EN

Case No IV/M.945 - MATRA BAE DYNAMICS / DASA / LFK

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 27/01/1998

Also available in the CELEX database
Document No 398M0945

Office for Official Publications of the European Communities
L-2985 Luxembourg

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.01.1998

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

Dear Sirs,

Subject : **Case No. IV/M.945 - MATRA BAE DYNAMICS/DASA/LFK**
Notification of 12 December 1997 pursuant to Article 4 of Council Regulation No. 4064/89

1. On 12 December, 1997 Matra BAe Dynamics SAS ("MBD") and Daimler Benz AG on behalf of Daimler Benz Aerospace AG ("DASA") notified to the Commission an acquisition of joint control over the undertaking LFK-Lenkflugkörpersysteme GmbH ("LFK").

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation No. 4064/89 and does not raise serious doubts as to its compatibility with the common market or with the functioning of the EEA Agreement.

I THE PARTIES

3. MBD is a joint venture company owned 50% by British Aerospace ("BAe") and 50% by Lagardère S.C.A. ("Lagardère")[1]. Its principal areas of business are: guided weapons ("GW") and guided weapon systems ("GW systems") and, unmanned air vehicles ("UAVs").

4. DASA is a subsidiary of Daimler Benz AG. It is mainly active in areas of, aerospace, aircraft industry, defence technology and radar, radio and sensor systems.

[1] See Commission decision of 23 September 1996 on Case IV/M.820 - BRITISH AEROSPACE/ LAGARDÈRE SCA

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5. LFK is a company belonging to the DASA group. Prior to the operation, DASA had a controlling interest of 81% in LFK's share capital, the remaining 19% being held by Dornier GmbH as a minority shareholder. LFK is mainly active in the field of aerospace and defence technology, in particular in the field of tactical missile systems. LFK operates both as a systems company as well as sub-assembler of parts of tactical missile systems or complementary equipment.

II THE OPERATION

6. DASA and MBD have entered into a Share Purchase agreement under which MBD will purchase from DASA 30% of LFK's existing share capital. The Share Purchase agreement is supplemented by a Shareholders' agreement between DASA and MBD, which establishes the terms at which both shareholder will exert joint control over LFK.

7. [...][2]

8. [...][2]

III CONCENTRATION

9. The operation notified is a concentrative joint venture under Article 3(1)(b) of Council Regulation No. 4064/89.

Joint control

10. DASA and MBD will exert joint control over LFK. The acquisition by MBD of the 30% stake is sufficient to give rise to joint control because of the rights that are granted to MBD under the shareholders' agreement. This agreements provides in particular that LFK's five years business plan, which is to include a detailed yearly budget for the first year, requires approval [...][3].

11. [...][2]

Autonomous economic entity

12. LFK has been active in the GW/GWsystems sector since 1995. It has all assets and management to perform the range of functions of an autonomous entity on a lasting basis. The Shareholder agreement has unlimited duration. Existing supply relationship between DASA and LFK does not affect the autonomous status of LFK, as it amounts to about 20% of LFK's total requirements and as LFK adds significant value to these inputs.

Absence of coordination

13. Whilst MBD and LFK have competing activities in the GW/GW systems markets, DASA is not active and has undertaken not to compete in any market in which LFK operates.

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[2] Business Secret - deleted for publication

14. DASA, MBD and BAe are active in several markets upstream of GW/GW systems. However, the areas of overlap of the parents activities are very limited. In particular BAe and DASA are both active in the production of warheads and rocket motor/propulsion components. However, both LFK and MBD have no activities in those fields.

15. For these reasons, no risk of coordination can be deemed to arise between the parents as a consequence of the acquisition of joint control on LFK.

IV COMMUNITY DIMENSION

16. The combined aggregate worldwide turnover of the undertakings concerned exceeds ECU 5000 million. The aggregate Community wide turnover of each party exceeds ECU 250 million. They do not achieve more than two-thirds of their turnover in one and the same Member State. The operation therefore has a Community dimension. It does not constitute a cooperation case under the EEA Agreement.

