II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 February 1998

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

(Case IV/M.920 — Samsung/AST)

(notified under document number C(1998) 392)

(Only the English text is authentic)

(Text with EEA relevance)

(1999/594/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 the Act of Accession of Austria, Finland and Sweden, and in particular Article 14(1)(a) and (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 [2],

whereas:

(1) On 22 April 1997, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EEC) No 4064/89 ('the Merger Regulation') by which the undertaking Samsung Electronics Co., Ltd ('Samsung') was to acquire within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of AST Research, Inc. ('AST') by way of public bid announced on 14 April 1997. The notification was declared incomplete on 24 April 1997, and Samsung was requested to provide further information. On 28 April 1997 the Commission was satisfied that all the information required had been supplied and it declared the notification complete. On 21 April 1997 the notifying parties submitted a request for derogation from the obligation not to put the concentration into effect pursuant to Article 7(4) of the Merger Regulation. They withdrew that request by letter of 7 May 1997.

[1] OJ L 395, 30.12.1989, p. 1; corrected version, OJ L 257, 21.9.1990, p. 13.
[2] OJ C 241, 26.8.1999.

(2) After examination of the notification, the Commission, by decision of 26 May 1997 [1], declared that the notified operation fell within the scope of the Merger Regulation and did not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement. In the same Decision (paragraph 5) the Commission referred to the possibility of imposing fines for the parties' late filing, pursuant to Article 14 of the Merger Regulation.

(3) The information in the Commission's possession confirmed, beyond doubt, that Samsung had already acquired control of AST within the meaning of Article 3(3) of the Merger Regulation (see recitals 5 to 8 of this Decision) in January 1996. Samsung failed to comply with both Article 4(1) of the Merger Regulation, which provides that a concentration with a Community dimension must be notified to the Commission not more than one week after the acquisition of a controlling interest, and Article 7(1), under which a concentration falling under the scope of the Merger Regulation should not be put into effect either before its notification or within the first three weeks following its notification.

(4) On 19 June 1997 Samsung 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.

On 14 July 1997, Samsung replied to the Statement of Objections and requested an oral hearing pursuant to Article 14(1) and (3) of Commission Regulation (EC) No 3384/94 [2] ('the implementing Regulation') on the notifications, time limits and hearings provided for in the Merger Regulation. A hearing took place on 23 September 1997.

On 20 January 1998, the Advisory Committee on concentrations was consulted pursuant to Article 19(3) of the Merger Regulation.

I. **ACQUISITION OF CONTROL**

(5) On 16 April 1997 Samsung voluntarily informed the Commission of a possible breach of Article 4 of the Merger Regulation in its acquisition of control over AST.

(6) On 22 April 1997 Samsung notified the operation in question to the Commission but on 24 April 1997 the notification was declared incomplete on the grounds that it did not clearly indicate when, precisely, Samsung had acquired control of AST. At the time of notification, Samsung had already acquired a 45,4 % share in AST's fragmented capital and had a majority of directors on the board of AST. Accordingly the Commission requested a number of documents signed by Samsung and AST under their Strategic Alliance Agreement since February 1995. The parties produced those documents on 28 April 1997 and on that date the notification became effective.

(7) The following conclusions can be drawn as to when Samsung was able to exercise decisive influence over AST:

(a) It is possible that Samsung already had *de facto* control of AST in July 1995, since Samsung seemed to have a decisive influence in all the strategic fields of activities of AST following the agreements concluded between Samsung and AST [3]. In addition, at the same time as the agreements were being drawn up, Samsung was providing AST with financial assistance to help cover its losses [4]. However, the number of directors that Samsung could nominate was limited by the Stockholder Agreement to one less than the majority of the authorised number of AST directors. There is not sufficient evidence before the Commission to prove that Samsung acquired control over AST in July 1995 within the meaning of Article 3(3) of the Merger Regulation.

