

***Case No IV/M.1433 -
CARRIER
CORPORATION /
TOSHIBA***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 25/03/1999

*Also available in the CELEX database
Document No 399M1433*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.03.1999

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No IV/M. 1433 – CARRIER/TOSHIBA

Notification of 25/02/1999 pursuant to Article 4 of Council Regulation No 4064/89

1. On 25/02/1999, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 by which Carrier Corporation, controlled by United Technologies Corporation, and Toshiba Corporation acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control, by way of transfer of assets, of a “global JV” including, inter alia, two joint ventures (Toshiba Carrier Corporation and Toshiba Carrier United Kingdom limited).
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

I. THE PARTIES

3. United Technologies Corporation (“UTC”) is a global and diversified industrial equipment company. The main member companies of the UTC group are the following: Otis (elevators, escalators, moving walkways and shuttle systems), Pratt & Whitney (commercial and military jet engines and space propulsion systems), UTC Flight Systems (flight and fleet control systems and propellers for commercial aircraft and commercial military helicopters), UT Automotive (automotive parts and electrical systems) and TPM (industrial gas turbines). UTC is also active on the sector of heating, ventilating, air-conditioning, compressor and cold chain businesses (“HVAC”) through its subsidiary Carrier Corporation.
4. Toshiba provides a broad range of high technology products and support services to customers world-wide. Toshiba is mainly active in the areas of information and communication systems, electronic devices and heavy electrical apparatus. Toshiba sells a variety of household appliances, such as air-conditioners, refrigerators and washing machines.

5. The businesses being contributed to the “global joint venture” include the worldwide HVAC business of the parties.

II. THE OPERATION

6. The transaction consists in the formation of a “global joint venture” in the area of HVAC. This “global joint venture” will be governed by a “global alliance agreement” which mainly provides for the formation of two joint companies, Toshiba Carrier Corporation (“TCC”), and Toshiba Carrier UK Limited (“TCUK”). The parties have claimed that although there will be two joint venture companies, the transaction amounts to one overall concentration in which the parents will share joint control. However, the question whether there is one or two concentrations can be left open, because in any event both would have Community dimension and could be treated in the same decision. Furthermore, there is nothing to prevent the Commission from taking into account in the competitive assessment the overall impact of the two considered together.

Joint control

7. As stated above, the global JV will essentially be composed of two interdependent, jointly controlled, companies, created and brought together under the framework of the Global Alliance Agreement”.
8. TCC will be domiciled in Japan and will undertake all of the parties’ HVAC manufacturing and distribution operations in Japan. It will also be ultimately responsible for the distribution of the JV’s products in most other territories, as well as undertaking some product development work for the JV as a whole. Toshiba will own 60% of TCC and Carrier 40%. Although Toshiba will own a majority of TCC, the TCC shareholders agreement provides that Carrier will have various special rights (such as the nomination of 4 out of 10 Directors, a supermajority of 80% of Directors being required for approval of budget and business plan).
9. TCUK will combine Toshiba’s HVAC manufacturing and sales operations in the UK with Carrier’s sales network there. Except in France, Germany and the United Kingdom, Toshiba’s RLC air conditioning sales in Europe have been made through independent distributors¹. Carrier will own 75% of TCUK and TCC the remainder. However, TCC and Toshiba will between them have similar special rights in TCUK to those of Carrier in TCC. The Board of Directors of TCUK will be composed of six directors, four nominated by Carrier and two by TCC, of whom at least one, known as the “Toshiba Director”, shall be nominated by Toshiba. Section 5.5. of TCUK shareholders agreement provides that matters including the establishment of the annual operating budget and business plan must be approved by the “Toshiba Director”.
10. It follows that Carrier and Toshiba will each have the possibility of exercising decisive influence over TCC and TCUK.

Full function character

¹ Toshiba will contribute to TCUK its sales company in the United Kingdom and the local Carrier subsidiaries will acquire Toshiba’s RLC inventory and sales organisation in France and Germany.

