



EU, COMPETITION AND REGULATED MARKETS

The General Court Annuls Commission Decision on UPS-TNT Merger

by **Marco Hickey**

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On 7 March 2017, the General Court of the European Union (the “**General Court**”) annulled, on the ground of a procedural irregularity, the decision by which the European Commission (the “**Commission**”) prohibited the merger between United Parcel Service (“**UPS**”) and TNT Express (“**TNT**”) in the express small package delivery services sector.

In 2012, UPS notified the European Commission of its proposed acquisition of TNT under the EU Merger Control Regulation. The Commission by a decision on 30 January 2013 blocked the proposed acquisition of TNT by UPS. In essence, it considered that that takeover would have restricted competition in 15 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 merger would therefore, according to the Commission, 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.

The General Court upheld the action and annulled the Commission’s decision, noting that "*observance of the rights of the defence and, in particular, the right to a fair hearing requires that the undertaking concerned must have been 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 claims.*"

In that connection, the General Court found that the Commission infringed UPS’s rights of defence by relying on an econometric analysis which had not been discussed in its final form during the administrative procedure, and that “*non-negligible*” changes were made by the Commission in the econometric model that had been the subject of an exchange of views and arguments. The models contained substantive changes to the models discussed during the administrative procedure, and therefore the Commission had failed to give UPS an opportunity to express its views before adopting its decision. The General Court emphasised that the rights of defence and the right to fair hearing must be guaranteed in all EU proceedings, including merger proceedings before the Commission.

Having established that UPS’s rights of defence had been infringed, the General 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 was 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 General Court found that this test was satisfied in the present case. This could not be overcome by the Commission's argument that it relied on qualitative analysis as well as the econometric model.

The General Court also considered the issue of time constraints. The General Court recognised the necessity for speed and 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*". However, on the facts, the econometric analysis was finalised over two months before the Commission adopted its decision. In the General 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.

The General Court's decision is a significant one, particularly because having taken the view that, during the administrative procedure, UPS might have been better able to defend itself if it had had at its disposal, before the adoption of the contested decision, the final version of the econometric model chosen by the Commission, the General Court annulled the decision of 30 January 2013 in its entirety, without examining the other pleas in law put forward by the parties.

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 even where there are time constraints. 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.

In the past, there has sometimes been a tendency by 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 T-167/08 *Microsoft v Commission* or the Court of Justice judgment in *Aalborg Portland A/S (C-204/00 P)*. 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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