



EUROPEAN COMMISSION

DG Competition

*Case M.8797 –
THALES /
GEMALTO*

Only the English text is available and authentic.

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

Decision on the implementation of the commitments -
Purchaser approval
Date: 17/05/2019



Brussels, 17.5.2019
C(2019) 3868 final

PUBLIC VERSION

To the notifying party

Dear Sir/Madam,

Subject: Case M.8797 Thales / Gemalto
Approval of Entrust Datacard as purchaser of nCipher following your letter of 28 February and the Trustee's opinion of 8 March¹

I. FACTS AND PROCEDURE

- (1) By decision of 11 December 2018 ("the Decision") pursuant to Article 8(2) of the Merger Regulation, the Commission declared the operation by which Thales S.A. ("Thales" or the "Notifying Party", France) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of Gemalto N.V. ("Gemalto", Netherlands) (the "Transaction") compatible with the internal market, subject to conditions and obligations ("the Commitments"). Thales and Gemalto are hereinafter collectively referred to as the "Parties".
- (2) In particular, the Commitments consist of the divestment of Thales' global GP HSM business, marketed under the nShield brand (the "Divestment Business"). The Divestment Business was integrated into Thales eSecurity, a business unit operating activities in data protection, including GP HSMs, Payment HSMs, Key Management, and Encryption Software. Following the separation from Thales eSecurity it operates under the name nCipher.
- (3) The main tangible assets forming part of the transfer are: [...] as well as all finished goods inventory, supplies tooling, test equipment, sales and promotional material, product documentation, and user manuals relating to the Divestment Business.
- (4) As regards intangible assets, the Divestment Business will include a transfer, or license (as appropriate), of the following main intangible assets: (i) all registered nShield trademarks and patents; (ii) all additional unregistered intellectual property including know-how, testing procedures, manufacturing procedures, product design, trade secrets, source code, and associated utilities and libraries (including product specifications and quality control standards); (iii) all nShield product SKUs listed in the nShield price list; (iv) an assignment of the section of

¹ The Trustee's opinion was supplemented on 18 and 19 April 2019.

any and all inbound licenses that are necessary for the operation (or otherwise used by) the Divestment Business; (v) all documentation associated with R&D for products currently marketed (or intended to be marketed) under the nShield brand.

- (5) With regard to the purchaser criteria, the standard purchaser criteria text is supplemented by an additional criterion that the “Purchaser shall be a player with significant experience in the HSM, or a closely related field, such as data security, enjoying a high level of trust and a good reputation in these areas among EEA-based customers. The Purchaser shall show by way of a business plan, at the Purchaser approval stage, that it has the ability and expertise, in using its own and the Divestment Business’ assets, to reliably provide the relevant products and services to EEA customers, even for enterprise grade security applications and that it has sufficiently concrete plans to undertake (i) all necessary steps to achieve and continue achieving all certifications, and their updates, necessary to supply GP HSMs in the EEA; and (ii) the required R&D for the further development of the Divestment Business” (Paragraph 14.c)
- (6) On 21 February 2019, Thales and Entrust Datacard (“EDC”) executed a Share Purchase Agreement (“SPA”) under which the Divestment Business will be sold to EDC subject to Commission and other regulatory approvals of EDC as the purchaser of the Divestment Business. On 8 March 2019, the Monitoring Trustee Advolis S.A. (“Trustee”) submitted an assessment of EDC’s suitability as a purchaser and, in particular, indicated that it fulfils the criteria of the purchaser requirements in section D, paragraph 14, of the Commitments attached to the Decision. In this assessment, the Trustee also indicated that, based on the SPA, the Divestment Business would be sold in a manner consistent with the Commitments.

