

Fair Trading Act 1973 Undertakings

ACQUISITION BY THE EUROPEAN AERONAUTIC DEFENCE AND SPACE COMPANY (EADS) OF ASTRIUM

UNDERTAKINGS GIVEN TO THE SECRETARY OF STATE FOR TRADE AND INDUSTRY BY

EUROPEAN AERONAUTIC DEFENCE AND SPACE COMPANY, EADS N.V., A COMPANY INCORPORATED IN THE NETHERLANDS WHOSE REGISTERED OFFICE IS AT LE CARRE, BEECHAVENUE 130-132, 1119 SCHIPHOL- RIJK, THE NETHERLANDS ("EADS")

PURSUANT TO SECTION 75G(1) OF THE FAIR TRADING ACT 1973

WHEREAS:

- (A) ASTRIUM was jointly controlled by BAE SYSTEMS and EADS;
- (B) EADS has acquired BAE SYSTEMS' entire shareholding in ASTRIUM;
- (C) As a result of this transaction EADS owns and controls ASTRIUM;
- (D) It appears to the Secretary of State that as a consequence of these arrangements, there is a merger situation qualifying for investigation;
- (E) The OFT:
 - (a) has made a recommendation to the Secretary of State that a reference to the Competition Commission should be made; and
 - (b) has under Section 75G(1)(c) of the Act given advice to the Secretary of State specifying particular effects adverse to the public interest which in its opinion the merger situation qualifying for investigation may have or might be expected to have; and
- (F) The Secretary of State considers the undertakings given below by EADS are appropriate to remedy or prevent the effects adverse to the public interest specified in the advice given by the OFT and thereby remove the necessity for any reference to the Competition Commission to be made.

EADS therefore gives to the Secretary of State the following undertakings for the purpose of remedying or preventing the effects adverse to the public interest specified in the advice given by the OFT.

INTERPRETATION

1. In these undertakings:-
 - 1.1 where reference is made to any company then in the event of any merger, joint venture or acquisition or internal re-organisation, such reference shall be interpreted as applying to the equivalent or successor organisation in the new structure;
 - 1.2 except where the context does not allow, the singular shall include the plural and the plural shall include the singular;
 - 1.3 reference to a clause shall be a reference to a clause within these undertakings;
 - 1.4 “**Act**” means Fair Trading Act 1973;
 - 1.5 “**ASTRIUM**” means ASTRIUM N.V. a company incorporated in the Netherlands whose registered office is at Le Carré, Beechavenue 130-132, 1119 PR Schiphol-Rijk, The Netherlands;
 - 1.6 “**ASTRIUM Limited**” means the UK-based subsidiary of ASTRIUM whose registered office is at Gunnels Wood Road, Stevenage, Hertfordshire SG1 2AS and whose registered number is 2449259;
 - 1.7 “**BAE SYSTEMS**” means BAE SYSTEMS plc a company incorporated in England and Wales (No.1470151) whose registered office is at 6 Carlton Gardens, London SW1Y 5AD;
 - 1.8 “**Classified**” means requiring protection in the interests of national security and so designated by the application of a national security classification or protective marking;
 - 1.9 “**Completion Date**” means the 7th of May 2003, the date on which EADS acquired BAE SYSTEMS’ entire shareholding in ASTRIUM;
 - 1.10 “**Compliance Officer**” means a competent person appointed by EADS in accordance with clause 2.8 for the purpose of checking compliance with the Security Undertakings;
 - 1.11 “**Customer**” means an immediate buyer from ASTRIUM Limited or its Subsidiaries or the ultimate user of products or services that ASTRIUM Limited knows or should reasonably know have been procured by another for the Ministry of Defence;
 - 1.12 “**Military Programmes**” means any Classified defence-related programmes in relation to which ASTRIUM Limited or its Subsidiaries enters into or has entered into contracts or obtains or has obtained any Classified information with the intention of entering into or deciding whether to enter into contracts where the Ministry of Defence is the Customer. The Ministry of Defence shall be the sole arbiter in the event of any dispute as to what is to be construed as Military Programmes;
 - 1.13 “**Ministry of Defence**” means the United Kingdom Secretary of State for Defence;
 - 1.14 “**OFT**” means Office of Fair Trading;
 - 1.15 “**Operational**” means “full operational service date” as that term is defined in the SKYNET 5 CISD (See definition set out in clause 1.19);
 - 1.16 “**Security Officer**” means the person responsible for facilitating and overseeing the compliance with UK National Security Regulations at each of the premises of ASTRIUM Limited and its Subsidiaries as set out in clause 2.8;
 - 1.17 “**Security Undertakings**” means the undertakings set out in clause 2;