[1] OJ C 203, 3.7.1997, p. 3.
[2] OJ L 377, 31.12.1994, p. 1.
[3] Strategic Alliance Agreement (27 February 1995), Stock Purchase Agreement (27 February 1995), Amendment No 1 to Stock Purchase Agreement (1 June 1995), Patent Cross Licence Agreement (31 July 1995), Component Sales Agreement (31 July 1995), Joint Development and Technical Cooperation Agreement (31 July 1995), Amendment No 2 to Stock Purchase Agreement (29 July 1995), Stockholder Agreement (31 July 1995).
[4] AST began experiencing difficulties in the early 1990s and has incurred cumulative net losses during calendar years 1994, 1995 and 1996 of approximately USD 800 million.

(b) On 21 December 1995, as a result of AST's continuing operating losses and the resulting decline in cash balances, Samsung and AST entered into an Additional Support Agreement pursuant to which Samsung agreed to guarantee a bank credit line for AST of up to USD 200 million and to increase AST's vendor line with Samsung to USD 100 million. In consideration for that additional support from Samsung, AST granted Samsung an option to purchase an additional 4 400 000 shares of common stock. Concurrently with the execution of the Additional Support Agreement, Samsung and AST entered into Amendment No 1 to the Stockholder Agreement. That Amendment permitted Samsung to vote its shares of AST's common stock for as many director nominees as it determined, subject to the requirement that at least three directors remained independent. However, that Amendment also ensured that Samsung would not be permitted to acquire in excess of 49,9 % of the outstanding shares of AST until 15 December 1998, unless it had the prior approval of a majority of independent directors. There is not sufficient evidence before the Commission to prove that Samsung acquired control over AST in December 1995 within the meaning of Article 3(3) of the Merger Regulation, in particular having regard to the limitations on capital ownership imposed upon Samsung.

(c) In January 1996 Samsung exercised its voting rights in such a way that six out of the 11 members of the AST Board were Samsung nominees. As a result of this majority, and according to the Certificate of Incorporation ([1]) and the bylaws ([2]) of AST, Samsung was able to determine the strategic commercial activities of AST, and consequently acquired control within the meaning of Article 3(3) of the Merger Regulation. The notifying parties have, in the letter of 7 May 1997 withdrawing the request for a derogation under Article 7(4) of the Merger Regulation, recognised that Samsung had already acquired control by January 1996 ([3]). In other documents seen by the Commission, it appears to have been recognised that a situation amounting to control within the meaning of the Merger Regulation already existed before the notification, but without the date when control was first acquired being identified ([4]). Control by Samsung, as a result of its majority in AST's Board, was reinforced in August 1996 when Samsung occupied the posts of chairman and chief executive officer on the board of AST.

(d) On 13 December 1996, Samsung and AST entered into a Second Additional Support Agreement pursuant to which Samsung agreed to guarantee a bank credit line up to USD 100 million. As consideration for such additional support, AST issued to Samsung 500 000 shares of non-voting preferred stock.

(e) In early January 1997, Samsung informed the independent directors of the AST board of the possibility of acquiring 100 % of the equity of AST. Following negotiations, a public bid was launched by Samsung on 14 April 1997 for the acquisition of all of the outstanding shares of AST's common stock.

(8) On that basis, it can be concluded that as the Commission established in its decision of 26 May 1997 and as the parties have recognised, the acquisition of control of AST by Samsung, within the meaning of Article 3(3) of the Merger Regulation, took place at least in January 1996.

II. **NATURE OF THE INFRINGEMENT**

(9) That acquisition constituted a concentration with Community dimension ([5]) which was notifiable under Article 4(1) of the Merger Regulation. However, the operation was not notified until 22 April 1997. Samsung therefore infringed Article 4(1) and Article 7(1) of the Merger Regulation.

([1]) Article 5(a) of the restated certificate of incorporation of AST, Exhibit A of the Stock Purchase Agreement dated as of 27 February 1995 between AST and Samsung: 'The business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors'.

