

*Case No IV/M.843 -
PTT Post / TNT / GD
Express Worldwide*

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 08/11/1996

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 8.11.1996

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sirs,

Subject : Case N° IV/M.843 - PTT Post/TNT/GD Express Worldwide
Notification of 4 October 1996 pursuant to Article 4 of Council Regulation N°
4064/89

1. On 4 October 1996 PTT Post BV (Netherlands) notified to the Commission an intended operation whereby PTT Post will acquire within the meaning of Article 3(1)(b) of Council Regulation (EEC) 4064/89 (the "Merger Regulation") sole control of (i) TNT Ltd (Australia) and (ii) GD Express Worldwide (Netherlands) ("GD Express").

I THE PARTIES

2. PTT Post, which is owned by Koninklijke PTT Nederland NV ("KPN") is the postal administration for the Netherlands. It is engaged in the transportation of documents and goods mainly by postal services. The Dutch State has in recent years reduced its shareholding in KPN from 100 per cent to less than 45 per cent.
3. TNT is an independent publicly quoted company. Its business also concerns the transportation of documents and goods. Among its other activities are airlines, tourism and aircraft leasing.
4. GD Express is a joint venture company created in 1991 in an operation approved by the Commission under the Merger Regulation (IV/M.102 -TNT/GD Net of 2 December 1991). That operation involved the creation by, on the one hand, five national postal administrations (Canada Post Corporation, Deutsche Bundespost Postdienst (now Deutsche Post AG), La Poste (France), PTT Post and Sweden Post), acting through GD

Net BV (a vehicle for coordinating their decisions) and, on the other hand, TNT of GD Express, a concentrative joint venture to supply international express delivery and similar services. The postal administrations contributed to GD Express their international express delivery activities; TNT contributed its international express delivery, European international express freight and remail activities.

5. On 23 July 1996 Canada Post, Deutsche Post and La Poste withdrew from GD Net, leaving PTT Post with 54 per cent and Sweden Post with 46 per cent of the shares and thereby conceding joint control of GD Express to PTT Post and TNT. The Commission also approved this operation under the Merger Regulation (IV/M.787 - PTT Post/TNT - GD Net of 22 July 1996).

II THE OPERATION

6. On 2 October 1996 PTT Post announced the initiation of a public bid by its subsidiary KPN (Australia) Ltd for the purchase of the entire issued share capital of TNT. The acquisition by PTT Post of sole control of TNT will also entail the consequence that GD Express will pass from joint control by PTT Post and TNT to sole control by PTT Post.
7. The operation accordingly constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III CONCENTRATION OF COMMUNITY DIMENSION

8. The aggregate worldwide turnover of the parties is: KPN ECU 9,550 million; TNT ECU 3,770 million and GD Express ECU 1,180 million. The aggregate Community-wide turnover of the parties is: KPN ECU 9,431 million; TNT ECU 1,130 million ECU and GD Express ECU 836 million. KPN alone achieves more than two-thirds of its aggregate Community-wide turnover within one Member State (ECU 9,361 million in the Netherlands).
9. Accordingly, the operation has a Community dimension within the meaning of Article 1(1) of the Merger Regulation. It does not qualify for cooperation with the EFTA Surveillance Authority under the EEA Agreement.

IV COMPATIBILITY WITH THE COMMON MARKET

Relevant product markets

10. The notification discusses the following product markets:
 - (i) International express delivery
11. This service has been defined by the Commission in decision IV/M.102 - TNT/GD Net⁽¹⁾ as a service for the delivery of documents and parcels which is overall faster and more

⁽¹⁾ Para 20. The distinction between basic postal services and express deliveries was recognised in the Commission decision (1 August 1990) concerning the provision in Spain of international express courier services (OJ (1990) L 233/19 at para 3).

reliable than the basic postal service and which provides certain value-added services. These services now include:

- proof of delivery
- track and trace (manual or electronic)
- possibility of changing destination or address in transit
- collection of mail from domicile
- flexible billing and pricing

The 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.

(ii) International express freight

12. This service was defined by the Commission in decision IV/M.102 - TNT/GD Net⁽²⁾ as a higher weight market (or markets) than international express delivery. A clear distinction between international express delivery and international express freight market (or markets) on the basis of weight is not however possible. It is essentially a truck or airline service and is usually arranged with a freight forwarder rather than with the transport companies themselves.
13. It would appear that the distinction between express freight and express delivery has become increasingly indistinct since the Commission's 1991 decision. Delivery times for express freight are often slightly slower than for express delivery and companies may provide dedicated vans and handling equipment in order to carry out the express freight service.

