



EUROPEAN COMMISSION
DG Competition

*Case M.9434 – UTC /
RAYTHEON*

Only the English text is available and authentic.

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

Decision on the implementation of the commitments -
Purchaser approval
Date: 24/04/2020



EUROPEAN COMMISSION

Brussels, 24.4.2020
C(2020) 2783 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

**Subject: Case M.9434 – UTC/Raytheon
Approval of BAE as purchaser of the GPS and Radios Divestment
Businesses following your letter of 26 March 2020 and the Trustee’s
opinion of 2 April 2020**

I. FACTS AND PROCEDURE

- (1) By decision of 13 March 2020 (“the Decision”), adopted in application of Article 6(1)(b) in connection with Article 6(2) of the Council Regulation (EC) No 139/2004,¹ the Commission declared the operation by which United Technologies Corporation (“UTC”) intended to acquire sole control over Raytheon Company (“Raytheon” and, together with UTC, the “Parties”), compatible with the internal market subject to full compliance with the commitments annexed to the Decision and the obligations contained therein (the “Commitments”).

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

- (2) In particular, in order to remove the serious doubts in the markets for the supply of military airborne radios and GPS receivers in the EEA, the Commitments provide for the divestiture of two different businesses (the “Divestment Businesses”):
 - (a) Raytheon’s military airborne radios (the “Radios Divestment Business”);
 - (b) UTC’s GPS receivers business (the “GPS Divestment Business”).
- (3) The Radios Divestment Business consists of Raytheon’s existing military airborne radios business located in Fort Wayne, Indiana, United States, which develops, assembles, tests, markets, sells, and repairs airborne radios for military aircraft together with the necessary capabilities to encrypt these products for military use.
- (4) The GPS Divestment Business consists of UTC’s military GPS receiver and anti-jamming business located in Cedar Rapids and Coralville, Iowa, United States, which designs, develops, manufactures, assembles, tests, certifies, and provides support for its military GPS receivers and anti-jamming products.
- (5) The Divestment Businesses include all assets and staff that contribute to their current operation or are necessary to ensure their viability and competitiveness.
- (6) On 21 February the Parties submitted a first set of commitments (the “Initial Commitments”) in which they proposed to sell the Divestment Businesses to BAE Systems Information and Electronic Systems Integration Inc. (“BAE”), with whom the Parties had entered into binding asset purchase agreements on 17 January 2020. (“the Proposed Agreements”). The Final Commitments submitted by the Parties on 11 March 2020 no longer referred to BAE as the Purchaser.
- (7) On 19 February 2020, the Parties responded to certain allegations of possible vertical issues arising from the acquisition of the Divestment Businesses by BAE.
- (8) On 5 March 2020, the Commission asked and received clarification from BAE on a number of items, notably about BAE’s suitability as a purchaser, including past supply chain management issues, and the allegations of possible vertical issues arising from BAE’s acquisition of the Divestment Businesses.
- (9) On the basis of the Initial Commitments, and in accordance with paragraph 56 of the Remedies Notice², the Commission assessed and market-tested BAE’s suitability as a purchaser of the Divestment Businesses. In the Decision³ the Commission indicated that it considered, on a *prima facie* basis, BAE to be a suitable purchaser of the Divestment Businesses.
- (10) After the adoption of the Decision, by letter of 26 March 2020, the Parties proposed BAE for approval by the Commission as purchaser of the Divestment Businesses and submitted again formally the Proposed Agreements.

² Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

³ Recitals 379-405.

- (11) On 2 April 2020, Mazars LLP (the “Trustee”) submitted its reasoned opinion assessing BAE’s suitability as a purchaser (the “Reasoned Opinion”).⁴ In the Reasoned Opinion, the Trustee concluded that BAE fulfils the criteria of the purchaser requirements as stated in section D of the Commitments. The Trustee also indicated that, on the basis of the Proposed Agreements, the Divestment Business would be sold in a manner consistent with the Commitments.

II. ASSESSMENT OF THE PROPOSAL

II.1. Legal Framework

- (12) Pursuant to the Remedies Notice and paragraph 18 of the Commitments, and in accordance with paragraph 17 of the Commitments, in order to be approved by the Commission, BAE must fulfil the following criteria:
- (a) be independent of and unconnected to the Notifying Party and its Affiliated Undertakings;
 - (b) possess the financial resources, proven relevant expertise in the supply of military aerospace systems and have the incentive and ability to maintain and develop the Divestment Businesses as a viable and active competitive force in competition with the Parties and other competitors; and
 - (c) the acquisition of the Divestment Businesses by BAE must neither be likely to create new competition problems nor give rise to a risk that the implementation of the commitments will be delayed. Therefore, BAE must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Businesses.

