COMMISSION

COMMISSION DECISION

of 14 December 1999

pursuant to Article 14 of Council Regulation (EEC) No 4064/89 imposing fines on an undertaking for supplying incorrect and misleading information in a notification in merger control proceedings

(Case No COMP/M.1608 — KLM/Martinair III)

(notified under document number C(1999) 4496)

(Only the English text is authentic)

(Text with EEA relevance)

(2005/152/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], and in particular Article 14(1)(b) thereof,

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

Having regard to the opinion of the Advisory Committee on Concentrations,

Whereas:

I. INTRODUCTION

(1) Koninklijke Luchtvaart Maatschappij NV (KLM) is the leading Dutch international airline, based at Amsterdam Schiphol airport. KLM itself operates scheduled flights carrying passengers and cargo, serving a wide range of European and intercontinental destinations. KLM's airline interests include Transavia Airlines BV, a majority-owned (80 %) subsidiary specialising in passenger flights (scheduled and charter) mainly from the Netherlands to Mediterranean holiday destinations.

(2) KLM also has a shareholding of 50 % in Martinair Holland NV (Martinair), the remaining 50 % being held by Koninklijke Nedlloyd NV (Nedlloyd). The Commission considers that in this situation KLM and Nedlloyd can exercise 'decisive influence' within the meaning of Article 3(3) of Regulation (EEC) No 4064/89 (the Merger Regulation) over Martinair. Therefore they jointly control Martinair for the purposes of the Merger Regulation. Martinair is the second-largest Dutch airline, also based at Schiphol, operating mainly charter flights from Amsterdam to Mediterranean holiday destinations. It also has regular passenger services to a limited range of long haul destinations, notably in North America.

(3) On 1 September 1998 KLM notified, pursuant to Article 4 of the Merger Regulation, a proposed concentration by which it would acquire control of the whole of Martinair [2]. The notification was withdrawn on 22 September 1998 [3] after the Commission informed KLM orally of its intention to declare the notification incomplete. On 21 December 1998 KLM notified the operation again [4]. On 1 February 1999 the Commission decided to initiate proceedings in application of Article 6(1)(c) of the Merger Regulation [5], and on 19 March 1999 the Commission issued a statement of objections against the planned operation. On 31 May 1999 KLM informed the Commission that it had abandoned the operation.

[1] OJ L 395, 30.12.1989, p. 1. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

[2] Case No IV/M.1128 — KLM/Martinair (OJ C 281, 10.9.1998, p. 7).
[3] OJ C 298, 26.9.1998, p. 8.
[4] Case No IV/M.1328 — KLM/Martinair (OJ C 408, 29.12.1998, p. 8).
[5] OJ C 42, 17.2.1999, p. 9.

II. **THE LANGUAGE OF PROCEEDINGS IN THIS CASE**

(4) On 25 June 1999 the Commission sent a statement of objections to KLM setting out its preliminary view that the notification of 1 September 1998 contained incorrect or misleading information (save as otherwise specified, references in this Decision to 'the notification' are to the notification of 1 September 1998). The statement of objections was drafted in English. In its response KLM objects to the use of the English language and requests that the proceedings be conducted in Dutch. KLM refers to Article 3 of Council Regulation No 1 determining the languages to be used by the European Economic Community [6], which provides that documents which an EU institution sends to a person subject to the jurisdiction of a Member State must be drafted in the language of that State. KLM argues that its choice of English as a language related only to the notification (which was made in English) and that it did not forfeit its right to receive the statement of objections of 25 June 1999 in its own language. KLM explains that it opted to submit the notification in English in order to accommodate the Commission, given the tight and strict deadlines that apply in the merger control procedure. It states that such deadlines do not apply to the present proceedings.

(5) Article 2 of Regulation No 1 provides that documents sent to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply of the institution must then be drafted in that language selected by the sender. Article 2(4) of 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 [7] gives expression to this general rule. It provides that the language chosen by the parties for the notification becomes the 'language of the proceeding'. KLM argues that it selected English for the procedure following the notification only and not for the present proceedings. The Commission interprets this provision as referring to all proceedings under the Merger Regulation which relate to the notified operation and not just those proceedings leading to substantive decisions on the concentration itself, such as a decision under Article 6 or Article 8. In relation to a notification under Article 4 of the Merger Regulation a number of proceedings are possible, such as the proceedings leading to decisions under Article 11(5) and Article 13(2), proceedings under Article 14(1)(b), (c) or (d) and Article 14(2)(a), (b), or (c), proceedings leading to decisions to revoke a decision under Article 6(3) or Article 8(5) or proceedings on issues relating to access to files. All these proceedings relate to the notification, for which the parties had the choice of the language.

