II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 December 1999

imposing fines under Article 14 of Council Regulation (EEC) No 4064/89 for supplying incorrect and misleading information in a notification and inaccurate information in response to requests for information (Case No IV/M.1610 — Deutsche Post/trans-o-flex)

(notified under document number C(1999) 4502)

(Only the German text is authentic)

(Text with EEA relevance)

(2001/271/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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

Having given Deutsche Post the opportunity to make known its views on the objections raised by the Commission,

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

Whereas:

(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 106, 6.4.2001.

A. INTRODUCTION

I. SUBJECT OF THE PROCEEDINGS

(1) Investigations carried out by the Commission have revealed that Deutsche Post AG (Deutsche Post) supplied incorrect and misleading information when it notified a takeover of trans-o-flex Schnell-Lieferdienst GmbH (trans-o-flex), on 4 February 1999 (Case IV/M.1447 — Deutsche Post/trans-o-flex). Deutsche Post also supplied incorrect information in response to the Commission's requests for information of 23 February 1999 (reference 1999), 26 March 1999 (reference 3359) and 22 April 1999 (reference 4350).

(2) In so doing, Deutsche Post committed infringements under Article 14(1)(b) and the first limb of Article 14(1)(c) of Regulation (EEC) No 4064/89 (the Merger Regulation).

(3) The Commission concludes that it ought to impose fines on Deutsche Post in respect of both infringements.

II. NOTIFICATION: CASE IV/M.1447 — DEUTSCHE POST/TRANS-O-FLEX

(4) On 4 February 1999 Deutsche Post notified the Commission under Article 4 of Regulation (EEC) No 4064/89 of a planned concentration whereby it proposed to acquire a holding of 50,4 % in trans-o-flex from Industrial Information GmbH (Industrial Information).

(5) Deutsche Post took the view that the intended acquisition of the majority of shares represented a structural change, as Deutsche Post would thereby acquire sole control of trans-o-flex. It stated in its notification that the trans-o-flex decision-making bodies took major decisions by simple majority, a majority which Deutsche Post would enjoy only when it had acquired the majority of the shares.

(6) On 4 March 1999 the Commission decided to initiate proceedings in this case under Article 6(1)(c) of the Merger Regulation and Article 57 of the Agreement on the European Economic Area. On 5 May 1999 Deutsche Post 'withdrew' the notification. It explained that it intended to annul the contracts on which the transaction was based. It did so on 7 May 1999. At this point the notification procedure was closed, as it no longer served any purpose.

III. FINES: CASE IV/M.1610 — DEUTSCHE POST/TRANS-O-FLEX

(7) The information that Deutsche Post supplied in its notification left open a number of questions which needed to be clarified before an assessment of the notified transaction could be made, and the Commission accordingly sent a number of requests for information to Deutsche Post and to other parties involved in an earlier transaction in 1997 in order to establish the facts. These enquiries revealed the following.

(8) Deutsche Post had infringed its obligation to supply information under the Merger Regulation both in its notification and in its replies to the Commission's requests for information. In its notification it made incorrect and misleading statements regarding the circumstances relevant to an assessment of the question whether the transaction notified in 1999 would lead to a change in control. Deutsche Post also gave incorrect answers on this point in its replies to the Commission's requests for information, some of which it supplied only after the requests had been repeated. The questions put in the requests for information frequently arose only as a result of the Commission's own investigations.

(9) The incorrect and misleading information supplied by Deutsche Post relates to facts connected with the 1997 transaction. Contrary to the view taken by Deutsche Post in its reply to the Commission's statement of objections, knowledge of all the circumstances relating to this transaction is crucial to the assessment of the transaction notified in 1999. There is a 'concentration' within the meaning of Article 3 of the Merger Regulation, and the Commission consequently has jurisdiction to assess the transaction, only if control changes hands. If Deutsche Post acquired control of trans-o-flex in 1997, its acquisition of a majority share in 1999 could not produce a change in control. The Commission can determine the question only if it has full knowledge of the circumstances of the 1997 transaction.

(10) Only in the course of its investigations did the Commission become aware of circumstances which suggested that Deutsche Post might have acquired control of trans-o-flex in 1997. In that year Deutsche Post had acquired an interest in Hanna 95 Beteiligungs-Verwaltungs GmbH (Hanna 95), and thereby in trans-o-flex AG; it now appeared that this was more than just a minority holding with no controlling rights. That there was in fact an acquisition of control was suggested by the circumstances in which the Hanna 95 shares were purchased in 1997, by the sequence in which the successive transactions were concluded, and by the circumstances and character of the various transactions associated with the purchase of the shares.

(11) The results of the investigations rest in part on answers given by other parties to the transaction to requests for information made by the Commission. They are also based on an examination of the minutes of meetings of the Deutsche Post and trans-o-flex supervisory and management bodies, which were supplied at the Commission's request. They likewise take account of the replies given by Deutsche Post, in particular in response to a reminder sent by the Commission on 22 April 1999, which sought answers to a series of questions asked of Deutsche Post in the requests for information of 23 February 1999 and 26 March 1999.

(12) The German Federal Cartels Office (the 'Bundeskartellamt') has since initiated its own proceeding in respect of the 1997 transaction, under reference B9-88/89.

B. **THE FACTS**

I. THE NOTIFICATION

(13) In the notification of 4 February 1999 Deutsche Post stated the following.

(14) 'Deutsche Post intends to purchase the 50,4 % holding in trans-o-flex belonging to Industrial Information, of Zurich, in order to acquire sole control of trans-o-flex, having previously acquired 24,8 % of the shares in June 1997.

The background to the planned concentration is as follows.

On 21 November 1995 Hanna 95, of Munich, concluded a purchase contract to acquire all 1 million ordinary shares in trans-o-flex AG from Franz Haniel & Cie. GmbH, of Duisburg, with effect from 30 December 1995; the shares had an individual nominal value of DEM 50.

Like Industrial Information GmbH, Hanna 95 Beteiligungs-Verwaltungs GmbH was a shelf company, a bare shell; it had been owned by the law firm Oppenhoff & Rädler. The shares in Hanna 95 GmbH were acquired by a number of private investors. In 1997 these investors decided to sell a majority holding in Hanna 95. The sellers believed that the most likely purchasers were the Dutch and German Post Offices. They wanted to sell at least three quarters of the shares at once, against immediate payment of the negotiated price. Had Deutsche Post bought the shares in Hanna 95, given the situation at the time with regard to turnover limits, the responsible competition authority would have been the German Federal Cartels Office. The transaction would also have had to be notified to the competition authorities in the other EU countries where trans-o-flex traded. This meant it would have taken months for Deutsche Post to conclude the purchase of the majority holding in Hanna 95. The sellers were not prepared to wait that long. But they were prepared to sell Deutsche Post, a minority holding, with no controlling interest, if another investor could be enlisted who would conclude the operation immediately. Thus an investor had to be found whose turnover, including that of trans-o-flex, did not exceed the DEM 2 billion limit beyond which prior notification would have been necessary under German competition law. [Mr R.] * from Barcelona was prepared to acquire a majority share in the company, because he believed he had a good chance of making a reasonable profit by reselling at a later date. A holding of 50,4 % of the shares in Hanna 95 was accordingly sold to Industrial Information, which became the property of [Mr R.]*.'

(15) The notification refers here to a document appended to it as Annex 5. This is the contract concluded by Industrial Information on 10 July 1997 for the purchase of 50,4 % of the shares in Hanna 95. Industrial Information, the buyer, was represented by [Mr H.]*, who is Deutsche Post's legal representative in this case.

(16) The notification also states that 'trans-o-flex Schnell-Lieferdienst AG was absorbed into Hanna 95 Beteiligungs-Verwaltungs GmbH under a full merger agreement concluded on 26 September 1997 (Annex 6). Hanna 95 Beteiligungs-Verwaltungs GmbH then changed its name to trans-o-flex Schnell-Lieferdienst GmbH'.

(17) Annex 6 to the notification contains a contract, authenticated by notary, merging Hanna 95 GmbH into trans-o-flex AG, concluded between Hanna 95 GmbH and trans-o-flex AG on 25 September 1997. The contract is subject to the suspensive condition that it must be approved by named bodies in both companies. No evidence of such approval is appended.

(18) The notification goes on to say that 'Industrial Information has complete control of trans-o-flex GmbH, as all decisions are reached by simple majority and Industrial Information holds 50,4 % of the shares. (The details are set out in my letter of 22 January 1999 to [a named Commission official] (Annex 6a). The articles of association of trans-o-flex Schnell-Lieferdienst GmbH are also attached to that letter; Article 16(6) states that all company decisions are to be taken by majority vote. All major decisions are taken at general meetings, as the supervisory board consists of equal numbers of representatives and therefore can perform only those tasks expressly required by law.) [Mr R.]* has always exercised his rights as a shareholder.'

* 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.

(19) In the letter of 22 January 1999 attached to the notification as Annex 6a, Deutsche Post's solicitor, [Mr H.]*, provides a similar but more detailed version of the historical background to the operation now notified as a concentration. He mentions the fact that informal discussions with the Federal Cartels Office had revealed that the Office was unlikely to take a swift decision. However, as the sellers insisted on a quick sale, Deutsche Post's only chance of competing successfully with the Dutch Post Office was through a fast and definitive agreement. [Mr H.]* had therefore suggested that Deutsche Post should simply acquire a minority holding in trans-o-flex, which would not give it control, and should find another investor to buy a majority holding in Hanna 95 and, through Hanna 95, in trans-o-flex AG. The investor found was [Mr R.]*. [Mr R.]* was an industrialist living in Spain who owned part of a Spanish aluminium company. He insisted that the operation be kept entirely separate from the Spanish company's activities. Given the need for haste, [Mr H.]* suggested that [Mr R.]* should acquire the Swiss company Industrial Information, which was a shelf company belonging to [Mr H.'s]* law firm, as there was no time to set up a new company. The use of shelf companies was common practice among lawyers. [Mr R.]* agreed to the plan, as did the sellers once the financial details regarding the purchase price had been settled.

(20) [Mr H.'s]* letter of 22 January 1999 states that both transactions, namely Deutsche Post's purchase of a minority stake and Industrial Information's purchase of a majority stake, took place on 10 July 1997. The remaining 24,8 % of the shares were held jointly by [Mr A.]* and [Mr Sch.]*. It had been clear from the beginning that Deutsche Post would buy only a minority holding in Hanna 95 with no controlling rights. The rights deriving from the minority share would not entitle Deutsche Post to influence trans-o-flex's policy decisions or its day-to-day running.

(21) [Mr H.]* refers here to the attached articles of association of trans-o-flex GmbH and concluded that Industrial Information had sole control of trans-o-flex. As it was clear that Industrial Information would keep the trans-o-flex shares only for a limited time, and that [Mr R.]* would attempt to sell them at a reasonable profit, a put-option was agreed between Industrial Information and Deutsche Post, whereby Deutsche Post was obliged to purchase the trans-o-flex shares as soon as Industrial Information wished to sell. The put-option was not matched by a call-option for Deutsche Post, so that it was entirely for Industrial Information to decide when the shares would be sold.

