

***Case No COMP/M.1564 -
ASTROLINK***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 25/06/1999

*Also available in the CELEX database
Document No 399M1564*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.06.1999

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 Madam/Sir,

Subject: Case No IV/M.1564 - ASTROLINK

Notification of 21 May 1999 pursuant to Article 4 of Council Regulation No 4064/89

1. On 21 May 1999, the Commission received a notification of a proposed joint venture between Lockheed Martin Global Telecommunications Inc. ("LMTG"), Telespazio S.p.A. ("TPZ") and TRW Inc. ("TRW"). The parties intend to acquire joint control of Astrolink International LLC ("Astrolink"), a limited liability company organised under the laws of Delaware, U.S.A. for the purpose of providing satellite global data communication services.
2. After an 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 AND THE OPERATION

3. LMTG is a wholly-owned subsidiary of the US defense products manufacturer Lockheed Martin Corporation ("LMC"). LMTG is a recently established subsidiary, which combines the investments of LMC in several ventures expected to be active in the future in the provision of telecommunications, information and technology services. In 1995, LMC established its Astrolink business (Astrolink International Ltd) to develop and market worldwide interactive broadband data communications services, in particular, Ka-band communication system consisting of geosynchronous satellites and space and ground network and control systems. LMC's Astrolink business has not yet commenced providing these services.
4. TPZ provides satellite communications systems services, in-orbit control management and operation of satellite communication networks. The company is a wholly-owned subsidiary of Telecom Italia ("TI").

5. TRW is a US company supplying technology products and services for automotive, space, defense and information systems industries.
6. The notified operation concerns the acquisition of joint control by LMGT, TPZ and TRW of Astrolink, to which all the assets of the existing Astrolink business of LMC will be transferred. The aim of the joint venture is to develop and market global on-demand, two-way satellite broadband data communication services.

II. CONCENTRATION

Joint control

7. Following the implementation of the notified transaction, LMGT will hold an approximate 45.7% interest in the joint venture, while TPZ and TRW will each have approximately 27.2%. LMGT's contribution to the joint venture will include both tangible and intangible assets and financial contributions, whereas TPZ and TRW will make only financial contributions.
8. The management of the joint venture is vested in the *Board of Directors*, which consists of [...] Directors, [...] to be appointed by LMGT and [...] by TPZ and TRW each. The Chief Executive Officer (CEO) is to be appointed by the Board. Decisions of the Board are taken by [...] majority where at least [...] Directors are present, except for certain strategic decisions where a majority of [...] are required including, *inter alia*, [...] ¹. The Chairman of the Board is nominated by the parents in turn for a term of [...].
9. The Limited Liability Agreement between LMGT, TPZ, TRW and Astrolink International LLC (hereafter referred as the "Agreement") establishing the joint venture thus provides that the agreement of the three parent companies will be required for the approval of the most important strategic decisions. Therefore, the joint venture will be jointly controlled by LMGT, TPZ and TRW.

Full functionality

10. The joint venture is set to become an active new player on its own right on the market for global on-demand two-way satellite broadband data communication services with an estimated launch of commercial services in the year 2003. Astrolink will commence its activities with the purpose of establishing world-wide, digital Ka-band communication system initially consisting of four geosynchronous satellites and space and ground control systems. Pursuant to the Agreement, the joint venture shall conduct its business as a full function undertaking autonomously from its shareholders. The joint venture is not limited in time.
11. At the time of the formation of the joint venture, Astrolink will have a cash base of approximately EUR [...]. The parties explain that all assets and property of the joint venture will be held in the name of the joint venture and all contracts, including those to manage gateways to interconnect the Astrolink network with terrestrial networks, are concluded in the joint venture's name. The joint venture will lease premises from a third party at the same site of the present LMC's Astrolink business.

¹ [...].

