of the infringement<sup>(501)</sup>.

(396) On the basis of the above, the starting amount of the fine to be imposed on Nintendo Corporation Ltd/Nintendo of Europe GmbH should be increased by a factor of 3 to EUR 69 million, the starting amount of the fine to be imposed on John Menzies plc should be increased by a factor of 1,25 to EUR 10 million and the starting amount of the fine to be imposed on Itochu Corporation should be increased by a factor of 3 to EUR 3 million.

#### Duration of the infringement

(397) Nintendo Corporation Ltd/Nintendo of Europe GmbH participated in the infringement from January 1991 until the end of December 1997 (recital 345), that is to say, for six years and 11 months. Consequently the starting amount for its fine should be increased by 65 %.

(398) John Menzies plc participated in the infringement from 4 August 1995 until the end of December 1997 (recitals 297 to 304, 346), or two years and four months. Consequently the starting amount of its fine will be increased by 20 %.

(399) Concentra — Produtos para crianças SA participated in the infringement from 14 May 1991 until the end of December 1997 (recital 347) or six years and seven months. Consequently the starting amount of its fine should be increased by 65 %.

(400) Linea GIG SpA participated in the infringement from 1 October 1992 until the end of December 1997 (recital 348) or five years and three months. Consequently the starting amount of its fine should be increased by 50 %.

(401) Nortec AE participated in the infringement from 23 October 1997 until the end of December 1997 (recital 349) or for slightly more than two months. Consequently, the starting amount of its fine should not be increased.

(402) Bergsala AB participated in the infringement from 15 May 1995 until the end of December 1997 (recital 350), or two years and seven months. Consequently the starting amount of its fine should be increased by 25 %.

(403) Itochu Corporation participated in the infringement from 16 December 1991 until 28 February 1997 (recital 351), or five years and two months. Consequently the starting amount of its fine should be increased by 50 %.

<sup>(500)</sup> Itochu's reply to the Statement of Objections paragraph 47.

<sup>(501)</sup> SA Musique Diffusion Française, [1983] ECR 1825, paragraph 75.

- (404) CD-Contact Data GmbH participated in the infringement from 28 October 1997 until the end of December 1997 (recital 352) or slightly more than two months. Consequently, the starting amount of its fine should not be increased.

#### Conclusion with regard to basic amounts

- (405) All factors regarding gravity and duration for all infringements considered together, the basic amounts of the fines to be imposed on each party are:
- Nintendo Corporation Ltd/Nintendo of Europe GmbH, EUR 113,85 million,
  - John Menzies plc, EUR 12 million,
  - Concentra — Produtos para crianças, SA, EUR 1,65 million,
  - Linea GIG SpA, EUR 1,5 million,
  - Nortec AE, EUR 1 million,
  - Bergsala AB, EUR 1,25 million,
  - Itochu Corporation, EUR 4,5 million,
  - CD-Contact Data GmbH, EUR 1 million.

#### 2.4.2.3. Aggravating circumstances

#### Nintendo Corporation Ltd/Nintendo of Europe GmbH

##### Role of leader

- (406) Nintendo Corporation Ltd/Nintendo of Europe GmbH was the leader and instigator of the infringement (recitals 228 to 238) and did not contest this<sup>(502)</sup>. With regard to this aggravating factor, it is appropriate to increase the basic amount of the fine by 50 % for Nintendo Corporation Ltd/Nintendo of Europe GmbH.

##### Continuation of infringement

- (407) In addition, Nintendo Corporation Ltd/Nintendo of Europe GmbH continued the infringement after the Commission had started the investigations in June 1995.
- (408) The Commission can take account, as an aggravating factor, of the fact that Parties deliberately continued a manifest infringement after the Commission made investigation into the conduct of the participants in an infringement, since such conduct showed that the Parties to the infringement were particularly determined to continue their infringement in spite of the risk of fines<sup>(503)</sup>. It is not required that the parties had been

expressly warned by the Commission that their conduct was illegal<sup>(504)</sup>. The fact that the basic amount of the fine takes into account the companies' knowledge that their behaviour was illegal, does not mean that the fine cannot be further increased to take account of the fact that they continued the infringement once they were aware of the Commission's investigation<sup>(505)</sup>.

- (409) Nintendo Corporation Ltd/Nintendo of Europe GmbH continued its illegal conduct after it had become aware of the Commission's investigation. In this context, it is relevant that Nintendo Corporation Ltd/Nintendo of Europe GmbH became aware of the Commission's investigation into its distribution system at the latest by June 1995 (recital 86).
- (410) Moreover Nintendo Corporation Ltd/Nintendo of Europe GmbH's particular determination in continuing the infringement after it had become aware of the Commission's investigation is shown by the following elements:

— during March and April 1996, Nintendo Corporation Ltd/Nintendo of Europe GmbH exercised pressure on John Menzies plc in order to ensure John Menzies plc's compliance with the infringement (recitals 119 to 126). As a result, parallel exports from the United Kingdom were substantially reduced after February 1996 (recitals 140 to 142),

