EN

Case No COMP/M.2624
- BP/Erdölchemie

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89

MERGER PROCEDURE

Article 14(1)(b)

Date: 19/06/2002

PUBLIC VERSION

Commission decision

of 19.06.2002
C(2002) 2208 final

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.2624 – BP/Erdölchemie)

(Only the English 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,

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) 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]

Having regard to the final report of the Hearing Officer in this case[4],

WHEREAS :

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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 ..., ..., p. ...

4 OJ C ..., ..., p. ...

I. THE PARTIES AND THE TRANSACTION

1. On 23 February 2001 the Commission received a notification pursuant to Article 4 of Regulation (EEC) No 4064/89 ("the Merger Regulation") from Deutsche BP AG ("Deutsche BP") of a proposed concentration in the chemicals industry (case COMP/M.2345-BP/Erdölchemie), by which it acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the undertaking Erdölchemie GmbH ("EC")[5].

2. Deutsche BP is a German subsidiary of BP plc ("BP"), the holding company of a multinational oil exploration, petroleum and petrochemical group. EC is a manufacturer and seller of petrochemicals with manufacturing facilities at Cologne in Germany, which was initially established as a joint venture jointly controlled by Bayer AG and BP via Deutsche BP. The transaction therefore consisted of a change from joint to sole control.

II. PROCEDURE

3. One of the chemical products where according to the notification the horizontal overlaps between the parties would lead to an affected market was acrylonitrile ("ACN"). The notification was declared incomplete on 21 March 2001, due to lacking information on ACN technology licensing, ACN catalyst and the ACN supply/demand situation and trade flows world-wide. After the parties had provided additional information regarding Form CO sections 4, 7 and 8 for ACN technology and catalyst and the requested information on the ACN market, the notification was declared complete on 22 March 2001. On 26 April 2001, the Commission declared the concentration compatible with the common market and the functioning of the EEA agreement pursuant to Article 6(1)(b) of the Merger Regulation[6].

4. It became apparent that the notification made by Deutsche BP contained misleading and incorrect information as regards three issues related to the product ACN: (i) BP's agreements with ACN competitors […]*, (ii) BP's activities in ACN technology licensing, and (iii) BP's activities in ACN catalyst. In its Statement of Objections of 23 November 2001, the Commission communicated its preliminary view that Deutsche BP negligently supplied incorrect and misleading information in a notification pursuant to Article 4 of the Merger Regulation, and that a fine should be imposed on Deutsche BP in accordance with Article 14(1)(b) and Article 14 (3) of the Merger Regulation. Deutsche BP submitted its comments on the Statement of Objections on 7 March 2002.

III. RELEVANT FACTS

1. Information on BP's co-operation agreements with […]* competitors

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5 OJ C 71, 3.3.2001, p.22.

6 OJ C 174, 19.6.2001, p.5.

* 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.

(a) The information given in the notification

5. Under the heading "Co-operative agreements", the Form CO, which specifies the information to be provided in a merger notification pursuant to Article 3(1) 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], in section 8.11 asks the following question: "To what extent do co-operative agreements (horizontal or vertical) exist in the affected markets?". The answer submitted in the parties' notification (page 51) with regard to ACN reads as follows:

> "The Parties are not aware of any significant co-operative arrangements as regards acrylonitrile in the EEA. However, at the horizontal level, various producers sometimes exchange material geographically so as to reduce distribution costs (for example, Erdölchemie currently exchanges c.[…] * kt [kilotonnes] of acrylonitrile p.a. with BP within the EEA). The only significant vertical arrangements are the captive propylene positions and forward integration outlined in section 7.8, above."

6. In section 8.12 the Form CO asks for the following information: "Give details of the most important co-operative agreements engaged in by the parties to the concentration in the affected markets, such as research and development, licensing, joint production, specialisation, distribution, long-term supply and exchange of information agreements." The parties submitted the following answer with regard to ACN in their notification (p. 52):

> "Not applicable."

7. The parties provided no information on co-operation agreements with competitors as regards ACN in other sections in the Form CO. In section 6 concerning the relevant geographical market definition (p. 19), they stated: "The parties consider the appropriate geographical market definition for acrylonitrile to be worldwide …".

