JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

30 April 2009 *

In Case T-18/03,

CD-Contact Data GmbH, established in Burglengenfeld (Germany), represented by J. de Pree and R. Wesseling, lawyers,

applicant,

v

Commission of the European Communities, represented by P. Oliver, X. Lewis and O. Beynet, acting as Agents,

defendant,

APPLICATION for the annulment of Commission Decision 2003/675/EC of 30 October 2002 relating to a proceeding pursuant to Article 81 [EC] and Article 53

* Language of the case: English.

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 COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Eighth Chamber),

composed of E. Martins Ribeiro, President, S. Papasavvas and N. Wahl (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 21 May 2008,

gives the following

Judgment

Background to the dispute

1. *The undertakings involved*

1 Nintendo Co., Ltd ('NCL' or '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.

2 Nintendo's business in the European Economic Area (EEA) is conducted, in certain territories, by wholly owned subsidiaries, of which the main one is Nintendo of Europe GmbH ('NOE' or 'Nintendo'). At the material time, NOE coordinated certain business activities of Nintendo in Europe and was its exclusive distributor for Germany.

3 In other sales territories, Nintendo had appointed exclusive independent distributors. Thus, The Games Ltd, a trading division of John Menzies Distribution Ltd, a wholly owned subsidiary of John Menzies plc, became Nintendo's exclusive distributor for the United Kingdom and Ireland in August 1995 and remained so until 31 December 1997 at least.

4 The applicant, CD-Contact Data GmbH, was, for its part, Nintendo's exclusive distributor for Belgium and Luxembourg from April to 31 December 1997 at least.

2. *Administrative procedure*

Investigation into the video games sector (Case IV/35.587 PO Video Games)

5 In March 1995, the Commission opened an investigation into the video games industry (Case IV/35.587 PO Video Games). During that inquiry, on 26 June and 19 September 1995 the Commission sent requests for information to Nintendo under Article 11 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1971 (III), p. 1035) in order to obtain information relating in particular to its distributors and subsidiaries, the formal distribution agreements with those undertakings and its general sales conditions. NOE replied to those requests by letters dated 31 July and 26 September 1995.

Additional investigation relating specifically to Nintendo's distribution system (Case IV/35.706 PO Nintendo Distribution)

6 As a result of its preliminary findings, in September 1995 the Commission opened an additional investigation specifically into the distribution system of Nintendo (Case IV/35.706 PO Nintendo Distribution).

7 In the course of that investigation, on 9 October 1995 the Commission sent Nintendo a request for information. A number of meetings relating to Nintendo's distribution policy were held between Nintendo representatives and the Commission. Nintendo also provided various versions of the agreements concluded by it with certain of its distributors.

Inquiry following the complaint lodged by Omega Electro BV (Case IV/36.321 Omega — Nintendo)

8 On 26 November 1996, Omega Electro, a company active in the import and sale of electronic games, lodged a complaint under Article 3(2)(b) of Regulation No 17 that primarily concerned the distribution of Nintendo game cartridges and consoles, on the ground inter alia that Nintendo was hindering parallel trade and was operating a resale price maintenance policy in the Netherlands. Following that complaint, the Commission extended its investigation (Case IV/36.321 Omega — Nintendo). On 7 March 1997, it sent a request for information to Nintendo and John Menzies. In its reply of 16 May 1997, Nintendo admitted that some of its distribution agreements and some of its general terms had contained certain restrictions on parallel trade within the EEA. In October 1997, the Commission sent John Menzies a fresh request for information, to which the latter replied on 1 December 1997, providing certain information on the restrictive agreements.

9 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.

10 On 13 January 1998, John Menzies provided further information. On 21 January, 1 April and 15 May 1998, Nintendo forwarded several hundred documents to the Commission. On 15 December 1998, a meeting was held between the Commission and Nintendo representatives at which the question of possibly granting compensation to third parties injured by the restrictive agreements was discussed.

11 Following its admission, Nintendo also took measures designed to ensure future compliance with Community law and offered financial compensation to the third parties which had suffered financial harm as a result of its activities.

12 By letter of 9 June 1999, the Commission asked the applicant 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 the applicant.

13 On 26 April 2000, the Commission sent a statement of objections to Nintendo and the other undertakings concerned, including the applicant, for infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement ('the EEA Agreement'). Nintendo and the other undertakings concerned submitted written observations in response to the Commission's statement of objections, in which Nintendo and a number of those undertakings requested the application of the Commission Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). None of the parties asked for a formal hearing to be held. Nintendo did not substantially contest the facts set out in the statement of objections.

14 As regards the applicant more particularly, the reply to the statement of objections was sent to the Commission on 13 July 2000. An informal meeting was held between the applicant and Commission staff on 16 October 2000. Following that meeting, on 6 November 2000 the applicant submitted an additional reply to the statement of objections.

3. *The contested decision*

15 On 30 October 2002, the Commission adopted Decision 2003/675/EC relating to a proceeding pursuant to Article 81 [EC] 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 Decision'). The Decision was notified to the applicant on 8 November 2002.

16 The Decision includes in particular the following provisions:

'Article 1

The following undertakings have infringed Article 81(1) [EC] 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:

…

— [the applicant], from 28 October 1997 to the end of December 1997.

…

Article 3

The following fines are imposed on the undertakings listed in Article 1 in respect of the infringement referred to therein:

…

— [the applicant], a fine of EUR 1 million.

…'

17 As regards the events in Belgium and Luxembourg, the Commission observes in particular that '[i]t was clear to [the applicant] that it was bound to ensure that its customers did not parallel export'. That is apparent from a fax sent by the applicant to NOE on 28 October 1997 by which it gave assurances that it did not want to have any exports (see recitals 195 and 196 of the Decision). In the Commission's submission, that fax, which was in reply to a letter from NOE asking whether one of the applicant's customers might have sold Nintendo products to customers of Nintendo France SARL, shows that the applicant and Nintendo 'had arrived at a "concurrence of wills" [that] no exports … were to occur and that [the applicant] would monitor supplies to customers … from whom exports could be expected' (see recital 317 of the Decision).

