JUDGMENT OF THE COURT (First Chamber)

10 February 2011 *

In Case C-260/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 10 July 2009,

Activision Blizzard Germany GmbH, formerly CD-Contact Data GmbH, established in Burglengenfeld (Germany), represented by J.K. de Pree and E.N.M. Raedts, advocaten,

appellant,

the other party to the proceedings being:

European Commission, represented by S. Noë and F. Ronkes Agerbeek, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, M. Ilešič (Rapporteur), E. Levits and M. Safjan, Judges,

Advocate General: J. Mazák,
Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, Activision Blizzard Germany GmbH ('Activision Blizzard'), acting as legal successor to CD-Contact Data GmbH ('CD-Contact Data'), seeks to have set aside the judgment in Case T-18/03 *CD-Contact Data GmbH* v *Commission* [2009] ECR II-1021('the judgment under appeal'), by which the Court of First Instance of the European Communities (now 'the General Court') reduced the fine imposed on CD-Contact Data and dismissed the remainder of the action brought by that company for annulment of Commission Decision 2003/675/EC 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) (OJ 2003 L 255, p. 33; 'the contested decision'). That decision related to a complex of agreements and concerted practices designed to restrict parallel exports in the market for Nintendo video games consoles and games cartridges.

Background to the dispute

2 Nintendo Co., Ltd ('Nintendo'), a publicly quoted company whose registered office is in Kyoto (Japan), is the head of the Nintendo group of companies, which specialise in the production and distribution of video game consoles and video game cartridges for use with those consoles. Nintendo's business in the European Economic Area is conducted, in certain territories, by wholly owned subsidiaries, of which the main one is Nintendo of Europe GmbH ('NOE'). At the material time, NOE coordinated certain business activities of Nintendo in Europe and was its exclusive distributor for Germany. In other sales territories, Nintendo had appointed independent exclusive distributors.

3 CD-Contact Data was Nintendo's exclusive distributor for Belgium and Luxembourg from April 1997 to 31 December 1997 at least.

4 In March 1995, the Commission of the European Communities opened an investigation into the video games industry. In September 1995, as a result of its preliminary findings, the Commission opened an additional investigation specifically into Nintendo's distribution system. Following a complaint lodged by a company active in the

importation and sale of electronic games, according to which Nintendo was hindering parallel trade and was operating a resale price maintenance policy in the Netherlands, the Commission extended its investigation. In its reply of 16 May 1997 to a request for information from the Commission, Nintendo acknowledged that some of its distribution agreements and some of its general terms had contained restrictions on parallel trade within the European Economic Area. By letter of 23 December 1997, Nintendo indicated to the Commission that it had become aware of 'a serious issue in relation to parallel trade within the Community' and expressed the wish to cooperate with the Commission. Following that acknowledgment, Nintendo took measures designed to ensure future compliance with European Union ('EU') law and offered financial compensation to the third parties which had suffered financial harm as a result of its activities.

5 By letter of 9 June 1999, the Commission asked CD-Contact Data to inform it whether the documents in the Commission files concerning it contained confidential data. In that letter, it was also stated that the Commission was considering opening formal proceedings against certain companies, including CD-Contact Data. On 26 April 2000, the Commission sent a statement of objections to Nintendo and the other undertakings concerned, including CD-Contact Data, alleging infringement of Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3). Nintendo did not substantially contest the facts set out in the statement of objections.

6 On 30 October 2002, the Commission adopted the contested decision, Article 1 of which states:

'The following undertakings have infringed Article 81(1) [EC] and Article 53(1) of the … Agreement [on the European Economic Area] 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:

…

[CD-Contact Data], from 28 October 1997 to the end of December 1997.'

7 Under Article 3 of that decision, a fine of EUR 1 million was imposed on CD-Contact Data.

8 In recitals 195 and 196 of the contested decision, the Commission states, as regards parallel exports from Belgium and Luxembourg, that '[i]t was clear to [CD-Contact Data] that it was bound to ensure that its customers did not parallel export'. According to the Commission, that is apparent from a fax sent by CD-Contact Data to NOE on 28 October 1997, by which CD-Contact Data gave assurances that it did not want to have any exports. In recital 317 of the contested decision, the Commission states that that letter shows that CD-Contact Data and Nintendo 'had arrived at a "concurrence of wills" [that] no exports from [CD-Contact Data's] territory were to occur and that CD-Contact Data … would monitor supplies to customers … from whom exports could be expected'. In recital 319 of that decision, the Commission states that '[CD-Contact Data] has further submitted evidence that it did not adhere to the agreement that parallel trade was to be restricted' and that, according to CD-Contact Data, 'it exported the products itself and/or sold products to companies that it knew

would export the same products'. The Commission, however, finds in recital 326 of the contested decision that the fact that, in practice, CD-Contact Data allowed parallel exports to occur shows that CD-Contact Data itself 'cheated'.

