

# Private and Public Space Activities in Europe through the Lenses of EU Competition Law

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## Abstract

The aim of this paper is to present an overview of the assessment undertaken by the DG Competition of the European Commission on a series of merger and acquisition cases occurring in the space sector in the last 25 years. Not only do the decisions of the DG Competition record the evolution of the major actors in the space sector in Europe but they also demonstrate how the DG Competition of the European Commission has acknowledged the regulatory contribution of the European Space Agency to the creation and growth of the industrial landscape of the space sector in Europe. The paper is not meant to be a scholarly contribution to the analysis of EU competition law. It is, instead, a fact-finding exercise seen from the perspective of ESA's industrial policy.

## Introduction

The aim of this paper is to present an overview of the decisions by the DG Competition of the European Commission in the space sector in Europe. It is not intended to analyse the decisions from a perspective of competition law. Instead, the intention is to undertake a fact finding exercise with the view to assess the conclusions of the DG Competition of the European Commission from the perspective of ESA's industrial policy.

The paper presents an overview of the case law of the DG Competition of the European Commission on a series of merger and acquisition cases decided for the past 25 years in the space sector. While the market analysis each time is linked to the specific features of the parties and the conditions of the market at a particular moment, it is still possible to draw some general conclusions about a field of activity which became gradually privatised and consolidated.

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Not only do the decisions of the DG Competition record the evolution of the major actors in the space sector in Europe and therefore tell us their stories but they most importantly address the competitive conditions in specific segments of space-related activities such as space segment, ground segment and launchers. The decisions of the DG Competition depict in a detailed manner the role of ESA as market enabler and regulator as well as underline the impact of ESA rules and regulations – such as the geographical return – on the creation and growth of the industrial activities in the space sector in Europe.

The paper does not address the impact of the regulatory regime of state aid in the European Union. It is true that some national public institutions in Europe, like France, Germany and the United Kingdom notify state aid schemes implemented in the space sector if the grants or subsidies provided meet the thresholds of the Block Exemption Regulation for such notification. This has been for instance the case of the UK National Space Technology Programme and the French guarantee for damages caused to third parties linked to space operations activities. However, no critical mass of case law related to EU state aid notification in the space sector has been found so as to enable the authors to draw any conclusions. The present papers does not therefore address these aspects.

#### **I) Review of M&A Space Sector –Related Case Law before the DG Competition**

##### **Case No. IV/M.437 - Matra Marconi Space/ British Aerospace Space Systems, dated 23 August 1994**

Matra Marconi Space N.V. (MMS) notified to the Commission its intention to acquire British Aerospace Space Systems Ltd. (BAeSS) and National Remote Sensing Centre Ltd (NRSCL). MMS was a joint venture between Matra Hachette S.A. (Matra) and The General Electric Company, p.l.c.(GEC).

The Commission identified that the space segment market comprised: (i) communications, remote sensing, and scientific satellites; (ii) launchers for satellites and manned space flight vehicles including rockets, spaceplanes, orbiting laboratories, and related infrastructure.

It cleared the transaction and established the distinction of the various markets in the space sector for subsequent analysis in later cases.

##### **Case No IV/M.497 - Matra Marconi Space/Satcomms, dated 14 October 1994**

Matra Marconi Space NV (MMS) notified to the Commission its acquisition of certain assets of Ferranti International plc (Ferranti), namely its Satcomms

division (Ferranti Satcomms). Ferranti was in administrative receivership. The market segments identified by the Commission concerned the satellite ground segments and the microwave components. The Commission cleared the transaction.

#### **Case N° IV.M.1185 - ALCATEL / THOMSON-CSF – SCS, dated 4 June 1998**

Alcatel Alsthom (“Alcatel”) and Thomson-CSF (“Thomson”) proposed to acquire the joint control over the Société Commune de Satellites (“SCS”). Parallel notification by Alcatel and Thomson-SA which acquired, in the context of the privatisation of the group Thomson by the French state, the control of Thomson-CSF. Based on an agreement among Alcatel, Thomson, Dassault and Aerospatiale it was set out that Alcatel and Thomson would transfer to SCS all their activities in the satellite business. Aerospatiale would transfer either directly to SCS or indirectly via Thomson its activities in the satellite sector. In exchange of its contribution, Aerospatiale would receive a minority participation in the capital of Thomson (4%). Alcatel would hold 51% of the capital of SCS and Thomson would hold 49%.

