

CPI EU News Presents:

The European Court of Justice's  
Judgment In Case C-265/17 P,  
*Commission v. United Parcel Service*

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## Summary

On January 16, 2019 the European Court of Justice (“CJEU”) confirmed the General Court’s annulment<sup>2</sup> of the European Commission’s (“Commission”) decision to block the *UPS/TNT*<sup>3</sup> transaction. The decision was overruled in view of infringements of the rights of defense which had been characterized by Advocate General Kokott as “*a textbook example of the issues arising.*”<sup>4</sup> The judgments confirm the importance of the rights of defense and demonstrate that procedural infringements can have more far-reaching implications than substantive errors. The case also calls for reflection about the role of economics in antitrust, and the balancing of regulatory deadlines with a fair hearing.

## Facts of the Case

### *The Commission Decision*

On January 30, 2013 the Commission prohibited the acquisition by United Parcel Service, Inc. (“UPS”) of TNT Express (“TNT”) because the transaction would significantly impede effective competition on the market for international express parcel delivery services in several Member States.<sup>5</sup> The planned merger would have reduced the number of market players with an integrated air and ground operation, so-called “integrators,” from four to three. According to the Commission, the merged entity would not have been constrained by non-integrated operators, potential entry, or customer buyer power. The Commission therefore concluded that the merger would likely result in price increases in 29 EEA states. However, in 10 of these countries the Commission recognized that the efficiencies claimed by UPS would have outweighed the predicted price increases. UPS submitted several commitment proposals to remedy the remaining concerns but all were found unsatisfactory, leading to the Commission’s decision to block the transaction.

The Commission’s key objection was that the transaction would cause a net price increase. The price effect was assessed by way of an econometric model. It is this econometric model - or more precisely one specific element of the algebraic formula involved - which is the focus of the CJEU’s recent judgment.

### *The General Court Judgment*

UPS first lodged an appeal with the General Court, claiming that the Commission’s decision should be annulled because UPS’s rights of defense had been infringed during the Commission’s proceedings. UPS argued that the econometric model used in the final decision was materially different from all the versions of which UPS had been informed.<sup>6</sup> The General Court agreed with UPS that the changes to the final model were not negligible. In the econometric model shared with UPS at the stage of the Statement of Objections (“SO”) the Commission had relied only on a *continuous variable*. The final model, however, applied a *discrete variable* to estimate the effects of the loss of a competitor on prices and a *continuous variable* to predict the effect of the merger on prices.<sup>7</sup> Nothing in the Commission’s file demonstrated that the use of different variables - as opposed to the use of the same variable at all stages - had been discussed

with UPS. The General Court decided that the Commission should have communicated the final model, with the alterations to the variables, to UPS.<sup>8</sup>

In reaching its conclusions, the General Court recalled that the observance of the rights of defense is a general principle of EU law enshrined in the Charter of Fundamental Rights of the European Union.<sup>9</sup> In addition, the right to a fair hearing, which forms part of the rights of defense, requires that the merging parties be given the opportunity during the Commission's investigation to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claims.<sup>10</sup> In this case, that implied the right to review the final model.

The breach of UPS's rights of defense was found sufficient to annul the Commission's decision because, in the absence of this procedural irregularity, the General Court found, *there would have been a slight chance that UPS would have been able to better defend itself*.<sup>11</sup> First, the version of the econometric model relied upon in the SO resulted in a provisional finding that there would be anti-competitive price effects in 29 EEA countries; this was reduced to 15 in the prohibition decision, which shows that the final model affected the Commission's conclusions.<sup>12</sup> Second, UPS had had significant influence on the development of the model because it had provided solutions to technical problems, which the Commission acknowledged, and the judgment implies that UPS may have had relevant comments on the final model.<sup>13</sup> Further, UPS might have been able to use the final version of the econometric analysis to counter some of the *qualitative* evidence taken into account by the Commission in addition to the *quantitative* model, because the model would have influenced the interpretation of the qualitative evidence.<sup>14</sup>

Finally, the Commission's "need for speed" argument was simply rejected because the Commission had adopted its final model more than two months before the decision. This period undermined the Commission's arguments about tight timelines in merger investigations.<sup>15</sup>

### **The Judgment of the European Court of Justice**

The Commission appealed the General Court's judgment, to the CJEU, but to no avail: the CJEU confirmed the General Court's judgment in its entirety.

