

*Case No IV/M.953 -
THOMSON /
SIEMENS / ATM*

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

Article 6(1)(b) NON-OPPOSITION

Date: 18/07/1997

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.07.1997

PUBLIC VERSION

MERGER REGULATION
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case N° IV/M.953- Thomson/Siemens/ATM
Notification of 16.06.1997 pursuant to Article 4 of Council Regulation N° 4064/89

1. On 16 June 1997 Thomson-CSF (Thomson) and Siemens Aktiengesellschaft (Siemens) notified the creation of a joint venture in the field of air transport management systems (ATM) and airport turnkey systems (ATS). On the same day, the Commission declared the notification incomplete under Commission Regulation N° 3384/94 Art 4(2). The parties supplied the relevant information on 17 June 1997 and the notification became effective within Commission Regulation N° 3384/94 Art 4(2) on this day.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of application of Council Regulation N° 4064/89 and does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

I. THE PARTIES

3. Thomson is a subsidiary of Thomson SA mainly active in professional electronics and defence systems.
4. Siemens is an industrial and electronics company present i.a. in automation, power generation, transmission and distribution equipments, defence electronics and transportation systems.

II. THE OPERATION

5. Thomson and Siemens will transfer to six newly-created companies their ATM activities. Similarly Siemens will transfer to one of these six newly-created companies part of its ATS activities. These companies will be 100% owned by a holding company called AIRSYS ATM SAS in which Thomson will hold 60% and Siemens 40% of the shares. The management of AIRSYS ATM SAS is set up in a Joint Venture Agreement.

III. CONCENTRATION

Joint venture

6. The Board of Directors (*Comité Exécutif*) of Airsys ATM SAS will consist of seven members of whom four will be appointed by Thomson and three by Siemens. All decisions taken at the Board will need the agreement of at least one member representing Thomson and one member representing Siemens. Furthermore, important decisions such as the approval of annual budgets, three year term plans, strategic plans and significant changes to these budgets and plans, the designation of the Chairman, the Chief Executive Officer and the Chief Financial Officer and the strategic alliances will require unanimous vote of all members.
7. It follows that Airsys ATM SAS will be jointly controlled by Thomson and Siemens.

Full-function joint venture

8. The joint venture will perform all the functions of an autonomous economic entity. It will be active in all phases encompassing specification, design, development, production, marketing, sales and maintenance of ATM and ATS. In this respect, all Thomson and Siemens' activities related to ATM have been transferred to the joint venture through the six newly-created companies together with the necessary [...] and personnel [...]¹. In addition, all the intellectual property rights and know-how necessary for the joint venture to carry out its business will be either transferred [...] [...] or licensed to Airsys ATM SAS.
9. Siemens and Thomson will provide Airsys ATM SAS, on the latter's request and on an arm's length basis, with some technical and other services. These services will be regulated by specific contracts in order to guarantee the autonomy of the joint venture. The joint venture will be free to subcontract such activity to third parties. Similarly, the joint venture may subcontract a small part of its development and manufacturing activities in some specific fields to its parents, which are bound to carry out such activities. The activities subcontracted may represent up to [...] of the value added generated by the joint venture and up to [...] of its turnover.² However, the joint venture will be free to subcontract such manufacture to third parties. In conclusion, the Commission considers that these services and subcontracting agreements fulfill the conditions set out in points 14

¹ Deleted for publication.

² Between 10-20%.

and 15 of Commission Notice 94/C385/01 on the distinction between concentrative and cooperative joint ventures³ in order to qualify the joint venture as full-function.

10. Airsys ATM SAS is set up for 99 years.
11. It follows from the above that Airsys ATM SAS will perform on a lasting basis all the functions of an autonomous economic entity.

Coordination of the competitive behaviour

12. As regards the ATM market, Siemens will completely withdraw and Thomson will only remain in this market through a controlling interest in the Spanish company Indra⁴.
13. As regards the ATS market, Siemens will remain present but Thomson has no activity in this market.
14. It follows that the operation will not give rise to the coordination of the competitive behaviour between Thomson and Siemens.
15. The operation is therefore a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

16. The undertakings concerned have a combined aggregate worldwide turnover in excess of 5000 million ECU (Thomson SA: 11378 million ECU; Siemens: 49981 million ECU). Both Thomson SA and Siemens have a Community-wide turnover in excess of 250 million ECU (Thomson SA: 4765 million ECU; Siemens: 30325 million ECU), but do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The operation therefore has a Community dimension within the meaning of Article 1 of the Merger Regulation, but does not constitute a cooperation case under the EEA Agreement.

