

***Case No COMP/M.5263 -
DEUTSCHE BANK
LONDON / LLOYDS TSB
BANK / ANTIN
INFRASTRUCTURE
PARTNERS (BNP
Paribas) /
PORTERBROOK
LEASING***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 01/12/2008

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 01/12/2008

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties:

Dear Sir/Madam,

**Subject: Case No COMP/M.5263 - DEUTSCHE BANK LONDON/ LLOYDS TSB BANK/ ANTIN INFRASTRUCTURE PARTNERS (BNP Paribas)/ PORTERBROOK LEASING
Notification of 27/10/2008 pursuant to Article 4 of Council Regulation No 139/2004¹**

1. On 27/10/2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertakings Deutsche Bank AG ("DB", Germany), Lloyds TSB Bank plc ("Lloyds", UK) and Antin Infrastructure Partners FCPR ("AIP", UK), an investment fund sponsored by BNP Paribas SA ("BNP", France) acquire within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of Porterbrook Leasing Company Limited and subsidiaries ("Porterbrook", UK), by way of purchase of shares.

I. THE PARTIES

2. DB is a global provider of financial services.
3. Lloyds is a financial services group providing banking and financial services in the UK and overseas. Lloyds entered into an agreement to acquire HBOS plc (HBOS) - a UK-based banking and financial company - on the terms of a recommended acquisition by

¹ OJ L 24, 29.1.2004 p. 1.

Lloyds TSB of HBOS, on 18 September 2008. This operation has not yet been completed².

4. AIP is an investment fund controlled by BNP.
5. BNP is a provider of banking and financial services in France and abroad.
6. Porterbrook is a British rolling stock leasing company ("ROSCO") which specialises in the supply of all types of railway rolling stock and associated equipment to British passenger train operating companies ("TOCs") and freight companies ("FOCs") under the terms of operating leases. It has a number of wholly-owned subsidiaries, through which it owns leases and provides maintenance to its railway rolling stock fleet.

II. THE OPERATION

7. According to the contractual arrangements³, following completion of the transaction the three acquiring parties will hold 100% of Porterbrook's issued voting share capital, under the following proportions: DB [...]%, Lloyds [...]% and AIP [...]%. Voting rights will follow the proportions of the acquiring parties' respective shareholding interests. However, each acquiring party will acquire joint control because, through rights given in the Partnership Agreement (section 9), each will have a veto right over "Special Majority Partner Matters" such as approving the business plan of the Target, the appointment of executive management and chairman, and the capital expenditure.

III. CONCENTRATION

8. The concentration concerns the proposed acquisition of joint control by DB, Lloyds and AIP, of the entire issued share capital of Porterbrook from its current owner, Abbey, which is part of the Banco Santander Central Hispano SA group.
9. Based on the above, the notified operation leads to the acquisition of joint control and constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

10. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion⁴ [DB EUR 89,509 million, Lloyds EUR 37,445 million, BNP EUR 92,376 million, Porterbrook EUR 375.3 million]. Each of them have a Community-wide turnover in excess of EUR 250 million [DB EUR [...], Lloyds EUR [...] million, BNP

² The agreement is subject to shareholder approval. It has been cleared in the UK, with a Decision by the Secretary of State for Business dated 31 October 2008 but is conditional upon obtaining merger control approvals and regulatory clearances from certain other regulatory bodies in other jurisdictions. It is expected that the Acquisition will be completed at the end of 2008 or in early 2009.

³ Partnership Agreement, signed on 14/10/2008 and Shares and Purchase Agreement, signed on 24/10/2008.

⁴ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25).

EUR [...]million, Porterbrook EUR 375.3 million], but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.

11. The notified operation therefore has a Community dimension.

V. COMPETITIVE ASSESSMENT

(1) Introduction and brief description of the British rail industry

12. According to the notifying parties, when the UK rail network and operations were privatised in 1995, all British Rail's operations were split between over 100 private companies⁵. Ownership and operation of the infrastructure of the railway system (e.g. tracks and stations) was taken over by Railtrack (now Network Rail). Passenger services were divided between 23 TOCs, which were, and still are, awarded franchises by the UK Government, through the Department for Transport (DfT), using a competitive tender process to operate a given passenger route, usually for 7 to 10 years. All freight services were sold off completely by the Government.
13. The rolling stock (i.e. the locomotives, wagons, multiple units and coaches) was sold either directly to the new freight operators, or to three rolling stock leasing companies (ROSCOs), which lease rolling stock to TOCs and FOCs. The three British ROSCOs created at the time of privatisation were: Porterbrook, Eversholt Leasing (now HSBC Rail) and Angel Trains.
14. The notifying parties argue that there is a distinction between freight and passenger rail stock leasing. According to them, freight rolling stock is leased as and when required, whereas passenger rolling stock is usually leased at the time that a TOC⁶ is awarded a franchise to operate particular passenger rail services (or, in some cases, mid-franchise where there is a "cascade" of replacement rolling stock from one franchise to another).
15. According to the parties, the new procurement models⁷ introduced in the last couple of years by the UK Government cause the passenger rail industry in Great Britain to move away from the traditional ROSCO-led procurement model in respect of new rolling stock (existing rolling stock will continue to be available only from ROSCOs). This has started to introduce a wider pool of competitors into the British rolling stock leasing market and is expected to continue to increase competition in the future.