9 As regards parallel imports into Belgium, the Commission refers in recital 197 of the contested decision to the fact that, from September until December 1997, CD-Contact Data corresponded on various occasions with NOE about parallel imports into its territory in the expectation that this 'problem' would be addressed. The Commission mentions in that regard three letters dated 4 September 1997, 3 November 1997 and 4 December 1997 respectively.

The judgment under appeal

10 By the judgment under appeal, the General Court varied the contested decision in so far as that decision did not grant CD-Contact Data the benefit of the attenuating circumstance of its exclusively passive role in the infringement and, consequently, reduced the fine imposed on that company to EUR 500 000. As to the remainder, the action for annulment of that decision was dismissed.

11 The first part of the first plea in law, alleging infringement of Article 81 EC – the General Court's examination of which is criticised by Activision Blizzard in the present appeal – was rejected in paragraphs 46 to 70 of the judgment under appeal.

12 In paragraph 52 of that judgment, the General Court stated that, in the analysis leading to its finding that an agreement contrary to Article 81(1) EC existed, the Commission

did not refer to the terms of the distribution agreement between Nintendo and CD-Contact Data as such. According to the General Court, the Commission stated, in that regard, in recital 196 of the contested decision, that '[t]he text of the distributor agreement between [CD-Contact Data] and Nintendo allowed [CD-Contact Data] to export passively'. The General Court pointed out, in that connection, that, by contrast with the findings made in the case of some of the distributors to which the contested decision relates, the distribution agreement between CD-Contact Data and Nintendo, which was concluded almost two years after the start of the Commission investigation concerning the distribution system in question, did not as such contain any clause prohibited by Article 81(1) EC.

13 After stating in paragraph 53 of the judgment under appeal that, in the case of CD-Contact Data, the Commission referred only to the conclusion of an agreement, the General Court pointed out in paragraph 54 of that judgment that, in the absence of any direct documentary evidence of a written agreement between Nintendo and CD-Contact Data concerning the restriction of passive exports, the Commission had found that CD-Contact Data's participation in an agreement contrary to Article 81(1) EC was evidenced by its conduct, as expressed in its correspondence.

14 The General Court took the view in paragraph 55 of the judgment under appeal that, accordingly, it was necessary to examine whether, in view of the wording of the letters exchanged, the Commission had established to the requisite legal standard that there was a concurrence of wills, as between CD-Contact Data and Nintendo, to limit parallel trade. In paragraph 56 of that judgment, the General Court pointed out in that regard that, in the contested decision, the Commission had referred to a body of written evidence and, more specifically, to a fax sent by CD-Contact Data to NOE on 28 October 1997.

15 In paragraph 58 of the judgment under appeal, the General Court pointed out that CD-Contact Data had explained in that fax that it had not been in a position to provide certain quantities of product to BEM, a wholesaler established in Belgium which

might potentially engage in parallel trade. The General Court stated in paragraph 59 of that judgment that, contrary to the submissions made by the Commission, it was not clear from the wording of that fax that CD-Contact Data was aware that it was supposed to prevent parallel exports and that it wished to defend itself against Nintendo France's allegations relating to such parallel exports from Belgium. In particular, according to the General Court, it could not be inferred with the requisite certainty that the 'caution' to which CD-Contact Data referred in relation to those of its customers which generally engaged in exports showed that it had agreed to the policy of restricting the parallel trade in question. Furthermore, the General Court considered it inappropriate to dismiss from the outset the interpretation argued for by CD-Contact Data, to the effect that the reference to the limited quantities of product at its disposal had to be analysed as information showing that it was materially impossible for CD-Contact Data to engage in active selling through a wholesaler established in Belgium.

16 The General Court observed in paragraph 60 of the judgment under appeal that the fax sent by CD-Contact Data to NOE on 28 October 1997 was, however, a direct response to the letter of 24 October 1997 in which Nintendo France had complained about parallel exports from Belgium – a territory for which CD-Contact Data was at the time the exclusive distributor of the products concerned – and had asked NOE to take the measures necessary to remedy the 'problems' that those exports were causing it. According to the General Court, CD-Contact Data had thus considered it necessary to justify itself in relation to the quantities at its disposal and the circumstances in which it exported the products in question in response to the complaint concerning those parallel exports.

17 In paragraph 61 of the judgment under appeal, the General Court stated that, as regards the documents relating to parallel imports into Belgium and Luxembourg, the Commission referred to the fact that a system for practical collaboration and the exchange of information on parallel trade had been developed between Nintendo and

certain of its authorised distributors, including CD-Contact Data. CD-Contact Data's participation in the information exchange system emerged, according to the General Court, from several letters referred to in recital 197 of the contested decision.