II. ASSESSMENT OF THE PROPOSAL

(a) Legal Framework

- (7) In its assessment of the proposed agreements and in accordance with paragraph 48 of the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22 October 2008 (the “Remedies Notice”), the Commission has to ensure the suitability and independence of the proposed purchaser, the viability of the divestment business after the sale, and that the divestment business is sold in a manner consistent with the conditions and obligations attached to the decision.
- (8) According to paragraphs 14 of the Commitments, the Commission should verify that the purchase fulfils the following criteria:
 - i. the purchaser is independent of and unconnected to the Parties;
 - ii. the purchaser has the financial capabilities, proven experience, and incentive to maintain and develop the Divestment Business as a viable and active competitive force with the Parties and other competitors;
 - iii. the purchaser is a player with significant experience in the hardware security modules (“HSMs”), or a closely related field, such as data security, enjoying a high level of trust and a good reputation in these areas among EEA-based customers. The purchaser shows by way of a business plan, that it has the ability and expertise, in using its own and the

Divestment Business' assets, to reliably provide the relevant products and services to EEA customers, even for enterprise grade security applications and that it has sufficiently concrete plans to undertake (i) all necessary steps to achieve and continue achieving all certifications, and their updates, necessary to supply General Purpose HSMs in the EEA; and (ii) the required R&D for the further development of the Divestment Business;

- iv. the acquisition of the Divestment Business by the purchaser is neither likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.

(b) Description of the Proposed Purchaser

- (9) EDC is a privately-held U.S. corporation founded in 1969. It provides technologies that enable consumers, governments and enterprises to maintain trusted identities and execute secure transactions. It is a provider of certificate-based data security solutions for enterprises, including Public Key Infrastructure (“PKI”), Secure Socket Layers (“SSL”) and advanced authentication solutions. EDC’s solutions serve customers across a range of verticals from banking to retail, corporate, healthcare, education, loyalty and memberships, telecommunications, and transit. Over EDC’s 2018 fiscal year (from April 1, 2017 to March 31, 2018), EDC generated revenues of EUR 540 million worldwide, including EUR 65 million in the EEA.
- (10) Based in Shakopee, Minnesota (USA), EDC has wholly-owned operations in numerous countries, including in the EEA (such as in France, Germany, Spain, and the UK) and globally (including in Canada, Hong Kong, China, Japan, Mexico, Australia, New Zealand, India, and Brazil). EDC also has a large distributor-based sales organization. Globally, EDC has more than 2,200 employees in 34 locations and serves customers in more than 150 countries.
- (11) EDC has been privately held by the German based Quandt family since 1987. It has also maintained a direct presence in Europe for more than 30 years, has over 300 employees in 11 locations in the EEA, and runs an indirect network of 144 partners that perform sales and services across the EEA. EDC has long-standing relationships with numerous EEA-based customers, including governments, financial institutions and other enterprises.
- (12) Over the past 18 months, EDC has completed three strategic acquisitions in Europe in the data security space, namely: (i) the acquisition of Trustis, a UK-based PKI solutions provider and an nCipher customer and reseller; (ii) SMS Passcode, a Denmark-based developer and seller of user authentication solutions; and (iii) Safelayer, a Spain-based developer of PKI and digital signature solutions and an nCipher reseller.

(c) Independence from the Parties

- (13) EDC and the Parties have no common shareholders. Neither of the Parties nor any of their subsidiaries have direct or indirect ownership interests in EDC or any of its affiliates. No director of either of the Parties or any of their subsidiaries is on the board of EDC or any of its affiliates. EDC or its affiliates are not economically dependent on Thales or Gemalto.
- (14) Thales and Gemalto are also independent of EDC. The Quandt family (Mr. Stefan Quandt and Ms. Susanne Klatten), who own EDC, currently own roughly 8% of the shares in Gemalto. They will tender their shares in Gemalto, however, as part of Thales' all-cash offer for all the issued and outstanding shares of Gemalto. At the closing of the Thales/Gemalto transaction, the Quandt family will not own any interests in the combined Thales/Gemalto entity.
- (15) The Trustee's review of relationships between the Parties and EDC has shown that EDC and Gemalto have limited partnership agreements not directly related to GP HSMs: (i) in 2016, EDC and Gemalto entered into a master agreement for the purchase of EDC's central issuance by Gemalto², (ii) in February 2018, EDC and Gemalto entered into a partnership to provide as-a-service instant issuance solutions to US financial institutions³, and (iii) in July 2018, EDC and Gemalto expanded on a previous partnership to allow customers to leverage Entrust Datacard Io Trust Security Solutions with Gemalto's Data Protection on Demand.⁴
- (16) The existing agreements are primarily hardware-related (card personalisation and issuance equipment) with some software components. The acquisition of the Divestment Business is not expected to affect these agreements which are not material to any party (less than [0-5]% in terms of sales). Those links have no bearing on EDC's independence and its ability to manage the Divestment Business independently from Thales and Gemalto.
- (17) EDC's only relationship with Thales is that of a purchaser of GP HSMs. EDC today purchases nShield GP HSMs from Thales for (i) resale and (ii) incorporation in its own secure hosted solutions. EDC's purchases from Thales amount to less than [0-5]% of EDC's total input purchases and less than [0-5]% of Thales' total sales.
- (18) In view of the above, the Commission considers that EDC is independent of and unconnected to Thales and Gemalto.