([2]) Article III, Section 8 of the bylaws of AST as amended through 31 July 1995: '... a majority of the directors shall constitute a quorum for the transaction of business at all meetings of the Board of Directors and the affirmative vote of not less than a majority of the directors present at any meeting at which there is a quorum shall be the act of the Board of Directors.'

([3]) 'As discussed during our meeting of 30 April 1997, the notifying parties hereby withdraw their request for a derogation from the obligation not to put into effect the transaction which was consummated in January 1996.'

([4]) See, for instance, a pre-notification memorandum of 16 April 1997, the notification of the operation by the parties of 22 April 1997 and the reply to the Statement of Objections of 14 July 1997.

([5]) See paragraph 6 of the Decision of 26 May 1997.

(10) Samsung has repeatedly described the situation as an oversight or error caused by the unfamiliarity of its local representatives in California with the Community definition of concentration. The Commission accepts that there was no deliberate intention to circumvent the Merger Regulation. Nonetheless, the provisions of the Merger Regulation are clear in that they cover not only intentional circumvention, but also negligent circumvention.

(11) Samsung proposed that, in deciding whether to apply Article 14(2), a distinction should be drawn between omissions arising inadvertently and omissions in bad faith. However the text of the Merger Regulation affords no basis for such a distinction, and Article 14 explicitly covers situations involving negligence. The question whether or not there was bad faith can be taken into account in the setting of the amount of the fine, since Article 14(3) requires the Commission to have regard to the nature and gravity of the infringement in setting the amount of the fine.

(12) On the basis of the foregoing, the Commission believes, that, since Samsung is a multinational company with very extensive activities in Europe, it cannot be unaware of the need to respect European merger control rules. This is likely to be true for any company of a size meeting the Community thresholds set out in Article 1 of the Merger Regulation.

(13) Samsung has also expressed the view that Article 14(2) of the Merger Regulation should only be applied when the parties to the concentration act in bad faith, or when the failure to act is the result of gross recklessness, or when the failure to file has specific and non-negligible anti-competitive consequences. Samsung considers that Article 14(1) and (2) of the Merger Regulation cannot both be relevant in a case such as this, since undertakings that intentionally or negligently fail to notify a concentration will normally complete such a transaction.

(14) The Commission does not agree that there can be such a reason for not applying Article 14(1)(a) and (2)(b). The breach of each of those subparagraphs might have a very different effect on the market. That is why the legislator envisaged the possibility of different fines for different situations.

(15) It is true that an undertaking which fails to notify, and thereby infringes Article 14(1)(a), will then normally put the operation into effect, and infringe Article 14(2)(b) as well. However, a situation could arise where only Article 14(1)(a) would be applied, for example where an undertaking which failed to notify could not put the operation into effect. Article 14(2)(b) might apply where an undertaking complied with the obligation to notify but failed to observe other provisions, for example, the requirement not to put the operation into effect within the first three weeks after the notification. In the former case, the undertaking would infringe the obligation to give prior notification of concentrations with a Community dimension, thus calling into question the ability to exercise effective merger control, for which the Merger Regulation envisages fines of ECU 1 000 to 550 000. In the second case, the infringement is potentially more serious, and consequently the fine envisaged is higher: up to 10 % of the turnover of the undertaking concerned. Such infringements strike at the core of the Community merger control system, which seeks to prevent lasting damage to competition caused by the structural operations falling under its scope. In order to do this, the Commission is empowered to review mergers and acquisitions before they actually occur.

(16) Accordingly, Samsung has negligently failed to notify a concentration in breach of Article 4 of the Merger Regulation and has negligently put the concentration into effect in breach of Article 7(1) thereof.

III. **IMPOSITION OF FINES**

(17) Article 14 of the Merger Regulation provides that the Commission may by decision impose fines on undertakings which, *inter alia*, are in breach of Article 4 and Article 7(1) of the Merger Regulation.