— Nintendo Corporation Ltd/Nintendo of Europe GmbH developed the system of information exchange and practical collaboration, which was only fully in place by April 1996, resulting in a significant reinforcement of the policy to effectively monitor parallel trade and traders (recitals 273 to 280),

— as Nintendo Corporation Ltd/Nintendo of Europe GmbH has also admitted<sup>(506)</sup>, from the early part of 1995, there were more actions to limit parallel trade in Europe than in the earlier period of the infringement,

— Nintendo Corporation Ltd/Nintendo of Europe GmbH has admitted that its senior management and EEA subsidiaries were well informed about the implications under Community law of hindering parallel trade at least since the Commission started its investigation in 1995<sup>(507)</sup>,

<sup>(504)</sup> ABB, paragraph 214 and judgment of 20 March 2002 in Case T-21/99, *Dansk Rørindustri v Commission*, [2002] ECR II-1681, paragraph 153.

<sup>(505)</sup> ABB paragraph 212.

<sup>(506)</sup> Nintendo's reply to the Statement of Objections paragraph 6.4.

<sup>(507)</sup> Pages 1639 and 1640 and Nintendo's reply to the Statement of Objections paragraph 4.2.

<sup>(502)</sup> Nintendo's reply to the Statement of Objections paragraph 6.16.

<sup>(503)</sup> Judgment of the Court of First Instance of 20 March 2002 in Case T-31/99 *Asea Brown Boveri Ltd v Commission* (ABB) [2002] ECR II-1881, paragraph 211.

- Nintendo Corporation Ltd/Nintendo of Europe GmbH claims to have explained to its subsidiaries in Europe the relevant legal principles regarding the limitations on the protection afforded to exclusive distributors and passive and active export sales in the context of its conflict with John Menzies plc in early 1996 <sup>(508)</sup>,
- indeed, during June 1996, a circular was sent by Nintendo France SARL to all its customers explaining in detail what it considered to be illegal parallel imports <sup>(509)</sup>. This definition did not include the importation of products from other EEA countries, which were first placed on the market in those countries by or with the consent of Nintendo Corporation Ltd/Nintendo of Europe GmbH <sup>(510)</sup>,
- moreover, Nintendo Corporation Ltd/Nintendo of Europe GmbH has admitted <sup>(511)</sup> that the explicit instructions that Nintendo Corporation Ltd/Nintendo of Europe GmbH issued on 15 May 1997 to its EEA-based subsidiaries reminding them of the requirements of Community law regarding intra-EEA parallel trade (recital 92) were ignored by Nintendo of Europe GmbH, Nintendo France SARL and Nintendo España SA. Indeed, these Nintendo subsidiaries continued to restrict parallel trade after 15 May 1997 (recitals 153 to 157 and 176 to 179).

- (411) With regard to this aggravating factor, the basic amount of the fine should be increased by 25 % for Nintendo Corporation Ltd/Nintendo of Europe GmbH.

### John Menzies plc

#### Continuation of infringement

- (412) John Menzies plc continued the infringement after the Commission had started the investigation. It became aware of the Commission's investigation at the latest by 7 March 1997, when the Commission addressed to it a formal request for information (recital 96). John Menzies plc has admitted that its participation in the infringement had started before this date and it continued its participation until December 1997 <sup>(512)</sup>. On that basis, the basic amount of the fine for John Menzies plc should be increased by 10 %.

#### Refusal to cooperate with the Commission

- (413) On 7 March 1997, the Commission sent John Menzies plc a formal request for information pursuant to

Article 11 of Regulation No 17. John Menzies plc's submission of 25 April 1997 was its reply to that request (recital 96).

- (414) The Commission considers that John Menzies plc's reply dated 25 April 1997 gave the Commission false information, thereby misleading it with respect to the exact scope of the infringement. John Menzies plc has contested this <sup>(513)</sup>.
- (415) In its request for information of 7 March 1997, the Commission explicitly asked John Menzies plc: 'Are Dealers restricted to reselling the products to final consumers and/or other authorised dealers only? If so, can the authorised dealer in the United Kingdom and Ireland also sell to companies (...) outside the sales territory of THE? <sup>(514)</sup>'. It was also specified that the questions were prompted by information received by the Commission and indicating that dealers might have been prevented from purchasing in other Member States <sup>(515)</sup>.
- (416) In John Menzies plc's reply dated 25 April 1997, it was stated that, 'there are no restrictions imposed upon dealers by THE Games' terms and conditions for sale with respect to how that dealer may deal with Products supplied other than with respect to rental' <sup>(516)</sup>. It mentioned [...] as an example where it allowed a company to act as a subdistributor. It also stated that, 'there are no examples of credit-worthy retailers or mail order sellers being refused supply of product by THE Games (save in circumstances of limited availability of product (...))' <sup>(517)</sup>. John Menzies plc nonetheless also stated that, as a result of what it considered a unilateral established business policy, it did not sell to subdistributors. It provided a copy of this policy (referred to herein as *THE Games commercial policy regarding authorised customer* and described in recitals 112 and 113 above) with its letter of 25 April 1997.
- (417) Contrary to John Menzies plc's reply of 25 April 1997, the conflict with [...] in August 1995 concerned precisely the opposite, namely, the fact that John Menzies plc wanted to restrict [...] to selling only to retail outlets (thus, to final consumers) that were part of the same group of companies as [...], namely, the [...] group and not as a subdistributor to third companies (recital 114).

