

# **Draft advent undertakings in lieu of national security issues**

## **Enterprise Act 2002 Undertakings**

### **Anticipated acquisition by AI Convoy Bidco Limited of Cobham PLC**

#### **Undertakings given to the Secretary of State for Business, Energy & Industrial Strategy**

**By**

**AI Convoy Bidco Limited, incorporated and registered in England and Wales with Company Number 12110752 whose registered office is at Hackwood Secretaries, One Silk Street, London, EC2Y 8HQ (“AI Convoy”);**

**And**

**Cobham PLC, incorporated and registered in England and Wales with Company Number 00030470 whose registered office is at Brook Road, Wimborne, Dorset, BH21 2BJ (“Cobham”)**

Whereas:

(A) On 25 July 2019 AI Convoy (an indirect subsidiary of funds managed by Advent International Corporation) and Cobham announced the proposed acquisition by AI Convoy of the entire issued and to be issued share capital of Cobham (the “**Transaction**”);

(B) On 17 September 2019 the Secretary of State issued a European Intervention Notice to the Competition and Markets Authority (“**CMA**”) under section 67 of the Enterprise Act 2002 (the “**Act**”);

(C) On the 29th October 2019 the CMA reported to the Secretary of State in accordance article 4 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (the “**Order**”), which was within the period specified by the Secretary of State, summarising representations received by it relating to the national security public interest consideration specified in the European Intervention Notice;

(D) The Secretary of State has the power to refer the Transaction under article 5 of the Order to the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 or may, instead of making such a reference, accept undertakings in lieu under paragraph 3(2) of Schedule 2 to the Order; and

(E) The Secretary of State considers the undertakings given below by AI Convoy and Cobham are appropriate to remedy, mitigate or prevent any of the effects adverse to the public interest within the meaning of section 58(1) of the Act which may be expected to result from the creation of the relevant merger situation, and the Secretary of State shall in consequence not make a reference to the chair of the CMA for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013.

**AI Convoy and Cobham therefore give to the Secretary of State the following undertakings for the purpose of remedying, mitigating or preventing any of the effects**

**adverse to the public interest within the meaning of section 58(1) of the Act, which may be expected to result from the creation of this relevant merger situation.**

## **1. Interpretation and Definitions**

### **In these Undertakings:**

- 1.1. where reference is made to any company then in the event of any merger, joint venture or acquisition or internal re-organisation or sale either private or to the public, such reference shall be interpreted as applying to the equivalent or successor organisation in the new structure;
- 1.2. except where the context does not allow, the singular shall include the plural and the plural shall include the singular;
- 1.3. reference to a clause is a reference to a clause within these undertakings;
- 1.4. any obligation on a party to “procure” a certain outcome shall mean an obligation for that party to exercise, lawfully and in a manner that does not otherwise put such party in breach of any fiduciary duty, any voting rights and use any and all powers vested in it from time to time as a holder of securities, shareholder, director, officer and/or employee and attorney, or through any contractual arrangements, to ensure compliance with that obligation so far as it is reasonably able to do so, whether acting alone or (to the extent that he or it is lawfully able to contribute to ensuring such compliance collectively) acting with others, provided that such obligation shall not require the relevant party to take any action which would be materially prejudicial to the interests of that party or its subsidiaries nor shall it require that party to incur unreasonable or disproportionate costs to procure the relevant outcome;
- 1.5. “**Advisory Board**” means an executive board, set up in accordance with governance documents or arrangements, having an advisory function for the sectors Aviation Services UK, Mission Systems and/or Communications & Connectivity, or should the Cobham Group structure change with an advisory function which covers business areas concerned with the delivery of Relevant Activities;
- 1.6. “**Board**” means the board of directors of a company;
- 1.7. “**Business Unit**” means a UK Operating Company or a component, subsidiary or business of a UK Operating Company, comprising assets, information and know how concerning the production of Controlled Items or concerning Relevant Activities.
- 1.8. “**Classified**” means protectively marked in accordance with the system of protective marking defined in the Cabinet Office ‘Government Security Classifications’ document as updated<sup>1</sup>;

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/715778/May-2018\\_Government-Security-Classifications-2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715778/May-2018_Government-Security-Classifications-2.pdf)