(b) Result of the investigation

8. In reply to the general question in a letter under Article 11 of the Merger Regulation ("Article 11 letter") asking for "the impact of the operation on the market", a competitor informed the Commission that BP and Sterling Chemicals Inc. ("Sterling"), another major US producer (BP's ACN plants are located in the USA) have an ACN export joint venture, called Anexco. On 8 March (17:49hrs) the Commission thereupon sent an e-mail to the lawyers representing BP and Deutsche BP ("BP's lawyers") stating: "We understand that BP has a joint acrylonitrile export company (Anexco) in partnership with Sterling, another major USA producer. This is, to my understanding, not mentioned in the Form CO. Please supply all relevant information as to this company, the impact of Sterling on the market and all other elements that may have an influence on the Commission's assessment as to the consequences of the merger."

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[7] OJ L 61, 2.3.1998, p. 1.

9. The existence of that joint venture with Sterling was confirmed by BP's lawyers in a fax dated 12 March 2001. It was specified that this joint venture sells BP and Sterling ACN in regions outside North America and Europe and therefore is not active in Europe. However, it was stated that BP also has a non-exclusive distribution agreement with Sterling, by which BP sells up to […]* kt per annum of ACN to Europe and Turkey. In its submission, BP's lawyers referred to the fact that this had been previously brought to the Commission's attention. The agreements with Sterling had been notified to the Commission under the antitrust-provisions according to Form A/B in April 1998 (case IV/E-2/37.035-BP-Sterling). The Commission issued a negative clearance type comfort letter on 1 June 1999.

10. In a telephone conference on 15 March, the Commission asked BP's lawyers to provide information on any links with other […]* suppliers. In their written reply to that question of March 16, BP's lawyers indicated (p. 6) that BP:

> "has no joint venture and/or distribution agreements with any [other producer]*, with exception of the links with Sterling set out in BP's fax of March 12. […] However, BP does [have an arrangement with another producer affecting exports to Europe]* "

11. By telephone and e-mail (16:56hrs) on 19 March, the Commission requested further information about the quantities involved and the duration of the arrangement with…]*. In the reply to those questions dated 19 March, BP's lawyers indicated that [details of the arrangement which limit the producer's ability to independently export ACN to Europe]*

12. According to the [arrangement, …]*.

13. The potential of […]* producers to supply ACN to Europe was an important element for the assessment of BP's competitive position on the market for ACN. The USA are the main exporting region for ACN due to significant excess capacity in relation to local demand. BP's sales of ACN in Europe are entirely based on imports from its production sites in the USA. [Sterling is one of the largest merchant sellers in the US following the market leader BP with a market share of around 20% (BP: 35%). It is therefore an important potential competitor of BP for ACN sales into Europe. The agreement significantly limits its potential to actively compete with BP in Europe. All its material sold into Western Europe went through the agreement, i.e. was marketed by BP, except for some marginal sales below 5 kt which Sterling marketed directly]*. The [arrangement with…]* gives BP a large measure of control over […]* exports to Europe. […]*

14. In conclusion, there were two important co-operation [arrangements]* for ACN between BP and [ACN producers]*. No reference was made to these [arrangements]* in the Form CO.

2. Information on BP's activities as regards ACN technology licensing

(a) Information given in the notification

15. Section 6.1 of the Form CO requires the parties to identify each affected market, and in Sections 7 and 8 detailed information has to be provided with regard to these markets. Section 6 III (b) defines vertically affected markets as relevant product markets where "one or more of the parties to the concentration are engaged in business activities in a

product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market shares is 25% or more […]".

16. Section 8.9 of the Form CO requires the parties to describe the various factors influencing market entry. In point (d) of that section, particular information is requested on "the extent to which each of the parties to the concentration are licensees or licensors of patents, know-how and other rights in the relevant markets."

17. BP's position in the licensing of ACN production technology, which has to be considered as being upstream of ACN production activities, is not explained in the notification, neither as an affected market nor in section 8.9 nor elsewhere. In Deutsche BP's submission under section 8.9, technology is mentioned as one of the relevant entry factors and it is indicated that:

> "the necessary technology can be readily purchased via license from various ACN producers (e.g. Asahi, BP, Solutia, DuPont, various Chinese licensors and others). These licensors carry on active licensing programs and availability of technology and intellectual property rights do not constrain entry into ACN production."