(6) In this case the notification was made in English and all communications with the parties were conducted in English. KLM's request would have as a result that the representations made by KLM to the Commission in English would have to be discussed in Dutch. The procedure under Article 14(1)(b) is inseparably linked to the notification. For these reasons the Commission considers that English is the correct language for the present proceeding.

III. **INFRINGEMENT OF THE MERGER REGULATION: RELEVANT FACTS**

(7) According to the notification the activities of the KLM group and Martinair overlap in three areas: charter flights to the Mediterranean, scheduled flights to North America and the transport of cargo. The incorrect or misleading information concerns the activities of the KLM subsidiary Transavia in passenger transport to Mediterranean destinations: KLM submitted incorrect information on the charter destinations of Transavia and withheld relevant information on scheduled flights of Transavia.

1. **Information on Transavia charter destinations**

(a) *the information given in the notification*

(8) The notification contains on page 40 of Form CO a table with a listing of Transavia's and Martinair's charter destinations to the Mediterranean for the summer season 1998. The table is in the form of a synopsis comparing the destinations for each country. The term 'Mediterranean countries' is defined earlier in the notification [8] as comprising Cyprus, Egypt, France, Israel, Malta, Spain, Italy, Portugal, Greece, Turkey, Tunisia, and Morocco. There are 12 destinations listed for Martinair and 46 destinations listed for Transavia. According to the table there is an overlap for only six destinations (Ibiza, Corfu, Kos, Antalya, Dalaman and Monastir).

(9) The table is preceded on page 39 by the statement that Transavia's and Martinair's operations are largely complementary:

'Transavia's and Martinair's charter services are to a large extend complementary. Martinair operates large aeroplanes (B747, MD-11, B767) on just a few Mediterranean destinations. Transavia operates smaller aeroplanes (B757) on various (other) destinations, most of which — due to their size — can not be served by Martinair's planes.'

(6) OJ 17, 6.10.1958, p. 385/58. Regulation as last amended by the 2003 Act of Accession.

(7) OJ L 61, 2.3.1998, p. 1. Regulation as last amended by the 2003 Act of Accession.

(8) Page 26 of the notification.

The table on page 40 of the notification is as follows:

'Charter destinations in the Mediterranean region of Transavia and Martinair summer 1998

Country	Martinair	Transavia
Spain	Ibiza Las Palmas Tenerife Malaga Palma de Mallorca	Ibiza Jerez de la Front Almeria Menorca Gerona Reus Arrecife Fuerteventura
Portugal	Faro	Oporto
Greece	Corfu Kos Heraklion	Corfu Kos Prevenza Kefalina Zakynthos Kalamata Chania Santorini Mykonos Athene Volos Skiathos Thessaloniki Kavala Limnos Mytilini Skyros Chios Samos Karpathos
Turkey	Antalya Dalaman	Antalya Dalaman Bodrum Istambul
Tunisia	Monastir	Monastir
Morocco		Agadir
Egypt		Luxor Hurghada
Israel		Tel Aviv
Cyprus		Paphos Larnaca
Italy		Rome Catania Rimini Milano Verona
France		Ajaccio'

(b) *incorrectness of the information on Transavia charter destinations*

(10) In the investigation it became apparent that at least 10 further so-called Mediterranean destinations, namely Alicante, Las Palmas, Tenerife, Malaga, Palma de Mallorca, Faro, Funchal, Rhodes, Heraklion and Djerba were served by Transavia charter flights in 1998 and were not mentioned in the table. That information was contained in a Transavia timetable submitted in response to a request for information [9]. With the exception of Alicante, Funchal, Rhodes and Djerba, these are all destinations which are also served by Martinair charter flights. Therefore, all Martinair destinations are also served by Transavia, which means that in reality there is a complete overlap between Transavia and Martinair destinations.

(11) Moreover, the missing destinations include several of the most important ones for holiday customers and for Transavia and Martinair. For example, Spain is by a significant margin the most popular country of destination, and the missing destinations in Spain and its islands include some of the most important tourist airports there.

2. **Information on scheduled services of Transavia to Mediterranean destinations**

(a) *information given in the notification*

(12) Nowhere in the notification did KLM state that Transavia has substantial scheduled operations to Mediterranean holiday destinations and that it sells seats on these flights to package tour operators.

