II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 13 March 2001

declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement

(Case COMP/M.1915 — The Post Office/TPG/SPPL)

(notified under document number C(2001) 721)

(Only the English text is authentic)

(Text with EEA relevance)

(2004/236/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], as last amended by Regulation (EC) No 1310/97 [2], and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 15 November 2000 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations [3],

Whereas:

(1) On 24 July 2000 the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EEC) No 4064/89. The notification was completed on 10 October 2000.

(2) Through the notified transaction the undertakings The Post Office (TPO), United Kingdom, TNT Post Group NV (TPG), the Netherlands, and Singapore Post Private Limited (SPPL), Singapore, will acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of two newly created joint ventures (Delta and NewCo).

(3) By decision dated 15 November 2000, the Commission found that the notified operation raised serious doubts as to its compatibility with the common market and initiated proceedings pursuant to Article 6(1)(c) of Regulation (EEC) No 4064/89 and Article 57(2)(a) of the EEA Agreement.

I. THE PARTIES' ACTIVITIES

(4) TPO is the national postal operator in the United Kingdom. It provides the full range of postal services including domestic and outbound cross-border mail as well as domestic and outbound cross-border parcels. TPO also has commercial activities, including outbound cross-border mail services, in a wide range of other countries such as Germany, France, Netherlands and the USA.

(5) TPG is the national postal operator in the Netherlands. It resulted from the splitting of the former Koninklijke PTT Nederland NV (KPN) group into KPN (telecom) and TPG. TPG contains the logistics, express and mail businesses of the former KPN-group. TPG is the parent company of Koninklijke PTT Post BV (PTT Post), the Dutch postal operator. TPG provides outbound cross-border mail services through PTT Post in the Netherlands and through its TNT International Mail business in more than 45 countries including the Netherlands.

[1] OJ L 395, 30.12.1989, p. 1; corrected version in OJ L 257, 21.9.1990, p. 13.
[2] OJ L 180, 9.7.1997, p. 1.
[3] OJ C 69, 19.3.2004.

(6) SPPL is the national postal operator in Singapore. It currently has extremely limited activities in the EEA.

II. **THE OPERATION**

(7) The operation consists of the formation of two joint ventures between TPG, TPO and SPPL which are to be active in the provision of outbound cross-border mail services and to a limited extent in providing outbound cross-border parcel services. They will not provide express services.

(8) The joint venture Delta will be active in the provision of the said services throughout the world except the Asia Pacific region. The joint venture NewCo will provide these services in the Asia Pacific region.

(9) TPG will contribute its TNT International Mail division to the joint ventures: those activities of TNT International Mail outside the Asia Pacific region, including those in the Netherlands, will be contributed to Delta, those in the Asia Pacific region to NewCo. The TNT International Mail Division carries out outbound cross-border mail activities and to a limited extent outbound cross-border parcel services (Easy Parcel product). TPG will retain *inter alia* the outbound cross-border mail activities of PTT Post in the Netherlands and domestic and cross-border parcel delivery services. It will also retain the TNT Express business.

(10) TPO will contribute its International Mail Division to Delta, which carries out outbound cross-border mail services outside the United Kingdom. All its activities are outside the Asia Pacific region. TPO will furthermore contribute Royal Mail US Inc, which is active in outbound cross-border mail services in the United States of America. TPO will retain, *inter alia*, its United Kingdom domestic and outbound cross-border mail business, domestic and cross-border parcel business. TPO furthermore retains its European Domestic Division, which includes the Red Mail Group (France), which is owned by TPO, and the CityMail Sweden AB, in which TPO holds an 67 % stake. Even though they provide some outbound cross-border mail services in their respective countries, these are not their main activities.

(11) SPPL is legally not in a position to contribute its outbound cross-border mail activities to NewCo. Therefore SPPL will contribute its outbound cross-border mail business through a contract with NewCo, under which NewCo will carry out SPPL's outbound cross-border mail activities as a sub-contractor on behalf of SPPL. SPPL will retain, *inter alia*, its domestic mail business, inbound cross-border mail and local and cross-border parcel service.

(12) For a transitional period of three years, Delta will sell outbound cross-border mail services from other countries with a destination in the United Kingdom on behalf of TPO under a sales and marketing agency arrangement. For the same transitional period Delta will be appointed as Koninklijke PTT Post BV's agent to sell and market its mail services to customers abroad for their mail with destination in or via the Netherlands. At the end of this period the agency agreements will terminate and the relevant businesses will be contributed to Delta.

III. **CONCENTRATION**

1. JOINT CONTROL

(13) The joint ventures will be jointly controlled by TPO, TPG and SPPL.

(14) Delta's share capital will be held by the parents in the following proportion: TPG will hold 51 % of the shares, whereas TPO and SPPL will hold 24,5 % each. The joint venture agreement gives each parent a veto right with regard to strategic decisions, such as the contents of the business plan, the business strategy and the budget.

(15) NewCo's share capital will be held jointly by Delta and SPPL at 50 % each. Delta and SPPL therefore jointly control NewCo. Since Delta is in turn jointly controlled by TPO, TPG and SPPL, the latter three companies ultimately control NewCo together.

2. FULL FUNCTIONALITY

(16) The joint ventures will perform on a lasting basis all the functions of an autonomous economic entity.

(17) Delta will carry out all the functions necessary to provide outbound cross-border mail services. Delta will act as a consolidator, putting together either services provided by themselves or by subcontractors in order to provide outbound cross-border mail services to business customers. Consolidators collect and group outbound cross-border mail to a specific destination and subsequently negotiate a special rate with public postal operators or with local delivery companies in order to distribute the consolidated mail in the country of destination. According to the parties, consolidators outsource approximately 80 % of their operating costs. Delta will not be obliged to outsource services to its parents. However, Delta will enter into agreements with its parents which provide that the parents provide delivery services for Delta within the parents' home countries. They furthermore provide that the parents accept outbound cross-border mail from Delta for distribution to the final recipient in the destination country. With the businesses transferred to Delta by TPO and TPG, Delta will have the resources to operate on a market for outbound cross-border mail, performing the functions normally carried out by undertakings operating on the same market.

(18) NewCo will also carry out the functions generally carried out by competitors providing outbound cross-border mail services. Like Delta it will act as a consolidator. Even though SPPL does not contribute its outbound cross-border mail business to NewCo, the joint venture will have sufficient resources to compete on the market through the business contributed by TPG.

IV. **COMMUNITY DIMENSION**

(19) The undertakings TPG, TPO and SPPL have a combined aggregate world-wide turnover in excess of EUR 5 000 million ([4]) (TPG, EUR 8 468 million; TPO, EUR 11 839 million and SPPL, EUR 176 million). Two of them have a Community-wide turnover in excess of 250 million EUR each (TPG, EUR […]* (*); and TPO, EUR […]*), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension. It does not constitute a cooperation case under the EEA Agreement, pursuant to Article 57 of that Agreement.

V. **COMPATIBILITY WITH THE COMMON MARKET**

A. *BACKGROUND*

(20) This transaction has to be seen in the light of the ongoing and future liberalisation of the postal sector.

1. REGULATORY ENVIRONMENT

(21) Under Council Directive 97/67 of the European Parliament and the European Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service ([5]), which is currently in force, Public Postal Operators (PPOs) can be granted a legal monopoly for the provision of certain services, to the extent necessary to ensure the maintenance of universal service. These services are the provision of domestic and cross-border mail weighing less than 350 grams and costing less than five times the standard rate. Above these price and weight limits (non-reserved area), the liberalisation process has already taken place. Below the limits, the Council Directive leaves open the possibility for Member-States to further liberalise the postal sector.

(22) Although the Council Directive does not make any distinction between inbound and outbound cross-border mail, in the postal sector there is a distinction between the two. While inbound cross-border mail can be defined as the international mail entering in a given country, outbound cross-border mail is the international mail sent from a given country. Outbound cross-border mail, which represents less than 5 % of total mail and 3 % of the total revenues of PPOs from the universal service, is, according to the notification, *de facto* liberalised in ten Member-States, except for Portugal, Spain, Italy, Greece and Austria. Denmark, the Netherlands, Sweden and Finland are the only Member-States where outbound cross-border mail is also *de jure* liberalised. In the United Kingdom, outbound cross-border mail will be *de jure* liberalised starting from March 2001 when the Postal Services Act 2000 will enter into force.