18 The General Court took the view, in paragraph 62 of the judgment under appeal, that the wording of those various letters made it possible, by a logical extension of the considerations set out in the preceding paragraphs of that judgment, to conclude that the object of those letters was to denounce parallel imports of Nintendo products into Belgium and that they were part of the information exchange system developed by Nintendo. In that connection, the General Court referred, in paragraphs 63 to 66 of that judgment, to: two letters sent from CD-Contact Data to NOE on 4 September and 3 November 1997 respectively; a fax sent by CD-Contact Data to Nintendo France on 12 November 1997; and a document of 4 December 1997, which was sent by NOE to CD-Contact Data.

19 In paragraph 67 of the judgment under appeal, the General Court held that the fact that CD-Contact Data had, in practice, participated in parallel trade by exporting goods to customers established outside Belgium and Luxembourg was not capable of calling in question the conclusion set out in paragraph 62 of that judgment. The General Court found in that regard that the fact that an undertaking, whose participation in an unlawful concerted practice under Article 81(1) EC was established, had not conducted itself in the market in the manner agreed with its competitors did not necessarily have to be taken into account. According to the General Court, an undertaking which, despite colluding with its competitors, followed a policy that departed from that agreed on could simply be trying to exploit the cartel for its own benefit.

20 Lastly, as regards proof of the prohibition of parallel imports into Belgium and Luxembourg, the General Court found, in paragraph 68 of the judgment under appeal, that CD-Contact Data could not claim that the letters relied on by the Commission had been misinterpreted, in so far as, in those letters, CD-Contact Data merely sought to ensure that the price that it was paying to Nintendo for the relevant products was

not too high. In consequence, according to the General Court, it was clear from all those letters – in particular, the fax of 12 November 1997 sent by CD-Contact Data to Nintendo France – that they dealt with the issue of the price of the relevant products in a more or less direct connection with the presence of parallel imports.

21 In paragraphs 69 and 70 of the judgment under appeal, the General Court deduced from those considerations that the Commission had not erred in finding that CD-Contact Data had participated in an agreement which had as its object the limitation of parallel trade and it consequently rejected the first part of the first plea raised by that company in its action.

Forms of order sought by the parties before the Court of Justice

22 Activision Blizzard claims that the Court should:

— set aside the judgment under appeal in so far as it dismisses the action for annulment of the contested decision;

— annul the contested decision, at least in so far as it concerns Activision Blizzard;

— in the alternative, set aside the judgment under appeal in so far as dismisses the action for annulment of the contested decision and refer the case back to the General Court;

— order the Commission to pay the costs of both sets of proceedings.

23 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs of these proceedings.

The appeal

24 Activision Blizzard relies on three grounds of appeal, each relating to the examination by the General Court, in paragraphs 46 to 70 of the judgment under appeal, of the first part of the first plea in law at first instance, alleging infringement of Article 81(1) EC.

The first ground of appeal

Arguments of the parties

25 Activision Blizzard's first ground of appeal is that the General Court erred in law by basing its finding that there was an illegal agreement for the purposes of Article 81(1) EC between NOE and CD-Contact Data on an incorrect legal categorisation of the facts. That error is apparent from the fact that, in the course of examining the evidence relied on by the Commission, the General Court did not consider the difference in legal effect as between a limitation of active parallel trade and a limitation of passive parallel trade.

26 Activision Blizzard states in that regard that the distribution agreement concluded between Nintendo and CD-Contact Data prohibited active parallel trade whilst allowing passive parallel trade. As the General Court confirmed in paragraph 52 of the judgment under appeal, that agreement is perfectly legal in the light of Article 81(1) EC.

27 Given the prohibition, laid down in the distribution agreement, on engaging in active parallel trade, it is not surprising that CD-Contact Data exchanged information with NOE on parallel imports to Belgium, as is evidenced by the fax from CD-Contact Data to Nintendo, dated 28 October 1997, read in conjunction with the letters cited in recital 197 of the contested decision.

28 In order to make a sound legal analysis of the facts, the General Court should, after establishing that CD-Contact Data was involved in an exchange of information on parallel imports, have determined whether the conduct at issue related to the limitation of active parallel sales, in accordance with the distribution agreement, or whether it also related to the illegal limitation of passive parallel sales. According to Activision Blizzard, the General Court could not, without first establishing the existence of an agreement which went further than the restriction of active sales, arrive at the conclusion that CD-Contact Data was party to an agreement prohibited under Article 81(1) EC.

29 Activision Blizzard concludes from this that, in so far as the General Court omitted to carry out that analysis, it could not, without erring in law, hold that the Commission had sufficiently established that CD-Contact Data's conduct was aimed at limiting passive sales.

