

***Case No IV/M.527 -
Thomson / Deutsche
Aerospace AG***

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

Article 6(1)(b) NON-OPPOSITION

Date: 02/12/1995

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 02.12.1994

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

**Subject: Case No.IV/M.527 - Thomson CSF/Deutsche Aerospace
Notification of 28 October 1994 pursuant to Council Regulation (EC) No. 4064/89**

- 1 The concentrations were notified on 28 October 1994 and consist of the creation of two joint ventures between Thomson-CSF, a subsidiary of the French company Thomson SA (Thomson), and Deutsche Aerospace AG (DASA), a subsidiary of the German company Daimler-Benz AG. One joint venture, Thomson DASA Armament (TDA), will be active in the field of armaments. The other joint venture, Bayern Chemie (BC), will be active in the field of missile propulsion.
- 2 After examination of the notification, the Commission has concluded that the notified operations fall within the scope of application of Council Regulation No 4064/89 and do not raise serious doubts as to their compatibility with the common market and with the functioning of the EEA Agreement.

I THE PARTIES

- 3 Thomson is a holding company controlled by the French State, with two main subsidiaries. The first, Thomson Consumer Electronics, is active in the design, development and manufacture of consumer electronic products. The second, Thomson-CSF, is active in professional electronics and defence systems. Its main strengths are in aircraft equipment, communication and command networks, detection systems, missile systems, electronics and information technology.
- 4 Daimler-Benz is a German holding company active in a variety of sectors such as the manufacture and distribution of passenger cars and commercial vehicles (through its subsidiary

Mercedes-Benz AG), the manufacture and distribution of automation equipment and systems, rail transport systems, electronic equipment and components and multi-functional electronics (through its subsidiary AEG AG), and services in the areas of computer retailing, finance, insurance, distribution and marketing (through its subsidiary Daimler-Benz InterServices AG).

Through its subsidiary DASA Daimler-Benz is also active in the development, manufacture and sales of aerospace related products, defence technology, medical technology, power plants, diesel engines, radar, radio and sensor systems.

II THE OPERATION

a) Joint control

- 5 The parties have agreed that they will merge their activities relating to armaments in a French joint venture, TDA, and will similarly transfer their activities relating to missile propulsion to a German joint venture, BC. Both joint ventures will be jointly owned and controlled by Thomson-CSF and DASA.
- 6 More precisely DASA will acquire from Thomson a shareholding of 50 per cent in TDA, into which almost all Thomson's armaments-related activities will have been transferred, and DASA will transfer to TDA all the shares in its wholly owned German subsidiary TDW-Gesellschaft für verteidigungstechnische Wirksysteme mbH (TDW), to which DASA will have contributed its armament business prior to the creation of the joint venture.
- 7 Thomson will similarly acquire a shareholding of 50 per cent in BC, into which all DASA's missile propulsion-related activities will have been transferred, and Thomson shall cause the transfer to BC of all the shares in its subsidiary PROTAC, to which Thomson will have contributed its missile propulsion business.
- 8 As regards TDA, both Thomson and DASA will be equally represented on the board of directors which will have six members. TDA will be managed by a president directeur général (PDG) elected by the board by a unanimous vote of the directors. The PDG will for the first five years be proposed by Thomson. He will have a casting vote at any meeting of the Board with the exception of strategic decisions such as the approval of the general accounting principles, the budget, the mid-term business plan and the strategic plan. It follows that TDA will operate in all respects as a single entity under the joint control of Thomson and DASA.
- 9 As regards BC, both Thomson and DASA will be equally represented on the council (Beirat), composed of four members. The council will elect a chairman from among its members by unanimous vote, and the chairman will have a casting vote at any meeting of the council with the exception of certain matters to be voted unanimously such as the approval of the general accounting principles, the budget, the mid-term business plan and the strategic plan. The council will exercise all the functions of the shareholders meeting except those which are assigned by law to the shareholders meeting, such as changes in the statute or in capital. The parties will be equally represented in the shareholders meeting. It follows that BC too will operate in all respects as a single entity under the joint control of Thomson and DASA.