(iii) International mail / remail

14. International mail refers to the service satisfying the demand for transporting documents at regular speed across national boundaries. However within this broader definition a segment, known as remail, may be identified.
15. Remail was described by the Commission in decision IV/M.102 - TNT/GD Net⁽³⁾ as the cross-border letter service developed by private operators, consisting 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. Remail can also, on certain occasions, be hand delivered by private companies in its country of destination. The country of destination can also be its country of origin i.e. A-B-A remailing.
16. Remail provides a particular combination of price, service and speed. However it would appear that, due to service developments (especially since 1991) in the postal industry, some forms of remail have certain characteristics that differentiate them from traditional international mail. The usual customers for remail are high volume mail users such as periodical publishing businesses, banks, direct mailing operations and express delivery

⁽²⁾ Paras 27-28

⁽³⁾ Para 29

companies acting either individually or through mail consolidators. For most of those big customers, however, there is a choice between on the one hand traditional international mail services and on the other hand remail services. The provision of the remail service (collection, value enhancement, in the form of packaging, sorting or franking, and delivery) can either be by the national post offices themselves or, in rarer circumstances, express delivery companies. As in international mail, mail must cross an international boundary to be classified as remail; unlike international mail some forms of remail will have an added-value step in its delivery chain usually in the form of packaging or printing.

17. Remail is usually a more efficient, quicker and normally cheaper service than traditional international mail. Some forms of remail may be expected to evolve further to form a distinct product market in the future.

(iv) Domestic express delivery

18. This is a service equivalent to international express delivery but conducted entirely within national boundaries. Some global suppliers provide it as an "add-on" to their international service rather than a separate service; in addition there are national or regional operators who provide such a service in a form short of a global service.

(v) Domestic express freight

19. This is a service equivalent to international express freight but conducted entirely within national boundaries. However weight is of less importance in defining the market than it is for international express freight due to the fact that domestic express freight is often undertaken by means of road rather than air transport.

(vi) Domestic parcels

20. This is a service for the transportation of parcels at regular speed within national boundaries.

(vii) Domestic mail

21. This is a service for the transportation of documents and similar items at regular speed within national boundaries.

(viii) Logistics

22. This is described as the service of planning, implementing and controlling the flow and storage of goods, services and related information from point of origin to point of consumption in accordance with customer requirements, accompanying either cross-border or domestic transport services. Logistics is an express delivery market that has added-value services (such as warehousing or just-in-time management) included in the delivery chain.

23. Summary

To a greater or lesser extent many of the services described above become subsumed with one another making precise definitions more difficult. Furthermore it is clear that

these markets have evolved since 1991 and that certain types of global customer demand many of the above services at the same time, from one supplier.

24. It is apparent that services provided on a universal basis by a national post office (eg domestic mail to a certain weight limit) form separate product markets.
25. International express delivery, international express freight, domestic express delivery, domestic express freight and logistics have previously been considered to be separate markets but have now become largely integrated into one. The express delivery and express freight markets can only be differentiated by the nature of equipment being used to handle and deliver the goods: in terms of speed and other conditions they are often the same. Furthermore there are global customers who demand that their goods and documents are transported internationally (or nationally) at speed, from the customer's or courier's warehouse: such customers do not differentiate the different services involved. However it is unnecessary to decide whether these five different types of service form different product markets or not as, even on the narrowest definition as discussed below, the operation would not give rise to the creation or strengthening of a dominant position.
26. International mail, being mail that crosses borders at a regular speed, is a separate product market. However it appears that some forms of remail, to the extent that they transfer mail from the country of origin (A) to an intermediate country (B) or that they so transfer mail and have an added-value step in the delivery chain, may form a separate segment or segments within this product market.

Geographic reference markets

27. In its decision IV/M.102 - TNT/GD Net the Commission considered that as a result of significant differences between Member States the geographic reference markets for international express delivery, international express freight and remail were national, although that conclusion was likely to change as internal market legislation (eg public procurement directives) took effect in the European Union and if customers increasingly demanded global accounts.
28. It appears that with the establishment of the single market and the fact that courier companies often have global accounts the markets for the provision of international express delivery, international express freight, domestic express delivery, domestic express freight and logistics have become international. This is even though the companies retain national distribution networks and pricing and despite the fact that management and marketing have become trans-frontier operations. It is unclear whether the international dimension is global or regional (eg European) and it is unnecessary to decide whether these five different types of service have different geographic markets or not as, even on the narrowest definition as discussed below, the operation would not give rise to the creation or strengthening of a dominant position.
29. As concerns domestic mail and domestic parcels it is believed that as many such deliveries are made under universal service arrangements the service has a national dimension. However it is unnecessary to be precise as to a geographic market definition for these services as even on the narrowest definition as discussed below, the operation would not give rise to the creation or strengthening of a dominant position.

