

EN

*Case No IV/M.086
T H O M S O N /
PILKINGTON*

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

Article 6(1)(b) NON-OPPOSITION
Date: 23.10.1991

*Also available in the CELEX database
Document No 391M0086*



COMMISSION
OF THE EUROPEAN
COMMUNITIES

Brussels,
23.10.1991

MERGER PROCEDURE
ARTICLE 6(1)b DECISION

PUBLIC VERSION

To the notifying parties

Dear Sirs,

Subject : Case No. IV/M.086 - Thomson / Pilkington
Notification pursuant to Article 4 of Council
Regulation No. 4064/89

1. The proposed operation which was notified on 20 September 1991, concerns the acquisition by Thomson-CSF S.A. of 49.99% of the shares of a subsidiary of Pilkington plc. This subsidiary company is engaged in the field of optronics, mainly in the defence sector.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation No. 4064/89 and does not raise serious doubts as to its compatibility with the common market.

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The parties

3. Thomson-CSF S.A. (Thomson) is a French company active in high technology military products. Its main strengths are in aircraft equipment, communication and command networks, detection systems, missile systems and technical components including semiconductors. It is also involved in computer equipment, software and technical services. Thomson S.A. holds 59% of Thomson-CSF S.A. and 75% of its voting rights.
4. Pilkington plc (Pilkington) is a British company whose major activities are centered on glass production. Its main strengths are in flat and safety glass, insulation, vision care and optronics.

The agreement

5. The parties have agreed that Thomson will take a 49,99% stake in Pilkington Optronics (PO) which is a Pilkington subsidiary in which Pilkington's optronics business is currently concentrated. Thomson will not transfer any assets or securities to this company. Thomson is already active in the optronics field and will not withdraw from these activities.

Joint venture

6. Thomson and Pilkington will have an equal number of ordinary shares in PO. []⁽¹⁾. The company's management structure will be two-tier:
 - there will be a board of directors, half of them nominated by Thomson and half of them nominated by Pilkington; the chairman of the board will be nominated by Pilkington but will not have a casting vote;
 - there will be a chief executive officer nominated by the directors appointed by Thomson subject to the exercise by the directors appointed by Pilkington of a right of veto on reasonable grounds. []⁽¹⁾. The chief executive officer will be able to attend meetings of the board of directors but will not be a director. He will be responsible for day-to-day management and will nominate the senior members of the management of PO;

[]⁽¹⁾. There will be a joint committee for the review of business opportunities, consisting of at least two directors of PO, one appointed by Pilkington and one appointed by Thomson.

⁽¹⁾ Deletion - business secret.

7. It follows that PO will be jointly controlled by Thomson and Pilkington and therefore the operation is a joint venture within the meaning of Article 3 of the Merger Regulation.

Concentrative joint venture

8. PO will be a full function joint venture, established on a permanent basis. All the current activities of PO will be included in the joint venture. The joint venture company will retain all the intellectual property rights which it currently uses, Pilkington transferring to PO any such intellectual property rights which are owned by Pilkington and used exclusively in the optronics business. There is also provision for the grant at completion of irrevocable licences to the joint venture in respect of intellectual property rights which are also used in other parts of Pilkington's business and for the joint venture to grant licences to Pilkington in respect of intellectual property rights it will own and which are currently used in other businesses of Pilkington. However, Pilkington has informed the Commission that it does not envisage any such sharing of intellectual property rights. There is no provision in the agreement for Pilkington or PO to make any intellectual property rights available to Thomson or vice versa.
9. Thomson will not withdraw from the optronics field. The company will not transfer any assets to the joint venture. Thomson will therefore remain in the same field of activity as the joint venture. Under the terms of the agreement, Thomson will not acquire any competing optronics business within the UK (directly or by way of taking shareholdings) without first offering the joint venture the opportunity of doing so.
10. Pilkington effectively withdraws from the optronics market transferring all its relevant assets including intellectual property rights and know how to the joint venture, with the exception of a minor research and development programme relating to a civil application of optronics.