18 The Commission also refers to the fact that, from September to December 1997, the applicant corresponded on various occasions with NOE about parallel imports into its territory in the expectation that this 'problem' would be addressed (see recital 197 of the Decision).

19 For the purpose of calculating the fines, the Commission applied in its Decision the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3) ('the Guidelines'). On the other hand, it decided not to apply the Leniency Notice because of the vertical nature of the infringement.

20 First, the Commission determined the basic amount of the fines according to the gravity and duration of the infringement.

21 In that connection, the Commission took the view that the undertakings concerned had committed a very serious infringement, in view of its nature, its actual impact on the market and the size of the relevant geographical market.

22 Next, the Commission considered that because the single and continuous infringement concerned several undertakings of extremely different sizes it was necessary to treat the undertakings concerned differently in order to take account of the specific weight of each undertaking and, consequently, the real impact of its offending conduct on competition. To that end, the undertakings concerned were divided into three groups according to the relative importance of each undertaking with regard to Nintendo, as distributor of the relevant products in the EEA. The comparison was made by reference to each undertaking's share in the total volume of Nintendo games consoles and cartridges purchased for distribution in the EEA in 1997, the last year of the existence of the infringement. On that basis, Nintendo alone was placed in the first group, whereas John Menzies was alone in the second group. For those undertakings, the Commission set the preliminary starting amount for gravity of the infringement at EUR 23 million in the case of Nintendo and EUR 8 million in the case of John Menzies. For the other undertakings concerned, a preliminary starting amount of EUR 1 million was decided upon.

23 Moreover, in order to ensure that the fine had a sufficiently deterrent effect, on the one hand, and in order to take account of the size and overall resources of Nintendo, John

Menzies and Itochu Corp., on the other hand, the Commission increased those starting amounts. More specifically in Nintendo's case, the Commission considered that, apart from its size, it being significantly smaller than Itochu, account had to be taken of the fact that it was the manufacturer of the products involved in the infringement. In view of those factors, the Commission increased by a factor of 3 the amounts set for Nintendo and Itochu, and a factor of 1.25 for John Menzies, so that the starting amounts were set at EUR 69 million in the case of Nintendo, EUR 10 million in the case of John Menzies and EUR 3 million in the case of Itochu.

24 As regards the duration of the infringement committed by each undertaking, the starting amount was increased by 10% a year. Since the applicant participated in the infringement only for a little more than two months, the Commission found that the amount of the fine imposed on it should not be increased.

25 Consequently, the Commission set the basic amount of the fine imposed on the applicant at EUR 1 million.

26 Second, with regard to aggravating circumstances, the basic amount of the fine imposed on Nintendo was increased, first, by 50% on the ground that it had been the leader and instigator of the infringement and, second, by 25% because it had continued the infringement after the Commission started its investigation in June 1995. The basic amount of the fine imposed on John Menzies was increased by 20% corresponding, first, to an increase of 10% to take account of the fact that it continued the infringement after the start of the Commission investigation and, second, an increase of 10% because of its refusal to cooperate with the Commission.

27 Third, when considering attenuating circumstances, the Commission considered that it was justified to reduce the fine imposed on one of the undertakings concerned, namely Concentra — Produtos para crianças SA ('Concentra'), Nintendo's exclusive distributor for Portugal, by reason of its exclusively passive role in the infringement during most of the period in question. The Commission then granted Nintendo a reduction of

EUR 300 000 to take account of the financial compensation offered by that undertaking to third parties harmed by the restrictive agreements who had been identified in the statement of objections. Finally, reductions of 40% and 25% respectively were granted to John Menzies and Nintendo for their effective cooperation with the Commission. However, no attenuating circumstances were established in the case of the other undertakings concerned.

Procedure and forms of order sought

28 By application lodged at the Registry of the Court of First Instance on 17 January 2003, the applicant brought the present action.

29 Upon hearing the report of the Judge Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure.

30 The parties presented their oral arguments and their replies to oral questions put by the Court at the hearing on 21 May 2008.

31 At that hearing, the Commission produced, at the Court's request, a number of documents in respect of which the applicant was requested to submit its observations. By letter lodged at the Court Registry on 26 May 2008, the applicant stated that it had no observations to make on those documents. Following the lodging of that letter, the Court decided that it was appropriate to close the oral procedure.

32 The applicant claims that the Court of First Instance should:

— annul the Decision in so far as it is addressed to the applicant, wholly or in part, in particular Articles 1 and 3;

— order the Commission to pay the costs.

33 The Commission contends that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

Law

34 In support of its application, the applicant puts forward two pleas in law. The first alleges infringement of Article 81 EC, breach of the obligation to state reasons, and manifest error of assessment. The second plea alleges breach of the principles of sound administration, equal treatment and proportionality and breach of the obligation to state reasons.

35 At the hearing, the applicant also claimed that, in view of the duration of both the administrative procedure and the procedure before the Court, the amount of the fine imposed on it should at the very least be reduced.

1. *The first plea: infringement of Article 81 EC, breach of the obligation to state reasons and manifest error of assessment*

Arguments of the parties

36 The applicant maintains that the Commission was not entitled to conclude, on the basis of the documents cited by it in the Decision, that an agreement or concerted practices existed between it and Nintendo. Therefore, the Commission not only misapplied Article 81 EC but also acted in breach of its obligation to state reasons under Article 253 EC.

37 It claims, first, that the distribution agreement it concluded with Nintendo in April 1997 allowed, under Article 4.6 thereof, for 'passive exports' and contained no provisions restricting trade contrary to Article 81 EC.

38 The applicant then states that it never concluded or participated in any agreement designed to hinder parallel trade. It maintains, in that regard, that it exported Nintendo products passively on a large scale and supplied customers which it knew either resold those products to customers established outside Belgium and Luxembourg or were themselves established outside those territories. The Commission's file contains nothing to indicate that the applicant's customers were refused supplies on the ground that they were located outside those territories or that the products supplied would then be exported.