- 1.18 “**SKYNET 5**” means the satellite constellation over which secure military satellite communication services will be delivered to the Ministry of Defence pursuant to the SKYNET 5 CISD;
- 1.19 “**SKYNET 5 CISD**” means the contract for implementation and service delivery relating to SKYNET 5 to be entered into between the Ministry of Defence and Paradigm Secure Communications Limited;
- 1.20 “**Subsidiary**” has the meaning given by section 736 of the Companies Act 1985 as amended but additionally a company (“**A**”) shall be a subsidiary of another company (“**B**”) if **B** has joint control (with one or more other undertakings) of **A**. “Joint control” has the meaning ascribed to it in the European Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (98/C 66/02);
- 1.21 “**UK**” means Great Britain and Northern Ireland;
- 1.22 “**UK Military Capability**” means the capability immediately prior to the Completion Date within ASTRIUM Limited and any Subsidiary thereof to carry out Military Programmes and the capability necessary to perform any contracts (including those entered into after the Completion Date) relating to Military Programmes;
- 1.23 “**UK National Security Regulations**” means the regulations in relation to Classified material as set out in the Government Manual of Protective Security as amended or supplemented from time to time;
- 1.24 “**UK Protected Material**” means information, software, hardware and equipment Classified “Confidential” or above or to which access is otherwise similarly restricted in the interests of UK national security and;
- 1.25 “**US Protected Material**” means information, software, hardware and equipment relating to Military Programmes and protectively marked in accordance with the system of protective marking defined in the appropriate US Government Executive Orders, Directives or Instructions as amended or supplemented from time to time. For the avoidance of doubt this includes Classified and other non-Classified controlled information, software, hardware and equipment including that which is marked ‘For Official Use Only’, that which is marked with an export control warning notice, and that which is marked with a distribution limitation marking.

2. SECURITY UNDERTAKINGS

EADS undertakes to ensure that:

Maintenance of strategic capabilities

- 2.1 For so long as ASTRIUM Limited is a contractor or a sub-contractor on Military Programmes, Military Programmes shall continue to be managed and controlled, except in so far as the Ministry of Defence has separately agreed otherwise in writing, by a company or companies incorporated within the UK under English law and in relation to which a majority of the company directors are UK security cleared British Citizens to enable security sensitive issues to be resolved at board level should the need arise.
- 2.2 EADS shall provide to the Ministry of Defence a copy of the Articles of Association of ASTRIUM Limited.
- 2.3 EADS shall not without the prior written consent of the Ministry of Defence:
- (i) substantially alienate any significant defence-related asset of ASTRIUM Limited. The Ministry of Defence shall be the sole arbiter in the event of any

dispute as to what is to be construed as a significant defence-related asset and where EADS is in any doubt it shall first consult the Ministry of Defence. For the avoidance of doubt substantive alienation includes disposal to EADS and its Subsidiaries;

- (ii) voluntarily wind up or dissolve ASTRIUM Limited or its Subsidiaries;
- (iii) dispose of, the whole or any part of, the equity share holding to which voting rights are attached of ASTRIUM Limited or its Subsidiaries to any company or person whether by private sale or an offer to the public; or
- (iv) materially run down or adversely affect in any material way the UK Military Capability,

PROVIDED THAT this clause 2.3 shall cease to have effect on the earliest to occur of the following events:

- a) When SKYNET 5 becomes Operational;
- b) at midnight on 31 December 2003 (or such later date as may be agreed in writing between the Ministry of Defence and EADS) if the SKYNET 5 CISD contract has not been awarded by that time; or
- c) on termination of the SKYNET 5 CISD in accordance with its terms.