30. As to international mail, it is believed to be a national service. However, the Commission will take account of potential competition from outside the Netherlands (see paragraph 37 below).

Competitive assessment

31. It is necessary to assess potential overlaps (i) between PTT Post and TNT and (ii) between PTT Post and GD Express. However on the basis of the Commission's enquiries and the notification there would not appear to be any affected markets in this case.

(i) Overlaps between PTT Post and TNT

32. On the narrowest product market and geographic market definitions set out above the only overlap between PTT Post and TNT is in domestic express delivery market in Germany and in the logistics market in Belgium, Germany and the Netherlands.
33. For the domestic express delivery market in Germany the subsidiary recently acquired by PTT Post has below 2 per cent and TNT has 4 per cent of the market. According to data provided to the Commission there are several other operators in this market whose share thereof is greater than that of the merged parties.
34. For the logistics market in each of Belgium, Germany and the Netherlands the combined market shares of PTT Post and TNT are not significant. The market is characterised by the presence of a number of major transport and similar companies providing vigorous competition.

(ii) Overlaps between PTT Post and GD Express

35. An overlap occurs in several Member States in the international mail market (including remail) between PTT Post and GD Express. However, the international mail activities of GD Express are insignificant in any of these Member States. The situation is in this respect comparable with that considered by the Commission in IV/M.102 - TNT/GD Net.
36. The effect of the addition of market shares is of even less importance in this particular case when it is considered that the present operation confers upon PTT Post sole control of GD Express in place of the joint control with TNT which it formerly exercised. This change of control is of little significance as regards an assessment of the competitive situation of the parties. This is because the influence of PTT Post in the joint venture in respect of international mail has been significantly greater than that of TNT, which (unlike PTT Post) has had no international mail activities following the establishment of GD Express.
37. Although PTT Post is the universal service provider for international mail in the Netherlands, it is subject to significant actual competition. It is understood that the UK post office has a collection point for international mail in the Netherlands. Furthermore international courier companies, acting either individually or as consolidators, are able to collect international mail in the Netherlands for placing in other postal administrations' national systems. In addition PTT Post via these intermediaries is in competition with other international mail operators active throughout Europe, including several other national postal administrations (eg Denmark, Belgium and the UK). Consequently should the quality of the service offered by PTT Post decline or if any price increase introduced by PTT Post be contrary to market expectations, these other operators would be able to

exploit opportunities that may arise. Therefore the market position of PTT Post in international mail in the Netherlands will not be strengthened.

38. Although PTT Post retains a legal monopoly in international mail services in the Netherlands, the monopoly is not currently enforced and these services are in practice liberalised. Sources of potential competition include courier companies and other national postal administrations, which could, like the UK post office (as noted above) establish operations in the Netherlands. In these circumstances it can be anticipated that competition to PTT Post in the supply of these services will increase.

Comments of interested parties

39. Several interested parties expressed to the Commission their concerns that the acquisition by PTT Post of TNT has been possible only as a result of KPN's revenues from its exclusive mail and telephone concessions in the Netherlands; that KPN will cross-subsidize its non-concession activities by its concession operations (eg by: the inaccurate allocation of revenues or costs between its non-concession and its concession activities and by the "bundling" of tariff structures); and that current or future users of PTT Post's networks will be discriminated against in comparison to TNT and GD Express.
40. As regards the acquisition of TNT the purchase is being undertaken at a market price (including a premium reflecting the acquisition of control by PTT Post) so that other potential purchasers have not been excluded from the same possibility to undertake the transaction; and the acquisition is being largely financed by credit facilities made available at market rates and not from retained cash reserves.
41. As regards cross-subsidisation, the Commission has for several years considered that 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 sector⁽⁴⁾ state that "subsidizing 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 1995 the Commission adopted a draft 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 services⁽⁵⁾. This states that "operators . . . should not use the income of the reserved area to cross-subsidize activities in areas open to competition, except where the share of the cost of the universal service obligations borne by the universal service providers justifies such cross-subsidization."
42. By paragraph 6.6 of the Netherlands General Postal Directives Decree PTT Post is under the obligation to take care that no cross-subsidization takes place from the activities for the implementation of the universal service to the other activities which it operates. Paragraphs 6.4 and 6.5 of the decree require separate financial accounting systems (including cost and revenue allocation) for the universal postal service and other activities; compliance with this requirement is monitored by an independent auditor reporting to the Telecommunications and Post Department of the Ministry for Transport. In order to ensure compliance with these requirements KPN must deliver an annual report concerning the implementation of its universal postal service obligation to the

⁽⁴⁾ OJ C 233 of 6.9.1991

⁽⁵⁾ OJ C322 2/12/95

regulator at the Ministry of Transport; the regulator then makes a report to the parliament and the public.