<sup>(508)</sup> Page 1640.

<sup>(509)</sup> Page 1464.

<sup>(510)</sup> Similar conclusions can be drawn from page 1546.

<sup>(511)</sup> Page 1640.

<sup>(512)</sup> John Menzies' reply to the Statement of Objections paragraph 9.2.

<sup>(513)</sup> John Menzies' reply to the Statement of Objections, Annex A point 214.

<sup>(514)</sup> Page 439, question 3.

<sup>(515)</sup> Page 437.

<sup>(516)</sup> Page 447.

<sup>(517)</sup> Page 446.

(418) In addition, contrary to John Menzies plc's reply of 25 April 1997, John Menzies plc had refused supplies to companies on the ground that they had exported the products or intended to do so and, thus, John Menzies plc did in fact impose restrictions that meant that its customers could not sell to companies outside its sales territory (recitals 132 to 139).

(419) On the basis of the above, it is concluded that John Menzies plc's behaviour has to be considered as a refusal to cooperate with the Commission that lasted until it decided to start cooperating at the beginning of January 1998. With regard to this aggravating factor, it is appropriate to increase the basic amount of the fine by a further 10 % for John Menzies plc.

(420) In conclusion, the basic amount of the fine should be increased by 20 % for John Menzies plc.

#### 2.4.2.4. Attenuating circumstances

##### An exclusively passive role in the infringement

(421) On the basis of the facts set out in recitals 212 and 213, Concentra — Produtos para crianças, SA's role must be considered as purely passive for most of the period. Consequently, it is justified to reduce the basic amount of the fine for Concentra — Produtos para crianças, SA by 50 %.

(422) Bergsala AB, Linea GIG SpA, Itochu Corporation, CD-Contact Data GmbH and John Menzies plc<sup>(518)</sup> have submitted that they had an exclusively passive or 'follow-my-leader' role in the infringement. More specifically, the following arguments were made in support of this claim.

(423) Bergsala AB refers to the leading role of Nintendo Corporation Ltd/Nintendo of Europe GmbH, the fact that when it communicated information on parallel imports into its territory, it did so in response to demands set by the Nintendo group and the fact that it was economically dependent on Nintendo Corporation Ltd/Nintendo of Europe GmbH and, thus, had little choice than to participate with infringement<sup>(519)</sup>.

(424) However, Bergsala AB's argument must be rejected because it spontaneously submitted information to Nintendo Corporation Ltd/Nintendo of Europe GmbH on parallel imports into its territory while requesting Nintendo Corporation Ltd/Nintendo of Europe GmbH to put an end to this (recital 227).

(425) Linea GIG SpA<sup>(520)</sup> submits that it had no room for autonomous decision making as it had to pay more for supplies from Nintendo Corporation Ltd/Nintendo of

Europe GmbH than other distributors, as it never participated in a meeting (unlike Bergsala AB) with the object to restrict parallel trade and as it never took any direct step to monitor parallel trade, to determine the price of the products or to prevent parallel export from or to Italy.

(426) The arguments made by Linea GIG SpA must be rejected because:

— Linea GIG SpA's argument as regards its ability for autonomous decision-making is contradicted by Linea's own statement that it attempted to keep Italy free from parallel imports (recitals 217 to 221),

— the mere fact that Bergsala AB participated at a meeting with the object of restricting parallel trade cannot, by itself, be relevant for concluding that Linea GIG SpA's conduct in relation to the infringement was passive. On the contrary evidence shows that Linea GIG SpA actively participated in the infringement (recitals 217 to 221).

(427) Itochu Corporation<sup>(521)</sup> refers to the vertical nature of the infringement and to the resulting unequal position between the different parties and Nintendo Corporation Ltd/Nintendo of Europe GmbH's leading role. Itochu Corporation claims that its relative passive role is proven by the fact that (i) its agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH restricting parallel trade was imposed on a 'take it or leave it' basis (considering the fact that other independent distributors had identical distribution agreements as evidence for this), (ii) the 'less emotional' tone in its communications regarding parallel trade and the lower frequency of these communications, in particular in comparison with Nortec AE and (iii) the continuous presence of parallel imported goods in Greece as evidence of its relative inactivity in the infringement.

(428) Itochu Corporation further argues that it was more distant<sup>(522)</sup> than other independent distributors from the infringement. In support of this contention, it refers to the fact that it performed less well as a distributor of the products, that the legality of restricting parallel trade and its marketing policies had been the subject of a conflict internal to Itochu Corporation and that it was involved itself in parallel export and imports. Moreover, it submits that its motive was not to restrict parallel trade but to improve its purchase price from Nintendo Corporation Ltd/Nintendo of Europe GmbH that maximised its profits by increasing its prices artificially in a number of territories at the expense of the independent distributors.

