EUROPEAN COMMISSION

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PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

To the notifying party

Dear Sir,

Subject: **Case M.9234 - Harris Corporation / L3 Technologies**
Approval of Elbit Systems Ltd. as purchaser of Harris's night vision business following your letter of 10 July 2019 and the Trustee's opinion of 28 August 2019

1. FACTS AND PROCEDURE

(1) By decision of 21 June 2019 (the "Decision") based on Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EC) No 139/2004[1] (the "Merger Regulation"), the Commission declared the operation by which the undertaking Harris Corporation ("Harris", United States or "Notifying Party"), acquired within the meaning of Article 3(1)(b) of the Merger Regulation sole control of L3 Technologies, Inc. ("L3", United States) by way of an agreement (the "Transaction") compatible with the internal market, subject to conditions and obligations (the "Commitments").

[1] OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").

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(2) In particular, the Commitments provide for the divestment of Harris's entire night vision business ("the Divestment Business"),[2] which is based out of a single production facility with a registered place of business and management at 7635 Plantation Road, Roanoke, Virginia 24019, USA. Harris designs and manufactures all of its night vision products in this facility.

(3) By letter of 10 July 2019, the Notifying Party proposed Elbit Systems Ltd. (together with its subsidiaries and controlled entities "Elbit" or the "Purchaser") for approval by the Commission as purchaser of the Divestment Business and submitted the Asset Purchase Agreement ("APA") concluded between Harris and Elbit Systems of America LLC ("ESA"), an Elbit group company, dated 4 April 2019.

(4) The Commission notes that the APA was signed prior to the submission of the Commitments (28 May 2019) and even prior to the notification of the case to the Commission (26 April 2019). As discussed in recitals 26-28 of the Decision, this is because prior to the merger procedure in the EEA the Transaction was also subject to merger control procedures in the United States and in the context of the US procedure Harris offered the sale of the Divestment Business as commitments to address competition concerns. However, at the time of the notification of the case to the Commission, this divestment was not yet implemented due to, inter alia, the lack of necessary regulatory approvals. Consequently, the Commission had to assess the Transaction as if the Divestment Business had been part of Harris and had to investigate whether, in light of the likely competitive effects in the EEA and under EU law, a remedy would be required. As discussed in detail in the Decision,[3] after conducting its investigation, the Commission concluded that the Transaction raised serious doubts as to its compatibility with the common market on the basis of horizontal non-coordinated effects in the markets for image intensification night vision devices ("NVDs") and image intensification tubes ("I2Ts") as well as on the basis of non-horizontal effects, more precisely input foreclosure, in relation to I2Ts and image intensification NVDs.

(5) In response to the serious doubts raised by the Commission, on 28 May 2019 Harris offered the same commitment to the Commission as it had offered in the context of the US merger procedure, i.e. the sale of the Divestment Business. In the Decision,[4] the Commission concluded that the Commitments are sufficient to eliminate the serious doubts and cleared the Transaction. Although the APA was signed with Elbit prior to the submission of the Commitments, Harris offered them in the form of a standard sale of the Divestment Business within a fixed time limit after the Commission decision on the Transaction, i.e. not as an "upfront buyer" or a "fix-it-first" remedy within the meaning of paragraphs 50-57 of the Commission's "Remedies Notice".[5] The Commission also did not require an upfront buyer or a fix-it-first remedy, as, in light of its investigation and under the rules of the Remedies Notice, such solutions were not necessary. The Commitments thus involve the sale of the Divestment Business within a fixed time limit after the Decision to a purchaser that is approved by the Commission on the

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2 Unless otherwise defined in the present decision, capitalised terms shall have the meaning as explained in the Decision or the Commitments as the case may be.

3 Decision recitals 35-240 and 246-250.

4 Decision recitals 399-414.

5 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission regulation (EC) No 802/2004, Official Journal 22.10.2008 C 267/01.

basis of the purchaser criteria set out in the Commitments. This also means that, although the APA with Elbit was signed before the notification, the sale cannot be implemented until the Commission approves Elbit as a suitable purchaser. It also implies that if the Commission rejects Elbit, Harris has to sell the Divestment Business within the fixed time limit stipulated by the Commitments to another suitable purchaser.

(6) On 28 August 2019, the monitoring trustee Alcis Advisers (the "Trustee") submitted an assessment of Elbit's suitability as the Purchaser ("Reasoned Opinion of the Trustee") and, in particular, indicated that Elbit fulfils the criteria of the purchaser criteria set out in paragraph 16 of the Commitments.

2. ASSESSMENT OF THE PROPOSAL

2.1. Legal Framework

(7) According to paragraph 16 of the Commitments, the Purchaser must fulfil the following criteria:

i) The Purchaser shall be independent of and unconnected to the Notifying Party and its Affiliated Undertakings (this being assessed having regard to the situation following the divestiture).

ii) the Purchaser shall have 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[6] and other competitors;

iii) the acquisition of the Divestment Business by the Purchaser must neither be 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.

(8) The Commission should thus verify that the Purchaser fulfils these criteria. The Commission should also verify whether the Divestment Business is sold in a manner consistent with the Commitments.

2.2. Description of the Purchaser

(9) The APA was signed between Harris and ESA. ESA is a member company of Elbit, a globally active aerospace and defence technology group.

(10) Headquartered in Haifa, Israel, Elbit employs more than 16,000 employees worldwide. In 2018, it had revenues of USD 3.6 billion (EUR 3 billion)[7] and was profitable. Elbit's shares have been traded on both the Tel-Aviv Stock Exchange and NASDAQ since 1996. In 2000, Elbit merged with the Israeli company Elop

6 "Parties" refers to Harris and L3 together.

7 Unless otherwise specified the USD/EUR exchange rate applied is the average exchange rate for the reference year, provided by the European Central Bank.

Electro-Optics Industries Ltd., resulting in the creation of the largest non-state-held defence company group in Israel.

(11) Elbit has established a global footprint through its major operating subsidiaries:

i) ESA, United States, which provides products and systems solutions focusing on U.S. military, homeland security, medical instrumentation and commercial aviation customers;

ii) Elbit Systems Electro-Optics Elop Ltd., Israel, which designs, engineers and manufactures a wide range of electro-optic systems and products mainly for defence, space and homeland security applications for customers worldwide;

iii) Elbit Systems Land and C4I Ltd., Israel, which produces land-based systems and products for armoured and other military vehicles, artillery and mortar systems, C4I systems,[8] cyber intelligence solutions, data links, radios and communications systems and equipment.

iv) Elbit Systems EW and SIGINT – Elisra Ltd., Israel, which provides a wide range of electronic warfare (EW) systems, signal intelligence (SIGINT) systems and C4ISR[9] technological solutions worldwide.

v) IMI Systems, Israel, which was acquired by Elbit in November 2018. Established in 1993 and formerly named Israel Military Industries, it specializes in the development, manufacturing, upgrade and integration of end-to-end defensive solutions for the modern battlefield.

(12) Elbit also has other small subsidiaries and investee companies in Israel, Europe, North America, South America and Asia-Pacific that conduct marketing, engineering, manufacturing, logistic support and other activities, principally in the subsidiary´s local market.

(13) 55.6% of Elbit´s shares are held by shareholders each holding 5% or less. The remaining shares are directly and indirectly held by Federmann Enterprises Ltd., established in Israel. Federmann Enterprises Ltd. is indirectly controlled by two Israeli entities, Beit Yekutiel Ltd. and Beit Bella Ltd. Michael Federmann, the Chairman of the Board, is the controlling shareholder of Beit Yekutiel and of Beit Bella Ltd. ESA is an indirectly owned 100% subsidiary of Elbit.

(14) In terms of geography, Elbit’s sales are relatively balanced across Israel, North America, Europe and Asia pacific, with North America having the largest share with 27 %. The complete split of revenues by geography is indicated in Table 1.

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8 “C4I” stands for Command, Control, Communications, Computers, and Intelligence.

9 “C4ISR” stands for Command, Control, Communications, Computer, Intelligence, Surveillance, and Reconnaissance.

Table 1: Distribution of Elbit's revenues by geographical regions for FY 2016-18

	2016	2017	2018
Israel	22%	22%	20%
North America	25%	25%	27%
Europe	20%	23%	20%
Asia Pacific	25%	20%	21%
Latin America	6%	6%	5%
Others	2%	5%	7%

Source: Elbit's Annual Report 2018 (Form 20-F, SEC filing)

(15) In terms of business segments, airborne systems operations and C4ISR systems generated the most revenues, accounting for 40% and 31% of Elbit's revenues respectively. Table 2 depicts the split of revenues by areas of operation for FY 2017 and FY 2018. The NVD business is part of the electro-optic systems segment.

