EN

Case No COMP/M.5450 - KÜHNE / HGV / TUI / HAPAG-LLOYD

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 06/02/2009

In electronic form on the EUR-Lex website under document number 32009M5450

Office for Official Publications of the European Communities
L-2985 Luxembourg

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 6.2.2009
SG-Greffe(2009) D/688/689/690
C(2009) 856

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.5450 - Kühne/ HGV/ TUI/Hapag Lloyd**
Notification of 23 December 2008 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 23 December 2008 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the "EC Merger Regulation") by which the undertakings Kühne Holding AG ("Kühne"), HGV Hamburger Gesellschaft für Vermögens- und Beteiligungsmanagement mbH ("HGV") and TUI AG ("TUI") (all of Germany) acquire within the meaning of Article 3(1)(b) of the EC Merger Regulation joint control of undertaking Hapag-Lloyd AG ("HL AG", Germany) by way of purchase of shares.

I. THE PARTIES

2. Kühne is the parent company of a group of companies that are active in the logistic business with main activities in sea freight forwarding, air freight forwarding and contract logistics.

3. HGV is the holding company for the business activities of the City of Hamburg. As such, HGV has subsidiaries that are active – inter alia – in the area of container terminal services, terminal logistics services, house cleaning services, local public transport, local water supply and local real estate.

[1] OJ L 24, 29.1.2004 p. 1.

4. TUI is the parent company of TUI Group. TUI Group's core businesses are tourism and shipping. In shipping, TUI Group provides container liner shipping services via HL AG and provides passenger cruise line services via other affiliates.

II. THE OPERATION AND CONCENTRATION

5. Kühne, HGV and TUI intend to acquire indirect joint control over HL AG by way of a sale and transfer of shares. Currently, TUI is the parent company of HL AG and holds 100% of its shares. A consortium that consists of Kühne, HGV, Iduna Vereinigte Lebensversicherung a.G. für Handwerk, Handel und Gewerbe, HanseMerkur Lebensversicherung AG and M.M. Warburg & CO Gruppe KGaA intends, via a newly created vehicle, Hamburgische Seefahrtsbeteiligung "Albert Ballin" GmbH and Co. KG ("Ballin KG"), to indirectly acquire 66.67% of the shares of HL AG.

6. Ballin KG is a limited partnership company which was created with the purpose to pool the interests of its partners in the course of the acquisition and holding of the shares of Albert Ballin Joint Venture GmbH & Co. KG ("Ballin JV"), which in turn will hold 100% of the shares of HL AG. The remaining 33.33% of shares of Ballin JV will be held by TUI. The two most important shareholders in Ballin KG are Kühne with 37.57% of the shares and HGV with 34.71% of the shares. The other parents will each hold below 11% in Ballin KG.

7. As a result of the transaction Kühne, HGV and TUI will acquire joint control of HL AG in the meaning of Article 3(4) of the EC Merger Regulation for the reasons laid down below.

8. Ballin KG is a vehicle set up to indirectly acquire and hold the shares in HL AG. Whereas Ballin KG is probably more than a pure financial holding company, in that it will allow its parents to coordinate their behaviour in order to exercise managerial control over HL AG, it can neither be considered to be full-function nor to have a presence on the market.[2] The real players behind the acquisition of joint control are the parents of Ballin KG.

9. Ballin KG will be jointly controlled by Kühne and HGV. They will each have the ability to appoint one managing director of the General Partner of Ballin KG […]. Furthermore, the Articles of Association of Ballin KG confer Kühne and HGV veto rights that go beyond the rights normally attributed to a minority shareholder. In particular, the Articles of Association allow Kühne and HGV to block resolutions regarding strategic decisions at the level of Ballin JV. On the basis of these rights Kühne and HGV have the possibility of exercising decisive influence on the commercial behaviour of HL AG.

10. As regards the rights of TUI, Ballin KG and TUI have agreed that a qualified majority of 75% of the votes is required at the level of Ballin JV also with respect to certain resolutions related to the operational business. The qualified majority of 75% is required, among others, for the adoption of the budget, certain investments and certain rights with regard to the appointment of the board. The veto rights of TUI therefore exceed the normal veto rights of a minority shareholder and therefore confer TUI control over HL AG.