30 In the alternative, Activision Blizzard submits that, at the very least, the General Court breached its obligation to state reasons, as the judgment under appeal in no respect sets out the reasons why the distinction between active and passive parallel trade did not have to be taken into account in the circumstances of the case.

31 The Commission concedes that Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1), which was applicable *ratione temporis* to the facts of the case, makes it possible to prohibit the exclusive distributor from actively seeking customers outside his territory and that the distribution agreement between CD-Contact Data and Nintendo included such a prohibition of active sales, which was not, as such, contrary to Article 81(1) EC. The Commission states, however, that that regulation does not apply where the parties agree to create a situation of absolute territorial protection under which exclusive distributors are totally prohibited from making sales outside their territory or from selling to customers who intend to export. That was the position in the present case.

32 The Commission contends that the General Court committed no error of law in upholding the contested decision on that point. It argues inter alia that, since the General Court had established the existence of the agreement between CD-Contact Data and Nintendo to limit parallel trade as such, it was not required to give further details in the grounds of its judgment as regards the distinction between active and passive sales by distributors.

Findings of the Court

33 The first ground of appeal is, in essence, that the General Court erred in law by not examining whether CD-Contact Data's conduct, as reflected in the correspondence on

which the contested decision is based, had the sole purpose of limiting active parallel sales, in accordance with the distribution agreement between CD-Contact Data and Nintendo, or whether that conduct also related to a limitation of passive parallel sales.

34 However, it must be held that, contrary to the assertions made by Activision Blizzard, the General Court carried out such an examination in the judgment under appeal and that, consequently, this ground of appeal has no factual basis.

35 Thus, the General Court first of all stated, in paragraph 52 of the judgment under appeal, that – by contrast with the distribution agreements concluded previously with some of Nintendo's other distributors – the distribution agreement between Nintendo and CD-Contact Data did not, as such, contain any clause prohibited by Article 81(1) EC, since it allowed CD-Contact Data to export passively.

36 The General Court went on to point out, in paragraphs 54 and 55 of that judgment, that, in the absence of any direct documentary evidence of a written agreement concerning the limitation of passive exports, it was necessary to examine whether, in relying on the correspondence between CD-Contact Data, NOE and Nintendo France, which is cited in the contested decision, the Commission had established to the requisite legal standard that CD-Contact Data had participated in an agreement which was contrary to Article 81(1) EC.

37 Lastly, the General Court expressly acknowledged in paragraph 59 of the judgment under appeal that it was inappropriate to dismiss at the outset CD-Contact Data's interpretation of the fax sent by CD-Contact Data to NOE on 28 October 1997, to the effect that the reference to the limited quantities at CD-Contact Data's disposal had to be construed as information showing that it was materially impossible for CD-Contact Data to engage in active selling through a wholesaler established in Belgium.

38 It follows that the General Court assessed the evidence put forward by the Commission in the light of the fact that the distribution agreement between CD-Contact Data and Nintendo provided for the prohibition – *prima facie* legal – of active parallel sales and by taking into account CD-Contact Data's argument that this explained the content of that fax.

39 Although, in paragraph 69 of the judgment under appeal, the General Court nevertheless held that CD-Contact Data had participated in an illegal agreement, that was because, on the basis of an analysis made in paragraphs 60 to 68 of that judgment of all the correspondence relied on by the Commission, it had come to the conclusion that that correspondence showed that there was a concurrence of wills, as between CD-Contact Data and Nintendo, with the object not only of limiting active sales but also of limiting parallel trade generally.

40 In those circumstances, the first ground of appeal put forward by Activision Blizzard must be rejected as unfounded.

The second ground of appeal

Arguments of the parties

41 Activision Blizzard's second ground of appeal is that the General Court distorted the evidence by considering that the documents referred to in paragraphs 56 to 68 of the judgment under appeal indicated pursuit of an illegal object. Activision Blizzard refers inter alia to the faxes of 4 September 1997 and of 3 and 12 November 1997, in which CD-Contact Data complained about exports to Belgium in infringement of

the exclusive rights which had been granted to it in that territory by the distribution agreement, using information relating to the prices of the imported goods as a bargaining tool to obtain a better purchase price from NOE. It would be at odds with the wording of those documents to conclude that they concerned anything other than a legal restriction on active sales in CD-Contact Data's exclusive territory or the manner in which CD-Contact Data put pressure on its supplier to lower its own purchasing price.

42 Activision Blizzard submits, in that connection, that it is apparent from the fax of 3 November 1997 that CD-Contact Data wanted to draw attention to the possibility that active sales, originating in Germany, were taking place on the Belgian market.

