

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
INTERNATIONAL BUSINESS MACHINES  
CORPORATION and ROLM CORPORATION  
  
Defendants.

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Civ. No. 84-3508  
Filed: 11/20/84

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16(b)-(h)), the United States of America files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry against International Business Machines Corporation and ROLM Corporation in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

This civil action began on November 19, 1984, when the United States filed a complaint challenging the proposed acquisition of ROLM Corporation ("ROLM") by International Business Machines Corporation ("IBM") as a violation of Section 7 of the Clayton Act (15 U.S.C. § 18). The complaint alleges that the effect of the acquisition of ROLM by IBM may be substantially to lessen competition in the United States in

the production and sale of "mil-spec commercial based computers." The complaint requests that IBM be required, if it acquires ROLM, to divest itself of ROLM's Mil-Spec Computer Division within six (6) months after November 19, 1984 and, in the interim, to hold ROLM's Mil-Spec Computer Division as a separate, independent entity.

The United States and IBM have stipulated that the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act. Entry of the proposed Judgment will terminate the action, except that the Court will retain jurisdiction to construe, modify, and enforce the Judgment, and to punish violations of the Judgment.

## II. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

In 1983, IBM and ROLM entered into an agreement pursuant to which IBM could purchase up to 30 percent of the voting securities of ROLM. Pursuant to that agreement, IBM has purchased approximately 23 percent of the voting securities of ROLM. On about September 26, 1984, IBM and ROLM entered into another agreement pursuant to which IBM will purchase all the outstanding voting securities of ROLM that IBM does not already own. Both IBM and ROLM's Mil-Spec Computer Division manufacture and sell "mil-spec computers" to the United States military. The military uses these computers to aid in communications, command, control, and intelligence functions on battlefields, in navigation and in the operation of aircraft,

ships, submarines, and missiles, and for other purposes. Thus, these computers must be specially designed and built to withstand harsh environmental conditions such as extremes in temperature, dust, or vibration. Many mil-spec computers utilize standard architectures developed by the military.

Another type of mil-spec computer used by the military is "mil-spec commercial based computers." Such a computers differs from other types of mil-spec computers because they are each software compatible with a computer that is used for a variety of commercial applications. Software compatibility permits a mil-spec commercial based computer to run software that can be run on the commercially available computer counterpart. It thus is often unnecessary to design new software for mil-spec commercial based computers, and where creation of new software is required, it is facilitated by the availability of commercial software. Also, mil-spec commercial based computers generally have greater processing capabilities than other types of mil-spec computers. In 1983, domestic sales of mil-spec commercial based computers were about \$150 million.

For a significant number of military applications, some of which have been developed recently, no acceptable alternative exists to the use of mil-spec commercial based computers. For such applications, including certain communications, command, control, and intelligence applications (e.g., missile launch



and control), the speed, reliability, and flexibility of mil-spec commercial based computers is required. In addition, the software compatibility of mil-spec commercial based computers permits the military to take advantage of software developments in commercial applications. Because of these and other unique capabilities, sales of mil-spec commercial based computers to the United States military comprise a relevant market for antitrust purposes.

Few firms produce and sell mil-spec commercial based computers. For each year from 1980 through 1983, two firms, ROLM and Norden Systems, Inc., an affiliate of United Technologies Corporation of Hartford, Connecticut, have accounted for over 80 percent of total annual domestic sales. Other competitors such as Electronic Memories & Magnetics of Encino, California, have relatively small shares of the business and limited production capacity. Thus, the production and sale of mil-spec commercial based computers is a highly concentrated business.

In addition, there are substantial barriers to beginning production and sale of mil-spec commercial based computers. To enter this business requires, among other things, access to and expertise in an appropriate commercial computer design, the adaptation of that design to meet military specifications, and the development of or access to special ceramic-coated mil-spec semiconductor chips and other specialty components. Also, a firm must have appropriate production facilities, approval by

the United States military, and a marketing group with expertise in military procurement.