12. By the end of 1999, the notifying parties envisage that the joint venture would have a staff of [...] people and by the launch in the year 2003 approximately [...] employees. At the initial phase, personnel would be employed to develop and provide network acquisition, market research, customer billing and support systems, distributor relationships, service provider evaluation, financing and regulatory and legal services. The parties intend to commence substantial operations and negotiations with some [...] potential service providers immediately following the formation of the joint venture.
13. Astrolink will have contractual relationships with its parents such as supply agreements and distribution agreements. The joint venture will enter into procurement and sub-procurement contracts as well as maintenance and other service contracts with LMC (launch services, satellites), LMGT (integration services), TPZ (ground network systems, operation and maintenance of satellite networks) and TRW (satellite payload). The notifying parties argue, however, that the joint venture will remain a fully functioning independent entity despite these initial inputs from the parents, which are considered necessary in the start-up phase of the operation to secure the parties' initial investment. The joint venture will have several alternative suppliers for all of the products and services it intends to source from its parents.
14. The fact that LMC, LMGT, TPZ and TRW will supply certain equipment and services to the joint venture does not call into question the full function nature of the joint venture as certain important equipment and services, for example user terminals, will be sourced from third parties. Furthermore, the fact that after the launch of the joint venture's commercial services, Astrolink will make some sales of its services to LMGT and TPZ for distribution purposes, does not either call into question the full function nature of the joint venture, since the majority of Astrolink's customers will be other service providers.
15. On the basis of the foregoing, it can be concluded that the joint venture will operate on a lasting basis and will perform all the functions of an autonomous economic entity.
16. Thus, the notified operation involving a setting up of the above-mentioned joint venture, would constitute a concentration within the meaning of Article 3(1) (b) of the Merger Regulation.

III. COMMUNITY DIMENSION

17. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (EUR 23,448.8 million for LMC in 1998, EUR 22,192.5 million for TI in 1998 and EUR [...] for TRW² in 1998)³. Each of LMC, TI and TRW has a Community-wide turnover in excess of EUR 250 million (EUR [...] for LMC in 1998, EUR [...] for TI in 1998, and EUR [...] for TRW in 1998), 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

² Turnover figures for TRW for the year 1998 include those of LucasVarity plc, which was acquired by TRW earlier this year. See Commission decision of 11 March 1999 in Case No IV/M.1462 – TRW LucasVarity.

³ 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.

does not constitute a co-operation case under the EEA Agreement, pursuant to Article 57 of that Agreement.

IV. COMPETITIVE ASSESSMENT

A. Relevant product markets

18. The joint venture will offer global on-demand, two-way, satellite broadband data communication services. According to the notifying parties, there are no affected markets in the meaning of Form CO. Nevertheless, the parties identify the following four business areas or sectors, on which the notified operation would have an impact: (i) global broadband data communication services; (ii) satellite ground segment systems and services; (iii) commercial communications satellites; and (iv) commercial satellite launch services.

Global broadband data communication services (“GBDC”)

19. Communication networks have traditionally been segmented into local access for the end-user territory and backbone to interconnecting territories. These networks have been operated and managed by multiple operators world-wide. Several companies, including Astrolink, are in the process of developing global broadband data communication services (“GBDC”) by combining access and backbone networks under one operator.
20. GBDC services are supported by three main network architectures: (i) terrestrial wireline systems; (ii) terrestrial wireless systems; and (iii) satellite based systems.
21. As regards satellite systems, two types of satellite systems are employed for broadband data communications: (i) broadband satellites, a new generation of satellites integrating packet switching and operating satellites in both Geosynchronous Earth Orbit (GEO) and Low Earth Orbit (“LEO”); and (ii) broadcast satellite systems which are available today from GEO satellites and offer broadcast data communications (video broadcast, Internet). The notifying parties take the view that broadcast satellite systems should be excluded from the definition of the relevant market due to the more enhanced capacity and high speed service provided through broadband satellites.
22. The customer makes the choice between the different GBDC architectures based on data speed/capacity, pricing and quality. The main customers of the joint venture will be service-providers. The end-users are likely to be business customers using the services offered by the joint venture to gain access to digital satellite transmission and broadband data communication services for a number of data applications (Internet access, video-conferencing and corporate data services).
23. Consequently, for the purpose of this case, the relevant market can be defined as a satellite GBDC services market or as a wider GBDC services market including both terrestrial and satellite architectures. The question of whether to include broadcast satellites into the definition of the relevant market can be left open since, irrespective of the market definition chosen, the concentration does not give rise to competition concerns.

