

Determination

Thales S.A. and Gemalto N.V. [2018] NZCC 21

The Commission:	Sue Begg Dr Stephen Gale Roger Featherston
Summary of application:	An application from Thales S.A. seeking clearance for it or any of its interconnected bodies corporate to acquire all of the issued and outstanding ordinary shares of Gemalto N.V.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to Thales S.A. to acquire all of the issued and outstanding ordinary shares of Gemalto N.V., subject to the divestment undertaking provided by Thales on 11 December 2018 under section 69A of the Commerce Act 1986.
Date of determination:	13 December 2018

Confidential material in this report has been removed. Its location in the document is denoted by [].

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The proposed acquisition and our decision

Summary of the proposed acquisition

1. On 1 August 2018, the Commerce Commission (the Commission) registered an application¹ from Thales S.A. (Thales or the Applicant) seeking clearance for it or any of its interconnected bodies corporate to acquire all of the issued and outstanding ordinary shares of Gemalto N.V. (Gemalto) (the proposed acquisition). The clearance application relates to the proposed acquisition to the extent that it affects markets in New Zealand.
2. On 11 December 2018, the Commission received an undertaking from Thales under section 69A of the Commerce Act 1986 (the Act)². As part of the undertaking, Thales would divest its entire general purpose hardware security module business.

Our decision

3. In accepting a divestment undertaking from Thales, we are satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant markets. Accordingly, we decided to give clearance to Thales to acquire all of the issued and outstanding ordinary shares of Gemalto subject to Thales' divestment undertaking.

Our framework

4. Our approach to analysing the competition effects of the merger is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).³

The substantial lessening of competition test

5. As required by the Act, we assess mergers using the substantial lessening of competition test.
6. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).⁴
7. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),⁵ or reduce non-price factors such as quality or service below competitive levels.

¹ A public version of the application is at: <https://comcom.govt.nz/case-register/case-register-entries/thales-s.a-gemalto-n.v.>

² See Attachment A: The divestment undertaking provided by Thales.

³ Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2013).

⁴ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁵ Or below competitive levels in a merger between buyers.

When a lessening of competition is substantial

8. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.⁶ Some courts have used the word 'material' to describe a lessening of competition that is substantial.⁷
9. As set out in our guidelines, there is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.⁸
10. A lessening of competition or an increase in market power may manifest itself in a number of ways, including higher prices or reduced services.⁹

When a substantial lessening of competition is likely

11. A substantial lessening of competition is 'likely' if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.¹⁰

The clearance test

12. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.¹¹ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.
13. In *Woolworths* the Court held that "the existence of a 'doubt' corresponds to a failure to exclude a real chance of a substantial lessening of competition".¹²
14. The burden of proof lies with the Applicant to satisfy us on the balance of probabilities that the proposed merger is not likely to have the effect of substantially lessening competition.¹³ The decision to grant or refuse a clearance is necessarily to be made on the basis of all the evidence.¹⁴ We will sometimes have before us conflicting evidence from different market participants and must determine what weight to give the evidence of each party.¹⁵

⁶ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁷ *Woolworths & Ors v Commerce Commission* (HC) above n6 at [129].

⁸ *Mergers and Acquisitions Guidelines* above n3 at [2.23].

⁹ *Mergers and Acquisitions Guidelines* above n3 at [2.21].

¹⁰ *Woolworths & Ors v Commerce Commission* (HC) above n6 at [111].

¹¹ Section 66(3)(a).

¹² *Commerce Commission v Woolworths Ltd* (CA) above n4 at [98].

¹³ *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [7] and *Commerce Commission v Woolworths Ltd* (CA) above n4 at [97].

¹⁴ *Commerce Commission v Woolworths Ltd* (CA) above n4 at [101].

¹⁵ *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 at [64].

Key parties

15. Thales is based in France and supplies electronics and communications equipment globally for a number of different industries including the aeronautics, space, ground transportation, defence and security industries. Relevant to the proposed acquisition, Thales' e-Security division supplies data encryption hardware and software, which is designed to protect and secure electronic information and data.
16. In New Zealand, Thales' encryption products are typically supplied via resellers under the brand names nShield and payShield, which are both brands of hardware security modules (HSMs). HSMs are discussed further below.
17. Gemalto is based in the Netherlands and is a specialised data security company that, like Thales, supplies data encryption hardware and software globally. In New Zealand, Gemalto supplies its products through resellers under the brand name SafeNet.

Other relevant parties

18. There are a number of specialised data security companies that supply encryption products. These companies also provide their products and services globally although their presences in different parts of the world vary. These companies include:
 - 18.1 Utimaco GmbH (Utimaco), which is based in Germany and supplies a range of data security appliances and compliance solutions under the Utimaco brand;
 - 18.2 Micro Focus International Inc. (Micro Focus), which is based in the United Kingdom and supplies a range of information technology including data security products and services for a range of different industries. In May 2018, Micro Focus announced it intends to divest its Atalla branded range of data security products to Utimaco. Where relevant, we have referred to this entity as Atalla;¹⁶
 - 18.3 Futurex LP (Futurex), which is based in the United States of America and supplies specialised cryptography products and services under its Futurex brand; and
 - 18.4 Atos S.E. (Atos), which is based in France and supplies a range of cyber security products and services under the Bull brand.
19. There are a number of prominent global software and cloud computing service providers that use (and provide) encryption products and management services similar to those provided by Thales and Gemalto. These providers include:

¹⁶ See media release 18 May 2018, Micro Focus announces agreement with Utimaco to divest Atalla portfolio. We also note that Micro Focus acquired the Atalla portfolio in 2016 when it merged with Hewlett Packard Enterprise's software business.

- 19.1 International Business Machines Corporation (IBM), which has a number of encryption software and hardware products in its global portfolio;
 - 19.2 Amazon Web Services (AWS), which is a subsidiary of Amazon.com, Inc. AWS provides a cloud computing platform to businesses and other enterprises that includes certain data security services which customers can use to manage and protect their data; and
 - 19.3 Microsoft Azure, which is a subsidiary of the Microsoft Corporation. Similar to AWS, Microsoft Azure is a cloud computing platform that includes data security services to protect its customers' information.
20. Thales and Gemalto, like other encryption hardware and software suppliers, typically supply their products to end-customers in New Zealand via third party distributors or resellers. In New Zealand, these resellers include:
- 20.1 Encryption Key Management Limited (e(K)m), which is a reseller of Thales' range of security and cryptography products;
 - 20.2 MPA New Zealand Limited (MPA), which is a reseller of Gemalto's range of security and cryptography products; and
 - 20.3 Scientific Software & Systems Limited (SSS), which provides IT security consultancy services as well as also reselling certain data security products supplied by Gemalto and Thales.

Industry background

Encryption software

- 21. Both Thales and Gemalto supply a range of enterprise encryption software for data 'at rest' (such as data stored in physical form) and 'in use' (such as data stored in a non-persistent digital state like a computer random-access memory). Because of limited overlap between the parties, and the large number of other global suppliers of encryption software, we do not further consider encryption software in these reasons.

Encryption hardware

- 22. All industry participants noted that Thales and Gemalto are two of the most prominent suppliers of certain hardware used by businesses to keep their data and information secure. For example, the most common way to secure data is to use an algorithm to encrypt the data. An encryption "key" (or secret code) is needed to encrypt and decrypt data. Relevant to the proposed acquisition, both Thales and Gemalto supply HSMs.

What is an HSM?

- 23. An HSM is an appliance which provides cryptographic functions, potentially including (but not limited to) encryption, decryption, key generation, signing, hashing and

cryptographic acceleration.¹⁷ The HSM itself can then be integrated into (or hosted within) a business' IT infrastructure or it can be accessed via an external network or connection. There are two main types of HSM, namely:

- 23.1 general purpose HSMs, which are a dedicated hardware appliance running encryption software to generate, protect, and manage keys in a secure tamper-resistant module; and
 - 23.2 payment HSMs, which are HSMs with a different software layer that allows them to perform higher frequency operations.
- 24. Typically, customers will purchase the required type of HSM and enter into maintenance arrangements with their preferred supplier, which ensures the HSM is kept up to date with any software and/or firmware updates. These customers are commonly referred to as 'on premise' customers.
 - 25. As the HSMs themselves are tamper-resistant, end-customers typically physically connect each HSM into their security framework. However, we also understand that HSM manufacturers produce customised HSMs for other equipment manufacturers.¹⁸ To this extent, there is an element of indirect sales to customers if an HSM is installed in the finished solutions sold to them.
 - 26. In addition, the growth of cloud computing has resulted in 'as a service' HSMs, which are cloud-based HSMs which can be accessed by a customer on a per-use basis, rather than the customer hosting their own HSM.
 - 27. Industry participants noted that there are numerous methods, both physical and electronic, with which businesses and enterprises can try to protect their electronic information. However, since HSMs were first developed in the 1980s, they have become the most commonly used appliance when a business requires a high level of protection and security for their information.¹⁹ For example, where high assurance or high security is required or high volumes of data are encrypted or decrypted, all parties we spoke to noted that the use of an HSM is typically considered "best practice" because they fulfil widely established and emerging standards of due care for cryptographic systems and practices.²⁰
 - 28. Given the importance of security, industry parties noted that no business or government agency would risk installing an HSM that was not certified by a recognised global industry standard. For HSMs, the two most recognised standards are:
 - 28.1 the Federal Information Processing Standard (FIPS) publication 140-2. Although this is an American standard, it has been adopted globally as a

¹⁷ The New Zealand Information Security Manual (version 3.0, August 2018) - 17.10. Hardware Security Modules, published by the Government Communications Security Bureau.