II.2. Description of the Proposed Purchaser

- (13) BAE is a multinational defense, security, and aerospace company. It is the largest manufacturer in the United Kingdom, the largest defense contractor in Europe, and the third-largest defense company in the world. BAE is headquartered in the United Kingdom and is present in more than 100 other countries. Its largest operations outside the United Kingdom are in the United States, where its subsidiary BAE Systems Inc. is one of the six largest suppliers of the U.S. Department of Defense (“DoD”). BAE employs around 85 800 people worldwide and has an annual turnover in excess of EUR 20 billion.

II.3. Independence from the Parties

- (14) The Parties submit that BAE is independent from and unconnected to UTC and Raytheon, both from a legal and economic perspective. They contend that there are no material cross-shareholdings, no cross-directorships and no material commercial relationships between BAE and the Parties.
- (15) In its Reasoned Opinion, the Trustee submits that BAE is independent from the Parties in spite of a number of ownership, cooperation and commercial links.

⁴ Mazars LLP was appointed by UTC as the monitoring trustee supervising the implementation of the Commitments on 24 March 2020.

- (16) In particular, UTC participates with BAE in the Data Link Solutions Joint Venture, which does not compete in the same markets as the Divestment Businesses. Raytheon also participates with BAE in the Exostar B to B Joint Venture, of which they are only two shareholders out of a total of seven.
- (17) The Trustee submits that it is a feature of the military aerospace production and defence industry to have supplier relationships and that cooperation among manufacturers is common. Based thereupon and taking account of the information provided to it, the Trustee concludes that the existing commercial relationships between BAE and any of UTC or Raytheon appear to be immaterial to BAE in view of their overall size in terms of revenues and do not impede BAE's independence from the Parties.⁵
- (18) Similarly, a large majority of respondents to the market test of the Commitments submitted that BAE is currently independent of and unconnected to UTC and Raytheon.⁶
- (19) On the basis of the information provided by the Parties, the Reasoned Opinion submitted by the Trustee and the results of the market test of the Commitments, the Commission considers that BAE is independent of, and unconnected to, the Parties and their affiliates.

II.4. Financial resources

- (20) The Parties submit that BAE possesses all necessary financial resources required to operate the Divestment Businesses, which in any event are in themselves highly profitable operations.
- (21) The Trustee submits that, considering its overall business performance and financial position, BAE has sufficient financial resources to purchase and develop the Divestment Businesses.⁷
- (22) According to the information provided by the Parties BAE recorded net sales of GBP 20 109 million in 2019. The company has been growing moderately (compound annual growth rate of 2.9% between 2015 and 2019) and achieved relatively stable EBITA margins (9.4% to 10.7%). BAE's own projections and estimates from external financial analysts predict that its business will continue to grow.
- (23) Similarly, a large majority of respondents to the market test considered that BAE has the financial resources to maintain and develop the Divestment Businesses in a viable and competitive way so as to replicate UTC's and Raytheon's respective constraints in the markets where the Commission identified concerns.⁸
- (24) On the basis of the information provided by the Parties, the Reasoned Opinion submitted by the Trustee and the results of the market test, the Commission considers that BAE has the financial resources to maintain and develop the

⁵ Reasoned Opinion, p. 31.

⁶ Questionnaire on Commitments offered by UTC and Raytheon, Question 27.

⁷ Reasoned Opinion, p. 41.

⁸ Questionnaire on Commitments offered by UTC and Raytheon, Question 28.

Divestment Business as a viable business and effective competitors to the Parties and other market players.

II.5. Proven expertise in the supply of military aerospace systems

- (25) The Parties submit that BAE has proven expertise in the supply of military aerospace systems as it is one of the most established suppliers in the world [...].
- (26) The Trustee submits that BAE has proven expertise in the supply of military aerospace systems, considering that both Divestment Businesses will fit well into existing BAE operations: [...]. According to the Trustee, BAE has broad expertise integrating businesses and conducting successful M&A processes.⁹
- (27) Similarly, a large majority of respondents to the market test considered that BAE has the relevant expertise and the R&D capabilities and resources/assets to maintain and develop the Divestment Businesses in a viable and competitive way so as to replicate UTC's constraint on the market for military airborne radios and Raytheon's constraint on the market for military GPS receivers.¹⁰
- (28) On the basis of the information provided by the Parties, the Reasoned Opinion submitted by the Trustee and the results of the market test, the Commission considers that BAE has the proven expertise to maintain and develop the Divestment Businesses as viable businesses and effective competitors to the Parties and other market players.