Satellite ground segment systems and services

24. Turnkey satellite ground segment comprises a ground station including equipment and sub-system, software, operation and maintenance and Telemetry, Tracking & Control

(“TT&C”) services. The parties submit that the various products and services can be provided by several ground segment providers or on a turnkey basis by a “prime contractor” ground segment provider that usually subcontracts for the various components of the system.

Commercial communications satellites

25. As held in a previous Commission decision⁴, satellites are highly complex spacecraft involving many differentiated technologies and subsystems. A standard satellite consists of two basic parts: the platform and the payload. The platform is the physical structure of the satellite that ensures its stability, maintains the satellite’s orbit, supplies electrical energy, and ensures the satellite’s thermal control. The payload governs the main parameters of the platform and is designed to perform the particular tasks for which the satellite was put in orbit.
26. Commercial communication satellites are a distinct type of satellites. They provide different types of telecommunications services from other types of satellites such as military or scientific satellites and are generally not interchangeable with such other types of satellites.⁵
27. Most commercial communication satellites are sold on a turnkey basis with the prime contractor supplying both the payload and the bus. Such satellites include either GEO, medium earth orbit (MEO) or LEO satellites. In prior decisions⁶, the Commission has made a distinction between GEO and MEO/LEO satellites on the basis of cost, function and other factors, though the services provided by GEO and LEO satellites are, according to the notifying parties, effectively interchangeable.

Commercial satellite launch services

28. Satellites are launched by means of multiple-stage rockets, fuelled by liquid or solid propellant, derived from ballistic missile technology. These rockets are expended during the launch process and are known as expendable launch vehicles (“ELVs”).
29. The notifying parties maintain that the appropriate upstream sector in the present case relating to the sales of ELVs consists of internationally-competed commercial launches. Commercial launches appear to be distinct from captive military or other governmental launches, which are ordinarily not available for open competition, though the used vehicles are similar. The commercial launch opportunity may or may not relate to a launch of a commercial communication satellite. A further distinction on the basis of the size of the satellite may also be appropriate.

B. Relevant geographic markets

30. The parties consider the geographic market for the type of service provided by the joint venture to be world-wide or at least EEA-wide in scope.

⁴ Case IV/M.437 Matra Marconi/British Aerospace Space Systems, paragraph 10.

⁵ Case IV/M.437 Matra Marconi/British Aerospace Space Systems, paragraph 11.

⁶ Case IV/35.518 – Iridium, OJ L16, 18.1.1997, p. 87.

31. In the present case, the exact definition of the relevant geographic market can be left open, since irrespective of the market definition chosen the concentration will not create or strengthen a dominant position in the EEA or any substantial part of it.

C. Competitive assessment

Global broadband data communication services (“GBDC”)

32. The parties emphasise that as the development of broadband services has only recently commenced and no company has broadband data satellites in service at present and thus no revenue from such services, estimations of future volumes of offered broadband services as well as sales volumes are difficult to make.⁷
33. The parties submit that in 1998 the size of the total Western European data communication services sector, irrespective of the bandwidth, was estimated to amount to EUR [...] of which broadband data communication services was estimated to be 20% (EUR [...]). In 1999, the total sales of data services in Western Europe is estimated to amount to EUR [...] and EUR [...] in 2002. The present main competitors on the European market for broadband data communication services, including both satellite and terrestrial service providers, include British Telecom ([15-25%]), France Telecom ([10-20]), Deutsche Telekom ([10-20%]) and Telefonica (<10%).
34. At present most of the GBDC sector is served by wireline means. The share of satellite GBDC sales of the total GBDC sales is expected to reach 10-15% in the year 2005 depending on the market acceptance of the satellite systems.⁸ The parties estimate that the joint venture may achieve a market share of [<10%] of the total GBDC market and [10-20%] of the satellite GBDC market, both at the world-wide and EEA level.
35. The joint venture faces several competing broadband satellite initiatives which are scheduled to be active in the years 2001-2003 including CyberStar (Loral), EuroSkyWay (Alenia), GEstar (GE American), SkyBridge (Alcatel), Spaceway (Hughes), Teledesic (Gates/MCCaw Boeing/Motorola) and WEST (Matra/Marconi). Apart from one of the joint venture’s potential competitors the other participants on the market did not raise concerns as to the impact of the proposed concentration on the GBDC services market. Astrolink will be confronted with significant competition and therefore it will not result in the creation or reinforcement of a dominant position in the field of GBDC services.
36. The notified operation will not lead to the elimination of the parent companies as potential competitors in the joint venture’s market. The parties confirm that TRW and TPZ are not potential competitors of the joint venture in the provision of satellite broadband data communication services. Neither TRW nor TPZ have planned or at present plan entering the market independently. TI currently provides terrestrial