(b) Result of the investigation

18. In reply to an Article 11 letter, a competitor informed the Commission that BP was the most important seller of technology for the production of ACN. After this issue was raised with BP's lawyers in a telephone conference on 13 March 2001, they submitted a memo in that regard dated 14 March 2001, stating that:

> "of total installed ACN capacity today, 85-90% of the underlying technology was originally licensed by BP".

19. Further submissions by BP's lawyers, including additional Form CO sections 4, 7 and 8 as regards ACN technology licensing, and the Commission's investigation revealed that until 1994, BP had a monopoly in the licensing of ACN technology. After that date, three world-scale ACN production plants have been built by Solutia, Tae Kwang and Formosa Plastic. Formosa obtained its technology licence from BP. Solutia developed its own production technology and built its plant on its own technology without the need for third party licences. The Tae Kwang plant is based on Solutia's technology and the licence was obtained in 1995 from Solutia. [BP did not offer its technology to Tae Kwang][*] In addition, an earlier BP licence to Formosa granted on 10 June 1987 […][*] BP's licence to the South-African producer Sasol gave BP a first option to buy their exports, and BP actually marketed Sasol's exports of […][*] until production at the Sasol plant was stopped.

20. With regard to the licensing activities of the other companies mentioned by Deutsche BP as source of ACN technology licences, the investigation revealed the following: At the time of the investigation, DuPont was not active in third party licensing, and considered any information on that issue submitted to the Commission in reply to an Article 11 letter as business secrets. Asahi had so far only licensed out its technology to its joint ventures or subsidiaries and to Sinopec (China) for three small-scale plants, of which only one is in operation today. In addition, Asahi's licences in China were part of

a co-operation agreement between BP and Asahi for the joint licensing of acrylonitrile technology in China. The "Chinese licensors" mentioned in the Form CO relates to Sinopec that offers its ACN technology on its website, but had not licensed a single plant. Sinopec is also a joint-venture partner of BP with regard to a possible licence for a new plant in China and has taken licences from Asahi for three small-scale plants.

21. Thus, the notification omitted relevant information and did not accurately describe BP's position as regards ACN technology licensing.

3. Information on BP's activities as regards ACN catalyst

22. A catalyst is an essential processing input in ACN production as it ensures that the propylene and ammonia feedstock materials produce ACN. Catalysts are sold on the market and constitute a separate product market.

(a) Information given in the notification

23. ACN catalyst was not identified as a (vertically) affected market within the meaning of section 6 III (b) of the Form CO. BP's activities in ACN catalyst are not mentioned at all in the Form CO. The only mention to ACN catalysts in the notification is in Section 8.10 (concerning the importance of research and development) where it is stated that:

> "R & D is not critical to entry into, or continued operation on acrylonitrile markets. In particular, there are many suppliers of catalyst technology (eg. Nitto, Asahi, DuPont, Solutia, etc) …."

(b) Result of the investigation

24. Again, in reply to a general question in an Article 11 letter, a competitor informed the Commission that BP is a leading catalyst seller. After this issue was raised with BP's lawyers in a telephone conference on 13 March 2001 , BP's lawyers submitted in a paper dated 14 March 2001, that:

> "… catalyst for new ACN plants will typically initially be bought from the technology licensor …. BP estimates that at present only [55-65%]* % of all ACN units world-wide … still use BP catalysts".

25. In their complementary sections 4, 7 and 8 of Form CO on ACN catalyst which were submitted after the Commission had declared the notification incomplete, the parties indicate that BP accounted for [65-75]* % of the world-wide merchant market for ACN catalyst in 1997 and they estimate BP's share to be [70-80]* % in 2001. These figures had been largely confirmed by the Commission's market investigation. As regards BP's competitors, the investigation revealed the following: DuPont does not offer its own type of catalyst, but is only active in regenerating used catalysts. In the view of customers, regenerated catalyst does not allow for the same plant performance as new catalyst. Solutia's catalyst is radio-active and according to market participants only operates with its own technology. Asahi only entered the merchant business at the beginning of 2001. Until 31 December 2000, BP had the exclusive right to sell Asahi catalyst world-wide (except for Asahi technology licensees and sales in Japan, Taiwan, Korea and China, which required Asahi's approval). BP had rights to all information disclosed by Asahi on catalysts during the term of the agreement, including

developments on Asahi's new catalyst that it is now marketing alone. In addition, BP and Asahi have an ongoing co-operation agreement for catalyst sales in China. Sinopec has so far sold its catalyst only in China. BP's most important competitor is Mitsubishi (formerly called Nitto). […]*. Only Mitsubishi and Asahi catalysts are fully compatible with BP's technology, i.e. they can be used as a [change out/replacement]* catalyst even if the plant initially was installed and run based on BP catalyst.

