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*Case No COMP/M.4763 –
Cerberus/ Torex*

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**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 7(3)
Date: 12/06/2007



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12/06/2007

SG-Greffe(2007) D/203512

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 7(3) DECISION

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.4763 – Cerberus/ Torex

Request of derogation pursuant to Article 7 (3) of Council Regulation No. 139/2004

1. We refer to your application for a derogation from the suspension obligation provided for in Article 7(1) of Council Regulation (EC) No 139/2004 ("the Merger Regulation") with regard to the proposed acquisition by Cerberus European Investments LLC ("Cerberus", USA) of sole control of the operating businesses of Torex Retail PLC ("Torex Retail", UK), submitted pursuant to Article 7(3) of the Merger Regulation on 08/06/2007 and updated on 11/06/2007.

I. THE PARTIES AND THE OPERATION

2. Cerberus is a private equity fund investing in diverse industries world-wide. The main sectors are financial services, manufacturing, building materials, car rental and real estate.
3. Torex Retail is a provider of retail-store related software and services. Torex Retail is active worldwide but has its main focus in the UK. Torex Retail is a holding company which controls 26 active UK companies and a number of foreign subsidiaries.
4. Cerberus intends to acquire via one or more holding companies organised in the Netherlands and in the UK all operating subsidiaries of Torex Retail (but not the holding company itself). The target businesses will in the following be referred to as

"Torex". As a result of the transaction, Cerberus will acquire sole control over Torex.

II. THE APPLICATION FOR DEROGATION

5. The parties submit that Torex is insolvent. Trading in the shares has been suspended.
6. The board of Torex Retail had commenced a competitive auction process to find a buyer for the group already in March 2007 and solicited bids from a number of potential buyers. Since any offers achieved in the auction process were less than the amount owed by Torex Retail to its creditors, it was decided that the sale would be effected by administrators to be appointed under the UK Insolvency Act 1986. It is intended that the business will be sold as a going concern by the administrators, in order to cover as great a proportion of its liabilities as possible.
7. By now, the company's cash flow position is according to the parties' information becoming increasingly unsustainable and it is currently only able to continue to trade with support from certain creditors. If this support ceases, an administrator will be appointed and thereafter it is considered virtually impossible that Torex could be sold as a going concern.
8. In order to ensure that the group can be sold as a going concern, the sale is supposed to be effected immediately after the administrators are appointed. According to the parties, it is a critical aspect of the sales process for an insolvent company that completion takes place as soon as possible after signature (and the appointment of the administrators) and that normally in such procedures completion is even required to be effected simultaneously. The primary reason for this is that the longer the parent company remains in administration with the administrators having the responsibility of running the group, the greater the uncertainty for customers, suppliers and employees and the greater the risk that the business will suffer a permanent loss of goodwill, reputation and viability.
9. It is standard in any bidding procedure for the seller to negotiate with a number of buyers in a first phase and then enter into in depth discussions with the most promising buyer at some point. Due to the work involved in such in depth discussions, exclusivity is normally assured to the potential buyer albeit for a short period of time. Torex Retail has granted exclusivity to the Cerberus Group until Monday 11 June.
10. As a result of the need to complete rapidly the sale of Torex, potential bidders that cannot sign and complete (more or less) simultaneously will according to the parties effectively be excluded from the procedure. Therefore, any bidder – such as Cerberus – which has a Community dimension would be excluded from the bidding process absent an Article 7(3) derogation from the Commission. Cerberus therefore requests a derogation either on or as soon as possible after Monday 11 June 2007.

III. THE CONDITIONS FOR A DEROGATION PURSUANT TO ARTICLE 7(3) OF THE EC MERGER REGULATION

11. Pursuant to Article 7(1) of the Merger Regulation, a concentration falling under that Regulation shall not be implemented either before its notification or until it has been declared compatible with the common market. Pursuant to Article 7(3) of the Merger Regulation, the Commission may, on reasoned request, grant derogation from the obligation imposed in Article 7(1). In deciding on the request, the Commission must take into account, *inter alia*, the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration.

A. THE OPERATION FALLS UNDER THE SUSPENSION OBLIGATION PURSUANT TO ARTICLE 7(1) OF THE EC MERGER REGULATION

12. The operation consists in the acquisition of sole control by Cerberus of Torex.

13. It has a Community dimension. The Cerberus Group is not yet in a position to provide audited turnover figures for the year 2006. In 2005, the Cerberus Group's world-wide turnover was EURO 47.6 billion. Its EEA-wide turnover for 2005 was EURO 8.3 billion. Torex's achieved a worldwide turnover of EURO 369 million and an EEA-wide turnover of EURO 300 million in 2006. The parties do not each achieve more than two-thirds of their Community-wide turnover within one and the same Member State. Accordingly, the transaction has a Community dimension.

14. On that basis, the operation falls under the suspension obligation laid down in Art. 7(1) of the Merger Regulation.

B. THE EFFECTS OF THE SUSPENSION ON THE UNDERTAKINGS CONCERNED AND THIRD PARTIES

15. The parties submit that the derogation would not have adverse effects on the undertakings concerned. On the contrary, a refusal of the derogation would effectively exclude Cerberus from the bidding process and would have significant negative financial effects on Torex.