39 The applicant submits that there was a clear difference between the facts relating to it and those relating to the other distributors to whom the Decision was addressed. The Commission's findings concerning its conduct are limited in scope. The Commission's conclusion that sufficient evidence made it possible to conclude that the applicant had participated in an agreement or concerted practice with Nintendo in order to limit parallel exports appears to rely more on the findings concerning Nintendo's distribution policy at the beginning of the 1990s than on a specific and objective assessment of the documents relating to the applicant.

40 The applicant submits in particular that the Commission failed to take account of the fact that it did not become a distributor of the relevant products until April 1997, that is to say during the period in which Nintendo reviewed its general distribution policy and was seeking active compliance with Community competition law. Against that background, the Commission could not merely rely on the conviction that the newly appointed distributors were simply integrated into the pre-existing plan.

41 In this case, there is no evidence of a concurrence of wills between the applicant and Nintendo or the acquiescence, tacit or explicit, of the applicant in Nintendo's unilateral policy. The Commission failed to observe the requirements concerning standard of proof of an agreement laid down by the case-law. The applicant submits that, as it claimed in its reply to the statement of objections, the factors supporting the conclusion that a horizontal agreement exists cannot, in all circumstances, be considered sufficient evidence to conclude that a vertical agreement exists. The applicant considers in particular that, whilst contacts between suppliers and distributors are logical and acceptable from the competition law standpoint, the same does not apply to horizontal relations between competitors.

42 As regards, first, proof of the existence of an impediment to parallel exports from Belgium and Luxembourg, the Commission relied on a single document, namely a fax sent by the applicant to NOE on 28 October 1997. However, according to the applicant, the Commission read that document in a partial and incomplete manner. In that fax, the applicant merely sought to inform Nintendo that the sales to the French market about which Nintendo had complained could not have been de facto 'active sales'

through a wholesaler established in Belgium. That fax referred only to the applicant's 'unilateral' decision on the way in which it allocated the products in view of the limited supplies available to it. In contrast, there was no reference to any agreement or commitment on the part of the applicant to limit exports. In its reply, the applicant maintains that, because it feared that Nintendo would limit its supplies or terminate its exclusive distribution agreement, it may have given it the impression that it was not exporting its products to other territories.

43 As regards, second, proof of the prohibition of parallel imports into Belgium and Luxembourg, the applicant maintains that the Commission again relied on a biased and incomplete reading of the relevant documents, namely a series of letters sent by the applicant to Nintendo. In those letters, the applicant merely sought to make certain that the price it was paying to Nintendo for the products in question was not too high.

44 As regards, third, proof of the existence of a concerted practice, the applicant considers that the documents produced in the administrative procedure clearly indicate that it did not participate in any concerted practice designed to hinder parallel exports of Nintendo products. In particular, none of those documents indicates that the applicant restricted its sales to customers outside Belgium and Luxembourg, save in situations where it was out of stock. On the contrary, those documents indicate that it was an active parallel exporter of Nintendo products and that it took part in parallel trade in those products.

45 The Commission contests all those arguments.

Findings of the Court

The existence of an infringement of Article 81(1) EC

46 It is settled case-law that, in order for there to be an agreement within the meaning of Article 81(1) EC, it is necessary and sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 256, and Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 67; see also, to that effect, 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).

47 As regards the form in which that joint intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (*Bayer* v *Commission*, paragraph 46 above, paragraph 68; see also, to that effect, *ACF Chemiefarma* v *Commission*, paragraph 46 above, paragraph 112, and *Van Landewyck and Others* v *Commission*, paragraph 46 above, paragraph 86).

48 The concept of an agreement within the meaning of Article 81(1) EC, as interpreted by the case-law, requires the existence of a concurrence of wills between at least two parties. The form of that concurrence of wills is unimportant so long as it constitutes the faithful expression of the parties' intention. That concurrence of wills may result from both the clauses of a contract, such as a distribution contract, and from the conduct of the undertakings concerned (see, to that effect, Case C-74/04 P *Commission* v *Volkswagen* [2006] ECR I-6585, paragraph 39).

49 In relation to adducing evidence of an infringement of Article 81(1) EC, it should be pointed out that it is incumbent on the Commission to prove the infringements which it has found and to adduce evidence capable of demonstrating to the requisite legal

standard the existence of circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58, and Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 86). In this respect, the Commission must produce sufficiently precise and consistent evidence to establish the existence of the infringement (see, to that effect, Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 43 and the case-law cited).

50 As regards, lastly, the scope of review by the Court, it should be recalled that according to settled case-law, where the Court is faced with an application for the annulment of a decision applying Article 81(1) EC, it undertakes a comprehensive review generally of the question whether or not the conditions for the application of Article 81(1) EC are met (Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 81; see also, to that effect, Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34, and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62).

51 Before the Court examines the material factors taken into account in the present case by the Commission, it points out that, contrary to what the Commission claims, an argument cannot be based on the fact that Nintendo, the other party to the agreement, expressly stated in its reply to the statement of objections that it accepted the way in which the Commission presented the facts in that statement and thus fully admitted the existence of an agreement and concerted practices with the applicant. Any recognition by Nintendo, the other party to the distribution agreement, of certain facts cannot in any event call in question the applicant's right to contest the facts before the Court. That consideration is all the more valid in this case, given that the applicant specifically contested in its replies to the statement of objections that it had committed any infringement whatsoever of Article 81(1) EC.

52 Further, it must be observed that, contrary to what the applicant appears to indicate in its written pleadings, the Commission did not refer to the terms of the distribution agreement between Nintendo and the applicant as such in order to find the existence of an agreement contrary to Article 81(1) EC. In that regard, the Commission stated, at

recital 196 of the Decision, that '[t]he text of the distributor agreement between [the applicant] and Nintendo allowed [the applicant] to export passively'. Unlike what was found in respect of certain of the distributors to which the Decision relates, the distribution agreement, which was concluded between the applicant and Nintendo 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.