2.4 EADS shall ensure continuity of development and/or supply of all goods and services provided by ASTRIUM Limited or its Subsidiaries for Military Programmes for which the Ministry of Defence is a Customer subject to the Ministry of Defence acting reasonably and offering to place contracts in the future.

Protection of Classified Information

2.5 Except in so far as the Ministry of Defence has separately agreed otherwise in writing, all matters relating to security within ASTRIUM Limited and its Subsidiaries shall be maintained in line with UK National Security Regulations, including the security of work areas subject to special physical ring-fencing and in particular:

- (i) the operational management of the Military Programmes within ASTRIUM Limited shall be by personnel with the appropriate UK security clearances, with security procedures meeting UK National Security Regulations and any other such requirements as deemed necessary from time to time by the Ministry of Defence;
- (ii) only personnel with appropriate security clearance (including personnel at board level) shall have access to UK Protected Material or US Protected Material;
- (iii) no UK Protected Material or US Protected Material shall be passed to the board of directors of EADS or its Subsidiaries, except ASTRIUM Limited, without the prior approval of the Ministry of Defence for UK Protected Material or the US Government for US Protected Material;
- (iv) no transfer or disclosure by whatever means of UK Protected Material to EADS or its Subsidiaries based overseas, or locations based outside of the UK shall be made except with the prior approval of the Ministry of Defence and;
- (v) no transfer or disclosure by whatever means of US Protected Material to EADS or its Subsidiaries based overseas, or locations based outside of the UK shall be made except with the prior approval of the US Government;

Intellectual Property Rights

- 2.6 EADS shall ensure that ASTRIUM Limited and its Subsidiaries are aware of and bound by the rights of the Ministry of Defence extant at the Completion Date (including rights to receive information, data packs, designs, drawings and software) in respect of any intellectual property used by ASTRIUM Limited in relation to Military Programmes and EADS shall ensure that those rights shall not be adversely affected by any transfer of intellectual property rights arising out of the transfer of control of ASTRIUM Limited to EADS. In addition no rights in any Ministry of Defence intellectual property shall be passed to EADS or its Subsidiaries, except ASTRIUM Limited, without the prior written authorisation of the Ministry of Defence. EADS shall further ensure that ASTRIUM Limited shall continue to respect any levy obligations to the UK Government in effect at the Completion Date.

Compliance

- 2.7 EADS shall provide the Ministry of Defence with such information as it may from time to time reasonably require to ascertain that it is fulfilling the Security Undertakings. If EADS is unable to comply with any of the Security Undertakings, it shall provide full reasons for the non-compliance within one month of becoming aware of the non-compliance.
- 2.8 As well as appointing a Security Officer responsible for facilitating and overseeing the compliance with UK National Security Regulations at each of the premises of ASTRIUM Limited and its Subsidiaries (as required by UK National Security Regulations), EADS shall within one month of the date of these undertakings following consultation with the Ministry of Defence appoint the Compliance Officer who shall be responsible for providing to the Ministry of Defence:
- (i) an annual report within three months of the end of the calendar year, as well as any other such information as the Ministry of Defence may from time to time require, to verify compliance with the Security Undertakings, including any measures taken or proposed by EADS, ASTRIUM or ASTRIUM Limited so as to ensure compliance with the Security Undertakings and to prevent any breach of them; and
 - (ii) full particulars of any failure to comply with the Security Undertakings immediately upon such failure becoming apparent.
- 2.9 For the purpose of checking compliance with the Security Undertakings, any representative of the Ministry of Defence shall be entitled to enter and inspect any premises used by ASTRIUM Limited which are in any way connected with Military Programmes and inspect any document or thing in any such premises which is concerned with such Military Programmes. Such representative shall be entitled to all such information as he/she may reasonably require.
- 2.10 EADS shall provide the Ministry of Defence with the contact details of the Compliance Officer as soon as he/she has been appointed and with any changes to those details as they occur.

Provision of information to the OFT

3. EADS shall provide the OFT such information as it may reasonably require for the purpose of ascertaining that these Security Undertakings are being or have been complied with or otherwise performing any of its functions under section 88 of the Act in

relation to the transaction referred to in Recital B.

Directions

4. EADS shall comply with such written directions as the OFT may from time to time give to take such steps within its competence as may be specified or described in the directions for the purpose of carrying out or securing compliance with these Undertakings.

