

European Union
European Commission
Case No IV/M.102 - TNT / Canada Post, DBP Postdienst,
La Poste, Ptt Post & Sweden Post
Decision of 02.12.1991

COMMISSION DECISION of 02.12.1991 declaring a concentration to be compatible with the common market (Case No IV/M.102 - TNT / CANADA POST, DBP POSTDIENST, LA POSTE, PTT POST & SWEDEN POST) according to Council Regulation (EEC) No 4064/89 (Only the English text is authentic)

Decision based upon Article(s) 6.1b

Dear Sirs,

Subject: Case No. IV/M102 - TNT/Canada Post, DBP Postdienst, La Poste, PTT Post and Sweden Post

Notification of 28 October 1991 pursuant to Article 4 of Council Regulation No. 4064/89

1. The proposed operation concerns a joint venture (JVC) between, on the one hand, TNT Ltd (TNT), and on the other hand, five postal administrations - Canada Post Corporation (Canada Post), Deutsche Bundespost POSTDIENST (DBP POSTDIENST), La Poste, PTT Post BV (PTT Post) and Sweden Post - which will participate in the JVC through GD NET BV (GD Net), a company set up for this purpose.

THE PARTIES

2. TNT is the holding company for the group of TNT companies, the main businesses of which are various transport services, ship management and tourism and leisure activities.

3. The five postal administrations (the Five) are engaged mainly in the provision of postal services. They are all wholly state owned companies.

THE AGREEMENTS

4. TNT will transfer the following businesses to JVC - its worldwide international express delivery business,¹ its European international express freight business² and its remail activities. This will involve the transfer of assets in these businesses (including aircraft, trucks, buildings, computer

¹Except its business in Chile and Brazil.

²Which excludes full truck load operations.

hardware and software), network systems, personnel, customer lists, intellectual property rights and goodwill. TNT retains a 50% interest in JVC shares.

5. The Five transfer their individual international express delivery business, known as EMS, to JVC. These are currently run as separate businesses, in the French case in conjunction with a minority shareholder partner. The transfer involves international goodwill and customer lists, as well as the transfer or licensing of intellectual property rights. Transitional periods are envisaged for the transfer of the international EMS businesses of the Five.

6. The proposed operation also presupposes that JVC products can be offered for sale through the sales outlets, that is, the post offices of the Five. Originally the agreements provided the JVC exclusive access to all outlets for a period of five years. In the course of the proceedings, these agreements were amended. Exclusivity is now for two years following transfer of the international EMS businesses to the JVC and applies to a more limited number of outlets.

7. In addition, a cash payment is made by GD Net to TNT. In return, the Five through GD Net receive 50% of JVC shares.

8. GD Net is a Dutch company, the shares of which are to be allocated as follows: Canada Post 12%, DBP Postdienst 30%, La Poste 25%, PTT Post 18% and Sweden Post 15%. Within GD Net, decisions concerning JVC have to be taken by a qualified majority of 60% of issued shares. This means that at least three or possibly four of the five have to agree on a proposal, depending on their shareholdings. No one postal organisation can either block or force GD Net positions in JVC.

I. COMMUNITY DIMENSION

9. The operation has a Community dimension. The combined aggregate worldwide turnover of all undertakings concerned amounts to more than 5,000 million ECU, (Turnover for 1990 were as follows: Canada Post 2,700 million ECU, DBP Postdienst 9,847 million ECU, La Poste 9,993 million ECU, PTT Post 5,870 million ECU and Sweden Post 2,755 million ECU), TNT had a turnover of 2,977 million ECU in 1990.

10. Each of the Five has to be considered as an undertaking concerned within the meaning of Art. 1 of the EC Merger Regulation. This is because GD Net is simply a vehicle set up to enable the Five to participate in JVC in order to facilitate decision-making amongst themselves and to ensure that they speak and act as one. The Five thereby ensure that they can exercise a decisive influence with TNT on the JVC and there can never be a situation where TNT exercises sole control through the Five being unable to reach a unified position on any decision.