⁵ Hitherto all of the infrastructure, and all of the passenger and freight operations running on the network were owned and operated by the UK government through British Rail

⁶ During the franchise award procedure, TOCs have to approach ROSCOs to negotiate and secure rolling stock leases.

⁷ The project to procure a new fleet of inter-city express trains ("IEP") and the London over-ground Thameslink routes tender are expected to open the market to even greater interest from non-ROSCO financiers in the future.

(2) Relevant product markets

16. Porterbrook is a ROSCO and owns a large volume and variety of railway rolling stock in Great Britain. Its principal business activity is the supply of operating leases of all types of railway rolling stock and associated equipment to British TOCs and FOCs⁸. The notifying parties underline that there is a fundamental distinction between passenger and freight rail stock leasing. While passenger rolling stock is usually leased at the time that a TOC is awarded a franchise to operate particular passenger rail services (or, in some cases, mid-franchise where there is a “cascade” of replacement rolling stock from one franchise to another), freight rolling stock is leased as and when required.
17. For the purposes of the current case, it is not necessary to reach a conclusion whether the relevant product market only includes operating leases of passenger rolling stock⁹ or whether also freight rolling stock is included as the case does not raise competition problems however the market is defined.
18. With regard to leasing, the notifying parties recall in fact that the Commission has recognized in the past¹⁰, that there is a fundamental distinction on the *demand-side* between direct ownership, finance leasing and operating leasing of rolling stock, since under a finance lease ownership of the asset and risk are transferred to the lessee, and the asset appears on the lessee’s balance sheet (or hire purchase)¹¹, whereas under an operating lease, the risks and rewards remain with the lessor at all times. They consequently submit that, on the demand-side, the market for the supply of operating leases for passenger rolling stock to TOCs is separate from the market for the supply of finance leases of rolling stock. They also stress that Porterbrook does not operate any finance leasing of rolling stock to third parties. This distinction between operating leasing and financial leasing is in line with previous Commission decisions¹².

⁸ Porterbrook also supplies to TOCs maintenance services on the rolling stock it owns, where the provision of such maintenance services is included in the lease.

⁹ This is not inconsistent with the approach taken by the UK Competition Commission in its investigation of the UK Rolling Stock Leasing Market. In its Provisional Findings report, http://www.competition-commission.org.uk/inquiries/ref2007/roscos/pdf/prov_find_report.pdf, the Competition Commission generally comes to the conclusion that it has to "take account of the fact that a different range of potential substitutes may be relevant to different lease transactions" and that therefore no single product market can be identified, but as a starting point (and as the broadest conceivable market definition), the market would be defined as the supply of rolling stock to TOCs through operating leases, see paragraphs 4.4, 4.26 of the Provisional Findings report. This is supported by the Competition Commission's statement in its Working Paper on Substitutability, p.3, concerning the same investigation (http://www.competition-commission.org.uk/inquiries/ref2007/roscos/pdf/working_paper_substitutability.pdf), setting out that the "terms of reference identify the 'leasing of rolling stock for franchised passenger services and the supply of related maintenance services' as the reference goods and services. This is most easily broken down into the supply of two types of services: (a) the supply of rolling stock to TOCs through leases; and (b) the supply of maintenance services to a TOC."

¹⁰ Case COMP/M.669 – Charterhouse / Porterbrook, decision of 11 December 1995, para 16.

¹¹ Similar considerations apply to the outright purchase of passenger rolling stock therefore differentiating it from rolling stock provided on the basis of operating leases.

¹² See Case COMP/M.3090 - Volkswagen / Offset / Crescent / LeasePlan /JV and Case COP/M. 4844 – Fortis/ABN Amro Assets.

(3) Relevant geographic markets

19. From a geographic perspective, the parties submit that the supply of operating leases of all types of railway passenger rolling stock and associated equipment to British TOCs is confined to Great Britain due to differing regulations and technical incompatibilities of rolling stock in the rest of Europe. This is consistent with a previous Commission decision on the same issue¹³ and with the UK Competition Commission's findings in its "Working Paper on Substitutability" of 2007.

(4) Conclusion on the relevant market.

20. In the present case, the market for supply of operating leases of all types of railway passenger rolling stock and associated equipment to British TOCs, or of all types of rolling stock including passenger as well as freight rolling stock is national as it concerns Great Britain.

(5) Competitive assessment.

