



COMMISSION OF THE EUROPEAN COMMUNITIES
Karel van Miert

Member of the Commission

SG (99) D/ 4155

Brussels, 10-06-1999

BY REGISTERED MAIL WITH
ACKNOWLEDGEMENT OF
RECEIPT

United Parcel Europe NV/SA
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via

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fax: 778 25 77

Subject: Case No. IV/37.129 – UPS/DP and DHL

Dear Sirs,

1. I refer to your complaint dated 8 June 1998 against Germany, Deutsche Post AG ("DP AG") and DHL International Ltd. ("DHL"). This complaint concerns alleged infringements of Articles 81, 82 and 87¹ of the EC Treaty.
2. On 8 February 1999, the Commission sent you a letter pursuant to Article 6 of Commission Regulation (EC) No. 2842/98 informing you of its preliminary view that the Commission considered that there were insufficient grounds for granting your application in so far as it was based on Articles 81 and 82 of the EC Treaty.
3. On 29 March 1999, your legal counsel, Mr Ottervanger, informed the Directorate General for Competition that you disagreed with the findings contained in the Commission's letter of 8 February 1999 and invited the Commission to investigate the matter under Article 82. He added that in case the Commission should nevertheless choose to reject the complaint, you requested the Commission to adopt a formal decision to that effect before 1 May 1999.

¹ Ex-Articles 85, 86 and 92.

4. I am now writing to inform you that for the reasons set out below the Commission is definitely rejecting your application in so far as it is based on Articles 81 and 82 of the EC Treaty.

I. The facts

5. On 11 May 1998 the Commission received a notification of a proposed concentration within the meaning of Council Regulation (EEC) No. 4064/89 (the "Merger Regulation") by which DP AG was to acquire joint control of DHL by purchasing 22.498 % of the latter's shares (case No. IV/M.1168 – Deutsche Post/DHL).
6. DP AG's main activities consist of the transport and distribution of letter mail and parcels in Germany. It retains a monopoly for the delivery of letters below a defined weight and price until the end of 2002. All the shares in DP AG are held by the German state. 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.
7. UPS Europe NV/SA (hereinafter "UPS") belongs to the UPS group of companies whose main activity is in transporting and distributing parcels.
8. In a letter dated 29 May 1998, UPS submitted comments on the proposed transaction. In addition to that, UPS replied to a request for information addressed to it by the Commission.
9. In its decision in this case adopted on 26 June 1998, the Commission came to the conclusion that the notified operation fell within the scope of the Merger Regulation and did not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

II. The complaint

10. In its complaint, UPS raises two objections against Germany, DP AG and DHL. First, UPS claims that the financing of the acquisition of joint control of DHL by DP AG infringes Articles 87 and 88² of the EC Treaty and represents, in so far as DP AG is concerned, an abuse of a dominant position contrary to Article 82 of the Treaty. Second, UPS is of the opinion that the future relationship between DP AG and DHL shall also infringe Articles 81 and/or 82 and/or 87 of the Treaty. With regard to both infringements, the complaint refers to the letter of 29 May 1998 for further details.
11. In this letter, UPS alleges that DP AG has for many years been suffering losses with respect to its activities on the parcel market. This leads UPS to the conclusion that DP AG uses its legal monopoly in other areas to develop its activities on the parcel market. It argues that DP AG finances the acquisition through profits obtained on the letter market whilst Germany foregoes a substantial amount of dividends. In UPS' view, it is not justified to use the benefit of state ownership to cross-subsidize activities on a liberalised market or to use exclusive rights for purposes other than that

² Ex-Article 93.

of complying with the universal service obligation. UPS concludes that by using revenues realized in the letter area, where it enjoys exclusive rights, to finance its activities in areas outside the area of the universal service obligation, DP AG is abusing its dominant position and, therefore, infringing Article 82. UPS is furthermore of the opinion that allowing the use of revenues from the reserved letter market for such purpose constitutes a state aid granted by Germany which is illegal as long as it has not been notified to and approved by the Commission. In its letter of 29 May 1998, UPS adds that the Commission should in any event impose conditions and provide for safeguards in order "to prevent and trace cross-subsidization from the reserved letter market to the parcel market".

12. As to the second head of its complaint, UPS claims in its letter of 29 May 1998 that the proposed transaction shall affect (potential) competition between DP AG and DHL. UPS considers that even if this transaction were to be authorised by the Commission under the Merger Regulation, Article 81 would remain applicable as between DP AG and DHL since no economic unit would be created. UPS therefore requests the Commission in this letter to make sure that DP AG and DHL will not restrict competition through the co-ordination of commercial conduct, the exchange of business secrets or otherwise unless and until and to the extent as to which such restrictions are explicitly approved by the Commission.