---

2 See paragraphs 146 and 147 of the Commission Consolidated Jurisdictional Notice (http://ec.europa.eu/competition/mergers/legislation/en.pdf).

11. Accordingly, the proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the EC Merger Regulation.

III. COMMUNITY DIMENSION

12. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion[3] (Kühne: EUR 12,774 million, HGV: EUR 2,247 million, TUI: EUR 21,772 million). Each of the three undertakings concerned have a Community-wide turnover in excess of EUR 250 million (Kühne: EUR […] million, HGV: EUR […] million, TUI: EUR […] million). Only one of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State (HGV: EUR […] in Germany). The notified operation therefore has a Community dimension pursuant to Article 1 (2) of the EC Merger Regulation.

IV. COMPETITIVE ASSESSMENT

A. RELEVANT PRODUCT AND GEOGRAPHIC MARKET

Container liner shipping

13. In previous merger decisions the Commission has found that the market for container liner shipping involves the provision of regular, scheduled services for the carriage of cargo by container[4]. It can be distinguished from non-liner shipping (tramp, specialized transport) because of regularity and frequency of the service. In addition, the use of container transportation separates it from other non-containerized transport such as bulk vessel. As possible narrower product market is that for the transport of refrigerated goods, which could be limited to reefer (refrigerated) containers only or could include transport in conventional reefer (refrigerated vessels).

14. The geographical dimension of container liner shipping services consists of single trades, defined by the range of ports which are served at both ends of the service. Each trade has specific characteristics depending on the volumes shipped, the types of cargo transported, the ports served and the length of the journey from the point of origin to the point of destination. Relevant trades are those from Northern European areas and back on the one hand[5], and from the Mediterranean to other non European areas and back on the other hand[6].

15. The parties submit that there might be substitution between Mediterranean and Northern European ports. In addition, the parties take the view that the markets should be defined according to the respective trade without distinction between the two different legs of the trade. However, for the purpose of this transaction it is not necessary to conclude on a precise definition of the geographic dimension as the transaction does not lead to any competition concerns under any market definition.

---

3 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice.

4 M.831 – PO/Royal Nedlloyd; M.1651 – Maersk/Sealand; M.3512 – ECT/PONL/Euromax; M.3829 – Maersk/PONL; M.3863 TUI/CP Ships.

5 Such as North America, Far East, South Africa, Caribbean/Central America and Australia/New Zealand.

6 See footnote 4.

Container terminal services

16. Previous decisions have defined the market for stevedoring services for deep-sea container ships, broken down by traffic flows to hinterland traffic (= direct deep-sea) and transhipment traffic (= relay/feeder).[7] The relevant geographical dimension of stevedoring services is in its broadest scope Northern Europe (for transhipment traffic) and in its narrowest possible scope the catchment area of the ports in the range Hamburg – Antwerp (for hinterland traffic)[8] or possibly even narrowed down to comprising the German ports only[9]. However, for the purpose of this transaction it is not necessary to conclude on a precise definition of the relevant market as the transaction does not lead to any competition concerns under any market definition.

Inland transportation services

17. Inland transportation covers the physical movement of goods by using own equipment. The Commission has in the past indicated that various means of transport probably constitute separate product markets and that geographically the market may be national or even wider[10]. However, for the purpose of this transaction it is not necessary to conclude on a precise definition of the relevant market as the transaction does not lead to any competition concerns under any market definition.

Freight forwarding

18. Freight forwarding has been defined by the Commission in previous cases as the organisation of transportation of items (possibly including ancillary activities such as customs clearance, warehousing, ground services etc.), on behalf of customers according to their needs[11]. The Commission in the past subdivided the market into domestic and cross border freight forwarding; land, air and sea freight forwarding; and express and standard freight forwarding[12]. Sea freight forwarding comprises the organisation of sea transportation of items. Sea freight forwarding services include land transportation to/from the port when required by the customer. The geographic scope of the markets is either national or wider[13]. However, for the purpose of this transaction it is not necessary to conclude on a precise definition of the relevant market as the transaction does not lead to any competition concerns under any market definition.