¹⁸ Commerce Commission interview with [].

¹⁹ Commerce Commission interview with []; Commerce Commission interview with []

²⁰ For example, see Commerce Commission interview with [].

practical security benchmark and best practice. There are four levels of this standard with levels three and four having the highest security certifications;²¹ and

- 28.2 the Payment Card Industry Data Security Standard (PCI DSS). The main payment card scheme providers require any HSM dealing with their payment transactions to meet this standard.²²
29. Each particular model of HSM is constantly tested and monitored to ensure it is maintaining its certifications and one of the main reasons for removing an HSM is if the model no longer meets these certifications.
30. Thales submitted that globally there are a number of competing manufacturers of the different types of HSMs. Its estimate of each manufacturer's global revenues is indicated in Table 1 below. However, all other industry participants questioned the scale and scope of these other manufacturers and emphasised that there would be a significant difference in size between the merged entity and all the other HSM manufacturers identified by the Applicant. We further discuss the merging parties' market positions in New Zealand relative to other manufacturers in the competition analysis below.

Table 1: Thales' estimated global revenues by HSM manufacturer in 2017

Manufacturer	Payment HSMs		General purpose HSMs	
	Global revenues(€)	Global share	Global revenues(€)	Global share
Thales	[]	[]	[]	[]
Gemalto	[]	[]	[]	[]
<i>Merged entity</i>	[]	[]	[]	[]
Combined Utimaco / Atalla entity	[]	[]	[]	[]
Atos	[]	[]	[]	[]
Futurex	[]	[]	[]	[]
Cavium	[]	[]	[]	[]
Ultra Electronics	[]	[]	[]	[]
Other*	[]	[]	[]	[]
Total	[]	100.0%	[]	100.0%

Source: Applicant. Estimates include revenues from HSMs 'as a service' sales. *Thales stated 'others' include parties such as Tokeim, IBM, AWS, Microsoft, Docusign, Realsec, Prism as well as many more others.

32. Given the specialised nature of HSMs, the number of customers requiring an HSM in New Zealand tends to be limited. Further, due to security reasons, once an HSM is installed within a customer's IT security infrastructure it does not tend to be replaced

²¹ Clearance Application from Thales (31 July 2018).

²² Unlike in New Zealand and in other parts of the world, card schemes providers in Australia require an additional Australian specific certification known as AS2805. At present, Thales and Gemalto have products that meet the AS2805 standard but Atalla does not. Clearance Application from Thales (31 July 2018).

with another manufacturer's HSM. This means that suppliers tend to focus on customers who need an HSM for a new requirement (or new installations).

33. In addition, because HSMs can have a relatively long shelf life (ranging from five to over 10 years), the annual sales of HSMs are also limited. As indicated by Table 2, Thales and Gemalto supply only a limited number of HSMs to New Zealand customers each year, with the majority of these sales being replacement products.

Table 2: Number of units supplied to New Zealand end-customers 2015-2017

Supplier	Type of HSM	Units sold to NZ end-customers		
		2015	2016	2017
Thales	Payment	[]	[]	[]
	General purpose	[]	[]	[]
Gemalto	Payment	[]	[]	[]
	General purpose	[]	[]	[]

Source: Thales, Gemalto.

Other jurisdictions

34. A number of other jurisdictions are considering the impact of the proposed acquisition, primarily because the acquisition would combine the two largest suppliers of HSMs.²³
35. We have not previously considered encryption hardware before. However, the Office of Fair Trading (OFT) undertook several investigations involving the two merging businesses (in one form or another) and the supply of HSMs.
36. In 2006, the OFT recommended that the Competition Commission assess the market for the supply of HSMs in regards to the proposed acquisition of nCipher by SafeNet (now Gemalto).²⁴ The OFT noted at the time that there appeared to be no substitutes for an HSM principally because HSMs have higher processing power, a higher level of security, functionality and a greater flexibility in key management and user interface than any other encryption product or services.
37. In 2008, the OFT cleared Thales to acquire nCipher and, in doing so, assessed a wider HSM market and narrower general purpose HSM and payment HSM markets.²⁵ In this respect, the OFT did not settle on any particular HSM product market.
38. On 11 December 2018, the European Commission approved the proposed acquisition of Gemalto by Thales under its merger regulations. This approval is

²³ For example see: European Commission press release, Commission opens in-depth investigation into proposed acquisition of Gemalto by Thales, 23 July 2018; and Australian Competition & Consumer Commission commences review under the Merger Process Guidelines, announced 24 September 2018.

²⁴ We note the Competition Commission never completed its investigation as the proposed acquisition was abandoned.

²⁵ OFT, Anticipated acquisition by Thales UK Limited of nCipher plc, decision published 6 October 2008.

conditional on Thales complying with a commitment it made to the European Commission to divest its general purpose HSM business.²⁶

Market definition

39. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
40. We define markets in the way that best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products which fall outside the market but which still impose some degree of competitive constraint on the merged entity.
41. In general, the more closely substitutable two products are, the closer the competition and the greater the competitive constraint between the products.
42. For the purposes of this application, the Commission has considered separate national markets for the manufacture/importation and supply of each of the following:
 - 42.1 payment HSMs; and
 - 42.2 general purpose HSMs.

What the applicant submitted

43. Both Thales and Gemalto supply general purpose HSMs and payment HSMs. However, Thales submitted that businesses and other enterprises with high security requirements have a range of encryption key management options available to them and all these options have the same purpose, which is to secure and protect an organisation's data. In the Applicant's view, these options are all part of the same market, which include using:
 - 43.1 encryption software/hardware that comes with the necessary key management capabilities pre-installed;
 - 43.2 dedicated key management software running on a physical or cloud server, used either standalone or in combination with hardware;
 - 43.3 specific HSMs that can be incorporated into a business's existing IT platform or infrastructure;

²⁶ European Commission press release: Commission approves acquisition of Gemalto by Thales, subject to conditions, 11 December 2018.

- 43.4 specific trusted platform modules which are microprocessors that contain pre-installed key management software; and
- 43.5 a cloud-based encryption service which includes key management capabilities.

The Commission's view on the relevant markets

- 44. The Commission's assessment primarily focuses on the boundaries of the relevant product markets. We examined:
 - 44.1 whether HSMs should be assessed separately from the other types of key management products;
 - 44.2 whether the different types of HSMs should be assessed separately; and
 - 44.3 whether cloud-based 'as a service' HSMs should be included in the same market as other HSMs.

Should HSMs be assessed separately from the other types of key management products?

- 45. We are of the view that it is appropriate to assess HSMs separately from the other types of enterprise key management products and services.
- 46. While there are a number of products and services that can perform certain key management functions, industry participants consistently advised the Commission that there are limited, to no, alternatives to using an HSM.²⁷ In our view, the use of an HSM is discrete from the other products and services listed in the application that have key management capabilities such as: dedicated key management software; encryption software/hardware containing key management capabilities; cloud-based encryption solutions; and trusted platform modules.
- 47. Industry participants including end-customers, resellers and the Government Communications Security Bureau (GCSB) noted that when businesses and government agencies assess their IT network and security architecture, and assess that they require a high level of data security (or require high volumes of data to be encrypted and decrypted) then there are limited, or no, alternatives to using and/or installing an HSM. For example:
 - 47.1 HSMs are used when customers desire an additional layer of security for their cryptographic functions. An HSM is able to isolate the cryptographic processes in a separate module, which limits the access to the keys more effectively than other key management products. HSMs also appear to provide extra security through tamper resistance and tamper detection characteristics.²⁸ To this extent, HSMs provide, and are perceived to provide,

²⁷ []

²⁸ Commerce Commission interview with []; Commerce Commission interview with []; and Commerce Commission interview with [].

customers with a higher level of security than other key management products; and

- 47.2 it is widely recognised that the use of an HSM in high security environments is considered to be industry best practice,²⁹ which is also consistent with many of the internal documents and third party reports that Thales provided to the Commission.³⁰

Should the different types of HSMs be assessed separately?

48. We are of the view that it is appropriate to assess the two main types of HSM – general purpose HSMs and payment HSMs – separately from one another, given the limited degree of demand-side and supply-side substitutability between the two types of HSM.
49. Industry participants including suppliers and end-customers of HSMs advised that:
- 49.1 the speed and functionality of general purpose HSMs and payment HSMs vary. End-customers use payment HSMs, which can perform a high volume of payment-related operations quickly, for different purposes than general purpose HSMs, which are used for more general key management across a number of different industries;³¹ and
- 49.2 the extent to which customers can switch to different HSM products may vary between payment and general purpose HSMs, with payment HSM customers being particularly unlikely to switch supplier once they have selected that particular provider.³²
50. As outlined in the application, there are constraints on a manufacturer's ability to expand the types of HSMs they supply. That is, switching is not simply a matter of adding additional software. For example, while some manufacturers supply both payment and general purpose HSMs, other suppliers appear to only manufacture one type of HSM.³³
- 50.1 Thales stated that designing and manufacturing general purpose HSMs and payment HSMs involves different technologies. For example, compared to general purpose HSMs, payment HSMs require a more complex software layer, different hardware architecture and different application programming

²⁹ For example, see The New Zealand Information Security Manual (version 3.0, August 2018) - Rationale & Controls - 17.10.12. Hardware Security Modules, published by the Government Communication Security Bureau.