43. The enforcement of the General Postal Directives Decree lies primarily with the regulator. However, an investigation can also be made following a complaint by a third party. As regards specific instances of cross-subsidisation it is expected that both TNT and GD Express will continue to prepare annual accounts which will become part of the public record. Consequently third parties will be able to assess for themselves whether cross-subsidisation has taken place.
44. Draft competition legislation modelled on Articles 85 and 86 EC is presently before the Netherlands Parliament. Therefore complaints concerning alleged abusive behaviour by KPN could be handled under national legislation.
45. As regards discrimination against competitors of TNT and GD Express (which might also be an infringement of Article 86 EC), PTT Post is bound by article 2(2) of the Postal Act to supply the universal postal service to anyone, including all end-users and service-providers in either a horizontal or vertical relationship to PTT Post, in the whole country against compensation. The General Postal Directives Decree requires that the same tariffs and conditions are offered within the universal service, although a discount system is available for high-volume purchasers.
46. Furthermore KPN has offered voluntary undertakings to the European Commission: These are contained in a letter from Messrs Loeff Claey's Verbeke (the representative of PTT Post) to the Commission dated 7 November 1996 (annex A to this decision).⁽⁶⁾ These undertakings correspond to a large extent to existing obligations under national or EC law.

V CONCLUSION

47. For the reasons set out in paragraphs 1 - 38 above 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 N° 4064/89.

For the Commission,

⁽⁶⁾ The undertakings given in December 1991 and repeated in July 1996 are set out in annex B to the present decision.

LOEFF CLAEYS VERBEKE

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European Commission

Merger Task Force

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* *Membre du Barreau de Rotterdam*

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Brussels, 7 November 1996

Dear Mr. Drauz,

RE: Case IV/M.843 PTT Post/TNT/GDEW

Further to our letter of 31 October 1996 and subsequent meetings with your service, I hereby confirm pursuant to my power of attorney as attached to the notification, that KPN formally undertakes:

- (i) that it will abstain from using the revenues earned from its national exclusive postal concession or from its exclusive rights in respect of voice telephony for as long as they remain exclusive - to subsidise the operational costs of assets and activities of TNT/GDEW, and
- (ii) that it will give end users as well as service providers, including competitors, access on a non-discriminatory and non-tying basis and with unbundled tariffs for its services, and
- (iii) that as long as the Bill providing for Independent Postal and Telecommunications Authority and the Bill for a new Dutch Competition Law have not yet been approved by Parliament and entered into force, KPN will cooperate with the Dutch regulatory authority to comply with all its requests for information on the subjects of cross-subsidisation from its reserved area to assets and activities of its non-reserved businesses, nondiscriminatory access and absence of lyings that would constitute an infringement of article 86 EC, unless a request of that authority can reasonable be considered to be not in accordance with the jurisprudence of the European Court for the protection of Human Rights and the European Court of Justice in respect of a fair process.

Société civile ayant emprunté la forme d'une société coopérative à responsabilité limitée

LOEFF CLAEYS VERBEKE

KPN moreover confirms that it will maintain, mutatis mutandis, the undertakings given in respect with the decision of the European Commission of 2 December 1991, TNT/GD Net (case IV/M.102), on the formation of GDEW and repeated and confirmed on 22 July 1996 and will apply the same undertakings in respect with TNT.

Yours sincerely

Jacques Steenbergen

ANNEX B

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⁽⁷⁾.

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.

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⁽⁸⁾, 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 courts⁽⁹⁾) for a period of one year from the relevant event.

⁽⁷⁾ Sweden 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.

⁽⁸⁾ Without prejudice to the exclusive access which the JVC will have temporarily to the sales outlets of the postal organisations.

⁽⁹⁾ While 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 confidential 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.

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 (Articles 85-90) of the EEC Treaty.

For greater certainty, nothing in this undertaking shall be construed as an acknowledgment 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⁽¹⁰⁾.

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 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."

⁽¹⁰⁾ Sweden 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.