53 It must also be stated that, contrary to the arguments put forward by the applicant, the Commission made no reference whatsoever, as regards the applicant, to the existence of a concerted practice between it and Nintendo, but only to the conclusion of an 'agreement' (see recital 196 of the Decision) contrary to Article 81(1) EC. Accordingly, the applicant's arguments regarding the absence of a concerted practice are ineffective.

54 In the absence of any direct documentary evidence that a written agreement was concluded between Nintendo and the applicant concerning the limitation or reduction of passive exports, the Commission found that the applicant's participation in an agreement contrary to Article 81(1) EC was evidenced by its conduct, as expressed in its correspondence.

55 Accordingly, it is necessary to examine whether, in view of the wording of the letters exchanged, the Commission established to the requisite legal standard that there was a concurrence of wills between the applicant and Nintendo to limit parallel trade.

56 In that respect, it should be recalled that, in the Decision, the Commission referred to a body of written evidence, and more specifically to a fax sent by the applicant to NOE on 28 October 1997. It is common ground between the parties that that fax was prompted by a complaint of 24 October 1997 sent by Nintendo France to NOE regarding, in particular, exports of products from Belgium, for which the applicant was Nintendo's authorised distributor.

57 That complaint states in particular as follows:

'Even if such kind of grey import will always occur, we believe NOE has several ways to help [Nintendo France] to limit those problems. Most efficient will be:

1. …

2. Negotiate with distributors to avoid it.

Some (we know it is true for Belgium and Italy) almost organize it unofficially with some wholesalers or even some retailers. What happens if we do the same exporting one discounted hot item to their customers?'

58 In the fax of 28 October 1997 sent to NOE in response to that complaint, the applicant explains that it was not in a position to provide certain quantities of product to BEM, a

wholesaler established in Belgium which might potentially engage in parallel trade. That fax, which is referred to in part in recital 195, is worded as follows:

'I have checked your information and do not find any correspondence with our information.

(1) [BEM]'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, [BEM] delivered some Hardware in France, we are very cautious with this customer and would never deliver him this big quantities.

(3) We only have received 7.000 pieces of Lylat Wars and are not in the possibility to deliver 5.000 pieces of Software to one customer.

…

As we discussed last week with you, we are very cautious in our deliveries as we do not want to have any export, as we need these goods for our Belgian market.'

59 Contrary to what the Commission submits, it is not clear from the wording of that fax that the applicant 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, it cannot be inferred with requisite certainty that the 'caution' to which the applicant refers in respect of its customers which engage generally in exports shows that the applicant had agreed to the policy of limiting the parallel trade in question. Thus, the applicant's interpretation that the reference to the limited quantities at its disposal must be analysed as information showing that it was materially impossible for it to engage in active selling through a wholesaler established in Belgium cannot be dismissed from the outset.

60 However, as was noted at paragraph 58 above, the fax of 28 October 1997 was a direct response to the letter of 24 October 1997 in which Nintendo France had complained about parallel exports from Belgium, for which the applicant 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. The applicant 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 parallel exports from Belgium.

61 As regards the documents relating to parallel imports into Belgium and Luxembourg, the Commission referred to the fact that a system of practical collaboration and information exchange on parallel trade had been developed between Nintendo and certain of its authorised distributors, including the applicant. The applicant's participation in the information exchange system emerges from several letters cited in recital 197 of the Decision.

62 The wording of those various letters makes it possible, by a logical extension of the considerations set out above, to conclude that their object was to denounce parallel imports of Nintendo products into Belgium and that they were part of the information exchange system developed by Nintendo.

63 In the letter of 4 September 1997 sent to NOE before the relevant period, the applicant stated inter alia the following:

'Our customers are cancelling their orders for the N64 console because they apparently can get them cheaper in France … This is definitely the main priority for our discussions in Monaco. Immediate action in this context is no doubt mandatory.'

64 The applicant's letter to NOE of 3 November 1997, which is also referred to by the Commission in recital 197 of the Decision, states inter alia:

'The following proposal is now on the Belgian market: 1420 pieces of N64 HW at … with German manual.'

65 In the fax sent on 12 November 1997 to Nintendo France, which had no power to set the purchase price of the products, the applicant makes the following comments:

'We have just received a leaflet from Toys'R Us who is apparently proposing SNES Donkey Kong Country 3 at a Consumer price in Belgium of [BEF] 1.495,- (+- [FRF] 249) while it is proposed on your latest price list at [FRF] 372 [excluding tax]. Are these goods Grey import or do you have a special promotion on this article?'

66 The document of 4 December 1997 sent to the applicant by NOE consists of a request for information on the parallel imported goods.

67 The fact that the applicant had, in practice, participated in parallel trade by exporting goods to customers outside Belgium and Luxembourg is not capable of calling in question the conclusion set out in paragraph 62 above. The fact that an undertaking, whose participation in an unlawful concerted practice under Article 81(1) EC is established, did not conduct itself in the market in the manner agreed with its competitors does not necessarily have to be taken into account. An undertaking which, despite colluding with its competitors, follows a policy that departs from that agreed on may simply be trying to exploit the cartel for its own benefit (see, to that effect, Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 130).

68 Lastly, as regards proof of the prohibition of parallel imports into Belgium and Luxembourg, the applicant cannot claim that the letters cited by the Commission (see paragraphs 63 to 66 above) were misinterpreted, in so far as, in those letters, the applicant merely sought to ensure that the price that it was paying to Nintendo for the relevant products was not too high. It is clear from reading all those letters, in particular the fax of 12 November 1997 (see paragraph 65 above), 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.

69 It follows from all those considerations that the Commission did not err in finding that the applicant participated in an agreement having as its object the limitation of parallel trade.

70 The complaint alleging infringement of Article 81(1) EC must therefore be rejected.

Infringement of the obligation to state reasons

71 The applicant essentially claims that the Commission did not set out the situation of each of the distributors. In so doing, the Commission considered that all the distributors had agreed with Nintendo to hinder parallel trade irrespective of the date and circumstances of the conclusion of the distribution agreements.