The Commission found that Alcatel and Aérospatiale exercised complementary activities in the satellite market. Alcatel was found to be specialised in telecommunication payloads whereas Aérospatiale specialised in earth observation payloads and platforms. Thomson was specialised in electric tubes and the development of ground segment resources. Following the transaction Aerospatiale would remain active in the market of launchers. Neither Alcatel nor Thomson would exercise activities in the satellite market outside SCS. As a result, the founding companies would not be simultaneously present in the same markets as the one where the new company would undertake its activities. The conclusion was therefore that SCS would not create or reinforce a dominant position of the company in the satellite market. Further, for what concerned the microwave wave tubes (MWT) it was assessed that no other player would enter the market at that point in view of the very significant investments required to put in place this technology. The company that produced the MWT was Thomson Tube Electroniques (TTE). It was found that the existing vertical relationship between TTE and SCS could give rise to anticompetitive effects but that the remedies proposed by the parties would alleviate those concerns.

#### **Case No IV/M.1309 – MATRA / AEROSPATIALE, dated 28 April 1999**

Lagardère controlled a group of companies active in the sectors of space, telecommunications, cars, electronics, defence, distribution services and media. Aérospatiale was a company active in the sectors of aeronautics, space

and missiles. It had acquired the share of the French state in Dassault Aviations which specialised in military and civilian aircraft. Matra Hautes Technologies was a subsidiary of Lagardère present in the space, defence, telecommunications and informatics sectors.

In the space market segment the Commission addressed spacecraft and structural components for satellites. The decision underlined that the Director of Administration of ESA was appointed as arbitrator in cases where clients of Aerospatiale would challenge the decisions of the company concerning the sourcing of components such as central tubes and antenna reflectors. The appointment of ESA as a neutral adjudicating authority/arbitrator provided the guaranties that any type foreclosure would be avoided in the market. On these premises it accepted the transaction.

### **Case No IV/M.1636 MMS/DASA/ASTRIUM, dated 21 March 2000**

MMS was jointly controlled by Matra Hautes Technologies S.A.S. (MHT) and by Marconi Electronic Systems Limited (Marconi) and its activities were the manufacture and supply of space systems, including satellites and their payloads, sub-systems for launchers and manned space flight vehicles, ground stations and various sub-systems and technologies. MHT was part of Aérospatiale-Matra, a French company primarily engaged in commercial and military aerospace, guided weapons, information and telecommunications. In the space sector, and in addition to its stake in MMS, Aérospatiale-Matra owned controlling interests in companies active in launchers, space infrastructure and spacecraft equipment. Aérospatiale-Matra was controlled by the French State and Lagardère, a French group also active in the automotive and media sectors. Marconi, formerly owned by the General Electric Company (GE), was merged with and into British Aerospace plc (BAE Systems), a UK-based group, which primarily operated in commercial and military aircraft, guided weapons, marine engineering and naval architecture, and defence electronics.

DDRH was exclusively controlled by DASA, a German company which combined the activities of the Aviation and Space Systems Division of the DaimlerChrysler group. DASA owned controlling interests in Eurokot Launch Services GmbH, which operated in the field of launch services. DASA belonged to the Daimler Chrysler group, which also operated in the automotive and service sectors.

Pursuant to a Shareholders' Agreement, Astrium would be a 50:50 joint venture of MMS and DDRH. Astrium would combine all of MMS activities (supply of space systems and sub-systems) and all the DASA activities currently performed in its subsidiary Dornier Satellitensysteme GmbH (supply of satellite systems and subsystems) and its division Raumfahrt-Infrastruktur (supply of space infrastructure and launchers). Astrium would be managed as one single multinational entity with crossborder business

divisions, and it would mainly operate through three legal entities located in France, Germany and the United Kingdom. Astrium would be jointly controlled by MMS and DASA and be managed by a board consisting of four members, two proposed by each of the parties.

For what concerns civilian communication satellites, ground segments and launch services, the concentration was not perceived as anti-competitive. The decision distinguished institutional (earth observation and science) satellites from commercial satellites sourced by commercial operators and explained that the two were distinct markets. Institutional satellites were subject to the application of the geographical “juste retour” principle of ESA requiring a balance between the financial contribution of Member States to ESA and the industrial share of business awarded to manufacturers of these Member States.