ROLM manufactures mil-spec commercial based computers under a series of licenses from Data General Corporation of Westboro, Massachusetts. ROLM's mil-spec commercial based computers are software compatible with certain of Data General's commercially available computers. In calendar year 1983, ROLM's sales of mil-spec commercial based computers were approximately \$75 million, or about 50 percent of total mil-spec commercial based computer sales.

IBM is the dominant manufacturer of computers for commercial uses in the United States. Many of its commercial machines are used by the United States military. In addition, IBM manufactures mil-spec computers for the military. While IBM currently does not manufacture mil-spec commercial based computers, it is one of only a few potential entrants into that market. IBM has the capability and incentive to commence production and sale of these computers. Also, IBM has indicated to the United States military that it intends to enter this market and to commence accepting orders in 1985. IBM has significant and unique advantages with respect to entry into the production and sale of mil-spec commercial based computers. These include a variety of commercial computer designs upon which mil-spec commercial based computers could be based, expertise in semiconductor chip design, and extensive



experience in production and sale of mil-spec computers to the military.

If IBM entered the concentrated business of supplying mil-spec commercial based computers in the near future, it would be another major firm that could compete for the military's needs for such computers. However, if IBM acquires ROLM, IBM will control ROLM's Mil-Spec Computer Division. In that situation, it would be unrealistic to expect meaningful competition to exist between IBM and its newly acquired Mil-Spec Computer Division. Thus, instead of gaining a new competitor, the military still would have only two major firms to vie for its business. Therefore, IBM's acquisition of ROLM, and its Mil-Spec Computer Division, may substantially lessen competition in the production and sale of mil-spec commercial based computers in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED  
FINAL JUDGMENT AND ITS  
ANTICIPATED EFFECTS ON COMPETITION

The United States brought this action because the effect of IBM's acquisition of ROLM may be substantially to lessen competition in violation of Section 7 of the Clayton Act in the production and sale of mil-spec commercial based computers. The only anticompetitive effects associated with the acquisition would be eliminated if ROLM's Mil-Spec Computer Division and IBM remained independent competitors in the production and sale of mil-spec commercial based computers.

To this end, the proposed Final Judgment requires IBM, if it acquires ROLM, to divest ROLM's Mil-Spec Computer Division within six (6) months after November 19, 1984, and if IBM does not, the Court will, at the request of the United States, appoint a trustee to make the sale. The Final Judgment provides a mechanism that should allow ample time for a trustee to be selected in advance of the expiration of the six (6) month period, and if one is so selected, the trustee's appointment will take affect when the period expires. In addition, once the trustee is appointed, only the trustee, and not IBM, shall have the right to sell the Mil-Spec Computer Division.

If a trustee is appointed, IBM will pay all of the trustee's expenses in selling the Mil-Spec Computer Division, and the trustee's commission will be structured to provide an incentive for it to complete the sale promptly. In addition, at the time of its divestiture, the Mil-Spec Computer Division shall be able to be operated as a viable, ongoing business engaged in the production and sale of mil-spec commercial based computers. Also, the purchaser of the Mil-Spec Computer Division must be able to demonstrate that it has the managerial, operational, and financial capability to compete effectively in the production and sale of such computers and that it intends to engage in such competition. If the United States objects to the proposed purchaser, the divestiture can be completed only with permission of the Court.

The proposed Final Judgment also requires that until IBM divests the Mil-Spec Computer Division, IBM shall maintain the Division as an entity separate and apart from IBM. In addition, IBM must take all steps necessary to assure that none of the Mil-Spec Computer Division's technology or other business information becomes available to IBM. Finally, IBM is required to refrain from taking certain steps that may jeopardize the Mil-Spec Computer Division's ability to remain a viable competitor in the production and sale of mil-spec commercial based computers. A Stipulated Hold Separate Order, approved by the Court on November 19, 1984, provides these same protections until the proposed Final Judgment is entered.

#### IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage actions. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the defendant.



V. PROCEDURES AVAILABLE FOR MODIFICATION  
OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Antitrust Procedures and Penalties Act, provided that the United States has not withdrawn its consent. The Act conditions entry upon the Court's determination that the proposed Judgment is in the public interest.