72 That argument cannot be upheld. The Decision clearly sets out the facts specific to each of the distributors in question. As regards more specifically the applicant, the Decision goes into considerable detail concerning in particular the events in Belgium and Luxembourg (recitals 194 to 197) and the arguments as to whether there was a prohibited agreement and as to the scope of the infringement (recitals 313 to 330).

73 Further, it is settled case-law that the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirement to state reasons must be assessed in the light of the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; and Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633, paragraph 368).

74 As is clear from the examination of the first part of the first plea, the Decision shows clearly and unequivocally the Commission's reasoning and enables the applicant to ascertain the reasons for the measure adopted and the Court to exercise its power of review.

75 The first plea must therefore be rejected.

2. *The second plea: breach of the principles of sound administration, equal treatment and proportionality and of the obligation to state reasons*

Arguments of the parties

76 The applicant maintains that, when setting the amount of the fine for infringement of Article 81 EC, the Commission must in all cases consider the position of each undertaking separately. It should in particular take into account any difference between the roles played by the undertakings concerned in the infringement and any difference in the degree or length of participation. However, according to the applicant, the Commission acted in breach of those principles by imposing on the applicant a fine that is comparable to or even higher than the fines imposed on Nintendo's other distributors, whereas the infringement alleged to have been committed by it was of more limited impact and duration.

77 Moreover, the Commission took no account vis-à-vis the applicant either of the various attenuating circumstances provided for in the Guidelines or the features of its particular situation.

78 In that regard, it claims in the first place that its conduct did not disclose either an intention to engage in, or an awareness of, offending conduct. It never took part in any formal agreement restricting parallel imports, received questionnaires or participated in meetings where the issue of parallel imports was discussed. The applicant

emphasises that it was a small distributor without the legal and economic knowledge and infrastructures which enable larger undertakings to recognise when their conduct constitutes an infringement.

79 Next, the applicant submits that, even were it to be assumed that the applicant participated in an infringement, it played an exclusively passive role, which under the Guidelines should lead to a reduction of the fine imposed on it. The Commission has not proved that it played an active role by informing Nintendo of parallel imports of its products. The applicant even acted contrary to the alleged agreement by delivering products to companies established abroad and to companies based in its territory while knowing that the products would be exported. It also emphasises that, at the time of the alleged limitations on parallel trade, it was not a Nintendo distributor and therefore was not aware of such restrictions.

80 The applicant submits that, if such circumstances do not lead to the annulment of the fine imposed on it, they should at the very least prompt the Court to reduce it by 50% in accordance with the principle of equal treatment. It observes that Concentra benefited from such a reduction even though Concentra's role was no less active than the applicant's. In its reply, the applicant states in particular that Concentra had, like it, given information to NOE.

81 The applicant also argues that its allegedly illegal conduct in any event had only a limited impact on the market. It states that it did not apply the alleged agreement and that, in comparison in particular with the conduct of other distributors, the infringement attributed to it is of very short duration.

82 The applicant also criticises the Commission for acting in breach of the principle of equal treatment by dividing the offenders into three groups. More specifically, it complains that it was placed in the same group, as regards the starting amount of the fine, as several distributors which participated in the alleged infringement for much longer periods and, in contrast to it, participated actively in it. By treating different

situations in the same way, that is to say, by imposing the same basic fine of EUR 1 million on those companies, the Commission disregarded the principle of equal treatment.

83 In its reply, the applicant contends in particular that the differences, in terms of market shares, between the undertakings in the third group are greater than the differences between the undertakings in the three groups. Thus, it is difficult to understand that, in view of the respective average shares of the undertakings concerned in the sale of the relevant products, Concentra, Linea GIG SpA, Nortec AE, Bergsala AB, Itochu and the applicant were placed in one and the same group, whereas John Menzies and Nintendo were placed in different groups. That difference is all the less understandable in view of the basic amounts set for each of those groups.

84 The applicant also criticises the Commission for relying, in classifying the undertakings in question into three groups, solely on the market shares held by each of them, which attests to the fact that no account was taken of the real impact of the conduct of each undertaking.

85 In addition, the applicant considers that the decision to impose a fine of EUR 1 million on a small and dependent distributor for an alleged agreement of a maximum two months' duration which was never implemented and in fact was infringed continuously is in breach of the principle of proportionality.

86 Next, the applicant criticises the Commission for not contacting it until 9 June 1999, on which date the Commission's investigation was being finalised. The Commission thus deprived it of any opportunity to cooperate and, therefore, benefit from a reduction of the basic amount of the fine in that regard of at least 40%. The fact that the Commission did not consider it necessary to inform it of the investigation by requesting information from it is an indication of the applicant's limited role in the scheme established by Nintendo.

87 The applicant claims, finally, that the Commission acted in breach of the principle of sound administration and the rights of the defence by depriving it of any opportunity to submit its observations during a formal hearing with third parties present. It claims that the undertakings concerned must be given the opportunity of making known their views concerning the objections raised against them and the documents upon which those objections are based. The right of the parties to be heard at a formal oral hearing under the chairmanship of an independent hearing officer is particularly important within the system in which the Treaty's competition rules are applied, since that is the only opportunity to make those views known to independent third parties who have an influence on the Commission's decision.

88 In this case, the Commission exercised 'undue influence' on the applicant to waive its right to a hearing in the presence of independent third parties. The applicant maintains that, whilst the Commission did not expressly pressurise it to waive its right to a formal hearing, it strongly suggested that it should accept an informal hearing, arguing that that would save time and costs. The Commission thus de facto limited the applicant's rights of defence during the administrative procedure. It states in that connection that, even though it waived that right by reason of the wish expressed by the Commission to give a decision as soon as possible, more than two years elapsed between its request and the adoption of the Decision. It also submits that the Commission should in any event have taken account of the fact that it cooperated by not requesting such a hearing and, consequently, reduced the fine imposed on it.