11. Both TCC and TCUK will be provided with all financial and other resources, including physical assets, staff and intellectual property rights, necessary for them to perform all the functions of autonomous economic entities. Carrier's European manufacturing facilities - in France, Italy, Spain and the Netherlands - will not be formally contributed to the JV. However, through the overall alliance agreement, their production (in the - limited - areas where it overlaps) will be strategically aligned with that of TCC and TCUK. Article 2 of the Alliance Agreement provides that Carrier's activities outside of TCC and TCUK will be closely integrated into the joint ventures. Moreover, it should be noted that under the Agreement, Toshiba will withdraw permanently from HVAC operations worldwide, other than through the global joint venture. Finally, TCC and TCUK will be established on an indefinite basis.
12. It follows from the above that TCC and TCUK will perform on a lasting basis all the functions of autonomous economic entities. Therefore, the proposed operation will constitute a concentration within the meaning of Article 3 of the Council Regulation.

III. COMMUNITY DIMENSION

13. UTC and Toshiba have a combined aggregate worldwide turnover in excess of EUR 5,000 million (UTC, EUR 21,4 billion; and Toshiba, EUR 38,1 billion). Each of them has a Community-wide turnover in excess of EUR 250 million (UTC, EUR 3,97 billion; and Toshiba, EUR 3,2 billion), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension. It does not constitute a cooperation case under the EEA Agreement, pursuant to Article 57 of that Agreement.

IV. COMPETITIVE ASSESSMENT

A. Relevant product market(s)

14. The only sector in which the parties' activities overlap in Western Europe is that for residential and light commercial ('RLC') air-conditioning systems.
 - 1) Distinction between RLC air conditioning systems and Industrial/Commercial systems
15. The parties suggest that RLC systems can be distinguished from larger ones, as they require little or no maintenance and as little specialised knowledge or equipment is required to install them. Consequently, they are distributed to the end-user by retail chains or independent dealers. For larger (so-called industrial and commercial) systems, by contrast, the equipment appears to be much more sophisticated : the cooling capacity of large commercial or industrial systems is generally between 250 Kw and 1500Kw while RLC air conditioners have cooling capacity of between 2.5 and 10 Kw. Furthermore, these systems involve much more powerful air-conditioners capable of covering areas of between 250 and 20000m2 (between 25 and 120m2 concerning RLC systems). They may also be used to ensure the safety or effectiveness of a process – e.g. where hazardous substances are used or ambient temperatures are critical to production – as well as for comfort.
16. The cost of commercial and industrial systems is also significantly higher and varies between €250 000 and €4,5 million, whereas the average prices for RLC air conditioners vary between €900 and €2000. Furthermore, installation and servicing requirements for commercial and industrial systems are much more significant and specialised than for RLC systems.

Consequently they are either sold direct from the manufacturer or via a specialist dealer or HVAC contractor. All the competitors and customers consulted during the Commission 's investigation answered that RLC systems and Commercial/industrial systems should be considered as two distinct markets.

2) Distinction between the different types of RLC system

17. A further distinction can be made in relation to the various types of RLC system. These systems vary from single portable units to fixed installations capable of cooling the main rooms in a typical house or small commercial property such as a restaurant or small retail bank branch. RLC systems could be divided into two main categories : unitary systems (“monoblocks”) and split systems.
18. Monoblock air-conditioners are single package systems that have all the components completely encased in one unit. Monoblock systems could be further divided into portable systems, that are designed to be movable without any reinstallation, and window rack systems that require a hot-air flue outlet to be inserted in a window. Monoblock systems of either type are mainly used to cool individual rooms of approximately 25-30m² and do not require any specific installation and after-sales maintenance. These products are generally sold through white goods stores, large retail chains or “do-it-yourself” retailers.
19. Split systems are heat pump or centralised air conditioning systems with components located both inside and outside of a building. This kind of system requires more professional installation and after sales service (exchange of filters, refrigerant charge checking) than window rack or portable units. Split systems could also be divided into ducted systems and ductless systems. Ducted split air conditioners are integrated into the building structure itself and installed above the ceiling, while ductless split systems are installed either on the inside walls of buildings (so called “console” or “high wall” systems) or beneath the ceiling. Furthermore, both ducted and ductless air conditioners can be delivered either as single-split units, used to cool an individual room of approximately 25-30m², or multi-split systems in which one outdoor condensing unit is linked to between two and four individual indoor air conditioning units. Ducted and ductless units are generally both sold by independent local retailers specialising in the installation and repair of RLC air conditioners.
20. In any event, the exact definition of the product market(s) for RLC air conditioners can be left aside, because even on the basis of the narrower market definition(s), the operation does not raise competitive concerns.