³⁰ Clearance Application from Thales (31 July 2018); Letter from Thales and Gemalto in response to the Commerce Commission's letter of issues (19 September 2018).

³¹ Commerce Commission interview with []; and Commerce Commission interview with [].

³² Commerce Commission interview with []; Commerce Commission interview with [].

³³ Clearance Application from Thales (31 July 2018).

interfaces.

[]³⁴

50.2 We understand the certification processes and requirements are also different between payment HSMs and general purpose HSMs. For example, to be acceptable to the main card providers, payments HSMs require additional certification under the PCI SSC.³⁵

51. Further, industry participants noted that the difficulties in developing the different types of HSM had led many suppliers to expand via acquisition:

51.1 [

];³⁶

51.2 Gemalto's existing range of payment HSMs was established via its acquisition of Eracom Technologies AG in 2005. Prior to this, Gemalto's range of HSMs did not include any payment HSMs;³⁷ and

51.3 similarly, when Thales acquired nCipher in 2008, while both parties designed and manufactured HSMs, there was limited overlap in the two parties' operations because nCipher only produced general purpose HSMs and Thales predominantly produced payment HSMs.³⁸

Should cloud-based 'as a service' HSMs be included in the same market as other HSMs?

52. We understand that many customers prefer to purchase and store an HSM in their own premises.³⁹ However, we also understand that some customers can and do access cloud-based HSMs and more customers might be encouraged to use a cloud-based 'as a service' HSM in the near future. For example, Thales stated that [

].⁴⁰

³⁴ Letter from Thales and Gemalto in response to the Commerce Commission's letter of issues (19 September 2018).

³⁵ Commerce Commission interview with []; Letter from Thales and Gemalto in response to the Commerce Commission's letter of issues (19 September 2018).

³⁶ Commerce Commission interview with [].

³⁷ Letter from Thales and Gemalto in response to the Commerce Commission's letter of issues (19 September 2018).

³⁸ OFT, Anticipated acquisition by Thales UK Limited of nCipher plc, decision published 6 October 2008.

³⁹ []

⁴⁰ Letter from Thales and Gemalto in response to the Commerce Commission's letter of issues (19 September 2018).

53. However, we are of the view that it is more appropriate to assess the constraint from cloud-based HSM products and services in the competition assessment, given these cloud services appear to be reliant on an HSM and, in many instances in the past, cloud HSM service suppliers have also been customers of dedicated HSM providers.

Other relevant market dimensions

54. Both Thales and Gemalto manufacture their products overseas and import them into New Zealand primarily through third party distributors. As such, we consider the relevant geographic and functional dimensions to be the national market for the manufacture/importation of any relevant products and services. This is because:

- 54.1 while both Thales and Gemalto primarily supply customers in New Zealand via resellers, some customers purchase HSMs directly from manufacturers. Further, even when a product is supplied into New Zealand via a reseller, the relevant manufacturer remains responsible for any maintenance services associated with the end product. To this extent, competition between manufacturers, such as Thales and Gemalto, occurs when end-customers in New Zealand select a particular brand of HSM; and
- 54.2 the constraint from global manufacturers who currently have no HSMs installed in New Zealand and/or no New Zealand specific operations or distribution arrangements is assessed in the competition assessment.

Conclusions on market definition

55. For the purposes of this application, the Commission considers the relevant markets to be:
- 55.1 the national market for the manufacture/importation and supply of payment HSMs (the payment HSM market); and
- 55.2 the national market for the manufacture/importation and supply of general purpose HSMs (the general purpose HSM market).

With and without scenarios

56. To assess whether competition is likely to be substantially lessened in any market, we compare the likely state of competition with the acquisition to the likely state of competition without the acquisition.⁴¹
57. With the acquisition, Thales would acquire all of the shares in Gemalto. Thales advised the main rationale for the proposed acquisition is to help it accelerate its digital strategy across all its five core divisions
- []

⁴¹ *Mergers and Acquisitions Guidelines* above n3 at [2.29]; *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

58. Without the acquisition, we consider the likely scenario is the status quo, with Thales and Gemalto operating independently of, and in competition with, one another.

How the acquisition could substantially lessen competition

59. We have considered whether the acquisition would be likely to substantially lessen competition as a result of horizontal unilateral effects.

60. The acquisition would have the effect of substantially lessening competition if the removal of Gemalto as an independent competitor would allow Thales to profitably increase prices (or reduce quality) to customers above the level that would prevail without the acquisition in the:

- 60.1 payment HSM market; or
- 60.2 general purpose HSM market.

Competition assessment

61. The Applicant submitted that, post acquisition, customers in the different HSM markets would have a range of alternative supply options, other than the merged entity. However, all other industry participants advised the Commission that the supply of the different HSMs are very specialised areas and that, at a global level, there are only a few manufacturers who have the established presence and reputations that customers require to be able to compete directly with the merged entity.
62. In both the relevant markets, the Commission focused its assessment on the competition for contestable sales and the ability of overseas based HSM manufacturers to enter and expand into New Zealand in the supply of HSMs to new customers. This is because:
- 62.1 once an HSM is installed within a customer's IT security infrastructure it does not tend to be replaced with another manufacturer's HSM;⁴² and
 - 62.2 due to risks to interoperability and security concerns, customers tend to be "super sticky" and it is only in exceptional circumstances that a customer would switch out one supplier's HSM for a different manufacturer's HSM in a given application.⁴³

The payment HSM market

63. The Applicant submitted that there is limited overlap between the parties in the payment HSM market due to Gemalto having a minimal presence in New Zealand.

⁴² Thales noted that this will remain the case for HSMs that have already been installed with and without the proposed acquisition taking place – so there would be no competitive effect from the acquisition on such HSMs which have already been purchased. Letter from Thales and Gemalto in response to the Commerce Commission's letter of issues (19 September 2018).

⁴³ Commerce Commission interview with [].

For example, [].⁴⁴ We also understand that Atalla's range of payment HSMs have an established presence and reputation in New Zealand and are currently installed with a number of prominent customers.

64. The main customers of payment HSMs in New Zealand are retail banks, card scheme providers and other payment processors. At present, Thales is the main supplier of payment HSMs to these customers and it has the largest installed base in New Zealand. This is consistent with its presence in some other overseas markets.⁴⁵

64.1 [] advised that it purchases payment HSMs from Thales and that Thales is the predominant payment HSM brand in New Zealand. Given that its payment HSMs are important to its operations, it would be reluctant to switch to another provider that it has no experience using.⁴⁶

64.2 [] advised that it purchases payment HSMs from Thales and it has done so for some time. It advised it is aware of only one retail bank in New Zealand that uses another manufacturer's payment HSM (namely Westpac which has installed an Atalla payment HSM).⁴⁷

64.3 [] also purchases payment HSMs from Thales. It noted that, while it was aware of Gemalto's range of payment HSMs, it has no knowledge of them being used in New Zealand.⁴⁸

65. We understand that the only other existing supplier with an installed base of payment HSMs in New Zealand is Micro Focus, with its Atalla branded payment HSM. At present, industry participants considered Atalla to be the closest competitor to Thales and would continue to be its closest competitor in New Zealand, post acquisition.

65.1 [] advised it has installed Gemalto payment HSMs in the past.
[]

].⁴⁹

⁴⁴ Letter from Thales and Gemalto in response to the Commerce Commission's letter of issues (19 September 2018).

⁴⁵ For example, Thales advertises that its data security products are currently used to protect 80% of the world's electronic card transactions. See "Securing Your Digital Transformation" brochure, downloaded from www.thalesgroup.com.

⁴⁶ Commerce Commission interview with [].

⁴⁷ Commerce Commission interview with [].

⁴⁸ Commerce Commission interview with [].

⁴⁹ Commerce Commission interview with [].

65.2 [] advised that it has installed payment HSMs from both Thales and Atalla.
[],
at present, it considers Thales and Atalla to be its closest alternatives for its current requirements.⁵⁰

65.3 [] advised that there are few international suppliers of payment HSMs and the number of suppliers has been decreasing due to a series of acquisitions. Both currently have installed Thales payment HSMs, but consider Atalla is their only comparable alternative supplier.⁵¹

66. There do not appear to be any barriers restricting payments HSMs suppliers with an installed base in New Zealand from competing for new customers and/or new installations with existing customers. For example,
[].⁵²

67. As indicated by Table 2, Gemalto supplied only a limited number of payment HSMs recently. Further, industry participants, [] did not consider that Thales and Gemalto were close competitors in the supply of payment HSMs.⁵³ Rather, given their installed base in New Zealand, industry parties consider that, for any new installation, Thales branded and Atalla branded payment HSMs would continue to be the two closest alternatives, post acquisition.⁵⁴

68. For example,
[]
[].⁵⁵

Potential entry

69. Payment HSM customers stated that the merger is unlikely to incentivise new entry because Atalla already has an existing presence in New Zealand and it would continue to act as a constraint on Thales.

⁵⁰ Commerce Commission interview with [].

⁵¹ Commerce Commission interview with [] Commerce Commission interview with [].