b) Concentrative joint venture

- 10 Each of the joint ventures performs on a lasting basis all the functions of an autonomous economic entity. Except for provisions in the joint venture agreement in the event of deadlock the joint ventures are intended to operate on a lasting basis. They each perform functions comparable to those carried out by other undertakings operating on the same market. The parties will transfer to them all the assets necessary to carry on their business; these include the relevant intellectual property rights, which will be assigned or (if the parties have independent applications for the rights) either licensed to the joint ventures for their duration or assigned to them and then licensed back. Each joint venture will be responsible for the marketing of its own products. Each will independently fulfil its funding requirements. Each will recruit its own staff, although some of the personnel may be seconded by the parties.
- 11 In addition to remaining active in sectors described in paragraph above which are not directly connected with armaments and missile propulsion Thomson and Daimler-Benz will not contribute the following activities to the joint ventures:

Thomson will continue to supply 76 mm proximity fuses for naval application. The turnover involved represents less than [...] ⁽¹⁾ of the current French and EU turnover and less than [...] ⁽¹⁾ of the current total turnover of Thomson in proximity fuses; indeed it is the minor nature of the activity and of the subsidiary concerned which makes it economically unfeasible to transfer it to TDA. Thomson will be unable to develop further proximity fuses as a consequence of (among other factors) the investment required.

Thomson will continue to participate in the development of submunitions for the Multiple Launch Rockets Systems (phase 3), a programme for the development of a new type of rocket in which France is now the only country involved. Thomson coordinates this project; it will itself have no industrial activities but will subcontract the development.

Daimler-Benz will retain control of Conventional Munitions Systems Inc, a United States company which supplies warheads and their components and related services exclusively on its home market. Provisions of US law relating to the foreign acquisition of armaments make the transfer of these activities to TDA very difficult.

Daimler-Benz will retain its 50 per cent participation in RTG, a joint venture company with Diehl, another German company. RTG manufactures the MW1 dispenser system for use on Tornado aircraft. The last delivery of Tornado aircraft has now taken place. Except for warranty work and the delivery of spare parts the activity of RTG has also ended.

- 12 These activities are either of minimal significance or are carried on in separate product or geographical markets from those of the joint ventures. With the exceptions of these activities technological barriers, high investment requirements and the general reduction in defence budgets will prevent Thomson and Daimler-Benz from re-entering the markets of the joint ventures. The joint venture agreement provides that if either party by acquisition obtains an armaments or missile propulsion business it will transfer it to the joint venture.
- 13 The parties also remain active in markets both upstream and downstream from the joint ventures. The joint venture agreement provides for them to supply products to the joint

⁽¹⁾ Deleted business secret, 0-15%

⁽²⁾ Deleted business secret; 0-15%

ventures provided that they are broadly competitive with other suppliers (see paragraph 33 below). The proportion of the joint ventures' supplies originating from the parties is however low. Such products will furthermore be passed on with a substantially enhanced value, having been incorporated into the products supplied by the joint ventures. The agreement also envisages that the parties will sub-contract from the joint ventures specific manufacturing requirements. These requirements are limited both in quantity and duration (a maximum of 4 years); they arise from existing weapons programmes in which Thomson and Daimler-Benz are engaged and related sub-contracts entered into by them with TDA and BC.

- 14 The operation thus involves no substantial risk of cooperative behaviour between the parties. The proposed joint ventures are therefore of a concentrative nature within article 3(2) of the Regulation.

