COMMISSION DECISION

of 10 February 1999

imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Regulation (EEC) No 4064/89

(Case IV/M.969 — A. P. Møller)

(notified under document number C(1999) 247)

(Only the Danish text is authentic)

(Text with EEA relevance)

(1999/459/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], as amended by Regulation (EC) No 1310/97 [2], and in particular Article 14(1)(a) and 14(2)(b) thereof,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations [3],

WHEREAS:

(1) During the examination of the concentration between Cable & Wireless and Maersk Data [4], notified pursuant to Article 4 of Regulation (EEC) No 4064/89 ('the Merger Regulation') it became clear that the Danish company A. P. Møller was to be considered as a group for the purpose of calculating turnover in accordance with Article 5 of the Merger Regulation and that the group's combined turnover exceeded the thresholds set out in the Merger Regulation. A. P. Møller then examined its past transactions in order to ascertain whether any of them had Community dimension and should thus have been notified to the Commission. As a result A. P. Møller notified the following three operations: Case IV/M.988 – Maersk DFDS Travel, Commission Decision of 4 November 1997; Case IV/M.1005 – Maersk Data/Den Danske Bank – DM Data, Commission Decision of 15 January 1998 and Case IV/M.1009 – Georg Fischer/DISA, Commission Decision of 10 March 1998. All concentrations were cleared in accordance with Article 6(1)(b) of the Merger Regulation. In all three decisions, the Commission noted that the transactions were concluded and put into effect several months before they were notified and that it would therefore have to consider a possible application of Article 14 of the Merger Regulation.

(2) With regard to these three concentrations, A. P. Møller did not comply with Article 4(1) of the Merger Regulation which provides that concentrations with a Community dimension shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. A. P. Møller also failed to fulfil the obligation set out in Article 7(1) according to which a concentration falling under the scope of the Merger Regulation shall not be put into effect either before its notification or within the first three weeks following its notification [5].

(3) On 12 October 1998, A. P. Møller was sent a statement of objections under Article 18 of the Merger Regulation, in order to give it the opportunity of replying to the Commission's objections prior to the possible adoption of a decision pursuant to Article 14.

(4) On 21 October 1998, A. P. Møller replied to the statement of objections and did not request an oral hearing.

(5) This Decision covers all infringements derived from the absence of notifications and unlawful implementations of the three transactions referred to above.

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[1] OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257 21.9.1990, p. 13.

[2] OJ L 180, 9.7.1997, p. 1.

[3] OJ C 201, 16.7.1999.

[4] Case IV/M.951 — Cable & Wireless/Maersk Data — Nautec, Commission Decision of 10 July 1997 (OJ C 235, 2.8.1997, p. 4).

[5] Since the transactions were completed before Regulation (EC) No 1310/97 of 30 June 1997 entered into force, reference is made to the wording of Article 7(1) in Regulation (EEC) No 4064/89 as it was prior to 1 March 1998.

I. BACKGROUND

(6) A. P. Møller is the largest Danish privately held company with worldwide activities in shipping, oil exploration and land based industries. The Group's worldwide turnover is approximately [EUR … billion] (*) and its Community-wide turnover is approximately [EUR … billion] (*) ([6]). The A. P. Møller Group consits of two main companies, Aktieselskabet Dampskibsselskabet Svendborg ('Svendborg') and Dampskibsselskabet af 1912 ('1912'), which are listed on the Copenhagen Stock Exchange. Maersk Mc-Kinney Møller and several family foundations hold in total more than 50 % of the shares in Svendborg and 1912, respectively, whereas the remaining shares are widely dispersed. Svendborg and 1912 hold approximately 50/50 of the shares in all companies within the A. P. Møller Group.

(7) On 3 June 1997, the undertakings Maersk Data A/S, a member of the Danish A. P. Møller Group, and Cable and Wireless plc notified a proposed concentration pursuant to Article 4 of the Merger Regulation ([7]). In the notification, it was stated that Maersk Data was considered to be a part of the A. P. Møller Group for the purposes of calculating the Group's turnover. However, subsequently, A. P. Møller approached the Commission and raised the point whether it constituted a group within the meaning of the Merger Regulation. Its main argument was that, according to Danish law, A. P. Møller had never been obliged to establish consolidated accounts for the whole group. On the basis of the available information the Commission was, however, of the opinion that A. P. Møller constituted a group within the meaning of the Merger Regulation. A. P. Møller accepted the Commission's position ([8]) and the three abovementioned transactions were notified.

(8) Since A. P. Møller has accepted the Commission's position that A. P. Møller constitutes a group for the purposes of the Merger Regulation, it is not necessary for the present assessment to go into further details on the corporate structure of the A. P. Møller Group.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

([6]) Turnover calculated in accordance with Article 5(1) of Regulation (EEC) No 4064/89 and the Commission notice on the calculation of turnover (OJ C 66, 2.3.1998, p. 25). Where the figures include turnover for the period before 1 January 1999, they are calculated on the basis of average ecu exchange rates and expressed as euro (converted on a one-for-one basis).