---

7 JV.55 – Hutchison/RCPM/ECT and JV.56 – Hutchison/ECT; M.3576 – ECT/PONL/Euromax.; M.3863 – TUI/CP Ships; M.5066 – Eurogate/APMM.

8 JV.55 – Hutchison/RCPM/ECT and JV.56 – Hutchison/ECT; M.3576 – ECT/PONL/Euromax.; M.3863 – TUI/CP Ships.

9 M.5066 – Eurogate/APMM.

10 M.2905 – Deutsche Bahn/Stinnes

11 M.1794 – Deutsche Post/Air Express International; M.3971 – Deutsche Post/Exel; M.4045 – DB/BAX Global; M.4746 – Deutsche Bahn/EWS; M.4786 – Deutsche Bahn/Transfesa; M.5096 – RCA/MAV Cargo.

12 See footnote 11.

13 See footnote 12.

B. ASSESSMENT

Container liner shipping

19. HL AG is a container liner shipping company offering worldwide services. Based on the existing fleet, HL AG is the 5th largest operator of container liner shipping worldwide. HL AG has a market share of below 25% on each EU trade. HL AG achieves its highest market shares on the trade Northern Europe – Australia/New Zealand and Northern Europe – North America with [20-30]% and [20-30]% respectively.

20. HL AG is member of a number of liner consortia. Consortia are operational agreements between carriers on a trade-by-trade or global basis for the provision of a joint service. Consortia carry out extensive co-operation which can comprise vessel sharing, exchange of space or slots in vessels, equipment interchange, joint operation or use of port terminals and related services, temporary capacity adjustments, the participation in a revenue or a cargo pool, joint marketing and the issuing of a joint bill of landing. The combined market position of members of consortia can be substantial.

21. HL AG is a member of a consortium, which reaches a market share of [40-50]% on the trade Northern Europe – South America East Coast. The other consortia with an HL AG membership all have a market share of below 30% on the trades, on which they are active. The highest market shares of consortia with HL AG membership are reached on the trades South America East Coast –Northern Europe with [20-30]%, Northern Europe – South America West Coast with [20-30]% and Northern Europe – Indian Subcontinent with [20-30]%.

22. With regard to container liner shipping, the activities of the parties do not overlap. Kühne is not active in container liner shipping. TUI is only active in container liner shipping via its subsidiary HL AG. HGV via its subsidiary combisped Hanseatische Spedition GmbH, Lübeck ("combisped"), operates three chartered feeder container ships in the Baltic Sea, where HL AG is not active. Moreover, services of chartered feeder container ships are not part of the market of container liner shipping as they do not provide liner services, i.e. regular, scheduled shipping operations. Services of chartered feeder container ships belong to a separate market that is vertically related to the container liner shipping business.

23. Therefore, on the market for container liner shipping, the concentration does not, under any alternative definition, raise serious doubts as to its compatibility with the common market and the functioning of the EEA agreement.

Container terminal services

24. HL AG is a co-controlling minority shareholder in a container terminal joint venture in the port of Hamburg, HHLA Container Terminal Altenwerder GmbH. The majority shareholder in this joint venture is HHLA Hamburger Hafen- und Logistik AG ("HHLA"), a subsidiary of HGV. HHLA has a market share of around [20-30]% in container terminal services in the Northern Range. HL AG has no additional container terminal services operations in Europe. HGV is also active in the area of container terminal services in Northern Europe and in Odessa, Ukraine. The proposed transaction will not lead to any addition of market shares as

HL AG and HHLA, a subsidiary of HGV, already jointly control the container terminal in Altenwerder.

25. There is no risk that container liner shipping companies competing with HL AG will be foreclosed from access to the relevant port terminal services as a result of the shareholding of HGV/HHLA in HL AG. Total demand of HL AG only represents [5-10]% of container handling in the Hamburg – Antwerp range and [5-10]% of container handling of German container terminals.

Inland transportation services

26. HL AG is not active in the area of inland transportation services.

27. HGV, via its subsidiary HHLA, has activities in the area of road transport and in the area of railway transportation but both activities are only marginal. As regards inland transportation services, HHLA is mainly active with own railway transportation resources through its Czech and Slovakian subsidiaries Metrans. Metrans is mainly active with customers located in Germany, the Czech Republic and Slovakia. The market share of HHLA in the market for railway transportation in these three Member States together is significantly below [5-10]%.