21. Porterbrook is active in the supply of operating leases of all types of railway passenger rolling stock and associated equipment to British TOCs. It has a market share of 31%. Its main competitors are Angel with 36% and HSBC Rail with 28% market share. Voyager Leasing ("VL") has a 3% market share and other smaller parties have the remaining 2%.
22. The notifying parties submit that neither DB, nor AIP/BNP have any operating leasing activities in the British rail industry.
23. However, HBOS and the Royal Bank of Scotland ("RBS") jointly own, since 2000, the fleet of the 78 "Voyager" passenger trains, which are leased by VL to TOCs, originally only to Virgin Trains and since recently to Virgin Trains (21) and Arriva (57). Although VL fully belongs to the RBS, HBOS could be considered to have a controlling power in its operating leasing decision making, because of its ownership of half of the Voyager fleet. Therefore, given the announced acquisition by Lloyds of HBOS¹⁴, it could, in substance, be considered that VL's market share of 3% has to be added to Porterbrook's, which gives a total of 34%.
24. The notifying parties argue that VL's activities are minor. Their only active involvement in this market is to provide, through an operating lease, its only asset, the fleet of "Voyager" passenger trains used by Virgin Trains and Arriva, the only customers of VL. Secondly, VL does not have a dedicated operational day-to-day management team, having outsourced the maintenance function to the manufacturer of the trains, Bombardier.

¹³ Case M.669, 1995

¹⁴ In accordance with past European Commission practice, the parties have included information on the HBOS business to the extent relevant to the European Commission's consideration of the acquisition of the Porterbrook.

25. In conclusion, the notifying parties stress that VL only accounts for 3% of passenger rolling stock in the UK. So even if VL were viewed as competing with Porterbrook, the combination of Lloyds' interest in VL and Porterbrook would not materially alter the market.
26. Two main competitors to Porterbrook (Angel and HSBC Rail) are present in the market and will be after the transaction. The increment of VL will not materially affect competition. Historically, it only had one customer (and since recently two). It has not increased its assets in the past [...]. Moreover it has not bid in any additional bid for procurement to a TOC since 2000 and consequently has not posed any competitive constraint on Porterbrook. Finally, the new procurement models introduced recently in the UK, see paragraph 15, will introduce a wider pool of competitors into the new rolling stock leasing market. Therefore the merger does not materially alter the market structure, even if it would be considered that the VL / Voyager fleet is controlled by HBOS.

VI. STATE AID ISSUES

27. A number of state aid measures that might benefit some of the notifying parties have been recently granted. In keeping with the case-law of the Court, the Commission has to consider the impact of these measures on the financial strength and future market position of the notifying parties and their consequences for the maintenance of effective competition in the Common market post-transaction¹⁵.
28. BNP is eligible for the French government's refinancing that was approved by the Commission on 30 October 2008 (N548/2008). Under this scheme, BNP Paribas have access to liquidity facility guaranteed against collaterals. Moreover, on 21 October 2008, BNP announced the intention of the French government to inject EUR 2.55 billion granted in the framework of a recapitalisation scheme put in place in the context of the financial crisis that is currently under review by the Commission). This injection should not take place until the Commission takes a final position on the compatibility of this scheme that should not lead to a significant distortion of competition.
29. Lloyds and HBOS have benefited from the UK package of measures intended to ensure the stability of the UK's financial system (recapitalisation, guarantee schemes and short term liquidity measures) that was approved by the Commission on 13 October 2008 (N507/2008).
30. As for the state aid measures that might benefit Lloyds HBOS and BNP post-transaction, the UK refinancing scheme has already been approved by the Commission

¹⁵ It must be stressed that, for the purposes of Council Regulation 139/2004, even a possible qualification of the above measures as state aid incompatible with the common market would not affect the assessment of the notified concentration. In this respect, it should be recalled that the assessment made under Regulation 139/2004 does not aim at excluding all possible impact on competition of state measures and does not provide a parallel assessment of the legality of aid. Rather, state aid is considered in the assessment merely in order to verify that the state measures in question are not such, in combination with other elements of the market situation, as to confer on the merged entity a market position which would result in a significant impediment to effective competition.

in the framework of the state aids rules as compatible with the common market; the French recapitalization scheme is currently under review and will only be approved if it is compatible with the common market.

31. Porterbrook as such is not a financial institution and will not benefit from any such state aid measures. Hence, any financial aids given to the parent companies could only indirectly benefit Porterbrook and it does not seem likely that these measures would lead to any significant change of the financial strength and future market position of Porterbrook.
32. Therefore, those state measures will not likely lead to any significant impediment of effective competition under the Merger Regulation. This Decision is entirely without prejudice to the Commission's eventual position on the existence and, if so, the compatibility of any State aid.
33. Consequently, the transaction does not raise serious doubts as to its compatibility with the Common Market.

VI. CONCLUSION

34. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
(signed)
Neelie KROES
Member of the Commission