

***Case No COMP/M.2437 -  
NEC / TOSHIBA***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 05/06/2001

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 5/6/2001

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

**To the notifying parties**

Dear Sir/Madam,

**Subject: Case No COMP/M. 2437 - NEC / Toshiba / JV  
Notification of 02/05/2001 pursuant to Article 4 of Council Regulation  
No 4064/89<sup>1</sup>**

1. On 02/05/2001 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 by which the undertakings NEC Corporation ("NEC") and Toshiba Corporation ("Toshiba") acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of a newly created company constituting a joint venture.
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. NEC is a Japanese company active in products and systems in the field of semiconductors, electronic devices, telecommunications, computer systems and peripherals, television and radio broadcast equipment and satellites.

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<sup>1</sup> OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

4. Toshiba is also based in Japan and has activities in information and communications equipment and systems, consumer electronics, power systems and industrial equipment, electronic components and materials, and space related products.

## **II. THE OPERATION**

5. The notified transaction consists of the creation of a joint venture between NEC and Toshiba. The parties intend to transfer the vast majority of their space related business to the JV (“NEC Toshiba Space Systems”), which will offer satellites and satellite systems, their related ground systems, subsystems and components, spacecraft systems, space stations, planet landing systems and rocket components.
6. However, each of the parties will retain certain space related businesses which will be excluded from the scope of the JV. These are for NEC (i) on-board electronics equipment (e.g. guidance control equipment and data calculating systems); (ii) data processing equipment and systems for array radar; (iii) laser application equipment (excluding communications applications); (iv) ground systems relating to (i) to (iii); and (v) ground systems for satellite communication (antenna, transceivers, etc.). Toshiba will remain active in (i) satellite broadcasting stations, satellite communication equipment for ships and/or aircraft, and satellite news gathering stations; (ii) satellite news-gathering vans and ground stations for public administration radio communication systems; (iii) transmitting and/or receiving equipment for television systems (satellite broadcasting vans, transmitting vans for HDTV, etc.); and (iv) mobile satellite broadcasting.
7. The parties explain that the businesses NEC retains are not exclusively used in space activities, and, more generally, that the retained activities relate to different sectors where their activities do not overlap, and therefore the parties decided not to transfer them to the JV.

## **III. CONCENTRATION**

8. NEC will own 60 per cent of the issued share capital in the Joint Venture, and will have the right to appoint four of the seven board members. Toshiba will own the remaining 40 per cent of the shares, and will have the right to appoint the remaining three board members. While NEC will hold the majority of the shares, and the majority of seats on the board, NEC and Toshiba will exercise joint control over the Joint Venture, because certain decisions of the board of directors, and in particular those concerning such matters as business plans and budgets, require the approval of one NEC director and one Toshiba director. Accordingly, both Toshiba and NEC effectively have veto rights over strategic board decisions.
9. The JV will carry out the space systems business activities transferred to it, which are currently undertaken by the parent companies. It will be established for an indefinite term, and will have an independent management structure and resources including employees, allowing it to perform the range of functions from research and development, through manufacture, to direct sales and after-sales support on the open market. The JV initially will be dependent upon NEC for a short period for its overseas sales and marketing activities (these are not being transferred to the JV), but will organise and develop its own overseas sales and marketing capabilities immediately post start-up.

10. In the light of the above, it is concluded that the joint venture will be jointly controlled by NEC and Toshiba, and that it will perform, on a lasting basis, all the functions of an autonomous economic entity. It follows that the notified transaction is a concentration pursuant to Article 3 (2) of the Merger Regulation.

#### **IV. COMMUNITY DIMENSION**

11. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion<sup>2</sup>. Each of NEC and Toshiba have a Community-wide turnover in excess of EUR 250 million, 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.

#### **V. COMPETITIVE ASSESSMENT**

##### **1. Relevant Product Markets**

12. In earlier decisions, in particular in the Astrium case (M.1636 – MMS/DASA/Astrium), the Commission found that the space industry could be split into the following main sectors: Satellites, space infrastructure (mainly space stations), launch services, launchers and ground systems. In all these sectors, a further distinction has to be made between the prime contracting level and the equipment level. As regards satellite equipment, the Commission further distinguished between the platform and the payload of the satellite, and indicated that there might be separate product markets for the different subsystems and components assembled on the satellite. As regards ground systems, the Commission indicated that a distinction should be made between systems dedicated to the command and control of the spacecraft, and those providing an interface with the spacecraft for the transmission of data and voice signals.
13. The parties submit that outside Japan, i.e. on a European or world-wide level, the JV will only be active in the sector for satellite equipment, and there on markets such as attitude sensors and telemetry, tracking and control (“TT&C”) transponders for the platform, payload telecommunications equipment such as transponders and antenna, and components of solar paddles. As regards attitude sensors, which are used to align the satellite in relation to the earth, the sun or the stars, the parties indicate that a further segmentation into earth, star and sun sensors might be appropriate. They argue that there are significant differences with relation to the underlying technology (magnetism versus optics based) and the required precision of the sensor. Furthermore, the parties accept that the Commission may favour a further segmentation of others of the above mentioned markets, e.g. telecommunications transponders might be segmented into electric power conditioners, channel amplifiers, low noise receivers etc.
14. The proposed product market definitions of the parties appear to be in line with the Commission’s general position taken in previous decisions. However, in this case the precise product market definitions for the different satellite components can be left open,

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<sup>2</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

as no matter the exact delineation of the markets, effective competition would not be significantly impeded in the EEA or any substantial part of it.