28. Kühne recently expanded its business in the road transportation segment, particularly by the acquisition of the French company Alloin.[14] As a result of the acquisition of Alloin, Kühne is mainly active in the French and Belgian markets for road transport services and achieved a market share of less than [0-5]% in each of these countries.

29. TUI has some very minor activities in inland transportation with a *de minimis* market share in any conceivable market.

30. Given the low market shares of Kühne and TUI, the acquisition of joint control is unlikely to result in any significant coordination of the parents' competitive behaviour pursuant to Article 2(4) of the EC Merger Regulation.

31. The integration of container liner shipping services and inland transportation is one of the most important forms of vertical integration in the container liner shipping industry. Container liner shipping companies are customers of inland transportation services. The transaction could thus potentially lead to foreclosure effects. This could take the form of input foreclosure, if Kühne, HHLA and TUI exclusively supplied HL AG and thereby restricted the access of other container liner shipping companies to inland transport services. However, given the low market shares of Kühne, HHLA and TUI in the market for inland transportation services, it is unlikely that the transaction will lead to any input foreclosure effects. Customer foreclosure, i.e. the foreclosure of access to HL AG as important customer base, is also highly unlikely because container liner shipping companies are only one of many customers of companies providing inland transportation services.

32. Therefore, on the market for inland transportation services, the concentration does not, under any alternative definition, raise serious doubts as to its compatibility with the common market and the functioning of the EEA agreement.

---

[14] M.5382 – Kühne + Nagel/Alloin.

Freight forwarding

33. In particular, Kühne is through its subsidiaries active in freight forwarding. HL AG and HGV are not active in freight forwarding and TUI has only some minor activities in the area of freight forwarding with only a marginal market share. There are thus hardly any overlaps in the activities of the parties.

34. However, there are also vertical relations between the activities of the parties as Kühne is active in sea freight forwarding. Sea freight forwarders are among the most important customers of container liner shipping companies. The vertical relations between HL AG's container liner shipping services and the sea freight forwarding activities of Kühne could thus potentially lead to foreclosure effects. This could consist in customer foreclosure whereby the new entity might foreclose access to a sufficient customer base, i.e. Kühne, to its actual or potential rival in the upstream market, i.e. in the market for container liner shipping.

35. Kühne has a market share of well below 25% in each national market for sea freight forwarding, apart from Luxembourg. Its market share in Luxembourg is significantly higher and amounts to [70-80]%[15].

36. The Commission has come to the conclusion that it is unlikely that the transaction would lead to foreclosure in the market in Luxembourg. For customer foreclosure to be a concern, it must be the case that the transaction involves a company which is an important customer with a significant degree of market power. However, as explained above, the relevant markets for container liner shipping are not defined on a national basis but are defined on one or more trades. Demand for these trades comes from customers, including sea freight forwarders, located worldwide. The sea freight forwarding market in Luxembourg represents less than 1% of the total EU market in sea freight forwarding. Consequently, demand from customers located in Luxembourg only represents a marginal share of total demand for container liner shipping. If Kühne in Luxembourg started to procure exclusively from Hapag-Lloyd, this would thus only have a marginal effect on total demand in the market for container liner shipping. Rivals in the upstream market, i.e. competitors of Hapag-Lloyd, would thus still have access to a sufficiently large customer base.

37. The Commission has come to the conclusion that it is unlikely that the transaction would lead to a customer foreclosure on any of the container liner shipping trades. Kühne has a share of below [5-10]% of total demand on each trade and is therefore not an important customer that would have a significant degree of market power. Moreover, the Commission considers that there is no risk that other sea freight forwarders competing with Kühne would be foreclosed from access to container liner shipping services given the low share of demand of Kühne on each trade.

38. Therefore, on the market for freight forwarding, the concentration does not, under any alternative definition, raise serious doubts as to its compatibility with the common market and the functioning of the EEA agreement.

---

15 According to information provided by the parties, this figure largely overestimates Kühne's market share as it takes into account services provided to customers that are not located in Luxembourg but that purchase services from Kühne's subsidiary in Luxembourg as well as services which are not primarily managed by Kühne.

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 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