

COMMISSION DECISION

of 26 May 2004

relating to a proceeding under Article 81 of the EC Treaty against The Topps Company Inc, Topps Europe Limited, Topps International Limited, Topps UK Limited and Topps Italia SRL

(Case No COMP/C-3/37.980 — *Souris-Topps*)

(notified under document number C(2004) 1910)

(Only the English text is authentic)

(2006/895/EC)

On 26 May 2004, the Commission adopted a decision relating to a proceeding under Article 81 of the EC Treaty. In accordance with the provisions of Article 30 of Regulation No 1/2003 ⁽¹⁾, the Commission herewith publishes the names of the parties and the main content of the decision, having regard to the legitimate interest of undertakings in the protection of their business interests. A non-confidential version of the full text of the decision can be found in the authentic language of the case and in the Commission's working languages at DG COMP's website at http://europa.eu.int/comm/competition/index_en.html.

I: SUMMARY OF THE INFRINGEMENT

Addressees, Nature and Duration of the Infringement

- (1) This Decision is addressed to The Topps Company Inc (hereinafter 'Topps USA'), Topps Europe Ltd (hereinafter 'Topps Europe'), Topps UK Ltd (hereinafter 'Topps UK'), Topps International Ltd (hereinafter 'Topps International') and Topps Italia SRL (hereinafter 'Topps Italia') (together referred to as 'Topps').
- (2) The addressees infringed Article 81(1) of the Treaty by participating with several of their intermediaries in the United Kingdom, Italy, Finland, Germany, France and Spain in a complex of agreements and concerted practices with the object of restricting parallel imports of Pokémon stickers, trading cards and other collectibles from 4 February 2000 until 29 November 2000.
- (3) The case originates from a complaint by La Souris Bleue, a French retailer for collectible products, alleging that Topps and its distributors had successfully prevented parallel imports of Pokémon stickers and albums from Spain into France.

Products Concerned and Behaviour of Topps

- (4) The Decision concerns Pokémon collectibles. Collectibles are items like stickers, trading cards or removable tattoos popular with young children which follow certain themes (e.g. members of sports teams or characters of cartoon series). Pokémon is the name for a whole range of characters originally developed for the Nintendo 'Game Boy' videogame but also used, under a licence, by Topps to illustrate collectible products. In 2000, there was a significant demand for such Pokémon collectibles.

- (5) The definition of the relevant market can be left open since this case concerns a restriction of competition by object.
- (6) The Decision identifies the existence of agreements and concerted practices between Topps and seven of its European intermediaries with the overall objective of restricting parallel imports of Pokémon collectibles between Member States. Topps and its intermediaries pursued this objective with the following instruments and mechanisms:
 - Topps actively collected information so that it learned of instances of parallel trade from its intermediaries;
 - Topps monitored the final destination of Pokémon products;
 - when Topps knew from its intermediaries about instances of parallel trade, it asked them for help in order to trace back parallel imports to their source;
 - Topps also involved its intermediaries by requesting and receiving assurances that stock would not be re-exported to other Member States;
 - in some cases where Topps had the impression that its intermediaries did not cooperate, it threatened to cut the supply.
- (7) Topps acknowledged that it 'engaged in activities that have had the effect of impeding cross-border trade within the EU' and that 'a complete ban on exports and extensive territorial protection for its distributors in the circumstances described above is difficult to reconcile with Article 81'.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

- (8) The agreements and concerted practices between Topps and its distributors or agents are restrictive by object. They aim

at preventing intermediaries from exporting, both actively and passively, Pokémon products outside their respective contractual territories. As the object of the agreements and concerted practices in this case is to restrict competition, it is not necessary to consider their actual effects on competition. Notwithstanding this, the evidence on the Commission file shows that parallel imports were, in fact, prevented.

- (9) The block exemption regulations No 1983/83 (applicable until 31 May 2000) and No 2790/1999 did not apply since the restrictions aimed at guaranteeing absolute territorial protection, thereby covering both active and passive sales. Nor could the agreements benefit from an individual exemption under Article 81(3) of the Treaty since they did not result in any improvement of the distribution of these products and were detrimental to consumers.
- (10) The Decision is addressed to all European Topps subsidiaries which participated in the anti-competitive agreements and concerted practices, and the ultimate US parent company which are held jointly and severally liable for the infringement. The latter is held liable because it was in a position to decisively influence the conduct of its wholly owned subsidiaries. The Commission legally presumes, on the basis of the case law of the Court, that this power to influence was actually exercised. Topps did not succeed in rebutting this legal presumption which was, on the contrary, confirmed by the parallel involvement of all European subsidiaries and by the dual position of one Topps employee as both Managing Director of the Irish subsidiary and Vice President (International) of the US parent company. The decision is not addressed to Topps' intermediaries because their responsibility for the infringement was less significant.

II: FINE

Basic Amount

- (11) In its assessment of gravity, the Commission considers that infringements with the objective of preventing parallel imports between Member States are by their *nature* very serious violations of Article 81(1) of the Treaty. Such infringements have the objective of artificially partitioning

the single market and, thereby, jeopardise a fundamental principle of the Treaty. As regards the *actual impact* of the infringement, the Commission takes into account that it has no evidence showing that the restrictions of parallel imports were applied systematically to all intermediaries or products. Some of the agreements or concerted practices appear not to have been implemented in full and may have had a limited effect in terms of value of the goods concerned. The Commission has no evidence of substantial effects of the restrictions on the market. Concerning the *size of the relevant market*, the agreements or concerted practices identified in this Decision concerned seven national markets but the restrictive effects were mainly felt in only three importing Member States.

- (12) Consequently, the infringement committed by Topps is considered serious. In the light of this, the Decision considers EUR 2 650 000 an appropriate amount to take as a basis for calculating the fine. As the infringement is of short duration (from 4 February 2000 until 29 November 2000), the basic amount of the fine is not increased.

Aggravating and Attenuating Circumstances

- (13) The Commission does not take into account aggravating circumstances in this case.
- (14) As regards attenuating circumstances, the Commission takes into account that Topps terminated the infringement after the first Commission intervention. In view of this, the basic amount of the fine is reduced by 20 % (EUR 530 000). The Commission also considers that Topps has cooperated effectively with the Commission during the proceedings. Topps went beyond what was legally necessary to comply with the obligations under Article 11 of Regulation No 17, does not contest the facts upon which the infringement is based and contributed significantly to establishing the infringement. Therefore, the basic amount of the fine is reduced by an additional 20 % (EUR 530 000).

The Final Amount Imposed

- (15) In view of the above, the final amount of the fine imposed on Topps is EUR 1 590 000.