

***Case No IV/M.1168 -
DHL / DEUTSCHE
POST***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 26/06/1998

*Also available in the CELEX database
Document No 398M1168*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.06.1998

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No. IV/M.1168 - Deutsche Post/DHL
Notification of 11 May 1998 pursuant to Article 4 of Council Regulation No. 4064/89

1. On 11 May 1998, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ ("ECMR") by which the undertaking Deutsche Post AG ('Deutsche Post') acquires within the meaning of Article 3(1) (b) of the Council Regulation joint control of DHL International Ltd. ('DHL') by way of purchase of shares. Deutsche Post will jointly control DHL together with Deutsche Lufthansa AG ('Lufthansa') and Japanese Airlines Company Ltd. ('JAL').
2. On 5 June 1998 the Commission received a proposal for undertaking by Deutsche Post according to Article 6(2) ECMR.
3. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

¹ OJ No L 395 of 30.12.1989; Corrigendum: OJ No L 257 of 21.09.1990, p. 13.

I. THE PARTIES' ACTIVITIES AND THE OPERATION

4. Deutsche Post provides the national postal service in Germany which encompasses different components including letters (international and domestic) and parcels. For the delivery of letters below a defined weight and price Deutsche Post retains a legal monopoly until the end of 2002. Since 1995 Deutsche Post has been diversifying into value added services such as contract logistics and non-express parcel delivery outside of Germany in Austria and Belgium. Deutsche Post is now also active in international and national express delivery services, which is a faster and more expensive service than basic mail with value added services, such as door-to door pick up and delivery and tracking. Deutsche Post's international express service is currently subcontracted to a subsidiary of KPN/TNT. When this contract expires on 30.06.98, Deutsche Post intends to replace the KPN/TNT subsidiary by DHL.
5. Lufthansa is an airline providing both passenger and freight services. In relation to its freight services, it operates dedicated freighters ("all cargo"), in addition to providing cargo capacity in the hold of scheduled passenger flights. Lufthansa also operates "combi" aircraft dedicated in part to cargo and in part to passengers.
6. JAL is an airline providing both passenger and air freight services. In relation to its freight services, it operates dedicated freighters ("all cargo") in addition to providing cargo capacity in the hold of scheduled passenger flights.
7. DHL's core business is the provision of cross-border express delivery for documents and parcels up to 50 kg through an international delivery network. As an integrator DHL provides integrated transport services with pre-established transit times. DHL organises a door to door pick up and delivery service, which is faster, provides a number of value added services and is more expensive than basic postal services. DHL operates some aircraft, but relies substantially on uplift capacity purchased from airlines. DHL provides domestic express services only as an add on to international services, i.e. a service offered only to international customers in order to complete a comprehensive service offering.
8. Deutsche Post intends to acquire a 22,498 % minority interest in DHL. Through voting rights and board representation for Deutsche Post it is intended that it will share control of DHL with Lufthansa and JAL, who will maintain their present share holdings of 25,001 % each.
9. According to the parties, the international express delivery will be jointly branded under DHL/Deutsche Post, but it will only be handled by DHL once it leaves the Deutsche Post network. Deutsche Post will subcontract the outbound delivery of its express business to DHL, thus terminating a corresponding agreement it has had with KPN/TNT.

II. CONCENTRATION

10. With the acquisition of a 22,498 % interest in DHL Deutsche Post will acquire control in the company jointly with Lufthansa and JAL. Joint control by the three companies will be ensured through voting rights and board membership. Deutsche Post, Lufthansa and JAL ("the controlling shareholders") will each be given the right

to appoint [a fixed number] out of [a fixed number] directors on the board of the management company, DHL World-wide Express B.V. Other DHL shareholder will have the right to appoint [a fixed number] other directors and the [a fixed number] remaining directors are appointed by the management company board itself. [business secret]. It is through this management company that the competitive strategy and strategic decisions of DHL are carried out. As strategic business decisions [business secret] require a majority of [a fixed percentage] of the votes [business secret] cast by the board, each of the three undertakings will have an effective veto right over the business policy of DHL. DHL will thus be jointly controlled by Deutsche Post, Lufthansa and JAL.