(22) The articles of association of trans-o-flex GmbH annexed to this letter are dated 27 August 1998.

II. THE RESULTS OF THE COMMISSION'S INVESTIGATIONS

1. **Background to the 1997 transaction**

(23) Deutsche Post intended to take over trans-o-flex as early as July 1997. According to the information supplied by Deutsche Post in the notification, which is set out at B.I, it would have taken Deutsche Post several months to acquire a majority holding at that time, owing to the need to notify the Federal Cartels Office and a number of competition authorities in other Member States. The sellers did not wish to wait that long, and were prepared to sell to other interested parties. The Dutch Post Office had shown interest in acquiring trans-o-flex.

(24) The sellers wanted to sell at least three quarters of the shares in trans-o-flex, but were prepared to sell Deutsche Post a minority holding of 24,8 %, as long as Deutsche Post could enlist a buyer for the remaining shares. Deutsche Post instructed its lawyer, [Mr H.]*, to find a buyer. A 50,4 % majority holding was sold to Industrial Information, a shelf company controlled by [Mr H.]*; altogether 75,2 % of the shares in trans-o-flex were sold on 10 July 1997. Eleven days later Industrial Information transferred its shares to [Mr R.]*. Deutsche Post contented itself with a minority holding only because this operation ensured that it could acquire a majority holding later.

2. **Transactions on 10 July 1997**

(25) A minority holding in Hanna 95 was sold to Deutsche Post on 10 July 1997. On the same day Industrial Information purchased a majority holding in Hanna 95, and a number of agreements were concluded in connection with these transactions.

(a) *Deutsche Post's purchase of a minority holding*

(26) The purchase contract supplied on 1 March 1999 by Deutsche Post in response to a request for information shows that Deutsche Post purchased a minority holding in trans-o-flex on 10 July 1997. The contract, dated 10 July 1997, is for the sale of a 24,8 % holding in Hanna 95. Deutsche Post paid [DEM ... million — a sum corresponding to a price per share equal to the price per share paid by Industrial Information as described in recital 30]* for its shares.

(27) The sellers were private investors who had purchased all the shares in trans-o-flex from Franz Haniel & Cie. GmbH (Haniel), through Hanna 95, in 1995. In 1997 they wished to sell the majority of their stake in Hanna 95, and thus in its sole subsidiary, trans-o-flex.

(28) The shares were bought by Deutsche Post Express und Transport GmbH. As is clear from the corporate report annexed to the notification, this company is a subsidiary of Deutsche Post, and was set up as a holding company on 1 July 1997.

(29) By purchasing a minority holding in Hanna 95, Deutsche Post indirectly acquired a corresponding stake in trans-o-flex AG, which was wholly owned by Hanna 95.

(b) *Industrial Information's purchase of a majority holding*

(30) The contract annexed to the notification shows that on 10 July 1997 the sellers of Hanna 95 concluded a contract with the Swiss company Industrial Information for the sale of 50,4 % of the Hanna 95 shares at a price of [DEM ... million — a sum corresponding to the credit line referred to in recital 45]*.

(31) [Mr H.]*, Deutsche Post's lawyer, represented Industrial Information. The Commission has sought and obtained a copy of an entry in the Zurich companies register from which it appears that Industrial Information was a Swiss limited company which was controlled at the time by [Mr H.]*, who held a two-thirds stake. [Mr G.]*, who was Industrial Information's manager and sole authorised signatory, held the other third of the shares.

(32) According to Deutsche Post, the remaining 24,8 % of the shares in Hanna 95 were retained by two members of the group of investors selling the shares (three, according to the consortium agreement ([4])), namely [Mr Sch.]* and [Mr A.]* (the [A.]* group). To exercise their voting rights they were required to act together ([5]).

(33) Hanna 95 was the sole shareholder in trans-o-flex, and so by acquiring this holding in Hanna 95 Industrial Information indirectly acquired 50,4 % of trans-o-flex.

(c) *The consortium agreement*

(34) On 10 July 1997, Industrial Information, Deutsche Post and the sellers of Hanna 95 concluded what they called a 'consortium agreement' ('Konsortialvereinbarung') laying down rules, among other things, for representation on the management and supervisory bodies of Hanna 95 and trans-o-flex. The agreement makes detailed provision for the number of seats on the supervisory boards to be allocated to the individual shareholders. Deutsche Post did not send this agreement to the Commission until 27 April 1999, when it replied to the Commission's reminder of 22 April 1999 drawing attention to the Commission's request for information of 26 March 1999. In its earlier letter, of 6 April 1999, in answer to a question from the Commission concerning the existence of an agreement regarding the allocation of seats on the trans-o-flex management and supervisory boards, Deutsche Post stated that details regarding representation on trans-o-flex's supervisory board had not been set out in writing. Deutsche Post provided no answer at that time to the same question in connection with the management board.

(35) Under the terms of the consortium agreement, Hanna 95's management was to be expanded. The trans-o-flex management board was to be reshuffled by agreement between the parties. The [A.]* group was to be entitled to designate at least one of the four board members, as long as the size of the board was not reduced.

(36) Under the provisions of the Co-determination Act, the trans-o-flex supervisory board must consist of at least 12 members, but membership was now to be expanded to 16 ([6]), with the [A.]* group and Deutsche Post entitled to designate two members each and Industrial Information entitled to designate four.

([4]) For details see the following section.
([5]) See the consortium agreement.
([6]) The trans-o-flex AG articles of association, which were sent to the Commission on 6 April 1998, provide for six members. The lists of members the Commission has received for the period 1995 to 1997 show numbers fluctuating between 14 and 20 members.

(37) The rules governing the capitalisation of trans-o-flex AG which are also contained in the agreement require an equity capital ratio of [...]* %. Capital increases must be approved by 80 % of the shareholders. But the opening-up, acquisition or relinquishing of activities, apart from acquiring activities which do not cover their costs, requires only a 75 % majority approval.

(38) The Hanna 95 articles of association of 22 December 1995 and 28 February 1996, which according to the consortium agreement continue to apply, have not been supplied to the Commission.

(d) *The option agreement*

(39) On 10 July 1997 Deutsche Post and Industrial Information concluded a contract called an 'option agreement', a copy of which the Commission received from Deutsche Post on 1 March 1999 in response to a request for information. Under the terms of this agreement, Deutsche Post undertook to acquire Industrial Information's shares in trans-o-flex if Industrial Information so requested on 31 July 1998. The purchase price was to be calculated on the basis of the price paid by Industrial Information for the trans-o-flex shares plus any expenditure incurred by Industrial Information less any profits accrued to Industrial Information. This agreement applied irrespective of the share value.

(40) If Industrial Information wished to sell the shares to a third party, Deutsche Post enjoyed a right of first refusal, entitling it to purchase the shares at the price agreed in the event that Industrial Information were to exercise its option.

(41) Under the terms of the contract, Industrial Information was also released from any responsibility or liability for the management of Hanna 95.

(42) On 10 July 1998 Deutsche Post and Industrial Information concluded a new option agreement. The difference between the two was that the second agreement extended the period during which the option could be exercised until 30 June 1999.

(43) On 23 December 1998 Deutsche Post and Industrial Information concluded an additional agreement increasing the agreed purchase price by [DEM ... million — a sum corresponding to the increase in capital referred to in recital 82]*, the additional amount to be used by Industrial Information to increase trans-o-flex's capital reserves on 30 December 1998 ([7]).

(44) According to Deutsche Post's notification (Annex 6a), the put-option was agreed in [Mr R.'s]* interests, in order to enable him to sell his shares to Deutsche Post at a reasonable profit at any time ([8]). In Deutsche Post's letter of 1 March 1999, however, and in its reply to the statement of objections, it is stated that the option agreement served as security for the bank which was financing the acquisition of the holding in Hanna 95. This latter view is confirmed by an analysis of all the relevant agreements ([9]).

(e) *Financing Industrial Information's acquisition of the shares*

(45) On 10 July 1997, Bank Julius Bär & Co. AG, of Switzerland (Julius Bär Bank), allowed Industrial Information a credit line of [DEM ... million — a sum corresponding to the purchase price referred to in recital 30]* to finance the purchase of 50,4 % of Hanna 95's shares. On 22 April 1999, in response to a request for information, the Commission received from Industrial Information Julius Bär Bank's written confirmation of this agreement.

(46) As security, Julius Bär Bank concluded a contract with Industrial Information on 15 July 1997 giving it a lien on Industrial Information's shares in Hanna 95; Deutsche Post supplied the contract to the Commission on 1 March 1999, in response to a request for information. The contract, which was authenticated by notary, was

([7]) This is clearly connected to the increase in trans-o-flex's capital agreed on the same day. For details see below.

([8]) 'Because it was clear from the beginning that Industrial Information would hold the shares in trans-o-flex only for a limited period of time and that [Mr R.]* would try to sell these shares expecting a reasonable profit, it had been agreed between Deutsche Post and Industrial Information that Industrial Information has put-option obliging Deutsche Post to honour in case Industrial Information wanted to sell its interests in trans-o-flex.'

([9]) For details see the following section.

signed by [Mr H.]* in his capacity as representative of Industrial Information, and as representative without power of attorney for Julius Bär Bank. In a declaration of assignment of 10 July 1997, which was supplied to the Commission by Deutsche Post on 1 March 1999, Industrial Information also assigned its rights under the option agreement to Julius Bär Bank. Contrary to the indications given by Deutsche Post in its reply to the statement of objections, there was no agreement to release Industrial Information from its obligations to Deutsche Post. Industrial Information further undertook to increase the capital of the company by at least [CHF ... million — a figure in line with those referred to in recitals 43 and 82]*.

(f) *Payment guarantee*

(47) Likewise on 10 July 1997, Deutsche Post underwrote a payment guarantee for [DEM ... million — a figure corresponding to the purchase price owed by Hanna 95 to Haniel as described in recitals 49 and 50]* in favour of Hanna 95. The document in question, though unsigned, was sent to the Commission by Deutsche Post on 1 March 1999, in response to the request for information dated 23 February 1999, as part of the contract for Deutsche Post's acquisition of a minority holding in Hanna 95. Deutsche Post's covering note of 1 March 1999 makes no references to the payment guarantee. In answer to questions in the request for information, the covering note denies that Deutsche Post has assisted trans-o-flex, Industrial Information or any of their shareholders, for example by waiving claims or taking over commitments.

(48) The reasons behind the payment guarantee have been confirmed by trans-o-flex in a statement of 26 April 1999, and are as follows. Deutsche Post gave a similar, if less detailed account on 27 April 1999, in response to a letter sent by the Commission on 22 April 1999 in which it drew attention to its request for information of 26 March 1999. There, and in its reply to the statement of objections, Deutsche Post referred to the contract for the purchase of a 24,8 % holding in Hanna 95, which it had supplied on 1 March 1999. No mention is made in the contract, however, of the circumstances described below.