III. Legal assessment

13. As mentioned above, only those aspects of the complaint based on Articles 81 and 82 are to be considered here.
14. In so far as Article 81 is concerned, UPS has not identified any agreements or concerted practices between DP AG and DHL which might infringe that provision nor has UPS provided any other facts indicating that DP AG and DHL might be infringing Article 81. UPS has, in its letter of 29 May 1998, simply requested the Commission to ensure that DP AG and DHL would not restrict competition through the co-ordination of commercial conduct, the exchange of business secrets or otherwise. This request was made at a time, where DP AG had not even acquired its shareholding in DHL and is therefore directed to a possible future behaviour of the two companies. In any event, the Commission has no indication whatsoever that DP AG and DHL do in fact engage in any such activities. For these reasons, the Commission, taking into account the improbability of establishing the existence of an infringement and the scope of the investigation which would be required to find a violation of Article 81, concludes that there is insufficient Community interest to justify an investigation of the case under Article 81.
15. As to the alleged infringement of Article 82, UPS considers that DP AG has infringed this provision by using revenues obtained on the letter market where it enjoys exclusive rights in order to finance the acquisition of joint control of DHL.
16. As the Commission noted in its decision of 26 June 1998, DP AG claims that the acquisition was financed by the sale of real estate which was the capital endowment for DP AG when it was made into a company. If this proved to be the case, the complaint would be unfounded on a point of fact.

17. In its letter of 29 March 1999, UPS correctly points out that it has not been established whether DP AG's claim as to the origin of the funds used is correct. However, contrary to the opinion expressed by UPS in this letter, it is not necessary for the Commission to investigate this matter. The reason for this is that the complaint would in any event be unfounded in law. Even if DP AG should indeed have used profits which it made on the letter market and if all the other conditions set out in Article 82 were fulfilled, there would be no abuse within the meaning of that provision.
18. The fact alone that a company decides to use the resources which are at its disposal in order to purchase a share in another company does not raise concerns under EC competition law as long as this acquisition does not result in the creation or strengthening of a dominant position.
19. In its decision of 26 June 1998, the Commission has come to the conclusion that the notified operation did not raise serious doubts as to its compatibility with the common market.
20. It is therefore necessary to examine the more specific question as to whether there is an abuse within the meaning of Article 86 where an undertaking uses (always on the basis of the assumption that the allegations of UPS are correct) profits which it derives from activities for which it enjoys a legal monopoly in order to finance the acquisition of control in a company which is active on a non-reserved market. The Commission considers that this question is to be answered in the negative. Even companies to whom member states have granted an exclusive right in a particular area are not prevented by Article 82 from expanding into other areas. This is without prejudice to the possibility that Article 82 could apply to the behaviour of these companies on the markets for which they enjoy monopoly rights.
21. Although the complaint is not completely clear in this respect it would seem that the complainant is also concerned about the possibility of a future cross-subsidization between DP AG and DHL. As the Commission has already pointed out in its decision of 26 June 1998³, cross-subsidization may indeed, under certain circumstances, represent an infringement of Article 82 of the EC Treaty.
22. However, in the present case this concern does not arise as DP AG has expressly undertaken to abstain from using revenues earned from its exclusive postal concession to subsidise the operational costs of DHL and to apply at arm's length conditions in its commercial relations with DHL.⁴ In any event, as the Commission already stressed in its decision of 26 June 1998 any cross-subsidy to DHL would be likely to be unattractive for DP AG since it would only be entitled to receive that part of DHL's profit corresponding to its share in that company, that is to say 22.498 % (at the time of the transaction).

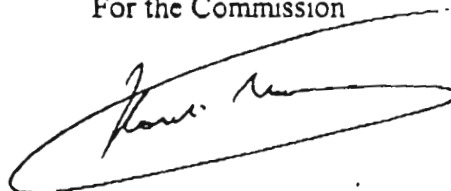
³ Paragraph 32 of the decision of 26 June 1998.

⁴ Paragraph 36 and point 1 of the Annex of the decision of 26 June 1998.

23. In view of the foregoing, the Commission has come to the conclusion that there are no grounds for granting your application in so far as Articles 81 and 82 of the EC Treaty are concerned.
24. In conclusion, and for the reasons set out above, I inform you that your application pursuant to Article 3 (2) of Regulation No. 17 of 8 June 1998 against Deutsche Post AG is hereby rejected.

Done in Brussels,

For the Commission

A handwritten signature in black ink, appearing to read 'Karel Van Miert', enclosed within a large, loopy oval shape.

Karel VAN MIERT

Member of the Commission

Copy: Deutsche Post AG

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