*Case No COMP/M.5763 -
DASSAULT
SYSTEMES/ IBM DS
PLM Software business*

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 29/03/2010

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

Subject: **Case No COMP/M.5763 - DASSAULT SYSTEMES/ IBM DS PLM Software business**
Notification of 24/02/2010 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 24 February 2010, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Dassault Systèmes ("DS", France) belonging to Group Industriel Marcel Dassault (France) acquires control, within the meaning of Article 3(1)(b) of the Merger Regulation, by way of purchase of assets of IBM Corporation's ("IBM", United States of America) Dassault Systèmes product lifecycle management software business ("IBM's DS PLM software business", or "IBM DS", United States of America).

I.   THE PARTIES AND THE OPERATION

2. **DS** is a French company active primarily in the development and sale of product lifecycle management ("PLM") software solutions. DS was founded in 1981 in order to market

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[1]   OJ L 24, 29.1.2004 p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

software which had been developed in house for the conception and design of aeroplanes. Initially, DS had no marketing or distribution network or expertise. It therefore entered in 1981 into a partnership with IBM to utilise IBM's established network and reputation to sell and distribute DS PLM software products.

3. **IBM DS** is a business within the IBM group (although it is not a legal entity). IBM DS has been distributing DS PLM software products since 1981. IBM DS is engaged solely in the licensing of DS PLM products to ultimate customers and in the provision of services in support of such DS PLM software license sales. It serves no other PLM software solution provider and does not sell any products other than licenses of DS PLM products.

4. From the information submitted by the notifying party, it appears that IBM DS currently distributes DS PLM products under a licence agreement entered into between DS and IBM in 1996 (the "1996 Licensing Agreement").[2] This agreement is non-exclusive and establishes distinct marketing and distribution responsibilities for DS and IBM. DS has progressively sought greater involvement in the distribution and marketing of its products. Since 2007, IBM DS has been responsible for sub-licensing DS PLM software to "Named Accounts" (mostly large enterprises). DS meanwhile has been responsible for distribution of its PLM software products to "non-Named Accounts", which are mostly small and medium sized businesses ("SMBs"). Some residual SMB customers ("Residual SMB Customers") which have not yet transitioned to DS licenses are supplied by IBM DS. IBM DS is not entitled to sell to customers other than Named Accounts reserved for IBM or to Residual SMB Customers. DS does not sell directly to IBM DS customers except when a particular customer specifically requests to deal with DS directly rather than IBM DS.

5. The notifying party submits that the rationale for the proposed transaction is to enable DS to develop a closer relationship with large customers allowing it to better anticipate and accommodate their needs in its future product development.

6. The proposed transaction concerns the acquisition of ownership and control over the IBM DS PLM software business by way of an asset purchase. The core transaction agreement, the Master Asset Purchase Agreement (the "MAPA"), was signed by DS and IBM on the 26 October 2009. The MAPA anticipates the transfer to DS of the business operations of IBM and certain IBM subsidiaries relating to the sale and support of DS PLM products to Named Accounts and the provision by IBM of services relating to DS' current and legacy products. As a result of the proposed transaction, DS will acquire sole control over the assets (including customers and sales force), liabilities, contracts, licenses and service offerings constituting the IBM DS PLM software business.

7. IBM DS is a business with a market presence, to which a market turnover can be attributed[3] and therefore constitutes a part of an undertaking within the meaning of Article 3(1)(b) of the Merger Regulation.

8. In light of the above, the proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

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[2]   1996 Amended and Restated License Agreement for Use and Marketing of Programming Material.

[3]   IBM DS' market turnover is generated through the sub-licensing of DS PLM software to customers as explained in paragraphs 3 and 4 above.

II. UNION DIMENSION

9. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (DS: EUR […] million; IBM DS: EUR […] million)[4]. Each of them has a Union-wide turnover in excess of EUR 250 million (DS: EUR […] million; IBM DS: EUR […] million), but they do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has a Union dimension.

III. MARKET DEFINITION

Relevant product market

10. PLM software and solutions refers to business software applications that support the end user in managing the life cycle of its products.

11. Specifically, PLM software and solutions are used to design and evaluate new products and the associated production processes in the virtual environment and then to manage all product-related data created at the initial stages and all subsequent stages of the product's lifecycle. Thus, PLM software and solutions cover multiple applications and data management functions and comprise software for the creation, management, dissemination and use of product-related information across the end user company, such as digital product development ("DPD") (encompassing computer-aided design ("CAD"), computer-aided engineering ("CAE") and computer-aided manufacturing ("CAM")), digital manufacturing ("DM"), and product data management ("PDM").The notifying party estimates that the total size of the worldwide PLM software solutions market was EUR […] million in 2008.