V COMPETITIVE ASSESSMENT

Relevant product market

17. MBD, DASA and LFK operate to different extents in the sectors of GW and GW systems, subsystems and components.

18. GW are missiles reliant upon a guidance mechanism to direct them to their target. A GW system consists of a missile with its launchers and fire control system. It may also include its own radar for surveillance and tracking. GW and GW systems may be incorporated into a wider weapon system, such as an aircraft, helicopter or a ship.

19. GW/GW systems are generally classified according to functionality and product characteristics into the following categories:

- air-to-air
- surface-to-air/land
- surface-to-air/naval
- air-to-surface
- anti-ship
- anti-armour.

20. These categories can be further segmented into types. A complete list is attached as Annex 1.

21. A GW/GW system is made up of a number of sub-systems and components. Sub-systems and components of the GW missile include missile electronics (seekers, proximity fuzes, data processing), inertial guidance, rocket motor/propulsion and warheads. Sub-systems and components of the GW system generally include radar and optical sub-systems.

22. Competition in the GW sector generally takes place at two levels, i.e. at prime contracting level for GW/GW systems and at sub-contracting level for GW sub-systems and components. Accordingly, the relevant product market should first

be defined by differentiating between: a) prime contracting markets for the different categories or segments of GW/GW systems, and b) sub-contracting markets for the different GW sub-systems and components. As to the exact definition of the product markets, i.e. whether to include or separate specific categories or types amongst those mentioned in the preceding paragraphs, various consideration as to e.g. short and long term demand-substitutability and procurement policies of customers should be taken into account. However, for the purpose of the present decision, it is not necessary to operate a precise definition of the relevant product markets. In the light of the inquiry carried out by the Commission and as explained in the assessment below, the operation will not lead to the creation or strengthening of a dominant position whatever market definition is adopted.

Relevant geographic market

23. Markets for defence equipment has shown a move towards a more international approach to procurement over the recent years. The ways in which national competition is being widened to allow greater international involvement include the creation of international teams and the formation of cross-border joint ventures. These trend responds to the objective of some Member States to share development costs and also sometimes to encourage restructuring and capacity rationalisation. In addition, increased competition from non-national suppliers can be noted, in particular for certain Member States which have been pursuing less restrictive procurement policies.

24. However, as inquiries show, this trend is still not sufficient to modify the traditional approach followed by the Commission in this respect, i.e. that markets remain national where a domestic supplier exist. Governments in these countries generally wish to support national suppliers and thereby the country's military independence. Thus, an important number of restrictions to trade mainly of regulatory and administrative nature are still in place which play in favour of the domestic supplier, to the exclusion of importers. On the other hand, where there is no domestic supplier, then, subject to other barriers such as export restrictions and other barriers connected with national security, competition generally takes place worldwide amongst suppliers of different countries.

25. In this context, for the present case, the impact of the operation has to be measured in particular in Germany, France, UK as well as in the rest of the world, taking care to exclude those producers which are not significantly present outside the domestic markets.

Assessment

26. The Commission maintains that when assessing market power of firms in the defence industry, account must be taken of the bargaining power of its main clients: the Ministries of Defence of the states concerned. MoDs generally formulate the operational requirements and technical specifications of armament. MoDs' general opinions must therefore be taken in consideration when assessing the operation. In this respect it should be noted that the MoD's of France, Germany and UK have not shown a negative attitude towards the proposed concentration.

27. The major impact of the operation will be on the prime contracting markets for GW/GW systems. Both MBD and LFK are mainly active as prime contractors for projects commissioned by the national Ministries of Defence, in particular those of France, Germany, UK. As to sub-systems and components, which generally represent more than half of the final product's price, the effects on competition will be less important.