B. Relevant geographic market(s)

21. The parties suggest that the relevant geographic market for HVAC systems, and specifically for RLC systems, should be considered as at least Western Europe. In this connection, they cite the existence of substantial cross-border sales both between EU Member States and between EU and non-EU countries (including Japan and the USA, the world's main markets for both production and consumption of air conditioning systems). They estimate that imports into Western Europe account for some 80% of RLC consumption there, and suggest that suppliers established in Western Europe all supply customers throughout that area from one or two manufacturing facilities. The parties also argued that there are no major geographic differences in specifications of RLC air conditioning systems between Member States. In this connection, it has to be noted that the parties and their competitors sell essentially uniform

models throughout the European Community. Furthermore, transport costs appear to be relatively low (around 5%).

22. The relevant geographic market could thus be considered as at least EEA wide. The competitors and the customers consulted during the Commission's investigation largely confirmed this conclusion. However, it is not necessary to decide upon the exact geographical dimension of the markets, as in any case the concentrations will not give rise to serious concerns for competition.

C. Assessment

23. The market position of Carrier and Toshiba in 1998 on the EEA market is as follows (market shares in volume):

Types of air conditioners	CARRIER	TOSHIBA	CARRIER/TOSHIBA
Window rack units	[10-20%]	[c.1%]	[10-20%]
Portable units	[5-15%]	[c.1%]	[5-15%]
Ducted split systems	[15-25%]	[c.5%]	[20-30%]
Ductless split systems	[10-20%]	[c.5%]	[15-25%]
Total RLC air conditioning	[10-20%]	[c.5%]	[15-25%]

Source : information from the parties

24. In value terms, the combined market shares of the parties amounted in 1998 to [10-20%] for the total market for RLC air-conditioning systems (and respectively [15-25%], [5-15%], [10-20%] and [25-35%] for window units, portables units, ductless split and ducted split systems). Carrier is the leading supplier of air-conditioning systems in the EEA while Toshiba is the sixth largest. On all the range of RLC products, the parties will face competition in the EEA from strong, world-scale competitors such as Mitsubishi ([5-15%] of total RLC systems), Daikin ([5-15%]), Panasonic ([5-15%]), Fujitsu ([5-15%]) and many others such as Electra group, Sanyo, Sharp and Samsung.
25. On the narrower possible product market for window rack air conditioners, the new entity will have a combined market share of around [15-25%] in value terms in the EU. Major competitors are active including Matsushita, Sharp and Airwell. Furthermore, the increment to Carrier's market share appears to be low ([c.1%]). It should also be noted that Carrier has lost shares of sales in recent years (from [20-30%] in 1996 to [15-25%] in 1998). The same is true concerning the market for portables on which the parties will also face competition from strong competitors such as Hitachi or Sanyo. The parties have higher market shares in ducted and ductless split air conditioners. However, a number of strong competitors are active in both of these products (Daikin, Matsushita, Airwell, Mitsubishi, York International).
26. The following factors should also be taken into account. The European market for RLC air conditioners is generally considered as underdeveloped, compared to Japan and the United States, with approximately 1.3 millions units sold per year (and circa 5% of the worldwide sales) and a penetration level of around 0.2 air-conditioning units per household. The Japanese market is by far the biggest market world-wide (35% of the world-wide sales). In volume terms, the Japanese market is four times the size of the European market (between 5.8 and 7

million units sold annually) and displays the highest level of individual household penetration with an average of 2.6 air-conditioning units per household. This partly explains the importance of Japanese manufacturers in the supply of these products. As regards new entry by producers, the parties have stated that the high growth potential of the European market has attracted a number of companies such as the Korean Samsung, the Trane company (US) and the UK based company York International. It should also be noted that transport costs are not considered a barrier to trade, either within the EEA (estimated below 5%) or from outside the EEA (approximately 6%).

