C(1999) 2290 final - EN

COMMISSION DECISION

of 28 July 1999

imposing fines for having supplied incorrect information in a notification submitted pursuant to Article 4 of Council Regulation (EEC) No 4064/89
(Case No IV/M.1543 - Sanofi/Synthélabo)

(Only the French text is authentic)

(Text with EEA relevance)

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, and in particular Article 57 thereof,

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

1. Sanofi is a public limited liability company governed by French law, 53.61% of whose shares are held directly or indirectly by Elf-Aquitaine, the remainder being held by private investors. Sanofi is active in three sectors: health products, i.e. mainly pharmaceutical products, but also diagnostic and animal health products, chemicals, and beauty products, where it produces and markets perfumes and cosmetics.

2. Synthélabo is a public limited liability company governed by French law, 56.64% of whose shares are held by L'Oréal, the remainder being held by private investors. Synthélabo is active in two sectors: health products, including pharmaceuticals and biomedical products, and chemicals.

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1 OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13.
2 OJ L 180, 9.7.1997, p. 1; corrigendum OJ L 40, 13.2.1998, p. 17.

3. On 18 January 1999, Sanofi and Synthélabo notified their proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 ("the Merger Regulation"). The notification was declared to be incomplete on 3 February 1999, since the replies to the questionnaires sent by the Commission to competitors and customers pursuant to Article 11 had shown that information on one of the affected markets (platelet inhibitors) had not been provided. The parties then supplied the additional information requested by the Commission, the notification took effect on 12 February 1999, and the merger was authorised by an Article 6(1)(b) decision on 15 March 1999 ("the authorisation decision of 15 March 1999").

4. Since the initial notification had indicated that there was no overlap or vertical links between the parties as regards active principles, the inquiry among competitors and customers did not deal with the impact of the merger on the markets for morphine and its derivatives and the decision of 15 March 1999 did not include any analysis of the impact of the merger in that area. The Commission subsequently received five complaints from third parties dated 15 and 17 March and 6 April 1999 relating to the competitive impact of combining the activities of Sanofi and Synthélabo, through their respective subsidiaries Francopia and Sochibo, in the field of narcotic active principles (morphine and derived active principles).

5. On 21 April 1999, the Commission therefore decided to revoke the authorisation decision of 15 March 1999, which was based on incorrect information.

6. The parties confirmed that they had not mentioned in their notification of 12 February 1999 the fact that they each had a monopoly in narcotic active principles, and they provided the information required by Form CO, which forms an integral part of Commission Regulation (EC) No 447/98[3] containing provisions for the implementation of the Merger Regulation as regards those products on 20 April 1999. On 17 May 1999, the Commission adopted a compatibility decision based on commitments given. The parties gave a commitment to the Commission that they dispose of Synthélabo's activities involving narcotic active principles, thus eliminating any overlap resulting from the merger in that area.

I. INFRINGEMENT OF THE MERGER REGULATION

7. During the procedure that culminated in the adoption of the authorisation decision of 15 March 1999, Sanofi and Synthélabo provided incorrect information relating to narcotic active substances.

8. The production and marketing of narcotic active principles are covered by rules within the framework of the United Nations Convention on Narcotic Drugs of 21 March 1961. Pursuant to the Public Health Code in France, the public authorities granted Sanofi (Francopia) the monopoly for the production and marketing of technical morphine (the raw material produced from poppies and opium) and its derived active principles, morphine sulphate, morphine hydrochloride and codeine. They similarly granted Synthélabo (Sochibo) the

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[3] OJ L 61, 2.3.1998, p. 1; corrigendum OJ L 66, 6.3.1998, p. 25.

monopoly for the production and marketing of pholcodine (an active principle also derived from technical morphine).

9. Those active principles are used in the manufacture of pharmaceutical products belonging to three ATC 3 classes: major analgesics (N2A), analgesics (N2B) and anti-tussives (R5D). Pholcodine and codeine are both used in the manufacture of anti-tussive medicinal products (R5D). Because of regulatory provisions, and by way of exception to the principle that the geographic markets in active principles have at least a Community dimension, the relevant geographic markets for narcotic active principles are national.

10. Vertical links existed between the parties before the merger. Francopia, a subsidiary of Sanofi, was the exclusive supplier of technical morphine to Sochibo, a subsidiary of Synthélabo; furthermore, Sanofi purchased pholcodine from Sochibo for the manufacture of anti-tussive medicinal products. Lastly, Sanofi's anti-tussive products, based on pholcodine, are in downstream competition with anti-tussive products based on codeine, an active substance which Sanofi itself supplies on an exclusive basis to its own competitors on the market in anti-tussive medicinal products.