(13) Section 6 of the notification is entitled 'Market definitions'. Under the heading 'I. Affected Markets' question 6.1 of Form CO is repeated. Then KLM states under the heading 'A. European (inclusive) charter market' [10] that there is no affected market due to the small market share ([…] (*) %) (*) of the parties [11]. Although KLM consequently claims that the market for

[9] The timetable 'Charter flights summer 1998' was provided as Annex III to a response (9 September 1998) to a request for information (4 September 1998). The timetable also mentions destinations in Malta and Croatia. Annex I to the same response contains a listing of the number of stretches of Transavia non-scheduled flights to Mediterranian destinations from the Netherlands (55 destinations) and the number of stretches out of the rest of Europe to Mediterranian destinations (22 destinations). This listing also contains these and additional destinations but no destinations in Israel, Morocco and Tunisia.

[10] Page 26 of the notification.

(*) 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.

[11] In order to determine its market share in the market for charter flights to the Mediterranean, KLM has used a very wide geographic market definition. KLM states that the planes of the parties and of other charter companies can operate from each airport in the Benelux, the United Kingdom and Germany. On this basis a market share of […] (*) % is calculated (page 61). If only flights from the Netherlands were taken into account, the market share of the parties would be above […] (*) % (page 62 of the notification).

charter flights is not an affected market it nevertheless states that it describes the market as if it were an affected market: 'However, in order to provide the Commission with relevant information they will describe this market as if it were an affected market.' ([12]). The description is then given on pages 26 to 41 of the notification without any further headings.

(14) The product market is defined as follows:

'KLM (primarily through Transavia) ([13]) and Martinair are both active in the product market that can be defined as the market for transport by plane at the request of tour operators, for inclusion in an organised foreign holiday package including accommodation to countries around the Mediterranean.' ([14]).

(15) The notification refers to this market as the 'charter market' which can be distinguished from markets concerning scheduled air transport. The differences between charter flights and scheduled flights are set out as follows:

'This charter market is a market that can be distinguished from markets concerning scheduled air transport to these destinations. First of all, the airlines' customers in the charter market are not the passengers like in scheduled flights. In this market tour operators are the airlines' customers. Tour operators request the airlines to fly to a certain holiday destination with a certain frequency and capacity. They buy a (minimum) amount of seats on the chartered planes, which is called an allotment. These seats are sold as part of an inclusive tour to passengers by tour operators and their agents for their own account. This makes this service substantially different from scheduled flights.' ([15]).

(16) There is no statement in this chapter that Transavia operates scheduled flights to Mediterranean destinations and sells seats on those flights to tour operators which are guaranteed by the tour operator and integrated into package tours. Neither the map with Transavia destinations nor the timetable referred to in paragraph 10 were contained in the notified documents.

([12]) Page 26 of the notification.
([13]) Although this statement seems to imply that KLM is to a small extent active on this market, no further information on KLM is given, with the exception of the statistical information in the appendix of the SH&E study. In Section 3.2.1 of Form CO KLM states: 'Transavia airlines B.V. (80 %) is active on the European (inclusive tour) charter market, which is in view of the parties to the concentration, not an affected market. Solely for the Commission's information, Transavia is mentioned here.'
([14]) Page 26 of the notification.
([15]) Page 26 of the notification.

(17) The only statement to the effect that Transavia is operating scheduled flights at all is made in the subsequent chapter on the description of the market for flights to North America: 'B. Western Europe (via Amsterdam) — United States /Canada markets'. In a footnote in relation to a statement that Martinair does not participate in the KLM frequent flyer scheme it is stated: 'Transavia passengers participate in KLM's frequent flyer program only when travelling on Transavia's scheduled flights and when KLM does not operate on such destinations itself.' ([16]). This information was not included as information on scheduled flights but as information on participation in the KLM frequent flyer scheme ([17]).

(18) Under the heading 'II. Markets related to affected markets within the meaning of Section III.' is printed the text of Question 6.2 of Form CO: Describe the relevant product and geographic markets concerned by the notified operation, which are closely related to the affected market(s) (in upstream, downstream and horizontal neighbouring markets), where any of the parties to the concentration are active and which are not themselves affected markets within the meaning of Section III.

(19) In response to this KLM briefly explains that KLM and Martinair each have a non-controlling participation in a tour operator and that KLM has a share in a computer reservation system. The notification continues:

'In addition, Martinair has charter flight operations to other destinations (e.g. Caribbean). KLM is only active in the European charter market through its subsidiary Transavia. KLM and Martinair have scheduled flights to various other destinations.' ([18]).

(20) There is no statement in this chapter that Transavia is operating scheduled flights to Mediterranean destinations. The only statement in this chapter concerning Transavia is: 'KLM is only active in the European charter market through its subsidiary Transavia.' ([19]).