89 In its reply, the applicant indicates that it did not claim that the Commission exerted direct or explicit pressure on it to waive its right to present its defence in a formal hearing conducted by a hearing officer. Similarly, it did not claim that the Commission had not informed it of its right to have a formal hearing. Moreover, it recognises that it is for the addressees of a statement of objections to request a formal hearing. The applicant nevertheless contends that it felt obliged to waive that right because it had been informed by one of the Commission's case handlers that the other addressees had already waived their right and that the Commission wished to proceed to a decision as quickly as possible. The Commission's practice is, according to the applicant, contrary to Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81 EC] and [82 EC] (OJ 1998 L 354, p. 18), as amended by Article 4 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21), according to which oral hearings should be conducted by a hearing

officer. It follows from those provisions that all matters concerning the right of parties to an oral hearing should be dealt with by the hearing officer and not by the Commission's case handlers adjudicating the case itself. The case handlers are barred from contacting parties to discuss the desirability of organising an oral hearing. The applicant considers that, even if such a breach of essential procedural requirements were not in itself to lead to annulment of the Decision vis-à vis the applicant, the Commission should at least have considered it in determining the amount of the fine.

90 The Commission disputes all those complaints.

Findings of the Court

91 In its second plea, the applicant puts forward various arguments relating, first, to the manner in which the amount of the fine imposed on it was set and, second, to the conduct of the administrative procedure.

92 The complaints put forward raise the issue, first, of compliance with the principles of equal treatment and proportionality in setting the amount of the fines, second, of compliance with the applicant's rights of defence and the principle of sound administration during the administrative procedure preceding the adoption of the Decision and, third, of compliance with the obligation to state reasons.

Compliance with the principles of equal treatment and proportionality in relation to the setting of the amount of the applicant's fine

93 In this instance, it should be pointed out that it is clear from recitals 366 to 464 of the Decision that the fines imposed by the Commission in respect of the infringements of Article 81(1) EC and Article 53(1) of the EEA Agreement were imposed pursuant to Article 15(2) of Regulation No 17 and that the Commission, as it expressly confirmed in its defence, applied the method set out in the Guidelines when it set the fines.

94 Although the Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91 and the case-law cited).

95 In claiming that the Commission omitted to take account of its particular situation at various stages of the calculation of the fine, the applicant to a large extent confuses the assessment of the actual impact of an infringement on the market for the purposes of determining its gravity (first paragraph of Section 1 A of the Guidelines) — in the course of which it is necessary to consider the effects of the infringement as a whole rather than the actual conduct of each undertaking — with the assessment of the individual conduct of each undertaking for the purposes of assessing any aggravating or attenuating circumstances (Sections 2 and 3 of the Guidelines), in the course of which it is necessary, in accordance with the principle that penalties must fit the offence, to examine the relative gravity of the undertaking's own involvement in the infringement.

96 Where the Commission relies on the impact of the infringement in order to assess its gravity, in accordance with Section 1 A, first and second paragraphs, of the Guidelines, the effects to be taken into account in that regard are those resulting from the entire

infringement in which all the undertakings participated, so that consideration of the individual conduct or figures particular to each undertaking is not relevant in that regard (Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 203).

97 However, as is apparent from the case-law, where an infringement has been committed by several undertakings, it is appropriate to consider the relative gravity of the participation of each of them (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 623, and *Commission* v *Anic Partecipazioni*, paragraph 49 above, paragraph 150) in order to determine whether there are any aggravating or attenuating circumstances relating to them.

98 That conclusion follows logically from the principle that penalties must fit the offence, according to which an undertaking may be penalised only for acts imputed to it individually. That principle applies in any administrative procedure that may lead to the imposition of sanctions under Community competition law (*Union Pigments* v *Commission,* paragraph 67 above, paragraph 119; see also, to that effect, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63).

99 Sections 2 and 3 of the Guidelines provide in that connection for adjustment of the basic amount of the fine by reference to certain aggravating and attenuating circumstances, which are peculiar to each undertaking concerned.

100 It is therefore necessary to examine the applicant's arguments separately according to whether they relate to the determination of the basic amount of the fine by reference to the gravity and duration of the infringement or to the establishment of certain attenuating circumstances.

— The determination of the basic amount of the fine: division of the undertakings concerned for the purpose of determining the specific starting amount of the fine and duration of participation in the infringement

101 According to the method laid down by the Guidelines, the Commission takes as the starting point for calculating the amount of the fines to be imposed on the undertakings concerned an amount determined by reference to the gravity of the infringement. In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market (Section 1 A, first paragraph). Within that context, infringements are put into one of three categories, namely 'minor infringements', for which the likely fine will be between EUR 1 000 and EUR 1 000 000,'serious infringements', for which the likely fine will be between EUR 1 000 000 and EUR 20 000 000, and 'very serious infringements', for which the likely fine will be above EUR 20 000 000 (Section 1 A, second paragraph, first to third indents). Within each of these categories, the proposed scale of fines makes it possible, according to the Guidelines, to apply differential treatment to undertakings according to the nature of the infringements committed (Section 1 A, third paragraph). It is also necessary, according to the Guidelines, to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (Section 1 A, fourth paragraph).

102 Within each of the three categories of infringement thus defined, it may be necessary, according to the Guidelines, to apply weightings in certain cases to the amounts determined in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type and, consequently, to adjust the starting point for the basic amount according to the specific nature of each undertaking (Section 1 A, sixth paragraph).

103 In this instance, the applicant disputes neither the very serious nature of the infringement in question nor the findings on which the Commission relied to conclude that that infringement was very serious, findings which concern the nature of that infringement, its actual impact on the market and the size of the relevant geographic market (recitals 374 to 384 of the Decision). Nor does the applicant call into question

the principle itself of dividing the members of a cartel into several categories. However, it complains, first, that the Commission infringed the principles of equal treatment and proportionality by placing in the same category undertakings of a different size and, second, failed to have regard to the differing degrees of involvement both in terms of duration and intensity of the various undertakings in the infringement in question.

104 In that connection, the Court recalls that the method of dividing the members of a cartel into categories in order to apply differential treatment when setting the starting amounts of the fines, the principle of which has been approved by decisions of the Court of First Instance even though it ignores the differences in size between undertakings in the same category, results in a flat-rate starting amount for all the undertakings in the same category (see Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 83 and the case-law cited).