- 1.9. **"The Cobham Group"** means Cobham, the UK Operating Companies and other subsidiaries which are subject to the Security Aspects Arrangements;
- 1.10. **"CMA"** means the UK Competition and Markets Authority;
- 1.11. **"Control"** has the same meaning as in section 26 of the Act;
- 1.12. **"Controlled Items"** means all military and/or dual-use goods, software, technology and technical data which are subject to Export Control regulations;
- 1.13. **"Customer"** refers to a situation where the relevant Department is either a direct purchaser of products or services from a company within the Cobham Group or is specified under the applicable contract as the ultimate user of products or services procured from a company within the Cobham Group by a third party;
- 1.14. **"The Departments"** means the Ministry of Defence and the Home Office
- 1.15. **"Director"** means a director of the Board who has voting or decision-making rights irrespective of whether the individual is in an executive position or not;
- 1.16. **"Effective Date"** means the date on which these undertakings are accepted by the Secretary of State, except where the Transaction is not completed, in which case these undertakings shall not take effect until the date of such completion;
- 1.17. **"Government Contractor"** means a government contractor within the meaning of section 12 of the Official Secrets Act 1989 which provides, or is employed in the provision of, goods or services to either of the Departments under a Security Aspects Arrangement and includes any sub-contractor in a chain of sub-contractors and provision of goods or services as a member of a consortium arrangement;
- 1.18. **"Home Office"** means the Secretary of State for the Home Department;
- 1.19. **"List X Area"** means any secure area that has been approved to hold Sensitive Material or is, subsequent to the Effective Date, granted List X status by the Defence Security and Assurance Services in accordance with the Security Requirements for List X Contractors;
- 1.20. **"List X Contractor"** means a government contractor granted List X status by the Defence Security and Assurance Services in accordance with the Security Requirements for List X Contractors;
- 1.21. **"Ministry of Defence"** means the UK Secretary of State for Defence;
- 1.22. **"Notice"** means the notice period required for the withdrawal of a Relevant Activity from operation, which will be 12 months, or such other period provided for in the relevant contractual arrangement, whichever is the longer;
- 1.23. **"Relevant Activities"** means the provision by the UK Operating Companies of the products and services listed in the confidential Appendix as a Government Contractor.

- 1.24. **“Relevant Services”** means those Relevant Activities which are services.
- 1.25. **“Restricted Information”** means Sensitive Material or information property rights owned or partially owned by the relevant Department.
- 1.26. **“Secretary of State”** means the UK Secretary of State for Business, Energy & Industrial Strategy;
- 1.27. **“Security Aspects Arrangement”** means a contractual arrangement entered into between the Ministry of Defence and a member of the Cobham Group which incorporates DEFCON 659/A – Security Measures or any specific, enhanced arrangement which concerns assets or information marked “Official-Sensitive” or Classified as “Secret” or “Top Secret” by an authorised UK government representative, and the Security Requirements for List X Contractors;
- 1.28. **“Security Requirements for List X Contractors”** means the Security Requirements for List X Contractors v10.0<sup>2</sup> or any updated version published by the UK Cabinet Office;
- 1.29. **“Sensitive Material”** means any UK government software, information, thing or documentation provided pursuant to a Security Aspects Arrangement;
- 1.30. **“Transaction Parties”** means the Cobham Group and Al Convoy.
- 1.31. **“UK”** means the United Kingdom of Great Britain and Northern Ireland;
- 1.32. **“The UK Operating Companies”** means FR Aviation Limited; FR Aviation Services Limited; FB Heliservices Limited; Chelton Limited; and Cobham Mission Systems Wimborne Limited, being the subsidiaries of Cobham, which are government contractors in respect of the Relevant Activities;

## 2. Security Undertakings

### Strategic Capability

#### *Maintenance*

- 2.1. The Transaction Parties will undertake to ensure that the UK Operating Companies will continue to meet and have capability (including the necessary UK strategic capabilities) to meet any contractual obligations concerning Relevant Activities.
- 2.2. The Transaction Parties will ensure continuity of supply of each of the Relevant Services to the Departments by the UK Operating Companies either directly or indirectly for so long as the service is operational, and the relevant Department wishes to be a Customer, subject to: (a) the relevant Department acting reasonably in

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/367514/Security\\_Requirements\\_for\\_List\\_X\\_Contractors.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/367514/Security_Requirements_for_List_X_Contractors.pdf)

negotiating and offering to place contracts in the future; and (b) applicable third party dependencies.