Table 2: Elbit's distribution of revenues by business segments

	2017	2018
Airborne systems	37.7%	39.9%
C4ISR systems	33.9%	30.7%
Land systems	14.9%	17.6%
Electro-optic systems	10.1%	9.1%
Other (mainly non-defence related products and services)	3.4%	2.7%
Total	100%	100%

Source: Elbit´s Annual Report-2018 (Form 20-F, SEC filing)

2.3. Independence from the Parties

2.3.1. Notifying Party's view

(16) In its request for the approval of Elbit as a Purchaser ("Request"), the Notifying Party submits that there are no cross-shareholdings between the Parties and Elbit.[10] In addition, there are no common directors, members of the management, or members of the supervisory boards as between the Parties and Elbit.[11] The Notifying Party further submits that commercial relationships between Elbit and the Divestment Business are restricted to ordinary sales of I2Ts, which are not different from similar types of sales the Divestment Business makes to other suppliers of NVDs, and [description of joint R&D efforts]. Other than these two links there are no commercial agreements or joint ventures in the field of night vision between Elbit and the Divestment Business.[12]

2.3.2. Commission's assessment

(17) The Commission notes that, the Commitments provide that the Purchaser has to be independent from the Notifying Party and its Affiliated Undertakings and that this

10 Request, paragraph 3.

11 Request, paragraph 3.

12 Request, paragraph 3.

has to be assessed after the divestiture.[13] As the divestiture takes place after the consummation of the Transaction, post-divestiture the Notifying Party will also control L3 and the latter will be an Affiliated Undertaking of the Notifying Party. Thus, in line with the Remedies Notice,[14] the question to be examined is the independence of Elbit from the merged entity (named as L3Harris after the merger) following the divestiture.

(18) The Commission agrees with the Notifying Party that there will be no structural links between the merged entity and Elbit as there are no cross-shareholdings and there are no common directors, members of the management, or members of the supervisory boards.[15]

(19) The Commission identified the following commercial links between the merged entity and Elbit:[16]

i) the sale of I2Ts from the Divestment Business to Elbit;

ii) [Description of joint R&D efforts];

iii) a current Elbit bid for a U.S. military contract [description of the Elbit bid in relation to which the Divestment Business is a supplier];

iv) various commercial links unrelated to NVDs consisting of various supply agreements and purchase orders in both directions;

(20) As regards links i)-iii), these involve a supply from the Divestment Business to Elbit and will be intra-group transactions after the divestiture. As such they are not relevant in the context of an independence assessment following the divestiture. Moreover, the sale of I2Ts do not differ from similar sales by the Divestment Business to other NVD suppliers.

(21) As regards link iv), i.e. commercial links between the merged entity and Elbit that are unrelated to NVDs, these include a list of [number of orders] in both directions although principally Elbit is in the supplier position.[17] The combined value of these orders and purchases is less than [0-5]% of Elbit's yearly revenues[18] and thus the significance of these commercial relationships cannot be expected to have a material impact on the independence of Elbit.

(22) Based on the above the Commission considers that Elbit is independent and unconnected to L3Harris within the meaning of the independence criterion set out in paragraph 16 of the Commitments.

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13 Paragraph 16 (a) of the Commitments.

14 Paragraph 48 of the Remedies Notice.

15 Reasoned Opinion of the Trustee, paragraph 51.

16 Reasoned Opinion of the Trustee, paragraph 53-56.

17 The full list is provided as Annex I to the Reasoned Opinion of the Trustee.

18 Reasoned Opinion of the Trustee, paragraph 52.

2.4. Financial resources, proven expertise and incentive to maintain and develop the Divested Business as a viable and active competitor

2.4.1. Notifying Party's view

(23) The Notifying Party submits that Elbit has the financial resources to maintain and develop the Divestment Business.[19] Elbit's 2018 revenues amounted to USD 3.7 billion / EUR 3.1 billion. In 2018, Elbit's night vision business alone generated revenues of USD 58.7 million / EUR 49.8 million.

(24) The Notifying Party further submits that Elbit has the relevant expertise[20] as vision systems and components are a long-term business for Elbit globally. In addition, Elbit owns and operates a large military and commercial electro-optical systems design, manufacturing, and support facility in Merrimack, New Hampshire, USA. Examples of past and current night vision programs executed in that facility include [information about military secrets].

(25) In the Notifying Party's view, Elbit also has the incentive to remain a full-line supplier of night vision products that is well positioned to compete with the future L3Harris, Thales, and Theon.[21] Indeed, the acquisition will expand Elbit's image intensification presence across the EEA. Elbit will also expand its portfolio with the Divestment Business's I2Ts. Elbit intends to invest in the Divestment Business, including bringing to market the [result of the described joint R&D efforts].

2.4.2. Commission's assessment

2.4.2.1. Financial resources

(26) The Commission notes that, indeed Elbit's 2018 revenues amounted to USD 3.7 billion (EUR 3.1 billion), up from USD 3.0 billion (EUR 2.2 billion) five years ago.[22] Over the last five years Elbit's gross margin stood between 27 % and 30 %, which implies that its core operations (i.e. revenue less direct costs) are profitable. Its 2018 EBITDA amounted to USD 411 million (EUR 348 million), corresponding to an 11% EBITDA margin, which reflects cash generation capacity and operating profitability. Its EBIT amounted to USD 293 million (EUR 248 million), corresponding to an 8% EBIT margin, which shows that Elbit was profitable even after the necessary investments to replace depreciating assets. Thus Elbit has significant revenues (amounting to 20 times the revenue of the Divestment Business) and shows healthy profitability.

(27) As per 31 December 2018, Elbit's total assets stood at USD 6.5 billion (EUR 5.5 billion).[23] The group had USD 225 million (EUR 190.7 million) cash on hand, long-term debt of USD 524 million (EUR 444.1 million), and shareholders' equity of USD 1.9 billion (EUR 1.6 billion). These balance sheet figures imply a low level of indebtedness, which is also reflected in Elbit's credit rating by Midroog, an Israeli credit rating agency, a Moody's subsidiary and accredited by the State of

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19 Request, paragraph 5.

20 Request, paragraph 6.

21 Request, paragraph 7.

22 https://www.macrotrends.net/stocks/charts/ESLT/elbit-systems/financial-statements. See also Reasoned Opinion of the Trustee, paragraph 77.

23 https://www.macrotrends.net/stocks/charts/ESLT/elbit-systems/financial-statements See the Reasoned Opinion of the Trustee, paragraphs 80.

Israel. Elbit's rating is Aa1.il, which is the second highest rating on Midroog's rating scale, which consists of 9 different ratings.[24] In Midroog's assessment, issuers rated Aa.il are those that have very strong creditworthiness relative to other local (i.e. Israeli) issuers.

(28) Recently Elbit consummated two sizable acquisitions, namely those of Universal Avionics Systems Corporation (in April 2018) and IMI Israeli Military Industries (in November 2018).[25] Of these acquired companies, IMI was loss making. These transactions, especially the IMI acquisition, put some pressure on Elbit's balance sheet as they added further liabilities for working capital and long term liabilities towards employees. In concrete, the ratio of adjusted financial debt to EBITDA increased from 1.8 to 3. Nonetheless, despite this worsening of the debt coverage ratio Midroog maintained its good credit rating of Elbit.

(29) As at 23 July 2019, Elbit had a market capitalization of USD 6.6 billion (EUR 5.8 billion).[26] Its shares are trading close to their all-time high of some USD 160 (EUR 141.9). In the past five years, the group's market capitalization has more than doubled.

(30) Thus, overall Elbit has a stable financial position with growing revenues, healthy profitability and a strong balance sheet. Its solid financial performance is reflected in its high market capitalization, increasing share price and good credit rating.

(31) Elbit also has the financial capacity to consummate the purchase of the Divestment Business at the agreed price of USD 350 million (EUR 310.3 million). As the Divestment Business will be transferred without cash and debt, [information regarding transaction financing]. According to [information about Elbit's transaction financing, including financing agreements] (to fund working capital requirements). [Information about Elbit's transaction financing and business strategy].[27] [Financial information]. [Financial information].