(49) In 1995 Hanna 95 gave Haniel a lien on all the ordinary trans-o-flex shares. Haniel had sold the trans-o-flex shares to Hanna 95, and the lien was its security for payment of the purchase price of [DEM ... million — a figure corresponding to the payment guarantee referred to in recital 47 and to the amount to be used to pay the purchase price as described in recital 50]*, which was supposed to be settled by 31 December 2007. On 10 July 1997, in view of Deutsche Post's acquisition of a minority holding in trans-o-flex, Haniel and Hanna 95 concluded a supplementary agreement to the purchase and pledge contract of 21 November 1995 ([10]). Under the terms of the new agreement, the purchase price was to be paid by 30 September 1997 and the pledged trans-o-flex shares released. Deutsche Post's payment guarantee served as security for the payment of the purchase price. The circumstances surrounding Deutsche Post's supplying the supplementary agreement to the Commission are the same as those concerning the payment guarantee described in the preceding recitals.

(g) *The loan to meet the commitments to Haniel*

(50) Deutsche Post made Hanna 95 a loan of [DEM ... million — a sum identical to the sum intended to meet Hanna 95's commitments to Haniel which is referred to in recitals 86, 164 and 167]* (in two part-payments of [DEM ... million — a sum corresponding to the purchase price referred to in recitals 49 and 50 and the payment guarantee referred to in recital 47]* and [DEM ... million — a sum corresponding to 17 % of the amount just referred to]*), at [less than 5 %]*, with effect from 30 September 1997. It was agreed that [DEM ... million — a sum corresponding to the purchase price referred to in recital 49 and the payment guarantee referred to in recital 47]* should be used to pay the share purchase price, which Hanna 95 owed Haniel, while the remaining [17 % of the sum just referred to]* was to repay the shareholders' loan to Hanna 95.

(51) On 27 April 1999, in response to the reminder drawing attention to the request for information of 26 March 1999, Deutsche Post sent the Commission a letter to Hanna 95, dated 13 October 1997, in which it confirmed the loan agreement. In its earlier reply of 30 March 1999 Deutsche Post simply referred to an otherwise unspecified loan of [DEM ... million — a sum equal to the loan referred to in recital 50 plus the amount by which the credit line referred to in recital 83 had been taken up]* which it had made to trans-o-flex at a rate below the market rate so that the company

([10]) The supplementary agreement referred to a transfer of losses and a loan.

could settle existing liabilities. Deutsche Post's letter of 30 March 1999 also replied to a reminder from the Commission asking for further details regarding its request of 23 February 1999 for information concerning possible assistance from Deutsche Post (see B.II.2(f)). In its letter of 1 March 1999 Deutsche Post denied any such action, but offered no further explanation (see B.II.2(f)).

3. **Changes in Industrial Information**

(a) *Granting general power of attorney to [Mr H.]**

(52) On 11 July 1997 Industrial Information granted Deutsche Post's lawyer, [Mr H.]*, who at that time had a controlling interest in Industrial Information ([11]), unlimited power of attorney to represent it in all its transactions. This power of attorney was signed by [Mr G.]*, in his capacity as manager of Industrial Information.

(53) The Commission learned of this power of attorney on 7 May 1999. Deutsche Post did not supply the document until it supplied the contracts cancelling the notified transaction. It did not submit it with the original notification.

(b) *The increase in the share capital and amendment of the articles of association*

(54) On 14 July 1997, following the acquisition by Industrial Information of a majority holding in trans-o-flex, [Mr G.]* transferred his shares in Industrial Information to [Mr H.]*. He remained the manager and sole authorised signatory.

(55) Then, on the same day, 14 July 1997, Industrial Information increased its share capital and amended its articles of association.

(56) Until then, Industrial Information's share capital had been CHF 21 000, CHF 14 000 of which was held by [Mr H.]* and CHF 7 000 by [Mr G.]*. [Mr G.]* was also sole manager and authorised signatory.

(57) On 14 July 1999, an extraordinary meeting of Industrial Information's shareholders chaired by [Mr H.]* decided to increase the share capital from CHF 21 000 to CHF 2 000 000. This was achieved by an increase in [Mr H.'s]* contribution from CHF 21 000 to CHF 1 999 000 and the entry into the company of [Mr T.]*, who made a contribution of CHF 1 000. [Mr H.]* and [Mr T.]* each undertook to pay their contribution.

(58) [Mr H.]* and [Mr T.]* joined [Mr G.]* as managers of Industrial Information, any two being authorised to bind the company.

(59) The Commission received the papers documenting these operations from [Mr H.]* on 6 April 1999, in response to its request for information dated 26 March 1999.

(60) [Mr T.]* explained in his letter of 6 April 1999 that he joined Industrial Information at the request of [Mr R.]*. [Mr R.]* held no shares in the company at the time.

(c) *[Mr R.'s]* entry into Industrial Information*

(61) In [Mr R.]* [Mr H.]* had found an investor who was prepared to acquire 50,4 % of the shares in Hanna 95. According to Deutsche Post's notification, [Mr R.]* purchased the majority holding with a view to making a reasonable profit by selling it at a later date. According to Deutsche Post, [Mr R.]* was an investor with a turnover of under DEM 2 billion, including his trans-o-flex holding. Had this turnover limit been exceeded, the transaction would have had to be notified to the Federal Cartels Office under German competition law.

(62) Eleven days after Industrial Information acquired the majority holding in Hanna 95, [Mr R.]* joined Industrial Information. Under the terms of the agreement of 21 July 1999 he took over [Mr H.'s]* contribution of CHF 1 999 000. [Mr H.]* supplied the relevant contract in response to the Commission's request for information of 26 March 1999.

(63) The entry in the Zurich companies register shows that [Mr H.]* gave up not only his stake in Industrial Information but also his position as manager. However, [Mr R.]* became neither a manager nor an authorised signatory.

(64) The purchase price of the contribution to capital was [CHF ... — a sum corresponding to [Mr H's]* increased capital contribution, referred to in recital 57, or about 4 % of the sum paid by Deutsche Post for its 24,8 % holding in Hanna 95, referred to in recital 26]*. [Mr H.]* informed the Commission in his letter of 6 April 1999 that [Mr R.]* received a loan to cover the purchase price from West-Treuhand GmbH, whose sole shareholder is [Mrs H.]*, [Mr H.'s]* wife. The Commission was sent no supporting evidence to confirm this.

([11]) For details see B.II.3(b).

4. **Trans-o-flex after the entry of Deutsche Post and Industrial Information**

(a) *Merger agreement*

(65) At the Commission's request, the Mannheim local court (Amtsgericht) sent the Commission a copy of a full merger agreement which had been concluded between Hanna 95 Beteiligungs-Verwaltungs GmbH and trans-o-flex Schnell-Lieferdienst AG on 27 August 1998. The merger was recorded in the companies register. Under the terms of the agreement, trans-o-flex AG was wound up. The companies register shows that Hanna 95 changed its name to trans-o-flex Schnell-Lieferdienst GmbH.

(66) The companies register also shows that [Mr A.]* and [Mr B.]* were registered as managers of Hanna 95 on 3 July 1997 and that they retained their positions until the merger. [Mr B.]* is a Deutsche Post employee. He represented the company and its subsidiary Deutsche Post Express und Transport GmbH during the acquisition of the minority holding in Hanna 95, and replied on Deutsche Post's behalf to the Commission's requests for information of 22 April and 26 April 1999. After the merger [Mr P.]*, [Mr L.]* and [Mr Br.]*joined the management.

(67) In the notification, however, it was stated that trans-o-flex AG was merged into Hanna 95 on 26 September 1997, that is to say, a year before the actual merger. A contract authenticated by notary and dated 25 September 1997 was supplied as a supporting document. This document in fact provided for the merger of Hanna 95 into trans-o-flex AG.

(68) It was only in the letter from trans-o-flex dated 26 April 1999 that the Commission was informed that the merger agreement between Hanna 95 and trans-o-flex AG had been concluded a year later, on 25 September 1998. Prior to this, trans-o-flex had written to the Commission on 29 March 1999 attaching the minutes of trans-o-flex's management board and shareholders' meetings. Examination of these documents revealed that Hanna 95 had indeed concluded a merger agreement with trans-o-flex AG in the autumn of 1997, under which Hanna 95 was to be merged into trans-o-flex AG. The minutes of the trans-o-flex extraordinary general meeting on 13 May 1998 show that the agreement was approved by the trans-o-flex general meeting on 25 September 1997. But the extaordinary general meeting on 13 May 1998 reversed that decision, and instead approved the merger agreement that merged trans-o-flex into Hanna 95.

(69) Deutsche Post made no reference to these changes in the facts in any of its letters. It mentioned them for the first time in its reply to the statement of objections, when it confirmed the facts established in the Commission's investigations.

(b) *Changes in management*

(70) When the new shareholders joined trans-o-flex AG, changes were made in the management structure. On 11 July 1997, the day after Industrial Information and Deutsche Post acquired their shares in trans-o-flex, trans-o-flex AG's management board spokesman, [Mr E.]*, resigned. This is confirmed by the documentation sent by Deutsche Post in response to the reminder of 26 March 1999.

(71) There are inconsistencies regarding the background to [Mr E.'s]* resignation. In its letter of 1 March 1999, and in its reply to the statement of objections, Deutsche Post cites disagreements with the supervisory board as the reason. According to the minutes of the supervisory board meeting of 11 July 1997, however, Deutsche Post had been allowed to designate a person to sit on the management board. [Mr E.]* was to give up his position. [Mr P.]* was proposed as the new member of the management board and spokesman. He was appointed to these positions at the trans-o-flex supervisory board meeting of 28 July 1997.

(72) The documentation sent by Deutsche Post on 30 March 1999 states that [Mr P.]* joined the trans-o-flex management board on 28 July 1997. He was appointed spokesman for the management board of trans-o-flex AG by virtue of a contract of employment dated 3 March 1998 with retroactive effect from 28 July 1997. Following the merging of trans-o-flex AG into Hanna 95 [Mr P.]* has continued to manage the affairs of trans-o-flex GmbH. He is one of the managers of trans-o-flex GmbH and, according to the notification of 4 February 1999, spokesman for the management. [Mr Br.]* and [Mr L.]*, two former trans-o-flex AG management board members, are also managers of trans-o-flex GmbH, alongside [Mr P.]*, according to the documents supplied by Deutsche Post on 30 March 1999.