The CJEU pointed out that observance of the rights of defense is a general principle of EU law<sup>16</sup> which in merger investigations requires that, before the adoption of the final decision, the merging parties are put in a position in which they can make known effectively their views on the accuracy and relevance of all the factors on which the Commission intends to base its decision.<sup>17</sup> This ensures that the procedure is fair and respects the principle of good administration.<sup>18</sup> This unsurprisingly also applies to econometric models which make it possible to predict the effects of a merger. If such models form the basis of a decision, they should be shared with the merging parties.<sup>19</sup>

The Commission put forward a number of arguments seeking to characterize the changes to the econometric model as immaterial to UPS's rights of defense. Each of these claims was rejected outright by the CJEU. The Commission first tried to equate

the amendments to the model to internal Commission documents, there being no right of access for the merging parties to these. The CJEU simply rejected the argument:<sup>20</sup> Advocate General Kokott had already referred to it as “*particularly unpersuasive*.”<sup>21</sup> The Commission also claimed that it was entitled to change its final findings since those in the SO are only provisional. The CJEU accepted this basic premise but not the Commission’s conclusion that it had not been necessary to inform UPS of the changes to the econometric model. This was because the amendments to the model post-SO had deprived UPS of the opportunity to comment on the Commission’s objections to the transaction.<sup>22</sup>

Finally, time limits cannot trump the rights of defense: the CJEU found that the Commission was required to reconcile the “need for speed” with observance of the rights of defense. The Commission did not in fact provide any reason to explain why it would have been impossible to give UPS time to comment on a model adopted two months prior to the decision.<sup>23</sup>

The CJEU also endorsed the General Court’s ruling that the rights of defense infringement was sufficient to annul the Commission’s decision. It is irrelevant, contrary to an argument advanced by the Commission, whether the model served as exculpatory or inculpatory evidence,<sup>24</sup> because it was one of the elements on which the Commission relied in its decision.<sup>25</sup> Such a model must be objective and contribute to the impartiality and quality of the Commission’s decision to ensure a trustworthy merger control process.<sup>26</sup> Failure to disclose the Commission’s methodological choices, especially as regards statistical techniques which are inherent to econometric models, would run counter to the objective of encouraging transparency in merger control processes and would undermine effective judicial review.<sup>27</sup>

## Opinion

There are a number of noteworthy observations about the Commission’s process and the Court judgments.

First, the Commission offered no clarification as to why within a two-month period it would have been impossible to share the final model with UPS. It may not have been more than an inadvertent procedural error. The Commission’s only explanation is “the need for speed” in merger investigations. This argument was, however, in the present case rightfully rejected by the Court, not only because respect for the rights of defense is fundamental for fair proceedings but also because more than two months were left in the procedural cycle before the decision deadline.

Second, the Court’s judgment endorses the existing low standard for annulment when an undertaking was deprived of access to evidence used by the Commission in support of the objections formulated in its decision.<sup>28</sup> If in such a situation, the undertaking can demonstrate that “*it would have been better able to defend itself*”<sup>29</sup> - or as expressed in earlier judgments “*the documents would have been useful for its defense*”<sup>30</sup> - the infringement of the rights of defense will justify annulment of the entire Commission decision. In *Commission v. UPS*, the CJEU identified a procedural, not a substantive, error and endorsed the critical importance of transparency and a fair hearing. In the Commission’s decision, the concerns were reduced from 29 to 15 countries compared