<sup>(518)</sup> John Menzies' reply to the Statement Objections paragraph 9.4.

<sup>(519)</sup> Bergsala's reply to the Statement of Objections paragraph 4.1.1.

<sup>(520)</sup> Linea's reply to the Statement of Objections paragraph 3.

<sup>(521)</sup> Itochu's reply to the Statement of Objections paragraphs 36 to 38 and paragraph 42.

<sup>(522)</sup> Itochu's reply to the Statement of Objections, paragraph 37.

(429) The arguments made by Itochu Corporation to support its view that their role was merely passive must be rejected because:

- the vertical nature of the infringement is a general feature of the infringement that has no relevance for assessing the actual behaviour of Itochu Corporation in relation to the infringement. Itochu Corporation's general conduct as a distributor of the products or the existence of conflict internal to the undertaking have no bearing on its actual conduct in relation to the infringement,
- the frequency of Itochu Corporation's communications regarding parallel trade or their 'emotional' tone does not have any bearing on the fact that Itochu Corporation spontaneously communicated information regarding parallel trade into its territory while knowing that this served to restrict parallel trade from other territories (recital 206). The fact that parallel imports into Greece were a recurring problem only proves that the illegal conduct of Itochu might have been unsuccessful and not that it did not participate in the infringement,
- it is clear from the documents indicated by Itochu Corporation<sup>(523)</sup> that NOE intervened to prevent Itochu from purchasing products from John Menzies plc. However, the letter dated 1 April 1996 suggests that NOE convinced Itochu Corporation not to purchase from John Menzies plc simply by arguing that, otherwise, it would have difficulties in persuading John Menzies plc to continue restricting parallel exports from the United Kingdom. Therefore, by not purchasing products from John Menzies plc, Itochu Corporation supported Nintendo Corporation Ltd/Nintendo of Europe GmbH's efforts to make John Menzies plc comply with the infringement,
- the fact that Itochu Corporation (and CD-Contact Data GmbH) itself exported, is no evidence of exclusively passive participation. The fact that an undertaking which has been proven to have participated in an infringement with the object of restricting parallel trade, does not behave on the market in the manner agreed is not necessarily a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which, despite entering into a common infringement, follows a more or less independent policy on the market may simply

be trying to exploit the infringement for its own benefit<sup>(524)</sup>,

- finally, the fact that Itochu Corporation had a formal distribution agreement identical to those of other independent distributors cannot be considered evidence that its position was passive or different from that of other independent distributors as, by itself, the fact that an agreement contains provisions with the object of restriction parallel trade is no indication as to the actual conduct shown in pursuit of that object.

- (430) CD-Contact Data GmbH refers to the fact that it supplied the products to companies established abroad and companies based in its territory while knowing that the products would be exported. It also refers to Commission Decisions<sup>(525)</sup> in which companies that were economically dependent on their suppliers but did not actively participate in the infringement were not fined.
- (431) As was already said above in recital 429, exports are not in themselves sufficient to show a passive role. An undertaking which despite entering into a common infringement follows a more or less independent policy on the market may simply be trying to exploit the infringement for its own benefit. As CD-Contact Data GmbH spontaneously communicated information to NOE on parallel imports into its territory (recital 197), its participation must be considered as active.
- (432) As regards John Menzies plc, it prevented parallel trade from the United Kingdom as part of a systematic business policy applied proactively and without the need for continuous monitoring and prompting by Nintendo Corporation Ltd/Nintendo of Europe GmbH or other independent distributors (recital 133). John Menzies plc's absence of purely passive conduct is proven by the fact that, on its own initiative, it reinforced its control by introducing a tagging system to trace parallel traders (recital 149) and requested additional information from other participants in order to facilitate its efforts to prevent parallel exports from the United Kingdom (recitals 144, 145, 146 and 147).
- (433) Consequently, it is concluded that there is no justification for reducing any fine, other than to be imposed on Concentra — Produtos para crianças, SA on the grounds of passivity of role.

<sup>(524)</sup> Case T-308/94 *Cascades SA v Commission*, [1998] ECR II-925, paragraph 230.

<sup>(525)</sup> In particular, Commission Decision 87/406/EEC in Cases IV/31.192 and IV/31.507 *Tipp-ex* (OJ L 222 of 10.8.1987, p. 1) and the Commission Decision 94/987/EC (OJ L 378, 31.12.1994, p. 45) in cases IV/32.284 — 34.590 *Tretorn* and others (with particular reference to the case of *Tenimport*) (OJ L 378, 31.12.1994, p. 45) and Commission Decision 98/273/EC in Case IV/35.733 *Volks-wagen* (OJ L 124, 25.4.1998, p. 60).

<sup>(523)</sup> See Itochu's reply to the Statement of Objections, paragraph 31.

