

***Case No COMP/M.3998 -  
AXALTO / GEMPLUS***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

---

Article 6(2) NON-OPPOSITION  
Date: 19/05/2006

***In electronic form on the EUR-Lex website under document  
number 32006M3998***



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.05.2006

SG-Greffe(2006) D/202682

MERGER PROCEDURE  
ARTICLE 6(2) DECISION

PUBLIC VERSION

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.3998 – Axalto / Gemplus  
Notification of 24.03.2005 pursuant to Article 4 of Council Regulation  
No 139/2004<sup>1</sup>**

- (1) On 24 March 2006, the Commission received a notification of a proposed concentration pursuant to Article 4 and following a referral pursuant to Article 4(5) of Council Regulation (EC) No 139/2004 by which the undertaking Axalto Holding NV (“Axalto”, The Netherlands) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Gemplus International SA (“Gemplus”, Luxemburg) by way of purchase of shares.
- (2) In the course of the proceedings, Axalto submitted undertakings as a result of which the deadline of the first phase was extended to 19 May 2006. The proposed commitments were designed to eliminate competition concerns identified by the Commission, in accordance with Article 6(2) of the Merger Regulation. After examination of the notification and in the light of these commitments, the Commission has concluded that the operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the EEA agreement.

---

<sup>1</sup> OJ L 24, 29.1.2004 p. 1.

## **I. THE PARTIES**

- (3) Axalto is a company listed on the Paris (Euronext) stock exchange since 2004, active in the manufacturing of secure plastic cards and related products and services. Axalto also manufactures point of sale (“POS”) terminals and related software.
- (4) Gemplus is a company listed on the Paris (Euronext) and New York (NASDAQ) stock exchanges. The company is active in the supply of secure plastic cards, in particular so-called “smart cards,” for a variety of applications, as well as related software, hardware and services.

## **II. THE OPERATION**

- (5) The Transaction will involve two steps. At the first one, the two significant minority shareholders of Gemplus will contribute their respective shares in Gemplus to Axalto in exchange for newly issued Axalto shares. As a result, Axalto will hold 43.7% of the outstanding shares of Gemplus<sup>2</sup>. The percentage of Gemplus shareholders present or represented at the last three annual shareholder meetings of Gemplus has not exceeded 80%. Accordingly, Axalto’s 43.7% of Gemplus’ shares following the contribution will confer sole control over Gemplus in this first step of the transaction.
- (6) Moreover, after completion of the first step, Axalto will launch a voluntary public tender offer on Euronext and NASDAQ for the remaining Gemplus shares. A possible third step, if Axalto acquires the requisite percentage of Gemplus shares under Luxembourg law, may be the merger by liquidation of Gemplus into Axalto.
- (7) The Transaction therefore is an acquisition by Axalto of sole control over Gemplus pursuant to Article 3(1)(b) of the ECMR.

## **III. CONCENTRATION**

- (8) The proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of Merger Regulation.

## **IV. COMMUNITY DIMENSION**

- (9) The operation does not have a Community dimension within the meaning of Article 1 of the EC Merger Regulation. Indeed, the transaction does not meet the jurisdictional thresholds of Article 1(2) of the EC Merger Regulation since, in 2004, the Parties’ aggregate worldwide turnover did not exceed €2,500 million.

---

<sup>2</sup> Based on the anticipated share exchange ratio, each significant minority shareholder of Gemplus will receive respectively about 20% and 15%, of the shares of Axalto. It is not anticipated that there will be any shareholders agreement between them with respect to their Axalto shares. Accordingly, the Transaction will not give rise to an acquisition of control over Axalto at any stage of the Transaction.

- (10) However on 15 December 2005 the notifying party informed the Commission in a reasoned submission that the concentration was capable of being reviewed under the national competition laws of six Member States (France, Germany, Greece, Portugal, Spain and the United-Kingdom) and requested the Commission to examine it. None of the six Member States competent to examine the concentration indicated its disagreement with the request for referral within the period laid down by the EC Merger Regulation. The case is therefore deemed to have a Community dimension pursuant to Article 4(5) of the EC Merger Regulation.

## V. COMPETITIVE ASSESSMENT

### A. Relevant product markets

#### 1) *Cards by application*

- (11) The Parties submit that the most appropriate product market definition is the whole market for secure plastic cards (equipped with magnetic stripes, micro-processor and/or memory chips, holograms, scratch panels, photos, printing, embossing). Moreover, for most applications, the parties argue that a number of identification, storage and security technologies are used in a single card (for instance, payment cards can include either a magnetic stripe alone, or both a chip and a magnetic stripe, as well as holograms). Hence, this market would gather various applications, including SIM cards for wireless mobile communications identification, payment cards, payphone cards, government and healthcare cards, corporate identity and security cards, content protection cards, and transport cards.
- (12) To justify such a definition the parties rely on the fact that the manufacturing process to produce secure cards would substantially be the same regardless of the type of card or application and if a manufacturer decides to switch production from one card to another, it can do so with very little effort, time and investment.
- (13) However, both from the supply- and demand-sides, smart cards are different from other cards. The chip embeds memory that can be deleted and changed, a feature not achieved with other secure plastic cards. Furthermore, some smart cards offer even more advanced functionalities and versatility (operating systems, applets (or small applications), different kinds of memories, etc.). Thus the manufacturing and usage of chip cards are very specific.
- (14) Further distinctions within the smart cards segment have to be made according to the technology used in the chip. The chip can be either a memory chip or a microprocessor chip<sup>3</sup>. In terms of costs, their level varies significantly depending on the use of a microprocessor (average cost per card: [...] cents) or a memory chip (average cost per card: [...] cents).
- (15) At the beginning of 2004, the installed base of microprocessor smart cards (1.77 billion) was considerably more than double that of memory card. Microprocessor cards (mobile communications-SIM cards and banking cards) are forecast to

---

<sup>3</sup> Memory cards are able to store data; microprocessor cards are devices that can compute information (they can add, delete and manipulate information in the memory of the card).

account for 80% of the growth in the annual market for smart cards from 2003 to 2009. As regards memory cards, the growth in health and government sector is expected to compensate the decline in non-mobile telecommunication market (payphone cards)<sup>4</sup>.

- (16) Finally, within the microprocessor cards segment, another distinction should be made according to the application of the card. The three major application segments are telecommunication (76%), banking (13.6%) and government & ID (3.7%)<sup>5</sup>, the first being by far the largest and most important one, the last being the one with the highest expected growth rate.
- (17) It results from the Parties data that the raw material in producing cards is distinct as mainly PVC is used for payment cards whereas SIM card can use ABS moulded, PVC or polyester. SIM and payphone cards are usually produced on card-by-card printing equipment that would not satisfy the more sophisticated production requirements of payment cards. Thus, production lines that have initially been set up for SIM and payphone cards are typically not adequate to mass produce payment cards or other secure cards requiring sophisticated card body security features without additional investment in the card body printing quality and security certifications. Conversely, a production line that has been initially set up for payment cards can easily be used to produce SIM and payphone cards.
- (18) The personalization step further demonstrates that the distinction by application is relevant. Personalization provides cards with a unique ID, either in the card body (such as by embossing the user's name on the card) or in related software (personal data, such as bank account, telephone number, or PIN code). Personalization of SIM and payphone cards is almost always done by the card manufacturers and is almost always included with the provision of SIM cards (i.e., in more than 95% of cases). Conversely, personalization of payment cards is often tendered separately from the production of the cards themselves (Axalto and Gemplus personalize only around [less than 35%] of the payment cards that they produce). Cards that are not personalized by the original manufacturer may be personalized by other card manufacturers or, most often, by personalization centres or by the customer.
- (19) In terms of costs, the cost of a SIM chip is 3 times higher than the cost of a payment chip. In terms of sales, the Parties data indicate that an average price of SIM card goes from [...] to [...] depending on the chip capacity when an average price for smart payment card runs between €[...] and [...] in recent months. This reflects the fact that the SIM card segment is on average more high-end than the payment card segment as the pace of innovation for SIM cards is much more important.
- (20) From the demand-side, the customers and their requirements are similar by application, i.e. wireless network operators (SIM), fixed line operators (payphone cards), financial institutions (payment cards) and several new or emerging groups (including applications/customers groups such as health and Government/ID,

---

<sup>4</sup> 2005 IMS Research, consultant report.

<sup>5</sup> Card Technology magazine, July/August 2005.

access control, etc which are characterized by project-oriented business and not yet as established as the other segments).