28. Considering US and European companies only, that is excluding Israeli, Japanese, Russian and Chinese manufacturers (which are not significantly present outside the domestic market), MBD and LFK will not exceed a share of 15% on the world-wide market for GW/GW systems. MBD and LFK together will give rise to the largest player in Europe, ahead of Aerospatiale, Thomson-Shorts and Alenia. Worldwide, they still lag behind the large US groups, in particular Raytheon/Hughes and Lockheed Martin/Loral.

29. If reference is made to the segments corresponding to the individual types as in Annex 1, the parties' activities overlap in a limited number of segments: surface-to-air very short range (VSHORAD); surface-to-air short range (SHORAD); surface-to-air naval point defence (PDMS); stand-off-weapons (SOWs); anti-ship heavy (AShM-H); anti-armour (MRAT). In all these segments both MBD and LFK carry on certain activities/projects, each at different stages of progress, so that the concentration gives rise to an addition of market shares. In some cases, world-wide combined shares are rather important. For example MBD and LFK together will have about 42% of SHORAD's world-wide production over the period 1980 to 1997, ahead of Aérospatiale (17,5%), Alenia (10%) and the US companies (jointly 20%). Also, as regards MRAT's world-wide production over the same period, MBD and LFK combined share will be of about 55%, Aérospatiale and Alenia/Bofors (jointly) being the most significant competitors with 30% and 5% respectively. At national level, MBD and LFK's overlapping products have generally very high market shares (in many cases 100% of the sales in the last five years in France, UK and Germany). However, in practice there is no geographic overlap between MBD and LFK's activity. MBD has not been active on the German market, and LFK has not made any sales outside Germany, the only exception being the Franco-German MILAN-HOT project, which is developed by the GIE Euromissile between LFK and Aérospatiale.

30. In spite of the important shares, no customer has expressed any concern about the operation. Indeed, in this sector, market shares are not necessarily a good indicator of actual market power. Competition between GW suppliers takes place at specific times within the procurement phases, namely at the beginning of the development phase and the production phase. This gives competition in the GW sector an auction type character.

31. Therefore, the impact on competition should rather be assessed by taking into account both the ongoing programs in the industry as well as the new programs to be developed, i.e. the potential of the company in terms of technology and R&D. The actual offer of products is less important, as those products are in the end developed on the basis of specification and financing of the commissioning Member State(s). In this light too the investigation has shown that the operation will raise no serious concerns for competition. MBD and LFK participate in various national, bi-national and multi-national programs, sometimes jointly (e.g. the NATO NVSS program), sometimes alone or in partnership with other

producers (e.g. Scalp EG/Storm Shadow for MBD, Taurus SOW for LFK jointly with Bofors). As regards the existing programs, the operation will not lead to any change that raises concerns for competition. Neither is the new entity expected to achieve dominant position in respect to new programs, where either the countervailing power of the MoDs as well as the existence of a number of important competitors, like Aérospatiale, Alenia, GEC Marconi, Thomson Shorts, Bofors, BGT and others in Europe and Lockheed Martin/Loral, Raytheoon/Hughes and Boeing/MDD in the US will impose sufficient constraint on the behaviour of MBD and LFK.

32. As regards the markets for sub-contracting of sub-systems and components for GW, the activities of MBD and LFK are relatively minor and they overlap to a very limited extent. Both companies are minor players in the optical sub-system sector and in the inertial guidance sector. They are not directly competing in the production of other subsystems and components.

33. Neither are any vertical implications to be expected by the presence of the BAe and DASA (directly or through joint ventures) in the production of subsystems and components. For example DASA is an important producer of radar and of radar seekers. Through TDA, a joint venture with Thomson, it produces proximity fuses and warheads. It also produces rocket motor/propulsion components, through another joint venture with Thomson, Bayern Chemie. BAe, through Royal Ordnance, plays an important role in the production of warheads and rocket motor/propulsion components. Moreover, it produces optical sub-systems, through its subsidiary BASE.

