EN

Case No COMP/M.2908 - DEUTSCHE POST / DHL (II)

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.10.2002

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties.

Dear Sir/Madam,

Subject: Case No COMP/M.2908 – Deutsche Post / DHL
Notification of 18 September 2002 pursuant to Article 4 of Council Regulation No 4064/89[1]

1. On 18.09.2002, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation No 4064/89 ("the Merger Regulation") by which the undertaking Deutsche Post AG of Germany ("Deutsche Post") acquires control of the whole of the Bermuda-based undertaking DHL International Ltd. ("DHL") by way of purchase of shares from Deutsche Lufthansa AG ("Lufthansa").

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

I. THE PARTIES

3. Deutsche Post, a public limited company incorporated under German law, provides the postal service in Germany including mail and parcels (international and domestic) and other postal items, under an exclusive licence that includes letters below certain weight and price limits. Via a number of subsidiaries, Deutsche Post is also active in international and domestic express delivery, road-based parcel delivery, freight and logistics, value-added mail activities, financial services, and stationery retailing. About 69% of Deutsche Post's

[1] OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

shares are directly or indirectly held by the Federal Republic of Germany, the remaining 31% are held by private investors.

4. DHL's principal activity is the international express door-to-door delivery of documents and parcels through an integrated delivery network. DHL also has activities in domestic express delivery, and to a minor extent in logistics and express freight. Currently, 50.64% of DHL's shares are held by Deutsche Post, 25.03% are indirectly held by Lufthansa, 1.5% by Japanese Airlines Company Ltd. of Japan ("JAL") and 11.39% respectively 11.44% by Exeter and Chester, two special purpose vehicles each owned by a Bermuda-based investment trust which are ultimately controlled by a consortium of banks led by the German Westdeutsche Landesbank ("WestLB"). Under the current contractual arrangements, DHL is jointly controlled by Deutsche Post and Lufthansa.

II. THE OPERATION

5. The notified operation consists in Deutsche Post purchasing Lufthansa's entire shareholding in DHL, giving Deutsche Post a 75.67% shareholding in DHL.

III. CONCENTRATION

6. With the notified operation, Deutsche Post will acquire sole control of DHL, that it has so far controlled jointly with Lufthansa.

7. Even though Deutsche Post already has a shareholding in excess of 50% in DHL, under DHL's shareholders' agreement, major strategic commercial decisions require a majority in the relevant decision-making body that can only be met by Deutsche Post and Lufthansa achieving consensus, thus giving each of them a *de facto* veto right. Under another agreement signed by Deutsche Post and Lufthansa in 2000 ("the Aerologic Agreement"), Lufthansa agreed to confer to Deutsche Post the industrial leadership in DHL, and to vote in favour of Deutsche Post's proposals in a number of matters, including the appointment of the executive chairman of DHL's management company, however keeping its veto right for certain strategically important investment decisions, as well as for all matters concerning "aviation". Given the importance for the overall competitive strategy of DHL of the decisions for which Lufthansa reserved its veto right, even under the Aerologic Agreement, DHL remains jointly controlled by Deutsche Post and Lufthansa.

8. The acquisition of sole control in DHL by Deutsche Post constitutes a concentration within the meaning of Article 3(1) of the Merger Regulation.

IV. COMMUNITY DIMENSION

9. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion[2] (Deutsche Post EUR 33.4 billion, DHL EUR […]). Each of them have a Community-wide turnover in excess of EUR 250 million (Deutsche Post EUR […], DHL EUR […]), but only Deutsche Post achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

V. COMPETITIVE ASSESSMENT

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[2] Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25).

A. The relevant markets

1. Product market definition

10. The present operation concerns mail, parcel and freight delivery services. In previous decisions regarding the postal and delivery services sector, the Commission has based its definition of the relevant product markets on three main distinctions:

- mail and parcel delivery on the one hand, and freight on the other hand,
- express and deferred services, and
- domestic and international services.

11. Following this definition of the relevant product markets, the present transaction has impacts in the product markets for international express parcel and document delivery, international express freight and international business mail.

12. International express delivery of parcels and documents[3] is a service that is overall faster (typically over night) and more reliable than the basic postal service and provides certain value-added services, including proof of delivery, track and trace (manual or electronic), the possibility of changing destination or address in transit, and flexible billing and pricing. Speed, reliability and additional services are reflected in a higher price for the express service, which can therefore be distinguished from the normal international mail service. Due to the national nature of infrastructure used for transport services, international express delivery has also to be distinguished from domestic express delivery. The above described features apply equally to document and parcel delivery.

13. International express freight[4] can be distinguished from other express services, since it has no size limitations and a much higher weight allowance, requires different handling equipment, and is characterised by a comparatively slower delivery time and lower price levels.