The decision further noted that it would lead to a horizontal integration at the prime contractor level, and to a vertical integration between the prime contractor level and the parties and Aérospatiale-Matra’s activities at the equipment level. However, it was found that the merger would not be in the position to raise its rivals’ costs. It had been argued by competitors at the time that with regard to ESA’s institutional programmes, in line with the juste retour principle, a certain proportion of each contract value would have to be carried out in Germany and the UK (together approximately 29%); (ii) Astrium’s position in these Member States would be such as to make other prime contractors dependent on contributions from Astrium for these German and UK returns; and (iii) that Astrium could raise its prices for these contributions, thereby either making its competitors’ offers non-competitive or forcing its rivals’ margins down to such an extent as to make these offers non-viable. It was established by the DG Competition that there was no indication that Astrium would be in a position to effectively raise Alenia’s costs through this mechanism. Altogether Alenia would not depend upon Astrium for more than 20% of the total contract value. It followed that, in such cases, Astrium would depend more on Alenia than Alenia would depend on Astrium, and Astrium would therefore not be in a position to raise Alenia’s costs. Concerning Alcatel Space, it was estimated that in view of the substantial presence of Alcatel Space in certain ESA Member States (such as Belgium, Spain, Denmark or Norway), Astrium would also have to seek a contribution from Alcatel Space. This would make Astrium dependent on Alcatel Space for a certain share of its contracts, and would therefore reduce the scope for Astrium to increase its rivals’ costs. ESA’s experience was underlined in light of its ability to detect any substantial price rise. Further, according to ESA procurement rules, the selection of suppliers followed an open competition monitored by ESA. Any favouring of in-house suppliers would be all the more difficult. Secondly, most of the products concerned were also supplied by companies outside France, Germany and the UK (where Astrium operates) and Astrium’s capacity to favour in-house suppliers

or impose unjustified contractual conditions would be seriously limited for the equipment concerned.

For what concerned the launch services, the decision noted that Aérospatiale-Matra, MMS and DASA were active in launch services through their interests in Ariespace Participations SA (which controlled Ariespace SA, the company responsible for the Ariane launcher production phase, and for the marketing and launch of the Ariane launcher family). DASA had joint control over Eurockot Launch Service GmbH, a company created in 1998 to procure launch services for LEO satellites with Russian Rockot small launchers. Finally, Aérospatiale-Matra had joint control over Vega Spazio SpA, a company intended to develop a small launcher in order to complement the Ariespace product range, and held an equity stake in Starsem, a company created for the commercialisation of launch services by Russian Soyuz medium launchers for LEO and MEO satellites. The decision found that none of the parent companies would have joint control over Ariespace. Further, if the launch services performed by each of the small launchers, medium launchers and heavy lift launchers constituted distinct product markets, the operation would only create overlaps in small launchers, where Eurockot Launch Service GmbH and Vega Spazio were active. Furthermore, in that sector, Eurockot Launch Service GmbH had just recently started its operations, while Vega Spazio had not developed any launcher yet and seemed to be jeopardised after the CNES, a major contributor, recently announced that it was no longer participating in that project. As a result, the notified operation did not create or strengthen the dominant position in the markets for launch services.

The last market to analyse was the ground segment consisting of two major sub-systems, a satellite control centre and one or more control stations. In that sector, MMS was active at the prime contractor level, where it supplied integrated control systems, as well as at the sub-system level, where it offered control centres to be included within communication satellite control systems. DASA was also active at the sub-system level, where it manufactured the radiofrequency part of communication satellite control stations through its interest in Nortel DASA Network Systems, a joint venture with Nortel Networks Corporation. The transaction therefore created a vertical integration between MMS and DASA activities. However, it was found that the competition for the supply of communication satellites (and therefore ground segments for communication satellites supplied in the context of turn-key offers) took place at worldwide level where the combined share of MMS and DASA remained low.

#### **Case No COMP/M.1745 – EADS dated 11 May 2000**

DaimlerChrysler AG (“DaimlerChrysler”), Lagardère SCA (“Lagardère”), the French State and Sociedad Estatal de Participaciones Industriales (“SEPI”)

merged their activities in the aeronautic, space and defence sectors. To this effect, DaimlerChrysler Aerospace AG (“DASA”), Aérospatiale-Matra and Construcciones Aeronáuticas SA (“CASA”) would be contributed to a newly created company, European Aeronautic, Space and Defence Company (“EADS”).

Lagardère was a French group primarily operating in i) the high technologies sector (i.e. space, defence and telecommunications); ii) automotive manufacturing; and iii) the communication and media sector. In particular, Lagardère and the French State had joint control of Aérospatiale-Matra, a French company active in commercial and military aircraft and helicopters, telecommunications, space systems, guided weapons and defence electronics. DaimlerChrysler was a German-based group active in i) the automotive sector, ii) defence and aerospace, iii) financial and information technology services, and iv) rail systems, automotive electronics and diesel engines. In particular, DaimlerChrysler owned 93% of DASA, a German company primarily active in civil and military aircraft and helicopters space systems, guided weapons, defence electronics and aero engines. SEPI was a Spanish State entity, entrusted with the management and privatisation of certain Spanish State controlled companies. In particular, SEPI owned 99% of CASA, a Spanish company operating in commercial and military aircraft and helicopters, and in space systems. EADS would be incorporated as a Dutch publicly-listed company. As mentioned in the previous case, Aérospatiale-Matra and DASA operated in the sector of supply of space systems (especially satellites, space infrastructure, launchers, ground stations) and equipment products for space systems through Astrium.