⁷ The parties’ estimations are based on statistics collected by Gartner Consulting relating to the overall data communication services sector for the year 1998 and by Booz-Allen/Parties’ estimates as regards the figures relating to the joint venture’s worldwide and EEA sales and shares of sales projected to the year 2005. Morgan Stanley Dean Witter’s market analysis forms the basis for the estimates concerning the space industry ground segment.

⁸ The total GBDC sales is estimated as EUR [...] worldwide and EUR [...] at EEA level, whereas satellite GBDC sales as EUR [...] at worldwide and EUR [...] at EEA level.

broadband data communication services through wireline architecture and is commencing to provide satellite services to a limited extent (“IperSpace” for Internet access and corporate multicast services) and is also exploring possibilities to offer broadband data services via broadcast satellite. TI’s total EEA terrestrial sales represent approximately 8% of total EEA sales. LMC and TRW are not providing broadband data communication services at present. Nevertheless, TPZ and LMGT intend to become exclusive service providers (“SP”) to deliver and distribute the services provided by Astrolink in respect of Italy and the U.S. Government, respectively.

Vertically related markets

37. The parties to the joint venture are present on a number of markets vertically related to that of the joint venture. However, as elaborated below, on none of these markets will the parties hold a combined market share exceeding 25%. The notified operation does not create or strengthen a dominant position on any of these markets.

Satellite ground segment systems and services

38. According to the parties, the notified operation has an impact on this market as TPZ is active in satellite ground systems and services and will be providing as “prime contractor“ such services to the joint venture. The providers of satellite ground segment systems and services compete on a global basis and thus the market is likely to be world-wide in scope. However, this issue can be left open, since irrespective of the market definition chosen, the concentration does not give rise to competition concerns.
39. TPZ has carried out a number of projects as ground segment system integrator and operations and maintenance provider as well as subcontractor for projects such as Iridium, Orbcom, Eutelsat, Intelsat and some other major consortia. The parties argue, however, that TPZ has not acted as a prime contractor for an entire system or for an independent customer and thus it could be regarded as a new entrant in the turnkey satellite ground segment system, where it faces competitors like Scientific Atlanta, NEC, Alcatel Espace and Matra Marconi Space.
40. According to the information submitted by the parties, world-wide space industry ground segment revenues have annually amounted to some EUR [...] during the last three years, including hardware for receiving data from the satellites, operation and control services, ground services for launches, spaceport facilities, testing locations and fuels and chemicals required for the operation of the earth stations. The European ground segment activities are estimated to represent 20% of the total world-wide revenues (EUR [...]). In 1998, TPZ’s turnover in ground segment services amounted to EUR [...] including both commercial and military satellites on the one hand and turnkey projects and separate ground segment services on the other hand as well as captive sales. It is the view of the notifying parties, that TPZ accounts for at maximum [...] and thus less than 25% of the EEA satellite ground segment systems.

Commercial communications satellites

41. The notifying parties submit that the intended operation has an impact on the commercial communications satellites sector because LMC is active in their production and sale and will supply satellites to the joint venture. Similarly, TRW is engaged in the supply of satellite payloads and will supply, through a subcontract from LMC, payloads to the joint venture.