11. The Notification of 12 February 1999 did not contain any information or present any competition analysis of the relevant markets in narcotic active principles. It also indicated that there was no overlap or vertical links between the parties as regards those products and hence no market affected by the merger.

12. Thus, by failing to supply the relevant information to the Commission and by making statements which were manifestly incorrect, the parties infringed the provisions of Sections 6, 7 and 8 of Form CO.

13. The Merger Regulation does not provide for any *de minimis* exemption from its scope of application, and consequently the fact that the turnover achieved on a given relevant market may be low could not justify omission of those activities from the notification form. Consequently, Sanofi and Synthélabo should have identified the existence of the aforementioned affected markets in accordance with Regulation (EC) No 447/98 and have completed Sections 6, 7 and 8 of Form CO.

II. IMPOSITION OF FINES

14. Under Article 14(1)(b) of the Merger Regulation, the Commission may, by decision, impose on the persons referred to in Article 3(1)(b), on undertakings or on associations of undertakings fines of EUR 1 000 to EUR 50 000 where, intentionally or negligently, they supply incorrect or misleading information in a notification pursuant to Article 4.

15. Under Article 14(3) of the Merger Regulation, in setting the amount of the fine, the Commission is to take account of the nature and gravity of the infringement. The Commission also takes account of any aggravating or mitigating circumstances.

Nature of the infringement

16. The infringement committed by Sanofi and Synthélabo took the form of the failure to provide information on the active substances and markets described above and in the supply of information which was manifestly incorrect as regards the identification of the affected markets.

    Consequently, the information provided by Sanofi and Synthélabo in the notification submitted on 12 February 1999 is incorrect within the meaning of Article 14(1)(b) of the Merger Regulation. The supply of this incorrect information constitutes, at the very least, gross negligence.

Gravity of the infringement

17. In their comments on the Commission's statement of objections, the parties submit that, in assessing the gravity of the infringement committed, account should be taken of the marginal nature of Synthélabo's products in the field of narcotic active principles (generating a turnover of some [XXX]*) and the specific nature of the activities in question, which are subject to very strict confidentiality instructions within the companies themselves.

18. As regards the marginal nature of the products affected by the merger, the Commission refers to the comments made in point 13. Furthermore, the active substances markets affected by the merger, and the Commission's analysis thereof in assessing the compatibility of the merger with the common market, are not limited to pholcodine, but included all the relevant active substances (pholcodine, codeine and morphine), which account for a total turnover of approximately […]*. In addition, the effects of the merger in this area also related to the downstream market in anti-tussives based on narcotic active substances, accounting for a turnover of approximately FRF 64 million.

19. As regards the argument relating to the specific nature of the activities in question, which are governed by very strict confidentiality instructions, it should be noted, first, that the parties could not have been unaware of the existence of the monopolies which they each held and, secondly, that the narcotic active principles of Sanofi and Synthélabo are not "off-market" products but, on the contrary, substances which are also sold to other companies and traded between the parties. Consequently, in accordance with Regulation (EC) No 447/98, Sanofi and Synthélabo should have identified the existence of the aforementioned affected markets and completed Sections 6, 7 and 8 of Form CO.

20. Furthermore, the infringement of the Merger Regulation committed by Sanofi and by Synthélabo (the supply of incorrect information) may be regarded as a very serious infringement for the following reasons:

21. In assessing the respective conduct of Sanofi and Synthélabo, it must be borne in mind that both are large European companies with significant business in Europe.

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* 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.

The Merger Regulation applies to mergers entered into by companies above a certain size, which are deemed to be directly aware of the existence of European competition legislation or to be able to obtain appropriate assistance. Sanofi and Synthélabo each have detailed knowledge of the activities which they carry on, as evidenced by the notification submitted, the annexes to which list the active substances produced by Francopia and Sochibo, but omit any description or analysis by reference to the position held by those companies on the corresponding markets.

It is thus beyond dispute that the parties were aware of the provisions infringed and were in a position to apply them to the active substances described above.

22. The Commission declared the notification incomplete on 3 February 1999, since the replies to the questionnaires sent by the Commission to competitors and customers pursuant to Article 11 had shown that information on one of the affected markets had not been supplied. Once the appropriate information was supplied by the companies, the notification took effect, on 12 February 1999. The parties thus had an additional period of eight days to ensure that their notification complied with the requirements of Regulation (EC) No 447/98. The fact that the initial notification was declared incomplete should clearly have drawn the attention of the parties and their representatives to the shortcomings in their preparatory work.

