



## **DETERMINATION OF MERGER NOTIFICATION M/09/012 - SRF III/Touax**

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### **Section 21 of the Competition Act 2002**

#### **Proposed joint venture between SRF III Limited and Touax Rail Limited**

**6 August 2009**

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#### **Introduction**

1. On 8 July 2009, in accordance with section 18(1) of the Competition Act 2002 ("the Act"), the Competition Authority ("the Authority") received a notification of a proposed joint venture between SRF III Limited ("SRF III") and Touax Rail Limited ("Touax") in respect of the operation of SRF Railcar Leasing Limited ("SRF Railcar").
2. SRF III is a special purpose investment vehicle for DVB Bank SE ("DVB"), which is an international advisory bank and financial institution specialising in transport finance. Touax is part of the Touax Group, which is headquartered in France, and provides operational leases in respect of shipping containers, modular buildings, river barges and freight railcars. SRF Railcar was incorporated by SRF III for the purposes of the proposed transaction.
3. It is proposed that SRF Railcar will be active in the provision of railcar leases. As a result of the proposed transaction, Touax and SRF III will have joint control over SRF Railcar.

#### **The Undertakings Involved**

##### *SRF III*

4. SRF III is a Maltese incorporated company owned by Osiris Holding Limited and Osiris Trust Limited. Its ownership and control structure is designed to seek to ensure that it is a bankruptcy remote entity. Two directors of SRF III are appointed by the Osiris Corporate Services group ("Osiris Group"), and an independent director is nominated by DVB.
5. The Osiris Group is based in Malta and provides corporate services including directors, holding structures and trustee services to clients. It is controlled by an individual, Stuart Blackburn. It does not have a presence, or any interests in, or sales into, the island of Ireland.
6. DVB is controlled by DZ Bank AG ("DZ Bank"), a German bank which holds 95% of its shares. DZ Bank is the fifth largest bank in Germany and acts as central bank for over 1,000 co-operative banks in Germany. DZ Bank has an Irish subsidiary within its investment bank function, DZ Bank Ireland plc, based in the International Financial Services Centre (IFSC) in Dublin.

7. DVB provides investment advisory services to SRF III pursuant to a contract between DVB's London branch and SRF III. According to the terms of that agreement, SRF III may not make investments which are not approved by DVB (although SRF III may opt not to make an investment advised by DVB).
8. In addition, in reality, the main economic and beneficial interest in SRF III accrues principally to DVB and Stephenson Capital Limited ("Stephenson Capital"), a company incorporated in the Cayman Islands that is indirectly controlled by DVB<sup>1</sup> and through which DVB manages its rail investment activities. SRF III acquires funding for its investments through loans from Stephenson Capital, although it may also acquire funding from other third parties that are introduced by DVB.
9. The parties submitted that given the structure of ownership and control of SRF III, it is not entirely clear that DVB and its group of companies are undertakings involved in the transaction for the purposes of the Act. However, they submitted that as it is possible to interpret the relationship between DVB and SRF III as one of indirect control, they deemed it prudent to notify the transaction to the Authority on the basis that DVB and DZ Bank's activities in Ireland would appear to bring the joint venture within the thresholds for mandatory notification.

#### *Touax*

10. Touax is a wholly-owned subsidiary of Touax SCA, a company listed in Paris on NYSE Euronext.<sup>2</sup> The Touax Group is headquartered in France and is a global provider of operational leases in respect of shipping containers, modular buildings, river barges and freight railcars.
11. Touax is incorporated in Ireland. It is active in the freight railcar sector, providing operational leases of standardised mobile equipment to its customers, the majority of which are located in continental Europe.

#### *SRF Railcar*

12. SRF Railcar is a shelf company that was established by SRF III for the purposes of the proposed transaction. As a result of the proposed transaction, SRF Railcar will lease out railcars sold to it by Touax (who will continue to manage the leasing arrangements).

### **The Proposed Transaction**

13. On completion, Touax will acquire 25.75% of the share capital of SRF Railcar and will have certain shareholder consent rights, including a right of veto over material changes to its business plan, the expansion of its business, the activities of SRF Railcar into a new line of business or market, or any changes to the nature or scope of the business as carried on from time to time.

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<sup>1</sup> The DVB group controls Stephenson Capital's investments and is entitled to the principal economic benefit from those investments.

<sup>2</sup> NYSE Euronext is the holding company created by the combination of NYSE Group, Inc. and Euronext N.V. It operates a stock exchange group and offers an array of financial products and services.