Aérospatiale-Matra, CASA, and DASA (except for its MTU aero-engines subsidiary) would be contributed to EADS, in exchange for shares in the latter company. After the completion of the transaction and the subsequent Initial Public Offering of EADS, each of the French interests (i.e. Lagardère, the French State and private institutions’ stakes) and DaimlerChrysler’s stake would amount to 30% of EADS shares. SEPI would hold approximately 5% of EADS shares, the remainder being held by the public (approx. 31%) or by a Lagardère blind trust (approx. 4%).

The operation would lead to the contribution to EADS of the Aérospatiale-Matra’ and DASA’s interests in Astrium, of the space activities (such as AML) previously retained by Aérospatiale-Matra and DASA, and of CASA’s space business. The competition aspects relative to the relationship between Aérospatiale-Matra and Astrium, and between DASA and Astrium, had already been assessed in the Astrium decision. DG Competition found these aspects remained unaltered and would not be addressed any further.

The decision went on to identify different market segments, namely: (i) satellites utilised for civilian and military applications whereby civilian satellites were further distinguished into commercial communication and institutional ones; (ii) satellite sub-systems or equipment of which the

satellites were composed (such as the propulsion system, the thermal control sub-system, solar generators, satellite structure, central tubes, structural panels or antenna reflectors) which were all distinct product markets and non-substitutable with each other; (iii) launcher systems, sub-systems (stages) and equipment (propulsion equipment, attitude control products, etc.) which are all separate product markets. The decision found that in certain market segments such as antenna reflectors and central tubes the operation would create or strengthen a dominant position in the relevant markets but cleared the operation on the basis of remedies, namely divestments, that the Parties committed to put in place.

Again for what concerns the civilian institutional satellites, equipment, space infrastructure and launchers in Europe the decision acknowledged that they were all primarily purchased by ESA, whose procurement of satellites and equipment products was subject to the geographic *juste retour* principle enshrined in the ESA Convention, according to which preference had to be granted to the fullest extent possible to industry in all ESA Member States so as to ensure that all ESA Member States participated in an equitable manner, having regard to their financial contribution in development programmes.

### **Case No COMP/M.2061 – AIRBUS, dated 18 October 2000**

This operation concerned the acquisition of control by EADS over the whole of the Airbus Integrated Company (“AIC”), a newly-created company combining the Airbus assets and activities of EADS and BAE Systems plc of the UK (“BAES”). BAES had been created through the merger of British Aerospace and Marconi Electronic Systems. BAES was primarily active in commercial aircraft, military aircraft, defence electronics, space activities and shipbuilding. BAES would only contribute its Airbus activities (“Airbus UK”) to the newly created AIC.

BAES and EADS, together with its constituting parties, EADS France, EADS Germany and CASA, entered into an agreement relating to the integration of their Airbus assets and Airbus activities, including their respective interests in Airbus Industrie Groupement d’Intérêt Economique (“GIE”), into AIC, a company incorporated under French law. The parties performed their Airbus activities through Airbus Industrie (“AI”), a GIE formed under French law in 1967. The operation constituted a restructuring and rationalisation of the existing legal partnership between the parties. BAES contributed all of its shares in Airbus UK to AIC and in return BAES received 20% of the shares in AIC. Upon completion of the transaction, EADS and BAES would therefore hold respectively 80% and 20% of the shares in AIC, which in turn would hold all of the shares in the parties’ Airbus operating companies, namely those in France, Germany and Spain which were already combined through EADS and those in the UK. Although BAES would have certain veto rights to



protect its financial interest in AIC, those rights did not confer joint control over AIC. EADS would therefore have sole control over AIC into which BAES' Airbus activities would be integrated.

The Commission analysed the aircraft-related market segments but not the space related ones when clearing the transaction.

#### **Case No COMP/M.2437 - NEC / TOSHIBA, dated 5 June 2001**

The operation aimed at the creation of a joint venture between NEC (60%) and Toshiba (40%). The parties intended to transfer the vast majority of their space related business to the JV ("NEC Toshiba Space Systems"), which would offer satellites and satellite systems, their related ground systems, subsystems and components, spacecraft systems, space stations, planet landing systems and rocket components. However, each of the parties retained certain space related businesses which were excluded from the scope of the JV (on-board electronics equipment, data processing equipment and systems for array radar, laser application equipment, antenna, transceivers etc).