43 As regards the fax of 12 November 1997 to Nintendo France, its content in no way indicates that CD-Contact Data was exerting pressure to limit passive parallel imports. The reference to 'grey imports' implies inter alia that those imports were legal. Furthermore, under Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21), even the hindrance of passive sales by Nintendo France would have been permitted, as Nintendo France was a subsidiary of the supplier.

44 The fax of 4 September 1997 – in so far as it may constitute evidence notwithstanding the fact that it was sent prior to the period in which the alleged infringement occurred – does not contain any evidence of an intention to hinder passive parallel trade. On the contrary, it is apparent from that fax that CD-Contact Data tried to use the information relating to the prices of the imported products as a bargaining tool in order to obtain a better price from NOE.

45 Activision Blizzard submits that the Commission is attempting to reverse the burden of proof by arguing that it is not apparent from those documents that the authors made a distinction between active and passive sales – as if it were for CD-Contact Data to prove that it had acted in compliance with Article 81 EC. However, the Court clearly indicated in Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299 that a reversal of the burden of proof is not permitted in that regard.

46 Activision Blizzard also states that, by contrast with the previous contracts concluded between Nintendo and other parties who actually admitted to having participated in the illegal system, the distribution agreement signed by CD-Contact Data was consistent with the outcome of the discussions held between Nintendo and the Commission and prohibited only active sales. In those circumstances and failing evidence to the contrary, it cannot be assumed that CD-Contact Data had interpreted that agreement other than as precluding it from actively supplying products in territories assigned to other distributors and vice versa. Furthermore, CD-Contact Data's actions were consistent with that interpretation. CD-Contact Data thus facilitated passive sales into France while alerting NOE to infringements of the prohibition on active trade set out in the distribution agreement.

47 The Commission contends that the second ground of appeal is inadmissible or, in the alternative, unfounded, since Activision Blizzard has not produced any evidence establishing that the General Court distorted the clear sense of the evidence before it.

48 The Commission maintains, inter alia, that there is nothing in any of the three documents referred to by Activision Blizzard – the faxes of 4 September 1997 and of 3 and 12 November 1997 – to suggest that those responsible for drawing up those documents operated a distinction between active and passive sales. Furthermore, according to the Commission, the General Court did not read those documents out of

context, but considered them together with the other evidence. Taken together, the correspondence at issue shows that CD-Contact Data had taken part in an information system intended to denounce all parallel imports and thus confirms that CD-Contact Data had adhered to an agreement to limit parallel trade as such.

49 According to the Commission, it is necessary to consider the background against which the exchanges of information between CD-Contact Data and Nintendo took place. Before CD-Contact Data entered Nintendo's distribution network, Nintendo and some of its distributors had already set up a scheme designed to upgrade the protection granted to exclusive distributors to the level of absolute territorial protection, and the system for exchanging information on parallel trade was an essential feature of that scheme. Moreover, Nintendo continued its illegal conduct even though it had become aware of the Commission's investigation.

Findings of the Court

50 Activision Blizzard's second ground of appeal is that the General Court distorted evidence, in particular, the faxes of 4 September 1997 and of 3 and 12 November 1997, sent by CD-Contact Data to NOE and Nintendo France respectively.

51 It should be recalled at the outset that it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and that the general principles of law and the rules of procedure relating to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the

evidence produced before it. Save where the clear sense of the evidence has been distorted, that appraisal does not, therefore, constitute a point of law which is subject, as such, to review by the Court of Justice (see, inter alia, Case C-419/08 P *Trubowest Handel and Makarov* v *Council and Commission* [2010] ECR I-2259, paragraphs 30 and 31 and the case-law cited).

52 In the present case, Activision Blizzard submits in a sufficiently detailed manner that the General Court's assessment of those faxes is at odds with their wording. In those circumstances, the second ground of appeal is – contrary to the assertions made by the Commission – admissible.

53 As regards the merits of that ground of appeal, it should be pointed out that, according to settled case-law, the distortion must be obvious from the documents in the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (see Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 54; *Trubowest Handel and Makarov* v *Council and Commission*, paragraph 32; and Case C-399/08 P *Commission* v *Deutsche Post* [2010] ECR I-7831, paragraph 64).

54 Even though it would be possible to interpret the faxes in question in the manner argued for by Activision Blizzard, it should nevertheless be stated that that is not the only way in which the wording of those faxes could be construed and that the different interpretation of those faxes adopted by the General Court does not reveal any distortion of their content. In particular, the line of argument set out by Activision Blizzard in support of its second ground of appeal does not bring to light any substantive inaccuracy in the General Court's reading of those faxes.

55 In that regard, it should be pointed out, in particular, that – contrary to what Activision Blizzard seems to suggest – it is in no way obvious from the fax of 3 November 1997 that CD-Contact Data intended by that fax only to bring attention to a case of active sales made by another of Nintendo's distributors in breach of the distribution agreement.