(23) On 30 May 2000, the Commission put forward a proposal for further liberalisation of the postal sector ([6]). According to the proposal, the weight and cost limits for domestic and inbound cross-border mail under which the incumbent PPO exercises a legal monopoly should be reduced by 2003 to a weight of 50 grams and a cost of less than 2 ½ times the standard rate. Furthermore, the proposal envisages a full liberalisation for all Member-States of outbound cross-border mail by 2003. The European Parliament adopted an opinion to amend the draft directive which did not allow for the liberalisation of outbound cross-border mail. The Council did not agree on the compromise proposal that was put to it on 22 December 2000. Timing and extent of future liberalisation of the postal sector is currently not clear.

2. OUTBOUND CROSS-BORDER MAIL

(24) With the liberalisation of outbound cross-border mail the incumbent PPOs have started to face competition in this area from third country PPOs and consolidators.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

([4]) Turnover calculated in accordance with Article 5(1) of Regulation (EEC) No 4064/89 and the Commission Notice on the calculation of turnover (OJ C 66, 2.3.1998, p. 25). To the extent that figures include turnover for the period before 1 January 1999, they are calculated on the basis of average ECU exchange rates and translated into euro on a one-for-one basis.

([5]) OJ L 15, 21.1.1998, p. 14.

([6]) Proposal of 30 May 2000 for a European Parliament and Council Directive amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, Commission(2000) 319 final: OJ C 337 E, 28.11.2000, p. 290.

(25) PPOs use their postal infrastructure to transport and deliver outbound cross-border mail to the final destination. As UPU ([7]) members they can and do operate so called Offices of Exchange (OEs), by which they introduce the mail into the PPO of the destination country as international mail. In these OEs, mail is tagged according to UPUrequirements, the necessary UPU forms are filled in, enabling the sending PPO to introduce the mail into the PPO of destination as international mail. The receiving PPO is then required to distribute this mail within its own country, without being able to impose its domestic postal requirements on it, which, unlike the uniform UPU requirements, may vary from country to country. Payment is covered by UPU rules, unless other modalities are agreed. The tariffs that are paid for mail within the EU are determined by the Reims II agreement ([8]) applicable between all Community PPOs except TPG ([9]).

(26) OEs are operated from the PPO's home country, however they can also be operated outside that country enabling the PPO in question to take advantage of better transport facilities in the host country. In the latter case, the mail which a third country PPO has collected in the host country or in another country can be fed through the OE into the UPU system as if it were originating in the PPO's home country.

(27) Alternatively, PPOs can choose to inject the outbound cross-border mail entrusted to them by their customers (either in their home countries or in countries in which they have a subsidiary, either with or without an OE) as domestic mail directly into the postal system of the PPO of the destination country as domestic mail. For business mail that is addressed to recipients in large urban centres, private delivery networks that deliver the mail often also provide an alternative to the traditional postal routes.

(28) Consolidators are not PPOs. They are private companies that collect and consolidate mail from business customers, thereby getting higher volume rebates from PPOs than the business customers might get individually. The PPOs, who in turn deal with consolidators, have the advantage of dealing with a limited number of large customers rather than with innumerable small business customers.

(29) Not being PPOs, consolidators are not eligible to operate their own OEs under the UPU rules. They are therefore dependent on PPOs for access to distribution of their outbound cross-border mail under the UPU system. They can therefore give the mail they have collected either to the incumbent post office in their country, or to a PPO established in that country. This third country PPO can process this mail either through the OE it operates in that country or via an OE in its home country. Alternatively the mail can also be distributed for the consolidators by a PPO not established in the consolidator's country of residence (even though that seems to be the exception).

(30) Outside the UPU system consolidators can — as described above for PPOs — introduce their mail via direct injection as domestic mail into the postal system of the country of destination. Equally, they can use alternative private delivery networks in regions where they exist.

(31) The number of alternative ways for the distribution of mail through the various operators that has been summarised here is represented in a graph that is annexed to this Decision (Annex I). This description represents abstract alternatives for the various operators. Whether and to what extent these various alternatives can and are in fact used by them depends largely on their economic viability for the individual operator. The operator, be it the incumbent PPO, a third country PPO or a consolidator, has to decide which way of routing its mail is economically viable and supported by the prices that the ultimate customers are willing to pay. This decision making process is the industrial know-how of the individual operator. The decision is not only determined by parameters such as the service required by the customer (speed, reliability, cost) but also by the size of the operator, the volumes it is capable of generating and the main destinations which are being served.

(32) In looking at the various players on the market it is noticeable that competing for the final business customer, i.e. the sender of the mail, are the incumbent PPO, next to third country PPOs as well as consolidators. At the same time consolidators will be customers of those same PPOs for the distribution of their mail through the UPU system. They will also be customers of those PPOs that have chosen not to compete for the ultimate customers, but concentrate on distributing consolidators' mail through their access to the UPU system.

B. *RELEVANT PRODUCT MARKETS*

1. OUTBOUND CROSS-BORDER MAIL

(33) The relevant market definition in the sector for outbound cross-border mail has been assessed by the Commission on the basis of the different product market definitions proposed by the parties as well as on the basis of the results of the market investigation.

([7]) Universal Postal Union, established by a treaty under public international law and to which countries are the signatories.

([8]) See Commission Decision 1999/695/EC of 15 September 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No IV/36.748 — Reims II), OJ L 275, 26.10.1999, p. 17.

([9]) The PPOs of the following countries are signatories to the Reims II agreement: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, i.e. all EEA countries except the Netherlands and Liechtenstein.

a. ***Market for outbound cross-border mail***

(34) The notifying parties stated in the notification that there is a relevant product market for outbound cross-border mail. Outbound cross-border mail services involve the collection of mail from customers, sortation of mail and its distribution to any destination country in the world. The parties included in this market definition personal items of correspondence as well as business mail. Business mail includes letters, direct mail, printed matter/publications and small packets from business customers (B[usiness]-to-B[usiness] and B[usiness]-to-C[onsumer]).

b. ***Market for outbound cross-border business mail***

(35) The market investigation has shown, however, that the relevant product market is not a market for all outbound cross-border mail, but is no wider than a market for outbound cross-border business mail. Business customers require and receive different services compared to private customers. The latter have to buy a stamp at a post office on the basis of a set tariff and mail their letters through mailboxes or post offices. On the basis of special agreements with postal operators and/or consolidators, business customers negotiate rebates and receive additional services such as pick up of mail on the premises, franking etc. The level of work-share provided by the business customer will be reflected in the price.

(36) Private customers are limited to the standard tariffs and services of the local post office, whereas most business customers have the choice of either sending their mail at the standard public tariff or on the basis of special agreements with postal operators and/or consolidators. Those smaller businesses that pay for their mail to be sent abroad by buying stamps are unlikely to have access to alternative service providers due to their small volumes of and expenditure on outbound cross-border mail services.

(37) For these reasons, in its Statement of Objections, the Commission adopted a product market definition for outbound cross-border business mail that excluded private consumers and business expenditure on stamps.

(38) In their reply to the Statement of Objections the parties contested the market definition adopted by the Commission. The parties proposed a new product market definition, identifying a specific market for outbound cross-border contract mail services. This market would include only cross-border mail services provided under contract and would therefore exclude not only the outbound cross-border business mail sent at the standard public tariff but also cross-border business mail sent using a franking machine.

(39) The parties have provided market share data for an outbound cross-border contract mail market in the United Kingdom and the Netherlands. As all the mail sent at public tariff rates and with franking machines represents business for the incumbent PPO, the main effect is to reduce the market share of the parties in their respective home countries in relation to their competitors.

(40) The Commission maintains its product market definition of outbound cross-border business mail as set out above for the following reasons.

(41) For the calculation of the market share of TPO and TPG in their respective home markets, the parties propose to consider as contract mail only the mail that meets the thresholds necessary in order to get a rebate as business customers. These thresholds are unilaterally fixed by the two incumbents in their home markets, and thus accepting such a market definition would mean defining the product market referring purely to supply-side criteria.

(42) It should be also noted that the thresholds necessary in order to get a rebate as business customers are very different from country to country. In the present case, the annual threshold fixed by TPG in the Netherlands is equivalent to NLG 25 000 (approximately EUR 10 000) and the annual threshold fixed by TPO in the United Kingdom market is equivalent to GBP 2 500 (approximately EUR 4 000). As a consequence, a business customer who is looking for a rebate contract in the Netherlands is faced with a threshold that is 2,5 times higher than in the United Kingdom. With the new proposed product market definition, which takes into account these different thresholds, the parties artificially define their market shares, considering as contract mail business customers only the ones that meet their thresholds.

