## MISLEADING INFORMATION (VARIOUS): THE DEUTSCHE POST CASE et al

Subject: Misleading information
Investigation
Procedure
Fines

Industry: Various; implications for all industries

Parties: See below; these were separate cases

Source: Commission Statement IP/99/985, dated 14 December 1999

*(Note. These cases illustrate the importance, in the procedure set out in the EC rules on competition, from notification through the process of investigation, of providing the Commission with accurate information. However, as the Commission points out, the fines which may be imposed on firms which fail to do so are relatively small and may not be a sufficient deterrent.)*

The Commission has adopted several decisions by which it imposed two fines of € 50,000 each on Deutsche Post, a fine of € 40,000 on the Dutch airline KLM and a fine of € 3,000 on each of the brewers Anheuser-Busch and Scottish & Newcastle. All companies had supplied incorrect or misleading information in competition procedures to the Commission. The Commissioner responsible for competition policy said: "For the enforcement of the EC competition rules it is an essential condition that companies provide accurate and complete information. These decisions underline the Commission's determination to ensure that firms comply fully with their legal obligations. Firms which frail to do so - whether deliberately or through a failure to take proper care - should not expect to escape sanction in future."

The Commission attaches considerable importance to ensuring that its role of creating and maintaining competitive markets, for the benefit of all companies and consumers in the European Union, is not compromised. Incorrect or misleading information can lead the Commission to take flawed decisions, with potentially serious effects on businesses and consumers in the EU. Therefore, the Commission is determined to apply its procedural rules strictly and to impose fines if and when these rules are broken.

Under the Merger Regulation from 1989 the Commission can impose fines between € 1,000 and € 50,000 when a company provides intentionally or negligently incorrect or misleading information in a notification or in a response to a request for information. Under Regulation 17 of 1962, the implementing regulation for procedures under Articles 81 and 82 of the EC Treaty concerning /

cartels and the abuse of a dominant position, the range of fines for the same infringements is from € 100 to € 5,000.

Deutsche Post AG notified in February 1999 under the Merger Regulation its intention to acquire sole control over the German high-speed delivery service Trans-o-flex GmbH. It had acquired a minority-shareholding already in 1997. Deutsche Post withdrew this notification some weeks after the Commission opened an in-depth investigation. In the merger proceedings of 1999, during its initial examination, however, the Commission found indications that the notified transaction of 1999 might not lead to the acquisition of control by Deutsche Post, because it could have acquired control over Trans-o-flex already in 1997. If that had been the case, the Commission would have had no jurisdiction to assess the transaction notified in 1999. On the basis of these indications, the Commission requested additional information from Deutsche Post and others concerning the transaction of 1997. In the course of this investigation it became apparent, that Deutsche Post had deliberately supplied incorrect and misleading information to deceive the Commission about its jurisdiction. Deutsche Post withheld information relevant in this context. The investigation of the Commission showed that Deutsche Post may have exercised control over Trans-o-flex since 1997 through a third party which had acquired the majority of the shares: agreements show that Deutsche Post carried the economic risk for this majority shareholding. This intentional supply of incorrect and misleading information in its notification and incorrect information in replying to information requests of the Commission by Deutsche Post constitutes a serious infringement of two provisions of the Merger Regulation, which call for the imposition of two fines. Meanwhile, the German Federal Cartel Office has also begun an investigation into the matter.

KLM notified in September 1998 under the Merger Regulation its planned acquisition of fill control of Martinair. KLM is the leading Dutch airline and Martinair is the second largest Dutch airline. The notification was withdrawn by KLM after the Commission had discovered that it contained incorrect and misleading information. The operation was again notified in December 1998 and finally abandoned in May 1999 after the Commission raised objections to the operation. The Commission then started proceedings because of the supply of incorrect information contained in the first notification, the one of September 1998. KLM had submitted incorrect information on the charter destinations of its subsidiary Transavia and withheld relevant information on scheduled flights of Transavia. In the notification KLM gave a table of the Mediterranean charter destinations of Transavia and of Martinair. In this table KLM failed to list ten important Transavia destinations. Furthermore, the table was presented in conjunction with the statement that the operations of Transavia and of Martinair were "largely complementary", whereas in reality Transavia operated to all Mediterranean destinations which were also served by Martinair. KLM also gave a misleading description of the activities of Transavia as it referred to Transavia only as a charter airline and failed to make any reference to the fact that Transavia had substantial scheduled operations to Mediterranean destinations and sold a significant number of seats on these flights to Dutch tour operators. In both instances the incorrect or misleading information was relevant for the competition assessment of the case and the Commission considers the behaviour of KLM as grossly negligent, at the very least.

Anheuser-Busch (USA) is the world's largest brewing organisation and brews the American Budweiser brand. Scottish & Newcastle is the largest UK brewer. The companies are party to agreements concerning the brewing, distributing and marketing of Budweiser beer in the UK. Scottish & Newcastle became a party to the agreement following its take-over of Courage in 1995. In the course of the Commission investigation, a formal request for information was sent to the notifying parties, in order to see whether there had been any changes to the agreements after Scottish & Newcastle signed up to them. In their joint response to the Commission's request for information, the parties omitted the so-called Budweiser marketing guidelines, which were agreed and accepted by Scottish & Newcastle. The negligence of the parties in this case seriously hindered the proper instruction of the file.

In the cases of Deutsche Post and KLM the amount of the fine is at or close to the maximum permitted, reflecting the Commission's view of their seriousness. The maximum fine which can be imposed for an infringement of the procedural rules is relatively low, € 50,000 for Merger cases and only € 5,000 for cases under Article 81 and 82 of the EC Treaty. In view of the importance of accurate information in competition procedures the Commission is therefore considering whether it may be appropriate to propose to the Council increases in the fines for infringements of these rules. ■

### Article 14 of the Merger Regulation

The Commission may by decision impose on the persons referred to in Article 3(1)(b), undertakings or associations of undertakings, fines of from € 1,000 to € 50,000 where intentionally or negligently:

...

(b) they supply incorrect or misleading information in a notification pursuant to Article 4;

(c) they supply incorrect information in response to a request made pursuant to Article 11 ...

### Article 15 of Regulation 17/62

The Commission may by decision impose on undertakings or associations of undertakings fines of from € 100 to € 5,000 where intentionally or negligently:

...

(b) they supply incorrect information in response to a request made pursuant to Article 11(3) or (5) ...