Non-implementation in practice of the offending agreements or practices

(434) Concentra — Produtos para crianças, SA, Linea GIG SpA, Itochu Corporation and CD-Contact Data GmbH contend that they did not implement the offending practices. Linea GIG SpA<sup>(526)</sup> and Bergsala AB<sup>(527)</sup> further argue that no direct actions against third parties aiming at preventing legal parallel trade were identified in the Statement of Objections as a result of their own participation in the infringement.

(435) Ample evidence exists that parallel trade was restricted by parties to the same infringement in which the above undertakings participated. Consequently, these parties cannot claim that the infringement in which they participated was not implemented in practice. The fact that no actions against third parties aimed at preventing parallel trade were taken as a direct result of the conduct of a particular Party, cannot change this conclusion.

(436) Linea GIG SpA<sup>(528)</sup> and Itochu Corporation<sup>(529)</sup> further submit that parallel trade into their territories continued to take place. However, the mere fact that the Parties were not entirely successful in achieving the objective of the infringement is not evidence that the agreement was not implemented.

(437) Consequently, it is concluded that there is no justification for granting any reduction of fines in application of this attenuating circumstance.

Termination of the infringement as soon as the Commission intervenes

(438) Before John Menzies plc's admission of 1 December 1997, the Commission, in its request for information dated 7 March 1997, had already asked John Menzies plc about its distribution practices and possible obstruction of parallel trade (recitals 96 to 98) and as indicated in recital 412 et seq. John Menzies plc did not terminate the infringement when the Commission intervened. Consequently, there is no justification for reducing John Menzies plc's fine on the ground that it ended the infringement as soon as the Commission intervened.

(439) Linea GIG SpA has argued that, as the infringement was ended during the course of the Commission's administrative proceedings, this should be taken as an attenuating factor. Linea GIG SpA considered this circumstance

all the more applicable given that it had ceased all illegal activity before the Commission took any action against Linea GIG SpA<sup>(530)</sup>. However, in order to benefit from this attenuating circumstance the undertaking has to show that its voluntary action to terminate the infringement is directly linked to the Commission's action. As Linea GIG SpA could not prove this there are no grounds to reduce its fine in this respect.

Nintendo Corporation Ltd/Nintendo of Europe GmbH's compensation of third parties

(440) Subsequent to its decision to collaborate and at the instigation of the Commission, Nintendo Corporation Ltd/Nintendo of Europe GmbH offered substantial financial compensation to third parties identified in the Statement of Objections as having suffered financial harm as a result of Nintendo Corporation Ltd/Nintendo of Europe GmbH's activities. Offers were made to [...]\*, [...]\*, [...]\*, [...]\*, [...]\*, [...]\*, [...]\*, [...]\*, [...]\* and [...]\*<sup>(531)</sup> (recitals 123, 131, 132, 136 to 138, 147 to 150, 157, 165 and 209). Offers were accepted by all these companies, except [...]\* and [...]\*<sup>(532)</sup>.

(441) In recognition of this element, Nintendo Corporation Ltd/Nintendo of Europe GmbH should be granted a reduction of EUR 300 000.

Acting under pressure

(442) John Menzies plc<sup>(533)</sup> has contended that the Commission should take into consideration as an attenuating factor that John Menzies plc was adhering to the infringement and that failure to do so would have resulted in damaging consequences for John Menzies plc.

(443) Even if Nintendo Corporation Ltd/Nintendo of Europe GmbH had to exercise real pressure to ensure that John Menzies plc's conduct complied with the infringement (recitals 119 to 126) and even if not submitting to Nintendo Corporation Ltd/Nintendo of Europe GmbH's policy of restricting parallel trade would very likely have resulted in real and serious harm to John Menzies plc's business (recital 120), John Menzies plc should have come to the Commission and complained about Nintendo Corporation Ltd/Nintendo of Europe GmbH's behaviour, instead of committing the infringement. The fine can therefore not be reduced on these grounds.

<sup>(526)</sup> Linea's reply to the Statement of Objections, paragraph 4.2.

<sup>(527)</sup> Bergsala's reply to the Statement of Objections, paragraph 4.1.4.

<sup>(528)</sup> Linea's reply to the Statement of Objections paragraph 4.2.

<sup>(529)</sup> Itochu's reply to the Statement of Objections paragraph 43.

<sup>(530)</sup> Linea's reply to the Statement of Objections, paragraph 5.

<sup>(531)</sup> See Nintendo's reply to the Statement of Objections, Annex B.

<sup>(532)</sup> Nintendo's submission of 21 December 2001.

<sup>(533)</sup> John Menzies' reply to the Statement of Objections, paragraph 9.4.



(444) Linea GIG SpA and Itochu Corporation's contention that they had to accept Nintendo Corporation Ltd/Nintendo of Europe GmbH's formal distribution agreement restricting parallel exports on a 'take it or leave it' basis is no ground for reducing their fines. The fact that the terms were not negotiable does not mean that they did not freely choose to accept them and that they did not commit the infringement. Therefore, no reduction of the fine can be granted.

(445) Nortec AE argues that it had no other option but to infringe Article 81(1) to ensure its survival. It claims that the products parallel imported into Greece from the United Kingdom, which exploited the difference between Nortec AE's high purchase price from Nintendo Corporation Ltd/Nintendo of Europe GmbH and the price that parallel importers were able to obtain in the United Kingdom, posed a serious threat to the company.