26. Thus, the notification did not mention BP's position in the catalyst market, and did not describe the market situation properly.

IV. ASSESSMENT UNDER ARTICLE 14 OF THE MERGER REGULATION

27. Under Article 14 (1) (b) of the Merger Regulation the Commission may by decision impose fines from EUR 1 000 to 50 000 where, intentionally or negligently, an undertaking supplies incorrect or misleading information in a notification pursuant to Article 4.

1. Incorrectness of the information on co-operation agreements.

28. The possibility for competitors to export material is a major element for the Commission to assess the geographical scope of the relevant markets as well as the competitive impact of the transaction in the common market. Deutsche BP submitted in the Form CO that there were no co-operation agreements as regards ACN. This proved to be incorrect, as BP had entered into agreements as described in recitals (8) to (13) with […]*, which affected their ability to export ACN to Europe and other destinations, and to compete there with BP. In particular as Deutsche BP argued that the relevant geographical market for ACN was world-wide, agreements in all parts of the world […]* had to be disclosed in the notification. It therefore has to be concluded that the information on ACN co-operation agreements provided in the Form CO was incorrect.

2. Incorrect or at least misleading character of the information provided on ACN licensing

29. The possible control of upstream markets like the ACN process technology market is an important aspect in assessing a party's position on a relevant market. BP's strong position in ACN licensing was not mentioned at all in the Form CO. The parties omitted to identify ACN technology licensing as a vertically affected market, and to provide the respective information required in the Form CO. The (little) information on ACN licensing gave a distorted picture of the true facts, as it gave the impression that BP was active with a market share below 25% among several other competitors well established and highly active (in section 8.9 BP refers to "active licensing programs") in the licensing market. This proved to be incorrect or at least misleading. BP was and still is the world-leader in ACN licensing. DuPont was not active in ACN technology licensing. Deutsche BP submits that it had good reason to believe that DuPont was an active licensor, as according to an article in an industry publication (*Chemicals Week*) of June 1998, a DuPont manager announced the opening up of DuPont's 25 speciality chemicals businesses to licensing including, inter alia, the ACN process. From this article, no conclusions can be drawn as regards the actual status of DuPont's ACN licensing business at the time of the notification. An article published two and a half years before the notification, and in which only the ambitions and business plans of a

company are reported, cannot support the statement in the notification that the technology was readily available from DuPont. Furthermore, there were not "various Chinese licensors" as submitted in the notification, but only one theoretically (Sinopec), which at the time had not granted any licence. The failure to mention the limitation of Asahi's activities to own plants and China and the fact that it has a co-operation agreement with BP for China has to be considered as at least misleading, as it gives the impression that Asahi is active without any geographic restrictions and completely independently from BP. It therefore has to be concluded that the information provided in the Form CO on ACN technology was incorrect or at least misleading.

3. Incorrect or at least misleading character of the information provided on ACN catalyst

30. The catalyst market has to be considered as a market upstream of BP's ACN production activities which is important for the assessment of their position on that latter market. It was not mentioned at all in the notification that BP is active in ACN catalyst. Again, the parties omitted to identify a vertically affected market. The limited information given on ACN catalyst gave the impression that BP was not active and that there were several other competitors well established and independently active on the catalyst market. This proved to be incorrect or at least misleading. BP was and still is the world-leader in ACN catalyst sales with over 70% market share. DuPont was not active on the market for new catalyst. In not mentioning the former and ongoing links between BP and Asahi, Deutsche BP omitted important information for the assessment of Asahi's potential as BP's competitor. The same applies to BP's relation to Mitsubishi. In conclusion, the information submitted in the notification on ACN catalyst has to be considered as incorrect or at least misleading.

4. Negligence

31. In its reply to the Commission's Statement of Objections, Deutsche BP takes the view that the failure to supply the relevant information has not been negligent, or at least that there was only a very low degree of negligence. Deutsche BP explains the omissions in the notification as follows: The omissions are mainly a result of internal communication and co-ordination problems and are related to the participation of several individuals from different BP units and from outside BP at the preparation and the drafting of the notification. The central unit which started the drafting of the notification requested the information according to the Form CO from the relevant business unit, which was located in the USA. This was done apparently without explaining to the necessary extent the different notions and technical terms in the Form CO, and the relevance of certain business relations for a competition assessment under the Merger Regulation.