- (21) It could be argued that because of the personalisation, cards purchased by one customer cannot be used by another customer. However, supply side substitution is immediate within a given application as the production process is exactly the same.
- (22) It seems unlikely that the relevant market may extend beyond each of the main categories such as SIM and payment cards. First, as seen above, selling prices differ significantly in their levels. Second, technical standards depend on the area of application and notably between SIM cards (microprocessor chip), payphone cards (memory chip), payment cards (majority of microprocessors), government and ID (majority of microprocessors) and other cards such as transport or pay-TV cards.
- (23) The internal organization of the major smart card manufacturers confirms that this market segmentation is most appropriate. Both Gemplus and Axalto, as well as their major competitors, are structured around the following main businesses: wireless Communications/Mobile (SIM), financial (payment), Identity & Security, prepaid phonecards (payphone).
- (24) It therefore results from these findings that the distinction by application (and at least distinguishing between SIM cards and payment cards) is the most appropriate to assess the competition impact of the transaction.

2) *OTA SIM cards administration.*

- (25) The Parties also provide products and services related to their principal activity of manufacturing and selling secure plastic cards, in particular products related to the administration of already issued SIM cards. This SIM cards administration is made through a technology called Over-The-Air (“OTA”), which enables mobile phone operators to communicate with, download applications to, and manage a SIM card without being connected physically to the card (the OTA platform formats the request of the mobile phone operator into a message that can be understood by the recipient SIM card). Thus, OTA is a technology that updates and changes data in the SIM card without having to reissue it.
- (26) At the core of this technology is the SIM OTA administration platform which is primarily used for the administration of SIM cards. These administration tasks include the updating of information stored on the SIM card (such as the operator name displayed on the handset or the list of preferred roaming partners). SIM OTA platform providers have further enhanced the core of their platforms, packaging some functionalities into modules (*e.g.*, management of administration campaign) or adding new features or value added services for the end-users (such as browsing services).
- (27) The parties consider that these types of ancillary services do not constitute separate product markets as they are allegedly related to and sold by the parties almost always in conjunction with secure plastic cards (even though many related services are provided by companies other than secure plastic card manufacturers and may be performed by customers in-house). The parties further submit that if the Commission were to consider OTA products and services as distinct product markets, they should be regarded as part of the operation and support system (OSS)

market in which traditional software vendors provide telecommunication operators with IT-solutions (including call completion, messaging solutions, delivery of data).

- (28) However, from the demand-side OTA administration is clearly not substitutable with other products and services, and an analysis of the supply-side leads as well to define a distinct market for OTA platforms for SIM cards administration. The market investigation has shown that the OTA services for mobile telecommunication operators are not supplied by traditional OSS software vendors but by companies specialized in mobile telecommunication sector: the specific functionalities of OTA require different know-how than the general OSS. In fact, virtually all respondents to the market investigation considered that OTA platforms constitute a relevant product market. As regards the parties' argument that OTA platforms are sold in conjunction with SIM cards, it can be rejected in view of the fact that, to the contrary, some significant companies are only active as either providers of OTA solutions (e.g. Smarttrust) or telecommunication cards (e.g. G&D).
- (29) The Commission therefore considers that the provision of OTA SIM card administration and services platforms consist of a distinct product market.

## **B. Relevant geographic markets**

### *1) Cards by application*

- (30) In the Parties view, the relevant geographic market for secure plastic cards is at least EEA-wide (if not worldwide) in scope since the conditions of competition are largely homogeneous across the EEA. They argue there is no national preferences or local presence required, purchases are international, trading flows are constantly shifting between countries, and prices are comparable across the EEA.
- (a) SIM cards
- (31) This EEA-wide dimension is valid for telephone SIM cards. The acceptance of SIM cards greatly depends on the existing digital cellular technologies—essentially GSM or CDMA—used in the different countries and regions of the world. Whereas GSM networks generally require the use of SIM cards (as in Europe), the use of SIM cards is optional for CDMA. Therefore, for example, CDMA customers in China and India use SIM cards, whereas CDMA users in Korea, the United States and Latin America do not. As regards a potential worldwide market dimension, it seems that any player wishing to be active in a given area has to have a manufacturing plant in this area (for instance [...]). And it appears from the Parties' data that most of the finalized products manufactured in a given region are sold within this region. Overseas traffic shows that European plants of one party deliver their product mainly in this region. The market investigation has confirmed these statements, strengthened by the standardization and relatively low number of competitors creating homogeneous conditions for competition at the EEA-wide level, and to some extent at the worldwide level (even if some competitors indicated that prices are not comparable at the worldwide level).

(32) However considering a EEA-wide or a worldwide dimension (meaning in the regions where SIM cards are used) can be left open as the competitive assessment of the transaction will remain unchanged.

(b) Payment cards

(33) The picture is different as regards secure payment cards. A general distinction can be made between countries that have adopted standards providing for the use of chips (together with other security features) and those that have not. Europe was the first region to implement smart payment cards (North America is still considered as a primarily magnetic stripe payment card region). Within Europe, preferences for payment cards with or without chips vary greatly on a country-by-country basis. Whereas the UK is leading the migration towards smart payment cards based on an international standard (EMV<sup>6</sup>), Spain and Italy still use predominantly magnetic stripe cards without chips. In France international credit cards (Visa and MasterCard branded cards to be EMV) are smart cards, whereas consumer credit cards (e.g., Carte Aurore or CETELEM cards) do not use chips. Furthermore, country-based standard specifications, such as those established by EMV, the GIE-Cartes Bancaires in France, ZKA in Germany, TIBC EMV in Spain and ABI in Italy lead to consider national markets for payment cards. Also, transport costs are higher in order to ensure the security requirements. Finally, the personalization requires a local presence for security concerns and that is provided by personalization centres accredited at the national level.

(34) These elements, confirmed by the market investigation, suggest that the markets for payment cards are still national in scope.

(c) Other types of cards

(35) As regards the other type of cards (such as government-ID, healthcare, transit-transport, pay-TV), there is no need to define the geographic scope of the markets given the absence of effects.

2) *OTA SIM cards administration*

(36) The Parties argue that the relevant geographic market is most likely worldwide. There would be no geographical barrier to expansion, as customers may be supplied from any country regardless of the country where actual manufacturing is undertaken. The market investigation has not contradicted this point.

(37) However considering a dimension narrowed to the EEA or a worldwide dimension (meaning in the regions where SIM cards are used) can be left open as the competitive assessment of the transaction will remain unchanged under any considered definition.

---

<sup>6</sup> EMV stands for Europay MasterCard Visa.



## C. Assessment

### 1) Cards by application

- (38) Based on an EEA-wide market definition, and segmenting the market for secure plastic cards by smart cards and by application, the parties have provided the following market shares<sup>7</sup>:

| Market Shares 2004 – Volumes              | EEA      |          |                       |
|---|----------|----------|-----------------------|
|   | Axalto   | Gemplus  | Combined              |
| Secure Plastic Card Market                | [0-10]%  | [0-10]%  | [10-20]%              |
| Smart Card Market (Total)                 | [10-20]% | [20-30]% | [40-50]%              |
| <b>Smart Card Market (By Application)</b> |          |          |                       |
| SIM Cards                                 | [10-20]% | [20-30]% | [30-40]% <sup>8</sup> |
| Payment Cards                             | [20-30]% | [10-20]% | [40-50]%              |

- (39) Based on a worldwide market definition, market shares provided by the parties are the following:

| Market Shares 2004 - Volumes              | Worldwide |          |          |
|---|-----------|----------|----------|
|   | Axalto    | Gemplus  | Combined |
| Secure Plastic Card Market                | [0-10]%   | [10-20]% | [20-30]% |
| Smart Card Market (Total)                 | [20-30]%  | [20-30]% | [40-50]% |
| <b>Smart Card Market (By Application)</b> |           |          |          |
| SIM Cards                                 | [20-30]%  | [20-30]% | [40-50]% |
| Payment Cards                             | [10-20]%  | [10-20]% | [30-40]% |

- (40) It should be noted that according to the data stemming from market studies and from competitors, the parties have similar market shares.
- (41) Based on a national market definition for payment cards, the transaction would also give rise to affected markets in the Czech Republic (Axalto [20-30]% + Gemplus [20-30]% = [40-50]%; G&D: [10-20]%, OCS: [30-40]%, new entrant, Austria Card: [10-20]%, new entrant), France ([40-50]%; OCS: [40-50]%), Greece ([25-35]%; OCS: [65-75]%), Spain (10-20]%; G&D: [20-30]%, OCS: [20-30]%), and the United-Kingdom ([50-60]%; G&D: [10-20]%, OCS: [30-40]%) in 2004<sup>9</sup>. Moreover, data for 2005 show that entries have occurred or are likely to occur in France (G&D, Sagem-Orga, Incard), Greece (G&D) and United Kingdom (ID Data, Thames).