12. The notifying party submits that PLM should be considered as a separate market from Enterprise Application Software ("EAS"), which performs business functions such as accounting, customer information management, production scheduling, bank or account maintenance.

13. Moreover, whilst referring to a previous Commission decision[5] in which a possible segmentation of the PLM software space on the basis of the various software applications was considered, the notifying party submits that, for the purposes of the case at hand, it is not necessary to decide on whether such narrower product markets should be defined since the proposed transaction will not give rise to competition concerns.

14. In that previous decision, Siemens/UGS, the Commission left open the questions (i) whether PLM software could be distinguished from EAS; and (ii) whether the various possible software applications and segments within the PLM software and solutions space constitute distinct product markets, namely DPD, CAD, CAE, CAM, DM and PDM.

15. In the present case, the Commission carried out a market investigation among competitors, customers and other distributors of PLM software such as value added resellers ("VARs") and system integrators ("SIs").

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[4] Turnover calculated in accordance with Article 5(1) of the Merger Regulation.

[5] COMP/M.4608 Siemens/UGS, 27 April 2007.

16. According to the market investigation the majority of respondents consider that (i) PLM software solutions do not form part of a wider EAS market;[6] and (ii) a segmentation of the PLM software space on the basis contemplated by the Commission in Siemens/UGS would be appropriate.[7]

17. A majority of respondents[8] made an additional distinction between "high-end" and "low-end" PLM software in particular in relation to certain types of more sophisticated PLM applications. There was a divergence of opinion, however, between respondents as to the PLM applications for which the "high-end"/"low-end" distinction would be relevant.

18. In a recent state aid decision in this sector, the Commission identified another possible segmentation of the overall PLM space by industrial sector of application (namely, "bioPLM" in that particular context) and by sub-application type (namely 2D or 3D applications).[9]

19. In the present case, the majority of respondents to the Commission's market investigation indicated that there could be a separate 3-D segmentation for certain PLM applications[10]. This appears to be the case particularly for design software (CAM, CAD) where the 3-D software functionality becomes more relevant. The market investigation was inconclusive as regards the appropriateness of further segmenting the various types of PLM software by industrial sector of application (such as automotive or aerospace).

20. For the purposes of the present case, the precise delineation of the product market can be left open since no competition concerns arise on the basis of any of the possible market definitions.

Relevant geographic market

21. DS submits that the market for PLM software solutions is worldwide or at the very least EEA-wide in scope. Previous Commission decisional practice left the precise geographic scope of the market open.[11] Respondents to the Commission's market investigation have almost unanimously confirmed that the scope of the market is at least EEA-wide.[12]

22. However, given that there are no competition concerns arising from the proposed transaction, the geographic scope of the market can be left open.

VI. COMPETITIVE ASSESSMENT

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[6] 35 out of 38 respondents.

[7] 32 out 43 respondents.

[8] 24 out of 42 respondents.

[9] N 541/2008 – France Soutien d'Oséo au PMII BioIntelligence, 15 May 2009, paragraphs 266 to 281.

[10] 24 out of 43 respondents.

[11] COMP/M.4608 Siemens/UGS, 27 April 2007, paragraph 11.

[12] 37 out of 39 respondents.

Horizontal Issues

23. The notifying party submits that the proposed transaction is of a vertical nature and that there is no horizontal overlap between DS and IBM DS in the supply of PLM products. According to the notifying party, the proposed transaction will thus not result in a loss of a competitive constraint previously exercised by IBM on DS or vice versa.

24. The notifying party submits, first, that since IBM DS does not produce any PLM products, there currently is no inter-brand competition between DS and IBM DS.

25. Secondly, the notifying party argues since the agreement currently in force between DS and IBM DS[13] clearly designates which customers DS and IBM DS are entitled to license DS PLM software to, there is currently also no intra brand competition between DS and IBM DS. IBM DS is responsible for sub-licensing DS PLM software to "Named Accounts" (mostly large enterprises). DS meanwhile is responsible for distribution of its PLM software products to "non-Named Accounts", (mostly SMB). Residual SMB Customers which have not yet transitioned to DS licenses are supplied by IBM DS. IBM DS is not entitled to sell to customers other than Named Accounts reserved for IBM or to Residual SMB Customers (see paragraph 4 above).

26. However, from the information submitted by the notifying party it appeared that there were some exceptions to this demarcation of licenses by DS and IBM, notably that a Named Account customer may request that DS supplies it directly. This appears to have happened increasingly, with customers such as […] and […] seeking to deal directly with DS rather than through IBM DS. In such case, from the information submitted by the notifying party it appears that DS would be free to market to such a customer, provided it gives IBM DS an opportunity to match its offer.[14]

27. In light of the exception to the customer delineation outlined above, the Commission's market investigation examined the extent of competition between DS and IBM DS.