([7]) See footnote 3.

([8]) Reference is made to a letter of 16 July 1997 from Hengeler Mueller Weitzel Wirtz on behalf of A. P. Møller and letters of 22 October 1997 and 22 July 1998 from A. P. Møller as well as A. P. Møller's reply to the statement of objections.

II. THE INFRINGEMENT

(9) The following three transactions had not been notified in accordance with Articles 4(1) and 7(1) of the Merger Regulation: In the Maersk DFDS Travel case, the agreement was concluded on 8 January 1997 (with effect from 1 January 1997); the Commission was informed of its existence on 11 July 1997; and it was notified to the Commission on 6 October 1997. In the Maersk Data/Den Danske Bank case, the agreement was concluded on 16 April 1997 (with effect from 15 April 1997); the Commission was informed of its existence on 4 August 1997; and it was notified to the Commission on 1 December 1997. Finally, in the Georg Fischer/Disa case, the agreement was concluded on 2 October 1995 (with effect from 1 January 1996); the Commission was informed of its existence on 12 September 1997; and it was notified to the Commission on 9 February 1998.

III. IMPOSITION OF FINES

(10) According to Article 14(1)(a) 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 EUR 1 000 to 50 000 where, intentionally or negligently, they fail to notify a concentration in accordance with Article 4. Furthermore, Article 14(2)(b) provides that the Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertakings concerned within the meaning of Article 5 on the persons or undertakings concerned where, either intentionally or negligently, they put into effect a concentration in breach of Article 7(1). Accordingly, the Commission can impose fines for both infringements in accordance with Article 14(1)(a) and 14(2)(b) of the Merger Regulation.

(11) In accordance with Article 14(3) of the Merger Regulation, in setting the amount of the fine, the Commission has to take into consideration the nature and gravity of the infringement. For the reasons explained below, the Commission will also take into account its duration and any aggravating or mitigating circumstances.

Nature of the infringements

(12) The nature of the infringements committed in this case is described above. A. P. Møller failed to notify the Commission of three concentrations with a Community dimension in the period set out in Article 4(1) and put them into effect without respecting the provisions of Article 7(1). The Commission considers that the underlying principles in these provisions are in themselves very important and that their violation undermines the effectiveness of the merger control provisions. Indeed, the obligation of prior notification of concentrations which fall within the scope of the

Merger Regulation, allows the Commission to prevent companies from carrying out a concentration before it takes a final decision, thereby avoiding irreparable and permanent damage to competition.

Gravity of infringements

(13) It appears that the late filing and unlawful implementation were not made intentionally in order to circumvent the Commission's control with a view to enforcing transactions that would not have passed the tests of the Merger Regulation.

(14) In order to assess A. P. Møller's behaviour, it is necessary to take into account that it is a very large European undertaking with significant activities in Europe and was previously, and is presently, involved in competition cases, both as a complainant and as a defendant, with the assistance of specialised advisors. A. P. Møller is a member of the Shipping Association which has an office in Brussels and offers advice to its members. In addition, A. P. Møller has its own legal department at its head office in Copenhagen. Therefore, A. P. Møller must be expected to be aware – and even have a good knowledge – of Community legislation, including merger control, and it clearly possesses the means to obtain legal advice in order to consider, or at least question, whether its company structure would make some of its operations qualify as a notifiable concentration. Furthermore, the Merger Regulation and the Commissioin's notice ([9]) are clear as to the interpretation to be given to the notion of a 'group'. It seems therefore reasonable to expect that A. P. Møller should have shown a larger degree of awareness of the legal requirements and regard for them.

(15) In its Reply, and throughout the administrative procedue, A. P. Møller has maintained that the infringements were caused by the fact that A. P. Møller, and its affiliates, according to Danish law have never been considered, and are still not considered, for corporate, tax and other purposes, to be a group of companies obliged to establish consolidated accounts. However, this argument cannot be taken into account, in view of basic principles of Community law such as direct applicability of Community regulations in Member States and supremacy of Community law.

(16) On the basis of the above, the negligence shown by A. P. Møller cannot be considered as merely caused by error or ignorance. On the contrary, the evidence mentioned above suggests that the behaviour of A. P. Møller can be characterised as one of qualified negligence. In its reply, A. P. Møller has not contested the Commission's position.

([9]) Commission notice on calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ C 66, 2.3.1998, p. 25).

Duration of the infringement

(17) As has been indicated above, the concentration was unlawfully operated for a significant time without the Commission's authorisation. Moreover, once the Commission was at length informed of the transactions, A. P. Møller took a considerable time before notifying them. While the Commission recognises that reasonable time must be allowed in order to submit a notification in accordance with the requirements set out in Form CO, it is in general considered that companies committing an offence have an obligation to regularise their infringements as soon as possible. In its reply to the statement of objections, A. P. Møller stated that the information needed for the notification was extremely difficult and time-consuming to gather. The Commission considers that the time which A. P. Møller took to notify is longer than could reasonably be expected. However, given that this is the first decision dealing with this aspect, the Commission will not, when calculating the duration of the infringement, take into account the period between the time when the Commission was informed of the transactions and the submission of the notifications.