<sup>7</sup> Market shares are based on parties' estimates, confirmed by the market investigation.

<sup>8</sup> An internal document from Gemplus relating to SIM competitors market share by region in 2004 states that for Northern-Western Europe, Gemplus holds [20-30]%, market shares and Axalto [20-30]%, (combined [40-50]%).

<sup>9</sup> Whatever the country concerned, market shares vary significantly from year to year.

- (42) As the Parties have considered a broad market for secure plastic card market with an EEA-wide scope at least, they have given arguments without distinguishing by application identified above. They therefore consider that the operation will not raise serious doubts as to the compatibility with the common market for the following reasons.
- (43) Firstly, there would be strong competitors such as G&D, OCS, Sagem-Orga, STM-Incard, Austria Card, Microelectronica, XponCard. Secondly, it would also be easy to expand or enter the market. Thirdly, intellectual property rights would not be a barrier to entry as they are accessible and the vast majority of any secure plastic card's functionality is based on technology that is either in the public domain or that is covered by patents that have been incorporated in one or more international standards (and therefore subject to fair, reasonable and non-discriminatory ("FRAND") licensing commitments). Finally, new entry into the secure plastic card sector is further encouraged by the absence of long term supply contracts and customers' practice of multi-sourcing (qualifying multiple suppliers and switching purchases among them to increase competition), these customers (such as telecom operator or banks) are powerful and being able to switch their supplier easily. These arguments are addressed in the following developments.

2) *Non-coordinated effects and innovation*

- (44) The markets for smart cards are similar to that of computer chips: the price of a given product declines sharply over time, while more advanced products are introduced in the market. In this context, some suppliers (such as Gemplus and Axalto) invest in R&D to be among the first to introduce new products, whereas other suppliers tend to be followers and focus on the "commodity" part of the market. Thus, all competitors are not equivalent and products can be considered as differentiated, this being especially true as regards SIM cards where innovation plays a more crucial role.

(a) *Impact on prices*

- (45) Given the level of the market shares held by the parties, the proposed merger might provide the combined entity with the ability and incentive to raise prices unilaterally, depending on the importance of the pre-merger competitive constraints on each other of the merging companies. Hence the Commission has examined bidding data provided by the customers of the parties and their competitors to assess the closeness of substitution between Axalto and Gemplus' products (meaning offering products which a substantial number of customers regard as their first and second choices).
- (46) As regards payment cards, contrary to SIM cards (and contrary to parties' assertion), there is no clear multi-sourcing strategy adopted by customers; on a total of [50-70] tenders since 2003, [30-40] exhibit a single-sourcing strategy. The Commission's market investigation shows that only [25-35]% of clients (with respect to the total tenders observed) are common customers to Axalto and Gemplus. However, Axalto and Gemplus are respectively the successful bidder and the second bidder (and vice versa) in only [15-25]% of the bids<sup>10</sup>. Furthermore, both sets of data indicate that OCS is a close competitor to Axalto for payment cards. This is particularly true for

---

<sup>10</sup> This finding is confirmed in terms of volumes.

the French, the UK and the Greek payment markets. As regards to the Czech Republic payment market, OCS as well as G&D and Austria Card could be considered as significant players. In Spain, OCS and G&D are market leaders. Thus, the ability to raise unilaterally prices will be limited.

- (47) Concerning SIM cards, closeness between Axalto and Gemplus is not confirmed by the Commission's market investigation. Out of a total of [30-50] bids, the Commission observed that the client overlap between Axalto and Gemplus is equal to [35-45]% of the total tenders. Axalto and Gemplus are respectively the winning company and the second winner (and vice versa) in only [10-20]% of the tenders<sup>11</sup>. The market investigation indicates also that there exist credible and close substitutes competitors like OCS and G&D as well as strong local players like Microelectronica, SagemOrga and STM-Incard<sup>12</sup>. Therefore, the likelihood of a non-coordinated price increase post-transaction could be considered as limited.
- (48) Furthermore, most customers of the parties expect that the transaction will not hinder their ability to negotiate competitive supply conditions. In particular, many customers expect that the transaction will lead to an acceleration in the decrease of prices due to the claimed efficiencies elicited by the transaction<sup>13</sup>.
- (49) In light of the above considerations, no detrimental impact on prices is expected as a result of the proposed transaction. Therefore, despite the market shares described above, it should be noted that a simple horizontal overlap would not significantly impede effective competition in the common market, in particular as a result of the creation of a dominant position in the given product markets.

(b) Impact on innovation

- (50) The Commission also examined the impact of the operation on innovation. Innovation represents a key driver for competition among the most important card manufacturers. For instance, their SIM cards customers (that is, mobile telecommunication operators) usually seek to upgrade their offering by supplying new products and new services.
- (51) In this context, the Commission's market investigation has shown that the two merging companies were, prior to the transaction, exerting constraint on each other as they were the most important innovators. For example, it appears from the Parties' data that Gemplus and Axalto have been the first to introduce major innovations in seven major innovation instances (respectively in four and two cases, in addition to one case where the two companies simultaneously introduce comparable innovations) out of eleven since 2000.

---

<sup>11</sup> The same trend is observed in terms of volumes.

<sup>12</sup> The Commission observed many differences between the database of the parties and the results of the market investigation. The reason could be large informational asymmetries between the competitors with respect to the tender issues. For that reason and in order to be more exhaustive, the Commission has built a database based on customers replies.

<sup>13</sup> The parties, in internal documents, allege that the new entity would benefit from lower prices on raw materials, mainly chips, as the price paid by a card manufacturer to its supplier of chips depends on the number of chips purchased.

- (52) Nevertheless, the new entity and its main competitors would keep a strong incentive to innovate. Indeed, the ability to innovate is strategic as innovative SIM card manufacturers make their margins in the first year immediately following the launch of a new product. After this initial period, prices decrease dramatically as more and more competitors are able to supply the product. By contrast, the market players which do not innovate offer low-end “commodity-like” products with very low margins.
- (53) In this context, the parties would have no interest in reducing R&D efforts. To the contrary, the new entity will be able to reallocate R&D capacities so that the number of R&D projects post-merger is likely to be greater than the R&D projects of the two companies pre-merger. The market investigation and the examination of the parties’ internal documents confirm the expectation that the parties will keep a strong incentive to innovate, on both short term as well as long term. In particular, several telecommunication operators welcome the merger as they expect that it will result in greater and faster innovation.
- (54) In view of these elements, the Commission concludes that innovation will not be negatively impacted by the proposed transaction.

3) *The Intellectual Property Rights in the smart card industry*

(a) Each of Axalto and Gemplus owns a large patent portfolio

- (55) As explained above, innovation is an important factor of competition among smart card manufacturers and, consequently, IP rights play a crucial role<sup>14</sup>. The merging companies are the main actors of the IP landscape within the industry. As of December, 31st 2004, Gemplus and Axalto held respectively [2000-2500] and [2000-2500] patents and patent applications. For comparison, G&D holds [2000-2500] patents and OCS only [<1000] patents. The patent filing of Gemplus soared [...] relative to 2003 and Axalto files approximately [...] initial patent applications each year. Furthermore, in its annual report 2004, Axalto states that the “*company’s success depends, in part, upon its proprietary technology and other intellectual property rights.*”
- (56) According to a graphic within an internal presentation made by Gemplus’s IP Licensing department<sup>15</sup>, each company owns, at the beginning of 2006, around [500-1000] published patent families. Gemalto (the future name of the new entity) is even indicated on this same graphic and will own [1000-1500] published patent families. The closest company, in terms of published patent families, is G&D with around [500-1000] of them then Sagem-Orga and OCS with respectively less than [500] and [500].

---

<sup>14</sup> In order to ensure a sufficient return on inventions or technological development and thus to preserve ex-ante incentives for innovation, IP rights give the innovator an exclusive right to the exploitation of the invention or development. The purpose of intellectual property policy is also to facilitate the dissemination of innovation. Therefore the relationship between IP rights and competition law should not be perceived as a contradiction because both IPR legislation and competition rules are deemed to promote innovation in the consumers’ interest.

<sup>15</sup> [An internal presentation on patent enforcement possibilities, dated January 27, 2006.].

