



Press and Information

Court of Justice of the European Union

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Judgment in Case C-265/17 P
Commission v United Parcel Service

The Court of Justice confirms that the Commission's decision prohibiting the acquisition of TNT Express by UPS must be annulled due to procedural irregularity

The General Court was right in finding that the Commission infringed UPS's rights of the defence

By decision of 30 January 2013, the Commission prohibited the acquisition by UPS of TNT Express on the ground that in 15 Member States that operation would have led to a significant impediment to effective competition on the market for the international express delivery of small parcels within the European Economic Area (EEA).¹ The decisive factor on which that prohibition was based is an econometric analysis that led the Commission to conclude that there was a risk that prices would increase on the majority of the markets concerned.

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 the defence had been infringed.² The General Court found that the price concentration econometric model ultimately used by the Commission differed considerably from that disclosed to UPS during the administrative procedure, without the Commission giving UPS the opportunity to submit observations on the amendments made.

The Commission brought an appeal before the Court of Justice to have the judgment of the General Court set aside.

In today's judgment, the Court points out that observance 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 on which the Commission intends to base its decision. Thus, where the Commission intends to base its decision on econometric models, the notifying parties must be able to submit their observations in that regard. Econometric models are, by their nature and purpose, quantitative tools appropriate for the purpose of carrying out the prospective analysis that the Commission undertakes in merger control proceedings. The 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 EU's merger control procedure.

The 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 enshrined in Article 41 of the Charter of Fundamental Rights of the European Union.

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

² Case: [T-194/13](#) United Parcel Service v Commission, see also Press Release No [23/17](#).

According to the Court, the Commission is required to reconcile the need for speed that characterises the general scheme of the regulation on the control of concentrations³ with observance of the rights of the defence. Such observance does not allow the Commission, after disclosure of the statement of objections, to 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 undertakings concerned and allowing them to submit their comments in that regard.

Consequently, the Court of Justice considers that the General Court did not err in law when it concluded that the Commission could not claim that it was not required to disclose the final econometric analysis model to the applicant before adopting the decision at issue.

In addition, the Court upholds the General Court's finding that failure to disclose an econometric model to the parties to a merger can lead to the Commission's decision being annulled, provided that it has been established that that irregularity has denied them the chance, even if that chance is slight, better to defend themselves. It need not be proven that, but for that procedural irregularity, the decision would have been different in content.

Given the importance of econometric models for the prospective analysis of the effects of a merger, raising thus the standard of proof to be met in order to cancel a decision due to an infringement of the rights of the defence resulting from failure to disclose the methodological choices which are inherent to those models would run counter to the objective of encouraging the Commission to show transparency in the development of such models and undermine the effectiveness of subsequent judicial review of its decisions.

The Court concludes that the General Court was entitled to find, without erring in law, that UPS's rights of the defence were infringed, with the result that the decision should be annulled, provided that it has been sufficiently demonstrated by UPS that, but for that procedural irregularity, it would have had the opportunity better to defend itself.

Accordingly, the Court of Justice rejects the Commission's appeal.

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 judgment is published on the CURIA website on the day of delivery.

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³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).