Signed for and on behalf of EADS

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[AUTHORISED SIGNATORY]

DATE

COPY NO:

TO: SECRETARY OF STATE FOR TRADE AND INDUSTRY

1.1.1 FROM: PENNY BOYS
EXECUTIVE DIRECTOR

13 August 2003

COMPLETED ACQUISITION OF SOLE CONTROL OF ASTRIUM N.V. BY EUROPEAN AERONAUTIC DEFENCE AND SPACE COMPANY, EADS N.V.

1. In this submission I advise under section 75G(1)(c) of the Fair Trading Act 1973 (the FTA) on the above merger situation. This advice is given having taken into consideration representations made by those with a substantial interest.
2. **I recommend that in lieu of a reference to the Competition Commission, you accept undertakings from EADS** in the form annexed to this submission. I am advised that these undertakings are appropriate to address the effects adverse to the public interest which are specified below. If you agree with this recommendation, the undertakings will need to be published together with the text of this advice.

TIMING

3. **Routine**, although this is a completed merger with a statutory deadline of **6 September 2003**.

BACKGROUND

4. **Astrium N.V. (Astrium)** was, prior to the merger, a joint venture, jointly controlled by EADS and BAE SYSTEMS (BAES), and operating in the satellite manufacturing market. Astrium was formed, after clearance from the European Commission in 2000, out of the merger of the space businesses of Matra Marconi Space, DaimlerChrysler Aerospace and DASA Dornier.¹ Astrium's principal activities are the design, development, manufacture and supply of space systems, including satellites and their payloads, sub-systems for launchers and manned space flight vehicles, ground stations, and other sub-systems and technologies. In the year ending December 2001, Astrium's worldwide turnover was €1,910.6m and its Community-

¹ COMP/M. 1636 – MMS / DASA / ASTRIUM

wide turnover was €1,731.6m.

5. **On 30 January 2003, EADS and BAES entered into a share purchase agreement by which BAES and EADS each agreed to inject €84m into Astrium and EADS agreed to subsequently purchase the entire interest of BAES in Astrium for €84m implying a net cash consideration of zero. With permission of the European Commission, the transaction was implemented on 7 May 2003 and the Commission granted clearance on 26 May 2003.**
6. On 22 July you announced that, in accordance with the Chairman's advice of 15 July, you had decided not to refer the transaction to the Competition Commission provided that undertakings were given to remedy public security concerns. Interested parties were invited to make representations to the OFT on the appropriateness of the draft undertakings.

The adverse effects of the merger

7. The Ministry of Defence (MoD) has identified national security concerns arising out of the merger relating to the maintenance of strategic UK capabilities and the protection of classified information. The MoD considers that these concerns merit a reference to the Competition Commission but may be addressed by way of undertakings given to the Secretary of State for Trade and Industry in lieu of such a reference.

The proposed undertakings

8. The undertakings are aimed at remedying or preventing the particular effects adverse to the public interest identified by the MoD. Specifically, the undertakings seek to address the two areas of concern referred to at paragraph 7 above. The undertakings also include a provision for a compliance regime consisting of the appointment by EADS of a "Compliance Officer" for the purposes of facilitating, overseeing and reporting to the MoD on the security undertakings. The MoD has confirmed that it is satisfied that the undertakings are the most effective means of addressing the adverse effects it has identified.
9. Following discussions with OFT officials, EADS confirmed that it was prepared to sign the undertakings annexed to this advice.

Representations

10. No third party representations were made to the OFT following the press announcement on 22 July.

RECOMMENDATION

11. The OFT is not expert in national security matters and must therefore rely heavily on the representations made by the MoD. I have no reason to doubt the MoD's analysis in relation to the public interest concerns it has identified, nor that the undertakings are an appropriate measure to address these concerns.
12. **I recommend that you accept the undertakings** offered by EADS as appropriate to

address the adverse effects arising from this merger which are specified in this advice. EADS has already signed the undertakings. Although this is helpful, it does not bind you to accept them. The undertakings, if acceptable to you, will need to be published together with this advice as required by section 75H(1) of the FTA.

Penny Boys

Executive Director