(43) Evidence that these thresholds should not be taken to delineate the market is provided by the fact that consolidators offer their cross-border mail services to all business customers, irrespective of their annual expenditure for mail services. Mercury International and Belgian Mailhouse, which are two consolidators active both in the United Kingdom and in the Netherlands, confirmed during the hearing that they will accept mail from any kind of business customer. TNT itself stated in the hearing that as a consolidator it would consider as potential customers all the business customers, without having any specific predefined threshold.

(44) Under the parties' proposal for a 'contract' market, it is assumed that none of the franking machine customers have a choice, whereas the Commission considers that there are business customers who fall below the thresholds set by the parties and are using franking machines who would be able to switch to other providers of outbound cross-border mail services.

(45) Such business customers may use franking machines even though they would be eligible to transfer their business to consolidators or third country PPOs, because they generate enough turnover and volume of outbound cross-border mail. During the course of the investigation the Commission has not been able to identify how much of the business derived from business customers with franking machines could realistically have been spent with competitors to TPO or TPG. Therefore it is considered appropriate to adopt a market definition for outbound cross-border mail which has an upper and lower limit. The upper limit includes all expenditure under contract plus that spent via franking machines. The lower limit includes all expenditure under contract but excludes that spent via franking machines.

c. ***Product market conclusion***

(46) In the light of the above reasoning, the product market definition retained by the Commission is that for outbound cross-border business mail. This product market definition has an upper limit (including franking machines) and a lower limit (excluding franking machines). For the purposes of this decision it is not necessary to further delineate this range, because regardless of whether the precise boundary of the market lies at the upper limit, the lower limit or somewhere in between, the assessment would not be materially affected.

2. OUTBOUND CROSS-BORDER PARCELS

(47) TPG will contribute by way of its TNT International mail business its Easy Parcel Product. The Easy Parcel product is a service that is accessory to the outbound cross-border mail services TNT provides to its customers. The service is geared towards business customers, with a pick-up service from the customer's premises, faster delivery times and is not available in post office counters, but provided to business customers. It is not a time-certain service.

(48) The parties state that the relevant product market for this product is the market for outbound cross-border expedited parcels. The parties argue that, while their product is not an express service, since it is not time certain, it has to be distinguished from standard parcel services. Unlike standard parcels, expedited parcels are collected from the business customers' offices and they are not available through post office counters.

(49) In its previous decisions, the Commission has not defined a separate market for expedited parcels as opposed to standard parcels. For the purposes of this decision it is also not necessary to further delineate the relevant product markets because in neither market definition considered, would effective competition be significantly impeded in the EEA or any substantial part of that area.

C. *RELEVANT GEOGRAPHIC MARKETS*

1. OUTBOUND CROSS-BORDER BUSINESS MAIL

(50) The notifying parties stated in the notification that the relevant geographic markets are national. The market investigation confirmed this view.

(51) In the past the Commission considered that the relevant geographic market for outbound cross-border mail could be characterised as national ([10]). However, the Commission also considered that the national dimension of the geographic market could be expected to change as a result of a possible trend towards a demand by customers for global accounts.

(52) The market investigation has shown that national market characteristics are still in place, even though some suppliers might have global accounts for the provision of the different delivery services: the outbound cross-border mail services are perceived by the customers as a national service, the distribution networks are national, the rate cards provided by the parties show that pricing is national and that the price levels are different in different countries, marketing is mainly done on a national level and there are significant variations in market share distribution of the main suppliers across the different Member States. In addition, the fact that there are different eligibility criteria in different countries in order to qualify for a contract (see above) is an additional argument in favour of national markets.

(53) In their joint reply to the Commission's Statement of Objections the parties stated for the first time that the geographic market should be characterised as either European or international. In proposing a new geographic market definition, the parties refer to a number of multinational companies which they say are increasingly shopping around among competitors based in different countries in order to obtain the best combination of price and service levels.

(54) If the Commission were to dismiss a wider geographic market definition, the parties consider there to be a single geographic market which includes at least the Netherlands and Belgium. The parties base their conclusion on the fact that three of the competitors in the Dutch market — TNT, Belgian Mailhouse and De Post/La Poste — run their operations in Brussels and not in the Netherlands. Furthermore, the parties also indicated that Belgium-based bulk mail customers bring their business mail to the Netherlands.

([10]) See the following Commission decisions: IV/M.102 — TNT/GD Net; IV/M.787 — PTT Post/TNT-DG Net; IV/M.843 — PTT Post/TNT/GD Express Worldwide; IV/M.1168 — Deutsche Post/DHL; IV/M.1410 Deutsche Post/Danzas.

(55) After considering the arguments presented by the parties in order to justify a wider geographic market definition than that which they had originally proposed, the Commission has decided to retain the geographic market definition as being national. The following reasons are pertinent in this context.

(56) Concerning the existence of a wider Netherlands/Belgium geographic market, the market investigation has shown that the customers of the different competitors active in the Dutch market are mainly Netherlands-based business customers. In particular the parties have been unable to provide evidence that their Dutch operations derive significant business from outside the Netherlands.

(57) The existence of a wider Netherlands/Belgium geographic market can also not be justified on the grounds that some of the competitors operating on the Dutch market have their production facilities in Belgium. In so far as these operators carry out their marketing and sales activities in the Netherlands, the fact that they process the mail in facilities in Belgium does not affect the geographic market definition.

(58) The market investigation also does not bear out the statement of the parties according to which large multinational companies purchase their outbound cross-border mail requirements on a European or international basis. The market investigation has shown that, while the occasional company may do so, the general purchasing pattern for outbound cross-border mail services remains national even for large multinational companies.

(59) In the light of the above reasoning, the Commission considers that the market is national in scope.

2. OUTBOUND CROSS-BORDER PARCELS

(60) The parties consider the geographic scope for international parcels to be national. This is in line with the previous decisions of the Commission. The results of the market investigation gave no indications for a different geographic market definition.

(61) It is not necessary to further delineate the relevant geographic markets because, in all alternative geographic market definitions considered effective competition would not be significantly impeded in the EEA area or any substantial part of that area.

D. *EFFECT OF THE CONCENTRATION*

1. OUTBOUND CROSS-BORDER BUSINESS MAIL

(62) The combined market share of the parties for outbound cross-border business mail is below (in many countries considerably below) 15 %, except in the home countries of TPO and TPG, namely the United Kingdom and the Netherlands. Therefore only the latter two markets show grounds for a more substantial assessment.

a. ***Intra-group competition***

(63) The effects of the concentration have been analysed on the basis of the addition of the market shares of TPO and TPG in the United Kingdom and the Netherlands respectively. In both countries one of the parents of the joint venture will remain active in the same market where the joint venture will operate. Even if the joint venture and the respective parent would compete with each other in those countries, this would have to be considered as intra-group competition and, in the light of the economic arguments outlined below, not as competition on the market.

(64) In their notification the parties state that competition between the parents and subsidiaries should be taken into account in the Commission's assessment and that in reality there will be no structural change on the parents' markets as the joint venture, Delta will continue to compete with its parents. The parties acknowledge that the incentives for such competition may be limited when the subsidiary is 100 % owned. However, they argue that the incentives for Delta to compete will actually increase as a result of the change in TPG's shareholding (100 % to 51 %) since TPG will only receive a 51 % share of any business that it loses to Delta, rather than the 100 % it would receive if the mail was sent via TPG.

(65) The Commission considers, however, that the fact of TPG retaining control, albeit joint control, over TNT, refutes these arguments. Whether and to what degree companies that belong to the same group do in fact compete with each other, depends ultimately on company policies and not on the market forces. Furthermore, there exist no elements to suggest that exceptional circumstances prevail, according to which intra-group competition can in this case be considered as equivalent to competition on the market. The fact alone that customers switch from one group member to another is not such a factor.

b. ***United Kingdom***

aa. **Market position**

(1) *Market shares*

(66) Table 1a gives market shares for outbound cross-border business mail, column 1 including franking machines ([11]), column 2 excluding franking machines.