28. The market investigation confirmed however the notifying party's submission regarding the very limited competition between DS and IBM DS. Indeed, the vast majority of respondents indicated that they do not perceive DS and IBM DS as competing in the supply of PLM software.[15] To the extent that there was any perception of competition between DS and IBM DS in respect of the supply of DS products, the Commission notes that this was not substantiated: if approached by a customer covered by the agreement between DS and IBM for a direct quote, DS would refer them to IBM so that in fact these customers never had a choice between DS and IBM for the supply of DS PLM software.

29. This lack of competition between DS and IBM DS implies that the proposed transaction would not result in a loss of a competitive constraint previously exercised by IBM on DS or vice versa.

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[13] Please refer to paragraph 4 of the Decision.

[14] In this event, the 1996 Licensing Agreement provides that IBM DS and DS should work together to establish a mutually acceptable solution for the customer.

[15] 35 out of 40 respondents.

30. In any event, even if IBM DS were to be perceived as a competitor to DS, the notifying party's estimates indicate that DS' market share[16] (which includes sales via IBM DS) is below 25% on most of the narrowest possible market definitions outlined in Section III above.[17] As regards those possible narrow segments where DS's market share, including sales via IBM DS, appears to exceed 25% (namely, auto and other transport PLM software[18], auto and other transport CAD/CAM software[19], fabrication and assembly CAD/CAM software[20], CPG/F&B/Pharma CAE software[21], aerospace and defence DM software[22] and auto and other transport DM software[23]), a number of competitors such as SAP, Oracle, Siemens, PTC and Ansys, will remain present in these segments post merger.

31. The market investigation confirmed that the transaction does not give rise to any significant competition concerns. Several customers in fact view the merger as positive as they will now have direct links with the producer of the PLM software without the intermediary supplier potentially resulting in lower prices through the elimination of double marginalisation.[24]

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[16] Given the lack of significant competition between the parties, the Commission did not reconstruct the market to verify the notifying party's market share estimates. The notifying party's market share calculations are based on world-wide DS revenue generated in 2008. The notifying party submits that the market shares do not change substantially on a EEA-wide market.

[17] See paragraph 18 of the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 05.02.2004, p. 5-18) which refers to a market share safe harbour where shares do not exceed 25%.

[18] The notifying party estimates DS' market share (including sales via IBM DS) at [20-30]%.

[19] The notifying party estimates DS' market share (including sales via IBM DS) at [30-40]%. The concerned DS PLM solution for 3D collaborative creation, "CATIA", contains both CAM and CAD applications. The notifying party considers also that it would be artificial to consider two different markets for the same product. For the purpose of the present case, it is not necessary to decide this issue, since under any market definition no competition problem arises.

[20] The notifying party estimates DS' market share (including sales via IBM DS) at [20-30]%.

[21] The notifying party estimates DS' market share (including sales via IBM DS) at [20-30]%.

[22] The notifying party estimates DS' market share (including sales via IBM DS) at [20-30]%.

[23] The notifying party estimates DS' market share (including sales via IBM DS) at [20-30]%.

[24] See paragraph 13, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

Vertical issues

32. The notifying party submits that any foreclosure theory of harm whereby it might refuse to supply distributors/other systems integrators with its products and thereby restrict competition in the supply of PLM software solutions and related services to end customers is not plausible essentially because it has no upstream market power in the supply of PLM software solutions so as to have the ability to foreclose its downstream competitors.

33. The notifying party also submits that the proposed transaction would not give rise to any customer foreclosure issues given that a number of alternative distribution channels are available to other producers of PLM software.

34. The proposed transaction would not give rise to concerns that post merger the new entity would be likely to restrict access to PLM software that it would have otherwise supplied absent the merger. From the information submitted by the notifying party it appears that DS only engages in limited direct sales and that IBM DS currently accounts only for 27% of DS' total revenue. Therefore, DS is heavily dependent on (other) distributors downstream and its losses from an input foreclosure strategy could be significant.

35. The Commission's market investigation also confirmed that there were no input foreclosure concerns.

36. As regards customer foreclosure issues, the proposed transaction would not give rise to concerns that the merged entity may decide to reduce or stop purchasing from upstream competitors as IBM DS does not currently distribute PLM software products for anyone other than DS.[25] In any event, the information submitted by the notifying party indicates that a sufficiently large customer base would be available to upstream competitors post-merger.

37. The Commission's market investigation confirmed that there were no customer foreclosure concerns.

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[25] See paragraph 60 of the Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008) regarding the ability of a merged entity to foreclose access to downstream markets.

VII. CONCLUSION

38. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
(signed)
Joaquín ALMUNIA
Vice-President of the Commission