



Press and Information

Court of Justice of the European Union

PRESS RELEASE No 122/18

Luxembourg, 25 July 2018

Advocate General's Opinion in Case C-265/17 P
European Commission v United Parcel Services, Inc.

Advocate General Kokott suggests that the Court of Justice should confirm that the Commission's decision prohibiting the acquisition of TNT Express by UPS should be annulled due to a procedural error

As the General Court correctly held, the Commission infringed UPS's rights of defence by making material changes to the econometric model on which it relied during the administrative procedure without informing UPS or giving the undertaking an opportunity to submit observations

By decision of 30 January 2013 the Commission prohibited the proposed acquisition by UPS of the Dutch parcel delivery firm TNT Express, because it would lead to a significant impediment to effective competition on the market for international express deliveries of small packages within the European Economic Area in 15 Member States.¹ This prohibition was based on a prediction in relation to the expected negative development of competition on the relevant markets, for which the Commission essentially relied on an econometric analysis by means of a price concentration model.

UPS successfully brought an action against that prohibition before the General Court. By judgment of 7 March 2017 the General Court annulled the Commission's decision on the ground that UPS's rights of defence had been infringed.² The last price concentration model used by the Commission exhibited significant differences, as far as the variables adopted were concerned, from the one that had been the subject of discussions with UPS during the administrative procedure. The Commission did not give UPS any opportunity to submit observations in relation to those changes.

The Commission then brought an appeal before the Court of Justice requesting it to set aside the General Court's judgment.

In today's Opinion, Advocate General Juliane Kokott suggests that the Court of Justice should dismiss the Commission's appeal and uphold the General Court's judgment.

The price concentration model in question was one of the key foundations for the objections raised by the Commission against the proposed acquisition. Therefore, it appears to be self-evident that the Commission, in order for UPS's rights of defence to be observed, should have put UPS in a position to make known its views on that model in an effective manner.

The Commission has not provided any indications that, due to the time constraints of merger control proceedings, it was practically impossible for it to hear UPS regarding that model and to set a short deadline for any response.

Further, the General Court was completely correct to find that UPS might have been better able to defend itself if it had had at its disposal, before the adoption of the decision at issue, the final version of the econometric model chosen by the Commission.

¹ Decision of 30 January 2013 declaring a concentration incompatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.6570 — UPS/TNT Express), notified under Case Number C (2013) 431 final and summarised in OJ 2014 C 137, p. 8; see also Commission Press Release IP/13/68.

² Case: [T-194/13](#) United Parcel Services and Commission; see Press Release No. [23/17](#).

Advocate General Kokott therefore considers it logical that the General Court annulled the decision at issue.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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