(32) As regards the sustainability of Elbit's finances in light of the new liabilities (loans) created by the acquisition, the Commission notes that Midroog estimated that the purchase will not cause a significant deviation from Midroog's base case established after the IMI acquisition.[28] As discussed in recital 28, in this base case analysis Midroog considered that the increased debt to EBITDA ratio following the IMI transaction does not affect Elbit's strong credit rating. No significant deviation from this base case implies that Elbit's creditworthiness will not decrease following the acquisition of the Divestment Business. Elbit's internal forecasts also count with a 2.5-2.8 debt to EBITDA ratio, consistent with the Midroog base case. Elbit's creditworthiness is expected to remain unchanged for several reasons, which include the leverage reducing effect of a recent capital raise of USD 186 million (EUR 164.9 million), other leverage reducing steps planned by Elbit[29] and the fact that the Divestment Business is a growing business with healthy margins[30] ([information about the Divestment Business' financial situation]). Thus, Elbit not

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24 https://www.midroog.co.il/Upload/Documents/Midroog%20Rating%20Scales%20and%20definitions%20-280316-clean.pdf

25 Reasoned Opinion of the Trustee, paragraphs 81-82.

26 Reasoned Opinion of the Trustee, paragraph 79.

27 Reasoned Opinion of the Trustee, paragraphs 83-87.

28 Reasoned Opinion of the Trustee, paragraph 90.

29 Reasoned Opinion of the Trustee, paragraph 92.

30 Reasoned Opinion of the Trustee, paragraph 97.

only has the financial capacity to consummate the acquisition of the Divestment Business, but its finances will remain stable even after taking on the liabilities financing that acquisition.

(33) On the basis of the above, the Commission considers that Elbit has the financial resources to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors. It has strong pre-acquisition finances (see recitals 26-29), able to finance the acquisition and its finances will not deteriorate significantly as a result of the acquisition (recitals 31-32).

2.4.2.2. Proven expertise

(34) As regards proven expertise, the Commission first refers to Section 2.2, which shows that Elbit is a large and sophisticated defence contractor with a high tech product portfolio and global footprint. In its role as a defence contractor, Elbit covers the same geographies and clients as the Divestment Business. This implies that Elbit has extensive experience in the wider defence sector worldwide and in the EEA and that it has expertise in the process of bidding, knowledge of customer preferences and industry trends.

(35) The Commission also notes that Elbit has been successful as a defence contractor in the last five years as it has shown profitable growth. In the period 2014-2018, its revenues and operating profits have grown from EUR 2.2 billion to EUR 3.1 billion[31] and from EUR 204 million to EUR 256 million[32] respectively. Its pre-tax income showed the same tendency, increasing from EUR 165 million to EUR 206 million.[33] Its ability to grow profitably is further proof of its expertise in the defence sector.

(36) Elbit also has expertise specifically in the night vision business. Its NVD product portfolio includes both image intensification and thermal NVDs. As regards device types, it produces goggles as well as other device types, such as weapon sights and vehicle mounted NVDs.[34] As the Decision noted, Elbit has a [5-10]% market share in image intensification NVDs in the EEA.[35] Being successfully active in the night vision business shows, in itself, that Elbit also possesses the relevant expertise necessary to run not only a generic defence business but specifically a night vision business.

(37) Moreover, as explained in recital 19 above, there are commercial links between the Divestment Business and Elbit in the night vision space (subparagraphs i)-iii). To recall, Elbit regularly purchases I2Ts from the Divestment Business; [description of the Divestment Business' R&D support to Elbit]; [description of the Elbit bid in relation to which the Divestment Business is a supplier]. As discussed in Section 2.3, these commercial links are not relevant for the assessment whether Elbit is independent from the Parties as they involve supplies from the Divestment Business to Elbit and as such do not affect Elbit's independence from the merged

31 Reasoned Opinion of the Trustee, Exhibit 7 at paragraph 77.

32 Reasoned Opinion of the Trustee, Exhibit 7 at paragraph 77. USD figures were recalculated to EUR figures based on the exchange rate as at 31 December 2014 and 31 December 2018.

33 Reasoned Opinion of the Trustee, Exhibit 7 at paragraph 77. USD figures were recalculated to EUR figures based on the exchange rate as at 31 December 2014 and 31 December 2018.

34 Reasoned Opinion of the Trustee, paragraph 60.

35 Decision, Table 1.

entity after the divestment. At the same time, these commercial links demonstrate that Elbit has very good and close knowledge of the Divestment Business' products as it used them in its own products and bids.

(38) Furthermore, Elbit is active in night vision areas where the Divestment Business is not active, such as thermal NVDs and device types other than goggles and weapon sights (e.g. vehicle mounted NVDs).[36] Unlike the Divestment Business, which has to source thermal technology from third parties to supply a fusion device, Elbit has this technology in-house. Given its broad capabilities in the night vision business, Elbit has the expertise to combine the two firms' strengths and develop enhanced or new products. For example, it is better positioned to improve on the Divestment Business' offer in fusion NVDs as it has its own thermal technology. Likewise, using its experience in vehicle mounted NVDs, which the Divestment Business lacked, it can use the Divestment Business' image intensification products to create a vehicle centred solution. In short, its expertise in areas where the Divestment Business is not active will also contribute to maintaining and developing the Divestment Business as a viable and active competitive force.

(39) In addition, Elbit has proven expertise in electro-optic systems, the larger segment of which night vision forms a part. As discussed in Section 2.2, Elbit derives 10 % of its global revenues from this segment. Experience in this broader segment implies familiarity with the various opto-electronic technologies, which equips Elbit with a deeper and broader expertise than just night vision expertise. This can also lead to combination of different technologies and potential new products, which would further strengthen the competitiveness of the Divestment Business.[37]

(40) Finally, the Commission notes that Elbit has a proven track record of acquisitions and of successfully integrating the acquired businesses in its operations. In the last five years alone, Elbit acquired 9 businesses,[38] and, as was explained in recital 35, over the same period it has managed to increase its profitability.

(41) On the basis of recitals 34-40 above, the Commission considers that Elbit has the proven expertise to maintain and develop the Divestment Business as a viable and active competitive force in competition with L3Harris and other competitors.

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36 For Elbit's activities, see Reasoned Opinion of the Trustee, paragraph 60. The Divestment Business is not active in thermal devices, see Decision, recital 30. As regards device types, the Divestment Business is only active in goggles and weapon sights, see Reasoned Opinion of the Trustee paragraph 140.

37 After the acquisition of the Divestment Business Elbit's US operations, including the Divestment Business, will be subject to the US International Traffic in Arms Regulations ("ITAR"), while ITAR will not apply to Elbit's non-US (Israeli, European etc.) businesses. Further, as explained in recital 111 of the Decision, certain European tenders exclude suppliers that are subject to ITAR (so called ITAR free tenders). Thus, in ITAR free tenders it may be difficult to realize some of the synergies stemming from the complementary portfolios discussed in recitals 38-39. This is because in such tenders ITAR may prevent the combination of the products and technologies of the two businesses. However, there are many purchases globally where there are no such regulatory obstacles and thus Elbit will have sufficient incentives to develop these enhanced products. Once developed, they will also be offered in the EEA tenders where companies subject to ITAR can also bid (ITAR tenders). In short, ITAR may prevent that some of the benefits from the combination accrue to ITAR free tenders in the EEA.

38 Reasoned Opinion of the Trustee, paragraphs 72-74.

2.4.2.3. Incentives to maintain and develop the Divestment Business

(42) As regards Elbit's incentives to maintain and develop the Divestment Business, the Commission notes that the Elbit's activities in the defence sector, the narrower opto-electric segment and in the specific night vision business[39] already shows that Elbit is a strategic long term acquirer and not a financial investor that is interested exclusively in short term profits. Elbit's established presence in the sector already suggests that it has the incentive to develop the business as a viable and active competitive force. Elbit's participation in advanced night vision army programs (see recitals 19 and 37), [description of R&D efforts] and other advanced solutions is a further confirmation in this regard as these projects are inherently future oriented. Elbit has already invested in these programs and thus it has a strong incentive to make them successful.

(43) There are several other pieces of evidence indicating Elbit's incentives to maintain and develop the Divestment Business.