11. DHL will continue to be a full function joint venture which will perform, on a lasting basis, all the functions of an autonomous economic entity. DHL already has all the attributes of a fully fledged business and will continue to conduct its business operations autonomously as it did prior to the introduction of Deutsche Post as a shareholder. According to the parties, the existing networks of Deutsche Post and DHL will remain independent and self standing, the only substantive link between the two undertakings being sub-contractual agreements concerning the handling of Deutsche Post's international express service by DHL.

III. COMMUNITY DIMENSION

12. The undertakings Deutsche Post, Lufthansa and JAL have a combined aggregate world-wide turnover in excess of 5,000 million ECU (Deutsche Post ECU 14,205 million; Lufthansa, ECU 10,926 million; JAL ECU 5,454 million). Each of them has a Community-wide turnover in excess of 250 million ECU (Deutsche Post ECU 14,176 million; Lufthansa, ECU 7,090 million; JAL ECU 330, 5 million), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension according to Article 1(2) of the Merger Regulation. It does not qualify for cooperation with the EFTA surveillance Authority pursuant to the EEA Agreement.

IV. COMPATIBILITY WITH THE COMMON MARKET

A. Co-operative aspects

13. The operation will not have as its object or effect the co-ordination of the competitive behaviour of the parent companies. Lufthansa and JAL, together with other shareholders, have already established joint control over DHL since 1990. Notwithstanding their mutual engagement in DHL, both parties have remained competitors. The exemption given to the undertakings under Art. 85 (3) was recently renewed. Even under the assumption that co-operative behaviour between these two parent companies might occur in the future, such a potential co-operation could not be directly linked to Deutsche Post's participation in DHL and would thus not be the result of the operation.

14. With regard to Lufthansa's and JAL's cargo activities, Deutsche Post is engaged on an upstream market. Only Deutsche Post is active on a neighbouring market to the activities of DHL. According to the information available, any co-operative behaviour between Deutsche Post and the two airline companies is thus not to be expected.

B. Relevant product markets

15. The notifying parties state that the relevant product markets are the expedited transport industry, which would include international express delivery, international express freight, domestic express delivery, international express freight and logistics. In this context they refer to previous decisions of the Commission in this area and in particular case IV/M.843.² While the Commission in this case has left open the question whether this would change the established product market definition, it has recognised that the markets described as expedited transport industry, which have previously been considered to be separate markets, have now largely become integrated into one. The replies to the market enquiry of the Commission in the present case tend to confirm this development.
16. The parties further identify international mail (including the segment remail), domestic mail, domestic parcels and international parcels as separate product markets. These markets have been defined as separate markets by the Commission in case IV/M.843. The question of whether remail constitutes a relevant market in itself can again be left open in this case, since in either case the competitive assessment of the case would not change.
17. The market enquiries in the present case contain indications that parcels and express deliveries do compete at least at the margins and that these two services may become closer in term of supply side substitutability. However, this trend does not appear to be sufficiently advanced, thus the respective markets remain at this stage clearly separate.
18. For the purpose of the present decision it is not necessary to further delineate the relevant product markets beyond the above distinctions because in all alternative market definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of that area.

C. Relevant geographic markets

19. The notifying parties state that the relevant geographic market for the expedited transport industry should be regarded as European. While the Commission has defined the geographic markets for the different services defined as expedited transport industry as being national, the Commission has recognised an internationalisation of these markets. However it did not define the geographic market because the competitive assessment did not depend on such a definition. The same is true in the present case.

² Case IV/M.843 - PTT Post/TNT/GD Express Worldwide.

20. With regard to international mail/remail, domestic mail, domestic parcels and international parcels the parties state that, in line with the assessment in case IV/M.843, the geographic markets are national.