Table 1.a

United Kingdom market for outbound cross-border business mail by value 1999

	Outbound cross-border business mail	
Competitor	(1) Including franking machines	(2) Excluding franking machines
Total market value	EUR [...]*	EUR [...]*
TPO — retained business	[50-60]* %	[40-50]* %
TPG — contributed business	[5-10]* %	[5-10]* %
TPO/TPG combined	**[60-70]* %**	**[40-50]* %**
Deutsche Post Group Total (includes DHL & Herald)	[10-20]* %	[10-20]* %
Mercury	[5-10]* %	[10-20]* %
La Poste (France)	[1-5]* %	[1-5]* %
Pharos	[5-10]* %	[5-10]* %
Swiss Post	[1-5]* %	[1-5]* %
Others	[5-10]* %	[10-20]* %

(67) If franking machine customers are included, the parties would have a combined market share of [60 to 70]* %, and the increment that would result from the concentration is [5 to 10]* %. Two other players have a market share of approximately [5 to 10]* %, Deutsche Post and Mercury, while a number of other players (La Poste, Pharos and Swiss Post) have market shares of up to [1 to 10]* %.

([11]) These data update the figures that the Commission had previously included in the Statement of Objections. The figures have been revised to remove EUR […]* spent by business on stamps to send outbound cross-border mail. It had not been the Commission's understanding that this expenditure had been included in the market shares. In addition, the data previously supplied to the Commission for the United Kingdom had been based on the following constant GBP/EUR exchange rates: TPO (1.722) and TPG (1.65). All data presented in Table 1a has now been based on the official ECB average exchange rates for 1998, 1999 and 2000 respectively. Nevertheless, the difference in market structure between the resulting market shares is not great, due to certain additional adjustments that the Parties also made to the figures previously provided.

(68) If franking machine customers are excluded, the most significant difference is that TPO's initial market share is smaller [40 to 50]* %. The increment that would result from the concentration would be [5 to 10]* %, therefore the combined share of the market would be [40 to 50]* %. TPO's share is smaller if franking machine customers are excluded because all of the income from mail sent via franking machines accrues to TPO.

(2) *Other competitors*

(69) The number of players on the market is not affected by the choice of market definition. On both markets it is clear that there are currently a number of players in the market. Some of these players are consolidators, such as Mercury International and Pharos; there are at least five third country PPOs from the EEA present ([12]), as well as a number of non-European PPOs (e.g. Philippine Post, Hong Kong Post and SPPL). Two remaining competitors have higher market shares than TPG, which is currently only the fourth largest player on the market.

(70) For the purposes of the consumer, it does not appear relevant whether their service provider is classified as a consolidator or as a PPO, as long as they provide a postal service which offers a consistent quality and which is available at a competitive price. Nevertheless, the presence of the third-country PPOs has the additional benefit that it provides consolidators with alternative points of access to the UPU system (see below).

(3) *Dynamics of the market*

(71) TNT (subsequently acquired by TPG) entered the United Kingdom market in 1986. In addition, as it entered the market earlier and has achieved a lower market share than a number of other players, the parties argue that TNT's growth rate is one of the slowest in the United Kingdom market.

(72) The following third-country PPOs have all entered the United Kingdom market in the last five years or so: Deutsche Post opened a sales office in the Midlands towards the end of 1998 but had sold from a distance for about a year before that. In 2000 Deutsche Post acquired the United Kingdom consolidator Herald and as a result has grown rapidly. La Poste has also been active in the United Kingdom for about four to five years. Swiss Post has been present in the United Kingdom for the last three years. Belgian Mailhouse, previously Nordic Mail, which is a joint venture between the Danish and Swedish PPOs has been active in the United Kingdom for about three to four years and the Philippines Post has started operating there in the last six months.

([12]) TPG, Deutsche Post, Swiss Post, La Poste, and Belgian Mailhouse, a joint venture between Post Danmark and Posten Sverige AB.

(73) In addition, the market investigation has shown that several of the PPOs currently active in the United Kingdom were positive about their intentions to expand their United Kingdom operations in the next three years. Others indicated their intention to enter this market in this time period.

bb. **Barriers to entry**

(74) The information available to the Commission shows that the entry barriers in the United Kingdom are relatively low.

(1) *Role of consolidators*

(75) The market in the United Kingdom is characterised by a large number of consolidators. Consolidators have been present in the United Kingdom for over 25 years and their existence is due to TPO's decision to encourage the growth of intermediaries, such as consolidators, by offering them significant volume discounts. The effect of this large body of consolidators on the market is twofold.

(76) Consolidators compete with the PPOs for the ultimate customers, thus giving the latter a larger choice of service providers. This is shown by the market shares achieved by consolidators as shown above.

(77) The other effect is that the presence of consolidators facilitates entry for potential entrants, because access to one consolidator in effect provides access to the mail of many business customers. The recent acquisition of Herald International (a top-5 United Kingdom consolidator) by Deutsche Post shows that independent consolidators in the United Kingdom provide third country PPOs with a relatively easy means of market entry by acquisition. Therefore, the existence of many consolidators on the United Kingdom market significantly lowers the barriers to entry that third country PPOs would have to overcome.

(78) Consolidators in the United Kingdom have expressed concerns about the effect of the transaction. The market investigation highlighted that one major source of concern is TPO's development of the Langley facility. This is a processing/distribution centre, which is due to become operational in 2002. However, since the Langley facility will not be contributed to the joint venture this development is unrelated to the present transaction and it is therefore not a relevant factor for the assessment of the joint ventures. Further concerns expressed by the consolidators are dealt with in the assessment below.

(2) *London Heathrow*

(79) The United Kingdom market is an attractive market for a third country PPO to enter. London's Heathrow airport is the leading European airport and offers very good connections with European cities and with other destinations around the world. A European PPO can easily fly United Kingdom mail from Heathrow straight to its own office of exchange (OE) in its home country, where the mail is then sorted for domestic delivery in the PPO's home country or for consolidation with domestic-originating mail for outbound cross-border delivery.

(80) Furthermore, provided sufficient volumes can be achieved, a third country PPO can increase the efficiency with which it deals with outbound cross-border mail from the United Kingdom by opening an OE near Heathrow. Such efficiency improvements can therefore improve their ability to compete. In the United Kingdom a number of European and non-European PPOs which are present also have an OE near Heathrow where they handle and process the outbound cross-border business mail according to the UPU rules.

(81) The market investigation has also shown that some postal operators that are not presently operating an OE in the United Kingdom are planning to do so within the next three years.

(82) Finally, (a major part) of United Kingdom outbound cross-border business mail is originated in London, which is one of the major business centres in Europe. This makes for a third-country PPO even easier to enter the United Kingdom market. In fact, third country PPOs can easily develop sufficient volumes in order to open an OE nearby Heathrow, without the need to develop a national sales force.

(3) *English language*

(83) The world wide importance of the English language creates substantial cross-border mailing needs for publishers located in the United Kingdom. This is a further element to attract entrants into the United Kingdom.

cc. **Vertical relationships**

(84) The Commission has received allegations that TPO will be able to offer Delta better terms and conditions than are available from TPO to other players on the market. According to the information available to the Commission it will be unlikely that the incumbent PPO, TPO, will be able to discriminate in favour of Delta to the detriment of other competitors.

(1) *Ability to discriminate*

(85) TPO currently has a strong position as an entry point into the UPU system as is shown by the fact that consolidators in the United Kingdom use the TPO as distributor for nearly (a major part) of their mail. The remainder (a minor part) of the mail collated by the consolidators is injected into the system via third country PPOs either in the United Kingdom or elsewhere, via alternative distribution networks or via direct injection into the local PPO of the recipients' country.

(86) The high proportion of outbound cross-border mail directed via TPO has been one of the main concerns expressed in the market investigation. This injection point is seen as a bottleneck, control over which enables TPO to exert control over an important element of the consolidators' costs and therefore their ability to compete. In particular, consolidators are concerned that as a direct result of this concentration TPO will have greater incentives to offer itself (including Delta) better terms and conditions than will be offered to the consolidators.

(87) As outlined above, there are several different routes that outbound cross-border mail can take between its sender and its recipient, the majority of which pass through the UPU/Reims networks. The market investigation has shown that consolidators have viable alternatives to TPO for routing their mail out of the United Kingdom. A number of United Kingdom consolidators uses already now for a considerable part of their consolidated outbound cross-border business mail third country PPOs in order to inject their mail in the UPU system.

(88) In their joint reply to the Statement of Objections, the parties by referring to a 'UK international consolidator survey' of February — May 2000 ([13]) have shown that consolidators in the United Kingdom, in addition to TPO, use a variety of third country PPOs, such as Deutsche Post, La Poste, Swiss Post, USPS, Mail Africa, Italian Post, Spanish Post, La Poste/De Post (Belgium), Post Denmark, Hong Kong Post and the Indian Post. The survey also suggest that the services offered by third country PPOs in the United Kingdom are in a number of respects considered by consolidators and third party mailers as being superior, more flexible and cheaper than that offered by TPO.