14. In addition to the shareholders' agreement, as part of the proposed transaction, Touax entered into a purchase agreement for the sale of railcars to SRF Railcar and a management agreement to manage the leasing activities of SRF Railcar. Touax will sell the railcars to SRF Railcar but will continue to manage the leases and will receive a commission on all leasing activities of SRF Railcar. The railcars being sold to SRF Railcar pursuant to the purchase agreement are pre-existing railcars which are currently subject to leases from Touax to its European customers. The benefit of these leases will be transferred to SRF Railcar but Touax will continue to manage the leases.
15. DVB's London branch will provide investment advisory services directly to SRF Railcar in a manner similar to that by means of which these services are currently provided to SRF III, whilst DVB Bank of America NV in Curacao, a subsidiary of DVB, will provide SRF Railcar with cash administration and bookkeeping services.

### **The Rationale for the Proposed Transaction**

16. DVB deals exclusively in the transport sector, in particular aviation, rail and shipping. As a lender, DVB provided, and still provides, funding to Touax and has observed its performance, thus prompting the proposed transaction. DVB's rail investment activities are managed through Stephenson Capital, which invests equity in rail assets and takes participations in high yielding loans/bonds/asset backed securities and mezzanine financings. This is DVB's first equity investment in a railcar leasing company in Europe and it considers that it is a natural progression to extend its portfolio in this area.
17. For Touax, the transaction will provide funding and capital through guaranteed sources of income as a result of the purchase agreement (which provides for the sale of railcars in three tranches) and through the management agreement, which will provide ongoing commission from the operation of the leases. The funding will enable Touax to invest further in, and expand, its own railcar leasing business.

### **Analysis**

#### *Horizontal Overlap*

18. Touax is active in railcar leasing. The DZ Group (including DVB and Stephenson Capital) is not engaged in any railcar leasing business on the island of Ireland. DVB's only interest in the railcar sector in Ireland is its existing loan to Touax. Similarly, outside the island of Ireland, DVB's only interest in railcar leasing is lending to entities in this industry, but it does not have any controlling interest in any railcar leasing business. DVB provides and will continue to provide funding to many of Touax's competitors in the European railcar leasing sector.
19. DVB is active in financial services. Touax has a number of subsidiaries, all of which are financing special purpose vehicles, which provide services to Touax only and have no market-facing presence.
20. There is therefore no horizontal overlap between the activities of the joint venture parents. SRF Railcar itself is a newly incorporated company.

### *Vertical Overlap*

21. Both DVB and Stephenson Capital provide financial lending, investment and advisory services to the transport sector and leasing companies in the railcar sector, such as Touax.
22. However, the parties submit that there is no risk of foreclosure, given the large number of financial institutions on the island of Ireland and international institutions providing services into the island of Ireland, who provide financial and advisory services to all sectors, including the transport and rail sectors.<sup>3</sup> The parties submit that DVB is a relatively small, niche player and it competes globally both with strong European and international banks and other niche players. DVB will continue to provide loans to competitors of Touax following the proposed transaction.
23. The Authority considers that there is no risk of vertical foreclosure in this case given the number of large institutions providing transport finance and the fact that DVB will continue to provide loans to competitors of Touax.

### *Conclusion*

24. As there is no real horizontal overlap and insignificant vertical overlap between the activities of the parties, the Authority considers that the result of the proposed transaction will not be to substantially lessen competition for goods and services in the State.
25. In addition, the Authority considers that the restrictions contained in the Exclusivity Side Letter that DVB, SRF III and SRF Railcar have entered into with Touax are directly related and necessary to the implementation of the proposed transaction.

### **Determination**

The Competition Authority, in accordance with section 21(2)(a) of the Competition Act 2002, has determined that, in its opinion, the result of the proposed joint venture between SRF III Limited and Touax Rail Limited in respect of the operation of SRF Railcar Leasing Limited will not be to substantially lessen competition in any market for goods or services in the State and, accordingly, the acquisition may be put into effect.

### **For the Competition Authority**

Dr Stanley Wong

Member of the Competition Authority

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<sup>3</sup> International institutions providing financial services in the transport sector include Natixis, Société Générale, Banesto, Banco Santander, Banco Popular, RBS, Standard Chartered Bank, Investec, Lloyds Banking Group, HSH Nordbank AG, BNP, SMBC, National Australia Bank and BTMU Capital Corporation.