⁵² Commerce Commission interview with [].

⁵³ []

⁵⁴ []

⁵⁵ Commerce Commission interview with [].

70. However, we also understand that there are potential payment HSM manufacturers, other than Atalla and the merged entity that customers could potentially source comparable payment HSMs from. To do so would likely require significant time and effort and an element of risk. However, the existence of potential suppliers could place a constraint on the merged entity comparable to the constraint placed on Thales by Gemalto currently, given Gemalto's limited sales in payment HSMs in recent years.

71. For example,
[

] advised that, with or without the acquisition, Futurex is a credible supplier for any new payment HSM installation with a New Zealand customer.⁵⁶

Conclusion on the payment HSM market

72. Gemalto has a very limited installed base of payment HSMs in New Zealand, which means there would be limited existing overlap as a result of the proposed acquisition.

73. Atalla is the closest current alternative to Thales and it already has an installed base in New Zealand. There appear to be no restrictions on its ability to expand this presence and supply payment HSMs for new installations in direct competition with the merged entity.

74. Accordingly, given the presence, and ability, of competing payment HSM manufacturers to supply New Zealand customers, the proposed acquisition is unlikely to result in a substantial lessening of competition in the payment HSM market.

The general purpose HSM market

75. In the past, when New Zealand-based customers have sought to purchase a general purpose HSM, Thales and Gemalto have been each other's closest competitor. For customers seeking to purchase a new general purpose HSM, customers consistently viewed either Thales or Gemalto as their best alternative, due to the established presence and reputation of both Thales and Gemalto in New Zealand. The proposed acquisition would remove this head to head competition.

76. While the Applicant submitted that there are a number of alternative global manufacturers of general purpose HSMs who can easily supply customers in New Zealand, industry participants provided limited evidence of such supply in the past.

⁵⁶ Commerce Commission interview with [].

77. Further, the scale and scope of the alternative HSM manufacturers listed in the application would not match the merged entity's range of general purpose HSMs, either globally or in the countries where these manufacturers are based. While entry in New Zealand could be achieved with limited physical presence, the Commission considers that New Zealand customers would be unlikely to consider general purpose HSMs manufacturers who do not have an established presence and reputation in their home markets to be a realistic alternative to the merged entity in New Zealand.
78. To this extent, with limited global alternatives to the merged entity, we are of the view that entry and expansion in the general purpose HSM market would not be sufficiently likely in extent and/or timeliness to constrain the merged entity.

Existing competition

79. The Applicant submitted that customers have a number of manufacturers of general purpose HSMs to choose from and there is no need for any of these manufacturers to have a presence in New Zealand directly.⁵⁷ However, industry participants provided the Commission with limited past evidence and examples of:
- 79.1 manufacturers other than Thales and Gemalto having general purpose HSMs installed within businesses or government agencies in New Zealand; and
 - 79.2 manufacturers other than Thales and Gemalto having (in one form or another) a service, maintenance and/or sales presence for general purpose HSMs in New Zealand.
80. Rather, industry participants advised that, in the past, when New Zealand-based customers have sought to purchase a general purpose HSM, Thales and Gemalto have been each other's closest competitor and customers have benefited from this competition.⁵⁸
81. To this extent, we understand that the installed base of general purpose HSMs in New Zealand has been predominantly supplied by Thales and by Gemalto, who are also responsible for the on-going maintenance of their respective HSMs. In addition, as noted above, once an HSM is installed, it is very rarely, if ever, replaced by a competitor's product.
- 81.1 e(K)m resells Thales' range of payment HSMs and general purpose HSMs. It advised that Gemalto is the only other current manufacturer with a presence in New Zealand in general purpose HSMs. This is

⁵⁷ Thales submitted there are global markets for its products. However, given the New Zealand based nature of distributors, we are assessing the extent to which global providers of HSMs could easily enter, and expand, into any New Zealand market to constrain the merged entity.

⁵⁸ []

because,[]^{.59}

81.2 MPA advised that it has been reselling Gemalto HSMs in New Zealand for a long time in direct competition with resellers of Thales HSMs.

[]^{.60}

81.3 SSS resells general purpose HSMs manufactured by Thales and Gemalto. It advised that it is aware that,[

] ^{.61}

81.4 Cogito Group Pty Limited (Cogito) is both an end-user and a reseller of Thales and Gemalto HSMs in Australia and New Zealand. In its view,

[]^{.62}

82. Accordingly, given the competition for the installed general purpose HSMs in New Zealand has already occurred, the Commission focused its assessment on the ability of alternative general purpose HSM suppliers based overseas to enter and/or expand in New Zealand to compete directly with the merged entity for new installations requiring a general purpose HSM.

Potential competition

83. We are of the view that entry and expansion in the general purpose HSM market would be unlikely to prevent a likely substantial lessening of competition. The risks associated in switching to an untested new entrant appear to be perceived as significant. Further, at a global level, other than the merged entity there would be a limited number of manufacturers that a New Zealand customer, or a reseller, could source general purpose HSMs from.

84. In New Zealand, the two main customer requirements when purchasing a general purpose HSM for a new installation are:

84.1 an HSM appliance/model with a high level of technical certification which is supported by on-going R&D; and

84.2 an established reputation and presence both globally and in New Zealand.

85. Almost all industry parties highlighted that general purpose HSM customers, as well as New Zealand resellers, have a strong preference for manufacturers with a known and established brand, given the importance of general purpose HSMs in providing

⁵⁹ Commerce Commission interview with e(K)m (15 August 2018).

⁶⁰ Commerce Commission interview with MPA (20 August 2018).

⁶¹ Commerce Commission interview with SSS (17 August 2018).

⁶² Commerce Commission interview with Cogito (13 September 2018).

security to customers. As above, Thales and Gemalto are the two most well-known HSM brands both in New Zealand and elsewhere in the world.⁶³

86. For example, if a customer were to be the only user of a particular supplier's HSM in New Zealand, this could represent a risk if there was not enough technical support or they were reliant on a single "point of failure" for this support, which might create a security risk for that customer.⁶⁴
87. Nevertheless, the Applicant stated that there is no need for an HSM manufacturer to have a presence in New Zealand directly. Thales' and Gemalto's existing installed customer base in New Zealand was established with limited, if any, New Zealand presence. For example, Thales provides all its technical support for its encryption products via its global support team and there are no New Zealand-specific HSM requirements requiring it to have a physical presence in New Zealand. Gemalto also has a very limited support presence in New Zealand.⁶⁵
88. Other industry parties also considered that the lack of a physical New Zealand presence was not an impediment for customers when they are selecting an HSM supplier. This is because it is relatively common for specialised technical support in the data security area to be provided from overseas-based technicians.⁶⁶ Further, because of the secure nature of an HSM, some are designed to "self-destruct" if they are tampered with. This means that if there is an issue with a unit, the entire unit is replaced rather than repaired, which limits the need for manufacturers to be 'on the ground' to provide technical support.⁶⁷
89. To this extent, the Commission has focused on the scale and scope of any global general purpose HSM manufacturers who New Zealand customers, or resellers, could, potentially, source general purpose HSMs from.
90. Thales and Gemalto stated that, globally, there are a number of well-established manufacturers who could easily start supplying general purpose HSMs into New Zealand, if incentivised to do so. While the Applicant accepted that reputation is a relevant factor for customers, it considers all its major competitors to be significant companies with strong reputations in New Zealand and elsewhere.⁶⁸
91. However, the major competitors listed by the Applicant include the likes of Microsoft Azure and AWS. While the Commission accepts that these suppliers do not lack name recognition or reputation in New Zealand, they tend to be cloud-based HSM

⁶³ []

⁶⁴ Commerce Commission interview with [].

⁶⁵ []

⁶⁶ Commerce Commission interview with [].

⁶⁷ Commerce Commission interview with [].

⁶⁸ Letter from Thales and Gemalto in response to the Commerce Commission's letter of issues (19 September 2018).

suppliers that, as noted above, do not appear to be direct alternatives to specialised general purpose HSMs suppliers like Thales and Gemalto. We discuss the constraint from cloud-based HSM products and services further below.

92. The Applicant also suggested a number of more specialised global general purpose HSM suppliers that, in its view, have the required technical certifications such that they would also constrain the merged entity from increasing its prices (or reducing its quality). These suppliers would include Atos, Utimaco, Futurex, as well as:⁶⁹
- 92.1 Securosys S.A., which is based in Switzerland;
 - 92.2 Cavium, Inc (Cavium), which is based in the United States and now supplies HSMs to AWS;
 - 92.3 Ultra Electronics Holdings Limited, which is based in the United Kingdom and acquired the A.E.P. Networks' range of general purpose HSMs in 2011; and
 - 92.4 Realia Technologies SL (Realsec), which is based in Spain.
93. We contacted a range of domestic and overseas-based industry parties to understand the scale and scope of these alternative HSM manufacturers and the extent to which they would be likely to compete with the merged entity in New Zealand and in other countries.
94. All parties stated that, when compared to Thales and Gemalto, there is a significant order of magnitude difference in scale between the suppliers listed by the Applicant and either Thales or Gemalto.⁷⁰ As a result, these suppliers' installed base of customers (and therefore their reputations) are relatively limited and, without this established reputation, the risks that could be created by installing one of their HSMs are potentially significant.
95. Numerous parties indicated that it would take a significant increase in price (or a reduction in quality) by the merged entity before New Zealand customers would consider sourcing and installing a general purpose HSM from one of the above suppliers. For example:
- 95.1 [];⁷¹
 - 95.2 []

⁶⁹ Letter from Thales and Gemalto in response to the Commerce Commission's letter of issues (19 September 2018).