² [...] For the fiscal years ending March 31, 2017, 2018, and 2019 (year-to-date), Gemalto's purchases of central issuance products from EDC averaged EUR [0-10] million.

³ With this combined solution, EDC's instant issuance printers are installed and set up at a branch. State-of-the-art EMV cards can then be personalized and printed on-demand while the issuance software is hosted by and remotely managed from Gemalto's secure, cloud-based Software-as-a-service infrastructure. This partnership has generated [...] revenues to date.

⁴ This partnership has generated [...] revenues to date.

(d) Financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitor

- (19) The Commission considers that EDC has the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.
- (20) First, the Trustee's financial analysis of EDC's annual statements and its business plan suggests that it displays a good level of structural profitability and sound financing structures. The Trustee further indicates that EDC has sufficient financial resources to support the Divestment Business as a viable and active competitor.
- (21) The Trustee analysed EDC's business plan for the Divestment Business and key financial indicators such as revenue, operating expenses and EBIT. The Trustee concluded that the revenues and profits of the operating companies will be growing going forward. The Commission checked that the methodology and the analysis provided by the Trustee on financials and business plan were consistent and reliable.
- (22) Second, the Trustee further indicates that EDC has the necessary expertise in the broader data security space. EDC has a long and proven experience as a provider of Secure Identity and Transaction solutions to governments and enterprises. HSM are part of EDC's solution and currently EDC purchases HSM from third parties. With the Divestment Business EDC acquires a complementary product portfolio with several market synergies including future intragroup sourcing of HSM.
- (23) Finally, EDC's business plan on the Divestment Business shows EDC's incentive to maintain and develop the Divested Business as a viable and active competitor in the market for GP HSMs.
- (24) In view of the above, the Commission considers that EDC has the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.

(e) Significant experience in the HSM or closely related field, including data security, enjoying a high level of trust and a strong reputation in these areas among EEA-based customers

- (25) The Commission considers that EDC has significant experience in the HSM or closely related field, including data security, enjoying a high level of trust and a strong reputation in these areas among EEA-based customers.
- (26) First, the Trustee's analysis indicates that EDC has been active in the data eSecurity market including HSMs. EDC's four main areas of activities are the following: (i) central and instant issuance of physical payment cards, (ii) authentication solutions, (iii) encryption and SSL/TLS certificate solutions, and (iv) digital identity solutions. EDC purchases GP HSMs for resale or to incorporate them in broader integrated solutions (i.e. GP HSMs are a core component of the underlying infrastructure of EDC's solutions).

- (27) Second, the Trustee analysed EDC's presence in the EEA in terms of both geographic footprint as well as level of trust and reputation among EEA-based customers.
- (28) Regarding EDC's presence in the EEA, the Trustee indicates that EDC's EU operations in financial year 2018⁵ was EUR 65 million, i.e. 12% of EDC's global turnover. EDC has 11 locations in the EEA spread over six Member States, with over 330 employees. EDC also has European teams dedicated to sales and services, with 99 sales employees and 75 in service functions.
- (29) EDC has a large and long-standing customer base in the EEA, including banks, airlines, and telecom operators. It serves customers directly and through distributors in all EEA countries, including in France, Germany, the UK, and Spain. Over the April 1, 2017-March 31, 2018 fiscal year, its indirect network served over 780 customers in the EEA. Some of EDC's customer relationships have been in place for 10 years or more (around 78 EEA-based customers).
- (30) EDC's customers include financial institutions, government-related industries, and digital businesses. EDC supplies also several governmental entities in the EEA, in particular EDC has been selected to run passport programmes in 12 Member States, national ID programmes in 8 Member States, and driver licence programmes in 6 Member States. EDC also supplies PKI solutions to NATO and Interpol.
- (31) EDC further aims to attract and retain more customers in the EEA. EDC has won several new European customers in the last five years. Out of the 161 EEA-based customers who generated the highest billings in financial year 2019 so far, 49 customers have been acquired over the last five years.
- (32) The EDC's wide-ranging and well-established customer base speaks for its reputation. Moreover, feedback from market participants on EDC's suitability as a purchaser of the Divestment business received by the Commission was largely positive.
- (33) In view of the above, the Commission considers that EDC has significant experience in the HSM or closely related field, including data security, enjoying a high level of trust and a strong reputation in these areas among EEA-based customers.

