

Boeing/MDC Merger
- Legal Perspectives and Viewpoints -

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I. “Driver” Appears to be Purchase of Premium Defense Asset

A. Boeing already achieved commercial Dominance

- Boeing held 64% global marketshare
- Douglas Aircraft Co. (DAC) held 3.3%
- MD-XX canceled (Oct. 25, 1996)
- \$15B recapitalization requirement to revive DAC
- Boeing/MDC “Strategic Collaboration” Agreement (Dec. 3, 1996)
(Statement of OEM Capitulation and Non-Competition Covenant)

B. McDonnell Douglas Aerospace (MDA) is “Crown Jewel”

- Limited injury from JSF loss
- MDA has healthy programs
 - ⇒ F/A - 18 E/F SuperHornet
 - ⇒ AH-64 Apache Longbow (multi-year)
 - ⇒ F-15 Eagle
 - ⇒ C-17 (multi-year)
 - ⇒ JDAM/JASSM/SLAM PGMs
- Boeing/MDA Defense Group likely to be based in St. Louis

II. DoD Driving Industry Consolidation/Antitrust Train

- “Defense tail wagging antitrust dog” (budget implosion)
- DoD Shapes Antitrust Review Process: (1992 Horizontal Merger Guidelines)
 - FTC gives “great deference to DoD” (Pitofsky - 1994 DSB Panel)
 - Legal Test: “ability to exercise market power”
 - ⇒ “relevant market” (mission requirements)
 - ⇒ “geographic market” (global v. traditional CONUS)
 - ⇒ current players
 - ⇒ barriers to market entry (2 years)
 - ⇒ can merging contractors exercise market power? (5% long-term price hike)
 - ⇒ If anticompetitive, will “efficiencies” outweigh risk? (“no restructuring”)
 - DoD praised move from 3 competitors to two “800lb gorillas”
- DoD budget driving International Co-Development
 - SecDef accelerating International Armaments Cooperation (Mar. 23, 1997)
 - Revised DoD 5000 Directives (hierarchy of material alternatives) (Mar. 15, 1996)

III. Trans-Atlantic Confrontation

- EC threat of \$4B fine
- American Airlines & Delta contracts (van Miert: “flies in face of real competition”)
- EC does have antitrust jurisdiction:
 - Treaty of Rome, Section 86 prohibits “abuse of market position”
 - “effects” doctrine
 - 1991 EC-US Competition Agreement (joint EC/FTC review)
 - 1992 EC-US Civil Aircraft Subsidies Pact (Caps government R&D subsidies at 33%)
- Scenarios:
 - EC seeking to escape Subsidies Pact to develop A3XX (\$8B)
 - EC negotiating increased DoD “workshare” (KC-X, JSF)
 - Enticing other U.S. prime contractors

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