56 As regards the faxes of 4 September 1997 and 12 November 1997, Activision Blizzard disputes, in essence, their evidential value by maintaining that it is not sufficiently clear from those faxes that they had an illegal object, but does not succeed in showing that the way in which the General Court construed those faxes is obviously at odds with their content.

57 It should be borne in mind in that connection that the review carried out by the Court in order to assess the present ground of appeal – that the evidence produced in the form of those faxes was distorted – is restricted to ascertaining that, in finding on the basis of those faxes that CD-Contact Data had participated in an illegal agreement intended to limit parallel trade in general, the General Court had not manifestly exceeded the limits of a reasonable assessment of those faxes. The task of the Court of Justice in the present case is not, therefore, to assess independently whether the Commission has established such participation to the requisite legal standard and thus discharged the burden of proof necessary to show that the rules of competition law were infringed, but to determine whether, in finding that that was actually so, the General Court construed those faxes in a manner manifestly at odds with their wording, which is not the case.

58 It follows from the foregoing that the second ground of appeal must be rejected as unfounded.

The third ground of appeal

Arguments of the parties

59 Activision Blizzard's third ground of appeal is that, even if the Court of Justice were to hold that the documents referred to in paragraphs 56 to 68 of the judgment under appeal go above and beyond the legal restriction of active trade, the General Court made a manifest error of assessment in concluding that those documents constituted sufficient evidence of the existence of an agreement, for the purposes of Article 81(1) EC, between CD-Contact Data and NOE. It is apparent from the case-law of the General Court and from that of the Court of Justice that such an agreement requires first, a unilateral policy adopted by NOE, with an anti-competitive goal, in the form of an implied or express invitation to CD-Contact Data to join in the pursuit of that goal and, secondly, at least tacit acquiescence on the part of the latter. In the judgment under appeal, however, the General Court applied those tests incorrectly or, at the very least, fell short of its obligation to state reasons in that regard.

60 As regards the first test referred to, Activision Blizzard submits that the General Court based its conclusion that Nintendo had unilaterally adopted a policy aimed at imposing on CD-Contact Data an obligation to hinder parallel sales on the simple fact that, in 1991, Nintendo had developed an information exchange system for monitoring passive parallel imports. Activision Blizzard maintains, in particular, that the General Court did not explain how Nintendo would have imposed that illegal policy on CD-Contact Data by expressly or implicitly inviting it to participate.

61 Moreover, according to Activision Blizzard, the General Court failed to consider relevant issues, such as: the absence of clear evidence that Nintendo had imposed

that policy on CD-Contact Data; the absence of a monitoring system or of penalties imposed on CD-Contact Data; the difference in the wording of the distribution agreement between Nintendo and CD-Contact Data as compared with that of earlier agreements with other distributors; and, lastly, the fact that the relations between Nintendo and its exclusive distributors were already being closely monitored by the Commission two years before Contact Data became one of Nintendo's distributors. These factors make it highly unlikely that Nintendo invited CD-Contact Data to join in the illegal information exchange system or applied that system in the same fashion as it did in its relations with other distributors.

62 As regards the second test referred to, Activision Blizzard submits that the General Court was not correct in finding that CD-Contact Data had acquiesced in the policy adopted unilaterally by Nintendo.

63 Activision Blizzard submits, in particular, that the General Court erroneously concluded in paragraph 67 of the judgment under appeal that the existence of a concurrence of wills could not be called into question by the fact that Contact Data had, in practice, participated in passive parallel trade by exporting goods to customers outside Belgium and Luxembourg. By basing its decision in that regard on its case-law relating to horizontal agreements, namely Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, the General Court failed to have regard to the fact that it is settled law that, in the case of vertical agreements, such exports may call into question the acquiescence by the distributor in an illegal policy on the part of the supplier to hinder parallel trade.

64 Activision Blizzard maintains, furthermore, that factors which constitute sufficient evidence of the existence of a horizontal agreement may not in all circumstances be regarded as sufficient evidence of the participation of an undertaking in a vertical

agreement, in particular where a concurrence of wills would have to be based on tacit acquiescence in a policy which was adopted unilaterally.

65 First, by contrast with contacts between competitors, contacts between suppliers and distributors concerning business practices is normal and even necessary, particularly in the context of exclusive distribution systems. Secondly, in vertical relationships, agreements to hinder competition are not necessarily concluded in the interests of the distributor. Thirdly, in a vertical relationship – unlike a relationship between competitors – distributors are dependent on supplies from their supplier and are therefore in a weak position vis-à-vis the supplier, which makes it more difficult for those distributors to dissociate themselves overtly from the policy adopted by the supplier.