There are two overseas subsidiaries of Pilkington dealing with optronics which will not be transferred to the joint venture which are Pilkington Optronics Inc. and Pilkington Opt-Electronics (Pty) Ltd. The activities of the first subsidiary are being run down and the second one is dormant. Pilkington has also a 49% stake in Pilkington Optronics S.A. but is not involved in the management of this Brazilian distribution company and has not received any orders from it. Furthermore, Pilkington agrees not to compete with the joint venture (directly or by way of taking shareholdings) during the period it is a shareholder of the joint venture and for two years thereafter. Finally the glass manufactured by Pilkington and used by PO represents []⁽¹⁾ of Pilkington's turnover. It can be added that this glass can be purchased from other companies in the EC, as Pilkington Optronics has already done in the past.

11. It is highly improbable that Pilkington would be able to re-enter the optronics market of the joint venture even if it was not bound by the non-competition restrictions in the agreement. There would be considerable practical difficulties

⁽¹⁾ Deletion - business secret. The figure is negligible.

in attempting to re-enter this market, the cumulative effect of which would constitute a high barrier to entry. These difficulties include:

- high technological barriers to entry - Pilkington would need to acquire the rights to use the appropriate technology which is developing at a fast pace and which the company will therefore lose touch with very quickly;
- the time scale for showing a profit on new products - it is not unusual for a period of 5 to 7 years to pass between the concept stage of a new defence optronics product and the commencement of commercial production during which period no profits would be earned;
- professional skills and expertise - the need to recruit a team of engineers and scientists;
- substantial investment would be required for a purpose built factory with purpose built capital equipment.

12. It follows from the above that since Pilkington will withdraw from the market of the joint venture with very little prospect of re-entering the market, there will not be coordination of the competitive behaviour of Pilkington and Thomson. As far as the coordination of the competitive behaviour between Pilkington and the JV is concerned, such coordination will not occur for the reasons mentioned in paragraphs 10 and 11. Finally, as regards the danger of coordination of the competitive behaviour between Thomson and the JV, the following elements have to be taken into consideration:

- a) While it is possible that the markets concerned may become more open to intra-Community competition in the foreseeable future, Thomson will continue to focus its activities in the French market while the joint venture's main field of activity will be in the UK, for the reasons explained in paragraphs 21 and 27 below. Furthermore, the products manufactured by the joint venture and by Thomson are to a large extent complementary.
- b) Pilkington's participation in the joint venture has been designed in such a way as to leave Thomson the main responsibility for the market behaviour of the undertaking. It will be recalled that the CEO of the joint-venture company will be nominated by the Thomson directors.

On the basis of these elements it is not reasonable to assume, in the present case, that there will be significant room for competition between Thomson and the JV.

The notified operation is therefore a concentration within the meaning of Article 3 of the Merger Regulation.

Community dimension

13. In their respective latest financial years⁽¹⁾, the combined aggregate worldwide turnover of Thomson S.A. and Pilkington plc exceeded 5.000 million ECU (Thomson S.A. 10.880 MECU, Pilkington plc 3.745 MECU). The Community-wide turnover for both Thomson S.A. and Pilkington plc exceeded 250 MECU (approximately 5.956 MECU for Thomson S.A. and 1.705 MECU for Pilkington plc). The parties did not achieve more than two-thirds of their Community-wide turnover in one and the same Member State. Thus, the operation has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

Ancillary restraints

14. As indicated above, Thomson and Pilkington agree on non-competition obligations (see paragraphs 9 and 10 above). There are also clauses in the agreement between Pilkington and the joint venture dealing with licences in respect of intellectual property rights (see paragraph 8 above).
15. Since these clauses are aimed at expressing the reality of the lasting withdrawal of Pilkington from the optronics market, Thomson's intention to develop its optronics business in the UK through the joint venture and the specialisation of the joint venture in the optronics business, they are an integral part of the concentration and hence ancillary restraints.

