

## UPS/TNT – Commission’s disclosure of economic analysis insufficient.

### 1 Summary

On 7 March 2017, the General Court of the European Union annulled the decision of the European Commission (“EC”) prohibiting the acquisition of TNT Express by United Parcel Services (“UPS”).

The Court found that the EC breached UPS’ rights of defence by relying on a version of an econometric model to support its decision that was in some respects different from the one disclosed to UPS during the investigation. The Court holds the EC to a strict standard requiring annulment when there is the slightest chance that the notifying party might have been able to defend itself better if it had access to the final version of the model.

This is the same standard used where the EC fails to disclose potentially exculpatory evidence in its possession. The EC had argued that, even without the economic modelling, the decision was sufficiently reasoned and the outcome would have been the same. This is the standard used for non-disclosed incriminating evidence.

This judgment imposes significant constraints on the EC in terms of making changes to its econometric models following the statement of objections. Given this, the EC may well appeal this judgment to the European Court of Justice.

### 2 Background

In January 2013 the EC announced its decision to prohibit the proposed acquisition of TNT Express by UPS. The EC found that UPS’ acquisition would have resulted in a significant impediment to effective competition (“SIEC”) in express small package delivery services in 15 member states.

UPS appealed the EC’s decision citing a number of grounds, including that the EC had infringed UPS’ rights of defence by failing to provide UPS the opportunity to comment on the final version of the econometric model ultimately relied upon in the EC’s decision.

During the merger review process, UPS and the EC had exchanged views on their respective econometric analyses to predict the price effects of the acquisition late into the process. Importantly, following the statement of

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objections, the EC made some changes to its modelling and never disclosed these to UPS. This was despite, according to the Court, the EC having ample time to do so and the dialogue with the notifying party on the modelling having continued after the time the EC had finalised its work.

### 3 General Court findings

The Court recalled that the observance of the rights of defence is a general principle of EU law enshrined in the Charter of Fundamental Rights of the EU, and must be guaranteed in merger proceedings before the EC.

The Court further noted that the right to a fair hearing (a part of the rights of defence) requires that merging parties must be afforded the opportunity, during the merger review process, to make their views known on the truth and relevance of the facts and circumstances alleged and on the documents used by the EC to support its claim.

The Court found that the EC relied on the econometric model in question to support its decision and in particular to identify the countries in which the acquisition was likely to result in an SIEC.

The Court rejected the EC's argument that the final econometric model was only "marginally different" from the model that had been disclosed to UPS. The Court found that despite several similarities between the model versions there were also differences which "cannot be regarded as negligible." The Court also noted that the final version of the model was ready more than two months before the adoption of the final decision, rejecting the suggestion made by the EC that merger proceedings are subject to strict timing requirements.

The Court further rejected the EC's argument that an annulment would only be warranted if the outcome of the EC decision would have been different without the econometric analysis. The EC had relied on other (qualitative) evidence, besides the modelling, to justify its decision. The Court disagreed and held that it was sufficient for UPS to show that "there was even a slight chance that it would have been better able to defend itself", citing the strict approach taken in *Solvay v Commission*, a judgement of the Court of Justice of 25 October 2011.

The Court noted that the EC had heavily relied on the modelling to identify the member states where the merger was likely to result in an SIEC and that UPS' earlier input had a significant influence on the econometric modelling used by the EC (and hence its results).

### 4 Comment

With this judgment, the General Court holds the EC to a strict standard in merger proceedings when it comes to the disclosure of the economic modelling carried out by the Chief Economist Team and relied upon in a prohibition decision.

This judgment will require the EC to disclose the final version of its economic modelling to the notifying party for comments, even at a late stage of the

proceedings. Otherwise, the EC's decision is at risk if the EC then relies on that modelling in its decision. Any changes beyond what the economic advisors to the notifying party have proposed in the last round may trigger an annulment. The EC must not necessarily accept what the notifying party proposes but it cannot make further changes to strengthen its case without providing an opportunity for comment.

The Court's ruling may make the EC more reluctant to rely on economic models as evidence, reverting to a practice of the past to engage in modelling but then base its decision only on the qualitative evidence disclosed to the notifying party. Given the impact on the ability of the Chief Economist Team to refine its modelling after the statement of objections it would not be surprising if the EC appealed this judgment.

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