27. On a national basis, the parties had in 1998 combined market shares for all RLC systems together varying from around [$<5\%$] in Ireland up to [30-40%] in The Netherlands, in value terms. The combined market shares of the new entity exceed 25% in Finland and in The Netherlands. On the narrower possible markets, in most countries, either the combined market shares do not exceed 25% or, where they do so, the increments to market shares are either minimal or non-existent. The parties' combined market shares reached [40-50%] in Sweden for window rack air conditioners (Carrier [35-45%] and Toshiba [c.5%]) and in Portugal for ducted split systems (Carrier [35-45%] and Toshiba [$<10\%$]). In Sweden, competitors such as Airwell, active in Denmark and Finland, could be considered as a likely cross-border entrant. The window rack air conditioners segment also appears to be relatively underdeveloped in this country, the total size of which only represented around € 1 million in 1998. In Portugal, it should be noted that Toshiba's market share for ducted split systems decreased from [10-20%] in 1996 to [$<10\%$] in 1998 while Carrier's decreased from [40-50%] to [35-45%] during the same period. On all these markets, the parties will have to face current and potential competition from other actors that can supply all the range of RLC products.
28. Even though the new entity will become market leader after the merger, it appears that the notified operation will have no impact on competition in the EEA. This conclusion is largely confirmed by the results of the Commission's enquiry. Consequently, the proposed concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of that area.

IV ANCILLARY RESTRICTIONS

29. The parties have requested that a number of ancillary restrictions should be assessed in conjunction with the concentration.

Non Competition clause

30. Article 2 (I) of the Alliance Agreement mainly provides that Toshiba undertakes not to compete with the JV in the HVAC business outside Japan. In addition, both Toshiba and Carrier have undertaken not to compete with TCC in Japan or with TCUK in Western Europe.
31. The provision aims at expressing the reality of the lasting withdrawal of the parents from the market assigned to the joint ventures and therefore it is covered by the present decision.

Confidentiality clauses

32. The JV agreements contain a number of confidentiality clauses concerning the global HVAC business. These confidentiality clauses only apply to non-public technology and information related to the transferred business.
33. In so far as such provisions constitute restrictions they are directly related to and necessary for the successful implementation of the concentration. They can therefore be treated as ancillary to the concentration.

Trademark and trade name assignments

34. The creation of the “global joint venture” contains a series of Trade mark and trade name assignments. Under the terms of the Trademark License Agreement (“TMLA”), TCC grants to TCUK a royalty-bearing non-exclusive, non-transferable , right and license to affix the Toshiba mark on RLC air conditioning products by or for TCUK and to use the Toshiba mark in association with the sale, installation and servicing of RLC air-conditioning systems in Continental Europe, the Middle East and Africa. TCUK shall not cause nor allow others to so use the Toshiba mark in any such way without prior written consent of TCC. The TLMA contains a number of other standard clauses in order to safeguard the goodwill associated with the Toshiba trademark. Under the Trademark License Agreement between Carrier and TCUK, Carrier, inter alia, also grants to TCUK the same type of right and license to affix the Carrier trademark on RLC air conditioning products manufactured by or for TCUK. The clauses and conditions of this agreement are identical to those of the TLMA.
35. Under the terms of the Tradenam License Agreement (“TNLA”), TCC grants to TCUK a royalty bearing non-exclusive, non-transferable , right and license to use the trade name Toshiba as part of its authorised business name for the conduct of business in the RLC market. TCUK shall use the trade name Toshiba only as part of the authorised business name expressly defined in the TNLA and in no other form of trade name. In addition TCUK shall not use the trade name Toshiba in any manner which would tend to disparage or degrade the reputation associated therewith, or which would impair TCC’s rights therein or its ownership thereof and TCUK shall use the trade name Toshiba only in a form and manner that is approved by TCC and shall comply with any written instructions of TCC relating thereto. Under the Carrier Tradename Agreement, Carrier grants to TCUK the same type of right and license to use the trade name Carrier as part of its authorised business name for the conduct of business in the RLC market. The terms of this agreement are identical to those of the TLNA.
36. As far as these license agreements are necessary to guarantee the full value of the assets transferred, the above restrictions can be considered as being covered by the concentration.

V. CONCLUSION

37. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission,