

EU Court of Justice Confirms Annulment of Commission Prohibition Decision Due to a Procedural Irregularity

Wednesday, February 20, 2019

On 16 January 2019, the Court of Justice of the European Union (CJEU) dismissed the appeal by the European Commission (Commission) against the 2017 judgment of the General Court of the European Union (GCEU). This annuls the Commission's decision to block the proposed acquisition of TNT Express NV (TNT) by United Parcel Services (UPS) in its entirety (C-265/17 P). The judgment reminds the Commission that it must maintain a balance between the need for speed and the observance of the rights of the defence in merger proceedings.

IN DEPTH

Background

By decision on 30 January 2013, the Commission blocked the proposed acquisition of TNT by UPS (Case M.6570).

On 7 March 2017, the GCEU annulled the Commission's decision in its entirety on the grounds that (i) the Commission infringed UPS's rights of defence by failing to communicate to UPS the final version of an econometric model on which it relied in its prohibition decision and that (ii) UPS might have been better able to defend itself if it had at its disposal the final version of that model.

The Commission challenged the GCEU judgment before the CJEU. First, the Commission argued that it was not required to communicate the final econometric analysis to UPS. Second, the Commission claimed that even if UPS's rights of the defence had been infringed, the GCEU should have dismissed UPS's plea alleging infringement of the rights of the defence as ineffective because a significant impediment to effective competition ("SIEC") could in any event be established in Denmark and the Netherlands without having to rely on the econometric model concerned.

CJEU Judgment

Infringement of the Rights of the Defence

The CJEU rejected the Commission's argument that the Commission was not required to communicate the final econometric analysis to UPS. Failure to do so was contrary to the principle of observance of the rights of the defence and Article 18(3) EUMR. Article 18(3) EUMR requires the Commission to base its decisions only on objections in respect of which the interested parties have been able to comment and establishes a right of access to the file.

For the CJEU, "[o]bservance of the rights of the defence before the adoption of a decision relating to merger control [...] requires the notifying parties to be put in a position in which they can make known effectively their views on the accuracy and relevance of *all the factors* that the Commission intends to base its decision on [italics added]" (paragraph 31). The CJEU considers that an econometric model should be regarded as one of those



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factors in view of its use to “[allow for a] better understanding of the planned operation by identifying and, where relevant, quantifying some of its effects, and thus [contribute] to the quality of the Commission’s decisions” (paragraph 33).

Accordingly, econometric models that the Commission intends to base its decision on must be communicated to the notifying parties unless the need for speed requires otherwise: “The Commission is required to reconcile [the] need for speed with observance of the rights of the defence” (paragraph 38).

In *UPS/TNT*, the final version of the econometric model had been adopted on 21 November 2012, more than two months before the adoption of the prohibition decision. Also, the amendments included in the final version were not negligible. Nevertheless, the Commission did not send the final version to UPS. Nor did it provide any information indicating the specific reasons for which it would have been impossible in practice, at that time, to give UPS a short deadline for it to comment on the final version.

Consequently, the CJEU rejected the Commission’s argument.

Consequences to be Drawn from an Infringement of the Rights of Defence

The CJEU found that the GCEU rightly annulled the decision by applying a correct test. According to which, a decision should be annulled when the applicant’s rights of defence are infringed “provided that it has been sufficiently demonstrated by the applicant not that, in the absence of that procedural irregularity, the [decision at issue] would have been different in content, but that there was even a slight chance that it would have been better able to defend itself” (judgment of 7 March 2017, *United Parcel Service v Commission*, T-194/13, EU:T:2017:144, paragraph 57).

The CJEU pointed out that “[g]iven the importance of econometric models for the prospective analysis of the effects of a merger”, applying a different test with a higher standard of proof, as suggested 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” (paragraph 55).

Accordingly, the CJEU concluded that the GCEU was not entitled to reject as ineffective UPS’s plea alleging infringement of the rights of the defence despite the fact that the Commission found that there was a SIEC in the Danish and Netherlands markets, irrespective of any consideration of the econometric model.

Comment

In the face of an increasing amount of internal documents to review, the Commission is under enormous time pressure to complete its merger reviews within the fixed timetable. That being said, as AG Kokott points out, “if the Commission decides to conduct complex economic analyses in competition proceedings [...], then it is above all its own responsibility [...] to conduct them with such promptness that they fit without difficulties into the procedural timetable envisaged by the [EU] legislator” (opinion of 25 July 2018, *Commission v United Parcel Service*, C-265/17 P, EU:C:2018:628, paragraph 58). As such, the “need for speed” must not be realized at the expense of the rights of defence, observance of which is a general principle of EU law.

As for the direct implications of this judgment for the parties, the proposed acquisition of TNT by UPS will not be resurrected. The only remedy UPS could obtain as a result of the annulment of the Commission’s prohibition decision would be compensation from the Commission. In this regard, UPS brought an action for damages against the Commission before the GCEU in December 2017 claiming a sum in compensation of EUR 1.742 billion and applicable interest (T-834/17).

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