11. The aggregate Community-wide turnover, respectively, of TNT, DBP POSTDIENST, La Poste and PTT Post is more than 250 million ECU. Neither the three postal administrations nor TNT achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.

II. CONCENTRATION

JOINT CONTROL

12. The JVC will be jointly controlled by TNT and the Five, who will act together through GD Net. GD Net will vote its shares as a block through the persons appointed as its two managing directors acting jointly. The Five and TNT, will have equal voting rights and an equal share in the voting in the JVC. They will each nominate five members to the JVC's Supervisory Board which adopts decisions by majority. For the first two years there will be two co-chairmen, one from each side. In subsequent years they will each appoint a chairman for one year, alternatively.

CONCENTRATIVE JOINT VENTURE

13. The JVC will be an autonomous economic entity in commercial, financial and operational terms. It will perform the bulk of its operations in-house. Some operations may be contracted out to third parties, including the shareholders, which is not an unusual practice in this industry. Access to the post office outlets will take place on an agency basis. In this respect commercial risks attached to the JVC operations will be its responsibility.

14. TNT and the Five will each withdraw from the international express delivery market as a result of the transfer of their respective businesses to the JVC. The fact that The Five will act as agents for the JVC does not affect this situation because, as stated above, it is the JVC that will carry out all operative and administrative tasks. Furthermore it will take all commercial risks. TNT will transfer to the JVC its international express freight business. The Five are not engaged in this business. According to the parties these two businesses, which have the highest growth potential, will form []* of the JVC's revenue in the first year of its operation and constitute the core of the JVC's activities. The objective of the JVC derives from the fact that the Five recognise that their EMS business cannot ensure the same level of reliability as private operators, since it is based on cooperation between participating postal administrations and lacks centralised control, such as that of TNT. For its part, TNT is currently loss-making amongst other reasons because of heavy investments made in Europe in recent years and requires additional volume.

15. TNT's remailing activities are also transferred to the JVC. (Remailing is described below in para. 28). Remail affects the cross border letter services of postal administrations. Remailers compete with postal administrations for bulk outward cross-border mail and therefore share some of the same customer base. The service performed is similar from the customer's point of view but marketing and operational techniques differ as remailers make use of the international mail system, with postal administrations used as intermediaries, in order to offer a particular combination of price, service and particularly speed. At the same time, however, remailers collaborate with postal administrations for ultimate delivery and possibly for expediting consignments to the destination country for delivery there.

*Deletion - business secret.

16. The JVC will not change this relationship. TNT's international remailing activities throughout the world (which consist of ABB and ABC remailing) are transferred to the JVC because they are integrally linked with its express delivery business from the operational and administrative perspective although they are separate services. It is not the objective of the operation to phase out the remailing activities of TNT. Moreover, this service provides additional volume which will reduce the operational costs of the JVC in providing the express delivery service. The Five have accepted the inclusion of remailing in the JVC's activities. It is not likely that this view will change. At present they do not share a common view amongst themselves on remailing. Indeed they are at opposite ends of the spectrum amongst postal administrations. Moreover, the Five do not command a majority within the JVC. Furthermore, if the Five sought to reduce the JVC's remailing activities, this could only be at their own cost as shareholders in the JVC, since other private operators would take over this business. For these reasons, coordination is not likely as between the Five and the JVC.

17. In addition, with regard to coordination between the Five, the commercial objective of the JVC and its set-up ensure that any such coordination with regard to remailing will not be facilitated. Moreover, there is no additional economic incentive to coordinate created by the JVC. Therefore, the impact of the proposed operation in this respect is likely to be negligible.