(89) Furthermore, the market investigation has confirmed that consolidators could switch 5 to 10 % of their business to alternative PPOs in a matter of weeks if necessary. Therefore, the Commission considers that consolidators can switch a sufficient proportion of their mail away so as to act as an effective disincentive to prevent TPO discriminating against them.

(90) Not only are consolidators able to react, this ability is enhanced by the fact that the market in which consolidators operate in the United Kingdom is characterised by a high degree of transparency. The prices that consolidators pay to TPO are set out in the Duet agreement and are set at a fixed level, depending on the extent of volume rebates achieved by the consolidator (minimum 6 %, maximum 10,5 %). If TPO were to favour one of the consolidators to the detriment of another, this would become quickly obvious to the rest of the market participants.

(91) The parties have explicitly stated that the terms and conditions according to which Delta will have access to TPO will be the standard terms and conditions set out in the Duet agreement and the standard rate card. There will be no individual agreement between Delta and TPO.

(92) The market investigation has shown furthermore that it is known in the market to whom a customer is lost that switches suppliers.

(2) *The role of SPPL's London office of exchange*

(93) Developing Countries (as defined in the UPU agreement) have access to lower Terminal Dues rates under UPU rules than those to which Industrialised Countries have access. SPPL — Singapore is considered a Developing Country under the UPU agreement — has an OE in the United Kingdom, and could therefore provide a low-cost route to Delta.

(94) [Description of the use made by SPPL of its London OE]*. [Description of the business purpose of SPPL in London]*.

(95) Furthermore, as outlined by the Parties in the joint reply to the Statement of Objections, the UPU Convention contains protection mechanisms to limit the opportunity for exploitation of terminal dues system (Articles 43 and 48 to 51 of the UPU Convention). In the UPU Convention there is a cap on the average number of items of mail being sent by Developing Countries and a cap on the annual weight of the mail received from Developing Countries. If the PPO of a Developing Country exceeds one of these two caps then the receiving Industrialised Country PPO can increase the rate of the terminal dues. Therefore, Delta will be prevented from exploiting this opportunity by the fact that there is a two-pronged cap system.

(96) Finally, there are also other non European PPOs (i.e. Philippines Post), which have an OE in the United Kingdom, where they handle and process the outbound cross-border business mail according to the UPU rules. These OEs will offer to the competitors of Delta the opportunity to have access to the lower terminal dues, eliminating the possibility that Delta through its privileged access to the SPPL OE in the United Kingdom could have a cost benefit at the margin, which will further increase its competitive advantage over its competitors as a result of the transaction.

(3) *The role of the regulator*

(97) With regard to the forthcoming United Kingdom regulatory regime, the regulator, Postcomm, is currently undertaking a public consultation to consider a wide range of issues, including how to fulfil its role of promoting competition with regard to postal services. The terms of the license under which TPO (whose new name will be Consignia Ltd) will operate are also

([13]) A survey that has been carried out by independent consultants for TPO based on 20 face-to-face interviews with consolidators/third party mailers.

currently under consultation. The draft licence has not yet been finalised, however, it does contain a clause effectively providing that the Licensee does not unfairly discriminate between persons having access to its postal facilities or show undue preference towards any such person.

(98) While the existence of such sectoral regulation is not, by itself, a reason to allow a concentration that would strengthen a dominant incumbent's position, it does represent a further check and balance against TPO's future ability to discriminate.

dd. **United Kingdom — Summary**

(99) The above arguments indicate that the concentration will not lead to the creation or strengthening of a dominant position which is likely to constitute a significant impediment to effective competition in the market for outbound cross-border business mail in the United Kingdom.

c. ***The Netherlands***

(100) TPG is dominant on the market for outbound cross-border business mail in the Netherlands. This transaction would strengthen this position of dominance. The following considerations are pertinent in this context:

aa. **Market position**

(101) Table 1.b sets out the market structure for outbound cross-border business mail in the Netherlands, column 1 including franking machines, column 2 excluding franking machines. In calculating the market shares, data provided by the parties has been adjusted to take account of information obtained from Deutsche Post.

Table 1.b

Dutch market for outbound cross-border business mail, by value 1999

	Outbound cross-border business mail	
Competitor	(1) Including franking machines	(2) Excluding franking machines
Total market value	EUR [...]* m	EUR [...]* m
TPG (retained business)	[70-80]* %	[40-50]* %
TPG (contributed business)	[5-10]* %	[10-20]* %
TPO (contributed)	[10-20]* %	[20-30]* %
TPO/TPG combined	**[80-90]* %**	**[70-80]* %**
Total Deutsche Post Group (including DHL)	[5-10]* %	[10-20]* %
Overseas Courier Service	[1-5]* %	[1-5]* %
Dumaco	[1-5]* %	[1-5]* %
Mercury	[1-5]* %	[1-5]* %
Other	[1-5]* %	[5-10]* %

Adjusted to remove Parties' estimate of turnover achieved by Deutsche Post in relation to a contract incorrectly classified as outbound cross-border mail from the Netherlands.

(102) If franking machine customers are included, TPG had a market share in the Netherlands of [70 to 80]* % in 1999, of which TNT accounted for [5 to 10]* percentage points. The addition of TPO's market share of [10 to 20]* % would result in a post-concentration market share of [80 to 90]* %.

(103) If franking machine customers are excluded, TPG had a market share in the Netherlands of [50 to 60]* % in 1999, of which TNT accounted for [10 to 20]* percentage points. The addition of TPO's market share of [20 to 30]* % would result in a post-concentration market share of [70 to 80]* %.

(104) In the Netherlands, Deutsche Post, Belgian Mailhouse, La Poste (France) and Swiss Post are all active. The other players in the market, such as Overseas Courier Service, Mercury and Dumaco, are consolidators. With regard to these other players, Table 1.b shows clearly that, regardless of whether or not franking machine customers are included, the other players are all relatively small and that they have been unable to achieve significant market shares.

(105) It is also clear that none of the PPOs other than Deutsche Post have achieved market shares greater than [1 to 5]* %. The competitive pressure created by these other players is therefore relatively limited. The rest of the European PPOs do not have any relevant operational presence abroad and do not appear to have any plan to enter in the Dutch market in the next three years.

(106) With regard to Deutsche Post, the parties argue that its business is comparable in the Netherlands to that of TPO and that it is particularly well placed to target customers in the direct mail and publishing sectors with large volumes to Germany. However, in the light of the existing disparity between their market positions, it appears unlikely that the presence of Deutsche Post will act as a significant constraint on the combined TPG/TPO entity.

(107) The main effect of the concentration in the Netherlands would therefore be to eliminate competition between the dominant player, TPG, and the most successful entrant into the Dutch market.

bb. **The market position of TPO in the Netherlands**

(108) As shown in the table, TPO has an estimated market share of [10 to 20]* % if franking machine customers are included, rising to a maximum of [20 to 30]* % if they are not. TPO has therefore been the most successful entrant into the Dutch market.

(109) The parties have argued that TPO plays a narrower role in the Netherlands market than suggested by its market shares because over [a major part] of the mail that it takes from the Netherlands is for destinations in the United Kingdom. Therefore, the parties argue that TPO is competing in the Netherlands more as a niche player than as a provider of outbound mail services regardless of its destination.

(110) For the purposes of this decision, the destination of the mail is not a relevant factor in determining the strength of competition provided by TPO, or indeed of any other operator. Indeed, the fact that nearly [a minor part] of the mail handled by TPO is not for a destination in the United Kingdom is a clear indication that TPO provides a wider service and a wider competitive force.

(111) Secondly, the high volume of mail that passes through TPO's channel between the Netherlands and the United Kingdom (approximately [a major part] of the Dutch originating mail handled by TPO goes to or via the United Kingdom) means that TPO could achieve economies of scale on this route, lowering significantly the cost for ABB and ABC mailing via the United Kingdom, in other words the mail that TPO takes to the United Kingdom and subsequently mails to other countries. Delta could also benefit from these lower costs and obtain a competitive advantage that is not available to the remaining consolidators and third country PPOs.