(44) First, the acquisition fits well with Elbit's overall business strategy. Elbit considers that the nature of military and homeland security actions in recent years, including low intensity conflicts and terrorist activities, as well as budgetary pressures to focus on leaner but more technically advanced forces, have caused a shift in the defence and homeland security priorities for many customers.[40] As a result, Elbit believes there is continued demand in the areas of C4I systems, intelligence, surveillance and reconnaissance systems, network centric information systems, intelligence gathering systems, border and perimeter security systems, unmanned aircraft systems, unmanned surface vessels, remote controlled systems, cyber-defence systems, space and satellite based defence capabilities and homeland security solutions. The Divestment Business fits well with this strategy as NVDs are an important means to create leaner but technically advanced forces and they are a must in low intensity engagements such as anti-terrorist operations. Indeed, night vision devices feature prominently in the US' and US allies' future plans.[41] Elbit's overall business strategy indicates its ideas for the direction of the development of its entire business. The fact that the Divestment Business fits into these plans implies that Elbit has an incentive to develop the Divestment Business as part of the entire Elbit business. In other words, the strategic fit makes it likely that Elbit has the incentives to maintain and develop the Divestment Business as a competitive force.

(45) Second, the Divestment Business fits well with Elbit's business strategy specifically in the night vision business. Elbit aims to become an important, full-service night vision supplier[42] and the Divestment Business will help to achieve this as the respective product portfolios are largely complementary. Indeed, as discussed before,[43] Elbit has thermal technology, which the Divestment Business does not have, and supplies thermal NVDs, which the Divestment Business does not. Elbit also makes device types that the Divestment Business does not, for example vehicle mounted (thermal) devices. On the other hand, Elbit does not

39 See Section 2.2 and Section 2.4.2.2 of this decision.
40 Reasoned Opinion of the Trustee, paragraph 67.
41 Reasoned Opinion of the Trustee, paragraph 104.
42 Reasoned Opinion of the Trustee, paragraph 103.
43 See recital 38.

produce fusion devices,[44] which the Divestment Business does produce (with thermal technology sourced from third parties).[45] Furthermore, in image intensification devices Elbit does not have the technology and the assets to produce the critical input, namely the I2T, whereas the Divestment Business is one of the three large I2T producers and uses its own I2Ts in its image intensification NVDs.[46] Thus, while Elbit and the Divestment Business overlap in image intensification NVDs, there is a strong element of complementarity in this regard too. The fact that the two businesses are largely complementary and that Elbit's strategy in the night vision segment is to become a strong, full service night vision firm makes it likely that it will maintain and develop the Divestment Business.

(46) Third, Elbit devised a concrete strategy in the night vision space in view of the acquisition that makes use of the Divestment Business.[47] Namely, Elbit intends to use the [information regarding Elbit's business strategy and its know-how] to expand its portfolio with the I2Ts of the Divestment Business in all geographies. It also plans to provide resources to [the Divestment Business's R&D program] and use ESA's logistics and support business to improve after-market support and product repairs provided by the Divestment Business. Furthermore, it plans to [information on how Elbit plans to combine the strengths of the businesses to create new products].

(47) Furthermore, as part of devising this strategy Elbit identified several specific synergies arising from the acquisition of the Divestment Business. These include the following:[48]

- Combining Elbit's capabilities in optics, electronics and infrared with the Divestment Business' image intensification strengths to create products required by customers.

- The respective technological know-how of Elbit and the Divestment Business will complement one another to improve their respective products. In particular, Elbit's know-how will improve the Divestment Business' digital capabilities, whereas the Divestment Business' technology will improve Elbit's sensors, e.g. [concrete example of how these strengths can be combined].

- The combined complementary expertise of Elbit and the Divestment Business will offer customers new options, e.g. [concrete example of how the two businesses' products can be combined].

- Cost savings in several products and components.

(48) The Commission notes that the first three bullets above are consistent with the discussion in recitals 38-39, which explain how Elbit's complementary expertise could lead to improved and new products.[49]

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[44] Reasoned Opinion of the Trustee, paragraph 103.
[45] Decision, recital 30.
[46] Decision, Section 5.2.
[47] Reasoned Opinion of the Trustee, paragraphs 105-107.
[48] Reasoned Opinion of the Trustee, paragraph 108.
[49] As explained in footnote 37, ITAR may prevent the realisation of some of these synergy benefits in ITAR free tenders. They can, however, full accrue in ITAR tenders.

(49) In the Commission's view, the fact that Elbit has devised a strategy in the night vision business that makes use of the Divestment Business and that in this context it identified synergies stemming from the complementary portfolios and expertise is further proof of its incentives to maintain and develop the Divestment Business. Indeed Elbit's business strategy reflects its intentions to utilize and develop the newly acquired asset and the existence of the potential synergies gives strong incentives to exploit them.

(50) Fourth, in addition to devising a business strategy in night vision, Elbit put together a detailed business plan with revenue and cost forecasts until 2024,[50] with some forecasts running until 2030.[51] The plan took into account customers' major night vision programs, some [Elbit's plans to improve the performance of the Divestment Business] as well as [Elbit's assumptions on future technology developments in NVDs].[52] In the discussions leading to this business plan, Elbit challenged the business plan of the Divestment Business' management and used more conservative assumptions,[53] which reflects professionalism. Further, the Trustee found Elbit's analysis of the Divestment Business professional and compelling.[54] The Commission considers that Elbit's sound and independent approach to business planning is further evidence of Elbit's mature approach to the acquisition and its incentives to maintain and develop the Divestment Business.

(51) Fifth, Elbit conducted a thorough due diligence and carried out a detailed SWOT analysis of the Divestment Business.[55] This again reflects Elbit's intentions to develop the Divestment Business further.

(52) Sixth, Elbit has a detailed plan for the transition and the integration of the Divestment Business and work already performed in this regard has been very thorough.[56] As a result the transition is currently in a very advanced stage.[57] These efforts also demonstrate Elbit's incentives to develop the Divestment business as absent such incentives it would not have made such efforts in transitioning and integrating the Divestment Business.

(53) On the basis on recitals 42-52 above, the Commission considers that Elbit has the incentive to maintain and develop the Divestment Business as a viable and active competitive force.

2.4.2.4. Overall conclusion on the second criterion

(54) On the basis of the analysis in Section 2.4, the Commission considers that Elbit 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 L3Harris and other competitors. The Purchaser thus fulfils the second criterion of paragraph 16 of the Commitments.

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50 Reasoned Opinion of the Trustee, paragraphs 113.
51 Reasoned Opinion of the Trustee, paragraph 118.
52 Reasoned Opinion of the Trustee, paragraphs 114-118.
53 Reasoned Opinion of the Trustee, paragraph 117.
54 Reasoned Opinion of the Trustee, paragraph 112.
55 Reasoned Opinion of the Trustee, paragraphs 110-111.
56 Reasoned Opinion of the Trustee, paragraphs 120-130.
57 Reasoned Opinion of the Trustee, paragraphs 131.

2.5. Absence of prima facie competition problems

(55) Absence of prima facie competition concerns is the first limb of the third criterion of paragraph 16 of the Commitments. Section 2.5 will focus on this limb exclusively, while the second limb (risk that the implementation will be delayed, in particular due to regulatory approvals) will be analysed in Section 2.6.

2.5.1. Notifying Party's view

(56) The Notifying Party submits that Elbit and the Divestment Business overlap only in image intensification NVDs and that even in this market their combined market share of [30-40]% is moderate.[58] Furthermore, Elbit's [5-10]% market share overstates Elbit's significance as a competitive constraint[59] because [0-5]% was due to a single contract in [concrete reference to a country]. In addition, this [concrete reference to a country] contract was ITAR free,[60] in which US suppliers and thus the Parties could not participate. The Notifying Party also argues that the Commission previously approved purchasers with combined market shares above 30% and with equivalent or greater increments than [5-10]%.[61]

(57) The Notifying Party further submits that Elbit and the Divestment Business are not close competitors.[62] First, the Decision considers that Harris and L3 were close competitors and thus Elbit and the Divestment Business have to be more distant competitors than Harris and L3 to each other. Second, the Divestment Business uses 18 mm tubes (I2Ts) in its NVDs, whereas Elbit's NVDs use [smaller diameter] tubes from [another supplier]. Elbit's [smaller diameter] tubes are smaller and lighter but less performant than 18 mm tubes resulting in NVDs that are not close substitutes. Third, the Divestment Business and Elbit [met in less than 5%] of tenders, whereas the Parties met in [20-40]% of tenders. Other than different tubes, which results in different parameters for their NVDs, the reason why [Elbit met the Divestment Business in less than 5% of tenders] is that the Harris and L3 cannot participate in ITAR free tenders whereas Elbit can. Fourth, the internal documents of Harris and L3 [content of internal documents], which speaks against closeness. Fifth, the Divestment Business and Elbit have different profiles in that, as acknowledged by the Decision, the Divestment Business, just like L3, focus on meeting the specifications and expectations of the US Armed Forces, whereas this is not true of Elbit.