(73) Even before his appointment [Mr P.]* had had close contact with Deutsche Post. According to his letter of 6 April 1999, he was contacted about the position by [Mr B.]*, who was himself to become a member of the

trans-o-flex supervisory board on 15 September 1997. [Mr P.]* and [Mr Bl.]* are shareholders in LBMG (Logistik Management-Beteiligungs GmbH), in which Deutsche Post also has a 24,8 % holding. Prior to working for trans-o-flex, [Mr P.]* worked for TNT Netlog, a company he had set up himself, whose only customer at the time was Deutsche Post.

(c) *Membership of the supervisory board*

(74) According to the consortium agreement of 10 July 1997 described in B.II.2(c), Industrial Information is allowed to designate four members of the trans-o-flex AG supervisory board, while Deutsche Post and the [Sch./A.]* group are entitled to appoint two each. It may be assumed that the other eight members of the supervisory board referred to in the consortium agreement are employees' representatives. This has not been confirmed by the parties. In its notification Deutsche Post simply states that the trans-o-flex supervisory board consists of equal numbers of representatives.

(75) On 15 September 1997 [Mr Bl.]* and [Mr D.]* were sent to represent Deutsche Post on the trans-o-flex AG supervisory board. Industrial Information did not exercise its right to designate board representatives until 27 August 1998. It designated only [Mr Bo.]*, although it was entitled to designate four members. This is made clear in [Mr A.'s]* letter of 3 March 1999. It is confirmed by item 3 of the minutes of the trans-o-flex AG supervisory board meeting of 11 July 1997, which were sent by Deutsche Post, together with the minutes of other trans-o-flex supervisory board meetings, in response to the request for information of 1 March 1999. The minutes state that Deutsche Post has been allowed to designate two board members, and that two of the shareholders' board members have therefore had to leave the board. There was no discussion concerning the four members to be designated by Industrial Information on the basis of the consortium agreement.

(76) As regards details of the persons appointed to the supervisory board, Deutsche Post merely provided, on 30 March 1999, a list of the trans-o-flex AG supervisory board members and dates when they took up their positions and when they left. In the light of the statement made by [Mr R.]* in his letter of 6 April 1999, where he identifies [Mr Bo.]* as the supervisory board member sent by Industrial Information, it is only indirectly that it can be concluded from this list that the two members appointed on 15 September 1997, [Mr Bl.]* and [Mr D.]*, must have been proposed by Deutsche Post.

(77) A comprehensive list of current trans-o-flex GmbH supervisory board members showing by whom they were designated has not been made available to the Commission. In response to questions on the matter, Deutsche Post sent the list referred to in recital 76, covering the period from 1 January 1985 until [Mr Bo.]* joined on 27 August 1998, which was before the merger agreement. Consequently, it can refer only to the now defunct trans-o-flex AG. (It should be noted that the list contains only 12 members, whereas the consortium agreement provided for membership to be increased to 16).

(78) Deutsche Post has not clarified to what extent the membership of the trans-o-flex AG board corresponds to the membership of the trans-o-flex GmbH board. In its letters of 6 April and 27 April 1999 it merely stated that the current membership of the supervisory board had been decided by verbal agreement between Industrial Information and the minority shareholders. Only in its reply to the statement of objections did Deutsche Post inform the Commission that there had been no change in the membership of the supervisory board since the last date indicated on the list it had supplied, namely 27 August 1998.

(d) *Voting at the shareholders' meeting*

(79) Deutsche Post's notification of 4 February 1999 and the annexed articles of association, together with the managers' rules of procedure supplied by trans-o-flex on 31 March 1999, show that the shareholders' meeting is trans-o-flex GmbH's controlling body. Shareholders' decisions are as a general rule taken by simple majority vote. [Mr R.'s]* and [Mr T.'s]* letters of 6 April 1999, as well as [Mr G.'s]* letter of 26 April 1999, all state that [Mr H.]* represented the majority shareholder. This is confirmed by Deutsche Post in its reply to the statement of objections. In response to a reminder from the Commission, [Mr G.]* also explained in his letter of 26 April 1999 that [Mr H.]* had been instructed to represent Industrial Information by [Mr R.]*. However, [Mr H.]* already had the general power of attorney before [Mr R.]* joined Industrial Information ([12]).

(80) At this point it should be pointed out that the statements made by Deutsche Post and the other parties questioned concern the exercise of controlling rights in trans-o-flex. Only at the end of the Commission's enquiries did trans-o-flex GmbH inform the Commission that trans-o-flex AG had been merged into Hanna 95 a year after the date

([12]) For details see B.II.3(a).

given in the notification. However, contrary to the view put forward by Deutsche Post in its reply to the statement of objections, for the period prior to that merger the decisive question is the control of Hanna 95, and not of trans-o-flex AG. Deutsche Post supplied no information regarding the control of Hanna 95. No investigation was carried out into this matter, since on the information supplied by Deutsche Post it appeared to be of no importance: according to the notification, the merger took place on 26 September 1997, closely following the transactions carried out on 10 July 1997. Hanna 95 and trans-o-flex GmbH are identical. But the documents referred to in the preceding recital concerning trans-o-flex GmbH reveal nothing about Hanna 95, as they are dated only from 27 August 1998 onwards. Only in its reply to the statement of objections did Deutsche Post inform the Commission, though without supplying the relevant documents, that there had been no change in the control structure between the old Hanna 95 and the new trans-o-flex GmbH. In the Deutsche Post letter of 31 March 1999, which included the documentation concerning the powers of the governing bodies of trans-o-flex AG, there are no details about the control structure of Hanna 95, the sole owner of trans-o-flex AG. Moreover, these documents are dated March and April 1998, and therefore have no bearing on the time when the minority holding was acquired.

(e) *Capital increase*

(81) According to Deutsche Post's letter of 27 April 1999, the shareholders decided at a meeting on 23 December 1998 to increase trans-o-flex GmbH's capital. Deutsche Post refers the Commission to an annexed shareholder resolution for further details. The resolution is signed only by the shareholders [A.]* and [Sch.]*, not by Industrial Information or Deutsche Post.

(82) According to this shareholder resolution Industrial Information is to make a cash investment of [DEM ... million — a sum equal to the sum named in the agreement additional to the option agreement referred to in recital 43]*. This is the same amount as that by which the purchase price in the option agreement between Industrial Information and Deutsche Post was increased in an additional agreement on the same day (see B.II.2(d)). Only in its reply to the statement of objections did Deutsche Post inform the Commission that that increase in capital had been financed by Julius Bär Bank, and that this had necessitated a corresponding increase in the security provided by Deutsche Post.

(f) *Loan to trans-o-flex*

(83) In its letter of 27 April 1999, in response to the Commission's reminder of 22 April 1999, Deutsche Post explained that it had allowed trans-o-flex a credit line of [DEM ... million — a sum twice as large as the take-up referred to in the next sentence]*. Of this total, trans-o-flex had taken up [DEM ... million — a sum equal to half the credit line granted, see also recital 51]*. Deutsche Post also referred to the relevant loan contract, which trans-o-flex had annexed to its letter of 29 March 1999.

(84) Under the terms of the contract, dated 7 January 1998, trans-o-flex was granted a credit line of [DEM ... million — a sum identical to the first figure mentioned in recital 83]* by Deutsche Post with retroactive effect from 1 September 1997. The credit line was to be open for a year and the period would be automatically extended unless it was cancelled. Interest was calculated on the basis of the Frankfurt interbank offer rate plus [a figure of less than 1 %]* and was to finance the day-to-day running of the company, as can be seen from trans-o-flex's letter of 26 April 1999.

(85) The contract was forwarded to the Commission by trans-o-flex on 29 March 1999, in response to a Commission reminder. The accompanying letter states that this is the contract by which Deutsche Post extended a loan of [DEM ... million — a sum identical to the figure referred to in recital 51 made up of the loan referred to in recital 50 and the take-up of the credit line referred to in recital 83]* to trans-o-flex. The loan had been agreed because Deutsche Post's conditions were far more favourable than those previously offered to trans-o-flex by the banks. This explanation matches that given by Deutsche Post in its letter of 30 March 1999, in response to a reminder.

(86) As the amounts mentioned in the Deutsche Post and trans-o-flex letters differed from the amount in the contract supplied, the Commission sent reminders to Deutsche Post and trans-o-flex on 22 April 1999

requesting answers to the requests for information previously despatched. Only in its response of 27 April 1999 to the reminder did Deutsche Post explain the details of its loan to trans-o-flex. It consisted in the first place of a loan of [DEM ... million — a sum identical to the loan referred to in recital 50 and to Hanna 95's debt to Haniel referred to in recitals 164 and 167]* to meet Hanna 95's commitments, especially to Haniel, as explained at B.II.2(g). The remaining [DEM ... million — a sum corresponding to the take-up of the credit line to finance day-to-day running as explained in recitals 83, 142 and 167]* had been taken up out of the credit line of [DEM ... million — a sum corresponding to the credit line granted to cover day-to-day running referred to in recitals 83, 84, 86 and 142]*.

5. The sale of the Industrial Information shares to Deutsche Post

(87) On 12 February 1999 a contract for the sale of the majority holding in trans-o-flex was concluded between Industrial Information and Deutsche Post Express und Transport GmbH. The purchase price was [DEM ... million — a sum equal to the purchase price paid by Industrial Information and referred to in recital 30, plus the capital increase or the equivalent figure named in the agreement additional to the option agreement referred to in recital 43, plus 5 % of the total purchase price]*. The contract was supplied to the Commission on Deutsche Post's behalf by letter from [Mr H.]* on 16 February 1999.

(88) According to [Mr R.]* and [Mr T.]* in their letters of 6 April 1999, the sale took place following an informal discussion, and the put-option was not used. It was not necessary to make use of the option, according to [Mr R.]*, as [Mr H.]* had told him of Deutsche Post's interest and [Mr R.]* had said he was prepared to sell to Deutsche Post.

(89) On 7 May 1999 the sales contract was annulled by a contract authenticated by notary which was concluded between Industrial Information, represented by [Mr H.]* on the basis of his general power of attorney of 11 July 1997, and Deutsche Post Express und Transport GmbH, represented by its managers.

C. LEGAL ASSESSMENT

(90) The Commission's investigations have shown that in its notification and in its reply to the Commission's requests for information Deutsche Post failed to meet the information requirements laid down in the Merger Regulation. A number of key facts that were of major importance in assessing the question of Deutsche Post's acquisition of control of trans-o-flex as a result of the transaction notified in 1999 were clarified only as a result of the investigations themselves. Those facts were presented incorrectly or in a misleading way in the notification. Deutsche Post's answers to the requests for information also contain incorrect information.

(91) The Commission was thus prevented from forming a complete picture of Deutsche Post's acquisition of control of trans-o-flex through the transaction notified in 1999. Contrary to what Deutsche Post asserts in its reply to the statement of objections, the Commission's objection is not that Deutsche Post took an erroneous view of the change in control. The objection made against Deutsche Post is that it did not present all the information that would allow the Commission to judge this matter itself.