34. However, in many cases their production is to be used captively within the group, and in any event on all these markets there are a large number of powerful competitors which can guarantee alternative sources of supply.

VI ANCILLARY RESTRICTIONS

35. The parties have requested the following clauses contained in the Purchase agreement and in the Shareholders' agreement to be considered ancillary to the concentration:

Non-compete covenant

36. According to Article 10.1 of the Purchase agreement, neither DASA nor any company affiliated with Daimler Benz AG will compete with the activities conducted by LFK, excluding certain actions which are exempted. The geographic scope of this clause is world-wide, i.e. the area of operation of LFK. Its duration is equivalent to the duration of the joint venture plus[...][3]. The [...][3] are in the parties' view to prevent DASA from using LFK's know-how in order to start competition with LFK immediately after its withdrawal as a shareholder.

37. The Commission considers that this clause expresses the reality of the lasting withdrawal of DASA from the market of LFK. Its geographical scope is appropriate. However, its duration of [...][3] beyond the duration of the joint

[3] Business Secret - less than 5 years

venture does not [...][2]. It is therefore considered to be an integral part of the concentration up to the duration of the joint venture agreement.

Intellectual Property Rights

38. According to Article 5.2.2. of the Purchase agreement, LFK grants to DASA for an unlimited period a non-exclusive right, to use and sub-licence certain intellectual property rights which are not exclusively used by LFK within the activities covered by the non-compete covenant. This licence is part royalty-free and part at market conditions. DASA is prohibited from using the respective intellectual property rights or sublicensing them for use within the scope of the activities covered by the non-compete covenant.

39. The grant of the intellectual property rights to DASA is non-exclusive and does not contain any territorial restriction. It is therefore not a restriction of competition.

40. The restriction on DASA from using the intellectual property rights within the scope of the activities covered by the non-compete covenant reflects the above non-compete covenant and is therefore ancillary to the concentration.

Business boundaries

41. The purchase agreement provides that those exclusivities which DASA guarantees to third parties in existing joint venture agreements, such as TDA and Bayern Chemie, also have to be respected by LFK.

42. This provision seeks to ensure that DASA complies with its existing obligation in its other joint ventures. The restriction is ancillary as it is necessary for DASA in order to be able to implement the transaction without breach of contractual obligation.

Confidentiality obligation and requirements from US programs

43. Article 7.1 of the shareholders' Agreement provides that MBD will comply with restrictions resulting from confidentiality obligation on LFK when seeking to obtain information relating to any program carried out by LFK or its affiliates which is in direct competition with any programmes or activities of MBD.

44. MBD undertakes in Article 8 of the Shareholders' agreement to comply with all requirements existing in connection with US programmes. This clause would be necessary in that in order for LFK to continue performing the US programmes, MBD has to undertake with these restrictions.

45. These two clauses do not represent a restriction of competition under Article 85 of the EC Treaty.

VII CONCLUSION

46. For the above reasons, the Commission decides not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the

EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89.

For the Commission,

ANNEX 1

GW CATEGORIES AND TYPES

GW Category	*GW Type*
1. Air to Air	(a) Short Range SRAAM (b) Medium Range MRAAM (c) Long Range LRAAM
2 Surface-to-Air/Land.	(a) Very Short Range Air Defence VSHORAD (b) Short Range Air Defence SHORAD (c) Medium Range Surface to Air MSAM
2.2. Surface-to-Air/Naval	(d) Point Defence PDMS (e) Area Defence ADMS
3. Air-to-Surface	(a) Laser Guided Bombs LGB (b) Short Range Missile SRM (c) Stand-Off Weapon SOW (d) Anti-Radiation ARM
4. Anti-Ship	(a) Light-Short Range AShM-L (b) Heavy-Long Range AShM-H (c) Anti-Submarine
5. Anti-Armour	(a) Short Range SRAT (b) Medium Range MRAT (c) Long Range LRAT (d) Terminal Guided Mortar TGMB