⁷⁰ Commerce Commission interview with []; Commerce Commission interview with []; and Commerce Commission interview with [].

⁷¹ Commerce Commission interview with [].

].⁷²

95.3 [

73

].⁷⁴

96. [] stated that “in principle” it has the ability to compete globally in the supply of general purpose HSMs and it would be interested in any new installations in the Asia Pacific region. However, without an existing installed base in New Zealand (or Australia), it would need to see significant growth opportunities to justify establishing the necessary local sales presence (as well as obtaining any required local certifications) which would be required to convince new customers to install one of its general purpose HSMs. For example, [] advised that if there was a new national standard introduced in New Zealand (essentially, requiring the installed base to be replaced), this would be the sort of industry change that would incentivise its entry into the general purpose HSM market.⁷⁵

97. [

].⁷⁶

98. However, given the overall concerns expressed by industry parties about the loss of the competition between Thales and Gemalto and the limited number of alternative general purpose HSM suppliers that have any global presence, we are of the view that entry and expansion in New Zealand is unlikely to be sufficiently likely in extent

⁷² Commerce Commission interview with [].

⁷³ []

⁷⁴ Commerce Commission interview with [].

⁷⁵ Commerce Commission interview with [].

⁷⁶ Commerce Commission interview with [].

and/or timeliness to constrain the merged entity in the supply of general purpose HSMs.

Constraints from cloud-based HSMs

99. The Commission considers that alternatives to purchasing (and owning) a general purpose HSM, such as cloud-based HSM services, would provide only a limited constraint on the merged entity.
100. As above, we understand that there are a number of software and hardware solutions that have, in one form or another, some functions that are similar to general purpose HSMs. However, for existing customers of HSMs, suppliers of these alternative products and services would likely provide limited constraint on the merged entity. Industry participants, including end-customers, resellers and suppliers, advised that customers with high security requirements would not use a solution that does not include an HSM, in one form or another.⁷⁷
101. The Applicant notes that there is a move to more cloud-based solutions for enterprise key management services and customers now have an option of purchasing ‘as a service’ HSMs. In essence, this means that customers are able to rent or lease an HSM, via the cloud, rather than buy their own module. At present, ‘as a service HSM’ providers include AWS, Google, and Microsoft Azure.⁷⁸
102. Post acquisition, it is likely that cloud-based ‘as a service’ HSM providers would allow some customers to access some level of services similar to those currently provided by manufacturers of HSMs, such as Thales and Gemalto. Further, unlike previously, ‘as a service’ HSM providers are less reliant on Thales or Gemalto to provide them with the necessary HSMs to enable them to provide their cloud services. For example, we understand that Thales had supplied AWS with HSMs, but AWS switched away from Thales and replaced its HSMs with ones supplied by Cavium.⁷⁹
103. Nevertheless, for the foreseeable future, ‘as a service’ HSM providers are unlikely to be viewed as a credible alternative for a significant portion of general purpose HSM customers whose strong preference is to own and store HSMs on their premises.⁸⁰ For example, customers with high security needs tend to purchase their HSMs outright as they do not want their “crown jewels” to be held by another party.⁸¹

⁷⁷

[]

⁷⁸ Clearance Application from Thales (31 July 2018).

⁷⁹ []

⁸⁰ []

⁸¹ Commerce Commission interview with [].

103.1 [] advised that government agencies and businesses with high security needs will always want to own their own HSMs and some entities are looking to set up their own cloud service because of security concerns.⁸²

103.2 [] understood from its own research and from other industry reports that customers are becoming more accepting of cloud based HSMs solutions but this is customer specific and many existing on-premise customers tend not to be keen to switch to a cloud based service.⁸³

Countervailing power of customers

104. Given that purchases of general purpose HSMs tend to be infrequent and ad hoc, particularly in New Zealand, we are of the view that customers would only have limited countervailing power with which to constrain the merged entity. In particular, the demands and requirements of any one particular customer are unlikely to be sufficient to sponsor a new supplier to enter and expand in New Zealand.

Conclusion on the general purpose HSM market

105. In the general purpose HSM market, Thales and Gemalto have been each other's closest competitor for some time and this competition would likely continue, absent the acquisition.

106. Post acquisition, there would be few comparable alternative suppliers with any global presence that could, potentially, enter and expand into the general purpose HSM market. Given this, and the infrequent nature of purchases in this market, entry and expansion is unlikely to be sufficiently likely in extent and/or timeliness to constrain the merged entity.

107. Accordingly, absent the proposed divestment, the Commission is not satisfied that the proposed acquisition will not have or be likely to have the effect of substantially lessening of competition in the general purpose HSM market.

The proposed divestment

108. To remedy our competition concerns in the general purpose HSM market, Thales submitted an undertaking to the Commission that it would divest its entire global general purpose HSM business (the Divestment Undertaking).⁸⁴ In particular, Thales noted that the undertaking reflects the commitments it has made[].⁸⁵

109. In our view, the Divestment Undertaking, once completed, would address our concerns and maintain the level of competition in the general purpose HSM market

⁸² Commerce Commission interview with [].

⁸³ Commerce Commission interview with [].

⁸⁴ See Attachment A: The divestment undertaking provided by Thales.

⁸⁵ European Commission press release: Commission approves acquisition of Gemalto by Thales, subject to conditions, 11 December 2018.

in New Zealand by establishing a credible and sustainable competitor to Thales. There appears to be limited risk Thales would not complete the undertaking within a standard divestiture period. In our view:

- 109.1 there are sufficient safeguards in place to ensure that the relevant assets will not deteriorate prior to divestment;
- 109.2 the makeup of the divestiture business is such that a purchaser will be able to offer meaningful competition to the merged entity in the general purpose HSM market; and
- 109.3 while there is no upfront buyer, the level of purchaser risk in the undertaking is relatively low as there are likely to be a number of industry parties who would be interested in the divestiture business. In the event that Thales is not able to agree a purchaser itself, the Divestment Undertaking [].

The divestment offer

- 110. To remedy our competition concerns in the general purpose HSM market, Thales submitted the Divestment Undertaking to the Commission in which it would divest its entire global general purpose HSM business.⁸⁶ In its view, the divestment would remove any overlap between Thales and Gemalto in the global supply of general purpose HSMs including in New Zealand.
 - 110.1 Thales submitted that, given the structure of its existing businesses within its e-Security division, there are limited risks in its ability to complete the proposed divestment.
 - 110.2 Thales would only divest the general purpose HSM business to an independent and unconnected party, with the financial resources, expertise, and incentive to maintain and develop the business as a viable competitive force.
- 111. Thales considers there would be no issues finding a suitable purchaser because the Divestment Undertaking would establish a business that would:
 - 111.1 be a significant player in the global supply of general purpose HSMs with global annual revenues of around €90 million; and
 - 111.2 have excellent growth prospects, given the growing demand for key management and data protection products and services such as general purpose HSMs.

⁸⁶ This business would incorporate all of the general purpose HSMs that are currently sold globally under the nShield brand.

Our assessment of the divestment undertaking

112. In considering whether any divestment undertaking would be sufficient to restore competition in the relevant markets, we have had regard to our own guidelines⁸⁷ as well as international best practice as set out in the International Competition Network Merger Remedies Guide 2016.⁸⁸ In addition, we have regard to the practices of other jurisdictions.⁸⁹
113. Where we consider that a merger is likely to substantially lessen competition in the relevant market(s), we consider whether the proposed divestment undertaking will remedy the likely substantial lessening(s) of competition. For a divestment undertaking to remedy competition concerns, we must be satisfied that the divestment would result in sufficient competitive constraint on the merged firm so that a substantial lessening of competition is no longer likely.
114. In making this assessment, we also consider the risk that the divestment proposal will fail to provide a sufficient competitive constraint to prevent a substantial lessening of competition. There will always be some uncertainty about a purchaser's likely impact on the relevant market. It follows that there will also be some uncertainty whether a divestment will actually remedy the competition concerns raised by the merger.
115. We assess whether the divestment would, of itself, or in combination with other market conditions, likely remedy the competition concerns that have been identified.
116. In this instance, Thales is proposing to divest its entire global general purpose HSM business. If the Divestment Undertaking is able to be completed as proposed, it would address our concerns and maintain the level of competition in the general purpose HSM market in New Zealand by establishing a credible and sustainable competitor to Thales. In effect, the proposed divestment, if completed, would return competition to the status quo.⁹⁰
117. In order to understand the ability of Thales to complete the Divestment Undertaking, we assessed the proposed divestment in relation to three kinds of risks that the divestment will not restore competition sufficiently.
 - 117.1 Composition risk – the risk that the scope of a divestment undertaking may be too constrained, or not appropriately configured, to attract a suitable purchaser.

⁸⁷ Mergers and Acquisitions Guidelines above n3 at Attachment F.

⁸⁸ Merger Remedies Guide 2016, Merger Working Group, International Competition Network.