The Act provides a period of at least sixty (60) days preceding the effective date of the proposed Judgment within which any person may submit to the government written comments regarding the proposed Judgment. Any person who wants to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate the comments, determine whether it should withdraw its consent, and respond to the comments. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

P. Terry Lubeck, Acting Chief  
Intellectual Property Section  
Antitrust Division (700 Safeway Building)  
U.S. Department of Justice  
Washington, D.C. 20530

## VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would assure that IBM will divest ROLM's Mil-Spec Computer Division within six (6) months and that during that time ROLM's Mil-Spec Computer Division would be isolated from any interference by IBM. The only alternative considered to settling this action pursuant to the proposed Final Judgment was for the United States to seek an injunction enjoining IBM's proposed acquisition of ROLM stock. The government rejected this alternative because there was substantial risk it would not succeed. Also, if the government had sought to block IBM's acquisition of ROLM stock and did not secure a preliminary injunction, the ultimate outcome of the litigation would have been no better and likely would have been significantly worse than the outcome reflected in the proposed Final Judgment.

IBM likely would have raised a series of arguments in opposition to a preliminary injunction. First, IBM could have argued that it would be unfair to halt the entire acquisition when the sole concern of the United States was IBM's acquisition of ROLM's Mil-Spec Computer Division, a comparatively minor part of ROLM. Second, IBM probably would have agreed to hold the Mil-Spec Computer Division separate and to divest it within a reasonable period in the event the Court were subsequently to

find a violation of the Clayton Act. Third, IBM could have asserted that an injunction would also be inappropriate because the theory of the case is based on the actual potential competition doctrine. That doctrine interprets Section 7 of the Clayton Act as prohibiting the acquisition of a major competitor in a concentrated market by one of the few actual potential entrants into that market. While this interpretation is economically sound and consistent with legal precedent, the Supreme Court has never affirmatively held that Section 7 reaches this conduct. Fourth, IBM could have asserted that it was unfair for the government now to seek to enjoin IBM's purchase of ROLM stock when the government did not object only fifteen (15) months ago when IBM notified the government that it intended to purchase up to thirty percent (30%) of ROLM's stock.

Under the circumstances, while the government believes that there are sound responses to these arguments, there was a substantial risk that the government would not have been successful if it had sued to block the entire transaction. Had the government lost the motion for a preliminary injunction, it would have had to establish liability under the Clayton Act at a trial at some indefinite point in the future. Even if successful at trial, the government would only be entitled to divestiture of the Mil-Spec Computer Division of ROLM, which is the relief called for in the proposed Final Judgment. Thus, the government concluded that the public interest in competition



in this important market would be best served by a divestiture accomplished as soon as practicable under the circumstances of this case, rather than risk a likely significant delay of divestiture and the possibility of no divestiture at all.

It should be noted that IBM told the government that it faced tax losses in the tens of million of dollars if it did not purchase the remaining ROLM stock by Wednesday, November 21, 1984. The Antitrust Division has no view on the likelihood of such losses or their magnitude. Its interest in this case relates solely to the competitive effects of the transaction. Once it was determined that a competitive problem existed in the mil-spec commercial based computer market, the government informed IBM that it would object to the acquisition of ROLM stock by IBM unless this problem could be satisfactorily resolved. IBM then requested that, if possible, a Complaint and Stipulated Final Judgment resolving the matter be filed before November 21, 1984. Negotiations commenced shortly thereafter and led to the proposed Final Judgment.

#### VII. DETERMINATIVE DOCUMENTS

The only documents determinative in the formulation of the proposed Final Judgment were the agreements between IBM and ROLM dated September 26, 1984, providing for the purchase by IBM of all the outstanding voting securities of ROLM. A copy of those agreements is being filed by the United States pursuant to Section 2(b) of the Antitrust Procedures and

Penalties Act, 15 U.S.C. § 16(b) and is attached to the  
proposed Final Judgment.

Dated: November 19, 1984

Respectfully submitted,

  
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