I. INFORMATION REQUIREMENTS UNDER THE MERGER REGULATION AND THEIR INFRINGEMENT BY DEUTSCHE POST

(92) Deutsche Post was obliged to present such information in the notification in accordance with form CO. Contrary to what Deutsche Post assumes in its reply to the statement of objections, this requirement to provide information is not confined to the circumstances directly associated with the notified transaction in 1999, but applies to all the circumstances relevant to a determination of the question whether there is a concentration within the meaning of Article 3 of the Merger Regulation. This includes, in this instance, the circumstances of the 1997 transaction. Only if those circumstances show that Deutsche Post did not acquire sole control of trans-o-flex through that transaction can it be assumed that there is acquisition of control and hence a concentration in 1999.

(93) The purpose of the information requirements is to ensure that the Commission has all the information it needs in order to take a decision on the notified merger within the time limits set by the Merger Regulation. It must be able to assess the notified transaction under competition law, but it must also be able to determine whether it has jurisdiction. The time limits are set in

such a way as to ensure that the economic process is impeded as little as possible. Given these deadline constraints, it is of particular importance that the parties ensure complete, correct and careful notification of the information to be provided under the Merger Regulation. The liability to pay a fine in the event of infringement of the information requirements thus serves to enforce the principle, which is essential to the Commission's monitoring activity, that the parties notifying a proposed merger must provide correct and complete information. The liability to pay a fine applies regardless of whether the infringement of the information requirements is such as to cause the Commission to make an incorrect assessment.

(94) In the notification, Deutsche Post described the 1997 transaction. However, it provided only information which supported its view that Deutsche Post would acquire control of trans-o-flex through the notified transaction. All information and facts that militated against this view were omitted. This presentation was underpinned by a number of incorrect items of information.

(95) A similar picture emerges from analysis of the answers given by Deutsche Post to the requests for information on questions relating to the acquisition of control. Those answers also contain incorrect information in support of Deutsche Post's view on the acquisition of control. This is true of the answers to questions on the composition of the management and supervisory bodies of trans-o-flex and on Deutsche Post's financial contributions to Hanna 95/trans-o-flex. It was only after repeated reminders had been sent by the Commission and through study of the content of the internal documents which the Commission had requested that a number of these incorrect items of information were rectified.

II. DEUTSCHE POST'S REPLY OF 13 SEPTEMBER 1999

(96) Deutsche Post was sent a statement of objections, giving it the opportunity to state its views on the issues raised by the Commission.

(97) In its reply of 13 September 1999, Deutsche Post did not dispute the facts established by the Commission's investigations. Indeed, it conceded that all the facts established by the Commission were correct.

(98) However, Deutsche Post took the view that, in the notification, it had presented the facts as applicable at the beginning of 1999 in a true and complete manner. It argued that form CO did not require it to present the circumstances of the 1997 transaction. The Commission, it claimed, had also taken this view. If the Commission did believe that such information was required, Deutsche Post did not agree with it. However, it argued, this could not be interpreted as an incorrect or misleading presentation of the facts.

(99) The question of possible acquisition of control in 1997 is of crucial importance to an assessment of the transaction notified in 1999. The relevant circumstances should therefore have been included in the notification. Deutsche Post was aware of this, since it did present these circumstances in the notification, albeit in an incorrect and misleading manner.

(100) The obligation to include such circumstances applies regardless of whether the Commission pointed this out to the notifying parties. In the case in point, however, the evidence suggesting a possible acquisition of control in 1997 was so clear that — contrary to Deutsche Post's assertion in its reply — the Commission had already pointed out to Deutsche Post in January 1999, prior to the notification, that the notification should include a comprehensive description of those details. This was done in particular at a preliminary discussion on the notification of Deutsche Post's intended acquisition of a majority holding in trans-o-flex which took place on 2 February 1999.

(101) Deutsche Post's obligation to present these facts applies regardless of the conclusions that may be drawn from them as to whether Deutsche Post had in fact acquired control of trans-o-flex in 1997. Consequently, Deutsche Post's assertion that the notification was complete because it only had to notify the details of the 1999 transaction is incorrect.

(102) Nor can the finable infringement of the obligation to provide information be nullified *ex post* through a change in circumstances. Deutsche Post argued at the hearing that there was no legal basis for the current proceedings, because the Commission could not have taken a decision on the basis of the information which Deutsche Post had provided. This in turn meant that there was no basis for the application of Article 14 of the Merger Regulation. Deutsche Post made reference here, on the one hand, to the cancellation of the notified transaction, which terminated the notification procedure. On the other, it argued that the Commission had no competence as regards an acquisition of control in 1997.

(103) Deutsche Post notified its acquisition of the trans-o-flex majority holding to the Commission under the Merger Regulation. The information contained in the notification was transmitted to the Commission for the purpose of preparing the ground for a decision under the Regulation. In so far as incorrect and misleading information is contained in that notification, this in itself constitutes an infringement of the information requirement laid down in the Merger Regulation. Any such infringement cannot be reversed simply because a decision is not taken in the particular case. Once it is established that the information requirements have been infringed, proceedings can be initiated for the imposition of a fine. It does not matter whether a notification is still pending and may lead to a decision.

(104) Deutsche Post's argument that the Commission did not have competence as regards the 1997 transaction is answered by the comments above explaining that the circumstances of the 1997 transaction are important in assessing the control structure in connection with the transaction notified in 1999.

(105) In its comments in its reply, Deutsche Post relies on a number of other arguments, which do not, however, stand up.

(106) In response to the charge that it infringed the information requirements, Deutsche Post advances its own assessment of the facts, which it bases on its own view of the acquisition of control. Deutsche Post is entitled to put forward that view, but it does not affect the information requirements laid down in the Merger Regulation. Those requirements apply objectively, irrespective of any conclusions that might be drawn from the facts that have to be provided. There is a duty to supply all the factual information called for by the Merger Regulation. It is not permissible for the notifying parties to select the facts to be provided on the basis of their own subjective interpretation of those facts, and any such selection constitutes an infringement of the information requirements.

(107) As regards the answers to the requests for information, Deutsche Post also takes the view in its reply that it answered correctly and completely all the questions which the Commission put to it. In this context too, Deutsche Post confirms that the facts established in the Commission's investigations are correct.

(108) However, Deutsche Post complains that it did not have sufficient time to answer the questions. It should be noted on this point that Deutsche Post was granted the usual amount of time to answer the requests for information. A shorter deadline was set only for parts of the questions that had not been answered, or not answered completely, in previous requests for information. Furthermore, Deutsche Post did not avail itself of the possibility of asking the Commission for an extension of the deadlines set.

(109) Deutsche Post also takes the view that some of the Commission's questions were unclear and that Deutsche Post could not therefore be blamed if it answered the questions in a different way than the Commission intended. This interpretation by Deutsche Post of the questions put by the Commission is justified neither by their wording nor by the context in which they were put, namely determination of the details of control. The only explanation is rather that Deutsche Post sought to withhold from the Commission any information that might cast doubt on Deutsche Post's view on the control issue. Deutsche Post has put forward a specific interpretation of its own of only one question, and that interpretation is not tenable: the question regarding agreements by the parties on the distribution of seats in trans-o-flex's governing bodies was confined, in Deutsche Post's view, to the identity of the persons delegated to them, and did not cover the shareholders' rights to delegate (see C.III.2(a)(1)).

(110) Deutsche Post bases its argument on a lack of a causal link between the incorrect or misleading presentation of the facts and the substance of a Commission decision. The facts that were not presented to the Commission would not have produced a different assessment, it argues.

(111) Such a causal link is not necessary for a finable infringement of the information requirement to be committed. The information provided under the Merger Regulation must not contain any incorrect and misleading particulars. The requirement that all the information called for under the Merger Regulation be provided in a correct and complete manner serves an objective purpose. It is intended to enable the Commission to take a decision on the basis of all the relevant information within the time limits set. It is, however, not necessary that the incorrect and misleading information should result in an incorrect assessment.

(112) For this reason, Deutsche Post's argument that the presentation of the information in question was not necessary because the Commission could not have reached any other conclusion on the basis of such information does not stand up. Deutsche Post takes its own interpretation of the acquisition of control as the basis for this assessment. In so doing, it fails to recognise that, although it is entitled to make such assessments,

the factual information on the basis of which the assessment was made must nevertheless be made available to the Commission in full so that it can form its own view. Selecting information which supports the notifying party's own interpretation at the expense of information that might call that interpretation into question does not meet the information requirements laid down in the Merger Regulation.

(113) Nor is the accusation that the information requirements under the Merger Regulation have been infringed invalidated by the fact that in its reply to the statement of objections Deutsche Post confirmed that the facts ascertained were correct. The purpose of these information requirements is precisely to ensure that the information is made available to the Commission from the outset and not after extensive and time-consuming investigations have been carried out. The same applies to the argument that Deutsche Post made no secret of the facts that were subject to the information requirement. If information is not presented in the notification, the information requirement is infringed.

(114) Deutsche Post points out that the Commission was able to obtain documents which were not submitted from generally accessible sources such as the companies register. Deutsche Post fails to recognise here that the information requirements laid down in the Merger Regulation are not confined to facts of which only the notifying parties have knowledge, but extend to all relevant information, including information which is generally accessible.

(115) Deutsche Post argues that a number of items of information which the Commission says are missing could be gathered from the annexes to the notification. As the first paragraph of point B in form CO makes clear, the information requirements regarding the notification apply primarily to the notification form. All the information required must be supplied in the form itself. The notification form must be comprehensible in its own right, and the annexes must be used only to illustrate or confirm the information supplied in the form. Notifying parties may not claim that they have fulfilled their information requirement by pointing out that facts which have been wholly omitted from the form have been included in the annexes. Furthermore, in this particular instance, the relevant information cannot be deduced in full from the annexes.

(116) Nor in Deutsche Post's specific comments on the individual points regarding which it is charged with having provided incomplete or misleading information are there any arguments that refute the objections which are the subject of this Decision. The following detailed analysis will, as far as necessary, look at the particulars of relevance in this respect.

III. INFRINGEMENT OF THE MERGER REGULATION

1. **Article 14(1)(b)**

(a) *The fact of the infringement*

(117) The facts set out above show that, in its notification of 4 February 1999 concerning the acquisition of 50,4 % of the shares in trans-o-flex GmbH from Industrial Information, Deutsche Post supplied incorrect and misleading information. This conduct is contrary to Article 14(1)(b) of the Merger Regulation.

(118) In its notification, Deutsche Post claimed that it would obtain control of the company only when it had acquired the majority holding in trans-o-flex as notified. It also claimed that, when it purchased a minority holding in trans-o-flex on 10 July 1997, it had not acquired a controlling interest in the company.

(119) However, the evidence uncovered in the course of the investigations, and the analysis of the results, which have already been explained in detail, suggest that Deutsche Post actually took over control of trans-o-flex AG on 10 July 1997.

(1) **Incorrect information**

(120) Deutsche Post's notification contained a series of inaccurate statements which served to support its presentation of the case.