(18) The Commission considers that the infringements in this case, for the reasons explained above, should be treated as having lasted from the date when the transactions were put into effect in breach of Article 7(1) of the Merger Regulation until A. P. Møller first informed the Commission of this ([10]).

(19) On that basis, the duration of the infringement for each of the three cases would be as follows: IV/M.988 – Maersk DFDS Travel: six months; IV/M.1005 – Maersk Data/Den Danske Bank – DM Data: three months; and IV/M.1009 – Georg Fischer/DISA: 20 months. Accordingly, the total period of 29 months for the three transactions will be used by the Commission in calculating the amount of the fines to be imposed in accordance with Article 14(2)(b). The risk of prejudice to the consumer increases proportionately with the duration of the infringement. In the present case, the infringement lasted for a significant time and the Commission considers that this factor should be taken into account in derterming the fine.

(20) As has been shown above, all three concentrations operated for a considerable time without the Commission's authorisation and a considerable time elapsed before they were notified.

Mitigating circumstances

(21) The Commission acknowledges the following mitigating circumstances:

— A. P. Møller has recognised the breach,

([10]) See also Case IV/M.920 – Samsung/AST, Commission Decision of 18 February 1998.

— all cases were straightforward from a competition point of view and there was no damage to competition,

— when it was confirmed that A. P. Møller was to be regarded as a group for the purpose of the notification in the Cable & Wireless/Maersk Data — Nautec case, A. P. Møller voluntarily informed the Commission of its failure to notify other transactions before the Commission discovered any infringement. A. P. Møller subsequently notified all three transactions,

— the infringements took place at the same time as the one which was the subject of the Samsung decision, at which time the Commission had not yet taken any decision under Article 14 of the Merger Regulation. This circumstance was considered to be a mitigating factor in the Samsung decision and the same reasoning applies in the present case.

Conclusion

(22) The Commission considers that fines must be imposed on A. P. Møller taking into account in particular the fact that the absence of notification, and the implementation of the operation without the Commission's authorisation, lasted for a significant period, and that for a multinational company like A. P. Møller those failures constitute a clear case of gross negligence that cannot be ignored. The Commission has a duty to uphold the basic principle that undertakings should be deterred from carrying out concentrations falling within the scope of the Merger Regulation without making appropriate notifications, and it should therefore use the powers granted to it by the Council for that purpose. Accordingly, the Commission considers it necessary to impose fines on A. P. Møller pursuant to Article 14 of the Merger Regulation.

IV. **AMOUNT OF THE FINES**

(23) On the basis of the above, in order to penalise the infringements and to prevent any repetition thereof and taking into account the circumstances of the case, the Commission considers it appropriate to impose a fine of:

EUR 15 000 for each transaction (namely EUR 45 000 in total for all three transactions) in relation to the infringement of Article 14(1)(a); and

EUR 6 000 per month for each of the six, three and 20 months respectively, (namely EUR 174 000 for 29 months in total for all three transactions) in relation to the infringement of Article 14(2)(b);

giving a total fine of EUR 219 000 for all three transactions.

(24) The relationship between the amount of the fines imposed by the Commission in accordance with Article 14(1)(a) and those imposed in accordance with Article 14(2)(b) is appropriate in the specific circumstances of this case and does not prejudge any future case arising under Article 14.

(25) The calculation of the fine in accordance with Article 14(2)(b) on the basis of the number of months is appropriate in the specific circumstances of this case and does not prejudge any future case arising under Article 14,

HAS ADOPTED THIS DECISION:

Article 1

1. A total fine of EUR 45 000 is hereby imposed on A. P. Møller pursuant to Article 14(1)(a) of Regulation (EEC) No 4064/89 for its failure to notify three concentrations in accordance with Article 4 of that Regulation.

2. A total fine of EUR 174 000 is hereby imposed on A. P. Møller pursuant to Article 14(2)(b) of Regulation (EEC) No 4064/89 for putting into effect three concentrations in breach of Article 7 of that Regulation.

Article 2

The fines referred to in Article 1 shall be paid to the Commission of the European Communities within three months of the date of notification of this Decision, to account number 310-0933000-43 at the Banque Bruxelles-Lambert, Agence Européenne, Rond-Point Schuman 5, B–1040 Brussels.

Upon expiry of that period, interest shall be automatically payable on the fines at the rate charged by the European Central Bank for transactions in euro on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points.

Article 3

This Decision is addressed to:

A. P. Møller
Esplanaden 50
DK-1098 Copenhagen K.

Done at Brussels, 10 February 1999.

For the Commission
Karel VAN MIERT
Member of the Commission