to the SO, and this on the basis of the undisclosed model - which one could argue was *advantageous* to the parties. Advocate General Kokott's opinion probably explains best why this is irrelevant. The qualitative factors emphasized by the Commission in relation to the 15 countries may in fact have carried less weight if the quantitative econometric calculations, by means of which those qualitative factors had originally been strengthened, became less reliable.<sup>31</sup> Further, there were only two Member States where competition issues had been identified purely on the basis of *qualitative* considerations independently of the econometric model. It would have been easier for UPS to defend itself in relation to two rather than 15, let alone 29, Member States in which problems were identified.<sup>32</sup> Finally, the prospects of proposing satisfactory remedies for a more limited number of markets would also have been better in that case.<sup>33</sup> Accordingly, the problem with the econometric model vitiated the entire decision.

The annulment of an entire decision on the basis of a procedural error contrasts with situations where the Court has upheld prohibition even while overruling significant substantive findings as "*manifest errors of assessment*." In *Honeywell v. Commission*<sup>34</sup> and *GE v. Commission*,<sup>35</sup> for example, the Court upheld the Commission's finding that the merger would have significantly impeded competition on three relevant markets. At the same time, though the Court disagreed with the Commission's conclusions about the vertical overlap between certain products (Honeywell's engine starters and GE's engines) and about the conglomerate effects resulting from the planned merger owing to GE's financial strength and vertical integration, and from bundling GE's engines with Honeywell's avionics and non-avionics products. Each of these was considered manifest errors of assessment by the Court; but the Court upheld the prohibition because it found the Commission had rightfully concluded that the planned merger would have created a monopoly on the worldwide market for jet engines for large regional aircraft, the market for engines for corporate jet aircraft and the market for small marine gas turbines. The manifest errors of substantive analysis did not affect the Commission's findings on all markets so the Court concluded that the prohibition was to be upheld on the basis of the significant impediment to effective competition ("SIEC") on those product markets.<sup>36</sup> A substantive error which does not affect all SIEC findings is unlikely to vitiate the entire decision.

Third, as with almost all other annulments of prohibition decisions, the Court judgment was of no value in practice for the companies concerned in terms of resurrecting the merger. Indeed, FedEx has in the meantime bought TNT.<sup>37</sup> UPS may however not be left entirely empty-handed in view of its pending compensation claim of €1.7 billion against the Commission.<sup>38</sup> This is a separate procedure in which UPS will need to prove that the Commission acted unlawfully,<sup>39</sup> i.e. that the Commission committed a sufficiently serious breach of a rule of law which is intended to confer rights on individuals (which includes undertakings).<sup>40</sup> This is a high threshold and it is not an automatic conclusion that damages will be awarded.<sup>41</sup> In the present case, the Commission infringed the rights of defense, an area in which it has no discretion, so the mere infringement of UPS's rights might be found a sufficiently serious breach.<sup>42</sup> The right to be heard has previously been characterized as one which confers rights on individuals,<sup>43</sup> including an undertaking's right to a careful and impartial investigation of all elements by the Commission during a merger case.<sup>44</sup>

Finally, the CJEU linked the need for transparency of econometric models with their importance for the predictive nature of a merger analysis. Economics has indeed gained increasing importance over the last 17 years. The rise of economics in Europe commenced after the famous Commission defeats in the early 2000s when the European Courts overturned a series of judgments: *Airtours*,<sup>45</sup> *Schneider*,<sup>46</sup> and *Tetra Laval*.<sup>47</sup> The Commission subsequently reformed its merger control procedures and adopted a reform package in January 2004 which created the European Merger Regulation still in force today. Part of the reform was “*strengthen[ing] further the underpinning of the [Commission’s] competition analysis*” to allow for “*more rigorous testing of the economic models [the Commission applies] in [its] investigations.*”<sup>48</sup> The reform created a “Chief Economist Team” (“CET”) and the first Chief Economist, Lars-Henrik Røller, was appointed in July 2003.