(b) *misleading or incorrect character of the information provided on the scheduled services of Transavia*

(21) In the further investigation of the case it became apparent that Transavia had substantial scheduled operations to Mediterranean destinations and that it sold seats on those flights to tour operators which integrated those seats into package tours.

([16]) Footnote 11 on page 45 of the notification.
([17]) KLM's covering letter with the notification of 1 September 1998.
([18]) Page 47 of the notification.
([19]) Page 47 of the notification.

(22) In response to a request for information ([20]), KLM stated in a letter of 9 September 1998 that Transavia had scheduled operations to Malaga, Alicante, Barcelona, Casablanca, Djerba, Faro, Funchal, Heraklion, Lisbon, Las Palmas, Malta, Nice, Palma de Mallorca, Tenerife (altogether […] (*) one-way passengers in 1997). This situation has not changed substantially since then; Transavia continued to have substantial scheduled operations to Mediterranean destinations. Most of those destinations are also served by Transavia charter flights. In KLM's letter there is no statement that seats on those scheduled flights are sold to tour operators.

(23) It was only in documents submitted in December 1998 ([21]) that KLM gave further information on its sales of seats on scheduled flights to tour operators, stating: 'Indeed, guaranteed seats are sold to tour operators.' ([22]) and 'Tour operator fares on scheduled flights for guaranteed seats are equal to guaranteed seat fares on non-scheduled flights.' ([23]). This latter statement has been confirmed by a letter from KLM of 4 March 1999 where it is shown that average gross prices of guaranteed seats sold to tour operators are almost identical on scheduled and non scheduled flights. In the notification of December 1998 KLM stated: 'Reality, however, is seldom black and white, the border line between scheduled and charter services is situated in a grey area. Guaranteed seats sold on scheduled flights to tour operators on routes to popular holiday destinations in the Mediterranean, come close to similar services on charter flights.' ([24]). From the information submitted it can be calculated that out of […] (*) ([25]) passengers transported by Transavia ([26]) on scheduled flights to Mediterranean destinations ([27]) in the season summer 1997 and in winter 1997/1998 altogether […] (*) ([28]) seats were sold to tour operators on a guaranteed basis and […] (*) seats were sold to tour operators on a non guaranteed basis ([29]). For certain destinations the majority of seats for all passengers transported ([30]) is sold to tour operators.

IV. RESPONSE TO THE STATEMENT AND THE COMMISSION's EVALUATION THEREOF

1. Information on Transavia Charter Destinations

(24) In responding to the Commission's statement of objections, KLM describes the omission of the destinations referred to in paragraph 10 as an 'administrative error'. KLM explains that in providing the information it based itself on the in-flight magazine published by Transavia. The in-flight magazine contains a map with Transavia destinations. Scheduled destinations are marked with a yellow dot and charter destinations are marked with a red dot. The destinations which are reached both by charter and by scheduled flights are however also marked with a yellow dot. These are Alicante, Las Palmas, Tenerife, Malaga, Palma de Mallorca, Faro, Funchal, Rhodes, Heraklion and Djerba. KLM states that the incorrect designation of those destinations in the in-flight magazine is the reason why they were not mentioned as charter destinations.

(25) KLM also refers to a study by SH&E annexed to the notification which, it claims, makes it clear that Transavia is serving further charter destinations. KLM states it should have been evident to anyone examining the notification and the annexes that the difference between the table in the notification and the tables in the annexes for the previous years was due to an error and that any closer study of the notification had rightly prompted questions on the part of the Commission.

(26) The notification contains in Annex X a listing of KLM's and Martinair's destinations, but no listing of Transavia's destinations. The map with Transavia destinations and the Transavia timetable referred to in paragraph 10 was not part of the notified documents. Annex VIII of the notification contains the SH&E study of June 1998: 'The European Charter Market — An analysis in relation to KLM's acquisition of the 50 % Nedlloyd stake in Martinair'. The study has 60 pages of text. Appendix 2 to the study (Non-scheduled passengers from Belgium, Germany, the Netherlands and the UK by Mediterranean destination and carrier) sets out tables for the years 1993, 1995 and 1997 which list all Mediterranean destinations served by non-scheduled flights from Schiphol and which give for each destination the total number of passengers, the number of passengers transported by competitors and the number of passengers transported by KLM, Martinair and Transavia. From those tables it can be concluded that Transavia was serving in the period 1993-1997 airports other than those airports which are mentioned for the year 1998 in the table on page 40 of Form CO of the notification, including the 10 destinations referred to in paragraph 10.