III CONCENTRATION OF COMMUNITY DIMENSION

- 15 The notified operations have a Community dimension within the meaning of Article 1(2) of the Regulation.
- 16 The undertakings concerned have a combined aggregate worldwide turnover in excess of 5000 million ECU. Both Thomson and Daimler-Benz have a Community-wide turnover in excess of 250 million ECU, but 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. Thomson and Daimler-Benz each have a turnover in the EFTA states exceeding 250 million ECU. The notification is therefore a cooperation case with the EFTA Surveillance Authority under the EEA Agreement.

IV COMPATIBILITY WITH THE COMMON MARKET

a) Relevant product markets

- 17 The concentrations concern six separate product markets. Five of these products (to be supplied by TDA) are types of armament - mortars and associated ammunition; unguided anti-armour weapons; subsystems such as air-to-ground rockets, bombs, cargoes and submunitions; proximity fuses; and warheads. The sixth product (to be supplied by BC) is propulsion components for tactical missiles.
- 18 Mortars are a form of artillery used by infantry troops on a decentralised basis. They are classified by calibre or degree of mobility and fire a range of projectiles intended for different objectives.
- 19 Unguided anti-armour weapons consist of anti-tank weapons fired from the shoulder and various types of mine.

- 20 Subsystems such as air-to-ground rockets, bombs, cargoes and submunitions are devices installed on aircraft or helicopters and more recently ships for the purpose of attacking mobile targets on the ground.
- 21 Cargoes are dispensing bombs, designed to release a high number of submunitions onto the target area and thus providing a short stand-off capability to aircraft.
- 22 Proximity fuses are the electronic components in ballistic projectiles which control their explosion; they differ from mechanical fuses which operate on impact.
- 23 Warheads are the payloads for missiles and other weapons. The warheads supplied by TDA contain conventional explosives,
- 24 Propulsion components are the motors and boosters used to propel tactical missiles.

b) Geographic reference markets

- 25 The Commission has generally considered the geographic reference markets for defence products to be national, at least where a country has an established producer of the relevant product. This is because the government in such countries, wishing to maintain national suppliers and thereby the country's military independence, favours national producers if they exist to the exclusion of importers; since the government is almost invariably the sole purchaser it is difficult for such importers to enter the market. France and Germany are national markets for most defence products. Similar considerations usually influence governments to insist that sub-contractors are also of the same nationality, so that the markets for such products are also generally national. A European market is beginning to develop as a result of common defence programmes.

c) Competitive assessment

- 26 On the demand side markets for all defence products are reducing as a result of the end of the cold war and national budgetary constraints; capacity already exceeds actual and forecast demand, with the result that competition will become even more intensive and further concentration can be anticipated. A further result is that on the supply side these markets will become increasingly multi-national as national governments enter into cooperation agreements and suppliers collaborate on research and development and other aspects of development. The need for an extensive variety of know-how and technological expertise, together with national regulatory systems and the need to finance development projects during long lead times, are entry barriers for the industry.. Another powerful factor is the increasing penetration of European markets by United States suppliers facing reduced domestic markets. Above all the demand side in markets for defence products is influenced by the existence of a single ultimate consumer in each country, the ministry of defence.
- 27 With regard to the supply within the EEA of the relevant products Thomson and Daimler-Benz have so far operated largely within distinct geographical markets. Thomson's principal market is its home market, France; similarly the principal market of Daimler-Benz is Germany. Their respective markets overlap only in France, for warheads and proximity fuses.