(58) Consequently the Notifying Party claims that Elbit is not a strong constraint on the Divestment Business, a fact which, in its view, is also acknowledged by the Decision.[63] The increment between the Parties is larger than the increment between the Divestment Business and Elbit throughout the whole 2014-2018 period as well as in all individual years of that period except one.[64] Further, the Parties overlap in

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58 Request, paragraph 14.

59 Request, paragraph 14

60 As explained in footnote 37 certain European tenders exclude suppliers that are subject to the US International Traffic in Arms Regulations ("ITAR"). These are referred to as ITAR-free tenders.

61 Request, paragraph 15. The cases include Case M.7982 *Abbott Laboratories / Ale*re (combined share [30-40%], increment [0-5%]), Case M.7792 *Konecranes / Terex Mhps* (combined share [30-40%], increment not stated) and Case M.7278 *General Electric / Alstom* (combined share [25-40%], increment [5-10%]).

62 Request, paragraph 16.

63 Request, paragraphs 17.

64 Request, paragraph 18.

[number of EEA countries], whereas Elbit and the Divestment Business overlap only in [number of EEA countries].[65]

(59) In addition, the Notifying Party considers that Elbit will be constrained in the EEA by four strong competitors, namely Theon, Thales, the merged entity with the former L3 NVD business and P.C.O.[66] Theon and Thales have stable market shares, which contrasts with the Divestment Business, which in recent years has followed a downward trend. As the Decision acknowledged, the former L3 business is a strong competitor and a close competitor to the Divestment Business.

(60) Finally, the Notifying Party considers that the combination of Elbit and the Divestment business will not give rise to vertical concerns.[67] As regards input foreclosure, Elbit's market share after the acquisition in I2Ts will be [20-30]% (same as the Divestment Business' current share as Elbit does not produce I2Ts), i.e. significantly below the 30% threshold for concerns, and Elbit will be constrained by the merged entity, which the Decision considered as a strong competitor, as well as Photonis, which is likely dominant with a market share of [70-80] %. As regards customer foreclosure, post-acquisition Elbit will not have any significant degree of market power on the downstream level for image intensification NVDs, and its downstream market share of [30-40]% is just marginally above the 30% presumption threshold for absence of foreclosure effects. As regards the vertical relation between thermal technology and fusion NVDs (which use this technology), given Elbit's EEA position in thermal NVDs ([0-5]% across 2014-2018) and the Divestment Business's EEA position in fusion NVDs ([0-5]% across 2014-2018), no conceivable foreclosure concerns arise from the combination of the Divestment Business and Elbit also in this regard.

2.5.2. Commission's assessment

(61) As discussed in recital 45 above, the night vision businesses of Elbit and the Divestment Business are largely complementary. Elbit produces thermal NVDs and vehicle mounted (thermal) NVDs, which the Divestment Business does not. On the other hand, the Divestment Business produces fusion devices with sourced technology, which Elbit does not produce. Furthermore, in image intensification devices Elbit does not have the technology and the assets to produce I2Ts whereas the Divestment Business is one of the three I2T producers active in the EEA.

(62) Elbit and the Divestment Business overlap in only one product market, namely image intensification NVDs.[68] In addition, there are no concerns on the basis of the elimination of potential competition in markets other than image intensification NVDs. First, the Commission's investigation found no indication that the Divestment Business wants to [description of business strategy].[69] Second, further to its inquiry the Trustee confirmed that [information regarding Elbit's business strategy].[70] It follows that horizontal concerns can only arise in the market for image intensification NVDs and thus the Commission's assessment of horizontal effects will be restricted to image intensification NVDs. With regard to vertical concerns,

65 Request, paragraph 19.
66 Request, paragraph 20.
67 Request, paragraphs 25-28.
68 Decision, Section 5.1 and Table 1.
69 Decision, Section 5.1.
70 Reasoned Opinion of the Trustee, paragraph 139.

given that the Divestment Business' I2Ts are inputs for Elbit's image intensification NVDs, the Commission will analyse potential vertical concerns in relation to image intensification NVDs. However, there can be no vertical concerns involving fusion devices. First, Elbit is not active in the upstream market of I2Ts and is very unlikely to enter given that the barriers to entry are very high.[71] Second, as discussed, [information regarding Elbit's business strategy]. Thus the acquisition does not bring any change in either the upstream or downstream markets.

(63) Furthermore, the Decision left open the possibility whether the market for image intensification NVDs should be further subdivided based on device type such as goggles, weapon sights, tank periscopes, vehicle mounted cameras etc.[72] or whether the market for fusion devices should be further subdivided according to integration technology.[73] Consequently, competition concerns could in principle also arise under these alternative market definitions. However, the Commission notes at the outset, that the second open question (further subdivision of the fusion NVD market by integration technology) has little effect. First, based on the preceding paragraph, there can be no horizontal concerns in fusion devices, and thus horizontal concerns can be excluded even if that market were further subdivided by integration technology. Second, as discussed in the preceding paragraph, there can be no vertical concerns in fusion devices because the acquisition does not bring about any change in the upstream and in the downstream markets. This conclusion is not affected by any further subdivision of the fusion NVD market. Thus this distinction can only have an effect on the analysis of conglomerate effects.

(64) Based on this overview, the Commission will first assess *prima facie* competition concerns considering both the market for image intensification NVDs and the market for fusion NVDs as a whole without further segmentation. Within this assessment, horizontal and non-horizontal effects will be discussed separately. As mentioned before, horizontal and vertical effects can only arise in relation to image intensification NVDs and not in relation to fusion NVDs. The assessment of conglomerate effects will include not only image intensification NVDs but the potential tying and bundling of any products. Following the assessment based on a single image intensification and fusion NVD market without further distinctions, the Commission will discuss *prima facie* competition concerns under the alternative market definitions. The first alternative market definition implies that the market for image intensification NVDs is further subdivided according to device types. The second alternative definition implies that the market for fusion devices is further subdivided by integration technology. As discussed in the preceding paragraph the analysis under the second alternative definition is restricted to conglomerate effects.

2.5.2.1. Horizontal effects in the market for image intensification NVDs without further subdivision

Non-coordinated effects

(65) The geographic scope of the market for image intensification NVDs is the EEA with the qualification that firms from all NATO and NATO ally countries are constraints.[74] In this market, the shares of the Divestment Business and Elbit are [20-

71 Decision, Section 5.2.2.2.F.
72 Decision, Section 5.1.1.1 and recital 109.
73 Decision, Section 5.1.1.1 and recital 109.
74 Decision, Section 5.1.1.2.C.

30]% and [5-10]% respectively, resulting in a [30-40]% combined share with a [5-10]% increment.[75] These market shares are based on combined sales in the period 2014-2018. As discussed in the Decision,[76] given lumpy demand, market shares calculated over a period of five years are more indicative of market power than market shares for a given year because large swings of market shares caused by the win or loss of a significant tender in a certain year are smoothed out. As the combined market share is significantly above the threshold relevant for an affected market (20%) and the increment is not insignificant, the market shares indicate *prima facie* competition concerns on the basis of non-coordinated effects.

(66) However, Elbit's market share appears to overstate its competitive strength for a number of reasons.

(67) First, as both the Notifying Party[77] and the Trustee[78] pointed out, Elbit's market share is almost exclusively due to [information on the number of Elbit's large contract wins]. It is true that in a market where demand is lumpy winning a large contract is common and the Commission used the methodology of calculating market shares over a five year period precisely to overcome this problem. Thus, the Commission's preferred market share metric measures Elbit's market power already factoring in the possibility that its share can result from a few large tenders. Nonetheless, in the relevant period, [information on the number of Elbit's large contract wins], while the Divestment Business has won several large tenders and very likely the same applies to Theon, Thales and even L3Harris (former L3 NVD business).[79] In that sense, Elbit's performance is less consistent than that of its peers.

(68) Second, [a certain tender] was indeed ITAR free,[80] which means that competition was restricted to non-US players and neither Harris nor L3 could participate in the tender. Given that, as explained in the Decision,[81] Harris (i.e. the Divestment Business) and L3 are two strong, and even the two strongest, competitors on the market, it is not at all certain that absent this tender specification Elbit could have won this tender. This is also an indication that Elbit's market share overstates its competitive strength.

(69) Third, not only had Elbit very few wins, it also does not appear to be a strong bidding constraint. Namely, in the whole period 2014 – 2018 Elbit participated in only [a few] tenders.[82] By way of comparison, the Divestment Business participated in [a 6-8 times larger amount of] tenders in the same period.[83]

(70) Fourth, the Commission's market investigation also showed that among the image intensification NVD competitors L3 and Harris (i.e. the Divestment Business) were

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75 Decision, Table 1.