(27) The introduction to Form CO contains a section entitled 'The need for correct and complete information' which states:

'All information required by this form must be correct and complete. The information required must be supplied in the appropriate section of this form. Annexes to this form shall only be used to supplement the information supplied by the form itself.'

([20]) Commission request of 4 September 1998.
([21]) Notification of 21 December 1998.
([22]) Notification of 21 December 1998, p. 64, footnote 18.
([23]) Notification of 21 December 1998, p. 65, footnote 19.
([24]) Notification of 21 December 1998, p. 66.
([25]) […] (*) in summer 1997 and […] (*) in winter 1997/98.
([26]) In addition, KLM also sells non-guaranteed seats on its flights to tour operators.
([27]) Malaga, Alicante, Barcelona, Djerba, Faro, Funchal, Heraklion, Lisbon, Las Palmas, Malta, Nice, Mallorca, Tenerife.
([28]) Page 69 of the notification of 21 December 1998 and Annexes XXIX (summer 1997) and XXX (winter 1997/1998); […] (*) in summer 1997 and […] (*) in winter 1997/1998.
([29]) Page 69 of the notification of 21 December 1998 and Annexes XXIX (summer 1997) and XXX (winter 1997/1998); […] (*) in summer 1997 and […] (*) in winter 1997/1998.
([30]) E.g. in the summer season 1997, Djerba, Faro, Funchal, Heraklion, Lisbon, Las Palmas, Malta, Mallorca, Tenerife.

(28) The information on charter destinations in the table on page 40 of Form CO is clear and does not contain any ambiguity. There is no obvious mistake which could be easily detected. The table contains no reference to the study cited by the parties or to any other source of information. The only instance in this chapter where a reference to the study is made is on page 34 in the context of the definition of the geographic scope of the relevant market and in order to support the argument that the geographic market is Europe wide ([31]). In this context KLM states: 'KLM and Martinair adopt SH&E's conclusion as their own for the purpose of this notification.' ([32]).

(29) The SH&E study refers to the years 1993 to 1997 and does not contain any information for the summer season 1998. Moreover, the statistical information in the appendix to the study is not presented in such a way that a comparison with the table in the notification could easily be made. In any event, airlines change the destinations they serve from time to time. Consequently it could not be clearly inferred from the presence of the 10 destinations referred to in paragraph 10 in the SH&E study for the years up to 1997 that their absence from the information provided in respect of 1998 was due to an error by KLM and not to a change in the destinations served. Therefore, the information provided in the appendix to the SH&E study cannot serve to rectify the incorrect information given in the appropriate section of Form CO of the notification.

2. **Information on Transavia's Scheduled Flights**

(30) KLM argues that Transavia's sales of seats on scheduled flights are not part of the relevant product market and therefore did not need to be mentioned. In response to the oral question whether Transavia scheduled flights are included in the market share data provided in the notification KLM gave the following written reply:

'Such market shares are not included in the SH&E analysis and, consequently, in KLM's notification. Martinair only operates as a non- scheduled carrier on Mediterranean destinations, as a result of which there is no overlap between the activities of Martinair and Transavia within the non-scheduled Mediterranean market. The European non-scheduled Mediterranean market is substantially different from a scheduled market for the reasons described below:

non-scheduled (charter) traffic is sold virtually only at one end of the route; passengers on non-scheduled (charter) flights buy their seats from a tour operator, while passengers on scheduled flights buy predominantly from travel agents or directly with the airline involved; seats on non-scheduled (charter) flights are sold to tour operators, contrary to seats on scheduled flights which are only sold to tour operators in small allotments; non-scheduled (charter) flights are operated at the commercial risk of one or more tour operators, the commercial risk of scheduled flights is with the air carrier; penalties for cancellation on scheduled flights are non-existing or, at least, much more liberal; the non-scheduled (charter) market has many more and different players.

The information provided in response to the Commission's request for information can not be added to the KLM Group's market share provided on p. 62 of the notification. Including Transavia scheduled flights into the market base would necessarily lead to a substantial increase of the total market base, since scheduled flights by other carriers should then be included as well. …' ([33]).

(31) The information required by Form CO in relation to market definition is described in Section 6. In Section 6.I, the following definition of the relevant product market is used: 'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the product's characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.'

(32) In view of the fact that certain seats on Transavia's scheduled flights are sold to package tour operators at the same price and under the same economic condition (guaranteed) as seats on charter flights, these sales are considered by the Commission to form part of the same product market. The fact that such a market definition would mean that seats sold on scheduled flights performed by other airlines might also have to be included into the relevant product market cannot serve to allow KLM to omit this information.