(18) Samsung submits that the Commission should follow a policy of granting amnesty in case's of inadvertent failure to file where there are no adverse competitive consequences, and where they are voluntarily brought to the Commission's attention and corrected by the parties. Samsung considers that by imposing fines in such circumstances the Commission would send the wrong message, and undertakings would tend not to remedy failures voluntarily in order to avoid the imposition of a fine. The Commission considers that, in the circumstances described by Samsung, that is negligent failure to file with no adverse competitive consequences and no complex situation with regard to the determination of control, an undertaking has every interest in informing the Commission and notifying the operation in question, as indeed Samsung did. The undertaking thereby runs the risk of having a relatively modest fine imposed on it by the Commission (depending on the circumstances of the case) but at the same time it will avoid the more serious consequences of a decision by the Commission under Article 14 of the Merger Regulation where the undertaking is acting in bad faith, and is found to be so doing. Undertakings will also be aware that it will be relatively difficult for large undertakings which meet the Community dimension thresholds to avoid being caught in the future. Such undertakings might, subsequently, be involved in other transactions or concentrations with a Community dimension and, especially in cases of concentrative joint ventures with third parties, be obliged by their partners to notify, in which case they will have to account for past omissions. In addition, competitors and other players active in the market in question may inform the Commission of situations where a concentration has not been notified [1]. Therefore, it would not be sensible for an undertaking of this size and nature to pursue a strategy of attempting to conceal past omissions from the Commission. It follows that there is no objective need for a policy of granting amnesty in cases such as this.

(19) In the context of these policy considerations, Samsung has made a number of references to other merger control systems and in particular to the policy of the Federal Trade Commission in the United States of America under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. However, the conclusions drawn by Samsung from the United States policy, if correctly interpreted, cannot be applied under the Community merger control system because of the differences in the statutory schemes, especially with regard to filing and the waiting period requirements. In addition, it is not clear that Samsung's failure to notify would have been regarded under the United States system as the result of simple negligence. Indeed, the term 'control' under the Rules of the Hart-Scott-Rodino Act includes having the contractual power presently to designate a majority of the directors of a corporation [2].

(20) Samsung also argues that the Commission should not impose a fine without a clear precedent and that the Commission has never set out any policy for imposing fines under the Community merger-control system. Samsung argues that, by analogy with the Commission notice on the non-imposition or reduction of fines in cartel cases [3], there should be a policy of leniency towards cases of inadvertent failure to notify a concentration with no adverse impact on competition. The Commission considers that the text of Article 14 of the Merger Regulation is particularly clear with regard to the scope of its application and the powers granted to the Commission. In addition, it is apparent that the Commission notice on the non-imposition or reduction of fines in cartel cases protects different competition interests from Article 14 of the Merger Regulation. In any case, the Commission is taking into account as a mitigating factor the fact that Samsung has recognised the breach and has cooperated with the Commission in its investigation.

(21) The Commission considers that fines must be imposed on Samsung 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 (see section IV), and that for a multinational company like Samsung those failures constitute a clear case of negligence that cannot be ignored. The Commission has the 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.

[1] In this case, a competitor made clear, in a response to a letter under Article 11 of the Merger Regulation, that Samsung acquired ownership of AST before the acquisition of the whole of AST by way of public bid announced on 14 April 1997.
[2] Sec. 801(b)(1).
[3] OJ C 207, 18.7.1996, p. 4.

(22) For those reasons, the Commission considers it necessary to impose fines on Samsung pursuant to Article 14 of the Merger Regulation.

IV. **AMOUNT OF THE FINES**

(23) Under Article 14(1) of the Merger Regulation the Commission may impose on undertakings fines of from ECU 1 000 to 50 000 where they intentionally or negligently *inter alia* fail to notify a concentration.

Under Article 14(2) it may impose fines not exceeding 10 % of the aggregate turnover of the undertakings concerned on those undertakings where they, either intentionally or negligently, *inter alia* put into effect a concentration before notification thereof.

(24) Under Article 14(3), in setting the amount of the fine, the Commission should have regard to the nature and gravity of the infringement.