16. According to the application, a derogation from the suspension obligation would not have any possible adverse effects on any third party. The Commission considers that, notwithstanding possible adverse effects on other bidders, it is appropriate to ensure that a bidder which has a Community dimension – such as Cerberus – is not unduly excluded from the bidding in the absence of a threat to competition posed by the concentration.

C. THE THREAT TO COMPETITION POSED BY THE CONCENTRATION

Horizontal effects

17. According to the parties' information, the transaction will not lead to horizontally affected markets. Torex develops and markets a variety of retail-store related software and provides related services. The software and services provided by the Target form part of the Retail Applications software ("RAS") market. The parties

submit, that suppliers of RAS normally offer different software products and services together. These typically include the following categories: EPOS software, workforce management software, business intelligence software and merchandising planning systems as well as installation, helpdesk and field engineering services.

18. According to the parties the geographic scope of the market for RAS is likely to be the EEA or wider because the main players operate on a global basis and there is a significant number of retailers operating on a global or regional basis which source the software in one country and then distribute it to all its subsidiaries/shops. On the basis of the above market definition, Torex's market share would remain clearly below 10%. Even on the basis of a national market definition, Torex would likely not have market shares exceeding 15% in the UK, which is its core market where it achieves the large majority of its turnover.
19. On the basis of the parties' information, none of the operating entities of the Cerberus Group is active in the RAS market. The parties submit that there is only one Cerberus company, Inovis International ("Inovis"), which engages in activities neighboring those of Torex which the parties, however, do not consider to form part of the same market RAS. Inovis is a US-based provider of supply chain communications software and related services to various industries. These activities essentially consist in the sale of software to companies that allow their IT systems to communicate with the IT systems of their suppliers using Inovis' B2B hosting services for inter-company electronic data interchange (or "EDI").
20. Even if both activities – EDI and RAS – formed part of the same product market, the transaction would on the basis of a preliminary assessment be unlikely to have adverse effects on competition. Both companies have a very different geographic focus. While Inovis is active only in the US, Torex operates mainly in the EEA. A horizontal overlap could only occur on a worldwide basis where according to the parties, Torex's and Cerberus' combined market shares would remain clearly below 10%.

Vertical effects

21. The Cerberus Group controls a number of companies which are active in the retail sector and therefore potentially downstream from the Target's activities in the RAS market. None of these companies generates any revenue or has any market share in the EEA. However, even under the assumption of a worldwide market, the retail customer base controlled by Cerberus would with high likelihood constitute only a small fraction of the customer base of RAS providers.

Conclusion

22. Therefore, according to the information currently available to the Commission, the operation does not seem to give rise to a threat to competition.

D. BALANCE OF INTERESTS

23. Based on the above, it appears that whilst the suspension obligation could seriously affect the financial interests of the parties, no threat to competition caused by the operation can currently be identified, and a derogation does not appear to have

adverse effects on one or more of the parties. After considering possible adverse effect on third parties, and in particular on other bidders, the Commission finds that a derogation can be granted in accordance with the application and to the extent specified below.

IV. TERMS AND CONDITIONS OF THE DEROGATION

24. Until the Commission has adopted a decision on the compatibility of the operation, this derogation is granted solely insofar as it allows Cerberus to take all actions that are reasonably necessary to restore the viability of Torex as a going concern following signing of the SPA. The necessary actions are the following:
 - Senior appointments: the two most senior management positions of Torex are currently unfilled (following the dismissal of the relevant individuals). Cerberus is permitted to take all necessary steps to fill these posts.
 - Funding: The Cerberus Group is permitted to inject capital into the company.
 - Information: Cerberus may contact the key customers of Torex to inform them of the change of ownership and Cerberus plans for Torex.
 - Costs: Cerberus is permitted to introduce cost cutting measures necessary to preserve the viability of Torex as a going concern.
25. The day to day operation of the company is the responsibility of its management. Any measures apart from those outlined above which require action by Cerberus must be approved by the Commission after a reasoned request.
26. According to Article 7(3), 3rd sentence, of the Merger Regulation, the derogation may be made subject to conditions and obligations. It is a condition of the present derogation that Cerberus appoints, subject to the Commission's approval, an independent observer, responsible for ensuring that the businesses of Torex are operated independently from Cerberus and that the terms and conditions of the derogation are observed. He will report to the Commission any breaches of the terms and conditions and any other matters he considers relevant to his task. The observer shall be independent of and unconnected with Cerberus. Cerberus will ensure that the independent observer is granted all the facilities necessary to carry out his task.
27. The derogation is made subject to the condition that Cerberus appoints one of Torex's senior managers as a "hold separate" manager who will be responsible for ensuring that the Torex's business is ring-fenced and run independently until the Commission has taken a final decision on the transaction.
28. The derogation is subject to the condition that Cerberus does not exercise any voting or other shareholder rights for any purpose other than those mentioned above until the operation has been declared compatible with the common market.

V. CONCLUSION

29. Based on the above considerations and in accordance with Article 7(3) of the Merger Regulation, Cerberus is granted a derogation from the obligations imposed by Article 7(1) of the Merger Regulation in accordance with the foregoing terms and conditions until the acquisition has been declared compatible with the common market by means of a decision pursuant to Article 6(1)b or 8(2) or a presumption pursuant to Article 10(6).

For the Commission

(signed)

Neelie KROES

Member of the Commission