(33) The Commission notes that KLM believed that seats sold to tour operators on scheduled Transavia flights did not form part of the same market as seats sold on charter flights. However, even under that assumption those activities should have been mentioned in response to Question 6.2 of Form CO as activities in a 'market closely related to the affected market' (so-called neighbouring markets). The purpose of the question on neighbouring markets is precisely to obtain the necessary information in cases where the parties have used a market definition which may be narrower than the one retained by the Commission.

([31]) Further references to the SH&E study are made in chapter 7 (Information on affected markets) of the notification.

([32]) Page 34 of the notification.

([33]) Letter from KLM of 18 September 1998.

(34) KLM gave a detailed explanation of why in its view scheduled flights did not form part of the relevant product market and was therefore aware that its was a market which was closely related. In its response to Question 6.2 on neighbouring markets KLM did not leave the respective chapter blank. KLM referred to its and Martinair's shareholding in tour operators and to its participation in a computer reservation system. It further stated that Martinair had charter flight operations to other destinations (Caribbean) and that KLM and Martinair had scheduled flights to various other destinations ([34]). That statement on charter and scheduled flights shows that KLM understood the question on neighbouring markets. However, KLM made no mention there of Transavia's scheduled flights. In that context, the detailed description by KLM of other neighbouring activities reinforces the impression that the information is complete and makes the omission misleading.

V. LEGAL ASSESSMENT

1. Information on Transavia's Charter Destinations

(35) The information given in the table on page 40 of Form CO on Transavia charter destinations is incorrect in that at least 10 destinations, most of them very important ones, are not mentioned. The incorrectness of the information is reinforced by the statement preceding the table that 'Transavia's and Martinair's charter services are to a large extent complementary' ([35]). In particular, by omitting important Spanish, Portuguese and Greek destinations the table gives the incorrect impression that the overlap in operations between Transavia and Martinair is only limited. The reference on page 39 to services being complementary can not be understood as relating only to the size of the planes, given the context in which the statement was made — immediately before the table. Furthermore, the statement that Transavia operates to destinations 'other' than those of Martinair supports the false impression which the reader gains from the table.

(36) The supply of that incorrect information was grossly negligent. Even if the parties' explanation concerning the use of Transavia's in-flight magazine is accepted, then a high degree of negligence is involved. An in-flight magazine is a marketing or promotional brochure where accuracy is not necessarily guaranteed. The parties should have used a more reliable source of information, such as internal statistics of Transavia or the Transavia timetable which was later sent to the Commission. As Transavia is a fully controlled subsidiary that information was readily available to KLM.

(37) Accordingly, KLM's failure to supply correct information on this point constitutes an infringement for which a fine may be imposed under Article 14(1)(b) of the Merger Regulation.

2. Information on Transavia's Scheduled Flights

(38) The omission of any information indicating that Transavia has scheduled flights to Mediterranean destinations and that Transavia sells seats on those flights to tour operators makes the information provided on Transavia both misleading and incorrect within the meaning of Article 14 (1)(b) of the Merger Regulation.

(39) Not to refer to Transavia's scheduled Mediterranean flights is, in the context of the rest of the information provided in the Form CO, not a matter of a simple omission but, as explained above (Sections III and IV), substantively misleads the reader as it gives a distorted picture of the true facts. Thus, the information is both incorrect and misleading within the meaning of Article 14(1)(b) of the Merger Regulation.

(40) The Commission cannot exclude the possibility that KLM intentionally withheld the information on Transavia's scheduled flights. At the very least a high degree of negligence is involved, since the information, its relevance, and the requirement to provide it in Form CO, are or should have been well-known to KLM.

(41) Accordingly, KLM's failure to include this information is also an infringement in respect of which a fine can be imposed.

VI. IMPOSITION OF FINES

(42) Under Article 14(1)(b) of the Merger Regulation, the Commission may impose on 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 of the Merger Regulation. Under Article 14(3), in setting the amount of the fine, the Commission is to take account of the nature and gravity of the infringement. The Commission thereby takes account of any aggravating or mitigating circumstances.

1. Nature of the infringement

(43) The infringement committed by KLM took the form of the supply of incorrect and misleading information within the meaning of Article 14(1)b of the Merger Regulation. The supply of this incorrect and misleading information was at the very least grossly negligent.

2. Gravity of the infringement

(44) The infringement of the Merger Regulation by KLM should be regarded as a serious infringement for the reasons set out below.

([34]) Page 47 of the notification.
([35]) Page 39 of the notification.