76 Decision, recital 135.

77 Recital 56.

78 Reasoned Opinion of the Trustee, paragraph 143.

79 For the Divestment Business, this is shown by Form CO, Annex RFI2 10. Given that Thales and Theon have similar market shares as the Divestment Business, it is very likely that this also applies to Theon and Thales. Further, as the merged entity's (former L3's) market share is [2-3] times as large as Elbit's, L3 is also likely to have won [number of large tenders won]. Market shares are taken from Decision Table 1, at recital 137.

80 Reasoned Opinion of the Trustee, paragraph 143.

81 Decision, recitals 139-140.

82 Reasoned Opinion of the Trustee, paragraph 153.

83 Reasoned Opinion of the Trustee, paragraph 154.

most often considered as "*credible today*" and "*credible in 3-5 years*", followed by Thales. Thus respondents to the market investigation did not consider Elbit as a particularly strong competitor.[84]

(71) Fifth, just like Thales, Theon and P.C.O., Elbit does not produce the critical input of image intensification NVDs, namely the I2T. By contrast, the Divestment Business and L3Harris have this capability. Given the lack of vertical integration with regard to I2Ts, Elbit's position prior to the acquisition of the Divestment Business is weaker that what its market share would suggest.

(72) Sixth, Elbit confirmed that, absent the acquisition, it was not its strategic priority to expand its EEA business materially, other than through somewhat increased sales efforts.[85]

(73) Overall, the Commission considers that Elbit's [5-10]% market share overstates its competitive strength and thus the competitive constraint exercised by Elbit is likely lower than its [5-10]% market share would suggest.

(74) The Commission also considers that Elbit and the Divestment business are not close competitors.

(75) First, Elbit and the Divestment Business [met in less than 5% of tenders] in the period 2014-2018 and thus there was no competitive interaction between the two firms in this period.[86] By comparison, the Divestment Business and L3 bid against each other in [20-40]% of the tenders in the same period.[87]

(76) Second, Elbit is not constrained by ITAR, whereas the Divestment Business is, which is consistent with their lack of competitive interaction. As discussed in the Decision, the distinction between ITAR and ITAR-free tenders normally would justify separate markets but the Decision did not distinguish these markets since both Parties were constrained by ITAR and thus the Transaction had no effect on ITAR-free tenders.[88] However, in the case of Elbit and the Divestment Business the situation is different and it has to be taken into account that the Divestment Business cannot even bid in ITAR-free tenders and thus the two firms do not even constrain each other. Further, as Elbit appears to be a weaker competitor than Harris or L3 based on the results of the market investigation,[89] it was likely to target ITAR free tenders where it could avoid two strong competitors. Indeed, as discussed above, [description of competitive information] was an ITAR free tender.[90]

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84 Decision, recital 140

85 Reasoned Opinion of the Trustee, paragraph 156.

86 Reasoned Opinion of the Trustee, paragraph 154.

87 Decision, recital 148

88 Decision, recital 117.

89 See recital 70 and Decision, recital 140.

90 As explained in footnote 37, after the acquisition, Elbit's operations will be partially subject to ITAR and partially not. The current Elbit NVD business will not be constrained by ITAR but the Divestment Business will continue to be even under Elbit's ownership. While, as discussed before, this may limit some of the synergies that can be realized from the combination, from a competition perspective the acquisition of the Divestment Business will not bring about any change in ITAR free tenders as only the pre-acquisition Elbit can participate in such tenders. Thus in ITAR-free tenders the situation after the acquisition will be the same as before the acquisition and before the Harris-L3 merger, i.e. there will be no lessening of competition. In ITAR tenders, the analysis in Section 2.5.2.1 applies.

(77) Third, the products of Elbit and the Divestment Business are not close substitutes. While Elbit uses 16 mm I2Ts, the Divestment Business integrates 18-mm I2Ts in its image intensification NVDs, which results in meaningful differences in respect of size, weight, power consumption and performance of the respective NVD product.[91] Notably 16-mm devices are 8-10% smaller and 20-30% lighter than 18-millimeter devices, which, all else being equal, favours the 16 mm devices as size and weight are important considerations for combat troops.[92] However, the smaller size and weight comes at the cost of worse performance in terms of figure of merit ("FOM").[93] FOM is a calculated abstract factor that allows for the measuring of night vision performance that is independent of the underlying technique used. NVD tenders typically specify a minimum performance, sometimes by reference to FOM level, which a given participant's NVD product needs to meet to win the tender.[94] In many cases the performance requirements are such that they can typically be achieved by NVD devices using standard 18-millimeter technology but not by devices using standard 16 mm tubes.[95] In such cases Elbit would need to source 16-millimeter tubes with a superior FOM level at a higher price to match standard 18-millimeter tube performance levels. Elbit estimates that this can result in comparative cost disadvantages in a range of [estimate of cost disadvantages], depending on sourcing-related factors.[96] Conversely, when the performance requirements can be met by standard 16 mm tubes, then Elbit has a competitive advantage as its devices are smaller and lighter. In short, the current products of Elbit and the Divestment Business fall on the opposite sides of the performance vs size and weight trade-off, which implies that their products are not close substitutes.

(78) Fourth, on a more general level, unlike Elbit, the primary focus of the Divestment Business has been the US market and thus its strategy and the specifications of its product portfolio are geared towards meeting the expectations of the US Armed Forces.[97] This does not mean that it is not competitive in the EEA; indeed the Decision has concluded that it is a strong competitor.[98] But it does mean that the Divestment Business and Elbit are not close competitors.

(79) Fifth, the Divestment Business and Elbit are not close competitors geographically. By way of background, in the period 2014-2018 close to 90 % of image intensification sales in the EEA took place in eight Member States, namely France, Germany, Greece, Italy, the Netherlands, Poland, Sweden and the United Kingdom.[99] As this is the group of countries where large sales opportunities arose, sales by the Divestment Business and Elbit can be expected to overlap. However, of the eight Member States, there was overlap only in [certain Member States], while both firms were absent from [certain Member States].[100] Thus, in [certain Member States], the Divestment Business had sales, while Elbit did not. Given that [Elbit met the Divestment Business in less than 5% of tenders], Elbit was not present in these

91 Reasoned Opinion of the Trustee, paragraph 164.
92 For the importance of weight and size, see for example Decision, Section 5.1.1.1.D.a)vii.
93 Reasoned Opinion of the Trustee, paragraph 165.
94 Reasoned Opinion of the Trustee, paragraph 165.
95 Reasoned Opinion of the Trustee, paragraph 165.
96 Reasoned Opinion of the Trustee, paragraph 165.
97 See, for example, the business plan of the Divestment Business, Reasoned Opinion of the Trustee, paragraph 113.
98 Decision, Section 5.1.2.2.A) c)
99 Form CO, Annex RFI1 44.
100 Reasoned Opinion of the Trustee, paragraph 161 and Exhibit 15.

four Member States in any form whatsoever (as bidder, winner or supplier in the case of [reference to business other than tender business]). In addition, outside the eight Member States mentioned above, the Divestment Business generated sales in nine EEA Member States.[101] However, of the eight Member States, there was overlap only in [certain Member States]. As Elbit and the Divestment Business [met the Divestment Business in less than 5% of tenders], the Commission notes again that in the [number of Member States] countries where Elbit had no sales, it had no presence whatsoever (as bidder, winner or supplier in the case of [reference to business other than tender business]). In summary, the Divestment Business' activities are much more extensive geographically than Elbit's. Thus the geographic overlap is minimal between Elbit and the Divestment Business.[102]

(80) Sixth, the results of the market investigation conducted in the context of the Harris-L3 merger review also confirm that Elbit is not a close competitor to the Divestment Business.[103]

(81) In summary, the Commission considers that Elbit's competitive strength is less than what is implied by its market share of [5-10]%. The increment brought about by Elbit's acquisition of the Divestment Business is thus rather limited. Furthermore, Elbit and the Divesment Business are not close competitors, which implies that the price effect,[104] if any, from such small increment is unlikely to be significant. It follows that the acquisition of the Divestment Business by Elbit is unlikely to create *prima facie* horizontal competition concerns on the basis of non-coordinated effects in the market for image intensification NVDs in the EEA.

Coordinated effects

(82) As the Decision noted,[105] image intensification NVDs are heterogeneous products with various functionalities and multiple parameters (i.e. not only price but also quality, performance levels, energy consumption, shape, weight etc), which makes it difficult for competitors to implicitly reach a common understanding on the terms of coordination.