- (b) Together they will have the ability and incentives to harm their competitors position in the market
- (57) In the information notified to the Commission, the parties have downplayed the importance of IP rights in the industry as, according to them, the bulk of their IP rights would be in the public domain and/or readily accessible, and the “essential” patents would be licensed under fair reasonable and non-discriminatory (FRAND) conditions<sup>16</sup>.
- (58) However, many competitors have expressed concerns in relation to the substantial strength stemming from the combined patent portfolio: the combination of the two most important portfolios of the industry would significantly alter the bargaining positions of the market players. It should be noted that such a strategy would affect all competitors and potential new entrants. Indeed, prior to the Transaction, besides [...] <sup>17</sup>, one third party could request a license either to Axalto and Gemplus for a competitive technology that each would own and be protected by patents. It was in the interest of either Axalto or Gemplus to have this competitor as client rather than to leave it to its main rival. This interest did not only lie in potential fees received from this competitor but also in the spreading of such technology (patent) or product (IP right) in order to allow wider and wider expansion of it. This reciprocal constraint does not exist anymore post transaction. And the new entity would allegedly be in a position to extract important fees from its competitors. These concerns are not related to specific patents but rather to a “thicket” or “fog” of patents filed by the parties that makes it hard to know whether and what patents of the parties are infringed.
- (59) In practice, Axalto and Gemplus exploit their advantage on IP rights in the following way: they resort to reverse engineering of their competitor’s products to determine whether these products are built on technologies at least partially covered by the parties’ portfolio. If this is the case, the parties let these competitors know about the alleged patent infringement(s) and urge them to agree on licensing the patent families that would spare them a legal challenge.
- (60) Resting on this methodology, the parties can use their portfolio of IP rights to worsen the bargaining position of their competitors when bidding for new contracts or even significantly affect the margins of their competitors and drive some out of business whilst raising barriers to entry. This would be so even if IP rights amount to a small share of the total production cost of a smart card<sup>18</sup>: bids of competitors in most cases differ from only a couple of cents. In particular, in e-auctions, the gap between two bids commonly amounts to only one cent as indicated by one respondent of the market investigation. In this environment, the ability to increase competitors’ cost can prove vital.
- (61) As far as the smaller competitors are concerned, they tend to focus on low-end products. The margins on low-end SIM cards are close to 0% (for example, XponCard which concentrates its activities on this segment has an operational

---

<sup>16</sup> A requirement from standard-setting bodies.

<sup>17</sup> To date, [...] has signed cross-licence agreements with each of the parties.

<sup>18</sup> A couple of percentage points.

margin of 3-4%<sup>19</sup> so that any increase in the costs of a market player like XponCard could drive it out of business). As regards high-end SIM cards, the margins are higher but the risks of development are also greater so that lowering the expected returns of the competitors' investments given the incurred risks could contribute to marginalise them.

- (62) This is confirmed by a Gemplus' internal document that states that the company could raise the costs [...] of their major competitors, [...] <sup>20</sup>,<sup>21</sup>.<sup>22</sup> In another Gemplus document, a similar reasoning is developed [...] <sup>23</sup>.
- (63) The fact that, after the merger, this type of strategy would be underpinned by a formidable IP portfolio raises serious questions on whether the parties' competitors will be really able to exert a constraint of any sort on the new entity on any smart card market. [...] <sup>24</sup>[...] Furthermore, it can not be excluded that the new entity would switch from the current offensive strategies that fetch royalties<sup>25</sup> to aggressive strategies by refusing the licensing of its patents to "small" competitors with no or few patents to offer.
- (64) Thus, in summary, the new entity will be in a position to marginalise competitors with its combined IP portfolio. The likelihood that it will actually implement such a strategy and, consequently, harm competition, is very high given the elements presented above.
- (65) In addition, tacit coordination with another market player and competitor, [...], cannot be excluded. This risk of coordination already exists as suggested by a

---

<sup>19</sup> Annual report 2005.

<sup>20</sup> [Internal email dated April 1, 2004 that describes the situation at a competing smart card player regarding patent enforcement. The email also considers the effect on that competitor should patent enforcement against that competitor be initiated, including the impact on its P&L and on its business generally.]

<sup>21</sup> [Internal email dated January 30, 2003 that speculates on the possibility of suing a competitor for patent infringement. Internal email dated August 6, 2004, that discusses the whether to publicize an imminent cross-license agreement. One email discusses the possibility of suing a competitor through patent litigation in order to have this competitor enter into a patent licensing agreement.]

<sup>22</sup> [Slide from an internal presentation on patent enforcement possibilities, dated January 27, 2006, describing the status of a proposed project to enforce patent rights.]

<sup>23</sup> [Internal email dated January 30, 2003 that speculates on the possibility of suing a competitor for patent infringement. One email speculates on the possibility of using the company's patent portfolio to sue smaller competitors. Another internal document, dated May 24, 2002, analyses a recent patent portfolio acquired by the company.]

<sup>24</sup> [Internal presentation on patent enforcement possibilities, dated January 27, 2006. An internal email, dated January 5, 2006, references a competitor that should be considered when planning patent licensing strategy other than in the short term.]

<sup>25</sup> [Slide from an internal presentation (draft) on patent enforcement possibilities other than those competitors who are already licensed, dated January, 2006.]

Gemplus' internal document: as [...] also owns an important IP portfolio<sup>26</sup> and is very active in filing new patents, and as [...], this internal document states that the three companies should have the same incentives regarding attacks on competitors such as [...] and [...].<sup>27</sup> Thus, it appears that a three-company coordination in the attack of competitors is deemed possible. Post-merger, a coordination between the two [...] would be easier to implement and thus at least as likely.

- (66) Consequently, with regards to the likely policy of the new entity regarding its IP portfolio and its impact on the functioning of competition on the markets for smart cards, the Commission has serious doubts as to the compatibility of the proposed transaction with the common market as it could significantly impede effective competition, in particular as a result of the creation of a dominant position.

#### 4) *OTA SIM cards administration*

- (67) As described above, Axalto and Gemplus sell wireless communication applications for the SIM card segment, primarily OTA-based solutions, in the EEA. The Parties sell these software solutions most often in conjunction with their respective secure plastic card offerings. The Parties' standalone sales of OSSs worldwide were less than [20] million in 2005 (which represent an insignificant part of their revenues). Given the broad OSS market and the number and type of competitors active in this market, the Parties submit that their combined sales are *de minimis* and would, in any event, not exceed 10% of the market.
- (68) However, on the specific segment of OTA SIM cards administration and services platforms, the parties have provided estimated shares in EEA (installed base) of [20-30]% for Gemplus and [10-20]% for Axalto ([30-40]% combined). Competitors are granted with [25-35]% for Smarttrust (which does not manufacture or supply any secure plastic card), [5-15]% for SagemOrga, [0-10]% for OCS, [0-10]% for Sicap (not active in SIM card/smart card market) and [0-10]% for telecom operators (which have developed in-house solutions).
- (69) At the worldwide level, the information gathered from the market investigation indicates similar market shares: Gemplus and Axalto would have respectively [20-30]% and [15-25]% ([40-50]% together<sup>28</sup>). Furthermore, an internal document from Gemplus relating to global OTA market shares states that for 2004 (excluding China) Gemplus holds [25-35]% market share and Axalto [5-15]% ([40-50]% combined). The main difference as compared to the EEA market shares relates to the competitor Smarttrust which is granted with an around [40-50]% market share and considered as one of the leaders of the market.

---

<sup>26</sup> [Internal email dated August 6, 2004, that discusses the whether to publicize an imminent cross-license agreement. One email references the size of a competitor's patent portfolio.]

<sup>27</sup> [An internal email chain, dated December 22, 2004, discussing existing cross-license agreements and that other competitors should have no reason not to follow suit. Another internal email, dated February 23, 2005, describing a meeting with a potential IPR consultant as regards assistance in patent licensing issues and strategy.]

<sup>28</sup> Estimates of competitors based on their internal data and the World Cellular Information service.