(25) The nature of the infringements committed in this case has been outlined in section II. Samsung omitted to notify the Commission of a concentration with a Community dimension within the period set out in Article 4(1) of the Merger Regulation. Moreover, Samsung implemented the concentration before giving the compulsory notification in breach of Article 7(1). The Commission has set out in section III the reasons why in this case it considers it necessary to sanction Samsung's failures.

(26) In considering the gravity of the infringement, and consequently the amount of the fines, the Commission has also taken into account the duration of the infringement as well as a number of mitigating and aggravating factors:

Duration

(27) The absence of notification and the corresponding implementation without the Commission's authorisation lasted for a significant period. The Commission considers that the period should be treated, on the most favourable basis for Samsung, as having lasted from January 1996 (as established by the Commission in its Decision of 26 May 1997) until April 1997 (when Samsung first informed the Commission of its failure). On that basis, the period of 14 months will be used by the Commission in calculating the amount of the fines to be imposed.

Mitigating factors

(28) Account may be taken of the following mitigating factors:

1. No damage to competition has been caused by the breach of the obligation to notify in good time and by the putting into effect of the operation. This fact has been verified with competitors questioned under Article 11 of the Merger Regulation and a finding to that effect has been made by the Commission in its Decision of 26 May 1997. AST's market share in the personal computers market in the Community is approximately 2,5 %, whereas Samsung has only negligible sales within the Community. There is therefore virtually no overlap resulting from the proposed operation. Apart from a slight decrease in AST's market share, the parties' combined market position has not changed significantly over the last three years.

2. Samsung voluntarily informed the Commission of its failure before the Commission discovered any infringement and Samsung subsequently notified the operation.

3. Samsung has recognised the breach and has cooperated with the Commission in its investigations.

4. According to the information made available to the Commission, the late filing and the implementation of the concentration without the Commission's authorisation were not intended to circumvent the Commission's control but were merely negligent.

5. This Decision is the first one taken by the Commission under Article 14 of the Merger Regulation and the first infringement by Samsung of the Merger Regulation.

Aggravating factors

(29) Account may be taken of the following aggravating factors:

1. Samsung is a large undertaking with significant activities in Europe [1] and must be considered to be aware of the Community merger control rules.

2. The determination of when control was acquired within the meaning of Article 3 of the Merger Regulation did not in this case require any complex legal or factual analysis.

(30) Therefore, in order to penalise the infringements and to prevent repetition thereof and taking into account the circumstances of the case and in particular the fact that this is the first time the Commission has applied Article 14 of the Merger Regulation, the Commission considers it appropriate to impose a fine of:

ECU 5 000 in relation to the infringement of Article 14(1)(a), and

ECU 2 000 for each of the 14 months of the delay in relation to the infringement of Article 14(2)(b),

giving a total fine of ECU 33 000.

(31) The relationship between the amounts of 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 circumstance of this case and does not prejudge any future case arising under Article 14.

(32) 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 fine of ECU 5 000 is hereby imposed on Samsung Electronics Co., Ltd pursuant to Article 14(1)(a) of Regulation (EEC) No 4064/89 for its failure to notify a concentration in accordance with Article 4 of that Regulation.

2. A fine of ECU 28 000 is hereby imposed on Samsung Electronics Co., Ltd pursuant to Article 14(2)(b) of Regulation (EEC) No 4064/89 for putting into effect a concentration in breach of Article 7(1) 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 automatically be payable on the fines at the rate charged by the European Monetary Institute for transactions in ecus on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 7,75 %.

[1] Community-wide turnover in 1996: ECU [deleted as a business secret].

Article 3

This Decision is addressed to:

Samsung Electronics Co., Ltd
Samsung Main Building
250, 2-Ka, Taepyung-Ro, Chung-Ku
Seoul, Korea 100-742

Done at Brussels, 18 February 1998.

For the Commission
Karel VAN MIERT
Member of the Commission