(83) The Decision also noted[106] that maintaining coordination also appears difficult for several reasons. First, the market is not transparent, which makes monitoring the deviations from the agreed terms of coordination difficult. Second, the lumpy nature of demand incentivizes firms to cheat on any agreed terms. Third, NVD markets are characterised by innovation, which tends to render any tacit coordination unstable.

(84) These arguments also apply to the acquisition of the Divestment Business by Elbit. On this basis, the acquisition of the Divestment Business is also unlikely to lead to prima facie horizontal concerns on the basis of coordinated effects.

101 Reasoned Opinion of the Trustee, paragraph 161 and Exhibit 15.

102 The Commission notes here again that Elbit and the Divestment Business [met less than 5% of tenders in certain Member States], a fact that attests their lack of closeness.

103 Q1 Questionnaire to customers, question 23, Q2 Questionnaire to competitors, question 33.

104 Price effect has the same meaning as that described in footnote 145 of the Decision.

105 Decision, Section 5.1.3.2.

106 Decision, Section 5.1.3.2.

2.5.2.2. Non-horizontal effects considering the market for image intensification NVDs and the market for fusion NVDs without further subdivision

(85) The acquisition of the Divestment Business by Elbit results in the vertical integration of the Divestment Business's production and sale of I2Ts at the upstream level into Elbit's image intensification NVD business at the downstream level, which raises the possibility of prima facie vertical competition concerns.

(86) However, post-acquisition Elbit's share in the upstream market for I2Ts will be [20-30]%, i.e. below the level that would lead to a presumption of input foreclosure effects.[107] More importantly, as Elbit does not have the capability to produce I2Ts[108] the acquisition does not bring about any change in the upstream market for I2Ts. Consequently, the acquisition is unlikely to lead to input foreclosure concerns. In addition, the merged entity and Photonis will remain strong constraints on Elbit.[109]

(87) As regards customer foreclosure, the combined market share of Elbit and the Divestment Business on the downstream market for image intensification NVDs will be [30-40]%, marginally above the threshold for the presumption for customer foreclosure effects.[110] However, as discussed in Section 2.5.2.1, Elbit's pre-acquisition market share ([5-10]%) overstates its competitive strength and thus the acquisition is unlikely to create the kind of market power in the downstream market that would trigger customer foreclosure concerns. Furthermore, the acquisition only removes Elbit as a customer and not the Divestment Business, which self-supplies the I2Ts it needs. Thus the acquisition only removes a small share of demand for I2Ts (corresponding to at most [5-10]% share on the downstream market). In addition, prior to the acquisition Elbit sourced I2Ts from Photonis, which has a [70-80]% market share in I2Ts.[111] In other words, the potential removal of Elbit as a customer will reduce Photonis' market share somewhat, but Photonis' market share, which was indicative of dominance prior to the acquisition of the Divestment Business, will remain so after the acquisition as well being significantly above [50-60]%. Photonis' ability and incentive to compete are thus not likely to be reduced, which in turn makes downstream price increases also unlikely. Consequently, the acquisition of the Divestment Business is unlikely to lead to customer foreclosure concerns.

(88) Although I2Ts are also used in fusion devices, as discussed in recital 62, the acquisition does not give rise any vertical concerns in relation to fusion devices.

(89) As regards conglomerate concerns, the Decision considered that within the night vision segment the Transaction was unlikely to lead to such concerns[112] for two reasons. First, tenders tend to be very specific, which is consistent with the finding that there is no demand-substitution across distinctions such as image intensification technology, device type and device shapes. Highly specific demand implies that a bundling and tying strategy is unlikely to be successful as such bundles are difficult to sell in the first place. Second, there are other suppliers that can replicate the bundles. The same reasons also apply to the acquisition of the Divestment Business

107 Decision, Table 3.
108 Decision, Table 3 and Section 5.2.2.2 B.
109 Decision, Section 5.2.2.
110 See recital 65.
111 Decision, Table 3
112 Decision, Section 5.3.3.2.

by Elbit: a bundling strategy is unlikely to be successful and competitors like Thales or the merged entity, both of which have broad night vision capabilities, are likely to be able to replicate any bundles. In addition, the combined market share of Elbit and the Divestment Business on the market for image intensification NVDs will be [30-40]%,[113] which is only marginally above the threshold for the presumption for conglomerate effects. As discussed in Section 2.5.2.1 Elbit's market share overstates its competitive strength and thus the acquisition is unlikely to create the kind of market power in the downstream market that would trigger conglomerate concerns.

(90) Conglomerate concerns are also unlikely when the bundling of night vision devices with non-night vision products is considered. In this case too, the fact that the procurement of night vision devices is very specific and their purchase is never bundled with other products[114] rules out prima facie conglomerate concerns. As regards conglomerate concerns involving purely non-night vision products, the acquisition does not bring about any change in this respect as the Divestment Business does not have any capabilities other than night vision.

(91) On the basis of the above the Commission considers that the acquisition of the Divestment Business by Elbit is unlikely to create *prima facie* non-horizontal competition concerns.

2.5.2.3. Assessment under alternative market definitions

(92) As discussed in recital 63 above, the Decision left open the possibility whether the market for image intensification NVDs should be further subdivided based on device type such as goggles, weapon sights, tank periscopes, vehicle mounted cameras etc.[115] or whether the market for fusion devices should be further subdivided according to integration technology (digital or optical).[116] This section discusses prima facie competition concerns in view of these two alternative market definitions.

(93) Under the first alternative market definition, separate markets exist according to image intensification device types, i.e. image intensification goggles, weapon sights, vehicle mounted devices, tank periscopes etc.[117] As discussed in the Decision, the geographical scope of all of these markets is EEA-wide, with the qualification that firms from all NATO and NATO ally countries are constraints.[118]

(94) In this regard, it is important to note that [shares of goggles in Elbit's NVD sales in the EEA] of Elbit's sales in the EEA [resulted from goggles].[119] Further, the Divestment Business is only active in goggles and weapon sights[120] and an overwhelming part of its sales in the period 2014-2018 resulted from goggles.[121]

(95) *Horizontal non-coordinated effects.* As the Divestment Business produces only goggles and weapon sights, the potential horizontal non-coordinated concerns are restricted to these two device types. Given that [shares of goggles in Elbit's NVD

[113] See recital 65.
[114] Decision, Section 5.3.3.2, recital 255.
[115] Decision, Section 5.1.1.1 and recital 109.
[116] Decision, Section 5.1.1.1 and recital 109.
[117] Decision Section 5.1.1.1.E.
[118] Decision Section 5.1.1.2.C.
[119] Reasoned Opinion of the Trustee, paragraph 139.
[120] Reasoned Opinion of the Trustee, paragraph 140.
[121] Reasoned Opinion of the Trustee, paragraph 140.

sales in the EEA] and the predominant part of the Divestment Business' sales in the EEA resulted from goggles, the assessment in goggles is substantially the same as under the unified market for image intensification NVDs. Thus, even if Elbit's market share in goggles before and after the acquisition were somewhat higher than in the case of the unified image intensification NVD market (Divestment Business [20-30]%, Elbit [5-10]%, combined [30-40]%)[122] it still remains the case that Elbit's own position pre-acquisition is weaker than its market share suggests and Elbit and the Divestment Business are not close competitors. In the case of weapon sights, Elbit has the capabilities[123] but [information on the level of Elbit's weapon sight sales in the EEA] whereas the Divestment Business had minimal sales. Elbit could therefore be a potential competitor in this market, which the acquisition will remove. However, this is unlikely to lead to prima facie horizontal concerns on the basis of non-coordinated effects. First, the share of the Divestment Business remains below [20-30] % in this hypothetical market.[124] Second, there are several strong competitors with weapon sight capabilities, including Theon and the merged entity (former L3 business).[125] Third, as discussed in recital 72, absent the acquisition, the EEA market was not Elbit's priority and thus it is unlikely that it would have increased its presence in weapon sights in the EEA.

(96) *Horizontal coordinated effects.* The assessment under the unified NVD market applies in full regardless of any further segmentation as the market characteristics discussed in that assessment are the same for all night vision segments.

(97) *Non-horizontal effects, input foreclosure*. The upstream market for I2Ts is not segmented according to device type[126] and thus the upstream market conditions will be the same as in the case of a unified NVD market. It follows that the same assessment applies regardless of any further segmentation in the downstream market.