- (70) An OTA SIM platform provider has to deal with the parameters of the SIM cards used in order to ensure the compatibility (or interoperability) between the two. The telecommunication industry has implemented OTA interoperability, mainly for the SIM OTA administration platform, with standardised protocol released by ETSI (European Telecommunications Standards Institute, a standard setting bodies gathering administrative bodies, network operators, manufacturers, operators and users). And SIM card providers, as regards some SIM OTA services or value added services such as SIM browsing services, have committed to ensure interoperability of the S@T technology<sup>29</sup> managed by the SIM alliance<sup>30</sup>.
- (71) However, despite this interoperability, SIM cards from different SIM vendors often are not completely interoperable among each other and with OTA platforms. OTA platforms can be seen as an architectural control point with regards to SIM cards. In order to ensure the communication between the OTA platforms and the SIM cards, the cards are subject to a certification process and a set up where the OTA provider plays a crucial role. Hence, in the case where the OTA system supplier is also a chip card supplier, its OTA system will for certain work with its own chip cards while another SIM card provider need to test and verify its SIM cards towards the OTA server before being able to sell its cards. When it comes to SIM browsing and other value-added services, an applet has to be developed by the card manufacturer (under its proprietary features) fulfilling the requirements specified by the OTA platform, and loaded in the SIM card.
- (72) Before the transaction, there was no incentive for any of the parties to favour (for instance by delaying the SIM card certification of competitors) its own SIM cards or its own OTA system as none of them had sufficient market power to benefit from such a behaviour. Any attempt by one of the parties to enter into such a strategy would have led the customer (telecommunication operator) to switch towards another OTA platform supplier who would not have impeded the interoperability features of the SIM cards providers. This can explain the fact that one of the current leaders among the OTA services providers (Smarttrust) is not active in manufacturing cards, meaning that it has no interest in advantaging or impeding any SIM card provider.
- (73) Post transaction, the incentives of the merged entity could shift and could affect competition because of the market power of the new entity in terms of market shares in the OTA SIM platform but also in terms of strengths gathered by the merging parties in licenses portfolio and innovation capacity as demonstrated above.
- (74) Thus, it was feared by some competitors that the position achieved by the parties on the SIM card market could enable the new entity to bundle its SIM OTA platforms with its sales of SIM cards (supplying SIM OTA platform at low price or even for free). However various considerations allow to conclude that this fear is not grounded. Indeed, the tendering process for OTA SIM platforms and SIM cards is different as customers will have to be provided with SIM cards sometimes several

---

<sup>29</sup> The SIM browsing is mainly implemented through the S@T technology managed by the SIM Alliance or the WIB technology, proprietary of Smarttrust.

<sup>30</sup> The members of the SIM Alliance are Axalto, Gemplus, G&D, M-System-Microelectronica, OCS, SagemOrga, Prism, ST Incard and Xponcard.



times by year whereas there is one providing of OTA SIM platform for its life expectancy. Furthermore, as confirmed by the market investigation, SIM OTA platforms are tendered separately from SIM cards. In addition, whereas the customers multi-source their SIM cards, they usually do not do so for SIM OTA platforms.

- (75) On the other hand, strong concerns were raised by a significant number of competitors as regards the ability of the parties to undermine or degrade the activity of other card manufacturers by making the latter's SIM cards incompatible with cell phone operators' OTA platforms or delay accreditation. This practice could be targeted upon the main competitors of the parties, whereas granting the smaller ones with the compatibility necessary and therefore leaving the customer with a *de facto* weaker multi-sourcing possibility. The position of the merged entity would allow them to control the acceptance of new cards, control how the cards are used and therefore finally grant the parties with the possibility to leverage their supply of cards. These leveraging incentives would be furthermore strengthened by the fact that OTA SIM platforms have an expected life longer than SIM cards, enabling the new entity to conduct such a policy on a long run.
- (76) Thus, given the position of the parties on the OTA-platforms market, the Commission has serious doubts as to the compatibility of the proposed transaction with the common market as it could significantly impede effective competition, in particular as a result of the creation of a dominant position in the SIM cards market.

#### 5) *Procurement of chips*

- (77) Another potential impact of the concentration feared by some competitors would be on the supply of raw material, mainly the chip that accounts for 45-70% of the manufacturing costs of a chip card. The chip is manufactured by semiconductor companies. There are only 5 of them worldwide. The chip card industry is a minor customer as compared to the computer and telecom industries. It has been explained to the Commission that, post transaction, Axalto/Gemplus would represent [40-60]% of this demand and, according to some of its competitors, would then be in a position to have access to chips at better prices than its competitors, enabling the new entity to eliminate competition (this advantage would be strengthened in shortage periods<sup>31</sup> as the new entity, thanks to its size, could secure its chip supply). Furthermore, as innovation in the SIM cards segment is strongly linked with the chip, and hence with the chip supplier, the size and weight reached by the merging parties could enable them to have a decisive advantage compared to their competitors in their cooperation with chip suppliers, resulting for competitors in delayed access to the latest technologies.
- (78) However, such a scenario is unlikely. Firstly, it results from the market investigation towards suppliers that if their turnover achieved with smart card manufacturers varies from 4 to 15% of their total turnover, the share achieved with the merging parties never exceeds (except in one case) the third of their turnover achieved with smart cards manufacturers (from 21 to 32% depending on suppliers). This means that the alleged strength of the new entity, both in bargaining power when buying

---

<sup>31</sup> The semiconductor industry faces regularly shortages when one of its leading purchaser industries (such as telecommunication companies) is subject to a strong demand increase.

chips and in its ability to cooperate in innovating projects, is not significantly changed compared to the pre-transaction situation. Secondly, periods of shortage are rare and the last ones occurred in 2001 during the IT growth. Thirdly, it is doubtful that, even in periods of shortages, no other card manufacturer would be delivered in chips. There exist 5 suppliers of chips and card manufacturers usually multi-source in order to minimise the sourcing risk. The new entity would procure its chips mainly from one or two of them<sup>3233</sup>. Fourthly, the parties will not be able to affect significantly supply to other card manufacturers. Chip manufacturers will still have an incentive to favour a strategy of multiple selling: as indicated above, they do not and will not depend on an exclusive relationship with a single entity and moreover chips are not high-end or specialised chips. Furthermore, it has to be noted that STM-Incard is currently owned by a chip manufacturer and that SagemOrga potentially has an even higher bargaining power than Axalto/Gemplus due to their other related businesses (including handsets and electronic devices). Thus, even assuming that the new entity would have a privileged access to chips, it would have to face the competitive pressure of two other companies in these extreme circumstances.

- (79) The existence of five chips' suppliers is also the reason why the proposed operation should have no or little impact on R&D cooperation between chip suppliers and card manufacturers. Firstly, R&D related to chips is mainly driven by the electronic industry rather than the secure plastic card industry. Secondly, R&D related to chips represents only a marginal proportion of the parties' R&D. Thirdly, as described above with the shares of turnover achieved by chip suppliers with smart card manufacturers, the transaction will not change the incentive of the chip manufacturers to innovate. Finally, the parties will not be in a position to force all card manufacturers to deal with them. Indeed, it will still be possible for the competitors of the new entity to enter in such cooperation with those suppliers that have no R&D agreement with the new entity.
- (80) It can therefore be concluded that the transaction is unlikely to raise serious doubts as regards the procurement of the main raw material needed in the manufacture of smart cards.

## **VI. COMMITMENTS SUBMITTED BY THE NOTIFYING PARTY**

### *1) Procedure*

- (81) In order to render the concentration compatible with the common market, the parties have offered some commitments pursuant to Article 6(2) of the EC Merger Regulation, which are annexed to this Decision. The commitment package was proposed by the parties on 26 April 2006 and some substantial adjustments were made to the initial proposal. The sets of commitments submitted were tested with third parties and a majority of those considered the commitments to be suitable to remedy the competition concerns identified. The commitments are attached to this

---

<sup>32</sup> Currently, Gemplus and Axalto mainly procure their chips from two chip suppliers, [...].

<sup>33</sup> If on the other hand, the parties were to procure their chips evenly from the 5 suppliers, their orders to a given supplier would be comparable to that of their competitors so that their alleged leverage to get the priority of delivery would be reduced.

decision and form an integral part thereof.

2) *Description of the commitments*

(82) The notifying party's commitments consist of :

- Axalto (meaning the new entity) undertakes for a period of ten years (subject to the possibility of a shortening of this period following a review by the Commission after five years in light of technological and/or market developments) that the combined entity will, upon written request by any Third Party, grant a non-exclusive license under any or all (*i.e.*, one, several or all) Patent Families of the combined entity's Patent Portfolio (including current and future patents and patent applications) as at the date such license is entered into to make, use, sell, and import Licensed Products anywhere in the EEA, and to export Licensed Products anywhere outside the EEA, on fair, reasonable, and non-discriminatory terms and conditions.
- Axalto also undertakes for a period of eight years (subject to the possibility of a shortening of this period following a review by the Commission after five years in light of technological and/or market developments) to disclose Interoperability Information to any Third Party qualified to supply SIM cards to any customer who has purchased an OTA Platform (including upgrades thereto) from the Combined Entity, so that Third Parties can ensure the interoperability of their SIM cards to be delivered on or after the date on which such OTA Platform becomes operational.
- Axalto also appoints a Monitoring Trustee. Following its appointment, the Monitoring Trustee shall (i) monitor compliance by the Combined Entity with the conditions and obligations; (ii) assume any other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision; (iii) propose to the Combined Entity such measures as the Monitoring Trustee considers necessary to ensure the Combined Entity's compliance with the conditions and obligations attached to the Decision; and (iv) provide to the Commission a written report.
- Finally, any dispute that may arise in relation to the two above commitments will be resolved by a fast-track arbitration procedure.

