

Commission Decision

of 12.07.2000

imposing fines on an undertaking for supplying incomplete information in merger control proceedings

(Case No COMP/M.1634 – Mitsubishi Heavy Industries)

(Text with EEA relevance)

(Only the English text is authentic)

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 Articles 14(1)(c) and 15(1) thereof,

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

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

WHEREAS :

I. INTRODUCTION

1. On 26 March 1999, the Commission received a notification pursuant to Article 4 of Regulation (EEC) No 4064/89 (“the Merger Regulation”) of a concentration whereby Kvaerner ASA (“Kvaerner”) and A. Ahlström Corporation (“Ahlström”) notified their intention to establish a joint venture by combining the pulping equipment engineering businesses of Kvaerner Pulp and Paper (“KPP”) and Ahlström Machinery Group (“AMG”)⁴.

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

² OJ L 180, 9.7.1997, p. 1.

³ OJ C ..., ... 2000 p. ...

⁴ Case No IV/M.1431 – Ahlström/Kvaerner

2. In relation with its extended investigation into the notified operation, the Commission faxed a request for information to Mitsubishi Heavy Industries Europe, Ltd. (“Mitsubishi”), pursuant to Article 11 of the Merger Regulation. The period allowed for supplying the information requested expired on 10 June 1999. Mitsubishi failed to reply to the request for information and claimed in its fax dated 14 June 1999 that it had provided all the information that could be provided.
3. Given that no information as requested was forthcoming from Mitsubishi, the Commission sent a copy of its request for information by fax on 17 June 1999. Mitsubishi replied by fax dated 22 June 1999. However, the information in this fax was incomplete, as was admitted by Mitsubishi itself in the reply.
4. On 2 July 1999, the Commission adopted a decision pursuant to Article 11(5) of the Merger Regulation. In the decision, the Commission required Mitsubishi to supply the relevant information no later than on 9 July 1999. The information requested was specified in the annex to the decision. In its decision, the Commission indicated, pursuant to Article 15(1) of the Merger Regulation, that should Mitsubishi fail to supply the information requested within the period prescribed, it would incur a periodic penalty payment of EUR 15 000 per day, calculated from the end of that period. The decision was notified to Mitsubishi on 6 July 1999. Mitsubishi has not provided the information requested by the Commission’s decision, despite several reminders.
5. On 20 December 1999, the Commission sent a Statement of Objections to Mitsubishi in order to allow Mitsubishi make known its views on the infringement of Article 11 of the Merger Regulation committed by it. Mitsubishi did not reply to the Statement of Objections.

II. INFRINGEMENT OF THE MERGER REGULATION: RELEVANT FACTS

6. Mitsubishi failed to supply the full information requested by the Commission in its decision of 2 July 1999 pursuant to Article 11(5) of the Merger Regulation. In particular, Mitsubishi failed to supply the information requested concerning the price charged by Mitsubishi for:

- each new recovery boiler sold world-wide since 1990 to the chemical pulp industry for incorporation into a new pulp mill

- each new recovery boiler sold world-wide since 1990 to the chemical pulp industry as a replacement for an existing recovery boiler.

The reply from Mitsubishi did not include the turnover achieved by Mitsubishi every year since 1990 either for:

- refurbishment activities on recovery boilers; or

- maintenance activities on recovery boilers.

7. Mitsubishi stated that to identify the figures necessary to provide the information requested would entail excessive and disproportionate amounts of work, since sales of the boilers in question represented only a small proportion of its total boiler turnover.

III. LEGAL ASSESSMENT

8. By failing to supply the information requested by the Commission within the period fixed by its decision pursuant to Article 11(5) of the Merger Regulation, or at all, Mitsubishi has infringed Article 11 of that Regulation.
9. Mitsubishi's failure to supply the information constitutes an infringement for which a fine may be imposed under Article 14(1)(c) of the Merger Regulation and for which a periodic penalty payment may be imposed under Article 15(1) thereof.

IV. IMPOSITION OF FINES AND PERIODIC PENALTY PAYMENTS

10. Under Article 14(1)(c) of the Merger Regulation, the Commission may by decision impose fines of from EUR 1 000 to 50 000 on undertakings which, intentionally or negligently, supply incorrect information in response to a request made pursuant to Article 11 of the Merger Regulation or fail to supply information within the period fixed by a decision taken pursuant Article 11. Under Article 14(3), in setting the amount of the fine, the Commission has to take account of the nature and gravity of the infringement. The Commission thereby takes account of any aggravating or attenuating circumstances.
11. Under Article 15(1) of the Merger Regulation, the Commission may impose on undertakings periodic penalty payments of up to EUR 25 000 for each day of delay calculated from the date set in the decision in order to compel them to supply complete and correct information which it has requested by decision pursuant to Article 11 of the Merger Regulation. In addition, under Article 15(3) of the Merger Regulation, where the undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may set the total amount of the periodic penalty payments at a lower figure than that which would arise under the original decision. In its decision of 2 July 1999 the Commission imposed a periodic penalty payment of EUR 15 000 on Mitsubishi for each day of failure to provide the required information.

A. Assessment under Article 14

Nature of the infringement

12. The infringement committed by Mitsubishi took the form of failure to provide information within the period fixed by a Commission decision pursuant to Article 11(5) of the Merger Regulation. The information requested concerned the company's activities in the world-wide recovery boiler business (see paragraph 6).