14. The market for international business mail[5] is distinct from the market for private mail, since business customers require and receive different services compared to private customers.

15. According to the parties, the dynamics of competition in the postal industry are increasingly leading towards European-wide markets for delivery services in place of the traditional set of intra-EU cross-border delivery markets. The parties therefore propose to alternatively look at separate product markets for, on the one hand express parcel and document delivery, and on the other hand express freight, depending on whether the delivery takes place within the EEA (be it cross-border or not) or between the EEA and the rest of the world ("international"). Thus, there would be four different product markets, i.e.

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3 See case IV/M.102 – TNT / Canada Post, DBP Postdienst, La Poste, PTT Post & Sweden Post, decision of 2 December 1991; case IV/M.843 – PTT Post / TNT / GD Express Worldwide, decision of 8 November 1996; case IV/M.1513, Deutsche Post / Danzas / Nedlloyd, decision of 1 July 1999.

4 See case IV/M.102 (footnote 3); case IV/M.1405, TNT Post Group / Jet Services, decision of 15 February 1999.

5 See case COMP/M.1915, The Post Office / TPG / SPPL, decision of 13 March 2001.

- international express parcel and document delivery (EEA to the rest of the world),
- intra-Europe express parcel and document delivery (cross-border or domestic),
- international express freight (EEA to the rest of the world), and
- intra-Europe express freight (cross-border or domestic).

16. Under this approach, the market for international business mail would still have to be distinguished from the product markets described in the previous paragraph.

17. The Commission's market investigation has revealed that, whilst there are clear tendencies that competitors and customers in the postal and delivery sectors increasingly try to adopt strategies on a European or even global basis, different national regulatory environments, local customs, as well as the need for providers of services in the sector to have a local presence still strongly influence the competitive environment in the industry. Therefore, it appears that at present, markets still have to be defined by distinguishing between domestic and international services.

18. However, the precise definition of the relevant product markets can be left open, as the proposed operation does not create or strengthen a dominant position irrespective of which of the above described market definitions are chosen.

2. Geographic market definition

19. In previous decisions, the Commission has considered the geographic scope of the relevant markets described above as national. The new approach to market definition in the sector proposed by the parties would lead to EEA wide markets, since this approach is based on a distinction between delivery within the EEA and between the EEA and the rest of the world.

20. The Commission's market investigation has confirmed that for the reasons outlined in paragraph17 above, it appears that at present, markets still have to be defined on a national basis. However, the precise definition of the relevant geographic markets can also be left open, as the proposed operation does not create or strengthen a dominant position irrespective of whether the geographic scope of the relevant markets is national or EEA-wide.

B. Effects of the concentration

21. In order to establish whether or not the operation raises serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement, the Commission must assess if it creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it, thereby taking into account the elements referred to in Article 2(1) of the Merger Regulation. Submissions by third parties received by the Commission in the course of its investigation also have to be analysed in the framework of this test.

1. The market position of the parties and their competitors

22. When analysing the effect of the present transaction on competition, it has to be taken into account that even before the concentration, Deutsche Post jointly controls DHL together with Lufthansa.[6] It follows that the impact of the present transition from joint to sole control appears to be limited. DHL already acts in the market to a large extent as a part of the Deutsche Post group, and the Commission's investigation has shown that Deutsche Post and DHL are considered by many market players as working closely together with a common strategy. Nevertheless, Deutsche Post has submitted that in order to fully integrate DHL into its group and to maximise synergies between DHL and its other subsidiaries and products, it needs to acquire sole control.

23. If one were to consider that the market positions of both Deutsche Post and DHL are for the first time being combined by the present operation, the concentration would lead to the following competitive overlaps in the affected product and geographic markets, as traditionally defined by the Commission in the postal and delivery sector:

- international express parcel and document delivery in Belgium (Deutsche Post [0-5%], DHL [35-45%], combined [35-45%] market share), Denmark (Deutsche Post [0-5%], DHL [30-40%], combined [30-40%]) and the Netherlands (Deutsche Post [0-5%], DHL [40-50%], combined [40-50%]),

- international express freight in Austria (Deutsche Post [25-35%], DHL [0-5%]), Ireland (Deutsche Post [10-20%], DHL [0-5%], combined [10-20%]) and the Netherlands (Deutsche Post [20-30%], DHL [0-5%], combined [20-30%]),

- international business mail in Germany (Deutsche Post [70-80%], DHL [0-5%], combined [70-80%]).[7]

24. In these above mentioned affected markets, although the combined market shares are quite considerable, this is almost entirely due to the market position that either DHL or Deutsche Post has pre-merger, whereas the increment in market share caused by the concentration is always marginal.