3) *Suitability for removing the serious doubts*

(a) The Intellectual Property Rights

(83) As to the commitment proposed in the area of intellectual property rights it is designed to entirely remove the serious doubts identified above. The respondents to the market investigation launched on the basis of the first commitments submitted by Axalto agreed in principle on the need to remove the threat of the combined IP portfolio of the new entity that could be used to raise rivals' costs or even foreclose competitors. However, there were strong feelings expressed against the conditions designed in order to give access to this IP portfolio, such as a requirement for reciprocity (one third party would have had access only by giving access to its own portfolio), the geographical scope, the duration of the commitment and the level of publicity. In addition, comments were made in relation to the definitions, in particular that some

were misleading or inappropriate in comparison to the standard practice within the industry.

- (84) Accordingly, in order to tackle all relevant concerns raised by third parties, some substantial modifications were made to the original commitments. In particular, beside the adaptation of the definitions, the duration was extended to ten years, the geographic scope was extended to the EEA and outside the EEA and the reciprocity requirement was removed. Instead of the latter, Axalto has now the faculty to insert a clause in any licence agreement, contracted under this commitment, that would protect the new entity from the misuse of this commitment by any third party.
- (85) Axalto will also designate a monitoring trustee as requested by third parties in their comments on the commitments. The tasks of the monitoring trustee will be to ensure a smooth implementation of the commitment, in particular to guarantee the setting of FRAND terms and conditions and to hear any dispute prior to the arbitration procedure. If the dispute cannot be resolved by the monitoring trustee during the conciliation clause, then the third party may request a fast-track arbitration. This two steps system is designed to remove any risk that the parties may stall the negotiation process with third parties.
- (86) Finally, the Commission is of the view that the undertakings in relation to the IP rights proposed by the notifying party, having regard to the refinements that have been crafted as a result of the market testing, adequately address the above issues, both the non-coordinated effects and the risk of tacit collusion, in allowing competitors to have access to the new combined entity's patent portfolio.

(b) The OTA SIM cards administration

- (87) As to the commitment proposed in the OTA SIM cards administration, Axalto undertakes to provide interoperability information to any competitor qualified to supply SIM cards to any customer which has purchased an OTA platform (including upgrades thereto) from the combined entity. Thus, such information will be disclosed within a period of ten working days so that Third Parties can ensure the interoperability of their SIM cards to be delivered to the customer operating the OTA platform.
- (88) In the market test, it was thought to provide the interoperability information to the customer (telecommunication operator) instead of the competitor. This proposal was considered to delay the procedure. There were also strong reserves in relation to the different periods set to enable the disclosure of the information. They were deemed to be too long and not suitable for the standard practice of the industry and thus put competitors in a disadvantage position. The period was shortened accordingly. In the final commitments submitted, in response to potential lack of visibility of this commitment, the notifying party also agreed to publish on its website contact details for the provision of the interoperability information.
- (89) Besides, alike for the IP rights, the monitoring trustee and the fast-track arbitration will allow shielding the efficacy of this commitment in a timely fashion.
- (90) The Commission is of the view that the undertakings proposed by the parties, having also regard to the additional refinements that have been crafted as a result of the market testing, adequately address the above issues.

4) *Conclusion on the commitments*

- (91) The Commission therefore considers the commitments suitable for remedying the serious doubts on the compatibility of the concentration with the Common Market and the EEA, which have been established in the previous sections of this Decision.

**VII. CONDITIONS AND OBLIGATIONS**

- (92) Under the first sentence of the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
- (93) The achievement of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(5) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.
- (94) In accordance with the basic distinction described above, the decision in this case is conditioned on the full compliance with Sections B to F of the Commitments submitted by the parties on 18/05/2006.
- (95) The remaining requirements set out in the other Sections of the Commitments submitted by the parties on 18/05/2006 are considered to constitute obligations.

**VIII. OVERALL CONCLUSION**

- (96) 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 pursuant to Article 2(2) of Council Regulation (EC) No 139/2004, subject to full compliance with the commitments as described in paragraph (82) and the related text in the Commitments annexed to this Decision that forms an integral part to this decision.
- (97) Consequently, 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 and Article 6(2) of Council Regulation (EC) No 139/2004.

HAS ADOPTED THIS DECISION:

*Article 1*

The notified operation whereby Axalto would acquire sole control of Gemplus is hereby declared compatible with the common market and with the functioning of the EEA Agreement.

*Article 2*

Article 1 is subject to full compliance with the conditions set out in Sections B to F of the Commitments submitted by the parties on 18/05/2006, contained in the Annex.

*Article 3*

This Decision is addressed to the notifying party:

Done in Brussels, 19/05/2006

For the Commission,  
Signed,  
Janez POTOČNIK  
Member of the Commission

**Axalto Holding N.V.**  
Joop Geesinkweg 541-542  
1096 AX AMSTERDAM  
The Netherlands  
www.axalto.com

Phone : +31 20 56 20 680  
Fax : +31 20 56 20 686



**May 18, 2006**

Henri Piffaut  
European Commission  
Directorate-General for  
Competition  
Merger Registry J-70  
Rue Joseph II, 70  
1000 Brussels

**BY HAND**

**Case COMP/M.3998 - Gemplus/Axalto**

**COMMITMENTS TO THE EUROPEAN COMMISSION**

Pursuant to Article 6(2), of Council Regulation (EEC) No. 139/2004 as amended (the “Merger Regulation”), Axalto hereby provides the following Commitments (the “Commitments”) in order to enable the European Commission (the “Commission”) to declare the prospective combination of Axalto and Gemplus (together, the “Parties”) compatible with the common market and the EEA Agreement pursuant to Article 6.1(b) of the Merger Regulation (the “Decision”).

The Commitments shall take effect upon the Closing Date.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

## Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

- (a) **Affiliated Undertakings:** means, with respect to an undertaking, other undertakings controlled by the first undertaking and/or by the ultimate parents of the first undertaking, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Notice on the concept of concentration under the Merger Regulation.
- (b) **Axalto:** means Axalto Holding N.V. and its Affiliated Undertakings, changing its name to “Gemalto N.V.” on the Closing Date.
- (c) **Blocking Patent:** means a patent or patent application owned by a Third Party and covering SIM, smart payment card or smart ID (government, corporate, healthcare and all other types of smart ID cards) technology for which no practical alternative technology exists.
- (d) **Closing Date:** means the Closing of the Contribution in Kind as defined in the Combination Agreement dated December 6, 2005 between Gemplus and Axalto.
- (e) **Combined Entity:** means Gemalto N.V. and its Affiliated Undertakings as of the Closing Date.
- (f) **Essential Patent:** as applied to a patent or patent application means that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available to make, sell, lease, or otherwise dispose of, repair, use or operate Licensed Products which comply with a standard or widely accepted specifications without infringing that patent or patent application. For the avoidance of doubt in exceptional cases where a standard or widely accepted specification can only be implemented by technical solutions, all of which are infringements of patents or patent application, all such patents or patent applications shall be considered essential.



- (g) **Gemplus:** means Gemplus International S.A. and its Affiliated Undertakings being acquired by Axalto, as defined above in (b), on the Closing Date.
- (h) **Interoperability Information:** means information and data required to enable Third Parties' SIM cards (it being understood that "SIM cards" in these Commitments shall include 3G smart cards and smart cards based on successor standards), to interoperate with the OTA Platforms offered by the Combined Entity.
- (i) **Licensed Products:** means
- (i) any and all portable devices (examples: smartcards, tokens, USB keys, etc....) for use by an end user and comprising at least one chip, said portable devices comprising means for establishing connection (with or without contact) or communicating with associated devices (e.g., terminals, readers, or servers with applications software), one of the main functions of said portable devices being:
    - a. identification and/or authentication of the portable device itself and/or of the bearer thereof, and/or
    - b. exchange and/or storage of information and/or history relating to said bearer and/or portable device,
- provided that the portable device is of pocket size or smaller, and where said portable device(s) can as such be used by the final user, subject to the personalization, which can be done by a Third Party; and
- (ii) any part of such portable devices (modules, components whose purpose is to communicate with other parts of the portable device, etc...) as defined above.
- (j) **Monitoring Trustee:** means one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Axalto, and who has the duty to monitor Axalto's compliance with the conditions and obligations attached to the Decision.