32. Consequently, according to Deutsche BP, the agreement with the US producer Sterling and […]* were not mentioned because initially the parties intended to propose a Europe–wide market definition for ACN, and relations with […]* producers [in other geographical regions]* therefore had not been considered relevant. When it was decided to shift to a world-wide market definition, the section of the Form CO on agreements was not amended accordingly.

33. As regards ACN technology and catalyst, Deutsche BP submits that the product experts preparing the Form CO did not consider these activities as "products up- or downstream"

of ACN in the sense of the Form CO. Business people tend to interpret this term as input raw materials (such as propylene and ammonia in the case of ACN), rather than technology. According to Deutsche BP, these initial misunderstandings remained undiscovered during the whole drafting process.

34. Deutsche BP finally submits that the organisation put in place by BP (i.e. gathering information by sending the precise wording of the relevant sections of the Form CO to the respective business units in good time, appointing specialist external counsel and making every effort to follow the Commission/ECLF Best Practice Guidelines[8]) was reasonable and generally should have been sufficient to avoid any shortcomings in the preparation of the notification. Deutsche BP thus takes the view that the incompleteness is not due to an organisational negligence, but to an exceptional set of unfortunate circumstances in an isolated case.

35. There are no indications that Deutsche BP acted intentionally. However, the Commission takes the view that the provision of the incorrect and misleading information was committed negligently. As regards the co-operation agreements, the questions in the Form CO are clear and precise. Deutsche BP must have been aware that these agreements form an important element in the assessment of the parties' position and the independence of their competitors. The availability of imports and the ability of outside competitors to put products on the market in Europe independently is an important element of the assessment, which must have been evident for Deutsche BP. The relevance of the missing information is independent of the geographical market definition finally applied. The relevant questions in section 8 of the Form CO do not contain any geographical limitation, and answers to this section should cover all parts of the world, in particular if the parties defend a world-wide market definition. Links between competitors are a relevant element of the competitive analysis on a Europe-wide as well as on an world-wide market. Therefore, Deutsche BP's argument that the omission resulted from the fact that in the course of preparing the notification, they changed their market definition for ACN from Europe-wide to world-wide, but accidentally failed to adjust section 8 of the Form CO accordingly, is not such as to eliminate the negligent character of the omission.

36. The fact that the agreement with Sterling had been notified to the Commission previously under Article 81 of the Treaty according to Form A/B supports the Commission's conclusion that Deutsche BP had no intention to hide any information from the Commission. However, it does not establish that there was no negligence. The Form CO requires the parties to submit a complete and comprehensive set of information including all aspects relevant for the assessment of the concentration. The fact that some information might have been brought to the attention of the Commission in another procedure or framework does not reduce the obligation of the parties to complete all chapters of the Form CO in full. Moreover, the parties did not even include a reference to the former procedure in the notification.

37. As regards ACN technology and catalyst, the definition of a vertically affected market is clearly laid out in section 6 III (b) of the Form CO. The submission of the parties that their business units involved did not consider technology licensing and catalyst as a "product

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[8] http://europa.eu.int/comm/competition/mergers/others/best_practice_gl.html

market" in the sense of section 6 of the Form CO, but only considered chemicals up- or downstream of ACN, is only of limited relevance and does not establish that there was no negligence. It is well established in the Commission's case law that technology licensing can constitute a distinct product market. In particular, in the Dow Chemical/Union Carbide case[9], the Commission extensively considered the market for polyethylene technology licensing. BP was an active participant in the Commission's investigation in that case. Although the case concerned a different product (polyethylene), it did not contain any indications that the approach as regards technology licensing had to be limited to this specific product and was not applicable to other chemicals.

38. The argument is even less acceptable as regards ACN catalyst, as this is a distinct chemical product, which is necessary as an additive for the ACN production process. The fact that Deutsche BP was aware of the relevance of technology licensing and catalyst for the competitive assessment is also shown by the fact that it was mentioned in the Form CO under the headings entry barriers and relevance of R&D, although in an incorrect or at least misleading way. Furthermore, Deutsche BP could not have been unaware of BP's very strong position with regard to these two markets. Finally, it has to be mentioned that Deutsche BP is part of a multinational company with a large record of notifications to the Commission including in the chemicals sector, and therefore has an extensive experience in merger review procedures and the interpretation of the Form CO.

