

## II

*(Acts whose publication is not obligatory)*

## COMMISSION

## COMMISSION NOTICE

**pursuant to Article 5 (2) of Council Regulation (EEC) No 3975/87 and Article 12 (2) of Council Regulation (EEC) No 1017/68 concerning Case IV/33.634 — Agreements providing for the acquisition by Lufthansa, JAL and Nissho Iwai of minority interests in DHL International**

### I. Application lodged by DHLI, Lufthansa, JAL and Nissho Iwai

On 20 July 1990, DHL International Limited, DHL House, 13 Mok Cheong St, Tokwawan, Kowloon, Hong Kong, and Middlestown NV, Plaza Jojo Correa, 1-5, Willemstad, Curaçao, Netherlands Antilles (together 'DHLI'), Deutsche Lufthansa Aktiengesellschaft ('Lufthansa'), Von-Gablenz-Straße 2-6, 5000 Köln 21, Federal Republic of Germany, Japan Airlines Company, Ltd, ('JAL'), Tokyo Building 7-3, Marunouchi 2-chome, Chiyoda-ku, Tokyo 100, Japan, and Nissho Iwai Corporation ('Nissho Iwai') 4-5, Akasaka 2-chome Minato-ku, Tokyo 107, Japan, submitted an application pursuant to Article 5 of Council Regulation (EEC) No 3975/87<sup>(1)</sup> and Article 12 of Council Regulation (EEC) No 1017/68<sup>(2)</sup> for a decision granting negative clearance or, in the alternative, applying Article 85 (3) of the EEC Treaty to the agreements concluded on 25 May 1990 by the aforementioned parties.

### II. Provisions of the agreements

#### 1. Acquisition by Lufthansa, JAL and Nissho Iwai of minority interests in DHLI and DHL USA

Pursuant to the agreements, Lufthansa and JAL shall each acquire a 5 % holding in DHLI with the option for each to raise its holding to 25,001 % ; Nissho Iwai is to acquire an initial holding of 2,5 % with the option of increasing this to 7,5 %. The options are exercisable within a period of 18 months.

Lufthansa, JAL and Nissho Iwai shall at the same time acquire shareholdings of 1 %, 1 % and 0,5 %, respectively in DHL Corporation USA ('DHL USA'), a separate corporation which provides express delivery services under the DHL name in the United States ; three years following the acquisition of these shareholdings in DHL USA, DHLI will have the option to acquire a 20 % holding in DHL USA. Prior to the exercise of that option, Lufthansa, JAL and Nissho Iwai will transfer their holdings in DHL USA to DHLI.

#### 2. Objectives of the agreements

From the perspective of DHLI's shareholders, the purpose of the agreements is to allow them to realize a portion of their interest in DHLI. As concerns DHLI and the new investors, the purpose of the agreements is to provide DHLI with financially strong shareholders who will increase its ability to compete successfully in an increasingly competitive environment and to permit the new shareholders to make a financial investment in the expanding door-to-door delivery industry.

#### 3. Board and management of DHLI

The 13-member board of DHLI will consist of the chief executive officer and of five directors nominated by DHLI's original shareholders, three directors nominated by each of Lufthansa and JAL and one nominated by Nissho Iwai. If any of the new investors fails to exercise its option in full, its representation will be reduced proportionately. The Board of DHLI will act by simple majority except for certain matters requiring the consent of 80 % of the board. The parties have not entered into any agreement concerning the exercise of their shareholder's or directors' votes.

For as long as they are shareholders, Lufthansa and JAL will each be entitled to nominate one member to DHL USA's 11-member board.

<sup>(1)</sup> OJ No L 374, 31. 12. 1987, p. 1.

<sup>(2)</sup> OJ No L 175, 23. 7. 1968, p. 1.

#### 4. Relations between DHLI, Lufthansa, JAL, Nissho Iwai and DHLI's original shareholders

The new and original shareholders agree, for a maximum duration of 10 years, and without prejudice to any existing activities, not to engage in, or acquire any new interest in any entity engaged in, the international door-to-door pick-up and delivery of documents and packages using its own ground transport and courier network.

DHLI will have the right to seek the use of airport or package and freight facilities belonging to either Lufthansa or JAL for the purpose of improving its business. Lufthansa and JAL will seek to comply with such requests to the extent that it is commercially reasonable to do so. Lufthansa and JAL may make similar requests of DHLI.

DHLI shall remain free in its choice of cargo carriers in the operation of its business; however, where DHLI chooses to use the cargo services of either Lufthansa or JAL, it shall benefit from that carriers' most preferred customer rates. In turn, DHLI will charge its most preferred customer rate to Lufthansa, JAL and Nissho Iwai.

### III. Arguments of the parties for negative clearance or exemption

#### 1. Negative clearance

The parties submit that the agreements will not restrict competition between the new investors and DHLI or as between the new investors, will not have the effect of foreclosing competitors of either DHLI or the new investors and will not strengthen or create a dominant position. In support of these arguments they note, *inter alia*, that DHLI and the new investors are not active in the same markets, that DHLI provides over 90 % of its own air transport requirements within the Community, that its requirements for air transport capacity account for less than 1 % of the cargo capacity made available annually by Lufthansa and JAL and that DHLI's principal competitors are vertically integrated to a significant degree as concerns the supply of air transport capacity.

#### 2. Reasons for exemption

The parties have put forth due following arguments in support of the application of Article 85 (3):

- the agreements will lead to the improvement of the distribution of goods and the provision of door-to-door express delivery services by permitting DHLI to have access to the organizational and management skills of the new investors and by increasing DHLI's ability to plan and carry out the investments necessary to provide competitive services in an expanding and highly competitive environment. The provision of air cargo services by Lufthansa and JAL will also be improved as a result of the new investors' exposure to DHLI's know-how and operational methods,
- consumers will receive a fair share of these benefits because they will be afforded a better level of services at competitive prices,
- there is no possibility of eliminating competition as concerns the services in question. The provision of door-to-door express delivery services is growing at a rate of 30 % per year. The presence of powerful competitors and new market entrants and the sophistication of professional customers ensures that competition will continue to remain intense for the provision of the services concerned.

### IV. Conclusion

This notice is published pursuant to the procedure established by Article 5 of Council Regulation (EEC) No 3975/87 and Article 12 of Council Regulation (EEC) No 1017/68, the Commission having determined, *prima facie*, that the agreement in question meets the test of Article 85 (1) of the Treaty. The Commission has not at this stage formed any view on the applicability of Article 85 (3) of the Treaty to the agreement.

The Commission invites all interested third parties and Member States to submit any comments they may have within 30 days from the date of publication of this notice, quoting reference IV/33.634, to the following address:

Commission of the European Communities,  
Directorate-General for Competition,  
Directorate D  
200, rue de la Loi  
B-1049 Brussels.