- 2.3. Provided that the Departments continue to be a Customer, the UK Operating Companies will refrain from issuing Notice withdrawing any Relevant Service (except where entitled to terminate a contract otherwise than for convenience) for the period of five years.
- 2.4. The Relevant Activities will continue to be directly controlled by a company or companies incorporated in the UK under the laws of England and registered at Companies House.
- 2.5. The Transaction Parties will undertake not to restructure the UK Operating Companies' capacity in a way that would result in some, or all, of the Relevant Activities being developed and/or supplied from outside the UK without the written approval of the relevant Department.

*Sale or disposal*

- 2.6. In order to inform the exercise of the public interest intervention powers within the Enterprise Act 2002, or any superceding legislation, having particular regard to the specified consideration of national security, in connection with the potential sale or transfer of a Business Unit Al Convoy will notify the relevant Department as soon as is reasonably practicable and, in any event, within five business days of the earlier of:
  - 2.6.1. Any decision to commence a sale or transfer process;
  - 2.6.2. Receipt of an offer to acquire a Business Unit which is intended to be accepted; or
  - 2.6.3. Provision of due diligence material to any potential purchaser;
- 2.7. Al Convoy will provide the details of the assets and activities of any Business Unit to be offered for sale or transfer and to specify, in particular:
  - 2.7.1. Any activities which concern the production of Controlled Items or Relevant Activities;
  - 2.7.2. The UK revenues derived from the Business Unit;
  - 2.7.3. Any activity in which the Business Unit to be offered for sale or transfer is acting as a Government Contractor;
  - 2.7.4. Any Restricted Information held by the Business Unit to be offered for sale or transfer; and
  - 2.7.5. Any security arrangements that are in place in relation to the activities of the Business Unit to be offered for sale or transfer.
- 2.8. As soon as reasonably practicable after a decision concerning the granting of substantive due diligence rights to a potential purchaser of the relevant Business Unit, and before the exercise of those rights, Al Convoy will procure and provide to the relevant Department the following information:
  - 2.8.1. The name, company number and place of incorporation of the potential purchaser;

- 2.8.2. The company structure and office holders of the potential purchaser;
- 2.8.3. Where the potential purchaser is a consortium, details as to all members of the consortium, the structure of the consortium, decision-making arrangements of the consortium, and structure and office holders of each member of the consortium;
- 2.8.4. Details of any people with Control over the potential purchaser or where the potential purchaser is a consortium any people with Control over members of the consortium.

## **Protection of Information**

- 2.9. The Transaction Parties will ensure that the Cobham Group will comply with, and maintain certification pursuant to, the Security Requirements for List X Contractors in respect of areas where Sensitive Material is used or stored and will continue to operate a consolidated set of security controls which are accredited under ISO 27001 and the Cyber Essentials scheme.
- 2.10. The Transaction Parties will ensure that the Cobham Group will maintain necessary security controls in respect of all areas and all matters relating to Sensitive Material and in respect of any other services provided by the Cobham Group as Government Contractors.
- 2.11. The Transaction Parties will undertake that no transfer or disclosure of any Sensitive Material will be made outside of the Cobham Group, including to Advent International, or to locations outside of the UK without prior written approval of the relevant Department;
- 2.12. The Transaction Parties will ensure that only personnel with the relevant clearance will have access to Sensitive Material or a List X Area, unless the relevant Department has granted prior written approval for the relevant individual.
- 2.13. Individuals with clearance and access to Sensitive Material will only be appointed as a member of any Advisory Board with the approval of the relevant Department and will be required to maintain the security controls in place and required to excuse themselves from Advisory Board matters which may give rise to a conflict.
- 2.14. The Transaction Parties will ensure that the Cobham Group members comply, as far as relevant to their activities, with the Cabinet Office guidance “Industrial Security – Departmental Responsibilities Version 10.1 May 2018” and will ensure that the relevant Department is satisfied that arrangements within the company meet UK national security requirements.
- 2.15. In particular, the Transaction Parties will ensure that for so long any of the Cobham Group members operate as a Government Contractor:
  - 2.15.1 at least 50% of the Directors on the Board of the relevant member(s) of the Cobham Group will be both UK Nationals and resident in the UK, except insofar as the relevant Department has separately agreed in writing;
  - 2.15.2 the Chairman of the Board of Cobham will be a British national;