D. Effect of the concentration

21. On the basis of the premises submitted by the parties, according to which the market is the expedited transport industry within the EEA, DHL would have a market share of [less than 10 %] and Deutsche Post of [less than 5 %].
22. If the relevant geographic markets for the expedited transport industry were to be regarded as national, affected markets would not be identified either. In Germany, where both parties have significant activities, DHL has a market share of [less than 10 %] and Deutsche Post of [less than 5 %].
23. On the basis of the narrowest possible market definition, i.e. national markets for each of the above mentioned services grouped under the definition of expedited transport industry as well as the other national product markets defined above, the situation is as follows:
24. No overlaps between the activities of DHL and Deutsche Post can be observed in the areas of domestic mail, international parcels and domestic parcels because DHL has no activities in these businesses. There are no overlaps either for international express freight and domestic express freight, because DHL has no activities there.
25. The only areas in which the activities of the parties do overlap are with regard to international mail/remail, international express delivery and domestic express delivery. In all these instances an affected market can be identified, due to the high market share of one of the parties. However, the respective increment of the market shares is marginal in each case since in areas of high market shares for one party the market shares of the other are very small. In international mail/remail, where Deutsche Post has a market share of [more than 75 %] in Germany, DHL has a market share of [less than 5 %]. Deutsche Post's activity relates almost entirely relating to ordinary international mail, whereas DHL's turnover is only remail. In international express delivery, where DHL has a market share of [between 45 % and 55 %] in Germany Deutsche Post has a market share of [less than 5 %]. In domestic express delivery there is no affected market since DHL has a market share of [less than 5 %] in Germany and Deutsche Post of [less than 10 %]. The increments to the markets share caused by the operation in the affected markets are not sufficiently large to cause the creation or the strengthening of a dominant position.
26. On the basis of the combination of the parties markets shares even on the basis of the narrowest possible market definition the operation would not cause the creation or strengthening of a dominant position.
27. This conclusion is not affected by considerations about any benefit which may arise to both Deutsche Post and DHL from combining their respective activities in the mail and parcels and in the express services. The combination of both their complementary networks seems to entail some synergies but these appear to be of limited scope, mainly as a result of the different technical requirements of parcel and express networks. The use of DHL's value added fast service network is too expensive for the provision of basic postal services, whereas Deutsche Post's infrastructure is not

set up for the provision of the value added services it offers. With the intended concentration, Deutsche Post will effectively withdraw from the international express delivery business for pick-up customers. The amount of business accruing to DHL through the sale at the counters of Deutsche Post is marginal: Deutsche Post's share of international express delivery sold through its postal counters in Germany is [less than 5 %].

28. Nor does the possibility afforded to the parties to offer a complete range of services to business customers appear to provide them with a substantial competitive advantage over their competitors at least in the short term. While many of the competitors of the two companies stressed the importance of being able to offer all transport services in one hand in what they often referred to as an increasingly competitive market place, the customers indicated that they considered a one stop shop to be convenient, but that their ultimate purchasing decision depended on the price and service of the individual service purchased.
29. In these circumstances this operation cannot be taken as leading to the creation or strengthening of a dominant position of the parties on their respective markets.

E. Comments of interested parties

30. Several interested parties expressed to the Commission their concerns that the acquisition of a controlling interest by Deutsche Post in DHL has been possible only as a result of Deutsche Post's revenues from its exclusive mail concession in Germany, that Deutsche Post cross-subsidises its non-concession parcel activities by its letter monopoly, and that current or future users of Deutsche Post's networks will be discriminated against in comparison to DHL.
31. As regards the acquisition of the shares in DHL, Deutsche Post submits that the purchase is being undertaken at a market price (including a premium reflecting the acquisition of control by Deutsche Post) so that other potential purchasers have not been excluded from the same possibility to undertake the transaction, and that the acquisition is being financed by the sale of real estate which was the capital endowment for Deutsche Post when it was made into a company.
32. As regards cross-subsidisation, the Commission has for several years considered that, under certain circumstances, such a practice may give rise to action under Article 86 EC. The 1991 Guidelines on the application of EEC competition rules in the telecommunications sector³ state that "subsidising activities under competition, whether concerning services or equipment, by allocating their costs to monopoly activities . . . is likely to distort competition in violation of Article 86." In February 1998 the Commission adopted a Notice on the application of the competition rules to the postal sector and in particular on the assessment of certain State measures relating to postal services⁴. This states that "operators . . . should not use the income of the reserved area to cross-subsidise activities in areas open to competition", and contains indications as to how the Commission would assess the need for an investigation under Article 86, or under Article 86 and Article 90(1) or under Article 92.