25. There are also very minor overlaps in the markets for international express parcel and document delivery in the UK (DHL [30-40%], Deutsche Post [0-5%], combined [30-40%]) and in Germany (DHL [35-45%], Deutsche Post [0-5%], combined [35-45%]). However in both countries these services are already marketed as joint Deutsche Post/DHL products, hence there will be no discernible change in these markets as a result of Deutsche Post's move from joint to sole control over DHL.

26. The merged entity will face strong competitors. These include on the one hand, companies such as UPS, Federal Express ("FedEx") and TNT Post Group ("TPG"), which are active world-wide and are able to offer a full range of express and deferred delivery products. On the other hand the merged entity will face competitors with a

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6 The acquisition of Deutsche Post's joint control in DHL was cleared by the Commission in its decision of 26 June 1998 in case IV/M.1168 – DHL / Deutsche Post.

7 Market share data as estimated by the parties. Some partly differing estimates have been submitted by third parties. However, the competitive analysis does not materially change according to those estimates, if they are corrected by cross-checking the third party estimates of Deutsche Post's and DHL's respective market shares with the effective turnover figures of Deutsche Post and DHL as provided by the parties.

strong local presence. In each of the above mentioned affected markets the main competitors' market shares are the following:

– international express parcel and document delivery (TPG [10-30%], UPS [10-30%], FedEx [0-10%]),

– international express freight (TPG [5-20%], other competitors on the different geographic markets [0-25%], UPS and FedEx less then 5%)

– international business mail (TPG [0-10%], others competitors less the 5%).

27. If one were to consider the effects of the transaction based on the new approach to market definition proposed by the parties for express parcel and document delivery and express freight, the operation would lead at EEA level to the following overlaps in the markets for

– international express parcel and document delivery: Deutsche Post [0-5%], DHL [30-40%], combined [30-40%],

– intra-Europe express parcel and document delivery: Deutsche Post [0-5%], DHL [10-15%], combined [10-20%] and

– international express freight :Deutsche Post [0-5%], DHL [0-5%], combined [0-5%].

28. The assessment outlined above concerning the markets traditionally defined by the Commission would however not materially change under this assumption.

2. Financial and economic power

29. Moreover, in addition to the market position of the parties and their competitors, the Commission has to take into account the economic and financial power of the undertakings concerned in order to assess whether the concentration leads to the creation or strengthening of a dominant position as a result of which competition would be significantly impeded. In that context, the Commission must assess *inter alia* whether the merged entity's economic and financial power is enhanced by state aid or other financial resources available to the merged entity that originate from government sources.[8]

30. The Deutsche Post group certainly has considerable financial strength, as reflected by its key financial indicators.[9]

31. Furthermore, it has been alleged by competitors that Deutsche Post is the beneficiary of illegal state aid, and that Deutsche Post uses excessive revenues deriving from its postal monopoly in Germany to cross-subsidise activities open to competition, including those carried out by DHL, or to finance acquisitions in those areas, including the acquisition of a majority stake in DHL. In that respect, it can be noted that according to the Commission's findings, Deutsche Post has received illegal state aid from Germany [10] and that the Commission has found Deutsche Post in breach of Article 82 EC because of

8 Court of First Instance, judgement of 31 January 2001 in case T-156/98, RJB Mining / Commission.

9 See table at point 35 below.

10 Commission decision 61/99 of 19 June 2002.

cross-subsidisation of its mail-order parcel activities by revenues derived from the letter mail area.[11]

32. However, whilst under Article 2(1)(b) of the Merger Regulation, economic and financial power are important criteria for the appraisal of whether a concentration is compatible with the common market, in the absence of other indicators financial strength as such will not be sufficient to lead to the creation or strengthening of a dominant position as a result of which competition will be significantly impeded.

33. In the present case, as outlined above, market share overlaps are not indicative of any creation or strengthening of a dominant position, since the parties' activities are largely complementary. It should also be noted that the concentration in question is not directly linked to the possible state aid that Deutsche Post has received, since the purchase price reflects market value.[12]

34. It is however necessary to examine whether Deutsche Post, by means of its financial power, will be able to increase DHL's market position by systematically undercutting competitors' prices in such a way that DHL's existing or potential competitors are marginalised.