(a) *Merger*

(121) Contrary to what was stated in the notification, the merger of trans-o-flex AG and Hanna 95 GmbH took place on 27 August 1998, a year later than the stated date of 25 September 1997. It is not possible that the discrepancy was due to a typing error in the notification, as the notification contained in the annex a merger agreement between the two companies, authenticated by notary, which had indeed been concluded on 25 September 1997. Only in the course of the investigation did it become clear that this agreement had been replaced by the agreement concluded on 27 August 1998, which

was then in fact implemented. Although, in its reply to the statement of objections, Deutsche Post concedes that the agreement submitted was not the final agreement between the parties, it claims that this was due to an oversight. But even if one accepts that there was such an oversight, the notification remains incorrect as regards the date of the merger, as Deutsche Post itself concedes in its reply. It has been explained already (B.II.4(d)) that the fact that the merger did not take place, in connection with the 1997 transaction, as was stated in the notification, but only one year later, is of major importance in determining when control was acquired.

(b) *Profit motive*

(122) According to the information given in the notification, [Mr R.]*, acting through Industrial Information, acquired a temporary majority holding in trans-o-flex with a view to making a profit, as it appeared to be a promising investment. The investigation revealed that this portrayal of the facts was also incorrect. Contrary to Deutsche Post's statements, the relevant contracts do not give [Mr R.]* any prospect of making a profit in line with the fortunes of the company. It is evident from the purchase price clause in the option agreement (B.II.2(d)) that, in the event of a sale to Deutsche Post, no provision is made for a profit margin for Industrial Information. Any remuneration through the reimbursement of expenditure incurred cannot be termed 'profit', but might at most be regarded as remuneration for a service provided. It follows from Deutsche Post's right of first refusal in conjunction with the purchase price arrangement (B.II.2(d)) that Industrial Information cannot expect to achieve a profit even in the event of a sale to third parties.

(123) On the basis of the arrangements contained in the option agreement, therefore, there is no economic interest on the part of Industrial Information and [Mr R.]*. Any economic interest as regards the participation of Industrial Information lies solely with Deutsche Post.

(c) *Exercise of shareholder rights*

(124) The notification also states that [Mr R.]* always exercised his rights as a shareholder. However, the investigation revealed that [Mr R.]* appeared only in order to purchase the shares in Industrial Information from [Mr H.]*, 11 days after the conclusion of the contracts concerning the acquisition of the majority holding. At that stage, [Mr H.]* already had a general power of attorney from Industrial Information, which he used to exercise its rights as a shareholder and to represent it in dealings with third parties and at the shareholders' meeting. Deutsche Post asserts in its reply to the statement of objections that there was an active exchange of information between [Mr R.]* and [Mr H.]* on the matter, and that instructions were issued. However, Deutsche Post has not substantiated these assertions in its submissions or provided documentary evidence for them.

(125) The assertion that [Mr R.]* exercised his rights as a shareholder is in any event incorrect, if only because there are other shareholders' rights which were not exercised. This is not disputed by Deutsche Post. The right to designate four members of the supervisory board was exercised only in part, since only one of four possible members was designated. Similarly, although it is the majority shareholder in Hanna 95 GmbH, trans-o-flex AG and trans-o-flex GmbH, Industrial Information is not represented in the managements of any of them.

(d) *Right to exercise the put-option*

(126) It is claimed in the notification that it was to be a matter entirely for Industrial Information to decide when the majority holding in trans-o-flex would be sold, and that this was why Deutsche Post granted Industrial Information a put-option. In fact, as Deutsche Post expressly confirms in its reply to the statement of objections, the put-option served as security for the lending bank, to which the put-option rights were transferred. Industrial Information thus waived the put-option right which entitled it alone to determine the timing of the sale of its trans-o-flex shares to Deutsche Post. The assertion made in the notification in this respect is therefore incorrect.

(2) **Misleading information**

(127) In addition to the abovementioned incorrect information, in its notification Deutsche Post also supplied a large amount of misleading information to substantiate its claim that Industrial Information, and not Deutsche Post, took control of trans-o-flex in 1997. Deutsche Post misled the Commission by failing to mention a number of facts that allow an appraisal to be made as to whether Deutsche Post would acquire control in 1999. Acquisition of control by Deutsche Post in 1999 was possible only if it had not already acquired sole control in 1997. The notification should therefore have provided all the facts that would have allowed the Commission to assess the control structure arising from the 1997 transaction.

(128) Under Article 4 of the Merger Regulation, read in conjunction with Article 3(1) of the Implementing Regulation ([13]), and, in particular, section 2.1 of form CO, Deutsche Post was obliged to supply this information in its notification. The Commission must be able to establish on the basis of the account given of a notified transaction whether the transaction is in fact a concentration within the meaning of Article 3 of the Merger Regulation. The Commission's assessment may not be replaced by the notifier's assessment, backed up by information selected to support that view. By failing to supply information needed for the assessment of the takeover, the account given by Deutsche Post distorted the facts. Contrary to what Deutsche Post claims in its reply to the statement of objections, such omission can result in a misleading presentation of the facts. If it was not to be incomplete and misleading, an account of the takeover should have contained the following information.

(a) *Control of Industrial Information by [Mr H.]* at the time of the 1997 transaction*

(129) [Mr H.]* controlled Industrial Information when the Hanna 95 shares were purchased. Deutsche Post had indeed informed the Commission that Industrial Information was a shelf company belonging to [Mr H.]*. But, according to Deutsche Post's account in its notification, [Mr R.]* first took over Industrial Information in order then to acquire a majority of the shares in trans-o-flex ([14]). In fact, all the transactions associated with the acquisition of the trans-o-flex shares occurred at a time at which [Mr H.]* still controlled Industrial Information. These facts are important in assessing the position regarding control, and it was therefore necessary to present them.

(b) *General power of attorney*

(130) On 11 July 1997, one day after Industrial Information's acquisition of the majority holding in Hanna 95 and at a time when, as the majority shareholder, he did not require power of attorney at all, [Mr H.]* obtained general power of attorney for Industrial Information, and on this basis he continues to represent the company today. This information is important in assessing the control structure and should therefore have been presented, since the delegation of such power may be seen as a preparatory step for the entrance of a majority shareholder who will not himself exercise any influence.

(c) *Timing of [Mr R.'s]* entry*

(131) [Mr R.]* took over Industrial Information only 11 days after all the transactions regarding the acquisition of trans-o-flex had been concluded. This again is a key factor in assessing the control structure and one which is not mentioned in the notification. If the only reason for this late entry of [Mr R.]* is in fact, as was first asserted in Deutsche Post's reply to the statement of objections, that [Mr R.]* was prevented from doing so because of other commitments, this could have been pointed out in the notification. This circumstance would then have been taken into account by the Commission in its assessment. The fact remains, however, that the information should have been provided.

(d) *Level of the purchase price for Industrial Information*

(132) [Mr R.]* paid only the nominal value of the Industrial Information shares. This corresponded to approximately 2 % of the value of the Hanna 95/trans-o-flex shares acquired by Industrial Information (see B.II.3(c)). These facts too should have been provided in the notification: it is of considerable importance in assessing the control structure, particularly in conjunction with the other facts established by the Commission, that the person described as the investor, [Mr R.]* should have paid only a small part of the actual value of the object of the investment.

(e) *The consortium agreement*

(133) The consortium agreement should have been supplied and explained. It contains agreements on the composition of the governing bodies of Hanna 95 and trans-o-flex AG and was therefore of importance for an assessment of the control structure. This is necessary in order to enable the Commission to carry out such an assessment even if, as Deutsche Post asserts in its reply to the statement of objections, the consortium agreement merely repeats for the record the rules of the relevant articles of association. Moreover, Deutsche Post's argument is invalidated by the fact that neither the articles of association of Hanna 95 nor those of trans-o-flex AG were submitted to the Commission.

([13]) Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 61, 2.3.1998, p. 1).

([14]) 'In this way, 50,4 % of the shares in Hanna 95 were acquired by Industrial Information, which in the mean time had become the property of [Mr R.]*.'

(f) *The option agreement*

(134) The option agreement should have been fully explained and annexed to the notification. The notification makes no mention of the price clause, Deutsche Post's right of first refusal, and Industrial Information's exemption from any responsibility of liability in relation to the management of Hanna 95, all of which were crucial to the assessment of the acquisition of control. These provisions of the agreement show that Deutsche Post bears the economic risk for the trans-o-flex shares acquired by Industrial Information (C.III.1(a)(1)(b)). The option agreement is thus of crucial importance in assessing the time when acquisition of control occurred.

(135) In its reply to the statement of objections, Deutsche Post argues that the option agreement was unimportant in the given context. The agreement did not confer rights nor impose obligations on Industrial Information, since those were transferred to the bank through the assignment by way of universal succession. Industrial Information had therefore been free to renegotiate the sale and the terms and conditions associated with it. This had in fact happened when the purchase agreement was concluded with Deutsche Post in 1999, with the result that the achievement of a profit had not only been possible, but had also actually taken place.

(136) However, it is clear from the wording of the option agreement in conjunction with the declaration of assignment and from the letter from the lending bank on 10 July 1997 that the object of the assignment to the bank was the exercise of the rights arising from Industrial Information's put-option. It is not possible, through a declaration of assignment, to release oneself from obligations to a third party. Thus the fact remains that the purchase price agreement and Deutsche Post's right of first refusal excluded a profit for Industrial Information and the conclusions drawn above regarding the acquisition of control stand. The fact that, as Deutsche Post argues in its reply to the statement of objections, a contract was concluded two years later which, according to Deutsche Post, was negotiated independently of these agreements, is without significance in this context. The crucial factor is that, in connection with the takeover of the majority shareholding in trans-o-flex in 1997, Industrial Information reached an option agreement with Deutsche Post which specified a purchase price arrangement which could not be altered unilaterally. It did not allow a profit on the part of Industrial Information.

(137) The content of the option agreement is therefore, in this context, of crucial importance and, contrary to what Deutsche Post asserts in its reply to the statement of objections, should have been presented in the notification. In this connection, in view of the account given by Deutsche Post in its reply to the statement of objections, it should be noted that the option agreement was not covered by the notification, but was transmitted to the Commission only when requested in a formal request for information.

(g) *Financing of Industrial Information's holding in trans-o-flex*

(138) The notification should have contained details of the financing of the acquisition of Industrial Information's majority holding in Hanna 95 by Julius Bär Bank, including the securities offered to the bank. These facts are of importance in assessing the control structure, since the securities necessary for the credit line were provided by Deutsche Post, the minority shareholder, alone. Julius Bär Bank, which provided that credit line, was assigned the put-option rights belonging to Industrial Information, and was pledged the trans-o-flex shares belonging to Industrial Information (see B.II.2(e)). Together with the purchase price arrangement for the exercise of the put-option (see B.II.2(d)), this ensured that the bank could at any time recover the capital it had provided in full from the financially strong Deutsche Post.

