

COPY NO:

TO: SECRETARY OF STATE FOR TRADE AND INDUSTRY

FROM: JOHN VICKERS
CHAIRMAN

29 September 2004

**ANTICIPATED ACQUISITION BY FINMECCANICA SOCIETA PER AZIONI OF
AGUSTAWESTLAND NV**

**A REPORT TO THE SECRETARY OF STATE FOR TRADE AND INDUSTRY PURSUANT
TO ARTICLE 4(2)-(5) OF THE ENTERPRISE ACT 2002 (PROTECTION OF LEGITIMATE
INTERESTS) ORDER 2003**

1. This report is made following the European intervention notice (the Notice) given to the OFT by the Secretary of State for Trade and Industry on 20 August 2004.

JURISDICTION

2. This transaction falls for consideration under the EC Merger Regulation (ECMR) and was cleared by the European Commission on 20 September 2004. Although the European Commission has sole jurisdiction to investigate the competition aspects of the merger under the ECMR, Member States may exercise their residual power under Article 21(4) of the ECMR to take 'appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation'. Article 21(4) states that public security shall be regarded as a legitimate interest.
3. As a result of this transaction arrangements are in progress by virtue of which a concentration with a Community dimension (within the meaning of the ECMR) will arise and in relation to which a reference under section 33 of the Enterprise Act (the Act), which would otherwise have been possible, is prevented from being made by virtue of article 21(3) of ECMR. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which if carried into effect will result in the creation of a European relevant merger situation within the meaning of section 68(2) of the Act.
4. You may therefore make a reference to the Competition Commission (the CC) under Article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (the Order) to address public security concerns arising from the merger provided that you believe that the conditions set out in Article 5 of the Order are satisfied.

THE PARTIES

5. **Finmeccanica Societa per Azioni (Finmeccanica)** is a holding company incorporated under the laws of Italy, operating through its subsidiaries in the aerospace, communications, energy, transportation, information technology and defence sectors.
6. **AgustaWestland NV (AW)** is a company incorporated under the laws of the Netherlands as the holding company for the joint venture into which Finmeccanica and GKN plc merged their respective helicopter and related businesses, Agusta SpA and Westland Helicopters Limited (Westland). Operating through its subsidiaries AW is active in the design, development, manufacture, maintenance and overhaul of civil and military helicopters, as well as related services.
7. The proposed transaction would result in Finmeccanica gaining full control of AW.

SUMMARY OF THIRD PARTY REPRESENTATIONS

8. Following receipt of the Notice, the OFT has consulted and invited comments on the national security public interest consideration identified in the Notice. In response to the consultation, representations on national security issues were received from the Ministry of Defence (MoD) alone. These representations are summarised below.
9. The MoD has made representations that the merger might adversely affect the public interest on national security grounds. The MoD has identified two main areas of concern arising from this merger: the maintenance of strategic UK capabilities and the protection of classified information.
10. Regarding the maintenance of strategic UK capabilities, the MoD has stated that AW is the design authority for the majority of the UK Armed Forces helicopter fleet and the company houses unique skills and knowledge relating to them. The MoD states that it is essential for the protection of the UK's national security that these capabilities are retained within the UK to design, develop, operate and maintain current and possible future helicopter systems. The MoD states that without this capability, the UK would be unable unilaterally to update equipment so as to maintain the operational advantage that the UK's armed forces gain from having technologically-advanced equipment that is capable of performing alongside allies and surpassing potential adversaries.
11. The MoD believe that it is necessary to obtain an assurance from Finmeccanica that it will continue to make available to the UK the capabilities that AW possesses in these areas, and that, in the event of any proposed rationalisation by Finmeccanica, such capabilities will be maintained within the UK and neither run down, nor transferred abroad, following the transaction without prior consultation with the MoD.
12. In relation to the protection of classified information, the MoD has indicated that some of the strategic capabilities described above are dependent on access to highly classified technology and information. Some of the information is

available only to UK nationals and may therefore bear a UK EYES caveat. If AW, under the control of Finmeccanica, is to continue its involvement in such work, the MoD considers it is necessary to ensure that such information is retained and protected within the UK. The MoD see a legally-binding undertaking combined with an appropriate compliance regime as being necessary to assure the UK government that information and technology is adequately protected.

Undertakings in lieu

13. The MoD has identified national security concerns arising from the transaction which relate to the maintenance of a strategic capability and the protection of classified information. If you believe that the concerns raised by the MoD may be expected to operate against the public interest, you may either make a reference to the CC under Article 5 of the Order or accept undertakings in lieu of such a reference under paragraph 3(2) of Schedule 2 to the Order.
14. The draft undertakings in the attached appendix are intended to remedy, mitigate or prevent the particular effects adverse to the public interest identified by the MoD. Specifically, the undertakings seek to address the two areas of concern identified above.
15. Finmeccanica and Westland have confirmed that they are willing to sign the undertakings in the form attached in the appendix.

Conclusions on national security considerations

16. The OFT is not expert in national security matters and therefore merely summarises here representations made by the MoD.
17. The OFT has no reason to doubt the representations made by the MoD on the appropriateness of the undertakings in order to remedy or prevent the specific effects adverse to the public interest identified by it and which are briefly described above.

CONCLUSIONS

18. The OFT advises you that it is or may be the case that arrangements are in progress or in contemplation which if carried into effect will result in the creation of a European relevant merger situation for the purposes of section 68(2) of the Act.
19. It appears that this transaction raises national security concerns of the type identified by the MoD. If you believe that as a result of this merger a European merger situation will be created and that the national security concerns raised by the MoD may be expected to operate against the public interest, you can make a reference to the CC on such public interest grounds, or accept undertakings in lieu of such a reference. The MoD has prepared undertakings, to be accepted in lieu of reference to the CC, which it believes are the most effective means of remedying the national security concerns it has identified.

20. Following discussions with OFT officials, Finmeccanica and Westland have confirmed that they are prepared to sign the attached draft undertakings. However, this does not fetter your discretion in determining whether to accept the proposed undertakings in their current form, or in a modified version, if found appropriate following public consultation.

John Vickers
Chairman