42. Production and sale of communication satellites (GEO, LEO/MEO) is highly competitive with several well-established firms on the market (for example Aérospatiale, Alcatel Espace, Hughes, Boeing, Matra Marconi). Because of their related activities, the parties acknowledge that certain other companies, including TRW, are possible entrants into the production or sale of commercial communication satellites. The manufacturers of commercial communications satellites compete on a global basis. Therefore, the market is likely to be world-wide in scope. However, this question can be left open, since irrespective of the market definition chosen, the concentration does not give rise to competition concerns.
43. According to the notifying parties, LMC has not made sales of commercial communications satellites to EEA customers. TRW and TI have not competed to supply commercial communication satellites in the EEA. On a world-wide basis, the combined market share of the parties in GEO satellites would amount to [10-20%]. The parties submit that taking account of GEO, LEO/MEO or satellites in all orbits, their combined share of the EEA communications satellites sales is less than 25%.

Commercial satellite launch services

44. The parties submit that the notified transaction results in an impact on the sector of commercial satellite launch services, as LMC is involved in the supply of expendable launch vehicles (“ELVs”) and may be providing such launch services to the joint venture. Even in the initial phase of the joint venture, launch services may, however, be provided by other service providers than LMC. Commercial launch awards are granted in global bidding processes and thus the market is likely to be world-wide in scope. However, the exact scope of the geographic market can be left open in the present case, since irrespective of the market definition chosen, the concentration does not give rise to competition concerns.
45. It is maintained that LMC’s market share of commercial ELV’s calculated in launch awards would in any case remain below 25% at the EEA level and below 20% worldwide.
46. In view of the foregoing, it can be concluded that the proposed concentration would not create or strengthen a dominant position as a result of which competition would be significantly impeded in the EEA or any substantial part of that area.

V. ANCILLARY RESTRICTIONS

47. The notifying parties submitted a number of contractual obligations they wish to be declared ancillary to the concentration. These contractual obligations cover exclusive and co-exclusive rights, non-compete obligation and most favoured customer arrangements.

a) Exclusive and co-exclusive rights

48. The parties have agreed in the Service Provider Commitment Agreement that [certain parties will benefit from exclusive co-exclusive rights for the provision of certain services to Astrolink] ⁹

⁹ [...].

49. The notifying parties maintain that the above-mentioned exclusivity clauses are necessary to protect the parties' significant investments in the joint venture and to secure the successful and immediate launch of the commercial service of the joint venture.
50. The Commission considers, however, that it has not been sufficiently justified why the granting of these exclusive rights to the parent companies is necessary for the implementation of the joint venture. Indeed, according to the parties, the joint venture has entered or is planning negotiations with some [...] potential service providers on a non-exclusive basis. Therefore, these clauses cannot be regarded as ancillary to the concentration.

b) Non-compete obligation

51. The parties have agreed in the LLC Agreement the following restrictions on the parties' ability to deliver good/services to the joint ventures' competitors:

[...]

52. The parties argue that the above-mentioned clauses are necessary to protect the joint venture's initial activities in ensuring that the joint venture obtains the agreed inputs from its parents. Secondly, it is argued that the clauses do not prevent the parents from negotiating and entering into supply or procurement agreements with third parties, as the non-compete obligations are limited to the delivery of such products/services to the joint venture's competitors within the said periods.
53. The Commission considers that these clauses are designed to ensure that the interests of the joint venture are protected for a period limited to the initial phase of the envisaged service provided by the joint venture. These clauses are thus directly related and necessary to the implementation of the concentration, since they are aimed at guaranteeing the transfer to Astrolink of the full value of the business acquired.

c) Most favoured customer –arrangement

54. In [...], the notifying parties have agreed to offer to the joint venture until [...], substantially similar terms and conditions for a comparable order (most favoured customer arrangement) than they would offer to their customers.
55. The parties maintain that this clause aims at ensuring the value of the parties' investment is not endangered by one party/parties offering better prices and terms to other ventures.
56. Given the specific features of the market, in particular the amount of research and development involved in the GBDC sector and to protect the viability of the joint venture during a start-up period, the Commission considers that this clause can be accepted for a period of three years following the date of the commercial launch of the joint venture's services, [...].

VI. CONCLUSION

57. 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,