(f) Concrete plans to achieve certifications to supply GP HSMs in the EEA and undertake the required R&D for the further development of the Divestment Business

- (34) Regarding plans to undertake the necessary steps to achieve and continue to achieve certification, the Trustee's report confirms that EDC's business plan does not foresee any negative change for the market position of nCipher in the EEA and nCipher will continue to strive to achieve certifications to supply its products in the EEA with the support of EDC. The Trustee indicates that nCipher has retained and further enhanced (through recruitment) the necessary expertise and capability to execute on its certification strategy going forward.

⁵ Financial year 2018 is between 1 April 2017 and 31 March 2018.

- (35) GP HSMs will continue to have dedicated engineering / R&D teams and to develop GP HSMs for nCipher's installed base, new customers and new case uses. Medium-term, some technological integration could occur to make EDC's PKI and nCipher's GP HSM easy to deploy together to (i) replicate products already on the market such as PKI in the Box by Utimaco (ii) develop new solutions.
- (36) Regarding R&D effort for the further development of the Divestment Business, the Trustee indicates that EDC does not only intend to spend the R&D budget foreseen in the current nCipher base operating model, but also to add to that [...] "to accelerate roadmap to catch-up with SafeNet product".
- (37) In view of the above, the Commission considers that EDC has demonstrated that it has concrete plans to all necessary steps to achieve and continue achieving all certifications, and their updates, necessary to supply General Purpose HSMs in the EEA and the required R&D for the further development of the Divestment Business.

(g) Absence of *prima facie* competition problems or risk of delay

- (38) The acquisition of the Divestment Business by EDC does not create any horizontal overlap, since nCipher is only active in GP HSMs while EDC is not active in this area.
- (39) Based on the Trustee's analysis, there are also no conceivable vertical foreclosure or conglomerate effects concerns for the reasons set out below.

Vertical relationship

- (40) First, the vertical relationship between EDC's activities in PKI/SSL and payment card issuance solutions, and nCipher's activities in GP HSMs will not give rise to foreclosure concerns. Post-transaction, the combined entity will not have the ability to engage in input foreclosure with regard to the provision of GP HSMs. While nCipher is a large and well-established provider of GP HSMs, there are a number of other GP HSM players that customers could turn to if EDC were to attempt to restrict the sale of nCipher HSMs. Moreover, EDC would not have any incentive to restrict access to in such a way. As nCipher GP HSM business is a successful and profitable business, EDC will be incentivized to make it grow.
- (41) Second, the fact that EDC may potentially purchase more nCipher GP HSMs going forward will not foreclose GP HSM competitors' access to an important GP HSM customer and thus push them from the GP HSM market. EDC buys only very limited amounts of GP HSMs (only a few million euros-worth in 2019, most of which already from Thales or Gemalto) as compared to a total GP HSM market estimated at about EUR 338.6 million globally, or EUR 141.5 million in the EEA. Therefore, EDC cannot be considered an essential route to market for providers of GP HSMs, whether globally or in the EEA.

Conglomerate effects

- (42) The related markets in which there might be a theoretical potential for conglomerate effects are GP HSMs and PKI/SSL solutions or GP HSMs and payment card issuance solutions. Neither nCipher, nor EDC holds market power in any of these markets. As outlined above, nCipher is just one of many GP HSM players. EDC too has shares well below 30% in both PKI/SSL solutions and payment issuance card solutions, and competes with numerous strong players offering these solutions, including (i) Microsoft, Digicert,