II.6. Incentive to maintain and develop the Divested Business as a viable and active competitor

- (29) The Parties submit that BAE has the incentive to maintain and develop the Divestment Businesses as a viable and active competitive force. First, they state that BAE is currently not active in the supply of GPS receivers or military airborne radios and therefore has an unambiguous interest to maintain and develop these businesses. Second, the Parties contend that, given the complementarity between BAE's existing operations and the Divestment Businesses, BAE has an incentive to maximize synergies resulting from the acquisition.
- (30) In the Reasoned Opinion, the Trustee points out that the GPS technology of the Divestment Business would contribute to BAE's strategic aim to target the market for precision guided munitions and offer significant commonality with BAE's own customer base, particularly in relation to Boeing. In addition, the product offering of the Radios Business complements BAE's existing airborne radio product portfolio and BAE has identified a number of its own products into which the technologies of the Radios Business may be incorporated.
- (31) Similarly, a large majority of respondents to the market test considered that BAE has the incentives to maintain and develop the Divestment Businesses in a viable and

⁹ Reasoned Opinion, pp 56-57.

¹⁰ Questionnaire on Commitments offered by UTC and Raytheon, Questions 29 and 31.

competitive way so as to replicate UTC's and Raytheon's respective constraints in the markets where the Commission identified concerns.¹¹

- (32) On the basis of the information provided by the Parties, the Reasoned Opinion submitted by the Trustee and the results of the market test, the Commission considers that BAE has the incentive to maintain and develop the Divestment Businesses as viable businesses and effective competitors to the Parties and other market players.

II.7. Absence of prima facie competition problems

- (33) The Parties submit that the acquisition of the Divestment Businesses by BAE does not raise any horizontal competition concerns, given the absence of any overlap between the activities of BAE and the Divestment Businesses.
- (34) As regards the vertical relationship between the GPS Divestment Business's upstream supply of GPS receivers and BAE's downstream supply of precision guided munitions ("PGM"), the Parties contend that BAE has neither the ability nor incentive to engage in input or customer foreclosure.
- (35) First, the Parties state that BAE has limited PGM sales of its own (its 2018 EEA market share was [0-5]%), next to its 37.5% interest in MBDA, a European developer and manufacturer of missiles.
- (36) Second, they submit that BAE would not have the ability to engage in input foreclosure because: (i) the GPS Divestment Business would risk losing the authorisations it requires from the DoD, which is also one of its main customers, if it attempted to foreclose competitors, (ii) current GPS customers are protected under long-term contracts, and (iii) in the future, BAE would be unable to engage in any such strategies because none of its PGM programs currently under development competes with a similar program relying on a GPS receiver produced by the Divestment Business, while for all other future programs, such strategies would be frustrated by the possibility to source GPS receivers from suppliers other than BAE.
- (37) Third, the Parties contend that BAE would have no incentive to engage in input foreclosure because: (i) such a strategy would devalue the Divestment Business, (ii) MBDA is unlikely to gain from foreclosure, and (iii) BAE has only a partial shareholding in MBDA. They submit that, accordingly, there cannot be any effect on downstream competition for PGMs.
- (38) Overall, the Parties contend that there is no risk that the implementation of the Commitments is delayed because of regulatory approvals. In particular, the acquisition of the GPS Divestment Business is not subject to any antitrust approvals, since the target's activities are largely limited to the United States, whereas the acquisition of the Radios Divestment Business was subject to the approval of the Austrian Competition Authority, which unconditionally cleared the transaction on 9 March 2020. Moreover, BAE is actively engaging with the relevant U.S. agencies to obtain all other regulatory approvals required and the Parties understand that BAE is confident about its ability to secure the relevant approvals in a timely manner,

¹¹ Questionnaire on Commitments offered by UTC and Raytheon, Question 30.

notably given that it is already well-known to those agencies as one of the main DoD suppliers.

