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*Case No IV/M.397 -
FORD / HERTZ*

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(a) INAPPLICABILITY
Date: 07.03.1994

*Also available in the CELEX database
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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 07.03.1994

MERGER PROCEDURE
ARTICLE 6(1)a DECISION

PUBLIC VERSION

To the notifying party

Dear Sirs,

Subject: Case No. IV/M.397 - Ford / Hertz
Notification of 4.2.1994 pursuant to Article 4 of Council Regulation No. 4064/89

1. The above mentioned notification concerns an agreement between the Ford Motor Company (Ford) and Commerzbank AG whereby Ford offers to purchase from Commerzbank 5% of the share capital of The Hertz Corporation (Hertz). Following the notified operation Ford will hold 54% of the shares of Hertz.
2. After examination of the notification, the Commission has concluded that the notified operation does not fall within the scope of application of council Regulation No. 4064/89.

I THE PARTIES

3. Ford is primarily involved in the manufacture and distribution of automotive vehicles and the provision of financial services, particularly to buyers of automotive vehicles. The Hertz business consists of car and truck rentals and leasing, construction equipment rental and second-hand vehicle sales. Both parties are active worldwide.

II COMMUNITY DIMENSION

4. The undertakings concerned have a combined aggregate worldwide turnover in excess of 5,000 million ECU. Both Ford and Hertz have a Community-wide turnover in excess of 250 million ECU but do not achieve more than two-thirds of

their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

III ABSENCE OF CHANGE IN THE DEGREE AND QUALITY OF CONTROL

5. Before the present operation, Ford was already the single major shareholder of Hertz, holding 49% of the voting rights and having the power to appoint 4 directors out of a total of 9 members of Hertz's Board whose decisions were taken by simple majority. Ford was also granted substantial veto rights on matters which should be viewed as primarily aimed to protect Ford's financial investment in Hertz. These matters included inter-alia the issuance of shares, changes to the company statutes, acquisitions or divestitures and vehicle supply agreements.
6. Ford's voting and veto rights in Hertz described above, although important, did not confer upon it a "de jure" right of control of Hertz since, on the one hand, Ford did not have the majority of the votes on the Board, and on the other, the veto rights which were granted to Ford did not include essential matters related to the conduct of Hertz's businesses such as the establishment of the business plan and the budget and decisions regarding major capital expenditure.
7. However, in addition to these rights (mentioned in paragraph 5) Ford was also granted by the 1989 Stockholders' Agreement between Ford and all other shareholders in Hertz the power to convert, at its sole discretion and at any time, part of its Class C shares into Class B shares, and by this operation to increase its representation on Hertz's Board to an absolute majority with the addition of two other directors. Ford's conversion rights could be exercised in a matter of hours and did not require any further cash disbursement.
8. For instance, should the Hertz's other stockholders decide to support a Board decision against Ford's will, in a matter of days or even hours Ford would have the possibility of converting a minimum of 200 Class C shares into 200 Class B shares, so becoming entitled, according to the Stockholders' Agreement, to appoint two additional directors and thus take control of the Board. The new Board, controlled by Ford, would then be able to vote again on the contested matters and take a new decision in accordance with Ford's proposals.
9. Ford's unconditional right to obtain a majority on the Hertz Board at any time can therefore be viewed as conferring upon them "de facto" sole control of Hertz. Indeed, since the acquisition of Ford's interest in Hertz, the decisions of the Board have been consistently taken by unanimity and Ford, therefore, has not needed to exercise that contractual right, as its proposals related to the business conduct of Hertz have always been put into effect by Hertz.

IV CONCLUSION

10. For the foregoing reasons, taking into account that the notified operation - although allowing Ford to obtain a "de jure" control of Hertz by acquiring a majority of the voting rights and of the Board representation - does not imply a change in the quality and degree of decisive influence already exercised by Ford on the conduct of the business of Hertz, the proposed operation does not satisfy the conditions of Article 3(1) of the Merger Regulation and therefore does not fall within its scope.

This decision is adopted in application of Article 6(1)(a) of Council Regulation No. 4064/89.

For the Commission