(112) TPO, which is the most important active competitor of TPG, the incumbent PPO, would be eliminated as a competitor as a result of the concentration. As a result, Delta (TPG/TPO) and Deutsche Post would be the only two players to have the necessary network and the resources to compete in the Dutch market for outbound cross-border business mail. However, in the light of the existing disparity between their market positions, it appears unlikely that the presence of Deutsche Post will act as a significant constraint on the combined TPG/TPO entity.

cc. **Barriers to entry**

(113) The barriers to entry into the Dutch market are relatively high. While entry does not require the investment of significant sunk costs, in order to be a viable competitor an entrant needs to have instant access to volume.

(114) Volume is an important factor for the operation of an outbound cross-border mail service. The profitability of operating a postal network, whether it be national or European, depends largely on the volumes that an operator can generate. This applies to every stage of the process, i.e. collection, transport and delivery. Provided that the network is in place, each additional item routed through that network raises revenue more than it raises costs. This is because once the costs of investing in the network have been incurred, the marginal costs incurred would vary little whether, say, 100 000 items, or 200 000 items are being handled.

(115) Customers and, with them, volumes have to be purchased, either by a better price/service combination or by the acquisition of existing participants in the market. In order to do so an entrant needs access to resources and an established distribution network, enabling the operator to attract customers with a more advantageous offer. Alternatively new entrants have to purchase market share by acquiring existing operators.

(116) Owing to the limited number of consolidators and their small market shares, consolidators do not facilitate entry for potential operators in the Dutch market. Given this lack of consolidators on the Dutch market, the only means of entry is by acquiring customers on an incremental basis. This significantly slows the process of entry, which in turn has adverse effect on the viability of entry due to the lack of volume. Furthermore, the relatively weak position of the consolidators means that it is more difficult for business customers to switch away from TPG to other suppliers of outbound cross-border mail services.

dd. **Size of the Dutch market**

(117) While the Dutch market is the fifth largest in Europe, it is nevertheless comparatively small. Whatever the precise boundaries of the relevant product market are considered to be, the Dutch market is approximately a quarter of the size of the United Kingdom market. It furthermore does not have the geographic advantages of a conveniently located airport with direct connections to most parts of the world which would compare with the advantages of London Heathrow outlined above.

(118) Therefore the incentives for potential entrants to make an effort to position themselves in the Netherlands in order to be able to compete in a future liberalised market that would comprise a larger geographic scope than is presently the case are limited. It is therefore unlikely that the strengthening of TPG's position that will be the result of the present transaction in the Netherlands is likely to change in the future due to inherent dynamics of the market.

ee. **Discrimination against others in favour of Delta and NewCo**

(119) [Characterisation of the contractual details in the contracts TPG has with TNT and consolidators]*.

(120) With the information available to the Commission it has not proved possible to validate whether or not the terms available to TNT can be fully justified on the basis of cost grounds. However, it is clear that — unlike in the United Kingdom — the terms and conditions that consolidators pay to TPG in the Netherlands are not set out in a contract that is as open as the Duet contract. The market therefore lacks the transparency that is present in the United Kingdom. Evidence about discrimination is therefore harder to gather and the incentives not to discriminate are commensurately lower.

(121) The Commission therefore considers that the concentration will not only strengthen TPG's incentives to favour the activities carried out by its own consolidator, TNT, but that the lack of transparency in the market will also enable TPG to extend this favourable treatment to Delta. This would aggravate the competitive situation facing other operators on the Dutch market further.

ff. **Netherlands — Summary**

(122) The above arguments indicate that the concentration will lead to a strengthening of a dominant position, which will constitute a significant impediment to effective competition in the market for outbound cross-border business mail in the Netherlands.

2. OUTBOUND CROSS-BORDER PARCELS

(123) On the basis of the product market definition of the parties, i.e. a market for expedited parcels, the transaction would not lead to a dominant position.

(124) The highest combined market share for expedited parcels can be observed in Austria with [10 to 20]* %. In the home markets of the parties the combined market shares of the parties are [5 to 10]* % in the Netherlands and [1 to 5]* % in the United Kingdom.

(125) On the basis of a wider market definition for all parcels that would include expedited and standard parcels the transaction would not lead to a dominant position either. The parties are not active in providing standard parcel services except in their respective home countries. In a market which includes standard and expedited parcel services the combined market shares of the parties in the Netherlands are at [20 to 30]* %, whereas in the United Kingdom the combined market share would be just above [1 to 5]* %.

VI. **COMMITMENTS SUBMITTED BY THE PARTIES**

(126) On 27 February 2001, the parties offered certain commitments to remove the competition concerns which the Commission had identified in its Statement of Objections and has retained in this decision in relation to the Netherlands. The full text of the final commitments is set out in Annex II which forms an integral part of this Decision.

A. *SUMMARY OF THE COMMITMENTS*

(127) The commitments offered by the parties consist of the divestment of the business of TNT International Mail in the Netherlands.

1. THE BUSINESS

(128) The business to be divested is that currently undertaken by TNT International Mail in the Netherlands (TNT IM Netherlands). This is the part of TPG in the Netherlands that was originally intended to be contributed to the joint venture, Delta. The parties describe the business to be divested as the tangible and intangible assets (excluding the brand) of TNT IM Netherlands in respect of outbound cross-border mail services in the Netherlands. This includes the goodwill, in particular the customer list, the know-how, and the personnel involved in the business, in addition to all the assets and facilities that are used in the business.

2. MEASURES TO ENSURE THE TRANSFER OF THE BUSINESS

a. ***Access to the network***

(129) The business that is being divested is the provision of outbound cross-border mail services from the Netherlands. In order to provide this service, TNT IM Netherlands has a network of agreements in place both upstream (largely with TPG for the collection of the mail) and downstream, for the transport (with trucking companies and airlines) and for delivery (with receiving PPOs or alternative delivery companies). According to the parties over [a major part] of the costs of this business are outsourced. For a purchaser of this business which does not have a similar network to be able to compete effectively with TPG from the day that the business is sold, it is vital that TPG enables the business to continue to benefit from its network of agreements for a transitional period and that the purchaser is in a position to demonstrate that its own network can be or become similar to that of TPG after the transitional period.

(130) In order to provide this possibility for the purchaser the parties commit to providing to the network currently available to TNT IM Netherlands at the same conditions to the divested business for a period of two years after the date of divestment. This covers the services that are currently provided to TNT IM Netherlands both by TPG itself, and those provided to TNT IM Netherlands by third parties under terms and conditions negotiated by the wider TPG group.

b. ***Access to the know-how***

(131) In addition, the business is based on know-how. In particular, the technical aspects of this know-how are condensed into a matrix which provides the routing options available to TNT IM Netherlands. Again, for a purchaser to be able to compete with TPG from the date of purchase, it is vital that it is given continued access to this routing matrix for a transitional period on comparable terms to those currently available to TNT IM Netherlands. The parties have committed to give the divested business access to these routing options for a period of two years after the date of divestment.

c. ***Personnel***

(132) In order to ensure that the business is transferred with the necessary personnel, the commitment includes a non-solicitation clause. This clause includes a commitment to take all reasonable steps to ensure that the current staff transfer with the divested business, and that if they stay in TPG, they will not be employed in competing lines of business for a certain period after the divestment.

d. ***Non-compete***

(133) The parties have committed to not compete for existing customers of the divested business during a certain period with two exceptions:

(i) that TPG has to be able to respond to requests from customers under the Universal Service obligation it faces as the Dutch postal operator under Dutch law, and

(ii) that TPO or the JV should be able to continue to provide services to those customers that it currently serves, but who also buy services from the business to be divested. However, the value of the services provided by TPO and the JV must not exceed […]*.

e. ***TNT Name***

(134) The divested business may refer to itself as the former business of TNT IM Netherlands and TPG will, for the same duration, not allow any third party, including the JV, to use the TNT name or logo for the purpose of the provision of outbound cross-border mail services in the Netherlands.

3. MODALITIES OF THE SALE

a. ***Up-front buyer***

(135) In order to ensure the transfer of the business to the purchaser the parties have proposed an up-front buyer solution. The parties commit to suspend the implementation of the notified transaction and not to complete the notified concentration until a binding sale and purchase agreement has been reached with a buyer that has been approved by the Commission. The commitment specifies a relatively short period in which this has to be achieved.

b. ***Speaking clause***

(136) The parties have included in their commitments a 'speaking clause', which provides the possibility for the Commission to review the extent of the commitments upon request from the parties showing good cause. This clause is intended to extend the divestment period, to waive one or more of the conditions and obligations of the commitments and to enable the Commission to agree to a divestment which does not include all the parts of the business.