- (k) **OTA Platform:** means “Over The Air” SIM administration platform hardware and software offering functionalities such as the ability to update/manage the SIM card with or without contact including access to (U)SIM-based internet browsing and/or download of Java SIM applets.
- (l) **Patent Families:** means a set of patents in the Patent Portfolio taken in one or more EEA countries for protecting a single invention.
- (m) **Patent Portfolio:** with respect to a legal or natural person, means all rights in patents and patent applications relating to SIM, smart payment cards and smart ID (government, corporate, healthcare and all other types of smart ID cards) segments owned by such person and its Affiliated Undertakings.
- (n) **Third Party:** means any actual or potential smart card competitor of the Combined Entity operating in the EEA and its Affiliated Undertakings.
- (o) **Transaction:** means the prospective acquisition of Gemplus by Axalto as notified to the Commission on Form CO on March 24, 2006 pursuant to the Merger Regulation.
- (p) **Working Days:** means “Working days” within the meaning of Article 24 of Commission Regulation (EC) No 802/2004.

## **Section B. License Commitment**

1. Axalto undertakes that, from and after the Closing Date and for a period of ten years thereafter (subject to the possibility of a shortening of this period following a review by the Commission after five years in light of technological and/or market developments), the Combined Entity will, upon written request by any Third Party, grant a non-exclusive license to such Third Party (the “Licensee”) under any or all (*i.e.*, one, several or all) Patent Families of the Combined Entity’s Patent Portfolio as at the date such license is entered into to make, use, sell, and import Licensed Products anywhere in the EEA, and to export Licensed Products anywhere outside the EEA, on fair, reasonable, and non-discriminatory terms and conditions.

2. Each such license once granted will take effect from the date of the Third Party’s request and will continue for the life of the last to expire of the licensed patents

unless terminated by the Combined Entity for a material breach of the license agreement by the Licensee or by the Licensee at its discretion.

3. Contact details to be used by a Third Party wishing to request a license under this Commitment shall be advertised in the Combined Entity's documentation and on its website in an easily visible position, together with one or more forms of standard license, which shall be subject to the prior approval of the Commission.

4. The Combined Entity may include a provision in any license agreement entered into under this Section B permitting the Combined Entity to terminate such license agreement should the Licensee sue the Combined Entity for an alleged infringement of an Essential Patent(s) or Blocking Patent(s) owned by such Third Party after a prior good faith request by the Combined Entity for a license of such Essential Patent(s) or Blocking Patent(s) on fair, reasonable and non-discriminatory terms. Any such termination will take effect retroactively as of the date that the license agreement was entered into. The Combined Entity shall inform the Commission without delay of any such cases.

## **Section C. OTA Interoperability Commitment**

1. Axalto also undertakes that from and after the Closing Date and for a period of eight years thereafter (subject to the possibility of a shortening of this period following a review by the Commission after five years in light of technological and/or market developments):

- i. Upon written request, the Combined Entity will disclose Interoperability Information to any Third Party qualified to supply SIM cards to any customer who has purchased an OTA Platform (including upgrades thereto) from the Combined Entity or upon written agreement of a customer who has purchased an OTA Platform (including upgrades thereto) from the Combined Entity.
- ii. The Combined Entity shall respond to written requests by Third Parties for the receipt of Interoperability Information pursuant to this Commitment within a period of 10 Working Days and either provide the requested information or explain why the requested information is not available.
- iii. The Combined Entity will provide Interoperability Information that is readily available to the Combined Entity without charge and will provide Interoperability Information that is not readily available on fair, reasonable, and non-discriminatory terms subject to the supervision of the Monitoring Trustee. Reasonable technical assistance/consultation and interoperability testing facilities shall be provided where necessary and at fair, reasonable and non-discriminatory prices to enable Third Parties to understand and be able to implement the Interoperability Information in accordance with Section 1(i) above.
- iv. Prior to any disclosure of Interoperability Information to a Third Party, such Third Party shall enter into an agreement with the Combined Entity as regards confidentiality, pricing, and assistance from the Third Party. The confidentiality provisions of such Third Party agreement will provide that (x) confidential information revealed by the Third Party to the Combined Entity, or vice versa, will not be disclosed to any entity other than the Commission, the Monitoring Trustee or the Arbitral Tribunal or as required by law, (y) the Combined Entity shall use confidential information of the Third Party only to discharge its obligations under this Commitment and for no other purpose and (z) the Third Party shall use confidential information of the Combined Entity

only to ensure the interoperability with the Combined Entity's OTA Platforms of the Third Party's SIM cards sold in the EEA or exported from the EEA and for no other purpose.

2. Contact details for the provision of Interoperability Information pursuant to this Commitment shall be advertised in the Combined Entity's documentation and on its website in an easily visible position. Interoperability Information of a general nature will be made available to Third Parties on the Combined Entity's website subject to the conditions set out in this Section C and subject to appropriate security procedures.

3. The Combined Entity's obligations under this Commitment are subject to the relevant Third Party providing Interoperability Information, technical clarifications and assistance and interoperability testing facilities to the Combined Entity under the same conditions, *mutatis mutandis*.

## **Section D. Monitoring Trustee**

### **I. Appointment Procedure**

1. Axalto shall appoint the Monitoring Trustee(s), subject to the prior approval of the Commission as referred to in Paragraph 3 below. The Monitoring Trustee shall be independent of the Parties and any Third Party, possess the necessary qualifications to carry out its mandate, for example as consultant or auditor, and shall neither be nor become exposed to a conflict of interest. Axalto shall remunerate the Monitoring Trustee in a way that does not impede the independent and effective fulfillment of its mandate.

2. Axalto shall propose a Monitoring Trustee satisfying the conditions of these Commitments for the Commission's approval within 30 calendar days after the Closing Date. The proposal shall contain sufficient information for the Commission to verify that the Monitoring Trustee fulfils the requirements set out in paragraph 1 above and the outline of a work plan in which the Monitoring Trustee describes how it intends to carry out the tasks assigned to it under the conditions and obligations attached to the Decision. The mandate submitted for approval shall be drawn up taking due account of the Commission Standard Trustee Mandate and shall include all provisions necessary to enable the Monitoring Trustee to fulfill its duties under these Commitments, including for the avoidance of doubt an obligation not to disclose confidential information of the Combined Entity and Third Parties except to the Commission and the Arbitral Tribunal.

3. The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfill its obligations. If only one name is approved, Axalto shall appoint or cause to be appointed the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If

more than one name is approved, Axalto shall be free to choose the Monitoring Trustee to be

appointed from among the names approved. The Monitoring Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

4. If the proposed Monitoring Trustee is rejected, Axalto shall submit the names of at least two more individuals or institutions within two weeks of being informed of the rejection, in accordance with the requirements set out in paragraph 2 for approval in accordance with paragraph 3.

5. If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom Axalto shall appoint, or cause to be appointed, in accordance with a Trustee mandate approved by the Commission.

## **II. Functions of the Monitoring Trustee**

6. The Monitoring Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Monitoring Trustee or Axalto, give any orders or instructions to the Monitoring Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

7. Following its appointment, the Monitoring Trustee shall:

- (i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;
- (ii) monitor compliance by the Combined Entity with the conditions and obligations provided in Sections B and C;
- (iii) assume any other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
- (iv) propose to the Combined Entity such measures as the Monitoring Trustee considers necessary to ensure the Combined Entity's compliance with the conditions and obligations attached to the Decision; and
- (v) provide to the Commission, sending the Combined Entity a non-confidential copy at the same time, a written report in English

- within 15 calendar days after the end of every month for the first three months; and
- within 15 calendar days after the end of every quarter for the first five years.

The report shall cover the developments in negotiations with potential Licensees and undertakings requesting the disclosure of Interoperability Information so that the Commission can assess whether Axalto complies with its obligations under these Commitments.

In addition to these periodic reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending the Axalto a non-confidential copy at the same time, if it concludes on reasonable grounds that Axalto is failing to comply with any of the conditions or obligations under these Commitments.

### **III. Duties and obligations of the Combined Entity**

8. The Combined Entity shall provide the Monitoring Trustee with all such assistance and information, including copies of all relevant documents, as the Monitoring Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to any of the business books, records, documents, personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments. The Combined Entity shall make available to the Monitoring Trustee one or more office(s) on its premises, and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

9. The Combined Entity shall provide the Monitoring Trustee, with copies of all license agreements entered into and Interoperability Information disclosed under these Commitments promptly following the execution and/or disclosure thereof, as applicable, in each case subject to the Monitoring Trustee's obligations of professional secrecy.