- Globalsign, and Comodo in PKI/SSL solutions and (ii) Muhlbauer, NBS, and Matica in payment issuance card solutions. Moreover, EDC's main customers in these spaces, whether they are dedicated card product companies (such as Gemalto, Idemia or G&D) or financial institutions (such as Bank of America, Chase, Barclays or ING), are substantially larger than EDC. They have their own expertise, and can and do multi-source from several providers.
- (43) Based on the Trustee's analysis, even if nCipher or EDC did have some degree of market power in the markets where they respectively compete, the transaction would not allow EDC/nCipher to foreclose their respective competitors, nor to leverage the fact that they sell (i) both GP HSMs and PKI/SSL solutions, or (ii) both GP HSMs and payment card issuance solutions, to the exclusion of companies not able to do so.
- (44) Only a small number of customers buy GP HSMs for PKI/SSL solutions or payment card issuance solutions. There are various other use cases for which customers buy GP HSMs, including for instance authentication and verification, code and document signing, database and application-level encryption. For all of these other use cases customers do not need to buy PKI/SSL solutions or payment card issuance solutions.
- (45) Conversely, customers of PKI/SSL solutions do not necessarily buy a PKI/SSL solution in conjunction with a GP HSM – and when they do, they generally prefer to select their own GP HSM (independently of the PKI/SSL solution). For instance, while EDC currently incorporates SafeNet GP HSMs in its standard hosted solutions, a significant number of customers prefer to choose their own GP HSM, and EDC supplies the hosted solution with the GP HSM that the customer selected. EDC would not be in a position to try to tie its PKI/SSL solutions with nCipher GP HSMs, as its customers who do not want the nCipher HSM would simply switch to another PKI/SSL solution provider who allowed them to choose their own GP HSM provider.
- (46) Numerous other PKI/SSL vendors sell GP HSMs with their own solutions (e.g. PrimeKey sells both nCipher and Utimaco GP HSMs). As a result, should EDC try to bundle its PKI/SSL solutions with nCipher GP HSMs, competing vendors would be able to replicate and ultimately defeat EDC's attempted exclusionary strategy. Similarly, in payment card issuance solutions, vendors often incorporate a GP HSM in their solutions. Generally, vendors use GP HSMs from one or several third-party vendors, so as to accommodate customers' individual preferences. Similarly as with respect to PKI/SSL solutions, if EDC attempted to tie nCipher GP HSMs to its payment card issuance solutions, and customers preferred a different GP HSM, they would simply move away to another payment card issuance provider.
- (47) Finally, EDC/nCipher's customers tend to be large and sophisticated enterprises with significant buying power and expertise, who would move quickly to disrupt any attempted exclusionary strategy.
- (48) Based on the information available, the Divestment Transaction does not meet the merger control notification thresholds in EEA countries or at the EEA level, and does not meet merger control notification thresholds in any other country globally.
- (49) EDC expects to receive a timely CIFIUS (Committee on Foreign Investment in the United States) approval without any undue delays. Besides the purchaser approval by the Commission, EDC requires purchaser approvals by the Department of Justice ("DoJ"), the Australian Competition and Consumer

Commission (“ACCC”) and the New Zealand Commerce Commission (“NZCC”).

- (50) In view of the above, the Commission considers that the acquisition of the Divestment Business by EDC is neither likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. EDC is also expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.
- (51) This *prima facie* assessment is based on the information available for the purpose of this buyer approval and does not prejudice the competition assessment of the acquisition of the Divestment Business by EDC by a competent competition authority under applicable merger control rules.

III. ASSESSMENT OF THE PROPOSED AGREEMENTS

- (52) The Trustee has carried out a detailed review of the proposed agreements, including the terms of the SPA and other agreements related to the transaction, and concluded that the terms of the Proposed Agreements are consistent with the Commitments.
- (53) In its review of the Proposed Agreements, the Commission did not identify any clause that would not comply with the Commitments or find any indication that the Divestment Business is sold in a manner that is not consistent with the Commitments.

IV. CONCLUSION

1. Based on the above assessment, the Commission approves the Proposed Purchaser as a suitable purchaser for the above-mentioned reasons.
2. Based on the Proposed Agreement, the Commission further concludes that the Divestment Business is being sold in a manner consistent with the Commitments.
3. This decision only constitutes approval of the Proposed Purchaser identified herein and of the Proposed Agreement. This decision does not constitute a confirmation that Thales has complied with the Commitments.
4. This decision is based on paragraphs 14 and 15 of the Commitments attached to the Commission Decision of 11 December 2018.

For the Commission,

(Signed)
Johannes LAITENBERGER
Director-General