23. The respective activities of Sanofi and Synthélabo in relation to the abovementioned active substances are covered by a monopoly granted by the French State. Merging two monopolies is liable, *a priori*, to create an anticompetitive situation where, as in the case in point, there are horizontal and vertical links between the two monopolies, on the one hand, and between the two monopolies and downstream markets, on the other. The parties could not have been unaware of this situation, nor could they have been unaware of the fact that the merger of their monopolies was liable to create or strengthen a dominant position, given the horizontal and vertical links between them By failing to point out circumstances involving an exceptional market structure, the parties were seriously at fault.

24. As soon as the market in the active substances in question had been identified, the parties promptly supplied the relevant information under Form CO and did not dispute the existence of the affected markets.

25. In their comments on the Commission's statement of objections, the parties submitted that account should also be taken, by way of mitigating circumstances, of the wholly specific and marginal nature of the relevant product (pholcodine) to Synthélabo, which explained that the failure to supply information and the supply of incorrect information were not "intentional".

26. For the reasons already set out in points 14 and 15, this does not constitute a mitigating circumstance.

27. The information supplied by the parties prompted the Commission to adopt the authorisation decision of 15 March 1999. It was only as a result of additional information, provided by the complainants, that the Commission came to the

conclusion that the merger raised serious doubts as to its compatibility with the common market, in that it would have created or strengthened a dominant position on the affected market(s). However, as regards the merger of two monopolies, the parties could not have been unaware of the reality of the situation, in the same way as they could not have been unaware that knowledge of this information could have prompted the Commission to conclude that the transaction was not compatible, since this information should be supplied by the parties at the time of their notification and not by subsequent complaints from interested third parties. That finding resulted in the revokation of the authorisation decision of 15 March 1999 and the adoption of a decision finding that the transaction was compatible on the basis of commitments given, on 17 May 1999.

CONCLUSION

28. In proceedings initiated pursuant to the Merger Regulation, it is very important, particularly in view of the time-limit constraints to which the Commission is subject so as not to impede business processes, that the parties to the merger supply full information at the time of the notification. Those constraints mean that undertakings must be particularly careful when submitting details of their merger. In this particular instance, the parties supplied information which was manifestly incorrect and were guilty, at the very least, of gross negligence.

29. The facts set out above demonstrate that Sanofi and Synthélabo provided the Commission with incorrect information in the notification submitted on 19 February 1999.

30. The Commission considers it appropriate to impose a fine on each of the undertakings involved in the merger. Where incorrect information is supplied, each of the firms is responsible for the information it provides, notwithstanding the appointment of a sole representative. In the case in point, both firms operate on the abovementioned affected markets which they failed to specify. Each of them must therefore be held responsible for not having supplied the relevant information concerning it.

31. It is the Commission's duty to uphold the basic principle underlying the exercise of its task of control of concentrations having a Community dimension, namely that parties notifying a merger must supply full and correct information.

    Consequently, the Commission considers it necessary to impose fines on Sanofi and on Synthélabo, pursuant to Article 14(1)(b) of the Merger Regulation.

AMOUNT OF THE FINES

32. On the basis of the foregoing and taking into account the circumstances of the case, the Commission considers it appropriate to impose a fine of EUR 50 000 on each of the undertakings that committed the infringement, pursuant to Article 14(1)(b) of the Merger Regulation, giving a total fine of EUR 100 000,

HAS ADOPTED THIS DECISION:

Article 1

1. A fine of EUR 50 000 is hereby imposed on Sanofi pursuant to Article 14(1)(b) of Regulation (EEC) No 4064/89 for having supplied incorrect information in the notification submitted to the Commission under that Regulation on 18 January 1999.

2. A fine of EUR 50 000 is hereby imposed on Synthélabo pursuant to Article 14(1)(b) of Regulation (EEC) No 4064/89 for having supplied incorrect information in the notification submitted to the Commission under that Regulation on 18 January 1999.

Article 2

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

Upon expiry of that period, interest shall automatically be payable on the fines at the rate charged by the European Central Bank to its repo operations on the first working day of the month in which this Decision is adopted, plus 3.5 percentage points.

Article 3

This Decision is addressed to:

Sanofi
174, avenue de France
F - 75013 Paris

Synthélabo
22, avenue de Galilée, BP 82
F - 92355 Le Plessis Robinson.

Done at Brussels, 28 July 1999

For the Commission

Karel VAN MIERT
Member of the Commission