COMPATIBILITY WITH THE COMMON MARKET

The product markets

16. Optronics is a field of electro optical applications which combines optic and electronic processing of physical signals susceptible to direction and transmission through optical devices. These physical signals are principally infra-red or visible light, either naturally produced or generated by dedicated systems such as lasers. Optronics have hitherto been used to a significant extent in defence applications. PO's and Thomson's optronic activities are mostly related to defence applications.
17. In the field of optronics there are the following related but nevertheless distinct activities:
 - systems: the design, engineering and assembly of a complete optronic system which satisfies the operational requirements of the end user. In the present case these systems are warning/detection/identification systems, navigation systems and fire control systems.

⁽¹⁾ 1990 for Thomson S.A., 1.4.1990 to 31.3.1991 for Pilkington Plc.

- equipment: design and production of certain key electro-optical pieces, which are integrated into a variety of systems and which may be produced by the system suppliers or sourced from third parties, e.g. infra red cameras (FLIR's) and laser equipment. Certain critical electro-optical components are needed to produce this equipment e.g. infra-red lenses and detectors for FLIRs and lasers for laser range-finding equipment. These components are either bought off-the-shelf or developed by the equipment manufacturer or by other sub-contractors for the particular purposes of the system.
18. The different systems are integrated in a number of different platforms. The very specific constraints imposed by each platform call for an adaptation of the system to the different types of platforms at an early stage of development. A target finding system for an aircraft is quite different from one for a helicopter or for a hand held device. They should therefore be considered as belonging to distinct markets, a view which is widely held within the industry. The platforms can be categorised as follows:
- aircraft
 - helicopters
 - missile IR seekers and ground to air defence systems
 - ground vehicles
 - hand held systems
 - surface ships
 - submarines
 - space vehicles
19. At the equipment level the key pieces have a wide range of applications. Nevertheless their level of sophistication requires specific adaptation to each project at system level. The adaptation of these pieces of equipment to the requirements of a system seems to be less critical than the adaptation of a total optronic system to a given platform. Important manufacturers of equipment may be able to offer pieces of equipment for the whole range of applications. On the other hand, R&D for equipment goes with the development of systems. So it would be justified to include the equipment in the system markets.

20. In addition, there are certain civil applications for optronic devices. The field includes TV fibre optics communications, medical equipment and security and surveillance. In this limited field, optronic technologies are in direct competition with non-optronic technologies and the latter now account for the greater part of this sector. The parties do not have a significant presence in these markets.

The geographic markets

21. In NATO countries the only ultimate buyers of optronic defence systems are the national defence Ministries (MoDs). The MoDs attach great importance to maintaining national suppliers who are active in key technologies. This holds especially for optronics, a highly sophisticated, comparatively new technology. The MoDs tend to support national industries. Nevertheless, this could change in the future given the opening up of public procurement procedures in defence markets. There are moves in the area of defence such as the IEPG (Independent European Programme Group) which has adopted a Plan of Action which establishes for members the obligation to publicise bids for tender in all IEPG countries. Furthermore, certain MoDs are opening up their public procurement procedures in particular for components / sub-contracting. However, orders for optronic systems or important equipment are given only exceptionally to non-national suppliers where there is a national optronics industry.
22. The fact that systems are often developed in the context of international cooperation is not indicative of broader geographic markets. The cooperation does not necessarily reflect international competition. It is based on agreements between the states participating in the projects. According to these agreements orders placed with the various national industries must correspond to the financial quotas of the respective states (principle of "juste retour").
23. There is a tendency towards closer cooperation in the European defence industry, as a consequence of increasing technological sophistication and the cost of defence equipment. But as negotiations on this matter between members of NATO show, this cooperation will be initiated by governments. More cooperation at different levels - programs, planning and production - would not mean more competition and a break up of national markets as national governments will still insist on the principle of "juste retour".
24. The abovementioned facts indicate that in the field of optronics the markets in countries with their own optronics industry are national markets.