18. In conclusion, the JVC constitutes a concentration within the meaning of Article 3.

III. COMPATIBILITY WITH THE COMMON MARKET

A. PRODUCT MARKET

19. The principal markets identified in this case are: -

(i) international express delivery

(ii) international express freight

(iii) remail (international mail).

i) International express delivery

20. The international express delivery market consists of a service for the delivery of documents and parcels which is overall faster and more reliable than the basic postal service and provides some or all of the following value-added services:

- proof of delivery

- track and trace (manual or electronic)

- possibility of changing destination or address in transit

- insurance

- home collections of mail

The speed, reliability and additional services are reflected in a higher price for the express service, which can therefore be distinguished from the normal mail service. The Commission has adopted this view in a number of decisions (see e.g. Commission Decision of 1 August 1990 concerning the provision in Spain of international express courier services OJ L 233/19, 28.8.1990).

21. A distinction can also be made between the international and domestic express delivery markets. From the supplier's perspective sales, marketing and operation of the international and domestic services are very different. The former involves a significantly higher number of destinations, specific and complex logistics, more qualified personnel and additional regulatory requirements (customs and security). This is reflected in a substantially higher price for international express delivery.

22. Another indication of a distinction between the two markets is the number and identity of players on each market. In addition, even where the same players are operating on both markets their businesses tend to be organised separately.

23. Customers also perceive international and domestic express services differently. This is shaped by the difference in price, destination and regulatory requirements.

24. There is at present no industry standard for the upper weight limit of the express market. Historically a 30 kilo limit has been generally accepted on the basis that this was the maximum weight applied by airlines for passenger luggage, which resulted in faster customs clearance for the couriers. Today, however, a number of companies in principle offer a higher limit (e.g. 50 kilos by DHL and 70 kilos by Federal Express). However, since in practice the vast majority of international consignments weigh less than 30 kilos (the current EMS limit is at 20 kilos) it is not necessary, for the purposes of the present, to delimit the upper weight limit.

25. A distinction may be possible within the international express market between documents and parcels. Documents are non-dutiable while parcels carry duty. As a result, the parcels service can be more expensive to the consumer, and from the supplier's perspective, an additional procedural hurdle is involved. Moreover, some operators are known more as parcels than documents carriers such as TNT, or vice versa, while some of the smaller operators do not carry documents at all. However all the major operators carry both and use the same operational structure for each. Indeed any parcel operator can carry documents as well, if he chooses to do so.

26. It would seem that current growth within the documents submarket is less than for parcels due mainly to the increased use of facsimile transmissions. As a result operators are seeking to shift the bulk of their business to the parcels submarket.

ii) International express freight

27. This represents a higher weight market (or markets) than international express delivery, by contrast to the latter market does not in general have any size limit. A clear distinction between international express delivery and international express freight market (or markets) on the basis of weight, however, is not possible because, due to changes in customer demand (increased demand for a speedier service, irrespective of weight) express operators have attracted customers from the traditional freight markets.

28. Express freight can be as fast as the express delivery service, especially if airlines are used, but is not necessarily so. In addition, while express freight can be a global service, in practice almost all carriers operate mainly within certain regions or specific destinations. It is essentially a truck or airline service and is usually arranged with a freight forwarder rather than with the transport carriers themselves. In addition, compared to the international express delivery market, prices for international express freight are significantly lower for equivalent weights.

iii) Remail (international mail)

29. Remailing refers to the cross border letter services developed by private operators. It consists of collecting international mail in bulk from business customers, consolidating it with other such mail in the same country (Country A) and freighting it to another country (Country B). There it is posted through the national postal administration which either delivers it to the addressees in Country B or sends it through the international postal system to the country of destination (Country C) for delivery there. Remailing is partly a result of exploitation of the weaknesses of the UPU³ terminal dues system. As a result it is possible for private operators to provide a particular combination of price, service and especially speed.

B. GEOGRAPHIC REFERENCE MARKET

30.i) International express delivery

While the service is offered in all business centres, it has developed as and in the main is marketed as providing a door to door service to customers. Customers therefore may perceive it as being local and call a local telephone number or a uniform national or regional number advertised by the courier services.

