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EU Court confirms the need for transparency and full disclosure of economic analyses in EU merger cases (UPS/TNT)

James Killick, Assimakis Komninos (White & Case) · Tuesday, January 22nd, 2019

On 16 January 2019, the Court of Justice of the European Union ("CJEU" or "Court") dismissed the European Commission's appeal against the annulment of its decision to prohibit the acquisition of TNT by UPS. The CJEU stressed the importance of respecting companies' rights of defence as regards economic analysis and methodology used in merger control.

Case Background

In January 2013, the Commission blocked the proposed transaction on the basis that it would significantly hinder competition in the market for international express small package delivery services in 15 EEA Member States.[1] In those Member States, the number of players on that market would have been reduced to three – possibly two – with DHL remaining as the only alternative to UPS. The Commission also concluded that the merger would have resulted in a price increase for customers.

In assessing the potential impact on prices in those markets, the Commission relied on an econometric analysis, which ultimately led to the adoption of the prohibition decision. UPS successfully challenged that decision to the General Court, claiming that its rights of defence had been breached as the Commission had failed to communicate the final version of the econometric model. The Court agreed with UPS and annulled the decision on the ground that the econometric analysis used in the decision was different from the version previously discussed during the administrative procedure.[2] According to the Court, UPS should have been given the opportunity to review the amended model and would have been in a better position to defend itself.

Following the General Court ruling, UPS lodged an action for damages against the Commission, claiming €1.7 billion in compensation for the loss suffered as a result of the Commission's prohibition decision.

The CJEU Judgment

The Commission appealed to the CJEU, claiming that the General Court wrongly found that it was required to notify UPS of the changes made to its econometric model before adopting the decision.

The Court of Justice sided with the General Court and held that the Commission had an obligation to notify UPS of the changes it made after stating its objections. The Court further reiterated that in order to ensure that the rights of defence are not infringed, the parties need to be given the opportunity to submit their views on the relevance of all the elements on which the Commission intends to base its decision.

This principle is also applicable to the use of econometric models in merger procedures, which the Court said contributes to the quality of the Commission's decisions. After recognising and stressing the importance of such models in the context of the prospective analysis that the Commission must perform in merger control, the Court held that disclosure of such models and methodological choices underlying their development is all the more necessary as it contributes to ensuring that the procedure is fair, in accordance with the principle of good administration. Indeed, this is a crucial part of ensuring the legitimacy of merger control, according to the Court:[3]

"[t]*he methodological basis underpinning those models must be as objective as possible in order not to prejudge the outcome of that analysis one way or another. Accordingly, those factors contribute to the impartiality and quality of the Commission's decisions which, ultimately, is the basis of the trust that the public and businesses place in the legitimacy of the Union's merger control procedure.*

[…]

Given the importance of econometric models for the prospective analysis of the effects of a merger, raising the standard of proof required to cancel a decision due to an infringement of the rights of the defence resulting, as in the present case, from failure to disclose the methodological choices, especially as regards statistical techniques, which are inherent to those models, as is advocated, in essence, by the Commission, would run counter to the objective of encouraging it to show transparency in the development of econometric models used in merger control procedures and undermine the effectiveness of subsequent judicial review of its decisions."

The fact that a case is past the stage of the Statement of Objections does not mean that the Commission can modify the substance of an econometric model on which it intends to base its objections without that modification being brought to the attention of the companies concerned and allowing them to submit their comments in that regard.

The Court also stressed that the procedural failings in question should lead to the annulment of the decision, if it has been sufficiently demonstrated by the company concerned not that, in the absence of that procedural irregularity, the decision would have been different in content, but that there was *even a slight chance* that it would have been better able to defend itself. This was a point in the General Court's judgment that the Commission heavily contested, but the ECJ sided clearly with the General Court.

Additionally, the Court rejected the Commission's claim that communicating these changes would prevent it from adopting a decision quickly, as is required in merger control proceedings, saying that the Commission "*is required to reconcile the need for speed with observance of the rights of defence*."[4]

Takeaways

The case is about a merger decision but the Court's powerful statements on the importance of rights of defence in the particular context of economic models and evidence is also relevant for antitrust investigations, especially in the area of Article 102 TFEU and in cases where an effects-based analysis is performed under Article 101 TFEU. The more the Commission engages in the use of economic models and evidence (as it should), the wider the relevance of today's ruling.

The Commission is best advised not to react to this ruling by reducing its reliance on economic evidence in merger cases, since this would lead to retrogression in EU competition law and ultimately would lead to further annulments of its decisions on substantive grounds. The Court, perhaps mindful of this risk, reminds the Commission of the importance of this evidence in the context of merger control. So the answer is not to scrap such economic models but rather to do a proper job in terms of ensuring that the rights of defence and access to the file are fully preserved.

Finally, it is interesting that the Court is taking an "institutional" approach when it stresses the importance of safeguarding these rights: this is not only about the rights of the companies concerned but also about the credibility, quality, fairness, trust and ultimately the effectiveness of the overall enforcement system as such. This is, indeed, something that the advocates of due process in Brussels have always stressed.

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

[2] Case T-194/13 *United Parcel Service v Commission*, 7 March 2017, EU:T:2017:144.

[3] Judgment, §§ 53, 55.

[4] Judgment, § 38.

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