(98) *Non-horizontal effects, customer foreclosure.* As Elbit [information on the share of goggles in Elbit's NVD sales in the EEA] and the overwhelming share of the Divestment Business' sales also come from goggles, the assessment for goggles is substantially the same as in the case of the unified NVD market.[127] As Elbit has capabilities in several device types,[128] Elbit could potentially be present in several downstream device types in the near to medium term. However, given that it is not yet present in these segments, it is very unlikely that it would achieve a 30 % market share in any device type, which would be the threshold for the assumption of customer foreclosure concerns.[129] Further, as discussed in recital 72 above, absent the acquisition, the EEA market was not Elbit's priority, which makes it unlikely that it would have increased its presence in these device types absent the acquisition. It follows that the acquisition does not raise prima facie customer foreclosure concerns even under the first alternative market definition.

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122 See recital 65.
123 See recital 36.
124 Reasoned Opinion of the Trustee, paragraph 140.
125 Reasoned Opinion of the Trustee, paragraph 140.
126 Decision Section 5.2.1.1. C.
127 See Section 2.5.2.2.
128 See recital 36.
129 This is unlikely even together with the Divestment Business. Other than goggles the Divestment Business is only present in weapon sights and its share is substantially below 20% (in this regard, see the Reasoned Opinion of the Trustee, paragraph 140).

(99) *Conglomerate concerns.* The assessment of conglomerate concerns that took the unified NVD market as a basis (Section 2.5.2.2) had three parts: bundling within the overall night vision space; bundling night vision products with non-night vision products; and bundling non-night vision products. As this assessment is agnostic to any further segmentation of the image intensification NVD market by device types, or indeed to any segmentation within the night vision space, the same assessment applies in the case of such segmentation.

(100) It follows that the acquisition of the Divestment Business is unlikely to lead to prima facie competition concerns under the first alternative market definition.

(101) Under the second alternative market definition, the market for fusion NVDs may be further subdivided according to the type of integration (optical or digital).[130] As discussed in recital 63 above, only conglomerate concerns can potentially arise under this alternative market definition. In this regard, as explained in recital 99, the assessment of conglomerate concerns under the unified NVD market in Section 2.5.2.2 is agnostic to any further segmentation within the night vision space and thus applies in this case too. Accordingly, conglomerate concerns can also be excluded. It follows that the acquisition of the Divestment Business is unlikely to lead to prima facie competition concerns under the second alternative market definition either.

(102) On the basis of the above the Commission considers that the acquisition of the Divestment Business by Elbit is unlikely to create *prima facie* non-horizontal competition concerns even under an alternative market definition.

2.5.2.4. Conclusion on prima facie competition concerns

(103) For the reasons explained in Section 2.5, the Commission considers that the acquisition of the Divestment Business by Elbit is not likely to create *prima facie* competition concerns. In other words the Purchaser fulfils the first limb of the third criterion of paragraph 16 of the Commitments. This prima facie assessment is based on the information available for the purpose of this buyer approval.

2.6. Risk that the implementation of the Commitments will be delayed

(104) The Divestment Business has no assets outside the US and has relatively limited revenues outside the US and the EEA. Consequently, Elbit's acquisition of the Divestment Business gave rise to merger control filings only in Israel and Turkey.[131] The Israeli competition authority unconditionally cleared Elbit's acquisition on 29 May, 2019.[132] This was also the case in Turkey on 21 June, 2019.[133]

(105) Given the nature of night vision products and the focus of the Divestment Business on the US, any non-US purchaser will be subject to US security related reviews. These include reviews by the Directorate of Defence Trade Controls ("DDTC") of the US Department of State, the Committee on Foreign Investment in the United States ("CFIUS"), and the Defence Security Service of the US Department of Defence ("DSS").[134]

130 Decision Section 5.1.1.1.E.
131 Request, paragraph 9, Reasoned Opinion of the Trustee, paragraph 180.
132 Request, paragraph 9, Reasoned Opinion of the Trustee, paragraph 180.
133 Request, paragraph 9, Reasoned Opinion of the Trustee, paragraph 180.
134 Request, paragraph 30.

(106) On 13 June 2019, the 60-day pre-notification period expired without further action from DDTC.[135] Clearances by CFIUS and DSS were received on 16 August 2019.[136]

(107) Given the above approvals, there are no regulatory obstacles to the acquisition of the Divestment Business (other than the Commission's purchaser approval decision). There is no risk therefore that the acquisition of the Divestment Business will be delayed on account of regulatory approvals.

(108) Furthermore, the transition and integration planning by Elbit have been tackled professionally and reached an advanced stage.[137] Consequently, there appears to be no risk that the acquisition and integration of the Divestment Business within Elbit will be delayed on account of any non-regulatory reason either.

(109) As there appears to be no risk that the implementation of the Commitments will be delayed, the Commission considers that the Purchaser also fulfils the second limb of the third criterion of paragraph 16 of the Commitments.

2.7. Consistency of the sale with the Commitments

(110) Given that the Commitments were prepared by the Notifying Party on the basis of existing transaction agreements, in particular the APA, negotiated at arms' length between Harris and Elbit, the transaction documents are expected to be fully in line with the Commitments.

(111) Indeed, the Trustee confirmed that the assets to be transferred pursuant to the sale are equivalent to the assets that the Notifying Party is required to transfer pursuant to the Commitments.[138] This includes all tangible assets and intangible assets of the Divestment Business.

(112) Also in line with the Commitments, the APA covers :[139]

i) all relevant permits primarily used in the Divestment Business;

ii) all relevant rights and benefits in and to all agreements, contracts, commitments, purchase orders, licenses, sub-licences, leases or subleases;

iii) all relevant originals of all business records of the Divestment Business;

iv) the transfer of all personnel of the Divestment business (with appropriate no-hire and no solicitation provisions)

v) the transfer of key personnel (with appropriate retention bonus schemes)

(113) Further, in line with the Commitments, the Notifying Party also grants a non-exclusive, irrevocable, perpetual, and worldwide license to Elbit for no additional consideration to use in the Divestment Business any other IP assets owned by Harris

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135 Request, paragraph 31, Reasoned Opinion of the Trustee, paragraph 182.

136 Email of the Notifying Party's counsel to the Commission of 16 August 2019. Reasoned Opinion of the Trustee, paragraph 183.

137 Reasoned Opinion of the Trustee, paragraph 131.

138 Reasoned Opinion of the Trustee, paragraphs 189-190 and 192; Commitments paragraph 6 (a).

139 Reasoned Opinion of the Trustee, paragraphs 189-190; Commitments paragraph 6(b)-6(d).

that are not transferred (or otherwise provided to the Purchaser) but that are used in the Divestment Business in the twelve months prior to closing of the divestment.[140]

(114) The Trustee also confirmed that Clause 17 of the Commitments (i.e. that the final binding sale and purchase agreement relating to the divestment is conditional on the Commission's approval) has been complied with.[141]

(115) The parties to the APA have agreed to a Transitional Services Agreement (TSA) according to which the merged entity will provide certain limited services to Elbit for a period of up to [duration of services]. The TSA reflects the fairly limited scope of services required, such as back office services, HR services, IT services (such as common corporate applications, including internet, connectivity, employee productivity applications) and certain engineering services. The Trustee confirmed that the scope of the services under the TSA is consistent with the Commitments; that these services are limited in scope and short in duration; and that they are priced consistently with the Commitments.[142]

(116) The Trustee further confirmed that overall the agreements bringing about the transfer of the Divestment Business to the Purchaser are in line with the Commitments.[143]

(117) On the basis of the above the Commission considers that the sale of the Divestment Business is consistent with the Commitments.

3. CONCLUSION

(118) On the basis of the above assessment, the Commission approves Elbit as a suitable purchaser of the Divestment Business. .

(119) The Commission further concludes that the Divestment Business is being sold in a manner consistent with the Commitments.

(120) This decision only constitutes approval of the proposed purchaser of the Divestment Business identified herein and of the transaction documents bringing about the sale. This decision does not constitute a confirmation that Harris has complied with its Commitments.

(121) This decision is based on paragraph 17 of the Commitments attached to the Decision.

For the Commission

(Signed)
Cecilio MADERO VILLAREJO
Acting Director-General

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140 Reasoned Opinion of the Trustee, paragraph 191; Commitments Schedule, paragraph 6(b).

141 Reasoned Opinion of the Trustee, paragraph 201.

142 Reasoned Opinion of the Trustee, paragraph 203. The transitional services are included in paragraph 7 of the Commitments and the TSA is attached as Annex CM 6 to the Commitments (Exhibit G to the APA).

143 Reasoned Opinion of the Trustee, paragraph 204.