(a) *relevance of the incorrect or misleading information*

(45) Information concerning any overlap between the parties on individual destinations is clearly of relevance to the competition assessment of the operation. This is regardless of the question whether the relevant market consists of individual routes or of all or certain Mediterranean destinations. The Transavia destinations which were not mentioned are the important Spanish, Portuguese and Greek holiday destinations which attract a high volume of passengers. The information that Transavia operates to all relevant Martinair destinations is also relevant for the assessment of the amount of actual competition between Martinair and Transavia, in particular if seen in the context of the parties' repeated statements that Martinair's and Transavia's operations are complementary ([36]).

(46) The information that Transavia is operating towards many major holiday destinations scheduled and charter services in parallel is also clearly of importance in order to assess Transavia's market position. Regardless of whether or not seats sold on scheduled flights form part of the relevant product market, the information that Transavia has substantial scheduled operations to its charter destinations is relevant to an assessment of the market strength of Transavia on those routes.

(b) *mitigating factors invoked by KLM*

(47) KLM emphasises that it had several meetings with the Commission in order to prepare the notification, that it discussed several drafts of the notification in those meetings and that it complied in good faith with the suggestions and remarks made by the Commission. It also points out that the notification in this matter was very complex because of the lack of readily available data. KLM further states that it is not proven that it provided 'incorrect or misleading' information, or that at any rate, in view of the particular circumstances of the case, any such provision cannot be taken as grounds for the imposition of a fine. The Commission cannot share this view for the reasons set out below.

(i) Transavia's charter destinations

(48) In its comments on the statement of objections, KLM explains the omission of the Transavia charter destinations as the result of an administrative error ([37]). KLM further argues that the mistake should have been evident to anybody examining the notification.

(49) KLM argues that the table in question was only included in the text of Form CO at the request of the Commission and that for the ongoing summer season 1998 detailed market share data were not yet available. However, the table on page 40 of the notification is not presented as an addendum or an update to the information contained in the SH&E study referred to in paragraph 26 of this Decision. It is an illustration following the KLM's statement that Transavia's and Martinair's activities are 'to a large extent complementary'. KLM's claim that this table could only have been read in conjunction with the study is unfounded as there is not even a reference to the study.

(50) KLM's claim that the incorrectness of the table was obvious is also unfounded. If the omission of the charter destinations in question was not detected by KLM, which has a much better knowledge of its activities than anybody else, it was certainly not such an obvious mistake that it could have been detected by any careful reader.

(51) KLM emphasises that it was not its intention to withhold that information from the Commission and that the seriousness of its administrative error is exaggerated by the Commission. However, the explanation of how KLM collected the information on Transavia's charter destinations shows a large degree of carelessness. To base the information on an in-flight magazine and not on a more reliable source shows a grave neglect of the duty to select carefully the necessary information, particularly in view of the fact that Transavia is a fully controlled subsidiary.

(ii) Transavia's scheduled operations

(52) KLM argues that it never made a secret in its contacts with the Commission of the fact that the KLM Group, including its subsidiary Transavia, operates scheduled flights in Europe in general and to the Mediterranean in particular. It also states that it would have provided more information on Transavia's scheduled flights if the Commission had requested it during the pre-notification talks. KLM refers to the SH&E study which it claims makes it clear that 47 % of all Dutch holiday-makers go on vacation on a scheduled flight. KLM states that it would be inconceivable that a large proportion of these passengers would not be attributed to the KLM group.

(53) The discussions in the prenotification meetings were principally concerned with clarifying the market definition. The Commission accepts that since KLM did not explain that Transavia had substantial sales of seats on its scheduled flights to package tour operators, the Commission did not initially contemplate taking those activities into account for market definition purposes. This does not, however, remove the obligation of KLM to include full information on those activities, at least in response to Question 6.2 of Form CO ([38]). Furthermore, the information given in the SH&E study relates to all

([36]) Page 32 and page 39 of the notification, page 5 of the letter of 9 September 1998.

([37]) See paragraph 24 of this Decision.

([38]) Such information was given in the notification of 21 December 1998.

Dutch holiday-makers and not just to customers who buy a package tour from a tour operator. It was therefore not possible to deduce from that information that Transavia sold seats on its scheduled flights to package tour operators. The way in which the information on Transavia was presented in all drafts submitted was not likely to prompt such questions on the part of the Commission. Transavia was always presented as a 'charter operator'. The information that Transavia also operates scheduled flights was only given in the final version of the notification in footnote 11 on page 45, which concerns the participation of Transavia in the KLM frequent flyer scheme. That information was not contained in earlier drafts. The argument that the Commission could, or should, have asked for that information is therefore unfounded.