4. INTERIM PRESERVATION OF THE DIVESTED BUSINESS

(137) TPG has committed to preserve the full economic viability, marketability and competitiveness of the business during the divestiture period. However, this does not include a commitment to keep the business separate from the business retained by TPG, nor a commitment to ensure that the business is managed as a distinct and saleable business as set out in the Notice on Remedies ([14]). The usual provisions enabling a trustee to supervise the implementation of the commitments have been proposed.

B. *ASSESSMENT OF THE COMMITMENTS*

1. TPO'S BUSINESS IN THE NETHERLANDS

(138) The transaction will combine TPG's business with that of TPO in the Netherlands. At first sight a divestment of TPO's business in the Netherlands would completely remove the overlap and restore the pre-concentration situation. However, the market share of the TPO business does not fully reflect its market position and, even though the TPO business has a higher market share than TNT IM Netherlands, is not a viable option for divestiture.

(139) TPO's business in the Netherlands is not an independent and viable business since it is almost entirely based on the infrastructure, the market position and the reputation of TPO in the United Kingdom and its Royal Mail brand. Five main factors are relevant in this context.

([14]) Paragraph 51 of the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ C 68, 2.3.2001, p. 3).

(140) Firstly, [a major part]* (by value) and [a major part] (by volume) of TPO's business in the Netherlands is destined for the United Kingdom. Since the distribution of this mail in the United Kingdom falls under the postal monopoly enjoyed by TPO there, its Dutch branch merely acts as a feeder for TPO's Royal Mail.

(141) Secondly, the business carried out by TPO in the Netherlands at present relies largely on the infrastructure of its TPO parent in the United Kingdom. It has practically no infrastructure in the Netherlands. In so far as the smaller proportion of TPO's Dutch mail that is not ultimately destined for the United Kingdom, nearly all of it is distributed via the TPO in the United Kingdom and as part of a mailing shot containing predominantly mail destined for the United Kingdom.

(142) Thirdly, through TPO's presence in the Netherlands customers are able to purchase their outbound cross-border mail services directly from the final distributor.

(143) Fourthly, the Royal Mail brand is important. Many of TPO's customers in the Netherlands buy their services from TPO because they want their mail with destination in the United Kingdom to have a United Kingdom indicia on it and thus appear as a local company.

(144) Fifthly, TPO's market share in the Netherlands is achieved through a customer base that is not very stable. [A significant part] of its turnover is achieved with one very large customer, who at the same time uses other competitors for its outbound cross-border mail needs. Were this customer to switch away from TPO Netherlands, its market share would be [significantly reduced]. It is therefore highly uncertain that this customer who chose to contract with Royal Mail directly would remain with a divested TPO Netherlands. TPO Netherlands has a total customer base of less than […]*.

(145) In the light of these reasons and given the lack of long-term contracts in this business, a divestment which would remove the benefits of the direct link between TPO in the United Kingdom and its Dutch branch, would therefore undermine the customer base. A market share equivalent to the one presently enjoyed would thus not be sustainable. This development would be aggravated by the fact that both parents of the joint venture are the leading incumbent postal operators and dominate the sender and destination markets respectively.

2. EFFECT OF THE PROPOSED DIVESTITURE ON MARKET POSITION

(146) The distribution of market shares post-merger, taking into account the effect of the proposed divestiture of TNT IM Netherlands, is displayed in the table below (column 1 including franking machines, column 2 excluding franking machines):

Table 2

Dutch market for outbound cross-border business mail, by value 1999

	Outbound cross-border business mail	
Competitor	(1) Including franking machines	(2) Excluding franking machines
Total market value	EUR [...]* m	EUR [...]* m
TPG (retained business)	[70-80]* %	[40-50]* %
TPO (contributed)	[10-20]* %	[20-30]* %
TPO/TPG combined	**[80-90]* %**	**[60-70]* %**
TNT IM Netherlands (divested business)	[5-10]* %	[10-20]* %
Total Deutsche Post Group (including DHL)	[5-10]* %	[10-20]* %
Overseas Courier Service	[1-5]* %	[1-5]* %
Dumaco	[1-5]* %	[1-5]* %
Mercury	[1-5]* %	[1-5]* %
Other	[1-5]* %	[5-10]* %

Market shares, which take into account the effect of the undertakings, based on Parties' reply to the SO and adjusted to remove Parties' estimate of turnover achieved by Deutsche Post in relation to a contract incorrectly classified as outbound cross-border mail from the Netherlands.

(147) If franking machine customers are included, TPG had a market share in the Netherlands of [70 to 80]* % in 1999, of which TNT IM Netherlands accounted for [5 to 10]* percentage points. The addition of TPO's market share of [10 to 20]* % would result in a post-concentration market share of [80 to 90]* %. The proposed divestment will reduce this share from [80 to 90]* % [by 5 to 10]* %.

(148) If franking machine customers are excluded, TPG had a market share in the Netherlands of [50 to 60]* % in 1999, of which TNT IM Netherlands accounted for [10 to 20]* percentage points. The addition of TPO's market share of [20 to 30]* % would result in a post-concentration market share of [70 to 80]* %. The proposed divestment will reduce this share from [70 to 80]* % [by 10 to 20]* %.

(149) While the transaction would still have the effect of eliminating TPO as the largest competitor of TPG, as has been detailed above the market position of TPO is intimately linked with its parent TPO. The elimination of TPO as the largest competitor of TPG will be mitigated by the fact that TPG commits to divest TNT IM Netherlands. As outlined above, this business was intended to be contributed to the JV and it is now, under the Parties commitment, the business to be divested.

(150) TNT IM Netherlands has, unlike TPO's Dutch business, a world-wide focus and does not rely solely on its parent for the distribution of mail. It has a heterogeneous customer base with more than […]* customers. None of the customers is in a position to significantly alter TNT IM Netherlands' market position if it were to shift its business.

(151) The eventual buyer will acquire a business with a significant market share ([5-10]* % to [10-20]* %) on both market alternatives, equivalent to the one of Deutsche Post. Therefore, if operated by a suitable purchaser who has access to volumes and an established network similar to that currently operated by TNT, the proposed divestment of TNT IM Netherlands will thus form a viable competitor to the parties in the Netherlands where, with the exception of Deutsche Post, all the remaining competitors will have a marginal market share.

(152) In conclusion, the strength of the divested business TNT IM Netherlands at least outweighs the increase in market share of the combined business through TPO. Therefore the current position of TPG in the Netherlands will not be strengthened by the transaction as modified.

3. COMMITMENTS TO ENSURE THE DIVESTITURE

a. ***Access to the network and the know-how***

(153) The commitments provide for access to the network and the know-how, which are essential parts of the business, for a period of two years after the divestment. This period will give the eventual purchaser the time to conclude new cooperation agreements with various services providers, such as airlines, PPOs and independent postal operators and to build up the necessary know-how implicit in the routing matrix.

(154) In order to be able to run the divested business as a viable independent competitor after the transitional period a purchaser would have to fulfil a number of criteria. Such a purchaser would have to have to be able to establish its own network for the upstream and downstream services temporarily provided to the divested business by or through TPG within the transitional period. The purchaser would furthermore have to be able to generate the necessary amount of mail volume that would enable it to purchase network services which in turn would enable it to sell its services at competitive prices. These volumes would have to be sufficient to enable the divested business to sell its outbound cross-border mail services at prices that are competitive to those which TNT IM Netherlands is currently able to offer. This would imply furthermore, that the purchaser would need to be able to offer mail distribution at competitive prices globally, like TNT IM Netherlands currently can, and not just limited to certain routes on which it might be particularly competitive. The divested business would lose its customer base and with it its viability, as soon as it would not be able anymore to offer its customers the prices and services which TNT IM Netherlands is presently able to offer. Since contracts are not long term and not exclusive, customers can and will switch to service providers that offer the best price/service package.

(155) The success of the remedy depends to a large extent on the characteristics of the purchaser. The current proposal suffices to ensure that a viable purchaser is in a position to continue the business in the short term and to develop the business in the long term.

b. ***Personnel***

(156) The non-solicitation clause has the purpose in particular to protect the goodwill and know-how embodied in the personnel of the divested business. The divested business provides outbound cross-border mail services to its customers. It is a service industry. Tangible assets do not constitute the core of the business as might be the case in manufacturing industries. The business is rather constituted by its goodwill and the know-how. These are to a large extent vested in the personnel of the business. As has been described above the customer relationships are volatile. Experience and established customer contacts are therefore vital in such circumstances. This is ensured by means of the proposed divestiture. However, the importance of the personnel as indicated in this paragraph also forms a significant part of the framework in which the Commission would have to judge an eventual request from the parties and the proposed buyer to accept a divestiture without a transfer of the personnel (see below).

c. ***Non-compete***

(157) With the commitment not to compete for the existing customers of the business for the duration committed to, the existing goodwill of the divested business should be protected.

