EXPORT RESTRICTIONS (VIDEO GAMES): THE NINTENDO CASE

Subject: Export restrictions
Parallel trade
Differential pricing
Fines

Industry: Video games
(Some implications for other industries)

Parties: Nintendo (Japan) and seven European distributors

Source: Commission Statement IP/02/1584, dated 30 October 2002

(Note. It is not unusual for suppliers of goods and services to sell at prices "which the market can bear"; but, when this leads to differential pricing in the Member States of the European Union, and when suppliers attempt to restrict supplies by direct or parallel trade from being exported to high-priced from low-priced countries, there is on the face of it an infringement of the rules on competition. This has been the principle applied by the Court and the Commission since the early Court case Consten and Grundig and the Commission Decision in the Konica case. The fines imposed on Nintendo and its principal distributors were heavy.)

The Commission has imposed a total fine of €167.8 million on Japanese video games maker Nintendo and seven of its official distributors in Europe for colluding to prevent exports to high-priced from low-priced countries. The fine on Nintendo alone was calculated at €149 million to reflect its size in the market concerned, the fact that it was the driving force behind the illicit behaviour and also because it continued with the infringement even after it knew the investigation was going on. Prices for play consoles and games differed widely from one European Union country to another during the period investigated by the Commission, with the United Kingdom up to 65 percent cheaper than Germany and the Netherlands. Every year, millions of European families spend large amounts of money on video games. They have the right to buy the games and consoles at the lowest price the market can possibly offer and we will not tolerate collusive behaviour intended to keep prices artificially high," Competition Commissioner Mario Monti said.

The decision concerns Nintendo and seven distributors of Nintendo products, namely John Menzies plc (Nintendo's distributor for the United Kingdom), Concentra - Produtos para crianças S.A. (Portugal), Linea GIG. S.p.A. (Italy), Bergsala AB (Sweden), the Greek unit of Japan's Itochu Corp, Nortec A.E. (Greece), and the Belgian unit of Germany's CD-Contact Data GmbH.

The Commission has collected evidence showing that Nintendo and its distributors colluded to maintain artificially high price differences in the

European Union between January 1991 and 1998. According to the arrangements, each distributor was under an obligation to prevent parallel trade from its territory, that is, exports from one country to another by way of unofficial distribution channels. Under the leadership of Nintendo, the companies intensively collaborated to find the source of any parallel trade. Traders who allowed parallel exports to occur were punished by being given smaller shipments or by being boycotted altogether.

The investigation showed that during the seven-year period price differences in the European Economic Area (EEA, the European Union plus Norway, Iceland and Liechtenstein) were frequent and significant. The United Kingdom usually had the lowest prices by far, which understandably tempted traders into re-exporting cheap goods to high-price countries.

The most striking price differences were observed in early 1996, when certain Nintendo products were up to 65% cheaper in the UK when compared with the Netherlands and Germany. They were also more affordable than in Spain (up to 67% more expensive than the UK), Italy (54%) and Sweden (39%). The difference narrowed but remained significant in 1997, when the UK price for all N64 game consoles and game cartridges was 33% lower (in October) than everywhere else in the EEA.

A Memo written by John Menzies for Nintendo on 11 April 1996 which was volontarily submitted to the Commission outlined the strategy and steps to maintain the huge price differences: "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 UK. [...] 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 UK, thus reducing the impact that this differential pricing has upon mainland Europe".

Subsequently, John Menzies took action, as a letter obtained after a formal request for information to Nintendo explained: "I can tell you that a significant amount of activity has been undertaken by THE (John Menzies's subsidiary called THE Games Ltd) since January/February this year [1996] with a view to stopping the grey exporting of products from the UK 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". It should be noted that, before this happened, John Menzies itself had been boycotted by Nintendo to force it to collaborate better with the infringement.

As a result of the illicit behaviour of Nintendo and its official distributors, families on continental Europe had to put up with high prices. To measure the harm caused to consumers it is sufficient to note that Nintendo sold five million game consoles and 12 million games in Europe in 1997 alone.

Article 81 of the EU treaty specifically prohibits agreements and concerted practices "which may affect trade between Member States and which may have as their object or effect the prevention, restriction or distortion of competition within the common market". Restrictions of parallel trade represent a serious infringement of Article 81: this was confirmed by the European Courts as early as 1966 in the landmark *Grundig-Consten* case and, more recently, in the 1998 Volkswagen decision. The seriousness of the infringement and the harm caused to end-consumers led the Commission to impose a total fine of €167.843 million, which is the fifth largest ever imposed for any anti-trust infringement. It is also by far the largest fine ever imposed for a so-called vertical infringement, in this case, between a producer and its distributors as opposed to a horizontal cartel between manufacturers of the same product. The fine on Nintendo is also the fourth largest ever imposed on an individual firm for a single infringement.