- (39) The Trustee considers that the divestiture to BAE does not appear to give rise to any significant competition concerns and that the regulatory approvals from mostly US regulators are likely to all be granted without any complications and a number of those approvals have already been granted.¹²
- (40) On the basis on the information provided by the Parties and the Trustee the Commission considers that there do not seem to be any direct horizontal overlaps between BAE and the Divestment Businesses, while the vertical relationship identified between GPS receivers and PGM seems unlikely to be problematic. BAE has a limited direct presence in the supply of PGMs, where it is mainly active indirectly through its shareholding in MBDA held by BAE's UK parent. On balance, BAE appears unlikely to have the ability or the incentive to foreclose upstream or downstream competitors. This is notably because, as the Commission understands, the GPS Business is reliant on authorisations of the DoD to produce and sell GPS receivers and the DoD is an important customer of the GPS Business itself. In addition, DoD's authorisations require maintaining a strict separation between BAE's US entity (BAE Systems, Inc.) that will acquire the GPS Business, and BAE's UK parent, which holds the interest in MBDA. In particular, implementing foreclosure measures would involve sharing sensitive information between BAE's US entity and MBDA, which would be in breach of the firewall required by the DoD authorisations.
- (41) In addition, none but one of the respondents to the market test raised competition concerns arising from BAE's acquisition of the Divestment Businesses.¹³
- (42) On the basis of the information provided by the Parties, the Reasoned Opinion submitted by the Trustee and the results of the market test, the Commission concludes that the acquisition of the Divestment Businesses by BAE does not create *prima facie* competition concerns or give rise to a risk that the implementation of the Commitments will be delayed.
- (43) The Commission notes that this *prima facie* assessment is based on the information available for the purpose of the Commission's assessment of BAE's suitability and does not prejudice the competition assessment of the acquisition of the Divestment Businesses by BAE by any competent competition authority under applicable merger control rules.

II.8. Conclusion on the purchaser criteria

- (44) In light of the above considerations, taking into account the Reasoned Opinion submitted by the Trustee, and taking into account the information available to it, the Commission concludes that BAE meets the purchaser criteria set out in paragraph 17 of the Commitments.

¹² Reasoned opinion, p. 63-64.

¹³ Questionnaire on Commitments offered by UTC and Raytheon, Question 33.

III. ASSESSMENT OF THE PROPOSED AGREEMENTS

- (45) Paragraph 18 of the Commitments requires that the Divestment Businesses be divested in a manner consistent with the Commission's decision and the Commitments.
- (46) On 17 January 2020, Raytheon and BAE signed the Radios Purchase Agreement selling Raytheon's military airborne radios business to BAE and on the same day UTC and BAE executed the GPS Purchase Agreement selling UTC's GPS Business to BAE (together referred to in recital (6) above as the "Proposed Agreements"). Both transactions take the form of an asset transfer.
- (47) The Parties provided, in addition to the Proposed Agreements, the following ancillary transaction agreements (the "Ancillary Agreements"):
- (a) For the GPS Business: [...].
 - (b) For the Radios Business: [...].
- (48) The Parties submit that the Proposed Agreements concluded with BAE will ensure the transfer of the Divestment Businesses in a manner consistent with the Commitments.
- (49) The Trustee reviewed both Proposed Agreements, including the Ancillary Agreements, and sought clarification from the Parties on a number of aspects, including (i) conditions precedent, (ii) the termination right by the seller, (iii) non-solicitation periods for Key Personnel, (iv) assets necessary for the transfer of the business, (v) the exclusion of Export Control Authorizations, (vi) the transfer of Key Personnel and (vii) the catch-all clause covering all other assets practiced or used exclusively in the operation of the relevant Divestment Business.
- (50) The Trustee identified a difference with regard to the duration of non-solicitation periods, as those stated in the Proposed Agreements are shorter than the [...] years laid down in the Commitments. The Trustee agreed with the Commission that, in this particular case, no further amendments were required to either of the Proposed Agreements since the Parties are bound by their obligations under the Commitments. The Proposed Agreements were drafted prior to the drafting of the Commitments and the non-solicitation provisions are a result of commercial negotiations between Raytheon and BAE. Under the Commitments, the non-solicitation provisions for the Key Personnel will be in place for [...] years.
- (51) In the Reasoned Opinion, the Trustee stated that it was satisfied with the clarifications received from the Parties, and concluded that the relevant sections of the Proposed Agreements, including the Ancillary Agreements, were broadly in line with the Commitments¹⁴ and that, as a result, the Divestment Businesses would be sold in a manner consistent with the Commitments.¹⁵
- (52) In view of the above considerations and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that the Proposed Agreements,

¹⁴ Reasoned Opinion, pp. 75 and 89.

¹⁵ Reasoned Opinion, p. 12.

including the Ancillary Agreements, are consistent with the Commitments and that, accordingly, the Divestment Businesses are being sold in a manner consistent with the Commitments.

IV. CONCLUSION

- (53) On the basis of the above assessment, the Commission approves BAE as a suitable purchaser of the Divestment Businesses.
- (54) On the basis of the Proposed Agreements, including the Ancillary Agreements, the Commission further concludes that the Divestment Business is being sold in a manner consistent with the Commitments.
- (55) This decision only constitutes approval of the proposed purchaser identified herein and of the Proposed Agreements, including the Ancillary Agreements. This decision does not constitute a confirmation that UTC has complied with the Commitments.
- (56) This decision is based on paragraph 18 of the Commitments attached to the Commission Decision of 13 March 2020.

For the Commission

(Signed)
Olivier GUERSENT
Director-General