(158) The exception relating to the Universal Service Obligation ensures that TPG through its national postal operator PTT Post is in a position to comply with the requirements of the law relating to the Universal Service Obligation. The Dutch legislation allows PTT Post to comply with the Universal Service Obligation by offering individually negotiated contracts to its customers rather than standard tariffs and rebates. In doing so PTT Post must act in a non-discriminatory way. This may lead to an obligation for PTT Post to enter into such contracts with customers on their request, provided similar contracts are already in existence. Under the terms of the commitments the Trustee has the necessary powers, in particular powers to monitor and to impose measures, in order to ensure the respect of this obligation and in particular to avoid any circumvention. This will ensure that this exception will not enable TPG to circumvent the non-compete obligation.

(159) As described above there is another exception relating to the customers currently dealing with both TNT IM Netherlands and TPO in the Netherlands. This exception limits the turnover that TPO and the JV may continue to achieve with each of these customers […]*. The scope of this exception is therefore clearly delineated and will preserve the status quo with regard to these customers and is therefore unlikely to threaten the goodwill that will be divested.

d. ***TNT Name***

(160) By having the right to refer to the Divestment Business as the former business of TNT International Mail and the inverse obligation on the parties not to present themselves as TNT, the transition between these services being provided by TNT IM Netherlands and by the eventual purchaser will be smoothed. Therefore, the purchaser should be able to establish itself as a credible competitor in the Dutch market for outbound cross-border business mail.

4. MODALITIES OF THE SALE

a. ***Up-front buyer***

(161) The up-front buyer combined with a short divestiture deadline solution proposed by the parties will put the risk of divestiture and with it the clearance of the transaction entirely on the parties. In case they do not find a purchaser that meets the various conditions described above and the approval of the Commission within the short time period, this conditional clearance decision would no longer stand.

b. ***Speaking clause***

(162) The speaking clause described above is intended by the parties to enable the Commission to approve a purchase agreement which does not contain the sale of all the parts of the business described above. The parties consider that there are potential purchasers who do not wish to acquire the entire business, because they are already in possession of the necessary personnel and infrastructure. In assessing a request from the parties to apply the speaking clause the Commission will have to consider very carefully whether the sale will amount to a divestiture of the business and whether such a business would be viable. In this context the standing of the potential purchaser in the market, in particular its access to volumes, networks and knowledgeable personnel in the Netherlands, will be vital.

5. INTERIM PRESERVATION OF THE DIVESTED BUSINESS

(163) The parties have argued that a hold-separate as indicated in the Notice on Remedies would not be necessary in the present case because their other commitments, namely that to preserve the full economic and competitive value of the business and that to let the Trustee monitor this commitment, suffice to ensure that there is no need for a hold separate commitment.

(164) The rationale for hold-separate measures as outlined in the Notice on Remedies is to protect the business to be separated by ensuring that it has a qualified independent management and that the risk of the transfer of confidential business information to the business retained by the parties is limited. The Commission considers that these interests are, in the current transaction, protected by the commitment not to complete the transaction until the Commissioner has approved a buyer and to do so in a very short time period. This should ensure that the risks that the hold-separate is designed to avoid will be limited.

6. CONCLUSION

(165) In the light of the above, the Commission concludes that the commitments given by the Parties are sufficient to remove the competition concerns identified by the Commission during its investigation of the proposed operation on condition that the parties comply with the following commitments which are subject to change by the Commission pursuant to paragraph 12 of Annex II:

(a) the divestment and suspension commitment set out in paragraphs 1 and 2 of Annex II;

(b) the commitment to maintain the viability of the divestment business set out in paragraph 3 of Annex II;

(c) the mechanism for the transfer of the existing personnel set out in the first two sentences of paragraph 5 of Annex II;

(d) the access to the network set out in paragraph 6 (i) and (ii) of Annex II;

(e) the completion of the divestment procedure as set out in paragraph 7, first subparagraph, first sentence and second subparagraph, phrase reading 'provided that … agreed by the Commission' of Annex II;

(f) the purchase of the divested business by a purchaser fulfilling the criteria set out in paragraph 7, subparagraph 3, first two sentences of Annex II, and

(g) the compliance with any measure imposed by the trustee to make the parties comply with their commitment as indicated in paragraph 10 (i) (b) of Annex II.

(166) The above aspects of the commitment constitute conditions, as only by fulfilling them (subject to any change pursuant to paragraph 12 of Annex II), can the structural change on the relevant market be achieved.

(167) The remaining aspects of the commitment constitute obligations (subject to any change pursuant to paragraph 12 of Annex II) as they concern the implementing steps which are necessary to achieve the structural change that is sought. In particular, this relates to:

(a) the non-compete obligations of paragraph 4 of Annex II;

(b) the commitments relating to the personnel other than those of the first two sentences of paragraph 5 of Annex II;

(c) the technical, administrative and operational assistance and the reference to the name of the previous business as indicated in paragraph 6 (iii), (iv) and (v) of Annex II;

(d) the divestment procedure described in paragraphs 7 and 8 of Annex II, with the exception of the part referred to in paragraph 165 of the Decision;

(e) the provisions relating to the trustee (Chapter D) with the exception of part referred to in paragraph 165.

VII. **CONCLUSION**

(168) In the light of the above, and subject to compliance with the conditions and obligations laid out in the commitments set out in Annex II, the proposed operation does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or in a substantial part of it. The operation is therefore to be declared compatible with the common market and the functioning of the EEA agreement, pursuant to Article 8(2) of the Regulation (EEC) No 4064/89.

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby the undertakings The Post Office, United Kingdom, TNT Post Group NV, the Netherlands, and Singapore Post Private Limited, Singapore, will acquire within the meaning of Article 3(1)(b) of Regulation (EEC) No 4064/89 joint control of two newly-created joint ventures known as Delta and NewCo, is compatible with the common market and the functioning of the EEA Agreement.

Article 2

Article 1 is subject to compliance with the following conditions, which may be changed by the Commission pursuant to paragraph 12 of Annex II:

(a) the divestment and suspension commitment set out in paragraphs 1 and 2 of Annex II;

(b) the commitment to maintain the viability of the divestment business set out in paragraph 3 of Annex II;

(c) the mechanism for the transfer of the existing personnel set out in the first two sentences of paragraph 5 of Annex II;

(d) the access to the network set out in paragraph 6 (i) and (ii) of Annex II;

(e) the completion of the divestment procedure as set out in paragraph 7, first subparagraph, first sentence and second subparagraph, phrase reading 'provided that … agreed by the Commission' of Annex II;

(f) the purchase of the divested business by a purchaser fulfilling the criteria set out in paragraph 7, subparagraph 3, first two sentences of Annex II, and

(g) the compliance with any measure imposed by the trustee to make the parties comply with their commitment as indicated in paragraph 10 (i) (b) of Annex II.

Article 3

Article 1 is further subject to compliance with the following obligations, which may be changed by the Commission pursuant to paragraph 12 of Annex II:

(a) the non-compete obligations of paragraph 4 of Annex II;

(b) the commitments relating to the personnel other than those of the first two sentences of paragraph 5 of Annex II;

(c) the technical, administrative and operational assistance and the reference to the name of the previous business as indicated in paragraph 6 (iii), (iv) and (v) of Annex II;

(d) the divestment procedure described in paragraphs 7 and 8 of Annex II, with the exception of that part referred to in Article 2 of this Decision;

(e) the provisions relating to the trustee (Chapter D) with the exception of that part referred to in Article 2 of this Decision.

Article 4

This Decision is addressed to:

The Post Office
148 Old Street
London EC1V 9HQ
United Kingdom

TNT Post Group NV
41-63 Neptunusstraat
2132 JA Hoofddorp
The Netherlands

Singapore Post Private Limited
31 Exeter Road
Singapore 239732

Done at Brussels, 13 March 2001.

For the Commission
Mario MONTI
Member of the Commission

ANNEX I

Explanatory graph may be consulted on the following Commission website:
http://europa.eu.int/comm/competition/index_en.html

ANNEX II

The full original text of the conditions and obligations referred to in Articles 2 and 3 may be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html