66 In those circumstances, the fact that a distributor does not dissociate himself overtly from the policy followed by his supplier should not too readily be regarded as acquiescence on the distributor's part in an agreement, in particular if it can be proved that that distributor did not in fact act according to the wishes of the supplier.

67 The Commission argues that the idea that cases involving vertical agreements require a different standard of proof for demonstrating a concurrence of wills as compared with the standard of proof required in cases involving horizontal agreements has no basis in the EC Treaty or the case-law. The distinction between horizontal and vertical agreements is relevant for the purposes of assessing the restrictive effects on competition, but not for the purposes of determining what constitutes a concurrence of wills.

68 According to the Commission, none of the three reasons put forward by Activision Blizzard to show that the General Court should have made the distinction which it proposes is convincing. First, the General Court concluded that there was an agreement, not on account of the fact that CD-Contact Data and Nintendo were in contact, but because the contents of the documents referred to in paragraphs 56 to 66 of the judgment under appeal revealed a concurrence of wills to limit parallel trade. Secondly, anti-competitive vertical agreements restricting parallel trade may, like anti-competitive horizontal agreements, be beneficial to the participants in those agreements even where not all of those participants comply with them. Thirdly, it is difficult to see how it is more problematic to dissociate oneself from anti-competitive behaviour in the framework of a vertical relationship than in the framework of a horizontal relationship.

69 The Commission infers from this that the General Court did not err in law, and that it gave sufficient grounds for its judgment, with respect to its finding that the Commission had established to the requisite legal standard that there was an agreement between CD-Contact Data and Nintendo to limit parallel trade. The Commission maintains, moreover, that Activision Blizzard intends, by its arguments, to call upon the Court to reassess findings of fact, which is inadmissible.

Findings of the Court

70 Activision Blizzard's third ground of appeal is, principally, that the General Court made a manifest error of assessment in finding that the documents relied on by the Commission constituted sufficient evidence of the existence of an agreement prohibited under Article 81(1) EC between CD-Contact Data and Nintendo. Activision Blizzard complains, in particular, that the General Court did not correctly apply in the context of the present case – that is to say, in the context of a vertical relationship – the case-law to the effect that the conclusion of such an agreement requires, first, an implied or express invitation by one of the parties to join in the pursuit of an

anti-competitive goal and, secondly, at least tacit acquiescence by the other party. In the alternative, Activision Blizzard submits that the General Court did not set out sufficient reasons for the judgment under appeal.

71 It should be pointed out at the outset that – contrary to what Activision Blizzard seems to suggest – it is not true that, as a matter of principle, the standard of proof required for the purposes of establishing the existence of an anti-competitive agreement in the framework of a vertical relationship is higher than that which is required in the framework of a horizontal relationship.

72 It is indeed true that factors which, in the context of a horizontal relationship, can sometimes suggest the existence of an anti-competitive agreement between competitors may prove inadequate for the purposes of establishing the existence of such an agreement in the framework of a vertical relationship between a manufacturer and a distributor, given that, in such a relationship, a certain measure of contact is lawful. However, the fact none the less remains that, for the purposes of assessing whether there is an illegal agreement, regard must be had to all the relevant factors, as well as to the economic and legal context specific to each case. The question whether it can be inferred from certain evidence that an agreement contrary to Article 81(1) EC has been concluded cannot therefore be addressed in abstract terms, according to whether the relationship involved is vertical or horizontal, with that evidence being considered separately from the context and the other factors characterising the case.

73 In the present case, it is apparent inter alia from paragraph 55 of the judgment under appeal that the General Court analysed the correspondence on which the contested decision is based in order to ascertain whether it shows that there was a concurrence of wills, as between CD-Contact Data and Nintendo, with a view to limiting parallel trade. It was on the basis of an assessment of all of that correspondence and of the context of which it formed part that the General Court arrived at the conclusion that there had indeed been such a concurrence of wills.

74 Examination of the arguments put forward by Activision Blizzard in support of its third ground of appeal does not reveal any error of law in that assessment.

75 As regards, first, the question whether Nintendo had implicitly or expressly invited CD-Contact Data to collaborate with a view to hindering parallel trade, it should be pointed out that – contrary to the submissions of Activision Blizzard – the General Court based its decision in that regard not only on the fact that, in the course of the 1990s, Nintendo had developed an information exchange system to limit parallel trade, but principally on the fact that the correspondence between NOE, Nintendo France and CD-Contact Data showed that CD-Contact Data had joined that system, which means that Nintendo must have invited it to do so.

76 Nor can Activision Blizzard reasonably complain that the General Court did not examine the relevant factors in its assessment as to whether such an invitation was made.

