

*Case No IV/M.669 -  
Charterhouse /  
Porterbook*

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

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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.669 - Charterhouse / Porterbrook

Notification of 9.11.1995 pursuant to Article 4 of Council Regulation No 4064/89

1. On the 9 November 1995, Charterhouse Development Capital Holdings Limited ("CDCH") notified an operation by which it will acquire control of Porterbrook Leasing Company Limited ("Porterbrook"). 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. CDCH, whose principle activity is the acquisition of interests in unlisted companies, is part of the Charterhouse Group whose ultimate parents are the French, Crédit Commercial de France SA ("CCF") and the German, Handels-und Frankfurter Bank ("BHF").
4. CDCH will acquire, via Porterbrook Leasing Company MEBO Limited, its wholly owned subsidiary, Porterbrook. Following the operation Charterhouse Group will hold [...] <sup>1</sup> of the shareholding of Porterbrook and will have sole control over this company.

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(1) Deleted business secret.

5. Porterbrook is one of the three ROSCOS which will provide railway passenger rolling stock, through operating leases, to Train Operating Companies ("TOCS"). Porterbrook is also responsible for certain heavy maintenance of the rolling stock.

## **II. Application of Article 3(5)(c) Merger Regulation**

6. CDCH has submitted that as Porterbrook is to be acquired by "financial holding companies", within the meaning of Article 3(5)(c) of the Merger Regulation, the transaction is not notifiable.
7. It is the view of the Commission that this interpretation of Article 3(5)(c) is inappropriate. "Financial holding companies" are defined in Article 5(3) of the Fourth Council Directive (78/660/EEC)<sup>2</sup> of 1978 concerning the annual accounts of certain types of companies as being: "those companies the sole object of which is to acquire holdings in other undertakings, and to manage such holdings and to turn them to profit, without involving themselves directly or indirectly in the management of such undertakings .... limitations imposed on the activities of these companies must be such that compliance ... can be supervised by an .... authority".
8. CDCH has submitted its Memorandum and Articles of Association to the Commission to support its assertion that it is a "financial holding company" and quotes clause 3(1), which states that one of CDCH's objects is "to carry on the business of an investment company". However CDCH's Memorandum of Association also shows, through 39 other clauses, that it may acquire shares or securities (clauses 2 and 3), lend money (clause 6), constitute trusts (clause 7), guarantee, support or secure (clause 9), manage, supervise or control businesses (clause 19), develop land (clause 22), effect insurance (clause 25) etc. Clearly therefore its sole object is not simply to acquire holdings in other undertakings and to manage such holdings and to turn them to profit as required by the Article 5(3) definition set out above. For these reasons it is not considered that CDCH forms a "financial holding company" within the meaning of the Fourth Directive and, therefore, the Merger Regulation.
9. Furthermore it should be noted that the UK authorities have not taken advantage of the exception provided by Article 5(3) to allow "financial holding companies" to prepare annual accounts in a special format. This is evidenced by UK company law in general and the absence of the specific supervisory body required by Article 5(3) to supervise such companies. Consequently CDCH has not been defined as a "financial holding company" by UK law.
10. The second test of Article 3(5)(c) is to ascertain whether the "financial holding company" manages its investments simply "to maintain the full value of those investments" or whether it "determine[s] directly or indirectly the competitive conduct of those undertakings." In this respect it should be recalled that the Charterhouse Group will control [...] <sup>3</sup> of the shareholding of Porterbrook; in addition, it may appoint [...] <sup>3</sup> "special directors" to Porterbrook Leasing Company MEBO Limited, one of whose consent is necessary to permit this company to undertake certain transactions.

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<sup>(2)</sup> OJ L 222 of 14.8.78, page 11.

<sup>(3)</sup> Deleted business secret.

11. Such transactions are set out in Schedule 3, Part 2 of the Agreement relating to the subscription of shares in Porterbrook Leasing Company MEBO Limited. These include, for example, matters such as [...]⁴.
12. It could be argued that a number of the above consents are necessary to safeguard the full value of CDCH's investment. However the far more probable interpretation is that these restrictions can be employed in managing directly, or indirectly, the day-to-day business of Porterhouse.
13. For these reasons the Commission does not consider that the exemption foreseen by Article 3(5)(c) is appropriate in this case and that therefore the transaction is subject to the Merger Regulation.

### **III. Community Dimension**

14. The operation has a Community dimension. The worldwide turnover of all the undertakings concerned amounted, in 1994/95, to more than ECU 5 billion. CCF has a worldwide turnover of ECU 5 billion and BHF ECU 3.02 billion, both calculated in accordance with Article 5(3), for the year ending 31 December 1994.
15. The Community-wide turnover of each of at least two of the undertakings 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. The Community-wide turnover for 1994/95 of the undertakings concerned was as follows: Porterbrook ECU [...]⁴, CCF ECU [...]⁴ and BHF ECU [...]⁴, the latter two calculated in accordance of Article 5(3).

### **IV. Compatibility with the Common Market**

#### The relevant product market

16. CDCH has submitted that the relevant product market is the provision of passenger rolling stock for the British railway industry. However it is also necessary to consider whether the method of financing this provision is relevant. Porterbrook will provide the rolling stock to the TOCS by way of operating leases. 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.
17. 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 differentiating it from rolling stock provided on the basis of operating leases.
18. 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

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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

19. The relevant geographic market is Great Britain. This is because, at present, 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

20. The acquisition only has an impact in Great Britain and there is no overlap between the operations of CDCH and Porterbrook.
21. 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.
22. 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 Porterbrook. 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.
23. Consequently it is not considered that the acquisition of Porterbrook by CDCH creates or strengthens a dominant position in the common market.

### **V. Conclusion**

24. 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 N° 4064/89.

For the Commission,