39. Finally, the Commission cannot accept Deutsche BP's argument that there was no negligence due to the sound process and organisation of BP with regard to the preparation of merger notifications and the unfortunate and exceptional character of the present case. The Commission acknowledges that so far the members of the BP group have a satisfactory record of merger notifications. However, the present case showed that the procedures applied by BP and Deutsche BP in the present case, which according to BP and Deutsche BP deviated from their usual procedures in merger notifications, failed to ensure a complete and satisfactory notification. A complete Form CO with comprehensive information is of crucial importance for the Commission's merger control procedure, inter alia due to the tight legal deadlines the Commission is required to meet in these procedures, and the notifying parties must be aware of this importance. The internal provisions set up within the notifying party for the preparation of the Form CO have to reflect this high importance of a complete notification. Consequently, the party has to organise its internal procedures with the highest care to ensure that the legal duties and requirements under the Merger Regulation are communicated to all relevant units, and that all relevant information is identified and supplied in the Form CO. The fact that in the present case information was missing in three different areas revealed imperfections in the procedures applied by BP and Deutsche BP in this instance, which led to submission of an incomplete Form CO.

40. These omissions go beyond minor errors which might be unavoidable in view of the complexity of large multinational undertakings. The explanation provided by Deutsche BP also does not establish any extraordinary circumstances which, despite all reasonable efforts, made it impossible to provide the missing information. There were three distinct aspects which have not been properly dealt with in the Form CO, and which were all of an evident relevance and importance for the competition assessment. This is also reflected in

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[9] Commission Decision 2001/684/EC in Case No. Comp/M.1671, OJ L 245, 14.9.2001, p.1, at recitals 74-95.

the fact that the missing issues were brought to the Commission's attention immediately by third parties at a very early stage of the investigation.

41. In terms of the degree of negligence, it has, however, to be taken into account that ACN was not the sole focus of the case. The Commission acknowledges that the present transaction affected a large number of different chemicals which had to be discussed in the notification, ACN being only one of them.

42. Against this background, it has to be concluded that Deutsche BP acted negligently in submitting the incorrect and misleading information, and that the negligence was of a considerable degree.

5. Nature and gravity of the infringement

43. Under Article 14 (3) of the Merger Regulation, in setting the amount of the fine, the Commission has to take account of the nature and the gravity of the infringement.

(a) Nature

44. The infringement committed by Deutsche BP took the form of negligent failure to disclose important co-operation [arrangements with Sterling and …]* and to identify ACN technology and catalysts as affected markets, as well as of providing misleading information on the competitive situation on the technology and catalyst markets and BP's position on these markets.

(b) Gravity

(1) Deutsche BP's arguments

45. Deutsche BP submits that the following elements should be considered as mitigating factors: First, Deutsche BP stresses that there was no intention to mislead, and that at no point did Deutsche BP intentionally withhold any information from the Commission. Deutsche BP further submits that the omission of the information arose as a result of a very unfortunate combination of circumstances, rather than as a consequence of negligent behaviour.

46. Second, Deutsche BP underlines the limited competitive impact of the omitted information. Deutsche BP argues that in neither case did the omitted information, once fully investigated by the Commission, prove to be significant enough to merit a remedy. In that respect, Deutsche BP refers to the previous cases where a fine was imposed by the Commission for lacking information in a notification. Deutsche BP takes the view that in all these cases the information was either withheld intentionally or there was a significant link between the omitted information and the decision on the substance of the case, in the sense that a remedy was required or the Commission based its competition concerns on the information.

47. Third, Deutsche BP considers it as a mitigating factor that it does not dispute the incompleteness of the Form CO as submitted. It further argues that it was fully and immediately co-operative as soon as the Commission indicated that the information was missing. With regard to the information on [the other arrangement]* and the way full

details emerged, Deutsche BP refers again to the limited impact of [it][*] on the competitive assessment.