(54) KLM further claims that the information on scheduled flights did not change KLM's market share and that therefore the omission of that information was irrelevant. However, the actual market share of a company is only one element to measure its market strength. The operation by Transavia of scheduled services to destinations which it also serves on a charter basis is clearly a factor which can contribute to its strength on those routes and is therefore relevant to the Commission's assessment of competition in connection with the merger. Accordingly, the Commission's substantive assessment of the case, and the nature and scope of any remedies that may be required, is likely to be affected by its knowledge (or lack of knowledge) of the existence of those operations and of their nature and extent.

(55) For example, if it were really the case that Transavia had no scheduled operations to those destinations, it might be argued that it would be relatively easy for other scheduled airlines to commence such operations, selling seats to individuals and to tour operators, and that in consequence the merger should be allowed. Similarly, if a possible dominant position were found to exist on some of the routes concerned, a remedy which focused exclusively on Martinair's operations, or Transavia's charter operations, might be insufficient, since it would not affect or take into account the substantial sales to tour operators which Transavia makes on its scheduled flights on those routes.

3. **Amount of the fine**

(56) In proceedings initiated under the Merger Regulation, it is very important that the parties to the merger supply full information in submitting the notification. These constraints mean that firms must be particularly careful in submitting details of their merger.

(57) In the present case KLM supplied information which was incorrect and misleading and KLM was at the very least, grossly negligent. Furthermore, the information was clearly relevant for the competitive assessment of the operation.

(58) KLM provided the correct information not on its own initiative but only as a result of the Commission's investigation. Complete information on the additional Transavia charter destinations could only be derived from information provided in a response to a request for information and was finally confirmed orally. The information that Transavia operates scheduled flights to Mediterranean destinations was given as a result of a request for information. The fact that KLM sells seats on its scheduled flights to tour operators under the same economic conditions as for its charter flights, and the importance of that activity, was only fully confirmed in the notification of 21 December 1998 and the Commission's subsequent investigation of the information contained in that notification.

(59) In assessing the conduct of KLM, it must also be borne in mind that KLM is a large European company with significant business in Europe. KLM also had prior experience of a notification under the Merger Regulation.

(60) In mitigation, KLM has claimed, in summary and as more fully described in paragraphs 47 to 55, that the alleged infringements were not deliberate, that the Commission should have been able to identify the missing information and request it during the prenotification period (which in this instance was quite extensive) and that the missing information was not decisive for the outcome of the case.

(61) In the Commission's view, only limited weight can be attached to those claims as regards their impact on the gravity of the infringement and hence on the amount of the fine that should be imposed. There is no evidence that the infringements were intentional, and KLM's participation in prenotification contacts with the Commission indicates, at the least, a desire to ensure that its notification was acceptable. Nevertheless, the responsibility for ensuring that all relevant information was provided was KLM's, and it failed to exercise due care in carrying that task out. The degree of negligence associated with the infringements is very substantial, in both instances. KLM should not have relied on an in-flight magazine for crucial information such as that concerning Transavia's charter destinations. It could have provided the information about Transavia's scheduled flights, and should have appreciated the importance of doing so, even in the absence of a specific request or reminder from the Commission. Moreover it is certainly possible that if the Commission had failed to identify either element of the missing information, its continued absence would have affected the substantive decision on the merger, and in ways which could have benefited KLM.

(62) On the basis of the above, and taking account of the circumstances in the case, the Commission considers it appropriate to impose a fine of EUR 40 000 on KLM, pursuant to Article 14(1)(b) of the Merger Regulation.

HAS ADOPTED THIS DECISION:

Article 1

A fine of EUR 40 000 is hereby imposed on Koninklijke Luchtvaart Maatschappij NV (KLM) pursuant to Article 14(1)(b) of Regulation (EEC) No 4064/89 for having supplied incorrect and misleading information in the notification submitted to the Commission under that Regulation on 1 September 1998.

Article 2

The fine referred to in Article 1 shall be paid within three months of the date of notification of this Decision into bank account No 310-0933000-43 of the European Commission, Banque Bruxelles Lambert, Agence Européenne, Rond Point Schuman 5, B-1040 Brussels.

After the expiry of that period, interest shall be automatically payable at the rate applied by the European Central Bank to its repo operations on the first working day of the month in which this Decision is adopted, that is 3 %, plus 3,5 percentage points, making 6,5 %.

Article 3

This Decision is addressed to:

Koninklijke Luchtvaart Maatschappij NV
Amsterdamseweg 55
NL-1182 GP Amstelveen

Done at Brussels, 14 December 1999.

For the Commission
Mario MONTI
Member of the Commission