

# Kluwer Competition Law Blog

## Economists Must Respect Due Process Too! EU General Court annuls Commission decision blocking UPS/TNT merger

James Killick (White & Case) · Monday, March 13th, 2017

The judgment reinforces due process and transparency in EU merger control proceedings. The Court made clear that due process standards will be strictly enforced in merger cases, despite the relatively tight deadlines. The Decision was, therefore, annulled for failure to respect rights of defence in relation to the handling of economic evidence by the Commission. The ruling also suggests that the EU judges are increasingly willing to scrutinise “complex economic appraisals” made by the Commission.

### 1. Background

On 15 June 2012, the global specialist transport and logistics provider United Parcel Services (“UPS”) notified the European Commission of its proposed acquisition of TNT Express NV (“TNT”) under the EU Merger Regulation.<sup>[1]</sup> UPS and TNT are both active on international express small delivery markets within the European Economic Area (“EEA”).

On 30 January 2013, the Commission blocked the proposed acquisition. According to its decision, the take-over would have restricted competition in 15 EU Member States as regards the express delivery of small packages to other European countries. In those Member States, the acquisition would have reduced the number of significant players in that market to only three, or even two, sometimes leaving DHL as the only alternative to UPS. The proposed acquisition would therefore, on the Commission’s analysis, have likely harmed customers by causing price increases. In its econometric analysis, the Commission relied on (a) a discrete variable for the estimation of the effects of the loss of a competitor on prices and (b) a continuous variable for the prediction of the effects of the merger on prices. The parties, in turn, presented economic analysis suggesting that any negative effects on competition would be offset by the cost savings resulting from the merger.

UPS brought an action before the General Court seeking the annulment of the Commission’s decision. In support of its action, UPS alleged, inter alia, the infringement of its rights of defence, submitting that the use of different variables at the different stages of the Commission’s final analysis was materially different from all the versions that it had been able to consult during the administrative procedure.<sup>[2]</sup>

## 2. The General Court's judgment<sup>[3]</sup>

The General Court annulled the Commission's decision on the basis that it had failed to communicate a final version of its econometric analysis to UPS – which contained substantive changes to the models discussed during the administrative procedure – and therefore had failed to give UPS an opportunity to express its views before adopting its decision.

## 3. Rights of defence

The Court's starting point was to recall that rights of defence must be guaranteed in all EU proceedings, including merger proceedings before the Commission. This means that a business subject to proceedings must be “afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim”,<sup>[4]</sup> i.e. its right to a fair hearing must be respected.

In that context, the Court held that the Commission was required to communicate the final econometric model to UPS before it adopted its decision. To support such a conclusion, the Court emphasised that the Commission had relied on that analysis in identifying the number of EU Member States where, in its view, the acquisition significantly impeded effective competition. Although the Court recognised that there were similarities between the final econometric model and the different models discussed during the administrative proceedings, changes “that cannot be regarded as negligible” had been made in the final model. This constitutes a strong signal that the General Court will not tolerate any lack of transparency in the use of economic evidence by the Commission. The rule is simple and fair: if the Commission uses econometric evidence against the parties, it should give them an opportunity to review and comment on all its material elements.

## 4. UPS may have been able to better defend itself

Having established that UPS's rights of defence had been infringed, the Court had to examine whether the Commission could rely on the argument that the breach of rights of defence would not have led to a different outcome. The relevant test is whether “in the absence of the procedural irregularity [...] there was even a slight chance that [UPS] would have been better able to defend itself”.

The Court found that this test was satisfied in the present case. The Court noted that the Commission relied on the final econometric analysis in determining EU Member States where the acquisition significantly impeded effective competition, and UPS was not afforded an opportunity to (effectively) challenge the reliability of the final econometric model. In this regard, the Court added that UPS was “already able, during the administrative procedure, to have a significant influence on the development of the econometric model proposed by the Commission, since it raised technical problems to which it provided solutions”.

This could not be overcome by the Commission's argument that it relied on qualitative analysis as well as the econometric model. In that respect, the Commission's acknowledgement that, in the context of the investigation, econometric-based arguments (inter alia) had already successfully countered qualitative analysis, was fatal.

## 5. Necessity for speed in the merger context

As an addendum, the Court recognised the importance of the overall context in merger control proceedings: “it is indeed necessary to take into account the necessity for speed, which characterises the general scheme of the Merger Regulation”.<sup>[5]</sup> However, on the facts, the econometric analysis was finalised over two months before the Commission adopted its decision. In the Court’s assessment, the Commission should have, at the very least, communicated its essential elements to UPS. Indeed, the Commission could have, for example, issued a supplementary Statement of Objections or a Letter of Facts setting out the new evidence used by the Commission to assess the effects of the proposed transaction.

## 6. More intense scrutiny of the Commission’s decisions in merger cases

This judgment extends the lists of recent cases where the EU courts have demonstrated heightened – and welcome – scrutiny in respect of undertakings’ due process rights in competition proceedings. In the antitrust context, the Court of Justice recently struck down Commission information requests, where the statement of reasons was excessively vague in light of the extent of the information requested and the advanced cartel investigation stage.<sup>[6]</sup> That built on the EU courts annulling inspection decisions, again in the context of Commission cartel proceedings, such as in *Nexans*<sup>[7]</sup> and *Deutsche Bahn*.<sup>[8]</sup>

This judgment, therefore, confirms that the importance that the EU courts place on due process also applies to the Commission’s merger control proceedings, no matter that the deadlines in such procedures are tight. In particular, the judgment reinforces the importance of undertakings’ having access to, and an opportunity to comment on, analysis upon which the Commission bases its decision. Failing to do so constitutes a breach of rights of defence and is likely to see the Commission’s decision struck down.

The General Court’s ruling is also important in the context of the debate on the role of econometric evidence in competition and merger control cases and the review of the Commission’s conclusions based on such evidence by the EU courts. In the past, there has sometimes been a tendency at the EU courts to avoid detailed examination of complex economic analysis used by the Commission, as can be seen in the General Court’s rulings in *Microsoft*<sup>[9]</sup> or the Court of Justice judgment in *Aalborg Portland*.<sup>[10]</sup> By contrast, in *UPS*, the Court acknowledges the pivotal role of the economic analysis in the Commission’s reasoning and specifically discusses the details of the models used by the Commission to conclude that the differences between the model discussed with the parties and the model adopted by the Commission were sufficient to find a violation of the rights of defence. So the judgment also signals a willingness to look deeper into complex economic appraisals.

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[1] Commission Decision of 30 January 2013 in Case M.6570, *UPS / TNT Express*.

[2] *UPS* also challenged the reliability of the Commission’s model, arguing that it was contrary to standard economic practice.

[3] Judgment of 7 March 2017, *United Parcel Service, Inc. v Commission*.

[4] Judgment of 10 July 2008, Bertelsmann and Sony Corporation of America v Impala, C-413/06 P, paragraph 61.

[5] Judgment of 14 December 2005, General Electric v Commission, T-210/01, paragraph 701.

[6] Judgments in Case C 247/14 P, Heidelberg Cement v Commission, Case C-267/14 P, Buzzi Unicem v Commission, Case C-286/14 P, Italmobiliare v Commission, and Case C-248/14 P, Schwenk Zement v Commission.

[7] Judgment in Case C-37/13 P Nexans v Commission.

[8] Judgment in Case C-588/13 P, Deutsche Bahn and Others v Commission.

[9] Judgment in Case T-201/04, Microsoft v Commission, paragraph 87.

[10] Judgment in Case C-204/00 P, Aalborg Portland and Others v Commission.

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