105 It is true that such a division into categories must comply with the principle of equal treatment, which prohibits similar situations from being treated differently and different situations from being treated in the same way, unless such treatment is objectively justified. Furthermore, according to the case-law, the amount of the fine must at least be proportionate in relation to the factors taken into account in the assessment of the gravity of the infringement. In order to ascertain whether a division of the members of a cartel into categories is in keeping with the principles of equal treatment and proportionality, the Court, as part of its review of the lawfulness of the exercise of the Commission's discretion in the matter, must none the less confine itself to checking that the division is coherent and objectively justified and not immediately substitute its own assessment for that of the Commission (*Daiichi Pharmaceutical* v *Commission*, paragraph 104 above, paragraphs 84 and 85).

106 In this instance, the Commission considered that the 'undertakings concerned [could] in principle be divided into three groups established according to the relative importance of each firm with regard to Nintendo … 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' (recital 386 of

the Decision). Nintendo (whose market share was estimated at [*confidential*] [1] %) and John Menzies (with a market share of [*confidential*]%) were thus each placed in the first and second group respectively. The other undertakings concerned (with market shares ranging from [*confidential*] to [*confidential*]%), including Itochu, were placed in the third category.

107 The Commission's decision to place in the same group the undertakings having a market share in the distribution of the relevant products lower than [*confidential*]% cannot be qualified as arbitrary and does not exceed the limits of the broad discretion which it has in that regard.

108 The fact that the starting amounts relating to each of the categories are not strictly proportionate to the respective market shares of the undertakings concerned cannot be censured since it is merely the result of the system of division by categories and the setting of a flat-rate amount that it entails. It should be pointed out that, even if the effect of the division into groups is that certain undertakings are allocated the same basic amount even though they differ in size, the difference in treatment is objectively justified by the greater importance attached to the nature of the infringement than to the size of the undertakings in the assessment of the gravity of the infringement (see Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 411 and the case-law cited).

109 In the present case, whilst there are admittedly differences in relative terms between the market shares held by the undertakings placed in the same group, those differences are not, in absolute terms, of such importance that they justified placing the applicant in a different group. In particular, the method adopted by the Commission did not produce a grossly distorted picture of the markets in question (see, to that effect, Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 159). The market in question, namely the market for distribution of Nintendo products, was dominated by Nintendo and its subsidiaries at the material time. With the exception of John Menzies,

1 — Condidential data omitted.

independent distributors occupied only a relatively modest position in the distribution system in question (see recitals 388 to 390 of the Decision).

110 It must therefore be concluded that the existence of considerable relative differences between the market shares of the undertakings belonging to the last category, which is inherent in the system of division by categories and in the setting of a flat-rate amount that it entails, is objectively justified. The usefulness of the Commission's right to classify undertakings into categories would be considerably diminished if any difference between market shares that is considerable in relative terms, albeit corresponding to a very small difference in terms of percentage points, precluded the placing of different undertakings in the same category.

111 In that context, the applicant cannot complain that the Commission did not, at that stage, take into account the differing degrees of involvement of each of the undertakings concerned, since those differences can be assessed only at the stage of the examination of attenuating circumstances (see paragraphs 97 to 99 above).

112 As regards, lastly, the argument that the Commission failed to take account of the very short duration of the applicant's participation in the infringement, it is sufficient to recall that, in accordance with the method set out in the Guidelines, the amount of the fine is adjusted by reference to duration after the amount of the fine set for gravity has been determined.

113 Moreover, the Commission clearly stated at recital 404 of the Decision that, since the applicant participated for only slightly more than two months, it had decided not to increase, under that heading, the preliminary amount of the fine set according to gravity. Accordingly, the Commission took due account of the relatively short duration of the applicant's participation in the infringement in question.

— The presence of attenuating circumstances and compliance with the principle of equal treatment in that connection

114 In this instance, it is necessary to examine whether the Commission was right to refuse to take into account certain circumstances in relation to the applicant, namely, first, the fact that it did not have the knowledge enabling it to recognise that its conduct constituted an infringement and, second, the fact that it played only a passive role in the infringement.

115 The first circumstance cannot, as the Commission indeed stated, be taken into account as an attenuating circumstance within the meaning of the Guidelines. The reference in Section 1 A of the Guidelines to the fact that,'[g]enerally speaking, account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognize that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law' does not mean, *a contrario*, that the Commission is required to take account of the modest size of certain undertakings.

116 As regards the second circumstance, namely the applicant's alleged passive role in the infringement, it should be recalled that, at recital 431 of the Decision, the Commission stated that the applicant had spontaneously communicated information to NOE on parallel trade and that, consequently, its participation should be regarded as active. The Commission refers in that connection to recital 197 of the Decision, which mentions four letters from the applicant dated 4 September, 3 November, 12 November and 4 December 1997 respectively.

117 The letter of 4 September 1997, which is cited in paragraph 63 above, precedes the infringement period and is therefore irrelevant. The letters of 3 November and 4 December 1997, which were sent to NOE, show that Nintendo products were being offered on the Belgian and Luxembourg markets. The letter of 12 November 1997

attests to the fact that the applicant had contacted Nintendo France, and only Nintendo France, in connection with some suspected 'grey' imported game cartridges.

118 The factors supporting the finding that Concentra played a passive role are set out in recitals 212, 213 and 421 of the Decision. It is stated inter alia therein that although no evidence exists that Concentra prevented or tried to prevent parallel trade there is 'evidence that Concentra reported parallel imports into Portugal to NOE and also asked NOE for help in this matter' (see recitals 212 and 213 of the Decision). It is not contested that, of the four letters from Concentra to NOE or Nintendo of America, Inc., cited in recital 213 of the Decision, three are in response to a questionnaire and one was communicated spontaneously. In the letter sent spontaneously on 21 November 1997, which is partially cited in recital 213 of the Decision, Concentra stated:

'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.'