(h) *Payment guarantee*

(139) The payment guarantee underwritten by Deutsche Post on behalf of Hanna 95 and the particular circumstances that led to this action and the reasons for it should have been described in the notification. This means not only the sale of trans-o-flex by Haniel in 1995, which was mentioned in the notification, but also the other facts set out in B.II.2(f), especially the fact that when the contracts were concluded on 10 July 1997 trans-o-flex's shares were under a lien held by Haniel. The provision of a guarantee served to prevent the exercise of this lien.

(140) Contrary to Deutsche Post's assertions in its reply to the statement of objections, these facts were not communicated to the Commission. Presentation of the purchase contract, to which Deutsche Post refers here and in which various liens are mentioned, is not sufficient in itself without mention in the notification. Furthermore, even on close reading of the purchase contract, the circumstances associated with the lien remain unclear. Form CO required that this information be disclosed. As already explained in detail (B.II.2(f)), the purpose of the provision of the guarantee was to prevent a

complete loss of the assets of Hanna 95 through realisation of the trans-o-flex shares subject to a lien. That a minority shareholder not formally entitled to control should underwrite such a guarantee, which primarily benefits the majority shareholder formally entitled to control, and this without any counter-consideration, is a key factor in assessing the control question at issue here.

(i) *The loan to redeem the lien*

(141) For the same reasons, the notification should also have mentioned that Deutsche Post made Hanna 95 a loan shortly before the due date of the claim secured by the lien, so that the lien could be redeemed. As Deutsche Post itself confirms in its reply to the statement of objections, the loan served the same purpose as the payment guarantee. Contrary to what Deutsche Post argues in its reply to the statement of objections, the majority shareholder here received favourable treatment from Deutsche Post regardless of whether Deutsche Post was able to re-finance this loan on more favourable conditions than it granted to trans-o-flex: the benefit is conferred by the very granting of the loan for the purpose described.

(j) *The loan to cover running costs*

(142) Deutsche Post granted trans-o-flex a credit line of [DEM ... million — see recitals 83, 84 and 86]* to cover its normal running costs, and trans-o-flex took up [DEM ... million — see recitals 83, 86, and 167]* of the loan (see B.II.4(f)). Contrary to Deutsche Post's opinion, such a transaction must be disclosed, since, regardless of the re-financing conditions, it represents a unilateral payment by the minority shareholder which, however, benefits all the shareholders in proportion to the size of their respective shareholdings. This fact is also relevant to assessment of the control structure.

(k) *Merger agreement*

(143) The merger agreement which was actually implemented, the declarations of consent provided for in the agreement, and any other relevant documentation should have been annexed to the notification. These documents and the time at which they were concluded are, as explained above (B.II.4(d)), of crucial importance in assessing the legal control structure of trans-o-flex.

(144) If the abovementioned documents had been transmitted, it would moreover have been immediately evident that the wrong merger agreement had been sent by mistake. The merger agreement submitted was an agreement which was authenticated by notary but which — as emerged from the Commission's investigations — had not entered into force, and was dated one day before the merger date specified in the notification. These dates are one year before the actual merger.

(l) *Articles of association*

(145) The Hanna 95 shareholders' agreement and the trans-o-flex AG articles of association which were valid when the shares were acquired in 1997 should have been annexed to the notification, together with any other documentation regarding the control of the two companies, contrary to the view taken by Deutsche Post in its reply to the statement of objections, since, as is clear from the explanations given above (B.II.4(d)), they are of crucial importance to determining the control structure created by the 1997 transaction. Only in this way would the Commission have been able to form an assessment of whether the legal control structures at the time of the 1997 transaction were the same as at the time of the entry into force of the later articles of association available to the Commission. Deutsche Post's assertion, in its reply to the statement of objections, that this was the case does not remove the infringement of the information requirement in this respect. Furthermore, Deutsche Post does not in its reply present any of the documents that were missing in the notification.

(m) *Change in management*

(146) Any changes in the management of trans-o-flex and Hanna 95 which occurred when Deutsche Post acquired its holding or were directly related to Deutsche Post's acquisition of Hanna 95 should have been disclosed and explained (see B.II.4(b)). Contrary to Deutsche Post's contention, such changes are important factors in assessing the control structure.

(n) *Supervisory board changes*

(147) This also applies to changes in the membership of the supervisory board (see B.II.4(c)). These should also have been disclosed in the notification.

(o) *Capital increase*

(148) On 23 December 1998, it was decided to increase trans-o-flex's company capital. Although Industrial Information provided the injection of capital, the plan was that Deutsche Post should compensate Industrial Information by including the amount in the purchase price. These facts too are not evident from the notification, but are essential in assessing the control structure. They must be seen in conjunction with the purchase price provision in the option agreement (see B.II.4(e)).

(b) *Intention*

(149) Deutsche Post committed the acts caught by Article 14(1)(b) intentionally, as it recognised or could not have been unaware that the information contained in its notification was in breach of the information requirements in the manner described in that provision.

(150) The investigation has revealed that Deutsche Post was aware of the information in respect of which Article 14(1)(b) applies. The Commission received much of the information in question from Deutsche Post in response to requests for information or reminders drawing attention to requests for information. Thus Deutsche Post knew that the information it had supplied in its notification was incorrect and misleading. The investigation has further revealed that Deutsche Post was also aware that these facts were crucial to the assessment of Deutsche Post's acquisition of control of trans-o-flex in 1999 through the notified transaction, and should therefore have been included in the notification.

(151) The way in which the facts were presented by Deutsche Post in its notification also makes this clear. The false information consists of more than isolated incorrect or misleading details. The incorrect and misleading information supplied in its notification served directly to support Deutsche Post's view of the takeover and deliberately and systematically prevented the Commission from forming a full and correct picture of the situation. By a deliberate combination of false information and the omission of information which was crucial to the decision, an account of the facts was fabricated which made it appear that the transaction matched all of the criteria for an acquisition of control. The process involved concealment of the actual sequence of events, such as the point at which [Mr R.]* joined Industrial Information in relation to the point at which the trans-o-flex shareholding was acquired. Out-of-date documents were also supplied, including the merger agreement of 25 September 1997, which was never implemented, while other documents did not relate to the relevant period, such as the articles of association of trans-o-flex AG, and the articles of association of September 1998.

(152) It follows that, in the account it gave in its notification, Deutsche Post acted with the intention to deceive. That intention in any event includes the intention referred to in Article 14(1).

(153) The same applies to the incorrect information regarding the merger. Since the date given for the merger in the notification corresponds to the date of the attached agreement, whereas the actual merger only occurred a year later (see C.III.A(a)(1)(a) and C.III.1(a)(2)(k)), it is not possible that the merger agreement was provided only inadvertently.

(c) *Finding*

(154) In its notification of 4 February 1999 in Case IV/M.1447 — Deutsche Post/trans-o-flex, therefore, Deutsche Post intentionally supplied incorrect and misleading information, in that it supported its depiction of the case by making a number of incorrect statements and providing a great deal of misleading information.

2. **Article 14(1)(c)**

(a) *The fact of the infringement*

(155) The facts set out show that Deutsche Post supplied incorrect information in response to requests made pursuant to Article 11 of the Merger Regulation. This conduct is contrary to the first limb of Article 14(1)(c) of the Regulation.

(156) The Commission sent Deutsche Post three requests for information concerning Deutsche Post's takeover of trans-o-flex, on 23 February 1999 (reference 1999), 26 March 1999 (reference 3359) and 22 April 1999 (reference 4350). The request for information of 26 March 1999 contained a number of new questions, and asked Deutsche Post to answer the questions contained in the request for information of 23 February 1999. The request for information of 22 April 1999 requested answers only to unanswered questions from the previous two requests.

(157) Deutsche Post replied to these requests for information in its letters of 1 March 1999, 30 March 1999, 6 April 1999 and 27 April 1999. The letters contained incorrect information. They also left a number of questions unanswered, forcing the Commission to repeat them, sometimes formulated more precisely on the basis of the results of the investigation being conducted, and to ask a number of further questions. Deutsche Post's letter of 27 April 1999, replying to the reminder of 22 April 1999 drawing attention to the previous requests for information, contained a number of corrections of information previously supplied and supplementary information completing information requested earlier.

(158) The investigation has shown that Deutsche Post supplied the following incorrect information when replying to the requests for information pursuant to Article 11.

(1) **Agreements regarding the allocation of seats on the supervisory board**

(159) In its letter of 6 April 1999, Deutsche Post stated, in reply to a question relating to arrangements for membership of the trans-o-flex management board and supervisory board, that no documents existed regarding the composition of the trans-o-flex supevisory board. This is incorrect, as the consortium agreement between the parties contains detailed rules concerning membership of the trans-o-flex AG Hanna 95 governing bodies.

(160) This question could not, as Deutsche Post states in its reply, be misinterpreted merely as a question on arrangements regarding the identity of the persons appointed to the supervisory board. The question is concerned above all with the shareholders' rights to appoint members to these bodies. The narrow interpretation placed on the Commission's question by Deutsche Post is justified neither by its wording nor by the context in which it was asked. The term 'seats' used in the question, and the context, which was the exercise of supervision by various shareholders, precludes a limiting of the question to the identity of the individuals represented. It was therefore clear to Deutsche Post that merely providing individual names would be of no help to the Commission. The only explanation for the interpretation of the relevant question proposed by Deutsche Post in its reply is that any information which could cast doubt on Deutsche Post's view of the control issue was to be withheld from the Commission. Moreover, Deutsche Post's reply was confined to the supervisory board, whereas the question covered the supervisory board and the management board.

(2) **Security provided by Deutsche Post**

(161) In its letter of 1 March 1999, replying to the request for information of 23 February 1999, Deutsche Post denied that it had directly or indirectly financed Industrial Information's acquisition of the shares.

(162) However, the investigation revealed that Deutsche Post financed this acquisition indirectly by providing security for the loan granted to Industrial Information (see B.II.2(e)). Deutsche Post therefore answered the question incorrectly.

(3) **Intervention by Deutsche Post**

(163) In its letter of 1 March 1999, replying to the request for information of 23 February 1999, Deutsche Post also denied that it had intervened to assist trans-o-flex, Industrial Information or any of their shareholders, for example by waiving claims or taking over commitments. However, the investigation revealed that Deutsche Post should have answered this question in the affirmative.

(164) Deutsche Post first gave a payment guarantee benefiting Hanna 95, which at that time was sole proprietor of trans-o-flex, and then made the company a loan. In this way it enabled Hanna 95 to meet its obligations, amounting to [DEM ... million — a sum corresponding to the sum lent to meet Hanna 95's commitments to Haniel referred to in recitals 50, 86 and 167]*, in respect of the purchase price owed by Hanna 95 to Haniel for the acquisition of trans-o-flex shares in 1995 (see B.II.2(f) and (g)). Deutsche Post therefore relieved Hanna 95 of the obligation to make this payment by the end of September 1997. It is not necessary for this debt to be waived completely, as maintained by Deutsche Post in its reply, for a discharge of debts to have occurred. An extension of credit is sufficient, especially if it is intended, as in this case, to protect the entire assets of the benefiting company, i.e. trans-o-flex AG shares, from conversion into cash and hence from loss. Deutsche Post therefore gave an incorrect reply to the question.