Gravity of the infringement

13. The Commission considers that the infringement of the Merger Regulation committed by Mitsubishi is a very serious one. The reasons for this are set out hereunder.
14. Under Article 11(1) of the Merger Regulation, the Commission may obtain all necessary information from undertakings in carrying out the duties assigned to it by the Merger Regulation. The information requested by the Commission from Mitsubishi was necessary, within the meaning of Article 11(1) of the Merger

Regulation, for the proper assessment of the compatibility of the notified operation with the common market. In particular, the information requested was necessary in order to determine the market share of the parties to the notified operation and those of the other market participants in the markets for engineering and supply of recovery boilers.

15. Given the limited number of manufacturers of recovery boilers for the pulp and paper industry world-wide, Mitsubishi must be considered to be an important source of information concerning the functioning of this market. Following Mitsubishi's failure to supply the information requested, the Commission was forced to base its assessment of the markets for recovery boilers partly on estimates. In particular, in view of Mitsubishi's failure to supply information on prices and turnover obtained from its world-wide recovery boiler business, the Commission had no alternative but to estimate the overall size of the market and the market shares of the market participants partly on information obtained from other market operators and customers. This increased significantly the Commission's workload and led to estimates which cannot be considered to be as reliable as first-hand information from Mitsubishi itself.
16. The information requested from Mitsubishi had a material impact on the assessment of the substance of the case. More precisely, the information requested from Mitsubishi had a direct bearing on the Commission's assessment of the position of AMG and KPP in the world-wide markets for recovery boilers. In particular, a gap of some 10% persisted between the parties' and the Commission's estimates of the parties' market share in recovery boilers. As a result of Mitsubishi's failure to supply reliable figures on its activities, the Commission could not establish the exact market shares of the parties and those of the competitors. In addition, as a consequence of Mitsubishi's failure to supply information concerning its activities in refurbishment and maintenance of recovery boilers, the Commission could not verify the parties' claim concerning the size of the refurbishment market nor establish Mitsubishi's position there. Accordingly, the conclusion must be that Mitsubishi's failure to supply the information requested constitutes a very serious infringement.
17. Mitsubishi claimed in its fax of 14 June 1999 that it had provided all the information that could be provided. However, Mitsubishi is a large industrial conglomerate, active world-wide in several business sectors. It is therefore reasonable to conclude that Mitsubishi has detailed knowledge of the activities which it carries on. Accordingly, given the size of the company, it is reasonable to assume that Mitsubishi has modern reporting systems that would have enabled it to provide the information requested. Also, in view of the fact that the Commission gave Mitsubishi several extensions to the original deadline resulting in almost an extra month to compliance with the request to supply information, the view must be taken that Mitsubishi had the necessary time to provide the requested information. It is also to be noted that all the other recovery boiler manufacturers contacted by the Commission could provide the information requested. Moreover, given the fact that Mitsubishi failed to attempt to provide even its best estimates of the information requested, it follows that Mitsubishi did not intend to comply with the Commission decision.

18. In the light of the foregoing, it has to be concluded that Mitsubishi has deliberately failed to supply the Commission with the relevant information. The Commission considers that the failure to comply with the Commission decision of 2 July 1999 was intentional.
19. There are no attenuating or aggravating circumstances to be taken into account.

B. Assessment under Article 15

20. The Commission decision of 2 July 1999 imposed on Mitsubishi a periodic penalty payment pursuant to Article 15(1) of the Merger Regulation in the event that it should fail to supply the information requested within the period prescribed. As was indicated above, Mitsubishi did not provide the information requested. Therefore, Mitsubishi has not, within the meaning of Article 15(3), satisfied the obligation which it was the purpose of the periodic penalty payment to enforce. Consequently, the Commission considers that Mitsubishi should be fined the full amount of periodic penalty payment, pursuant to Article 15(1) of the Merger Regulation.

Duration

21. The infringement has not ceased. To date, Mitsubishi has not complied with the Commission decision of 2 July of 1999 and has not provided the information requested. However, it may be considered that Mitsubishi's obligation to provide the information became nugatory when the proceedings for the merger between Ahlström and Kvaerner were closed on 8 September 1999.

V. CONCLUSION

22. On the basis of the above, and in the light of the circumstances in the case, the Commission considers it appropriate to impose, pursuant to Article 14(1)(c) of the Merger Regulation, the fine of EUR 50 000 on Mitsubishi for failing to comply with the Commission decision of 2 July 1999.
23. Furthermore, the total amount of periodic penalty payments to be paid by Mitsubishi in accordance with the Commission decision of 2 July 1999 should be fixed at the rate of EUR 15 000 per day, running from the day following the expiry of the deadline to provide the information requested (that is, 10 July 1999) until 8 September 1999, the date on which the proceedings relating to case M.1431 – Ahlström/Kvaerner ended, that is to say, 60 days.

HAS ADOPTED THIS DECISION:

Article 1

A fine of EUR 50 000 is hereby imposed on Mitsubishi Heavy Industries Europe, Ltd. ("Mitsubishi") for having supplied incomplete information to the Commission in merger control proceedings.

The total amount of periodic penalty payments to be paid by Mitsubishi pursuant to the Commission decision of 2 July 1999, for its failure to supply complete and correct information as required by that decision, is hereby fixed at EUR 900 000.

Article 2

The fine and the definitive amount of periodic penalty payments referred to in Article 1 shall be paid within three months of the date of notification of this Decision into bank account No 642-0029000-95 of the European Commission with the Banco Bilbao Vizcaya Argentaria BBVA, Avenue des Arts 43, 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 main refinancing operations on the first working day of the month in which this Decision is adopted, that is 4,29%, plus 3,5 percentage points, making 7,79%.

Article 3

This Decision is addressed to:

Mitsubishi Heavy Industries Europe, Ltd.
Bow Bells House
Bread Street (Cheapside)
London, EC4M 9BQ UK

Done at Brussels, 12.07.2000

For the Commission,

Mario MONTI