119 It must be held that the documents cited by the Commission and the circumstances in which they were communicated do not disclose any notable difference between the role played by the applicant in the infringement and that played by Concentra. The different treatment applied by the Commission is all the less justified given that, first, the applicant entered the market affected by the infringement at a particularly late stage (see, to that effect, Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 168 and the case-law cited) and, second, Concentra had concluded with Nintendo a formal distribution agreement restricting competition, which was not true of the applicant.

120 It follows from those considerations that the Commission infringed the principle of equal treatment in finding that the applicant did not play an exclusively passive role in the infringement but granting Concentra the benefit of that attenuating circumstance.

121 This plea must therefore be upheld in part and it is necessary to vary the Decision by granting the applicant a rate of reduction of the fine identical to that granted to Concentra for attenuating circumstances owing to the passive nature of its role in the infringement in question, namely a reduction of 50%. The specific consequences of that variation will be clarified below.

Observance of the applicant's rights of defence and the principle of sound administration

122 It must be stated that the claim that the Commission encouraged the applicant to waive its right to a formal hearing is in no way substantiated. The applicant has mentioned the fact that 'the Commission notified [it] on 3 July 2000 that all other addressees had waived their right for an oral hearing and that the Commission wanted to proceed with the case as swiftly as possible' and that, in so doing, it implicitly pressurised the applicant to waive its right to a formal hearing.

123 That cannot constitute proof of an infringement of the rights of the defence or of the principle of sound administration. Further, the Commission clearly stated in the letter accompanying the statement of objections that, in accordance with Regulation No 2842/98, it was for the parties to make a request in their written comments to develop their arguments at an oral hearing.

124 The argument that the Commission infringed Article 10 of Regulation No 2842/98, as supplemented by Article 4 of Decision 2001/462, an argument based on an incorrect premiss, must likewise be rejected. Those provisions stipulate respectively that '[h]earings shall be conducted by the Hearing Officer' (Article 10 of Regulation No 2842/98) or that '[t]he hearing officer shall organise and conduct the hearings provided for in the provisions implementing Articles 81 [EC] and 82 [EC]' (Article 4 of Decision 2001/462). It does not in any way follow that only hearing officers can contact the undertakings in question in order to discuss and inform them of the possibility of a formal hearing. Such contact, which is part of day-to-day administrative activities, does not therefore encroach on the tasks of the hearing officer.

125 Further, the fact that the applicant chose not to request an oral hearing cannot be interpreted as cooperation entitling it to a reduction of the fine imposed on it. Cooperation conferring entitlement, as the case may be, to a reduction of the amount of the fine under Section 3 of the Guidelines must be 'effective cooperation by the undertaking in the proceedings'. That means conduct which enabled the Commission to establish the existence of the infringement more easily and, if necessary, to put an end to it (Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 36, and Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 83). Waiving the right to a formal hearing, assuming that it enabled the Commission not to delay the adoption of the Decision, cannot be categorised as cooperation within the meaning of Section 3 of the Guidelines.

126 Nor can the applicant claim that the Commission deprived it of an opportunity to cooperate by informing it of the investigation only on 9 June 1999. As was pointed at paragraph 125 above, any reduction of the amount of the fine imposed on an undertaking under Section 3 of the Guidelines presupposes 'effective cooperation' by it. However, in the present case, nothing supports the conclusion that the applicant was able to provide such cooperation, since it claims itself that it had no knowledge of the practices complained of.

127 Accordingly, all the complaints pertaining to the conduct of the administrative procedure must be rejected.

Compliance with the obligation to state reasons

128 As regards the claim that the Decision gives insufficient reasons in the assessment of the applicant's particular situation, it is sufficient to observe that it is apparent from recitals 194 to 197, 313 to 330, 352, 359, 404, 430 and 431 of the Decision that the Commission clearly refers to factors specific to its situation. Such a statement of reasons satisfies the requirements of Article 253 EC, as interpreted by the case-law referred to in paragraph 73 above.

3. *The plea put forward at the hearing, relating to the duration of the administrative procedure and the procedure before the Court*

129 Lastly, the Court must also reject the applicant's argument, put forward at the hearing, that the amount of the fine imposed on it should be reduced in view of the duration of the administrative procedure and the procedure before the Court.

130 To the extent that that plea concerns the duration of the administrative procedure conducted by the Commission, it must be declared inadmissible under Article 48(2) of the Rules of Procedure of the Court of First Instance, since that plea, which was not put forward in the original application, cannot be regarded as elaborating directly or by implication on a plea already put forward in the original application and is not based on matters of law or of fact which came to light in the course of the procedure. Nor is there any need in the circumstances of this case for the Court to examine of its own motion the plea alleging that the procedure before the Commission was unreasonably long (see, to that effect, Joined Cases T-189/95, T-39/96 and T-123/96 *SGA* v *Commission* [1999] ECR II-3587, paragraph 46, confirmed by the order in Case C-39/00 P *SGA* v *Commission* [2000] ECR I-11201, paragraphs 42 to 45).

131 As regards the criticism of the duration of the procedure before the Court, it must be stated that any excessiveness in that duration is not capable of affecting the lawfulness of the Decision that the Court is required to rule on. It follows that that plea is ineffective.

4. *The determination of the final amount of the fine*

132 As is apparent from paragraphs 116 to 121 above, it is necessary to vary the Decision inasmuch as it did not grant the applicant the benefit of the attenuating circumstance of its exclusively passive role in the infringement but granted the benefit of that attenuating circumstance to Concentra.

133 The Commission's findings in the Decision and the method of calculating the fines applied in the present case are otherwise unchanged.

134 The final amount of the fine is thus calculated as follows: the basic amount of the fine imposed on the applicant (EUR 1 million) is reduced by 50% on the basis of the attenuating circumstance of its exclusively passive role in the infringement, resulting in a final amount of EUR 500 000.

Costs

135 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court of First Instance may order that costs be shared or that

each party bear its own costs. In the circumstances of this case, each party must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber)

hereby:

1. **Sets the amount of the fine imposed on CD-Contact Data GmbH at EUR 500 000;**

2. **Dismisses the action as to the remainder;**

3. **Orders each party to bear its own costs.**

Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 30 April 2009.

[Signatures]

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