- 2.15.3 a sufficient number of the directors of the relevant member(s) of the Cobham Group will be UK security cleared British Citizens to enable security sensitive issues to be resolved at board level should the need arise; and
  - 2.15.4 Cobham will have a Board Level Contact who is a British national and who has overall responsibility for security in accordance with the Security Requirements for List X Contractors.
- 2.16. The Transaction Parties will ensure that at least 50% of members of the Advisory Boards are both UK Nationals and resident in the UK, except insofar as the relevant Department has separately agreed in writing.
- 2.17. The Transaction Parties will ensure that in the event of any change in the composition of the boards of any member of the Cobham Group or any structural changes to members of the Cobham Group post-closing it will satisfy the relevant Department as to the acceptability of the composition of the relevant Board, having regard to the need for the number of foreign nationals not to be excessive.

### **3. Compliance**

- 3.1. The Transaction Parties will employ an independent security controller, with appropriate AS9100 expertise, responsible for facilitating and overseeing compliance with the Security Requirements for List X Contractors and these Undertakings. Such security controller shall be a British citizen with Security Check clearance.
- 3.2. If the Transaction Parties are unable to comply with any of these Undertakings, or become aware of any material noncompliance, they will: notify the relevant Department immediately; provide to the relevant Department full reasons for the inability to comply or the non-compliance within two (2) months of becoming so aware; and use best endeavours to remedy any non-compliance as soon as possible.
- 3.3. The security controller will provide an annual compliance notice to the Departments confirming that the Transaction Parties have undertaken and maintained all commitments within these Undertakings and providing further details and the outcome of any noncompliance notice issued in accordance with clause 3.2.
- 3.4. For the purposes of checking compliance with these Undertakings, the relevant Department, or their authorised representative, shall be entitled to enter and inspect any premises used by the Cobham Group which are in any way connected with Sensitive Material and inspect any document or thing in such premises which is concerned with such Sensitive Material, whether the visit is announced or unannounced. Such representatives shall be entitled to access all such information as they may reasonably require and may remove from any premises any Sensitive Material that is being used or stored in breach of the undertakings.
- 3.5. The Transaction Parties will take or refrain from taking such action as is reasonably necessary, in order to enable Cobham to comply with these Undertakings.

### **4. Provision of Information**

- 4.1. The Transaction Parties will co-operate with the CMA and provide it with such information as it may reasonably require for the purpose of any of its functions under section 92 of the Act in relation to these Undertakings.
- 4.2. The Transaction Parties will provide the Secretary of State or the relevant Department with such information as it may from time to time reasonably require to ascertain that they are fulfilling these Undertakings.

## **5. Directions from the CMA**

- 5.1. The Transaction Parties will comply with such written directions as the CMA may from time to time give to take such steps within their competence as may be specified or described in the directions for the purpose of carrying out or securing compliance with these Undertakings. The Transaction Parties will do or refrain from doing anything so specified or described in such written directions which they might be required by these Undertakings to refrain from doing or to do.

## **6. Implementation of Undertakings**

- 6.1. The Transaction Parties will implement these Undertakings as soon as possible and in any event within five (5) working days of completion of the Transaction.

## **7. Term of Undertakings**

- 7.1. These Undertakings shall take effect upon the Effective Date and shall continue in force until they are released by the Secretary of State or as provided for in clause 7.2.
- 7.2. The obligations of the Transaction Parties under these Undertakings shall terminate:
  - 7.1.1. in full, when the Cobham Group ceases to be Controlled by Advent and/or any of its Affiliates pursuant to a bona fide transaction or series of transactions; and
  - 7.1.2. in respect of any UK Operating Company, Relevant Activity, Relevant Service and/or member of the Cobham Group, when that UK Operating Company, Relevant Activity, Relevant Service and/or member of the Cobham Group ceases to be Controlled by Advent and/or any of its Affiliates pursuant to a bona fide transaction or series of transactions.

## **8. Governing Law**

- 8.1. These Undertakings shall be governed by and construed in accordance with the laws of England and each party hereby irrevocably submits to the exclusive jurisdiction of the English courts.

Signed

For and on behalf of Al Convoy



Signed

**For and on behalf of Cobham**