31. In practice, pick-up and delivery is organised on a national basis at least within the EEC. In addition, prices and pricing schemes differ substantially for every country and marketing is different in each. Market shares for the most important service providers vary appreciably in the various Member States.

32. Differences between individual Member States relate to inter alia different costs of labour (which

³The Universal Postal Union. This is a United Nations body that regulates the international movement of mail by postal administrations.

constitute more than half of total costs), costs of fuel and regulatory requirements. Furthermore national markets within the EEC are at different stages of development (the United Kingdom appears to be mature market whereas the Portuguese and Greek markets are only just being developed).

33. At present therefore markets can be characterised as national. However, this is likely to change, particularly within the European Community, as internal market legislation eg public procurement directives, take effect. In addition, a trend may grow for customers to demand global accounts for their courier services.

ii) International express freight

34. This is the same as in i) above, for largely the same reasons.

iii) Remail (international mail)

35. Remail is to be considered in the same way as international express delivery for the same reasons as in i) above.

C. ASSESSMENT

i) International express freight

36. In view of the fact that none of the Five are active in this market (or markets), the market position of the JVC will be that currently held by TNT. This is not significant in market share terms in any of the three Member States concerned in this case (France, Germany, Netherlands).

ii) Remail (international mail)

37. While the remailing business is not the same as the cross border delivery service provided by postal administrations, there is a competitive effect between them. As a result, any combination of these businesses might have an impact on competition.

38. In the case in question, however, the particular competitive relationship between the international mail business of the Five and the remailing business remains unchanged (see above in para 15). In any event TNT's remailing activities in each of the three Member States concerned in this case is minor in comparison to the international mail businesses of the three postal administrations (between []*).

39. The proposed operation, therefore, will not result in strengthening the market position of the JVC or any of the national postal administrations in France, Germany and the Netherlands.

*Below 5%.

iii) International express delivery

40. This market is characterised by global players, that is, currently, TNT, DHL, Fedex and UPS, which each control all the relevant assets used in the production chain for a particular destination. In addition, a number of smaller players exist which through subcontracting to e.g. airline companies, are also in a position to exert a measure of operational control from pick-up in one country to delivery in another. Finally, there are also niche players, which address particular industries requiring special handling arrangements or special service levels.

41. The international EMS service which the Five provide is based on cooperation between participating organisations. It was originally set up in 1987 by the major postal administrations in the EEC and North America. Under the current EMS system the individual postal organisations are not able to select operating partners and depend wholly on the other postal administrations involved.

42. The JVC will become the leading operator in France, with a market share of around []**, followed by DHL, Fedex and UPS. In Germany and the Netherlands it will be the second behind DHL, with around []*** and []**** respectively. Within the EEC as a whole the JVC will continue to be the second largest operator, behind DHL, and the third in the world, behind DHL and Fedex. These figures indicate that the JVC will be in a relatively strong market position.

43. The present stage of development of the market however, lessens the significance of the market shares of the JVC. The express delivery market is still developing strongly, with growth rates above 30% in the last three years in the European Community. Market shares of service providers fluctuate considerably. UPS and Fedex are presently gaining more from the rapid growth of the market than DHL and TNT.

44. Entry barriers to the market may be considerable for those who are not already operating either in the domestic express delivery market or in the transport sector in general. For the latter however, entry barriers are less significant. For example, UPS and Fedex have entered the international market on a large scale in the 1980s and have become important competitors to the global operators TNT and DHL.

45. Other factors, however, indicate that the market position of the JVC might be significant particularly over time, and together with the JVC's market shares, might lead to a dominant position.

46. Exclusive access to postal outlets. The parties originally notified that the JVC would potentially have exclusive access over a period of five years to approximately 17,000 postal outlets in France,

** Below 50%.

*** Above 25%.

**** Above 25%.

[]**** in Germany, 1,300 in the Netherlands, 6,460 in Canada and 2,100 in Sweden. This would have provided the JVC with a segment of customers, which would only have been available to other private operators through establishing a separate network and which would have given the JVC a significant advantage over its private operator competitors, an advantage which has already proved to be important in some Member States.

