



## **U.S. SENATOR HERB KOHL** WISCONSIN

### **Kohl, Brown Call for DHL-UPS Deal to be Blocked**

September 25, 2008

WASHINGTON, DC – Today, US Senator Herb Kohl (D-WI), Chairman of the Senate Antitrust Subcommittee, and Senator Sherrod Brown (D-OH) urged officials at the Department of Justice and Federal Trade Commission to prohibit DHL Express US and United Parcel Service Inc. from entering into a 10-year contract, under which UPS would serve as the exclusive provider of air transportation for DHL’s North American delivery service. In a letter to Thomas Barnett, Assistant Attorney General at the DOJ’s Antitrust Division, and FTC Chairman William E. Kovacic, Kohl and Brown state if finalized the agreement between UPS and DHL, respectively the second and third largest overnight package delivery services in the United States, “would be anti-competitive and in violation of antitrust law.”

“This arrangement between DHL and UPS would appear to substantially harm competition in the overnight package delivery market, and thereby would likely hurt consumers and business reliant on these services,” Kohl said. “It is our judgment that antitrust law requires federal enforcement authorities to act to block DHL and UPS from entering into this deal that is contrary to antitrust law.”

“Congress is carefully reviewing the proposed DHL-UPS deal. It’s time the Justice Department do the same. Fair competition is at risk, not to mention the livelihoods of thousands of Ohio families,” Brown said.

The text of the letter follows below.

September 25, 2008

The Honorable Thomas Barnett Assistant Attorney General Antitrust Division United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530  
The Honorable William E. Kovacic Chairman Federal Trade Commission 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580

Dear Assistant Attorney General Barnett and Chairman Kovacic:

On May 28, 2008, DHL Express US (“DHL”) and United Parcel Service, Inc. (“UPS”) announced their intention to enter into a contract where UPS will become, for ten years, the exclusive provider of air transportation for DHL’s North American package delivery service. The Ohio congressional delegation, and other members of Congress, have

raised serious concerns about the proposed deal and implications for job loss and competition. The Antitrust Subcommittee, as well as the office of Senator Brown, have been investigating the likely competitive consequences of the DHL-UPS arrangement, and we write to inform you of the conclusions of our investigation. In brief, it is our conclusion that, should this agreement be finalized, it would be anti-competitive and in violation of antitrust law and therefore should be blocked by the appropriate antitrust enforcement agency.

UPS and DHL are, respectively, the second and third largest overnight package delivery services in the United States. The top three competitors, FedEx, UPS and DHL collectively control over 90% of the market. According to the Air Cargo Management Group (“ACMG”), of the over \$ 32 billion domestic air cargo and express market in 2007, FedEx had a 43% market share by revenue, UPS a 32% share, and DHL an 8.5% share.[1] The daily package volume in the U.S. domestic express market is at 6.644 million shipments per day.[2]

DHL currently contracts with two independent airlines, ASTAR and ABX, to provide the air transportation for DHL packages (otherwise known as “airlift”) throughout the United States. The hub for both airlines, and the location of the sorting of DHL packages, is Wilmington, Ohio. The Wilmington Air Park is the largest employer in southwest Ohio, employing a total of approximately 9,000 people in the ASTAR and ABX airlines and DHL sorting operations.

As noted above, DHL now proposes to contract with one of its two main competitors, UPS, to provide nearly all the airlift and sorting services for DHL packages. It is our understanding that, if this agreement is finalized, DHL’s contracts with ASTAR and ABX will be terminated and nearly all DHL packages will be shipped on UPS’s airplanes, and the main hub sorting of DHL’s packages will occur at UPS’s hub in Louisville, Kentucky. It is expected that nearly all of the 9,000 jobs in Wilmington, Ohio will be lost. It is our judgment that this arrangement will substantially diminish, if not eliminate, the competition between DHL and UPS by rendering DHL a captive of UPS rather than an independent competitor, and therefore constitutes an illegal agreement in restraint of trade under Section 1 of the Sherman Act.

There are several reasons for our conclusion that the DHL-UPS agreement, if consummated, would be anti-competitive. First, once this agreement is implemented, DHL will become dependent on UPS for air delivery of its packages, obviously an essential part of DHL’s business. Indeed, it appears that air delivery is the most important cost of an express package delivery business. It seems highly doubtful that DHL will still be able to effectively compete against UPS since UPS will now have a large role in determining the cost and quality of DHL’s services. Whether, and how, DHL packages will receive priority should UPS planes fill to capacity is another serious concern raised by this deal. Should DHL suddenly pose a competitive threat, UPS might have the ability to degrade DHL service by giving DHL low priority on UPS planes. It appears contrary to the basic principles of full and fair competition to have DHL entirely reliant on one of its two main competitors for the air shipment of its packages.

Second, this arrangement would appear to give UPS the ability to engage in a “price squeeze” by raising DHL’s costs while reducing the prices it charges to its own

customers. UPS would be free to raise the price on a key input for DHL (airlift) so that DHL would have to charge rates much higher than UPS or lose money on each package. This conduct, of course, would be wholly destructive to competition.

Third, critics of the deal have asserted that it would also require DHL to adopt UPS's package tracking, labeling and hub distribution systems. If this is true, UPS would have access to DHL's proprietary data, by giving UPS access to DHL barcodes or labels that include information such as package contents, name and address of customers, volume and price. UPS could gain the information it could use to undercut DHL on price, and to convince DHL customers to switch express delivery services.

Fourth, if the DHL-UPS agreement is consummated, the result will be that only two airlines (FedEx and UPS) will provide airlift for about 90% of the nation's overnight express delivery services. Having only two airlines providing national airlift capacity for overnight package delivery could raise the risk of serious economic disruption should service on one of these two airlines be reduced due to unforeseen difficulties, such as a strike, maintenance issues, weather disruptions or other similar events.

Additionally, as noted above, implementation of the DHL-UPS agreement will likely result in the loss of approximately 9,000 jobs in southwestern Ohio. While not directly relevant to the competition analysis set forth above, we urge the regulators to be cognizant of the potentially devastating economic impact of such job loss resulting from this anti-competitive agreement. An agreement which substantially injures competition while destroying the livelihood of thousands of people should not be countenanced by your agencies.

In sum, the DHL-UPS agreement, if consummated, is likely to essentially eliminate DHL as an independent competitor in the express package delivery business. It will make DHL wholly dependent on the air transportation and sorting services of one of its two chief rivals, will leave DHL subject to a price squeeze, and will enable UPS to gain access to the pricing and other valuable commercial information of DHL. Elimination of an independent competitor to UPS and FedEx carries the very substantial risk of higher prices and degrading the quality of services offered to consumers for overnight package delivery. If consummated, it is clear to us that this agreement would constitute an illegal restraint of trade under Section 1 of Sherman Act, and that therefore the antitrust agencies should take action to block it.

Thank you for your consideration of this matter.

Sincerely,

HERB KOHL  
Chairman, Subcommittee on  
Antitrust, Competition Policy  
and Consumer Rights

SHERROD BROWN  
United States Senator

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