Individual fines

The following is a breakdown of the fines per company (all figures expressed in € million):
Nintendo Corporation and Nintendo of Europe GmbH (jointly liable): 149.128
John Menzies plc: 8.64
Concentra - Produtos para crianças S.A.: 0.825
Linea GIG. S.p.A.: 1.5
Bergsala AB: 1.25
Itochu Corporation: 4.5
Nortec A.E.: 1.0
CD-Contact Data GmbH: 1.0
The amounts reflect the real impact of the offending conduct of each firm on competition as well as their different size to ensure a sufficient deterrent effect. Nintendo, John Menzies and Itochu are much bigger than the others.

Nintendo was the instigator and the leader of the infringement and carried on with the illicit behaviour even after the Commission had started its investigation, as did John Menzies. This constitutes an aggravating circumstance. The latter also tried to mislead the Commission with regard to the real scope of the infringement in mid-1997. These aggravating factors were duly balanced with the fact that, after December 1997, John Menzies and Nintendo co-operated with the Commission. Similarly, in setting the final fine on Nintendo, the Commission also took into consideration its decision to offer substantial financial compensation to third parties, which suffered material harm. Nintendo and John Menzies were, nevertheless, granted large reductions, which stresses the importance the Commission attaches to co-operation by companies that have infringed EC competition law even if this was not through participation in a 'classic' horizontal cartel. (Because this is a vertical infringement, the 1996 Leniency Notice does not apply. However, the 1998 Method on how to calculate fines in antitrust infringements does also afford the opportunity to take into account co-operation in an investigation outside the scope of the 1996 Leniency Notice.) The small fine on Concentra reflects its passive role in the illicit agreement.

Nintendo produces game consoles and games compatible with those consoles. The products concerned by this decision are the static NES and SNES consoles, the N64 game console that superseded them and the 'hand-held' Game Boy. In some Member States, Nintendo acts as the official importer and distributes its products to wholesalers and retailers itself. This is the case in Germany, the Netherlands, France, and Spain. At the beginning of the investigation period, Nintendo also distributed its products itself in Belgium, the UK and Ireland, but later appointed independent official importers for these countries. The Games Ltd, part of John Menzies, became Nintendo's official distributor for the UK and Ireland in 1995. CD-Contact Data GmbH became Nintendo's official importer for Belgium in 1997. In Portugal, Italy and the Scandinavian countries the official importers are or were Concentra, Linea GIG Spa and Bergsala AB. In Greece, Nintendo products were distributed by Itochu Hellas EPE, a subsidiary of Itochu, until 1997. At that point, the distribution was taken over by Nortec EA. After the investigation period, Nintendo reorganised its distribution system.

The Commission's investigation started in 1995 but gained momentum when, in December 1997, John Menzies and, subsequently, Nintendo began to co-operate with the Commission. On 25 April 2000, the Commission issued a Statement of Objections. All the companies replied in writing but did not request an oral hearing. They were also given the right of access to the Commission's file. ■

Limitations: The Carlsberg / Heineken Case

A useful reminder that there is a "statute of limitations" in competition cases has been provided by the Carlsberg / Heineken case. The Commission has closed its investigation into an alleged market sharing agreement between Carlsberg of Denmark and the Dutch company Heineken, two large international brewers, since the Commission did not find evidence to prove that the suspected infringement continued after May 1995. Under EU rules, the Commission cannot fine companies for infringements for which it has no evidence that they continued in the five years preceding the start of its investigation, which in this case was 2000. Council Regulation EEC/2988/74 of 26 November 1974 sets out the Commission's procedural framework with respect to limitation periods in competition cases. It requires that, for fining purposes, the Commission must give evidence that an infringement of the competition rules was not terminated five years before its first intervention. In this case the first relevant intervention was in May 2000. As evidence of the kind sought was not found, the Commission came to the conclusion that any possible infringement arising in this case would fall outside the time limit for fines. Therefore the Commission informed the companies that no further action would be taken with respect to its investigation and that the case had been closed.

Source: Commission Statement IP/02/1603, dated 4 November 2002