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***Case No IV/M.664 -
GRS Holding***

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

Article 6(1)(b) NON-OPPOSITION
Date: 11/12/1995

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.12.1995

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sirs,

Subject : Case No IV/M.664 - GRS Holding

Notification of 10.11.1995 pursuant to Article 4 of Council Regulation No 4064/89

1. On the 10 November 1995 Nomura International plc. ("NI") notified an operation by which it will acquire control of Angel Train Contracts Limited ("ATC"). The transaction forms a first step in the UK rail privatization process.
2. After examination of the notification, the Commission has concluded that the proposed operation falls within the scope of the Council Regulation No 4064/89 (the Merger Regulation) and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

I. The Operation and the Parties

3. NI is a wholly owned subsidiary of Nomura Securities Co. Limited, an international investment bank based in Japan. NI's principle activities are in brokerage, trading and the underwriting of securities and the provision of corporate finance and investment advisory services.
4. ATC is one of the three ROSCOS which will provide railway passenger rolling stock, through operating leases, to Train Operating Companies ("TOCS"). ATC is also responsible for certain heavy maintenance of the rolling stock.
5. GRS Holding is the holding company of ATC and its shares are held equally by Prideaux & Associates Limited ("P&A") and Babcock & Brown (UK) Holdings Limited ("B&B"). P&A is a business advisory company providing specialist services in the merger and acquisition and project fields, with a particular emphasis on railway related projects. B&B is a subsidiary of Babcock & Brown Holdings Inc a specialist in asset financing, leasing and tax based financing advisory company, with particular specialisation in transport equipment.

6. The concentration consists of an acquisition of sole control of ATC by NI through GRS Holding which is controlled by NI by means of contractual rights conferred by a Co-operation Agreement. According to the Co-operation agreement, NI, will hold warrants entitling it to acquire [...] ⁽¹⁾ of the ordinary shares of GRS Holding. In addition, NI may acquire shares from defaulting parties and require the other parties to sell their shares and/or warrants in certain circumstances. None of the other shareholders are allowed to dispose of any of their shares in GRS Holding without the consent of NI for a specified duration.

II. Community Dimension

7. The operation has a Community dimension. The worldwide turnover of all the undertakings concerned exceeds ECU 5 billion. In 1994/95 NI had turnover of ECU 8.3 billion (calculated in accordance with Article 5(3)) and ATC of ECU 373 million, of which 100% was achieved within the United Kingdom. The Community-wide turnover of each of at least two of the undertakings concerned exceeds ECU 250 million and the undertakings concerned do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.

III. Compatibility with the Common Market

The relevant product market

8. NI has submitted that the relevant product market is the provision of passenger rolling stock by way of operating leases. However it is necessary to consider whether the method of financing this provision is relevant. The provision of rolling stock through operating leases differs from the provision of rolling stock either through finance leasing or by outright purchase by the train operator. Operating leases are structured over a shorter period than the economic life of the asset and, consequently, are aimed at a shorter period of supply, geared to the needs of the TOCS, which have franchises limited to some 7-10 years.
9. Finance leasing, on the other hand, is generally of a longer period and fully repays the asset cost resulting in the transfer of ownership of the product to the lessee. Similar considerations apply to the outright purchase of passenger rolling stock therefore also differentiating it from rolling stock provided on the basis of operating leases.
10. However, for the purposes of this case, the question of whether the type of financing changes the definition of the relevant product market can be left open as, on the basis of the assessment set out below, a dominant position would not be created or strengthened even on the narrowest definition of the product market.

The relevant geographic market

11. The relevant geographic market is Great Britain. This is because, at present, it is understood that no opportunities exist in other Member States for the independent provision of passenger rolling stock to train operating companies. Furthermore, restrictions on the design and construction of the rolling stock and track make it impossible to provide passenger rolling stock designed for Great Britain without a fundamental redesign of the existing stock, to other Member States. Finally it should be noted that railways operating in Northern Ireland are, at present, excluded from the privatization process.

Assessment

12. The acquisition only has an impact in Great Britain and there is no overlap between the operations of NI and GRS Holding and ATC.
13. Following this step in the privatization process, the provision of passenger rolling stock to the twenty-five TOCS will be carried out by the three ROSCOS which will have an approximate market share of 33% each. These market shares arise due to the fact that each ROSCO has been granted an approximately equal share of existing passenger rolling stock of an equal average age. Furthermore each ROSCO has been endowed with operating leases, of similar lengths and values, that already exist with the TOCS.

(1) Deleted business secret.

14. The purpose of the sale of the ROSCOS is to introduce competition into the market for the provision of passenger rolling stock. At the outset it may appear that competition may be restricted due to the market shares of the three ROSCOS and specifically of ATC. However it should be noted that the TOCS, on renewal of the operating leases, will be able to choose between the various providers of passenger rolling stock. Furthermore, there will be no regulatory restrictions or licence requirements (other than those appertaining to safety) preventing other operators entering the market. In this respect, and in the light of the Commission's enquiries, it would appear that manufacturers of passenger rolling stock may be willing, in the short term, to supply such equipment, on the basis of operating or finance leases, to the TOCS.
15. Consequently it is not considered that the acquisition of ATC by NI creates or strengthens a dominant position in the common market.

IV. Ancillary restrictions

Non-competition clauses

16. Clauses 4.2, 4.3 and 4.4 (as amended) of the Co-operation Agreement, clauses 2.2 and 3.6 of the P&A Consultancy Agreement and clauses 2.1, 2.2 and 3.8 of the B&B Consultancy Agreement place restrictions on the parties as regards the acquisition of an interest in a competitor or the provision of services to the same. In addition it is provided that the minority shareholders can not entice away employees from GRS Holding during the minority shareholders' period of beneficial interest. These clauses either impose periods of non-competition on the parties, of between 28 and 88 months, or periods limited in time to the reduction of NI's interest, in GRS Holding, to below [...] ⁽¹⁾ or [...] ⁽²⁾ in respect of the provision of services and the acquisition of an interest in a competitor or the enticing away of an employee.
17. The geographic dimension of these non-competition clauses is widely drawn. Whilst it is appropriate that such clauses should be made with respect to other ROSCOS and TOCS it is not believed to be necessary to exclude other lessors of rolling stock operating in the UK or all train manufacturers worldwide. Therefore, to the extent that these non-competition clauses operate inside Great Britain, they can be considered as ancillary restrictions directly related and necessary to the implementation of the concentration.

Restriction on transfer of warrants

18. Clauses 7.1, 7.2 and 7.3 (as amended) of the Co-operation Agreement provide that the minority shareholders may not, subject to certain exceptions, dispose of their warrants except with NI's consent. This forms a normal commercial arrangement and can be considered as an ancillary restriction directly related and necessary to the implementation of the concentration.

V. Conclusion

19. For the above reasons, the Commission has concluded that the notified operation does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89.

For the Commission,

(2) Deleted business secret.