The Commission referred to the Astrium case and distinguished the following relevant markets: Satellites, space infrastructure (mainly space stations), launch services, launchers and ground systems. In all these sectors, a further distinction was made between the prime contracting level and the equipment level. The Commission further distinguished between the platform and the payload of the satellite, and indicated that there might be separate product markets for the different subsystems and components assembled on the satellite. As regards ground systems, the Commission indicated that a distinction should be made between systems dedicated to the command and control of the spacecraft, and those providing an interface with the spacecraft for the transmission of data and voice signals. The Commission found that there was no vertical or horizontal impact on competition in the European market arising from the combined market shares and activities of the two companies constituting the JV.

The decision made reference to ESA when analysing the geographic market for the civil institutional satellites and equipment since these products were primarily procured by ESA in Europe on the basis of the *juste retour* (geographical return) principle according to which ESA is required to grant preference to the fullest extent possible to the industry in Member States.

#### **Case No COMP/M. 2438 – SES/Stork/Fokker Space, dated 24 July 2001**

Saab Ericsson Space ("SES"), a Swedish company active in spacecraft equipment such as digital and microwave technologies and mechanics, was jointly controlled by Ericsson, active in the telecommunications and data

communications industry, and Saab, a high technology company mainly active in defence, aviation and space industry. Saab was jointly controlled by BAE Systems, which also jointly controlled Astrium, the leading prime contractor in the European space industry, especially for institutional satellites. Stork was active in textile printing and food processing as well as in components, systems and services for the aviation and space industry, inter alia through the supply of launcher structures for the Ariane launcher. Fokker Space was a Dutch company active in satellite equipment such as solar arrays, robotics for space infrastructure and structural components for the space industry. It was established as an independent company in 1995 and is 100% owned by Dutch Space Holding B.V., which in turn was controlled by the Dutch foundation Stichting Aandelen Dutch Space Holding. The operation consisted in SES acquiring 65% of the shares of Fokker Space, and Stork will acquiring the remaining 35%.

BAE Systems did not have sole control over SES or Astrium. In addition, the link between Fokker Space and Astrium appears to be remote. As regards Fokker Space, BAE Systems' instructions would have to go through three levels of joint ventures (Saab, Saab Ericsson Space and ultimately Fokker Space). BAE Systems was not directly represented in the boards of Directors of SES or Fokker Space, and there are no direct links between BAE Systems and SES on either management level, employee level or through commercial contracts between these companies. Finally, the commercial importance of Fokker Space's activities in relation to BAE Systems business was seen as minor. SES' activities accounted for only 2.5% of the turnover of the Saab group, which lead to an even smaller figure if one considered the relation between Fokker Space and BAE Systems.

The decision repeated the same arguments about the distinction of the various markets as well as the role of ESA. Interestingly enough, this decision analysed the impact of the operation on the Netherlands' geographical return at ESA. The decision noted that Fokker Space and Stork accounted for a part of the return of the Netherlands' participation in ESA programs but concluded that this situation was unlikely to affect Stork's or Fokker's market position in the two above mentioned markets. Fokker represented for the last five years approximately 40% of the geographical return of the Netherlands, Stork accounted for around 4%. In addition, there were currently around 200 firms in the Netherlands that represented the remaining share of the return. A situation where there would not be sufficient alternative suppliers for ESA projects in the Netherlands that could meet the Dutch geographical return, with the result that the parties' guaranteed sales and their market share in the above mentioned markets would likely increase, was found to be very unlikely.

### **Case No COMP/M.2488 - ALCATEL / ALCATEL SPACE, dated 6 July 2001**

Alcatel specialised in the sectors of telecommunication systems and equipment, cables, components, transport and space communications. Alcatel controlled 100% of SAFT which produced batteries for satellites. Alcatel also exercised control over Thales with 25,3% of the capital of the latter company. Alcatel Space was present in the market of development and launch of satellites. It was a French company created in 1998 and resulting from the combination of the satellite-related activities of Alcatel, Aerospatiale which in the meantime evolved into EADS following the merger with DASA and CASA, and Thomson CSF/ Thales. In 1998 Alcatel controlled Alcatel Space with a share of 51% and Thales with the remaining 49%.

The operation aimed at the acquisition by Alcatel of Thales' share in Alcatel Space so that it would acquire 100% control over the company. Alcatel Space developed and manufactured satellites. Alcatel and Thales were both present in the space sector as manufacturers of components and equipment for satellites.

The Commission found that the operation would not lead to a foreclosure of the markets since the companies were active in different segments. There was only one segment, the batteries for satellites where there was a risk for vertical integration since SAFT was controlled by Alcatel. However, the Commission established that Alcatel Space already purchased batteries from SAFT and that SAFT had many global competitors in the market.

