Taking a closer look

There is now greater scrutiny of misleading information in EU merger cases

*by **Frances Dethmers****

In recent merger control cases, the European Commission (the Commission) has shown a greater willingness to investigate companies for providing incorrect or misleading information in submissions, in particular in the Form CO. The provision of incorrect or misleading information is an infringement under article 14(1) EUMR and can attract penalties up to 1% of the aggregate group turnover of the undertakings concerned. A telling example is the Facebook/WhatsApp case (M.8228). Commissioner Margrethe Vestager recently confirmed that there are other ongoing investigations.

These investigations are initiated under article 14(1)(a)-(c) EUMR and can be against either the merging parties or third parties. The formal investigation is preceded by an informal review, which is usually not public. Prior to a formal investigation, there will be a state of play meeting. The formal investigation will also involve a state of play meeting, a statement of objections, access to file and the opportunity to have an oral hearing. The investigation can be initiated at any time during the substantive review or up to three years after submission of the information, as was the case in Facebook/WhatsApp. There is the possibility of an appeal but, as far as we are aware, there has not been a judgment on article 14(1) EUMR (an appeal was lodged in respect of M.1610 Deutsche Post/Trans-o-flex but the procedure was closed without a judgment).

Old case law not helpful

There are some relatively old cases from the turn of the century – for instance, KLM/Martinair III (M.1608), Deutsche Post/Trans-o-flex (M.1610) and BP/Erdölchemie (M.2624) – where the Commission imposed fines on companies under article 14(1) EUMR. However, these relatively old precedents, although useful, may not provide reliable insights into the Commission's current enforcement practice for two main reasons.

First, the Commission is now capable of imposing very substantial fines, with the maximum fine amounting to 1% of the aggregate group turnover of the undertakings concerned. The new fining regime was introduced in 2004, which predates all the cases referred to above – with the exception of Facebook/WhatsApp. As such, there is now much more at stake and the Commission's public statements seem to suggest that it is not afraid to make use of these powers and wants to make it abundantly clear that it will not tolerate misleading submissions made under EU merger control. For completeness, we note that the European Commission also still has the power to deem the Form CO incomplete, thereby forcing the merging parties to renotify – and in theory, the Commission could also render a clearance decision null and void.

Second, the Commission's increased scrutiny may be linked to its increased reliance on both internal documents and market feedback under EU merger control investigations. The Commission has become much more critical of key statements made by the merging parties and will cross-check these very carefully against the parties' internal documents and the submissions made by third parties in its market investigation. Any significant unexplained inconsistencies may lead to the conclusion that the notifying party deliberately withheld relevant information or deliberately submitted incorrect or misleading information.

Implications for companies and practitioners

This development is of great importance to practitioners and companies for a number of reasons.

First, the approach to a Form CO should become much more fact-based. For instance, there is still a tendency to present facts in a favourable way or simply to gloss over possible issues. Such an approach could conceivably lead to a substantial penalty and possibly harm the reputation of both the notifying party and that of its advisors vis-à-vis the Commission. As regards the presentation of the facts, the shorter the better (eg bullet points) if only because that way it is easier to double-check the factual statements made and not get bogged down in unnecessary details. Where there is any doubt about the reliability of the information, the notifying party should not only use appropriate caveats but also be transparent with the Commission about, for instance, the limitations of certain information.

Second, it means that the Commission may not always take statements made by companies at face value. Ideally, early on in the process (ie before filing), an assessment should therefore be made of the internal documents (even if only a representative sample of them) for cases with likely substantive issues.

Third, the relevant business people should be made aware of the consequences of not providing accurate and complete information.

Often facts unavailable or not clear-cut

While the Commission's stricter approach is understandable, it should also acknowledge that often there are no clear-cut or precise facts (eg market share estimates, predictions regarding further product or R&D developments). Further, there are bound to be some inconsistencies between, on the one hand, a company's numerous internal documents, which are not always entirely unbiased (eg a struggling business that fears being restructured may present its plans to senior management in a more positive way than justified) and, on the other hand, statements made to the Commission based on a more thorough factual review. In this respect it is also worth reminding the Commission that senior management is not always fully informed about all available information at lower levels in their organisation. Linked to this, many companies, even large multinationals, do not always keep track of relevant

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commercial information on a consistent or reliable basis – indeed, sometimes the most basic information such as individual product revenues is not readily available.