³ OJ C 233 of 6.9.1991

⁴ OJ C 39 of 6.2.1998, p.2

33. In the present case Deutsche Post only acquires a share of 22,498% in DHL and not 100%. DHL is controlled together with Deutsche Post by Lufthansa and JAL. Any cross subsidy to DHL is likely to be unattractive for Deutsche Post, since Deutsche Post would only have the right to 22,498% of DHL's profits. An invisible transfer of funds to a commonly owned company by Deutsche Post would furthermore not be possible. In a undertaking to the Commission (see attachment to the present decision) Deutsche Post has furthermore expressly undertaken to abstain from using revenues earned from its postal concession to subsidise the operational costs of DHL and treat any commercial relations with DHL at arm's length conditions.
34. In the context of the present procedure Deutsche Post has submitted an undertaking (see attachment to the present decision) to keep separate accounts for reserved and non-reserved services and publish the basic financial data relating thereto in its annual reports.
35. As regards discrimination against competitors of DHL by Deutsche Post (which might also be an infringement of Article 86 EC), Deutsche Post is the universal service provider under German law (Deutsches Postgesetz) and thus obliged to supply the universal postal service in the whole country against compensation. The quality and prices for this service are subject to the control by the competent regulator. Detailed rules with regard to the universal service are currently being prepared by the authorities. Furthermore Deutsche Post has offered an undertaking (see attachment to the present decision) to the European Commission according to which it will offer services which it provides to DHL on a comparable basis to DHL's competitors.
36. The attachment to this decision contains the undertakings offered by Deutsche Post to the Commission on the matters referred to above. These undertakings reflect or anticipate to a large extent existing obligations under national or EC law.

IV. ANCILLARY RESTRAINTS

37. The shareholder's agreement provides for a non competition clause which ensures that Deutsche Post and the existing shareholders of DHL will not compete with or acquire interests in companies which compete with the core business of DHL. The non-compete-covenants are only applicable while the respective company holds shares in the DHL and has a right to appoint directors to the boards of DHL. The future activities of the parties already under contemplation as well as their present engagements will not be affected by the agreements.
38. To the extent this clause refers to shareholders having joint control on DHL, namely Deutsche Post, Lufthansa and JAL, the Commission considers it to be ancillary to the operation in so far as it can not be considered to form an integral part of the concentration. The clause expresses the withdrawal of Deutsche Post, Lufthansa and JAL from the market assigned to DHL.

V. CONCLUSION

39. 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 functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89. This decision is taken without prejudice to any decision the Commission may take on the basis of any other EC-competition rules, in particular Articles 85, 86, 90, 92 and 93 EC-Treaty.

For the Commission,

Undertakings by Deutsche Post AG
(Case IV/M.1168 - DHL/Deutsche Post)

Deutsche Post AG undertakes as follows:

1. that it will abstain from using the revenues earned from its national exclusive postal concession to subsidise the operational costs of DHL, in particular, that any financial and commercial relationship with DHL will be at arm's length conditions;

2. that it will, within six month of the Commission's clearance of the present concentration, keep separate accounts within its internal accounting systems for each of its services within the reserved sector on the one hand and for its non-reserved services (including parcels) on the other, in accordance with Directive 97/67/EC; such accounts will be certified by independent auditors and basic financial data relating thereto (operating cash flow and P&L statements [Kosten- und Erlösrechnung]) will be published within Deutsche Post AG's annual report, including information on the criteria employed to allocate revenues and costs between the reserved services (Briefpost) and the non-reserved services (Frachtpost); and

3. that it will, if requested, provide the services it may at any time in the future provide to DHL, to competitors of DHL. This will extend also to any services similar to those provided to DHL. This undertaking covers any and all services which use the same infrastructure which Deutsche Post AG uses for its national exclusive postal concession. Third parties will be given terms and conditions which do not discriminate between them and DHL, to the extent that the transactions are equivalent. Account will be taken of factors including but not limited to, volume, range and frequency of service to be performed, features, area and density of geographic coverage, financial compensation, liability and payment terms, and length of contract. In order to allow verification with respect to these assurances, Deutsche Post AG will keep records of the terms and conditions on which Deutsche Post AG has provided such services to third parties, including DHL, available for inspection on a confidential basis by the Commission.