⁸⁹ Richard Feinstein, Negotiating Merger Remedies: Statement of the Bureau of Competition of the Federal Trade Commission (January 2012); The FTC's Merger Remedies 2006-2012, A Report of the Bureau of Competition and Economics, January 2017; and Notice on remedies acceptable under Council Regulations, European Commission, 2008.

⁹⁰ See for example, Commerce Commission interview with [].

117.2 Asset risk – the risk that the competitive effectiveness of a divestment package will deteriorate prior to completion of the divestment.

117.3 Purchaser risk – the risk that there may not be a purchaser acceptable to the Commission available and/or the risk that the applicant has an incentive to sell to a weak competitor.

Composition risk

118. Composition risk is the risk that a divestment proposal may be too limited in scope, or not appropriately configured, to attract either a suitable purchaser or to allow a successful business to be operated in competition with the merged entity.

119. We consider that, given the proposed make up of the business to be divested, any purchaser would acquire all the necessary assets, technology, and employees to be able to supply a full range of general purpose HSM products as well as the necessary maintenance services.

120. [] Given its existing structure, Thales considers that it would be able to carve-out all the necessary activities to be able to create a standalone global general purpose HSM business. In particular, the Divestment Undertaking includes [

120.1

91

120.2

120.3

92

120.4

]

121. By including [] assets and contracts currently used by Thales in the supply of general purpose HSMs, the composition risks in the Divestment Undertaking is likely to be limited.

122. Further, Thales stated that, as part of the Divestment Undertaking, it would take all the necessary steps (to the extent permitted by law) to facilitate the transfer of the existing personnel within Thales that would be necessary to operate a standalone

⁹¹ []

⁹² []

global general purpose HSM business.⁹³

[]there is a risk that a proportion of employees may not wish, or be sufficiently incentivised, to switch to a new employer. To this extent, even with the necessary assets and contracts, if a sufficient number of personnel, [], do not transfer to the divested business, there is a risk that the divested business would potentially struggle to compete effectively.

123. [].

124. We are of the view that the risk of insufficient personnel transferring from Thales to any potential purchaser is relatively low.
[]

125. We consider the scope of the Divestment Undertaking is sufficient to enable any purchaser to offer a competitive alternative to the merged entity in the general purpose HSM market.

Asset risk

126. Asset risk is the risk that the competitiveness of a divested business will deteriorate prior to completion of the divestment, such that the divestment will not restore competition to the relevant markets sufficiently.

127. Given the terms of the proposed Divestment Undertaking, we consider there is little risk of asset deterioration prior to the divestment. This is primarily because the Divestment Undertaking requires that:

127.1 a Monitoring Trustee, to be approved by the Commission, supervises Thales' compliance with the Divestment Undertaking;

127.2 a hold separate manager, under the supervision of the monitoring trustee, manages the day-to-day operations of the general purpose HSM business to ensure that these operations are managed as a distinct and saleable entity, separate from Thales' other operations;

127.3 any confidential information relating to the general purpose HSM business is ring fenced from Thales and not transferred to the merged entity; and

⁹³

[]

127.4 the monitoring trustee and the Commission are regularly informed of the progress on the divestment.

128. Further, the Divestment Undertaking provides that the divestment is to occur within [] of the completion of the proposed acquisition. This timeframe limits the risk that the competitiveness of the general purpose HSM business will deteriorate prior to completion of the divestment and is in line with the Commission's typical timeframe for divestments.

Purchaser risk

129. In assessing purchaser risk, the key factors we consider are:

129.1 whether there will be a purchaser who will restore competition sufficiently in the relevant markets and therefore be acceptable to us; and

129.2 whether the Applicant has an incentive to sell to a party who would not be a strong competitor.

130. A buyer acceptable to us needs to have certain attributes that enable it to be an effective competitor in the relevant market. Examples of attributes that may make a buyer acceptable are:

130.1 it is independent of the merged entity;

130.2 it possesses or has access to the necessary expertise, experience and resources to be an effective long term competitor in the market; and

130.3 the acquisition of the divested shares or assets by the proposed buyer does not in itself raise competition concerns.

131. The Divestment Undertaking requires Thales to divest, with the approval of the Commission, its general purpose HSM business to an industry party with the resources, expertise, and incentive to maintain and develop the business as a viable competitive force. In particular, any purchaser shall:

131.1 be a player with significant experience in HSMs, or a closely related field such as data security, and who has a good level of trust and reputation with industry parties;

131.2 have the ability and expertise, in using its own and the divested assets, to reliably provide the relevant products and services to customers;

131.3 have sufficiently concrete plans to undertake all necessary steps to achieve (and continue achieving) all certifications (and their updates) necessary to supply general purpose HSMs as well as the required R&D for the further development of the divestment business; and

131.4 not be likely to create competition concerns in New Zealand.

132. In terms of purchaser risk, Thales considers there is little risk that it would not be able to divest its general purpose HSM business to a suitable purchaser within [] divestiture period. While the undertaking is purposely limited to parties with industry expertise and reputations, Thales considers there would be a number of industry participants who meet these criteria and who would be interested in the proposed divestiture. In particular, this is because:

132.1 []

132.2 []

133. As with any divestment proposal where there is no upfront purchaser, we consider that the Divestment Undertaking offered by the Applicant carries some level of purchaser risk. Further, the Divestment Undertaking limits a potential purchaser to someone who has industry expertise and an established reputation. As outlined above, at present there are few general purpose HSM suppliers comparable to either Thales or Gemalto.

134. However, within the wider data security and encryption industries, there are a significant number of specialised companies, at a global level, that would likely meet the required criteria for industry expertise and reputation.⁹⁴
[]. To this extent, we are of the view that the level of purchaser risk is likely to be relatively low.

135. Further, if the Commission does not approve a purchaser
[].

Conclusion on the Divestment Undertaking

136. In our view, the Divestment Undertaking includes all the necessary assets, contracts and key personnel needed to establish an independent competitor that would restore competition in the general purpose HSM market to that which would prevail absent the proposed acquisition. Further, the risk profile of the divestment is likely to be low as the Divestment Undertaking would establish of a stand alone business for which there are likely to be a number of viable purchasers.

Overall conclusion

137. For the purposes of this application, the Commission has considered separate national markets for the manufacture/importation and supply of each of the following:

⁹⁴ Thales considers that potential interested purchasers would include:
[]

137.1 payment HSMs; and

137.2 general purpose HSMs

138. In the payment HSM market, Gemalto only has a limited presence and given the ability of competing payment HSM manufacturers to supply New Zealand customers, the proposed acquisition is unlikely to result in a substantial lessening of competition.
139. In the general purpose HSM market, Thales and Gemalto have been each other's closest competitor for some time and this competition would likely continue, absent the acquisition. With few comparable alternative suppliers to the merged entity, we had concerns that existing and potential competition would be unlikely to constrain the merged entity in this market.
140. Subsequently, Thales submitted the Divestment Undertaking to the Commission that, once completed, would address all our competition concerns in the general purpose HSM market by removing any overlap between Thales and Gemalto and creating an effective independent competitor to the merged entity.
141. Accordingly, subject to Thales' divestment undertaking, we are satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant markets.

Determination on notice of clearance

142. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Thales S.A. for it or any of its interconnected bodies corporate to acquire all of the issued and outstanding ordinary shares of Gemalto N.V., subject to the divestment undertaking provided by Thales S.A. on 11 December 2018 under section 69A of the Commerce Act 1986.

Dated this 13th day of December 2018

Sue Begg
Deputy Chair

Attachment A: The divestment undertaking provided by Thales

DIVESTMENT UNDERTAKING DEED

THALES S.A.

COMMERCE COMMISSION

Blue highlighting denotes information that is confidential to Thales



Barristers & Solicitors
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DEED DATED

DECEMBER 2018

PARTIES

1. **THALES S.A.** a company incorporated in France and having its registered office at Tour Carpe Diem, 31 Place des Corolles, CS 20001, La Defense Cedex, Paris, 92098, France (**Thales**)
2. **COMMERCE COMMISSION** established by section 8 of the Commerce Act 1986 (**NZCC**)

BACKGROUND

- A. On 1 August 2018, Thales applied to the NZCC for clearance to acquire all issued and outstanding ordinary shares of Gemalto N.V. (**Gemalto** and the **Proposed Transaction**) under s 66 of the Commerce Act 1986 (the **Act** and the **Clearance Application**).
- B. As Thales has explained among other points in its Clearance Application, Thales does not believe that the Proposed Transaction will, or is likely to, result in a substantial lessening of competition in any relevant market. Notwithstanding that, in order to secure expeditious clearance, Thales offers the NZCC the divestment undertakings in this Deed pursuant to s 69A of the Act on the terms specified in this undertaking in order to resolve the NZCC's remaining concerns.

THIS DEED RECORDS THAT:

1. DEFINITIONS AND INTERPRETATION

- 1.1 **Definitions:** For the purpose of this Deed, the terms below shall have the following meaning:

Affiliated Undertakings means undertakings controlled by the Parties and/or by the ultimate parents of the Parties.

Assets means the assets that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business as indicated in clause 2.4 and described in more detail in the Schedule.

Closing means the transfer of the legal title to the Divestment Business to the Purchaser.

Closing Period means the period of **[redacted]** from the approval of the Purchaser and the terms of sale by both the European Commission and the NZCC.