Economics has since then become central to almost any investigation; but the work of the CET must fit within the merger procedures. Advocate General Kokott expressed this clearly in her opinion:

*The desire to incorporate more economic expertise into the assessment of competition cases must not be realized at the expense of fundamental procedural guarantees (...) if the Commission decides to conduct complex economic analysis in competition proceedings as part of a ‘more economic approach’, then it is above all its own responsibility firstly to conduct these analyses carefully and impartially and secondly to conduct them with such promptness that they fit without difficulties into the procedural timetable envisaged by the European Union legislator.*<sup>49</sup>

It seems obvious indeed that economic analysis must respect the rights of defense. But there is also a broader question about the extent to which economics has pervaded competition law: has the balance tipped too far in favor of economics (and indeed econometrics)? It is remarkable that the prohibition of a merger between two international players is annulled on the basis of the type of variable used in an econometric model. The question arising is whether too much emphasis has been put on *quantitative* evidence and whether it should be rebalanced with *qualitative* evidence. This is not to suggest that economics be reduced to a minimal supporting role in competition law investigations, but it may be right to re-evaluate the balance of qualitative and quantitative evidence in the legal and economic analysis competition cases inevitably entail.

In the *UPS/TNT Express* investigation the Commission relied on qualitative evidence from internal documents and the market investigation.<sup>50</sup> There is an increasing trend in Commission merger investigations to rely more on internal documents. For example, it has been reported that document requests in recent complex merger investigations have amounted to not just thousands but hundreds of thousands and even more than a million documents.<sup>51</sup> As mentioned above, in *UPS/TNT Express* on the basis of qualitative evidence, without the quantitative econometric model, the Commission would only have identified problems in two Member States. So, the qualitative evidence by itself would have made the transaction more feasible. However, more reliance on qualitative evidence does not necessarily imply an increased likelihood of clearance. It has been mentioned in debate by officials, for example, that when the internal

documents include sufficient evidence to prove negative effects on competition to the requisite standard, quantitative evidence about efficiencies may not be able to undermine those conclusions.

The increasing use of qualitative evidence may rebalance the role of economics in investigations, but the Commission should also bear in mind the lessons from *UPS/TNT Express* and ensure that the rights of defense are respected and balanced with the “need for speed.” When parties are required to hand over several thousand or even several hundred thousand documents, the parties may not be able to perform appropriate reviews within the short timeframes of a merger control investigation. Simply stopping the clock, to artificially extend the timetable, misappropriates the stop the clock mechanism. Recent EU merger control data shows that the statutory timetable foreseen in the European Merger Regulation is repeatedly extended through pre-filing discussions which are taking longer; frequent use of voluntary extensions of time; and stop the clocks when, in extreme cases, parties are unable to complete a document request on Friday by the following Monday. There has been a steady increase in the Commission’s use of the stop the clock procedural tool in the last three years (from 33 percent of Phase II cases in 2016 to 40 percent in 2017 to 50 percent in 2018), adding an average of 1.3 months to each affected investigation in 2018.<sup>52</sup> The increased use of internal documents should not be allowed to lead to overburdening the parties even further in a process, which unlike the U.S., for example, is already extremely intrusive since it requires completion of a significant pre-determined filing form which also includes demands for large data sets.

The analysis of qualitative evidence must also be based on a fair and objective assessment in the round and not laser focus on an individual statement or document which might - similar to the *UPS/TNT Express* case - lead to the validity of a decision being based on a very narrow foundation.<sup>53</sup> In this context it will also be important to take account of the author and addressee of an internal document, e.g. materials produced by staff without any influence over the company’s strategy should be assessed within that framework. In all of this, the guidance the Commission plans to issue on the collection of internal documents will be welcome.<sup>54</sup>

## Conclusion

The judgment of the CJEU in *UPS/TNT Express* is to be welcomed as a forthright reinforcement of the importance of the rights of the defense. Its practical implications may though be two-edged: the intensity and duration of Commission procedures can only increase, so that due process will come at a practical cost. The confluence of econometric rigor and the appetite for intensive document review point to ever-longer procedures in the future.