- 28 As far as warheads are concerned, both companies are present in France. According to the parties, their market shares in France are [...] ⁽¹⁾ for Daimler-Benz and [...] ⁽¹⁾ for Thomson, while the other main suppliers for warheads in France are Aerospatiale ([...] ⁽¹⁾) and Giat ([...] ⁽¹⁾). Thomson, Aerospatiale and Giat are each French public undertakings. In spite of the fact that warheads are only an element of a whole system such as a missile, warhead manufacturers are chosen most often directly by the end customer, ie the ministry of defence, simultaneously with the system provider.
- 29 Increasingly missile programmes are not undertaken at a national level but in cooperation by two or more states. The presence of Daimler-Benz in France is directly linked to trans-national programmes, ie the Euromissile programme, controlled jointly by the French and the German states, and the Euromissile Dynamics Group, controlled jointly by the British, German and French states. Those transnational programmes represent a major part of Daimler-Benz' turnover in Europe. That is why the market for warheads tends to be less national, thus allowing warhead manufacturers from different states to compete against each other. On the demand side the final purchaser remains a state or a group of states. This ultimate buyer can always either obtain its supplies from TDA or from the above-mentioned French public undertakings or turn to alternative suppliers such as Diehl (Germany) and Royal Ordnance (part of British Aerospace, United Kingdom), which have the capacity to supply warheads of an equivalent standard to those supplied by the parties. In such circumstances the operation does not create or strengthen a dominant position in the supply of warheads.
- 30 As regards proximity fuses Thomson has 94 per cent of the French market. Daimler-Benz attempted to enter the French market in 1993 in connection with a study to decide whether their fuses could be adapted for French use. But they did not succeed in doing so. The operation thus creates no addition of share on the French market.
- 31 As a conclusion the operation will 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.

V ANCILLARY RESTRAINTS

- 32 The parties have requested that certain restrictions contained in the joint venture agreement be considered as ancillary to the concentration.
- 33 Article 6.1 gives to Thomson-CSF and DASA preference in the supply of goods and services to the joint ventures, provided in some cases that they are competitive with other suppliers and in other cases that there is no overriding advantage in sourcing elsewhere (cf paragraph 13 above). Also by article 6.1 existing suppliers to the parties will be engaged by the joint ventures in some cases if they are competitive with other suppliers and in other cases subject to continued satisfactory performance. These conditions create restrictions on competition. They cannot be said to be necessary to the implementation of the concentration in the sense that in their absence the concentration could not be implemented or could be implemented only under more uncertain conditions, at substantially higher costs, over an appreciably longer period or with

⁽³⁾ Deleted business secret; 15-30%

⁽⁴⁾ Deleted business secret; 0-15%

⁽⁵⁾ Deleted business secret; 30-45%

⁽⁶⁾ Deleted business secret; 15-30%

considerably less probability of success. They are accordingly not covered by the present decision.

- 34 By article 6.6 the parties agree (subject to the exceptions discussed at paragraph 11 above) not to compete with the joint venture companies and express their intention that, if either of them later acquires a competing business, it will be added to the joint venture. This prohibition aims at expressing the reality of the lasting withdrawal of the parents from the market of the joint ventures; it is therefore an integral part of the concentration. The restriction contained in the licences of intellectual property rights granted back to Thomson and Daimler-Benz by the joint venture companies (article 11.2) to their use in non-competing businesses has a similar aim. They are thus ancillary to the concentration.
- 35 Article 19 imposes upon the parties various limitations on their conduct pending the completion of the arrangements to set up the joint ventures. These are intended to ensure that the concentration is put into effect in the conditions contemplated by the parties and that neither party can during this period act in relation to the businesses to be merged to the detriment of the other. To the extent that these provisions constitute restrictions on competition they are necessary for the implementation of the concentration in the sense described in paragraphs above.
- 36 As discussed in paragraph 13 above, annex 9 requires Thomson and DASA to continue to sub-contract work to the joint ventures the manufacture of specified components for armaments. These requirements are for a limited duration and for limited quantities and are in some cases qualified by the condition that the sub-contractor must be competitive. Since they impose no exclusivity they have no anti-competitive effect. To the extent that they create restrictions they are intended to ensure outlets for the joint ventures during the initial period of their operation. They thereby contribute to the certainty, economy and speed of implementation of the joint ventures and are thus ancillary to the concentration..

VI CONCLUSION

- 37 For the foregoing reasons, the proposed concentration does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

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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 functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No. 4064/89.

For the Commission