(446) According to Nortec AE, its situation was exacerbated by the behaviour of [...]\*, which was the exclusive distributor of Sony Playstation and compatible games in Greece and also the main Greek parallel trader in Nintendo products. As Nortec AE's agreement with Nintendo Corporation Ltd/Nintendo of Europe GmbH prohibited it from distributing competing products, whereas [...]\* apparently could, Nortec AE was at a disadvantage. As evidence of [...]\*'s allegedly unfair and unlawful behaviour, Nortec AE submitted copies of two injunctions where the Single Member Athens Court of First Instance decided against [...]\* and in Nortec AE's favour.

(447) Nortec AE could have insisted that Nintendo Corporation Ltd/Nintendo of Europe GmbH reduce its prices for the products or that it relax the terms of its distribution agreement. Instead, it chose to participate in the infringement. Consequently, no reduction of the fine can be granted to Nortec AE in this respect.

#### Financial benefits from the infringement

(448) Itochu Corporation<sup>(534)</sup>, John Menzies plc<sup>(535)</sup> and CD-Contact Data GmbH<sup>(536)</sup> have argued that they may not have benefited financially to the same extent as other participants, or even at all, from the infringement. In principle, neither non-benefit from an infringement nor any economic disadvantage suffered due to participation in an infringement, constitutes attenuating circumstances. Despite CD-Contact Data GmbH's assertion,

nothing in Commission Decision 94/985/EC in the Far Eastern Freight Conference case<sup>(537)</sup> contradicts this conclusion.

(449) Consequently, there are no reasons to reduce fines on these grounds

#### Nintendo Corporation Ltd/Nintendo of Europe GmbH and John Menzies plc compliance programmes

(450) Subsequent to their decision to collaborate, Nintendo Corporation Ltd/Nintendo of Europe GmbH and John Menzies plc introduced compliance programmes in order to ensure that their business would be conducted in accordance with the law.

(451) While the Commission does indeed welcome all steps taken by undertakings to raise awareness amongst their employees of existing competition rules, these initiatives cannot relieve the Commission of its duty to penalise their very serious infringement of competition rules.

#### Non application of the Leniency Notice

(452) Nintendo Corporation Ltd/Nintendo of Europe GmbH<sup>(538)</sup>, John Menzies plc<sup>(539)</sup>, Linea GIG SpA<sup>(540)</sup>, Bergsala AB<sup>(541)</sup> and CD-Contact Data GmbH<sup>(542)</sup>, requested the application of the Commission Notice on the non-imposition or reduction of fines in cartel cases<sup>(543)</sup> (Leniency Notice).

(453) The first paragraph of the Leniency Notice limits its application to 'secret cartels' between undertakings aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports. Its application is limited to a subcategory of agreements falling under Article 81(1) of the Treaty, namely those that are secret and horizontal (as cartels are). Consequently, as the present infringement is vertical in nature, the parties cannot benefit from the application of the Leniency Notice.

#### Effective cooperation by the undertakings in the proceeding outside the scope of the Leniency Notice

(454) Effective cooperation of companies in the Commission's proceedings can be taken into account as an attenuating circumstance outside the framework of the Leniency Notice. In this respect, some firms involved in the present infringement effectively cooperated with the Commission.

<sup>(534)</sup> Itochu's reply to the Statement of Objections, paragraph 40.

<sup>(535)</sup> John Menzies' reply to the Statement of Objections, paragraph 5.

<sup>(536)</sup> Contact's reply to Statement of Objections, paragraph 37.

<sup>(537)</sup> OJ L 378, 31.12.1994, p. 17.

<sup>(538)</sup> Nintendo's reply to the Statement of Objections paragraphs 6.9 to 6.14.

<sup>(539)</sup> John Menzies' reply to the Statement of Objections, paragraph 10.

<sup>(540)</sup> Linea's reply to the Statement of Objections, paragraph 2.

<sup>(541)</sup> Bergsala's reply to the Statement of Objections, paragraph 3.

<sup>(542)</sup> Contact's reply to the Statement of Objections, paragraph 37.

<sup>(543)</sup> OJ C 207, 18.7.1996, p. 4.

John Menzies plc

- (455) John Menzies plc's submission of 13 January 1998 was spontaneously made.
- (456) John Menzies plc's submission of 13 January 1998 contained the letters dated 4 April 1996 from NOE to John Menzies plc and John Menzies plc's reply to NOE of 11 of April 1996, referred to in recitals 127 to 131 above, that contributed significantly to establishing the extensive collaboration between John Menzies plc with Nintendo Corporation Ltd/Nintendo of Europe GmbH to tighten the control of parallel exports from John Menzies plc's territory. The same submission also supplied further information on approaches made to John Menzies plc for passive export sales. The Commission considers that the submission of 13 January went beyond John Menzies plc's obligation to reply to previous formal requests for information and thus, can be considered as effective collaboration with the Commission's proceedings.
- (457) In view of the above, a reduction for effective cooperation of 40 % of the basic amount of the fine for John Menzies plc is justified.