Confidential Information means any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

Conflict of Interest means any conflict of interest that impairs the Trustee's objectivity and independence in discharging its duties under this Deed.

Decision means the decisions by both (i) the European Commission pursuant to Article 8(2) of the Merger Regulation to declare the Proposed Transaction compatible with the internal market and the functioning of the EEA Agreement and (ii) the NZCC under s66 of the Act to give clearance to Thales for the Proposed Transaction.

Divestment Business means the business or businesses as defined in clause 2 and in the Schedule, which Thales commits to divest.

Divestiture Trustee means one or more natural or legal person(s) who is/are approved by the NZCC and appointed by Thales and who has/have received from Thales the exclusive Trustee mandate to sell the Divestment Business to a Purchaser [redacted]. Thales may elect to propose the same person as Divestiture Trustee under this Deed as under the Commitments given to the European Commission.

Effective Date means the date when both the European Commission and the NZCC have adopted the Decision.

First Divestiture Period means the period of [redacted] from the Effective Date.

Hold Separate Manager means the person appointed by Thales for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

Key Personnel means all Personnel necessary to maintain the viability and competitiveness of the Divestment Business, as listed in Annex 6 to the Schedule, including the Hold Separate Manager.

Monitoring Trustee means one or more natural or legal person(s) who is/are approved by the NZCC and appointed by Thales, and who has/have the duty to monitor Thales' compliance with the conditions and obligations attached to the Decision. Thales may elect to propose the same person as Monitoring Trustee under this Deed as under the Commitments given to the European Commission.

Parties means Thales and Gemalto.

Personnel means all staff of the Divestment Business as outlined in Annex 7 and Annex 8 to the Schedule.

Purchaser means the entity approved by the NZCC as acquirer of the Divestment Business in accordance with the criteria set out in clause 4.

Purchaser Criteria means the criteria laid down in clause 4.1 of this Deed that the Purchaser must fulfil in order to be approved by the NZCC.

Schedule means the schedule to this Deed describing the Divestment Business in more detail.

Trustee(s) means the Monitoring Trustee and/or the Divestiture Trustee as the case may be.

Trustee Divestiture Period means the period of [redacted] from the end of the First Divestiture Period.

1.2 Interpretation: In this deed, unless the context indicates otherwise:

- (a) **Defined Expressions:** expressions defined in the main body of this Deed have the defined meaning throughout this Deed, including the Background;
- (b) **Headings:** clauses and other headings are for ease of reference only and will not affect this Deed's interpretation;
- (c) **Parties:** references to any party include that party's executors, administrators, successors and permitted assigns;
- (d) **Persons:** references to a person include an individual, company, corporation, partnership, firm, joint venture, association, trust, unincorporated body of persons, governmental or other regulatory body, authority or entity, in each case whether or not having a separate legal identity;
- (e) **Plural and Singular:** references to the singular include the plural and vice versa;
- (f) **Clauses/Schedules/Attachments:** references to clauses, schedules and attachments are to clauses in, and the schedules and attachments to, this Deed. Each such schedule and attachment forms part of this Deed;
- (g) **Negative Obligations:** any obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done;
- (h) **Inclusive Expressions:** the term includes or including (or any similar expression) is deemed to be followed by the words without limitation; and
- (i) **Time of Essence:** time is of the essence in the performance by the Parties of their obligations under this deed.

2. THE COMMITMENT TO DIVEST AND THE DIVESTMENT BUSINESS

2.1 Commitment to Divest: In order to maintain effective competition in General Purpose Hardware Security Modules (**GP HSMs**), Thales commits to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to a Purchaser and on terms of sale approved by the NZCC in accordance with the procedure described in clause 4.2 of this Deed. To carry out the divestiture, Thales commits to find a Purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If Thales has not entered into such an agreement at the end of the First Divestiture Period, Thales shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in clause 5.12 during the Trustee Divestiture Period.

2.2 Thales shall be deemed to have complied with this commitment if:

- (a) by the end of the Trustee Divestiture Period, Thales or the Divestiture Trustee has entered into a final binding sale and purchase agreement and the NZCC approves the proposed purchaser and the terms of sale as being consistent with this Deed in accordance with the procedure described in clause 4.2; and
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- (b) the Closing of the sale of the Divestment Business to the Purchaser takes place within the Closing Period.

2.3 [redacted]

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2.4 Structure and Definition of the Divestment Business: [redacted]

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- (a) [redacted];
- (b) [redacted];
- (c) [redacted];
-];
- (d) [redacted].

3. RELATED COMMITMENTS

3.1 Preservation of Viability, Marketability and Competitiveness: From the Effective Date until Closing, Thales shall preserve or procure the preservation of the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular Thales undertakes:

- (a) not to carry out any action that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;
- (b) to make available, or procure to make available, sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans; and
- (c) to take all reasonable steps, or procure that all reasonable steps are being taken, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business, and not to solicit or move any Personnel to Thales' remaining business. Where, nevertheless, individual members of the Key Personnel exceptionally leave the Divestment Business, Thales shall provide a reasoned proposal to replace the person or persons concerned to the
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NZCC and the Monitoring Trustee. Thales must be able to demonstrate to the NZCC that the replacement is well suited to carry out the functions exercised by those individual members of the Key Personnel. The replacement shall take place under the supervision of the Monitoring Trustee, who shall report to the NZCC.

3.2 Hold-Separate Obligations: Thales commits, from the Effective Date until Closing, to keep the Divestment Business separate from the businesses it is retaining and to ensure that unless explicitly permitted under this Deed:

- (a) management and staff of the businesses retained by Thales have no involvement in the Divestment Business; and
- (b) the Key Personnel and Personnel of the Divestment Business have no involvement in any business retained by Thales and do not report to any individual outside the Divestment Business.

3.3 Until Closing, Thales shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the businesses which Thales is retaining. Immediately after the adoption of the Decision, Thales shall appoint a Hold Separate Manager. The Hold Separate Manager, who shall be part of the Key Personnel, shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by Thales. The Hold Separate Manager shall closely cooperate with and report to the Monitoring Trustee and, if applicable, the Divestiture Trustee. Any replacement of the Hold Separate Manager shall be subject to the procedure laid down in clause 3.1(c) of this Deed. The NZCC may, after having heard Thales, require Thales to replace the Hold Separate Manager.

3.4 Ring-Fencing: Thales shall implement, or procure to implement, all necessary measures to ensure that it does not, after the Effective Date, obtain any Confidential Information relating to the Divestment Business and that any such Confidential Information obtained by Thales before the Effective Date will be eliminated and not be used by Thales. This includes measures vis-à-vis Thales' appointees on the management team of the Divestment Business. In particular, the participation of the Divestment Business in any central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. Thales may obtain or keep information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or the disclosure of which to Thales is required by law.

3.5 Non-Solicitation Clause: The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of [redacted] after Closing.

3.6 Due Diligence: In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, Thales shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:

- (a) provide to potential purchasers sufficient information as regards the Divestment Business; and
 - (b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.
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- 3.7 Reporting:** Thales shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the NZCC and the Monitoring Trustee no later than **[redacted]** after the end of every **[redacted]** following the Effective Date (or otherwise at the NZCC's request). Thales shall submit a list of all potential purchasers having expressed interest in acquiring the Divestment Business to the NZCC at each and every stage of the divestiture process, as well as a copy of all the offers made by potential purchasers within **[redacted]** of their receipt.
- 3.8** Thales shall inform the NZCC and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of any information memorandum to the NZCC and the Monitoring Trustee before sending the memorandum out to potential purchasers.

4. THE PURCHASER

- 4.1** In order to be approved by the NZCC, the Purchaser must fulfil the following criteria:
- (a) The Purchaser shall be independent of and unconnected to the Parties (this being assessed having regard to the situation following the divestiture);
 - (b) The Purchaser shall have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;
 - (c) The Purchaser shall be a player with significant experience in hardware security modules , or a closely related field, such as data security, enjoying a high level of trust and a good reputation in these areas. The Purchaser shall show by way of a business plan, at the Purchaser approval stage, that it has the ability and expertise, in using its own and the Divestment Business' assets, to reliably provide the relevant products and services to New Zealand customers, even for enterprise grade security applications and that it has sufficiently concrete plans to undertake:

 - (i) all necessary steps to achieve and continue achieving all certifications, and their updates, necessary to supply GP HSMS in New Zealand; and
 - (ii) the required research and development for the further development of the Divestment Business.
 - (d) The acquisition of the Divestment Business by the Purchaser (including the final binding sale and purchase agreement (as well as ancillary agreements) relating to the divestment of the Divestment Business) must neither be likely to create, in light of the information available to the NZCC, *prima facie* competition concerns in New Zealand nor give rise to a risk that the implementation of this Deed will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant other regulatory authorities for the acquisition of the Divestment Business.
- 4.2** The final binding sale and purchase agreement (as well as ancillary agreements) relating to the divestment of the Divestment Business shall be conditional on the
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NZCC's approval. When Thales has reached an agreement with a proposed purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), within [redacted] to the NZCC and the Monitoring Trustee. Thales must be able to demonstrate to the NZCC that the proposed purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the NZCC's Decision and this Deed. For the approval, the NZCC shall verify that the proposed purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with this Deed including their objective to bring about a lasting structural change in the market. The NZCC may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, or by substituting one or more Assets or parts of the Personnel with one or more different assets or different personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

5. TRUSTEE

- 5.1 Appointment Procedure:** Thales shall appoint a Monitoring Trustee to carry out the functions specified in this Deed for a Monitoring Trustee. Thales commits not to close the Proposed Transaction before the appointment of a Monitoring Trustee.
- 5.2** If Thales has not entered into a binding sale and purchase agreement regarding the Divestment Business [redacted] before the end of the First Divestiture Period or if the NZCC has rejected a purchaser proposed by Thales at that time or thereafter, Thales shall appoint a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.
- 5.3** The Trustee shall:
- (a) at the time of appointment, be independent of Thales and Gemalto and their Affiliated Undertakings; and
 - (b) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker or consultant or auditor; and neither have nor become exposed to a Conflict of Interest.
- 5.4** The Trustee shall be remunerated by Thales in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, such success premium may only be earned if the divestiture takes place within the Trustee Divestiture Period.