### **IV. Replacement, discharge and reappointment of the Monitoring Trustee**

10. The Commission may, after hearing the Monitoring Trustee, order the Combined Entity to remove the Monitoring Trustee if the Monitoring Trustee has not acted in accordance with the Commitments or for any other good cause.

11. The Trustee may also be removed by the Combined Entity with the prior approval of the Commission and after the Commission has heard the Monitoring Trustee if the Monitoring Trustee has not acted in accordance with the Commitments or for any other good cause.

12. The Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in paragraphs 1 to 5 above.

13. The Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties, at the latest at the end of the period referred to in Section B.1. above.



## **Section E. Review**

1. Axalto undertakes that from and after the Closing and for a period of ten years (subject to the review clause in Paragraph B.1. above and Paragraph E.4. below) thereafter the Combined Entity will ensure that procedures are put in place so that any prospective Third Party can apply for the rights granted in Sections B and C.

2. Axalto undertakes that (i) from and after the Closing and for a period of ten years (subject to the review clause in Paragraph B.1. above and Paragraph E.4. below) thereafter the Combined Entity will report to the Commission in writing every six months in English on developments in negotiations with potential Licensees and undertakings requesting the disclosure of Interoperability Information and (ii) the Combined Entity shall provide the Commission with copies of all license agreements entered into and Interoperability Information disclosed as well as requested under these Commitments promptly following the execution and/or disclosure thereof, as applicable, in each case subject to the Commission's obligations of professional secrecy.

3. The Combined Entity shall report to the Commission any matters, which the Commission requests in order to determine whether the Combined Entity has complied with this Commitment. Any such report shall be sent to the Commission within 15 Working Days from the date the Commission makes a request.

4. In response to a request from the Combined Entity showing good cause, the Commission may, where appropriate, for example in response to technological developments and/or market conditions, waive, modify or substitute one or more of the provisions of these Commitments at any time.

## **Section F. Fast Track Dispute Resolution**

1. If the Combined Entity and a Third Party cannot agree on the terms of the license pursuant to Section B or on the information to be disclosed pursuant to Section C, such disagreement including the non-conclusion of a license agreement with a Third Party, or the non-disclosure of Interoperability Information within 10 Working Days following the written request by a Third Party sufficiently identifying its requested information, shall be finally and exclusively resolved by the fast track dispute resolution procedure as described below.

2. Any Third Party who wishes to avail itself of the fast track dispute resolution procedure (a "Requesting Party") shall send a written request to the Combined

Entity (with a copy to the Monitoring Trustee) setting out in detail the reasons leading that party to believe that Combined Entity is failing to comply with the requirements of the Commitments. The Requesting Party and the Combined Entity will use their best efforts to resolve all differences of opinion and to settle all disputes that may arise through co-operation and consultation within a reasonable period of time not exceeding 15 Working Days after receipt of the Request, or in the case of a dispute related to Interoperability Information under Section C, within a reasonable period of time not exceeding 10 Working Days.

The Monitoring Trustee shall present its own proposal (the “Trustee Proposal”) for resolving the dispute within eight Working Days, specifying in writing the action, if any, to be taken by the Combined Entity in order to ensure compliance with the commitments vis-à-vis the Requesting Party, and be prepared, if requested, to facilitate the settlement of the dispute.

3. Should the Requesting Party and the Combined Entity (together the “Parties to the Arbitration”) fail to resolve their differences of opinion in the consultation phase as described in Section F.2. above, the Requesting Party may serve a notice (the “Notice”), in the sense of a request for arbitration, to the International Chamber of Commerce (hereinafter the “Arbitral Institution”), with a copy of such Notice and request for arbitration to the Monitoring Trustee.

The Notice shall set out in detail the dispute, difference or claim (the “Dispute”) and shall contain, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, *e.g.* documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by Combined Entity (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal, including a comment as to its appropriateness.

4. The Combined Entity shall, within 10 Working Days from receipt of the Notice, submit its answer (the “Answer”), which shall provide detailed reasons for its conduct and set out, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, *e.g.*, documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action, which the Combined Entity proposes to undertake vis-à-vis the Requesting Party (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

### **Appointment of the Arbitrators**

5. The Arbitral Tribunal shall consist of three persons having experience in intellectual property matters. The Requesting Party shall nominate its arbitrator in the Notice; the Combined Entity shall nominate its arbitrator in the Answer. The arbitrator nominated by the Requesting Party and by the Combined Entity shall, within five Working

Days of the nomination of the latter, nominate the chairman, making such nomination known to the parties and the Arbitral Institution, which shall forthwith confirm the appointment of all three arbitrators.

Should the Combined Entity fail to nominate an arbitrator, or if the two arbitrators fail to agree on the chairman, the default appointment(s) shall be made by the Arbitral Institution.

The three-person arbitral tribunal is herein referred to as the “Arbitral Tribunal”.

### **Arbitration Procedure**

6. The Dispute shall be finally resolved by arbitration under the rules of the Arbitral Institution with such modifications or adaptations as foreseen herein or necessary under the circumstances (the “Rules”). The arbitration shall be conducted in Paris, France in the English language.

7. The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of e-mail for the exchange of documents.

The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organizational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of Reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitral Tribunal at the organizational meeting or immediately thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within three weeks of the confirmation of the Arbitral Tribunal.

8. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, particularly an overview of terms and conditions of the licenses entered into in the last three years with presentation of the substance of the licensed patents and comprising at least rates and terms at which licenses have been granted to earlier Third Parties, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Trustee in all stages of the procedure if the Parties to the Arbitration agree.

9. The Arbitral Tribunal shall not disclose confidential information and shall apply the standards attributable to confidential information under the Merger Regulation. The Arbitral Tribunal may take measures necessary for protecting confidential information

in particular by restricting access to confidential information to the Arbitral Tribunal, the Trustee, and outside counsel and experts of the opposing party.

10. The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a prima facie case and (ii) if the Requesting Party produces evidence of a prima facie case, subject to Paragraph F. 12. below, the Arbitral Tribunal must find in favor of the Requesting Party unless the Combined Entity can produce evidence to the contrary.

### **Involvement of the Commission**

11. The Commission shall be allowed and enabled to participate in all stages of the procedure by

- Receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;
- Receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of Reference and procedural time-table);
- Giving the Commission the opportunity to file *amicus curiae* briefs; and
- Being present at the hearing(s) and being allowed to ask questions to parties, witnesses and experts.

The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission without delay.

In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Commitments, the Arbitral Tribunal may seek the Commission's interpretation of the Commitments before finding in favor of any Party to the Arbitration and shall be bound by the interpretation.

### **Decisions of the Arbitral Tribunal**

12. The Arbitral Tribunal shall decide the dispute on the basis of the Commitment and the Decision. Issues not covered by the Commitment and the Decision shall be decided (in the order as stated) by reference to the Merger Regulation, EU law and the laws of the Republic of France without reference to its rules of conflicts of law; and the arbitrators shall not act in amicable composition. Each Party to the Arbitration shall submit a single proposal for the terms of the license or information to be disclosed to an arbitration panel. The Arbitral Tribunal shall take all decisions by majority vote. This Arbitral Tribunal can select one of the two submitted proposals in its entirety; provided, however, that the Arbitral Tribunal may, if it determines that the proposal to be selected contains one or more unreasonable clauses, impose alternatives to such clauses. With respect to the royalty to be paid, the royalty can be the one proposed by either party or any royalty in between. This selection must be made by majority decision or, if there is no majority, by the chairman alone.

13. The Arbitral Tribunal shall in the award specify the action, if any, to be taken by Axalto in order to comply with the Commitments vis-à-vis the Requesting Party (e.g., specify a contract including all relevant terms and conditions in accordance with Paragraph E. 12. above). The award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The costs associated with any arbitration (including arbitration fees and the fees and expenses of counsel to the successful party) will be borne by the losing party, as determined by majority decision or, if there is no majority, by the chairman alone.

14. The award shall, as a rule, be rendered within one month after the adoption of the Terms of Reference; provided, however that if both Parties to the Arbitration agree, the award may be rendered not more than three months thereafter. The time-frame shall, in any case, be extended by the time required for the Commission to submit an interpretation of the Commitment if so requested by the Arbitral Tribunal.

15. The Parties to the Arbitration shall prepare a non-confidential version of the award, without business secrets. The Commission may publish the non-confidential version of the award.

16. Nothing in the arbitration procedure shall affect the power to the Commission to take decisions in relation to the Commitment in accordance with its powers under the Merger Regulation.

AXALTO HOLDING N.V.

By: \_\_\_\_\_

**Olivier Piou**

Chief Executive Officer