35. DHL's main competitors are the companies FedEx, UPS and TPG, which are active world-wide, offer a large product portfolio and have themselves considerable financial strength. The following table sets out the key financial data of Deutsche Post, UPS, FedEx and TPG:[13]

2001	**Deutsche Post**	**UPS[14]**	**FedEx[15]**	**TPG**
Total sales in EUR million	33,379	34,218	23,234	11,218
EBT in EUR million	2,153	4,396	1,308	924
EBT margin	6.5%	12.8%	5.6%	8.2%
EBITDA in EUR million	3,617	5,983	3,027	1,454

11 Commission decision of 20 March 2001 in case COMP/35.141.

12 This distinguishes the present case from the situation in the RJB Mining case decided by the Court of First Instance (see footnote 8 above).

13 Data from publicly available sources (in particular annual reports and web sites). EBT: earnings before tax; EBT margin: relationship EBT to sales; EBITDA: earnings before interest, tax, depreciation and amortisation; EBITDA margin: relationship EBITDA to sales; equity ratio: relationship equity to total assets.

14 UPS: Data in USD converted into EUR on the basis of the average conversion rate for 2001 of 1 EUR = 0.8956 USD.

15 FedEx: Financial year June 2001 to May 2002. Data in USD converted into EUR on the basis of the average conversion rate for the period June 2001 to May 2002 of 1 EUR = 0.8869 USD.

EBITDA margin	10.8%	17.5%	13.0%	13.0%
Total assets in EUR million	22,061	27,508	15,573	8,454
Equity in EUR million	5,353	11,443	7,379	2,499
Equity ratio	24.3%	41.6%	47.4%	29.6%

36. As can be seen from the table, DHL's competitors' financial strength is not generally inferior to that of Deutsche Post; for some key indicators, like EBITDA margin and equity ratio, Deutsche Post even lags behind one or more of the said competitors. Even though their financial power is not further enhanced, as arguably may be the case for Deutsche Post, by state aid or the possibility to generate revenues from monopoly activities, they have certainly sufficient financial strength to be able to counteract any possible attempts by Deutsche Post to force them out of the market by means of predatory pricing strategies.

37. It can therefore be excluded that the financial power Deutsche Post has and the additional power it may enjoy as a result of state aid and / or the possibility of cross-subsidisation from its reserved area should lead to the creation or strengthening of a dominant position.

38. Under these circumstances, the mere fact that a merging company may have access to financial means that it is not lawfully entitled to, and that it may use such means to finance the acquisition of control in another company, does not as such lead to the conclusion that the resulting acquisition of control is incompatible with the common market under the Merger Regulation. However such cross subsidisation may be relevant for an Article 82 EC[16] investigation.

3. Other concerns expressed by third parties

39. The Commission's market investigation has not revealed any other substantial grounds to expect that the present concentration may lead to the creation or strengthening of a dominant position in any of the affected markets.

40. One competitor submitted that the concentration would allow DHL to access the business customer base of Deutsche Post, an advantage that no other competitor had. The possibility of the merged companies to offer customers a full range of postal services, combined with the financial strength of Deutsche Post and cross-subsidisation advantages, which could not be matched by other competitors, would lead to or reinforce a dominant position of DHL. Another competitor raised concerns that the operation would give the merged entity an increased incentive to cross-subsidise and bundle services, and to restrain access to Deutsche Post's infrastructure, thereby creating foreclosure effects.

41. These submissions do not raise any substantiated concerns that the concentration will result in the creation or strengthening of a dominant position of the merged entity.

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16 Court of First Instance, judgement of 20 March 2002 in case T-175/99, UPS Europe SA / Commission.

42. The submissions do not substantiate for which reasons a possible bundling strategy, or restriction of access to Deutsche Post's infrastructure by the merged entity could result in a foreclosure effect. On the one hand, the parties' activities are to a large extent complementary, and they already have the possibility to bundle their products and services, as DHL is already jointly controlled by Deutsche Post before the operation. On the other hand, there is no indication that DHL's main competitors are in any way dependent on Deutsche Post's infrastructure, since each of UPS, FedEx and TPG/TNT operate on a world-wide scale based on their own world-wide and local infrastructure.

43. Furthermore, apart from the aspect of financial power already discussed above, the competitors submissions are mainly based on the assumption that Deutsche Post is not willing to act in line with the obligations laid down in the postal directives 97/67/EC and 2002/39/EC, or is going to abuse its existing dominant positions in other markets, thereby infringing Art. 82 EC. It would be doubtful though to decide over the compatibility of the operation with the common market on the assumption that the merged entity will act unlawfully.

4. Summary

44. It follows from the above that the Commission's investigation has not revealed any indication that, taking into account the relevant factors listed in Article 2(1) of the Merger Regulation, the present concentration might lead to the creation or strengthening of a dominant position as a result of which competition would be significantly impeded in the common market or in a substantial part of it.

VI. CONCLUSION

45. 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 (EEC) No 4064/89.

For the Commission

Mario MONTI
Member of the Commission