The market positions of Thomson and Pilkington

25. The optronic activities of Thomson and Pilkington are shown in the table below which gives the parties' market shares in France and the UK for 1989. These figures can be taken as representative of the parties' market position over the last three years. Neither of the parties can be considered as "system leaders", i.e. as undertakings responsible for the design and the assembly of entire platforms such as aircraft systems, helicopter systems, anti-aircraft defence systems, etc. Thomson and Pilkington develop optronic systems that fit onto a platform. Furthermore they supply key products, which are part of these systems.

Market shares (1989)⁽¹⁾

Platform	<u>France</u>		<u>United Kingdom</u>	
	Thomson CSF	Pilkington Optronics	Thomson CSF	Pilkington Optronics
Aircraft				
Helicopters				
Missiles				
Hand Held				
Ground vehicles				
Surface ships				
Submarines				
Space				
Other				

26. The products manufactured by the proposed joint venture and by Thomson-CSF are to a large extent complementary. At the optronics systems level, PO's main strengths are in submarine periscopes and ground vehicle systems. Thomson-CSF's primary strengths are in aircraft systems, missiles and ground to air missile systems. At the equipment level, the degree of overlap is also limited.
27. The parties are also operating in different national markets. PO's business is concentrated in the United Kingdom and Thomson-CSF sells principally in France and the Middle East. Neither party has significant market shares in any other Member State in the Community. PO's turnover in the most recent financial year in the rest of the Community (ie excluding France and the UK) was only £ 2.1 million.
28. In considering the UK and French markets in relation to the narrow product groups identified above, the only addition of market shares on the basis of figures for 1989 occurs in the field of missiles in the UK. The parties will have a combined market share of []⁽²⁾ (PO []⁽²⁾ and Thomson-CSF []⁽²⁾). There is one major competitor with a similar market share []⁽²⁾.
29. In the UK, PO's market shares in the product markets identified are relatively low (with the exception of submarines) []⁽²⁾. In the field of submarines Pilkington Optronics has a []⁽³⁾ market share. However the company is faced by a single buyer, namely the national defence procurement authority, which severely restricts its scope of action in this market. This is true generally in defence related national markets. The situation will not change as a result of the concentration and it can be noted that Thomson is not present in this product market in France.

(1) The figures in this table have been deleted for the purpose of publication as they are business secrets.
 (2) Deletion - business secrets.
 (3) Deletion - business secret. The figure is high.

30. In France, Thomson has a relatively low market share in the various product markets except for aircraft []⁽¹⁾ and hand held []⁽¹⁾. However there is no addition of market shares as a result of the concentration since PO has no significant presence in any of these markets in France.
31. The parties relatively low market shares in most of the product markets in question indicate that there are other competitors. On the UK market, companies such as []⁽¹⁾. In France, SAT and SFIM have considerable market shares in most of the product markets in question.
32. Since there is no significant overlap between the parties in the two national markets in question, the concentration will not create or strengthen a dominant position in any of the product markets identified. This conclusion is re-inforced by other important factors. Firstly, the parties are faced with a single buyer for most of their products because they are defence related and secondly there are other significant competitors in most of the product markets in question in both the UK and France.
33. In relation to civilian products, the parties have very small market shares and they are active in different segments of the market.
33. For the above reasons the Commission has decided not to oppose the notified concentration and to declare it compatible with the common market. This decision is adopted in application of Article 6(1)b of Council Regulation No. 4064/89.

For the Commission,

**TEXTE RECONSTITUÉ ÉLECTRONIQUEMENT / ELECTRONICALLY RE-CREATED
TEXT / ELEKTRONISCH NACHGEBILDETER TEXT**

⁽¹⁾ Deletion - business secret.