Nintendo Corporation Ltd/Nintendo of Europe GmbH

- (458) Subsequent to Nintendo Corporation Ltd/Nintendo of Europe GmbH's admission on 23 December 1997 (recital 94), the company spontaneously provided the Commission, after John Menzies plc, with numerous documents in submissions received on 21 January, 1 April and 15 May 1998 <sup>(544)</sup>.
- (459) These documents contributed to substantiating the existence of the infringement, improving the Commission's knowledge of the facts based on its own investigations and on documents provided by John Menzies plc. The documents also helped in establishing the participation of several parties and the geographical scope of the infringement. The Commission considers that these submissions went beyond Nintendo Corporation Ltd/Nintendo of Europe GmbH's obligation to reply to previous formal requests for information and, thus, can be considered as effective collaboration with the Commission's proceedings.
- (460) Therefore in consideration of the above the effective cooperation by Nintendo Corporation Ltd/Nintendo of Europe GmbH justifies a reduction of 25 % of the basic amount of its fine.

- (461) Nintendo Corporation Ltd/Nintendo of Europe GmbH has requested the Commission to exercise its discretion such that any credit that it may receive for its voluntary cooperation should also benefit its independent distributors. This is in view of its role as instigator and leader and its wish not to seek advantage at its distributors' expense by approaching the Commission.
- (462) A reduction in the fine on grounds of cooperation during the administrative procedure is justified only if the conduct of the undertaking in question enabled the Commission to establish the existence of an infringement more easily and, where relevant, to bring it to an end <sup>(545)</sup>. Consequently, the Commission cannot accept Nintendo Corporation Ltd/Nintendo of Europe GmbH's request. In any event, nothing prevents Nintendo Corporation Ltd/Nintendo of Europe GmbH from compensating its independent distributors following this decision if it so wishes.
- (463) Apart from John Menzies plc and Nintendo Corporation Ltd/Nintendo of Europe GmbH, no other party has provided additional evidence for the case.
- (464) In summary, the basic amounts for each of the undertakings should be reduced as follows:
- Nintendo Corporation Ltd/Nintendo of Europe GmbH: 25 % plus an additional EUR 300 000,
  - John Menzies plc: 40 %,
  - Concentra — Produtos para crianças, SA: 50 %,
  - Linea GIG SpA: 0 %,
  - Nortec AE: 0 %,
  - Bergsala AB: 0 %,
  - Itochu Corporation: 0 %,
  - CD-Contact Data GmbH: 0 %.

## 2.4.2.5. Ability to pay

- (465) Itochu Corporation has argued that the Commission should take account of the fact that Itochu Hellas EPE made losses over the period during which it acted as a distributor of the products, with the exception of the period 1995 to 1996.
- (466) Taking account of the adverse financial situation of an undertaking when establishing fines would be tantamount to conferring an unjustified competitive advantage on those undertakings least well adapted to market conditions <sup>(546)</sup>. In any event, Itochu Corporation did not even provide any evidence that these losses of Itochu Hellas EPE impaired its financial situation.

<sup>(545)</sup> See judgment in Case C-297/98 P, *SCA Holding v Commission* [2000] ECR I-10101, paragraph 36.

<sup>(546)</sup> Judgment in Joined Cases 96 to 102, 104, 108 and 110/82 NV *IAZ International Belgium and others v Commission* (Navewa) [1983] ECR 3369, paragraphs 54-55.

<sup>(544)</sup> Pages 988, 1236 and 1668.

(467) Linea GIG SpA submits that the company was put into liquidation on 8 January 1999 and has applied for protection from its creditors<sup>(547)</sup>, offering to cede all the company's assets to its creditors. This request was admitted and, subsequently, ratified on 17 November 1999 by the national court in Florence. However, taking account of the adverse financial situation of an undertaking when establishing fines would be tantamount to conferring an unjustified competitive advantage on those undertakings least well adapted to market conditions.

(468) Bergsala AB deduces, from Commission Decision 85/206/EEC<sup>(548)</sup> that the Commission may decide not to impose fines where there are special circumstances. Bergsala AB has claimed that its financial situation at the time when it replied to the Statement of Objections may be taken as such a special circumstance, justifying the imposition of a zero fine, or only a token fine.

(469) It is the Commission's view that only exceptionally, could fines be adjusted to take account of real inability to pay in a specific social context.

(470) [...] <sup>(549)</sup> <sup>(550)</sup>

(471) Bergsala AB nonetheless continued to claim that its financial position meant that substantial fines could jeopardise the company's existence<sup>(551)</sup>.

(472) In order to consider this argument, on September 2002, the Commission requested detailed information on the company's financial position. After examining the company's reply, it is concluded that there is no justification for adjusting the amount of the fine in the present case.

(473) Bergsala AB has therefore not even shown its inability to pay, far less in a specific social context.

(474) Consequently, no reduction of fines to be imposed on Bergsala AB, Itochu Corporation and Linea GIG SpA can be justified on these grounds.