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- <sup>1</sup> Associate, Dechert LLP, Brussels.
- <sup>2</sup> T-194/13, *United Parcel Service, Inc. v. Comm'n*, 2017 O.J. C. (121) 28.
- <sup>3</sup> M. 6570, *UPS/TNT Express*, [http://ec.europa.eu/competition/mergers/cases/decisions/m6570\\_20130130\\_20610\\_4241141\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6570_20130130_20610_4241141_EN.pdf).
- <sup>4</sup> Opinion of Advocate General Kokott, C-265/17 P, *European Comm'n v. United Parcel Service, Inc.*, 2018 E.C.L.I. 628, § 21.
- <sup>5</sup> *UPS/TNT Express*.
- <sup>6</sup> *United Parcel Service, Inc. v. Comm'n*, § 160.
- <sup>7</sup> *Id.* §§ 205-208.
- <sup>8</sup> *Id.* § 209.
- <sup>9</sup> *Id.* § 199.
- <sup>10</sup> *Id.* § 200.
- <sup>11</sup> *Id.* § 210.
- <sup>12</sup> *Id.* §§ 211-213.
- <sup>13</sup> *Id.* § 214.
- <sup>14</sup> *Id.* §§ 216-217.
- <sup>15</sup> *Id.* §§ 219-220.
- <sup>16</sup> C-265/17 P, *Comm'n v. United Parcel Service, Inc.*, §28, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=209848&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10531904>.
- <sup>17</sup> *Id.* § 31.
- <sup>18</sup> *Id.* § 34.
- <sup>19</sup> *Id.* § 33.
- <sup>20</sup> *Id.* § 35.
- <sup>21</sup> Opinion of Advocate General Kokott, C-265/17 P, *European Comm'n v. United Parcel Service, Inc.*, 2018 E.C.L.I. 628, § 41.
- <sup>22</sup> *Comm'n v. United Parcel Service*, §37.
- <sup>23</sup> *Id.* §§ 41-42; Opinion of Advocate General Kokott, § 61.
- <sup>24</sup> *Id.* § 54.
- <sup>25</sup> Opinion of Advocate General Kokott, § 40.
- <sup>26</sup> *Comm'n v. United Parcel Service*, § 53.
- <sup>27</sup> *Id.* § 55.
- <sup>28</sup> See, e.g., C-109/10 P, *Solvay v. Comm'n*, 2011 E.C.R. I-10329, § 57.
- <sup>29</sup> *Comm'n v. United Parcel Service*, § 56.
- <sup>30</sup> See, e.g. *Solvay v. Commission*, § 57.
- <sup>31</sup> Opinion of Advocate General Kokott, C-265/17 P, *European Comm'n v. United Parcel Service, Inc.*, 2018 E.C.L.I. 628, § 71.
- <sup>32</sup> *Id.* § 72.
- <sup>33</sup> *Id.* § 73.
- <sup>34</sup> T-209/01, *Honeywell International, Inc. v. Comm'n*, 2005 E.C.R. II-05527.
- <sup>35</sup> T-210/01, *General Electric Company v. Comm'n*, 2005 E.C.R. II-05575.
- <sup>36</sup> *Id.*, §§ 732-735.
- <sup>37</sup> M.7630, *FedEx/TNT Express*, [http://ec.europa.eu/competition/mergers/cases/decisions/m7630\\_4582\\_4.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7630_4582_4.pdf).
- <sup>38</sup> T-834/17, *United Parcel Service v. Comm'n*, 2018 O.J. (C 72) 41; *UPS sues EC for €1.7 bn over blocked TNT takeover*, AIRCARGONEWS, February 26, 2018, <https://www.aircargonews.net/news/airline/express/single-view/news/ups-sues-ec-for-EUR17bn-over-blocked-tnt-takeover.html>.
- <sup>39</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 268 and 340, May 9, 2008, 2008 O.J. (C 115) 47.
- <sup>40</sup> In addition, UPS will also need to demonstrate actual damage and a causal link: see, e.g. 153/73, *Holtz & Willemsen GmbH v. Council and Comm'n*, 1974 E.C.R. 00675, § 7.
- <sup>41</sup> For example, the Court of First Instance did not consider that the Commission had committed a manifest and grave infringement of EU law even though its *Airtours* prohibition had been annulled by the Court because the Commission has discretion in the assessment of mergers provided that it is capable of explaining the reasons for which the Commission could reasonable come to is findings, were well founded: T-212/03, *MyTravel Group plc v. Comm'n*, 2008 E.C.R. II-01967.