## 2. Relevant Geographical Markets

15. Satellites and their equipment may be purchased by three different types of customers: (i) commercial operators (purchasing essentially communication satellites and equipment); (ii) civil institutional customers, i.e. national governments and space agencies such as ESA (focussing on observation and scientific satellites); and (iii) military customers (purchasing both types).
16. In previous decisions, the Commission found that (i) the markets for *commercial satellites and equipment* had to be considered as global, (since commercial customers purchase these products without concern for geographic considerations); (ii) the geographic markets for *civil institutional satellites and equipment* corresponded to the ESA Member State territories (since these products are primarily procured by the European Space Agency, which is required to grant preference to the fullest extent possible to industry in Member States (the "juste retour" principle); and (iii) that the geographic markets for *military products* would appear to be either national or world-wide, depending on the procurement pattern concerned.
17. The parties follow the geographical markets as previously defined by the Commission. They submit that the JV in Europe will only be active on markets which can be considered as world-wide (i.e. commercial satellites and their respective components and equipment), as due to its non-European origin, the JV will not have access to ESA or governmental European procurement programs.

## 3. Assessment

18. There is no indication that the transaction could lead to affected markets in the EEA territory, either on a horizontal level or on a vertical level.

### *Horizontal effects*

19. The focus of the parties' space activities is the Japanese market where they act as prime contractors for institutional programs for the Japanese Government. Both generated [the major part] of their space related turnover through sales in Japan. The parties have only very limited sales of space products related to commercial communication satellites in the Community and world-wide. In 2000, NEC generated € [...] through space business sales in Europe, which relates to TT&C transponders for the satellite bus and different kinds of transponders used as telecommunications equipment. Toshiba had [...] space related sales in Europe in 2000. In the last three years, Toshiba has only sold [...] in Europe [...], namely [...].
20. There are no overlaps between the parties' activities outside the institutional sector in Japan. The parties are not active in institutional or governmental programs (both civil or military) in Europe. With regard to the world-wide market for commercial satellites, neither of the parties acts as prime contractor for satellites. As regards equipment and components for commercial satellites, there are no overlaps between the parties' products, as Toshiba only sold [two kinds of components] in this sector, which NEC does not produce.

21. In all markets - except for the market for attitude sensors – the parties' respective share is [...] below 15 %, irrespective of the depth of the segmentation of the product markets, and in most cases it is below [...]%. On all these markets important competitors like Boeing, Lockheed Martin and Alcatel are active. With regard to attitude sensors for commercial satellites, the parties submit that NEC holds a [10-30]% market share on the world-wide market, which would amount to [>20]% if earth sensors were to be regarded as a separate product market. However, there is again no overlap between the parties' activities, as Toshiba sells its attitude sensors on the Japanese market for institutional programs only. If one considered a further segmentation of the market for attitude sensors into sun, star and earth sensors, there would also be no product overlap, as NEC only manufactures earth sensors, and Toshiba only produces star and sun sensors. NEC presently does not supply earth sensors to EU prime contractors.

#### *Vertical issues*

22. There are no issues of vertical integration with an impact on the EEA, as the parties are not active as prime contractors outside the institutional sector in Japan, and neither of them is active up- or downstream of any product the other sells on the world-wide market for commercial satellites equipment. Furthermore, there are no risks of possible foreclosure effects, as neither of the parties has a significant position in the supply to competitors of the other party.

#### *Conclusion*

23. In the light of the above, it can be concluded that the operation does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

### **VI. ANCILLARY RESTRAINTS**

24. The Joint Venture Agreement contains a non-compete restriction which the parties consider as directly related to and necessary for the implementation of the Joint Venture, and which they therefore request be treated as an ancillary restriction. Pursuant to that restriction, NEC and Toshiba, shall not compete with the business of the Joint Venture after the transfer of the space businesses to the Joint Venture for the duration of the Joint Venture Agreement. The restriction includes subsidiaries of the parties where they own more than 50% of the shares with voting rights. In case the Joint Venture Agreement should be terminated before the lapse of five years from the date of transfer of the parties' space businesses (i.e. 30 September 2006), the non-compete obligation will continue until 30 September 2006. The parties maintain that the duration of the above non-compete obligation is necessary in the light of the high-technologies involved, the large expenditure of resources on research and development, the relatively long duration of programmes, and the considerable know-how which will be transferred to the Joint Venture. The parties submit that this justifies exceeding the general three-year period recommended as a guideline in the Commission's new draft notice on restrictions directly related and necessary to concentrations.
25. The Commission only partly follows the arguments of the parties. Against the background of the particularities of the markets where the JV will be active as mentioned by the parties, it appears to be justified to treat the clause as ancillary for a duration of five years. However, the Commission considers that ancillary treatment is not justified for a non-compete clause for the entire duration of the JV, which may

significantly exceed this period. In addition, if the JV agreement were to be terminated before the expiration of the five-years period, the non-compete clause would exceed the lifetime of the JV. The Commission takes the view that non-competition obligations extending beyond the lifetime of the JV cannot be regarded as directly related and necessary to the implementation of the concentration. Consequently, the agreement cannot be considered as ancillary for (i) longer than five years and (ii) beyond the duration of the JV agreement, in case it should be terminated before the lapse of five years.

## **VII. CONCLUSION**

26. 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

*Signed,*  
Mario MONTI  
Member of the Commission