#### 2.4.2.6. The amount of fines imposed in the present proceedings

(475) In view of the above considerations, the final amount of the fine to be imposed on each undertaking should be as follows:

— Nintendo Corporation Ltd/Nintendo of Europe GmbH, EUR 149,128 million,

— John Menzies plc, EUR 8,64 million,

— Concentra — Produtos para crianças, SA, EUR 0,825 million,

— Linea GIG SpA, EUR 1,5 million,

— Nortec AE, EUR 1 million,

— Bergsala AB, EUR 1,25 million,

— Itochu Corporation, EUR 4,5 million,

— CD-Contact Data GmbH, EUR 1 million,

HAS ADOPTED THIS DECISION:

#### Article 1

The following undertakings have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices in the markets for game consoles and game cartridges compatible with Nintendo manufactured game consoles with the object and effect of restricting parallel exports in Nintendo game consoles and cartridges:

— Nintendo Corporation Ltd/Nintendo of Europe GmbH, from January 1991 to the end of December 1997,

— John Menzies plc, from 4 August 1995 to the end of December 1997,

— Concentra — Produtos para crianças, SA, from 14 May 1991 until the end of December 1997,

— Linea GIG SpA, from 1 October 1992 until the end of December 1997,

— Nortec AE from 23 October 1997 to the end of December 1997,

— Bergsala AB, from 15 May 1995 until the end of December 1997,

— Itochu Corporation, from 16 December 1991 to 28 February 1997,

— CD-Contact Data GmbH, from 28 October 1997 to the end of December 1997.

#### Article 2

1. The undertakings listed in Article 1 shall immediately bring to an end the infringement referred to therein, in so far as they have not already done so.

They shall refrain from any agreement or concerted practices in relation to their activities in the markets for game consoles and game cartridges compatible with Nintendo manufactured game consoles which may have the same or similar object or effect as the infringement.

<sup>(547)</sup> Pursuant to Articles 160 et seq. of Royal Decree No 267 of 16 March 1942.

<sup>(548)</sup> IV/26.870, Aluminium imports from Eastern Europe.

<sup>(549)</sup> Bergsala's reply to the Statement of Objections, paragraphs 2.6, 2.7 and section 4.2, substantiated further by Bergsala's submission of 17 November 2000.

<sup>(550)</sup> Bergsala's submission of 10 May 2001.

<sup>(551)</sup> Bergsala's submission of 10 May 2001.

2. Concentra — Produtos para crianças, SA and Nortec AE shall, within three months of the date of notification of this Decision, inform all their customers in writing of the rights of those customers to parallel-export and parallel-import Nintendo products and to purchase and resell parallel-traded Nintendo products.

#### Article 3

The following fines are imposed on the undertakings listed in Article 1 in respect of the infringement referred to therein:

- Nintendo Corporation Ltd/Nintendo of Europe GmbH, jointly and severally liable, a fine of EUR 149,128 million,
- John Menzies plc, a fine of EUR 8,64 million,
- Concentra — Produtos para crianças, SA, a fine of EUR 0,825 million,
- Linea GIG SpA, a fine of EUR 1,5 million,
- Nortec AE, a fine of EUR 1 million,
- Bergsala AB, a fine of EUR 1,25 million,
- Itochu Corporation, a fine of EUR 4,5 million,
- CD-Contact Data GmbH, a fine of EUR 1 million.

#### Article 4

Within three months of the date of notification of this Decision, the fines shall be paid into Bank account No 642-0029000-95 (IBAN Code: BE76 6420 0290 0095; SWIFT Code: BBVABEBB) of the European Commission with Banco Bilbao Vizcaya Argentaria BBVA, Avenue des Arts, 43, B-1040 Brussels.

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision was adopted, plus 3,5 percentage points, namely 6,78 %.

#### Article 5

This Decision is addressed to:

- Nintendo Corporation Ltd  
60, Kamitakamatsu-cho  
Higashiyama-Ku  
Kyoto 605, Japan
- Nintendo of Europe GmbH  
Nintendo Center  
D-63760 Großostheim
- John Menzies plc  
108 Princes Street  
Edinburgh EH2 3AA, United Kingdom
- Concentra — Produtos para Crianças, SA  
Rua Prof. Henrique Barros, 9  
P-2685-339 Prior Velho
- Linea GIG SpA  
Via Volturmo, 3/12  
I-50019 Osmannoro  
Sesto Fiorentino, Firenze
- Nortec AE  
8, Alexandroupoleos str.  
GR-44 51 Metamorfoosi, Athens
- Bergsala AB  
Marios Gata 21  
S-434 37 Kungsbacka
- Itochu Corporation  
5-1, Kita-Aoyama, 2-chome  
Minato-ku,  
Tokyo 107-8077, Japan
- CD-Contact Data GmbH  
Brunnfeld 2-6  
D-93133 Burglengenfeld.

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

Done at Brussels, 30 October 2002.

*For the Commission*

Mario MONTI

*Member of the Commission*