47. In the course of the examination of the case the parties amended their original agreements in the following ways:

- exclusive access by the JVC to the postal outlets of the Five has been reduced to a period of two years. This period begins six months after closing of the operation, following completion of the transfer of the international EMS businesses of DBP POSTDIENST, PTT Post, Sweden Post and Canada Post. In the case of La Poste the period begins after the transfer of its international EMS business which will take place one year after the closing of the operation;

- the scope of exclusive access has also been reduced. It will only apply to as many postal outlets as currently provide the international EMS service.

48. Subcontracting arrangements. The JVC may subcontract to the postal administrations certain services which are expected to be mainly pick-up delivery and sales through the postal outlets (see above). It is provided in the agreements that these subcontracting arrangements be negotiated with each of the Five individually on an arm's length, fee for service basis.

49. At present, postal administrations have not yet set up systems enabling them to calculate precisely the costs of each service which they provide, the absence of which was stressed by competitors as leading to potential cross-subsidisation. It could not be excluded therefore that distortions of competition can arise in relation to a recipient of these services, in this case the JVC, which might contribute therefore to a finding that the JVC would have a dominant position.

50. At the same time, however, the fact that such services are to be on a commercial basis indicates that the postal administrations do not, in principle, intend to render services on a non-cost related basis. Indeed, there is no economic rationale for them to provide them other than on a commercial basis since their individual share of the profits of the JVC could not match the possible 'subsidy' provided by each.

51. Furthermore, and in line with current developments in the postal sector, DBP POSTDIENST, La Poste, PTT Post and Sweden Post have stated that, to the extent that express delivery related services are provided to the JVC, they will provide these services to its competitors on terms and conditions which are similar to those offered to the JVC if requested to do so, 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,

**** More than 20,000.

financial compensation, liability and payment terms, and length of contract. This will apply as long as each postal administration providing the service cannot demonstrate that it does not cross-subsidize from its exclusive concession.

52. These postal administrations have also stated that the same principles apply in relation to the mail and parcel services they may provide in acting as 'B' countries in the remail chain. (Full text of this statement attached as Annex to this decision).

53. The JVC will be linked to shareholders which are able to ensure future capitalisation for its operations. However its main competitors - DHL, UPS and Fedex are also in a position to capitalise their operations sufficiently. UPS and Fedex have worldwide annual turnovers of \$13.6 billion (1990) and \$7.7 billion (1991) respectively, while DHL is linked to Lufthansa, JAL and Nissho Iwai.

54. The Commission has also considered whether the JVC would benefit from certain legal privileges which are available only to postal administrations and not to private operators. These legal privileges relate, inter alia, to VAT exemptions, customs privileges, exemptions from legal liability and special provisions for air or road operations such as night flights. To the extent that such privileges would be extended to the JVC they would distort competition between the JVC and the private operators.

55. However, insofar as such privileges continue to exist in relation to express delivery services, they cannot apply to the JVC since it will have the legal status of a private operator only.⁴ In addition, the agreement now obliges the shareholders not to seek any postal privileges for the JVC in the future.

56. On the basis of the above and taking into account in particular the reduction in the time and scope of the exclusivity period the proposed transaction does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it as far as the JVC is concerned.

57. The proposed operation might also strengthen the market position of the Five for postal services generally. They will be able to offer a premium express service through those postal outlets which become agents for the JVC. However, it is not likely that this will further improve the market position of the postal administrations given that they were already active on the express delivery market through the EMS business.

IV. ANCILLARY RESTRAINTS

58. The agreements provide that the JVC will not engage in any business other than international

⁴These postal administration have stated that, in the event that they become involved on a subcontracting basis in clearing international express delivery consignments of the JVC through customs they will not claim or use, if permitted to do so, which they do not consider to be the case, the so-called postal privilege entailing relaxed customs procedures and formalities.

express delivery, international express freight and remail. In addition, TNT and the Five agree that they shall not have any interest in the following businesses: international express delivery, international express freight and, in respect to TNT, remail (letters and parcels).