(2) Evaluation

48. The Commission takes the view that the infringement is of considerable gravity. The notification is the basis and the starting point of the Commission's investigation of a merger case. It determines to a large extent the approach of the Commission towards the case and the areas and focal points of its investigation. Incorrect and misleading information creates the risk that important aspects relevant for the competitive assessment of the transaction are neither investigated nor analysed by the Commission, and its final decision consequently is based on incorrect information. In assessing mergers, the Commission is subject to extremely tight deadlines. In this framework it is essential for the Commission's work that it can focus its investigation on the relevant issues from the very beginning of the procedure, based on comprehensive and correct information provided in the notification.

49. The notification in the present case was incorrect and misleading on three separate occasions. Two of the aspects were not brought to the Commission's attention at all in the notification: no reference was made to the co-operation agreements, and there was no mention at all that BP was active in ACN catalyst. The infringements concern three important elements in the assessment of the case which prima facie could have led to serious competition problems. The incorrect and misleading information in the Form CO with regard to the ACN market resulted in a misdirected and incomplete first investigation by the Commission, which failed to include these important issues. The relevant information only came to the attention of the Commission as part of information volunteered by third parties in the course of the investigation conducted by the Commission, which otherwise would not have considered these points at all. After the notification had been declared incomplete, the Commission had to re-launch an extensive investigation to verify and assess the new facts subsequently disclosed by BP, Deutsche BP and other market participants.

50. As regards Deutsche BP's points, the Commission's views are as follows: The absence of intention and the degree of negligence has already been dealt with in the relevant section above, which has to be taken into account in adjusting the amount of a fine. The Commission agrees that there was no intention on Deutsche BP's side, but takes the view that Deutsche BP acted negligently in a considerable degree.

51. The fact that the omitted information did not form the basis for competition concerns which resulted in a need for remedies cannot be taken into account as a mitigating factor. The information requirements set out in the Form CO, which Article 14(1)(b) of the Merger Regulation serves to protect and enforce, do not differentiate according to the likely outcome of the competition analysis. In the present context it is only relevant that the information omitted was of importance for the proper investigation and assessment of BP's competitive position on the ACN market. It has to be recalled that, inter alia, two clearly affected markets had not been identified. The fact that at the end of the Commission's assessment, taking into account the information that initially was missing, the transaction did not lead to competition concerns, does not reduce the gravity of the omission. This gravity depends on the relevance of the information for the investigation and assessment, but not on the final outcome of this assessment.

52. Accordingly, the reference to the absence of competition concerns in the Commission's final decision cannot be taken into account as regards the way the information on [the other arrangement]* was provided.

53. As explained in recitals (8) to (11), even after the Commission raised the agreement with Sterling with Deutsche BP for the first time, Deutsche BP did not disclose [the other arrangement]* immediately. And even after the Commission asked for further information […]*, Deutsche BP did not provide immediately the full information on [the other arrangement]*. Another request for further information was necessary to discover [the full scope of the restrictive content of this arrangement]* . In the light of the fact that it was only after several requests and after a total delay of 11 days (8 March to 19 March) the full information was provided, there is no basis for taking into account Deutsche BP's co-operation as a mitigating factor.

54. As an attenuating circumstance it has to be taken into account that Deutsche BP did not dispute the facts discovered by the Commission and agreed that the relevant information should have been included in the Form CO.

6. Amount of the fine

55. Accordingly, taking account of the circumstances in the case, the Commission considers it appropriate to impose a fine of EUR 35 000 on Deutsche BP, pursuant to Article 14(1)(b) of the Merger Regulation. In the event of late payment, the interests should be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this decision is adopted, which for June is 3.5% as published in the Official Journal N° C 132 of 04.06.2002, plus 3.5 percentage points.

HAS ADOPTED THIS DECISION:

Article 1

A fine of EUR 35 000 is hereby imposed on Deutsche BP AG 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 23 February 2001.

Article 2

The fine imposed in Article 1 shall be paid, within three months of the date of notification of this Decision to the following bank account of the European Commission:

Account No 642-0029000-95

European Commission

Banco Bilbao Vizcaya Argentaria (BBVA)

Code Swift: BBVABEBB – Code IBAN: BE 76 6420 0290 0095

Avenue des Arts, 43

B-1040 Brussels

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points, that is to say 6.75%.

Article 3

This Decision is addressed to:

Deutsche BP AG
Max-Born-Strasse 2
D-22761 Hamburg

Done at Brussels,

For the Commission,

Mario MONTI
Member of the Commission