77 First of all, the Court has stated that, in order to arrive at a finding that an agreement prohibited under Article 81(1) EC has been concluded, it is not necessary in all cases to determine whether a system for monitoring and imposing penalties had been set up (see to that effect, inter alia, Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23, paragraph 84).

78 Next, it emerges from paragraph 52 of the judgment under appeal that the General Court took into account the fact that, by contrast with the earlier distribution agreements which Nintendo had entered into with other distributors, the distribution agreement between Nintendo and CD-Contact Data did not contain any prohibited clause.

79 Lastly, in so far as Activision Blizzard maintains that the correspondence analysed by the General Court does not constitute sufficiently clear evidence and that, given the absence of a monitoring system, the difference between the distribution agreement with CD-Contact Data and earlier agreements, and the monitoring by the Commission since 1995 of the relationships between Nintendo and its distributors, it is highly unlikely that Nintendo invited CD-Contact Data to join an illegal information exchange system, it is sufficient to state that, by that line of argument, Activision Blizzard is simply asking the Court to substitute its own assessment for that of the General Court and that that line of argument is therefore, in accordance with the case-law cited in paragraph 51 above, inadmissible.

80 As regards, secondly, the assessment as to whether CD-Contact Data accepted, at least tacitly, Nintendo's invitation to participate in an agreement to restrict parallel trade, it should, first of all, be pointed out that it is apparent in particular from paragraphs 59 to 66 of the judgment under appeal that – contrary to what Activision Blizzard seems to suggest – the General Court's finding that CD-Contact Data had accepted that invitation was based not on the fact that CD-Contact Data did not protest against Nintendo's anti-competitive policy, but on the correspondence relied on by the Commission and, in particular, on the fact that the faxes of 4 September 1997 and of 3 and 12 November 1997, which were sent by CD-Contact Data to NOE or to Nintendo France, were intended to denounce the parallel imports carried out in Belgium, a territory which had been assigned to CD-Contact Data.

81 Next, it is important to point out that the General Court in no way erred in law by concluding, in paragraph 67 of the judgment under appeal, that the fact that CD-Contact Data had, in practice, participated in passive parallel trade by exporting goods to customers outside Belgium and Luxembourg was not capable of calling in question the existence of a concurrence of wills.

82 Although it is true that that fact constitutes one of the relevant factors to be taken into consideration in assessing whether CD-Contact Data accepted Nintendo's invitation, the fact remains that it is not, in itself, decisive and it cannot automatically preclude the possibility of such acceptance. Thus, contrary to the assertions made by Activision Blizzard, an exclusive distributor may have an interest, not only in entering into an agreement with the manufacturer to limit parallel trade, as a means of further protecting its own distribution area, but also in secretly making sales contrary to that agreement in an attempt to use the agreement for its exclusive benefit. Consequently, it was open to the General Court to conclude, without erring in law, that it was apparent from an overall assessment of all the relevant factors and in particular of the correspondence relied on by the Commission, read in the specific context of the case, that CD-Contact Data had in fact accepted Nintendo's invitation to collaborate in limiting parallel trade.

83 Lastly, as regards Activision Blizzard's argument that, in view of the ambiguous nature of that correspondence and the fact that CD-Contact Data's exports were considerable, the General Court should have reached the conclusion that CD-Contact Data's acquiescence in Nintendo's anti-competitive policy had not been established, it is sufficient to state that, in accordance with the case-law cited in paragraph 51 above, that argument is inadmissible since it is an invitation to the Court to substitute its own assessment for that of the General Court.

84 In so far as Activision Blizzard claims, in the alternative, that insufficient reasons were stated for the judgment under appeal, it should be borne in mind that, according to established case-law, the obligation to state reasons does not require the General Court to provide an account which addresses exhaustively, one after the other, all the arguments put forward by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know the reasons for the General Court's decision and provides the Court of Justice with sufficient material for it to exercise its power of review (see, inter alia, the judgment of 22 May 2008 in

Case C-266/06 P *Evonik Degussa* v *Commission*, paragraph 103, and Case C-583/08 P *Gogos* v *Commission* [2010] ECR I-4469, paragraph 30 and the case-law cited).

85 It is apparent from the above considerations that sufficient reasons were stated for the judgment under appeal to enable the Court to review that judgment and Activision Blizzard to know the reasons which led the General Court to find that it had participated in an agreement which had as its object the restriction of parallel trade.

86 Consequently, the third ground of appeal must be rejected as in part inadmissible and in part unfounded.

87 Since none of the three grounds of appeal relied on by Activision Blizzard can be upheld, the appeal must be dismissed in its entirety.

Costs

88 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission sought an order for costs against Activision Blizzard, and Activision Blizzard has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders Activision Blizzard Germany GmbH to pay the costs.

[Signatures]