In addition, in large or complex cases, the Form COs have become enormous – in large part due to the Commission's ever-expanding requests for information – easily running into hundreds of pages with countless annexes even for relatively simple cases. Further, the Commission often requires the parties to provide information that they do not ordinarily track, at least not in the format required by the Commission. As such, despite the best efforts of parties and their advisers, there is invariably the possibility that some information in large and complex cases is arguably inaccurate or incomplete, especially if taken in isolation.

As regards market feedback, query whether the Commission applies the same standard and rigour when reviewing the replies provided by third parties. This is especially so given that third parties are required to provide accurate information in response to the Commission's information requests. In doing so, the Commission should keep in mind that not only competitors but also customers may have ulterior motives to thwart a deal. Thus, the Commission should be careful when concluding that an inconsistency between the market feedback received and the submissions made by the notifying party points to potentially misleading information.

An infringement need not be appreciable

In investigating the submission of potentially misleading or incorrect information, it would make sense for the Commission to focus its scare resources and ability to impose large fines on those cases where the alleged misleading or incorrect information would have made a difference to the substantive outcome and/or where there is a consistent pattern throughout the submissions of providing misleading or incorrect information. Neither the law nor the relevant cases suggest that the infringement must be appreciable, leaving the Commission with significant discretion. There will need to be a clearly defined threshold against which the Commission will assess such cases in order to enable merger parties to defend themselves properly.

Indeed, an infringement does not require intent, although the fine is lower where the infringement is due to negligence. Similarly, even if the misleading or incorrect information is irrelevant to the outcome of the investigation, there can still be a procedural infringement and the relevance of the information is only a factor in the determination of the gravity of the infringement. It is worth noting in this regard that the European Commission held in BP/Erdölchemie that "gravity depends on the relevance of the information for the investigation and assessment, but not on the final outcome of this assessment".

This legal test seems too strict, especially now that the Commission is able to impose such substantial fines and requires so much information (which often goes beyond the scope of the Form CO). Arguably, there ought to be at least demonstrable wrongdoing that had an impact on the competitive assessment before the European Commission can come to a finding of an infringement.

Limited guidance on the level of fines

As regards the level of fines, there are no specific guidelines and, as explained, there is very limited precedent, which is in any event of little relevance under the new fining regime. Nonetheless, the following factors may be of relevance (although this is not an exhaustive list):

- **Negligence or intent.** It is worth noting that the Commission may apply a lower threshold for a finding of negligence where large companies are involved with prior merger control experience – see in this respect BP/Erdölchemie. This is not necessarily fair, given that smaller companies with smaller deals may actually be better equipped to provide complete and accurate information. In addition, negligence cannot be assumed but should be assessed on a case-by-case basis with the burden of proof on the Commission.
- **Relevance of the information.** Although the Commission seemed to argue in the KLM/Martinair case that the relevance of the information has no bearing on a finding of negligence, it seems far-fetched to assume negligence if the information was of no relevance whatsoever to the assessment. In this respect, it is worth considering whether the European Commission has a right to request irrelevant information (which is an often-heard complaint) and, if so, whether a company's refusal to provide such information or a complete response can be considered an infringement.
- **Scope and pattern**. Did the misleading information cover one or multiple issues and was the misleading information provided on one or several occasions? This factor should add considerable weight in the determination of a fine, as there is more likely to be an impact on the assessment in the case of a consistent pattern, as opposed to a single isolated instance of misleading or incorrect information.
- **Circumstances in which the information was provided**. For instance, did the notifying party have sufficient or additional time to provide the information, was the information only provided after repeated requests, etc? In any event, what is very clear is that, in practice, it is better to correct and supplement a submission if information provided later turns out to be misleading or incorrect.

There is no formula that can be applied to weigh these factors and, as with fines under articles 101/102 TFEU, the Commission has considerable discretion to set a fine.

Need for a consistent approach

Finally, while the Commission may not have the resources to investigate every single case where there is a suspicion that the parties provided misleading or incorrect information, it is important that the Commission intervenes in a consistent manner against all companies irrespective of size or reputation. Of course, it is to some extent understandable that the Commission may wish to prioritise by focusing on high-profile cases to reinforce the message that companies must provide complete and accurate information. That said, it will be important that the Commission focuses only on those cases where the incorrect or misleading information will have had a material impact on the substantive assessment of the transaction. Ultimately, what matters most is that the Commission's substantive appraisal is done on a consistent basis with the same rigour, irrespective of whether or not it decides to initiate an article 14(1) investigation.