Proposal by Thales

- 5.5** No later than [redacted] after the Effective Date, Thales shall submit the name or names of one or more natural or legal persons whom Thales proposes to appoint as the Monitoring Trustee to the NZCC for approval. No later than [redacted] before the end of the First Divestiture Period or on request by the NZCC, Thales shall submit a list of one or more persons whom Thales proposes to appoint as Divestiture Trustee to the NZCC for approval. The proposal shall contain sufficient information for the NZCC to verify that the person or persons proposed as Trustee fulfil the requirements set out in clause 5.3 and shall include:
- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under this Deed;
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- (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks; and
- (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or Rejection by the NZCC

- 5.6** The NZCC shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, Thales shall appoint or cause to be appointed the person or persons concerned as Trustee, in accordance with the mandate approved by the NZCC. If more than one name is approved, Thales shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within **[redacted]** of the NZCC's approval, in accordance with the mandate approved by the NZCC.

New Proposal by Thales

- 5.7** If all the proposed Trustees are rejected, Thales shall submit the names of at least two more natural or legal persons within **[redacted]** of being informed of the rejection, in accordance with clauses 5.1 and 5.6 of this Deed.

Trustee Nominated by the NZCC

- 5.8** If all further proposed Trustees are rejected by the NZCC, the NZCC shall nominate a Trustee, whom Thales shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the NZCC.
- 5.9** **Functions of the Trustee:** The Trustee shall assume its specified duties and obligations in order to ensure compliance with this Deed. The NZCC may, on its own initiative or at the request of the Trustee or Thales, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and Obligations of the Monitoring Trustee

- 5.10** The Monitoring Trustee shall:
- (a) propose in its first report to the NZCC a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.
 - (b) oversee, in close co-operation with the Hold Separate Manager, the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by Thales with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
 - (i) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with clauses 3.1 and 3.2 of this Deed;

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- (ii) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with clause 3.3 of this Deed;
 - (iii) with respect to Confidential Information:
 - (A) determine all necessary measures to ensure that Thales does not after the Effective Date obtain any Confidential Information relating to the Divestment Business;
 - (B) in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business;
 - (C) make sure that any Confidential Information relating to the Divestment Business obtained by Thales before the Effective Date is eliminated and will not be used by Thales; and
 - (D) decide whether such information may be disclosed to or kept by Thales as the disclosure is reasonably necessary to allow Thales to carry out the divestiture or as the disclosure is required by law;
 - (iv) monitor the splitting of Assets and the allocation of Personnel between the Divestment Business and Thales or Affiliated Undertakings; propose to Thales such measures as the Monitoring Trustee considers necessary to ensure Thales' compliance with this Deed, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the nondisclosure of competitively sensitive information;
 - (c) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process:
 - (i) potential purchasers receive sufficient and correct information relating to the Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and
 - (ii) potential purchasers are granted reasonable access to the Personnel;
 - (d) act as a contact point for any requests by third parties, in particular potential purchasers, in relation to this Deed;
 - (e) provide to the NZCC, sending Thales a non-confidential copy at the same time, a written report within **[redacted]** after the end of every **[redacted]** that shall cover the operation and management of the Divestment Business as well as the splitting of assets and the allocation of Personnel so that the NZCC can assess whether the business is held in a manner
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consistent with this Deed and the progress of the divestiture process as well as potential purchasers;

- (f) promptly report in writing to the NZCC, sending Thales a non-confidential copy at the same time, if it concludes on reasonable grounds that Thales is failing to comply with this Deed;
- (g) within **[redacted]** after receipt of the documented proposal referred to in clause 4.2 of this Deed, submit to the NZCC, sending Thales a non-confidential copy at the same time, a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations included in this Deed, in particular, if relevant, whether the sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser;
- (h) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations included in this Deed.

- 5.11** If the Monitoring and Divestiture Trustee are not the same legal or natural persons, the Monitoring Trustee and the Divestiture Trustee shall cooperate closely with each other during and for the purpose of the preparation of the Trustee Divestiture Period in order to facilitate each other's tasks.

Duties and Obligations of the Divestiture Trustee

- 5.12** Within the Trustee Divestiture Period, the Divestiture Trustee shall sell **[redacted]** the Divestment Business to a Purchaser, provided that the NZCC has approved both the Purchaser and the final binding sale and purchase agreement (and ancillary agreements) as in line with this Deed in accordance with clauses 4.1 and 4.2 . The Divestiture Trustee shall include in the sale and purchase agreement (as well as in any ancillary agreements) such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of Thales, subject to Thales' unconditional obligation to divest **[redacted]** in the Trustee Divestiture Period.
- 5.13** In the Trustee Divestiture Period (or otherwise at the NZCC's request), the Divestiture Trustee shall provide the NZCC with a comprehensive **[redacted]** report written in English on the progress of the divestiture process. Such reports shall be submitted within **[redacted]** after the end of every **[redacted]** with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to Thales.
- 5.14** **Duties and Obligations of the Parties:** Thales shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of Thales' or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under this Deed and Thales and the Divestment Business shall provide the Trustee upon request with copies of any document. Thales and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings
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in order to provide the Trustee with all information necessary for the performance of its tasks.

- 5.15** Thales shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. Thales shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. Thales shall inform the Monitoring Trustee on possible purchasers, submit lists of potential purchasers at each stage of the selection process, including the offers made by potential purchasers at those stages, and keep the Monitoring Trustee informed of all developments in the divestiture process.
- 5.16** Thales shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale (including ancillary agreements), the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, Thales shall cause the documents required for effecting the sale and the Closing to be duly executed.
- 5.17** Thales shall indemnify the Trustee and its employees and agents (each an **Indemnified Party**) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Thales for, any liabilities arising out of the performance of the Trustee's duties under this Deed, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
- 5.18** At the expense of Thales, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Thales' approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should Thales refuse to approve the advisors proposed by the Trustee the NZCC may approve the appointment of such advisors instead, after having heard Thales. Only the Trustee shall be entitled to issue instructions to the advisors. Clause 5.17 of this Deed shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served Thales during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.
- 5.19** Thales agrees that the NZCC may share Confidential Information proprietary to Thales with the Trustee. The Trustee shall not disclose such information.
- 5.20** Thales agrees that the contact details of the Monitoring Trustee are published on the website of the European Commission's Directorate-General for Competition as well as the website of the NZCC (if the NZCC in its discretion chooses to do this), and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.
- 5.21** For a period of **[redacted]** from the Effective Date the NZCC may request all information from the Parties that is reasonably necessary to monitor the effective implementation of this Deed.
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5.22 Replacement, Discharge and Reappointment of the Trustee: If the Trustee ceases to perform its functions under this Deed or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:

- (a) the NZCC may, after hearing the Trustee and Thales, require Thales to replace the Trustee; or
- (b) Thales may, with the prior approval of the NZCC, replace the Trustee.

5.23 If the Trustee is removed according to clause 5.22 of this Deed, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in clauses 5.1 to 5.8 of this Deed.

5.24 Unless removed according to clause 5.22 of this Deed, the Trustee shall cease to act as Trustee only after the NZCC has discharged it from its duties after all of the obligations in this Deed with which the Trustee has been entrusted have been implemented. However, the NZCC may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

6. THE REVIEW CLAUSE

6.1 The NZCC may extend the time periods foreseen in this Deed in response to a request from Thales or, in appropriate cases, on its own initiative. Where Thales requests an extension of a time period, it shall submit a reasoned request to the NZCC no later than [redacted] before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to Thales. Only in exceptional circumstances shall Thales be entitled to request an extension within the [redacted] of any period.

6.2 The NZCC may further, in response to a reasoned request from Thales showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in this Deed. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to Thales. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

7. ENTRY INTO FORCE

7.1 This Deed comes into effect when it is executed by Thales and is accepted by the NZCC under section 69A of the Act.

8. MISCELLANEOUS

8.1 Thales confirms that by entering into the obligations recorded in this Deed it intends to create binding and enforceable legal obligations for the benefit of the NZCC.

8.2 This Deed is governed by New Zealand law and the parties accept the exclusive jurisdiction of the New Zealand courts.

- 8.3** This Deed may be executed by an exchange of electronic copies (whether by email or otherwise) and execution of this Deed by that means is valid and sufficient execution.

EXECUTED AND DELIVERED AS A DEED

[redacted

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SCHEDULE

[redacted]

[redacted]

[redacted]

[redacted]