59. These restraints can be regarded as ancillary insofar as they express the reality of the lasting withdrawal of TNT and the Five from the international express delivery business and the international express freight business (in fact the Five have never engaged in the latter business) and TNT from remail (letters and parcels).

60. As far as the restraints upon the JVC go beyond the businesses of the parents transferred to it, it would in any event be in the hands of the parents to define the scope of the JVC's activities.

61. The agreement that the JVC will have exclusive access to postal outlets of the Five for a period of two years can also be regarded as ancillary on the basis that such a period is necessary to transfer the value of the EMS businesses to the JVC.

V. FINAL ASSESSMENT

Based upon the above findings the Commission has come to the conclusion that the proposed operation does not raise serious doubts as to its compatibility with the common market.

For the above reasons the Commission has decided not to oppose the notified concentration and to declare it compatible with the common market. This decision is adopted in application of Article 6(1)b of Council Regulation No. 4064/89.

For the Commission,

ANNEX

UNDERTAKING OF THE PARTIES CONCERNING SUB-CONTRACTING

In order to allay any concerns about the possibility that the JVC might be subsidised through preferential, non-commercial sub-contracting arrangements it might conclude with postal organisations participating in GD Net, the four European postal organisations have given the following assurances to the EEC Commission.⁵

Without prejudice to the JVC's autonomy in deciding whether or not to subcontract any services to the postal organisations, it is envisaged that such services will be limited mainly to the areas of pick-up, delivery and sales.

⁵Sweden Post Group gives these assurances for the event that the EES Treaty, adopting the principles of Articles 85-90 of the EEC Treaty, enters into force.

Unless the postal organisation concerned can demonstrate to the reasonable satisfaction of the Commission or, as the case may be, the competent national regulatory bodies (including national courts) that it does not cross-subsidise from its exclusive concession the ITCD related services it provides to the JVC, it will, if requested, provide these services to competitors of the JVC on terms and conditions which are similar to those offered to the JVC,⁶ 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, the four postal organisations will keep records of the terms and conditions, on which they have provided ITCD related services to third parties, including the JVC, available for inspection on a confidential basis by the Commission or the competent national regulatory bodies (excluding the national courts⁷) for a period of one year from the relevant event.

In addition, the postal organisations recognise that they are subject notably to non-discrimination obligations as set forth in national postal and competition laws or in the competition rules (Article 85-90) of the EEC Treaty.

For greater certainty, nothing in this undertaking shall be construed as an acknowledgement of a dominant position by the postal organisations with respect to any of the services covered by this undertaking.

In order to allay any concerns that the remail activities of the JVC might be favoured by any or all of the postal organisations participating in GD Net, the four European postal organisations have given the following assurances to the EEC Commission.⁸

If they act as 'B' countries in the remail chain, they will, if requested, provide mail and parcel services to competitors of the JVC on terms and conditions which are similar to those offered to the JVC, to the extent that the transactions are equivalent. Account will be taken of factors including but

⁶Without prejudice to the exclusive access which the JVC will have temporarily to the sales outlets of the postal organisations.

⁷While a postal organisation may find itself arguing in a national court that it does not cross-subsidize from its exclusive concession the ITCD-related services it provides to JVC, this postal organisation should not be obliged to hold available for inspection and produce in court any business records. The reason is that court rules may not guarantee confidentiality and require that such business records be disclosed to the other side. For greater certainty, to the extent that a national regulatory body would maintain similar procedures and not guarantee confidentiality treatment of any business records made available to it by a postal organisation, the postal organisations do not by virtue of this undertaking agree to make such records available.

⁸Sweden Post Group gives these assurances for the event that the EES Treaty, adopting the principles of Articles 85-90 of the EEC Treaty, enters into force.

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.