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- <sup>42</sup> See, e.g. C-352/98 P, *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Comm'n*, 2000 E.C.R. I-05291, §§ 43-44.
- <sup>43</sup> See, e.g. T-193/04 R, *Hans-Martin Tillack v. Comm'n*, 2004 E.C.R. II-03575, § 121.
- <sup>44</sup> T-212/03, *MyTravel Group plc v. Comm'n*, 2008 E.C.R. II-01967, §§ 49-50.
- <sup>45</sup> T-342/99, *Airtours plc v. Comm'n*, 2002 E.C.R. II-02585.
- <sup>46</sup> T-48/03, *Schneider Electric SA v. Comm'n*, 2006 E.C.R. II-00111.
- <sup>47</sup> T-5/02, *Tetra Laval BV v. Comm'n*, 2002 E.C.R. II-04381; C-12/03 P, *Comm'n v. Tetra Laval BV*, 2005 E.C.R. I-00987.
- <sup>48</sup> Philip Lowe, Director-General Directorate General for Competition European Commission, Speech at the International Bar Association meeting: Future directions for EU Competition Policy (Sept. 20, 2002), [http://ec.europa.eu/competition/speeches/text/sp2002\\_034\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2002_034_en.pdf).
- <sup>49</sup> Opinion of Advocate General Kokott, C-265/17 P, *European Comm'n v. United Parcel Service, Inc.*, 2018 E.C.L.I. 628, §§ 57-58.
- <sup>50</sup> COMP/M. 6570, *UPS/TNT Express*, § 726, [http://ec.europa.eu/competition/mergers/cases/decisions/m6570\\_20130130\\_20610\\_4241141\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6570_20130130_20610_4241141_EN.pdf).
- <sup>51</sup> Nicholas Levy & Vassilena Karadakova, *The EC's increasing reliance on internal documents under the EU Merger Regulation: issues and implications*, 39 EUROPEAN COMPETITION LAW REVIEW [E.C.L.R.] 17 (2018).
- <sup>52</sup> Alec Burnside, Michael Weiner & Rani Habash (Dechert LLP), *DAMITT 2018 Year in Review: No Trump Effect Yet, But Some EU Durations Decrease; Brexit Looms With Potentially Significant Implications*, (Jan. 24, 2019), <https://www.dechert.com/knowledge/onpoint/2019/1/damitt-2018-review--no-trump-effect-yet--but-some-eu-durations-d.html>.
- <sup>53</sup> These are just some issues with the increased use of internal documents in EU merger control proceedings. A more detailed overview is e.g. provided in Nicholas Levy & Vassilena Karadakova, *The EC's increasing reliance on internal documents under the EU Merger Regulation: issues and implications*, E.C.L.R. 19-23 (2018).
- <sup>54</sup> Johannes Laitenberger, Director-General for Competition European Commission, W@competition Conference: Enforcing EU competition law in a time of change – Is Disruptive Competition Disrupting Competition Enforcement? (Mar. 1, 2018), [http://ec.europa.eu/competition/speeches/text/sp2018\\_03\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2018_03_en.pdf).