### **Case n. COMP/M.2949 - FINMECCANICA/ TELESPAZIO, dated 30 October 2002**

The Commission allowed the acquisition of control by Finmeccanica over Telespazio using the same line of argumentation as in previous cases. The detailed decision is not available on line and cannot be therefore further analysed.

### **Case No COMP/M.3217 - CARLYLE/FINMECCANICA/AVIO, dated 18 August 2003**

The operation concerned the acquisition of control over Avio S.p.A by the Carlyle Group (70%) and Finmeccanica (30%) jointly by way of purchase of shares via a newly created acquisition vehicle (Avio Holding S.p.A.). The Shareholders Agreement between Carlyle and Finmeccanica provided that Finmeccanica, although a minority shareholder, would hold veto rights over major strategic decisions concerning Avio.

Carlyle was a private investment group which made private equity investments through various funds in select industries, including aerospace, automotive, defence, energy, financial services, healthcare and

telecommunications. Finmeccanica was a public quoted company of which the Italian Ministero dell'Economia e delle Finanze was the largest shareholder with 34%. The remaining shares were widely dispersed. Finmeccanica was active in the design and manufacture of military and civil aircraft, helicopters and satellites, missile systems, radar, components for power generation, trains and information technology services. Avio was at the time a company newly created under the laws of Italy. 100% of its share capital was owned by FiatAvio S.p.A. which had transferred all assets related to its business activities for the purpose of the proposed transaction to Avio. Avio was active in: a) aero-engine components (both military and commercial) for commercial and military aircraft; b) aero-engine components for military and commercial helicopters; c) aero-derivative systems used in power generation and for maritime propulsion; d) space propulsion; e) maintenance, repair and overhaul (MR&O) services.

The Decision found that Avio designed and supplied the satellite control system for the Italian military satellite Sicral I, which was manufactured by Finmeccanica. This project was a military one, and the Italian MoD required this control system to be supplied by an Italian producer. The Italian MoD, therefore, sponsored the entry of Avio into this market, since Avio had never produced such a system before. It was not clear whether a Sicral II would be commissioned by the Italian MoD. However, the proposed concentration would not change the competitive situation on the Italian market for military satellites since Finmeccanica was the only Italian prime contractor for satellites, and Avio was the only Italian supplier of satellite control systems. Therefore, if the Italian MoD opted for Italian suppliers, it would lead to the same combination of suppliers as for the Sicral I. If, however, the Italian MoD were to choose a competitor from outside Italy such as Astrium (part of EADS), Alcatel Space or one of the major US suppliers such as Boeing or Lockheed Martin, it seemed unlikely that such a foreign prime contractor would have had difficulties in submitting a bid by being denied access to Avio's control system, given that there were numerous other suppliers of control systems, and, Avio's share of the value of such a satellite was only 10-15%. The Commission therefore allowed the operation.

#### **Case No COMP/M.3680 ALCATEL / FINMECCANICA / ALCATEL ALENIA SPACE & TELESPAZIO, dated 28 April 2005**

The operation consisted in the acquisition of joint control by Finmeccanica and Alcatel over the newly created joint venture undertakings Alcatel Alenia Space and Telespazio by way of transfer of shares. Alcatel and Finmeccanica intended to merge their activities in the space sector through the setting up of two full-function joint ventures Alcatel Alenia Space (67% held by Alcatel - 33% held by Finmeccanica) and Telespazio (33% held by Alcatel - 67%

held by Finmeccanica), to which their activities relative to space systems would be transferred pursuant to an Alliance Agreement executed by the parties on January 28, 2005.

Alcatel Alenia Space would be active, through its contributed assets, in the design, manufacture and supply of ground and space systems, including satellites, subsystems and equipment in the commercial, institutional and military fields. Telespazio would be active, through its contributed assets, in the provision of services and end-user applications using or related to satellite-based solutions. The Commission allowed the operation subject to divestiture commitments concerning the Tracking Telemetry and Command systems, receivers and radio altimeters. The commitments consisted of the conclusion of a licensing arrangement under which the parties would provide complete technical information and assistance to enable another space supplier to develop these types of subsystems.