V. COMPATIBILITY WITH THE COMMON MARKET AND THE EEA

Relevant product markets

17. Thomson not being active in ATS, the parties activities only overlap on ATM.
18. ATM activities cover all the ground systems and equipment needed to provide full air space surveillance and control facilities to ensure full safety to the civil air transport activities.
19. ATM activities generally include system engineering capabilities and the following services and sub systems/equipment:

³ OJ C 385, 31.12.1994, p.1

⁴ See Commission Decision of 22.08.1995 in Case N° IV/M.620- Thomson-CSF/Teneo/Indra

- System design and product management;
 - Surveillance equipment, including in particular Monopulse Secondary Surveillance Radar, Primary Surveillance Radar, Ground Surveillance Radar;
 - Simulators;
 - Control centres;
 - Navigation and landing systems;
 - Satellite-based navigation and landing aids;
 - Communication systems;
 - Turnkey project capabilities and services;
 - Maintenance, product support, customer service and after sales activity.
19. Whilst quite a large number of companies are presently active in supplying one or more subsystems with associated services, not all of them appear having the capability to supply complete ATM systems. Furthermore, only a few companies appear to be able to supply high performance systems in high density traffic environment. This could lead to the definition, within the ATM activities, of some narrower product markets comprising certain subsystems and/or specific types of ATM systems.
20. It is, however, not necessary to decide upon the scope of the product market as there are no indications that the operation would give rise to competition problems regardless of how the market is defined

Relevant geographic market

21. In cases IV/M.620 Thomson-CSF/Teneo/Indra and IV/M.697 Lockheed Martin/Loral the Commission considered the geographical market for ATM to be in the process of enlarging from its traditional national dimension to become at least EEA-wide. Decisive factors to this process are the important development in technology as well as the common public procurement rules in the air transport sector. It appears now, based on the results of the market inquiries carried out by the Commission, that this process has well advanced, so the market for ATM would be today at least EEA-wide, if not larger. In several Member States foreign and even non-European companies do participate in tenders for supply ATM equipment and indeed they are often awarded the relevant contracts.
22. It cannot be excluded that some countries still constitute separate markets, because of ATM's links with national security or some entry barriers due to cultural/traditional reasons. It is, however, not necessary to decide further on this matter since there are no indications that the operation would give rise to competition problems on any national markets.

Assessment

23. Although demand slowed down in the last years after a period of strong growth during the 1980's-1990's, ATM is still a growing market because of the need of many countries to modernise and standardise air traffic management on the basis of the emerging new technologies. Whilst the growth rate is likely to be further reduced be in Western Europe, which tends to become a mature market, there is still a very

significant scope for growth in the East European countries. The customers in this market are typically the national aviation authorities (or organisations reporting to national administrations), which have a significant buyer power.

24. Thomson and Siemens are the two largest ATM producers in the EEA, with market shares of [...] respectively in 1996. Thomson holds a controlling interest in Indra, which had in 1996 [...] of the EEA market (nearly all realised in Spain). If Indra's market share is added to that of the joint venture, they will achieve [...] of the EEA market. Thomson is also extensively present world-wide. AIRSYS will be the clear market leader in the EEA market and the sole European company with a size comparable to that of the major US companies in the field, such as Lockheed Martin and Raytheon. At world-wide level these three companies have market shares in 1996 of [...] and [...] respectively, and appear as the sole true global players. In the EEA, Lockheed Martin and Raytheon have both a market share of [...]. There are however a large number of other important companies, some of which specialised in supplying specific subsystems and/or mainly active in some specific geographic areas, which include amongst others Alenia, Alcatel, DASA in Europe and Hughes and Northrop Grumman of the US.
25. At national level the parties activities show significant overlaps in Germany and Austria (combined share in 1996 of [...] and [...] respectively). However, the customers in these countries, as well as those of other European countries have expressed no concerns on this merger. They argue in particular that they are ready to buy from other (foreign) suppliers either complete systems or sub-systems and that they are in a position as nearly exclusive national buyers to exercise sufficient constraint on prices and specifications. They usually purchase ATM equipment by means of public tenders which are open to European and non-European producers. They see their substantial buyer power and the presence of other strong global competitors as a sufficient constraint to the competitive behaviour of AIRSYS.
26. Furthermore, it should be noted that due to the limited number of contracts which are awarded yearly, market shares fluctuate largely over the years. Thus ARSYS's market shares, even if important at EEA level and in certain countries, cannot be taken as to signify a steady degree of market power on those markets.
27. In conclusion there are no indications that the present operation would provide such advantages to AIRSYS vis-à-vis existing competitors that a dominant position would be created or strengthened in the EEA or a substantial part of it.

⁵ Between 10-20%.

⁶ Between 0-10%.

⁷ Between 30-40%.

⁸ Between 20-30%.

⁹ Between 50-60%.

¹⁰ Between 80-90%.

V. ANCILLARY RESTRICTIONS

28. The Joint Venture Agreement foresees a covenant on the parties not to compete with the business contributed to the Joint Venture for a period of time expiring five years following the termination of the Joint Venture Agreement. The duration of this clause, which exceeds the duration of the joint venture, is justified by the nature of ATM activities, and in particular by the length of the periods required for research, development and implementation of certain projects in the ATM field.
29. As for the period corresponding to the duration of the joint venture, the non-compete clause expresses the commitment of the parties to the joint venture and the reality of the lasting withdrawal of the parent companies from the market assigned to the joint venture. As for the five years following the termination of the joint venture, the clause is essential to the operation to ensure that, in case one of the parent companies were to withdraw its participation in the joint venture, it would not be able to compete with the joint venture and use the know-how it may have obtained from participating in it, for a period equivalent to that required to develop and implement the projects.
30. For the above reasons, the Commission considers the non-compete clause to be directly related and necessary to the implementation of the concentration, thus ancillary to it.

VI. CONCLUSION

32. In light of the above, the Commission has decided 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 (EEC) No 4064/89.

For the Commission.