(165) Nor can it be argued, as in Deutsche Post's reply, that the question had been correctly answered because the circumstances surrounding the provision of the guarantee and the loan were clear from the documents enclosed. If these circumstances were clear from the annexes alone, they would merely confirm that the Commission's answer was wrongly answered in the negative. Not only is Deutsche Post's reply incorrect, it is also contradictory. In any event, the facts which reveal that Deutsche Post's answer is incorrect are not clear from the annexes, as explained in the next recital.

(4) **Circumstances of the payment guarantee and loan from Deutsche Post**

(166) In its letter of 27 April 1999 Deutsche Post stated that all the relevant information concerning the payment guarantee and the granting of the loan were supplied in the annexes to its letter of 1 March 1999. This is not the case. The Commission was not able to determine the facts relating to the payment guarantee and the granting of the loan from the annexes to the letter of 1 March.

The loan contract was not enclosed, and the payment guarantee was supplied only in draft form. Moreover, no explanation was given of the context surrounding these agreements. The Commission first gained knowledge of all these elements through its own investigations (see B.II.2(f) and (g)). Deutsche Post's answer was therefore incorrect.

(5) **Reason for the loan**

(167) In its letter of 30 March 1999 Deutsche Post claimed it had made trans-o-flex a loan of [DEM ... million — see recital 85, with further references]* in order to enable trans-o-flex to settle existing liabilities at a rate of interest lower than the market rate. The investigation revealed, however, that [DEM ... million — see recital 164, with further references]* of the loan was used to meet Hanna 95's commitments to Haniel. The purpose of this loan was to enable Haniel to release the pledged trans-o-flex shares, while [DEM ... million — see recital 142, with further references]* financed trans-o-flex's current activities. The main purpose of the loan was not, therefore, as Deutsche Post claims, the refinancing of existing liabilities at a low rate of interest. Deutsche Post's answer was therefore incorrect.

(6) **Changes in management**

(168) In its letter of 1 March 1999, Deutsche Post stated that no changes to trans-o-flex's management had been made at the behest of Deutsche Post. This was not true. The record of the trans-o-flex supervisory board meeting of 11 July 1997, one day after the 1997 transaction, indicated that [Mr P.]* joined the management board (as chairman) on behalf of Deutsche Post, and that the resignation of [Mr E.]* was directly connected with this event. Whether or not tensions already existed between [Mr E.]* and the supervisory board before Deutsche Post joined the board, as claimed by Deutsche Post, is not important in this context, since these had not led [Mr E.]* to resign.

(7) **Membership of trans-o-flex governing bodies**

(169) When the Commission asked for the names of the members of trans-o-flex's governing bodies, with details of when they joined and left, Deutsche Post answered by supplying the list of supervisory board members for 1995, 1996 and 1997. Only when reminded by the Commission did Deutsche Post supply, on 30 March 1999, a list of all management and supervisory boards, beginning at 1 January 1985 and ending at 27 August 1998. The list, however, is incorrect, as it refers only to trans-o-flex AG, which ceased to exist folowing the merger, and contains no information about the membership of the corresponding bodies in trans-o-flex GmbH.

(170) Deutsche Post's failure to provide a correct answer to the Commission is not remedied by the fact that it indicates in its reply to the statement of objections that no changes to these bodies had occurred after the stated final date. This statement is unclear and ambiguous. If it refers to trans-o-flex AG, no change could have been made after the stated date, since it ceased to exist immediately after that date as a result of the merger. If it refers to trans-o-flex GmbH, it cannot be correct since, although the company has a supervisory board, it does not have a management board ('Vorstand') but three managers ('Geschäftsführer') instead.

(b) *Intention*

(171) The investigation has revealed that Deutsche Post was aware of the information in respect of which the first limb of Article 14(1)(c) of the Merger Regulation applies. The Commission received much of the information in question from Deutsche Post in response to reminders drawing attention to its requests for information. Thus Deutsche Post knew that the information which it had supplied and which has been examined here was incorrect. Deutsche Post deliberately attempted to make use of this incorrect information to give a false presentation of the facts in order to support its view of the takeover. If follows that in the account it gave in its notification Deutsche Post acted with the intention to deceive. That intention in any event includes the intention referred to in Article 14(1). Deutsche Post therefore acted intentionally within the meaning of Article 14(1).

(c) *Finding*

(172) In its letters of 1 March 1999, 30 March 1999, 6 April 1999 and 27 April 1999, replying to requests for information pursuant to Article 11 of the Merger Regulation in Case IV/M.1447 — Deutsche Post/trans-o-flex, Deutsche Post intentionally supplied the incorrect information described (at C.III.2).

D. **FINES**

(173) In setting fines the Commission has taken the following factors into account.

I. ARTICLE 14(1)(b)

(174) Article 14(1)(b) of the Merger Regulation states that 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 EUR 50 000 where intentionally or negligently they supply incorrect or misleading information in a notification pursuant to Article 4.

(175) Article 14(3) states that, in setting the amount of a fine, the Commission is to have regard to the nature and gravity of the infringement. The Commission will here take account of any aggravating or mitigating circumstances.

(176) The infringement at issue is the intentional supply of incorrect and misleading information by Deutsche Post in its notification of 4 February 1999.

(177) The fact that the incorrect and misleading information relates to the acquisition of control, and hence to the Commission's competence in respect of the notified transaction, is to be regarded as an aggravating circumstance. Information on the acquisition of control is information that must be supplied by the parties in accordance with section 2.1 of form CO in order to enable the Commission to assess whether the notified merger constitutes a concentration within the meaning of Article 3(1) of the Merger Regulation. This assessment is essential for determining the powers of the Commission in respect of the notified transaction. If the tests for the presence of a concentration laid down in the Merger Regulation are not satisfied, the transaction is not within the Commission's competence. One of the main tests of this kind is that the notified operation should produce a change in control.

(178) A further aggravating circumstance is the fact that the incorrect and misleading information listed above in connection with the question of intention was intended to deceive the Commission with regard to an acquisition of control, and therefore with regard to the Commission's powers in relation to the transaction.

(179) There are no circumstances in this case which would justify a reduction in the fine. Deutsche Post cannot plead in mitigation that it supplied the Commission with the bulk of the information which enabled the Commission to prove that an infringement had occurred. The information was supplied only in response to requests from the Commission, and often only in response to reminders. It was also supplied very late in the proceedings.

II. FIRST LIMB OF ARTICLE 14(1)(c)

(180) Article 14(1)(c) of the Merger Regulation empowers the Commission by decision to impose on the persons referred to in Article 3(1)(b), undertakings or associations of undertakings fines of from EUR 1 000 to EUR 50 000 where intentionally or negligently they supply incorrect information in response to a request made pursuant to Article 11.

(181) Article 14(3) states that in setting the amount of a fine the Commission is to have regard to the nature and gravity of the infringement. The Commission will here take account of any aggravating or mitigating circumstances.

(182) A series of infringements caught by the first limb of Article 14(1)(c) have been committed, in that incorrect information on various points detailed above was supplied on a number of occasions in response to requests for information made by the Commission under Article 11 of the Merger Regulation.

(183) The incorrect information was designed to deceive the Commission with regard to the acquisition of control, and thus to ensure that the Commission continued in its opinion that it was competent in the case, as had been suggested by the incorrect and misleading information in the notification. Only after exhaustive investigation was the Commission able to clarify the facts sufficiently to be able to make a correct assessment of the acquisition of control in the event that it took a decision in the case.

(184) Here, too, the fact that the incorrect replies relate to the acquisition of control and hence to the Commission's competence should be regarded as an aggravating circumstance.

(185) The gravity of the infringement is also aggravated by the intention to deceive, which has already been established.

(186) For the reasons already outlined in the light of Article 14(1)(b) of the Merger Regulation, there are no circumstances here which would justify a reduction in the fine. Deutsche Post cannot plead in mitigation that in response to the Commission's requests it supplied the information which led to the clarification of the case.

(187) As was explained above, Deutsche Post provided an account of the real facts of the case only in its letter of 27 April 1999, and many material facts were omitted from that letter, such as the sequence of events and [Mr H.'s]* power of attorney. Nor should it be forgotten that the information was supplied only in response to reminders drawing attention to the failure to answer questions in previous requests for information.

E. **CONCLUSIONS**

(188) The considerations set out above demonstrate that Deutsche Post supplied incorrect and misleading information in its notification of 4 February 1999 in Case IV/M.1447 — Deutsche Post/trans-o-flex. They likewise demonstrate that Deutsche Post replied incorrectly to requests for information under Article 11 in its letters of 1 March 1999, 30 March 1999, 6 April 1999 and 27 April 1999.

(189) The Commission reaches the conclusion that Deutsche Post's actions are caught by Article 14(1)(b) and the first limb of Article 14(1)(c) of the Merger Regulation, which makes it liable to fines under two separate provisions.

(190) The Commission ought to impose a fine on Deutsche Post under Article 14(1)(b) of the Merger Regulation, and a further fine under the first limb of Article 14(1)(c).

(191) Accordingly, taking into account the circumstances of the case, the Commission considers it appropriate to impose a fine of EUR 50 000 under Article 14(1)(b) of the Merger Regulation and a further fine of EUR 50 000 under the first limb of Article 14(1)(c), making a total of EUR 100 000,

HAS ADOPTED THIS DECISION:

Article 1

1. A fine of EUR 50 000 is hereby imposed on Deutsche Post AG under Article 14(1)(b) of Regulation (EEC) No 4064/89 for intentionally supplying incorrect and misleading information to the Commission in the notification it submitted on 4 February 1999.

2. A fine of EUR 50 000 is hereby imposed on Deutsche Post AG under the first limb of Article 14(1)(c) of Regulation (EEC) No 4064/89 for intentionally supplying incorrect information to the Commission in reply to requests for information made on 23 February 1999 (reference 1999), 26 March 1999 (reference 3359) and 22 April 1999 (reference 4350).

Article 2

1. 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, Filiale Rond-Point Schuman 5, B-1040 Brussels.

2. Upon expiry of the period allowed for payment, default interest shall be payable on the fines at the interest rate applied by the European Central Bank to its repo operations on the first day of the month in which this Decision is adopted, namely 3 %, plus 3,5 percentage points, giving a total of 6,5 %.

Article 3

This Decision is addressed to:

Deutsche Post AG
Generaldirektion
D-53105 Bonn.

Done at Brussels, 14 December 1999.

For the Commission

Mario MONTI

Member of the Commission

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