The Commission addressed in length the role and policies of ESA. It repeated, as in previous cases, that the institutional satellite as well as the sub-systems and equipment markets were European in scope due to the specific procurement policy of ESA. In referring to the procurement policies of ESA it misinterpreted the *juste retour* industrial policy principle as a requirement to award manufacturers in each Member State of ESA contracts that should be equal to the financial contribution of each Member State<sup>1</sup>. It further acknowledged that both the European Commission and ESA had called for the consolidation of the European space industry in order to concentrate research and development efforts. The decision noted that in the market segment of institutional civil applications the merger would reduce the number of main players from 3 to 2. Post merger, only the new entity and Astrium would be able to act as the prime contractor for large satellites. The German OHB Systems and British SSTL were increasingly participating in tenders for small satellites and, taken together, they did not account for more than [0-10]% of the European civil institutional prime contractor satellite market. Over the 2001 to 2003 period, Astrium accounted for 40-50% and this compared to the 40-50% for the parties combined (Alcatel [20-30]% and Alenia [15-25]%). Whilst the merger resulted in eliminating a player capable of assuming a prime contractor role, based on the market investigation, the Commission found that the impact would be limited. This was because there was a very strong bargaining power of the European Space Agency as the monopsonist buyer for institutional applications. Following the merger between DASA and Matra Marconi Space, which created Astrium, ESA had significantly increased and formalised its countervailing power by introducing

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1 In fact, the minimum geographical return requirement is at 0.84 of the contribution made by a Member States unless a guaranteed return of 1 is agreed by the Participating States in a Programme and approved by the Council of the ESA Member States.

best practices as described below for institutional sub-system procurement. ESA's ability to force suppliers into competitive tendering and to monitor costs throughout the process were considered sufficient to counterbalance the concentration on prime contractor level.

The decision observed that ESA was able to monitor the pricing and supply conditions applied, and thus avoided vertical foreclosure from occurring thanks to the best practices designed to allow ESA to take corrective action. The participation of ESA in evaluation boards organised by the prime contractors and the ineligibility of an affiliated company of a prime contractor to submit proposals ensured the avoidance of conflict of interests.

#### **Case No COMP/M.4403 – THALES/FINMECCANICA/ALCATEL ALENIA SPACE & TELESPAZIO, dated 4 April 2007**

Thales was a French company active in the development and integration of critical information systems for the defence, aeronautics and transport industries and for civil security. It was jointly-controlled by TSA (formerly Thomson-SA, a company wholly-owned by the French State) and Alcatel. Finmeccanica, Alcatel Alenia Space and Telespazio have been already described earlier in this paper.

The operation aimed at Thales acquiring Alcatel's shareholdings in Alcatel Alenia Space and Telespazio. In addition, Thales and Finmeccanica would contribute certain of their space activities to Alcatel Alenia Space or Telespazio. After completion of the operation, Thales and Finmeccanica would jointly control Alcatel Alenia Space and Telespazio, including the space activities contributed by Thales and Finmeccanica to these two joint ventures. The decision analysed several market segments in which the new entity was likely to implement a strategy to foreclose its rival prime contractors and found that the consolidation of the companies in Europe would not lead to the acquisition of a share of the market that would impede the competitive conditions in the market.

#### **Case M.7353 – Airbus/ Safran/ JV, dated 26 November 2014**

Airbus was a Dutch-based company active in aeronautics, space and defence. Through its division Defence and Space, in particular its business line Space systems, Airbus designed, manufactured and sold worldwide civil space launchers, launcher subsystems and equipment, satellites, satellite subsystems and equipment and was active in the field of strategic and tactical missiles. Safran was a French-based company active in aerospace propulsion, aircraft equipment, defence and security. Through its Aerospace propulsion business, Safran produced liquid rocket and solid rocket motors propulsion systems for launchers as well as electric propulsion subsystems for satellites. Safran was

also active in the field of strategic and tactical propulsion for missiles. The operation consisted in the creation of a 50/50-owned joint venture, to which the Parties intended to contribute their respective activities in space launchers, satellite systems and subsystems and missile propulsion.

The Commission considered that subsequent to the operation the Parties would not be able to exercise any voting rights or other forms of de jure or de facto sole control over Arianespace and further noted that the acquisition of CNES' stake in Arianespace by the Joint Venture would be a separate transaction. Consequently, the competitive impact of a possible acquisition of CNES's stake in Arianespace by the Joint Venture was not assessed in this decision.

The Commission identified that the market was subdivided into the following main sectors: launch services, launchers, ground systems, satellites (commercial, institutional, military) and space infrastructure as well as missiles and missile subsystems and equipment. The Commission allowed the operation subject to commitments that the Parties submitted.

When addressing the structure of the launchers' market in Europe the Commission acknowledged that ESA was the only customer with regard to the prime contracting of launchers development in Europe. The selection of the prime contractor for ESA launchers was attributed by ESA through bilateral negotiations with the industry of the main contributing Member State based on the *juste retour* principle. No other European industry had at this point the capabilities for developing a launcher comparable to Ariane 5 or 6. The same applied to the selection of the propulsion systems that ESA chose on a bilateral basis based on their unique competences and in accordance with the *juste retour* principle. For what concerned other components ESA and the Commission's investigation confirmed that suppliers were selected according to ESA's Best Practices. The decision addressed the issue whether ESA's role would diminish as a result of the attribution of design authority to the Joint Venture and concluded that this would not be the case. The selection of sub-contractors would take place according to ESA's Best Practices following the preparation of the Industrial Procurement Plan by the prime contractor that is approved by ESA. The Commission analysed in detail the ESA Best Practices procedure and concluded that the possibility for a company to have recourse to the ESA Ombudsman and appeal to the ESA Head of Procurement and the Procurement Board are significant guarantees to ensure the fairness of the procedures. Last, during the exploitation phase the Commission found that ESA would remain the most important customer and would maintain certain key facilities operational (for example, launch pads). ESA's would guarantee that there could be no discrimination or abuse from the Joint Venture.

## Case No M.7724 - ASL / ARIANESPACE, dated 20 July 2016

The transaction consisted in Airbus Safran Launchers (“ASL”) acquiring sole control over Arianespace Participation S.A. and Arianespace S.A. by way of purchase of the entire shareholding currently held by Centre National d’Etudes Spatiales (“CNES”) in Arianespace.

Arianespace was a company founded in 1980 by CNES, acting as the main shareholder, and the satellite industry participating in the Ariane programme, namely Airbus, Safran and eleven other European companies representing the European countries financing, through their participation in the European Space Agency, the development of the Ariane launcher. This initial shareholding structure remained mostly unchanged up until 2016. Arianespace performed launches of satellites and other spacecraft for commercial and institutional clients from the Guiana Space Centre (“CSG”) located in Kourou, France. For that purpose, it was entrusted by ESA with the exclusive right to commercialise the ESA-developed launchers Ariane and Vega. Pursuant to agreements signed between Russia, France and ESA, Arianespace also had the exclusive right to operate launch services from the CSG for commercial missions using the Russian Soyuz launcher.

The market segments identified in the decision were launchers, satellites (commercial, institutional, military), payload adapters and dispensers, space insurance and satellite operations. ESA’s role in the development of the Ariane and Vega launchers was extensively described and analysed. Further, the decision described that the negotiation and adoption of the exploitation conditions of the European launchers and Soyuz was coordinated and implemented by ESA. ESA also reviewed tender documentation prepared by the launcher manufacturer to ensure impartiality and was a member of the evaluation board that made supplier selections. However, ESA had not means of preventing differentiations in prices offered to other Arianespace institutional customers. Neither did the exploitation agreements put in place under the auspices of ESA bind ESA Member States to use the ESA-developed launchers.

After a lengthy analysis of all the cases of potential horizontal or vertical foreclosure, the Commission allowed the operation subject to behavioural commitments.

### **II) ESA’s industrial policy from the lenses of the DG Competition of the European Commission**

The review of the case law of the DG Competition leads to the following observations regarding ESA’s industrial policy:

- The Commission (DG Competition) has always allowed and encouraged the consolidation of the space sector in Europe whether this concerned the space segment, the ground segment or the launchers.



Consolidation was not regarded as an impediment to competition. Instead it was perceived as a way to strengthen the competitiveness of the European space industry. In this context, the role of ESA as enabler and regulator of the market was acknowledged in several decisions. This is especially the case when the Commission reaches the conclusion that no foreclosure will occur in the market either vertically or horizontally.

- ESA's principle of geographical return is evaluated by the Commission as a guarantee for fair competitive conditions in the market.
- ESA's Best Practices are considered by the Commission to constitute a safety net vis-a-vis eventual anticompetitive behaviours by prime contractors, especially in terms of vertical integration.
- In one case, ESA was appointed as arbitrator between the clients of a company and the company in question thanks to its neutrality and institutional role in Europe. The Commission welcomed this appointment thanks to which it obtained the required guarantees that the competitive conditions in the market would be ensured by ESA.
- In all cases, ESA was acknowledged as the main institutional customer for satellites in Europe as well as for launchers.
- In the market segment of launchers the Commission described in detail ESA's contribution in the development and exploitation of the European launchers.
- In light of the above it is argued that the Commission relied on ESA and ESA's mission, rules and practices, in order to facilitate the growth of the space sector in Europe.
- The regulatory impact of EU Competition law has been pivotal for the consolidation of the space sector in Europe and, as such, complemented the industrial policy and regulatory regime put in place by ESA which is based on the technical understanding of space projects and a market intelligence over 50 years. The regulatory complementarity of the EU and ESA regimes play on the strengths of each organisation.