SLAUGHTER AND MAY

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EU General Court annuls European Commission's UPS/TNT prohibition decision

In a **ruling**[1] issued on 7 March 2017 the General Court (GC) annulled the **decision**[2] by the European Commission to block the proposed merger between United Parcel Services (UPS) and TNT Express. In January 2013 the Commission had vetoed the proposed acquisition, finding that it would have resulted in a significant impediment to effective competition (SIEC) in express small package delivery services in 15 EEA Member States. UPS subsequently appealed the decision to the GC, arguing that its rights of defence had been infringed due to the Commission's failure to disclose the final version of an econometric model relied upon in its prohibition decision.

Background

UPS notified the Commission of its proposed acquisition of TNT in June 2012. The Commission adopted its decision on 30 January 2013, prohibiting the proposed acquisition on the grounds that the transaction would have reduced the number of significant players in the express delivery of small packages market from four to three, or even two, in 15 EEA Member States. This in turn would likely have resulted in price increases for customers.

In reaching its conclusion the Commission used econometric analysis to predict the anti-competitive price effects of the proposed acquisition. The Commission participated in an ongoing dialogue with UPS regarding the econometric models used, providing UPS with the opportunity to submit its observations on those models throughout the process. However, between the issuing of its Statement of Objectives (SO) and the adoption of its final decision, the Commission made changes to its econometric model, but failed both to inform UPS of the changes and to provide UPS with the opportunity to express its opinion on the analysis. The amended econometric model was ultimately relied upon in the prohibition decision.

The GC's judgment

UPS appealed the decision to the GC, seeking its annulment. UPS submitted that during the administrative procedure it and the Commission had exchanged

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

[1] Case T-194/13, *UPS v Commission*, judgment of 7 March 2017.
[2] Case COMP/M.6570 — *UPS/TNT Express*, Commission decision of 30 January 2013.

analyses of the net effects of the merger on prices in various national markets. However, the price analysis of the merger used in the decision was materially different from the versions that UPS had been able to consult during the administrative procedure, which UPS claimed had infringed its rights of defence.

In its ruling, the GC first 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 European Union which must be guaranteed in all proceedings, including merger proceedings before the Commission. In particular, the right to a fair hearing requires that a party concerned in such proceedings must be afforded the opportunity to make known its views on the truth and relevance of the facts and circumstances alleged and the documents used by the Commission to support its claim.[3]

When applying these principles to the Commission's decision, the GC made the following observations:

- the Commission had relied on the econometric analysis in question in order to identify the number of SIEC States;
- the Commission adopted the final version of the econometric model more than two months before the adoption of its decision in January 2013, providing ample time in which to consult with UPS;
- the final version of the econometric model was not communicated to UPS; and
- the GC rejected the Commission's claim that the econometric model ultimately used in its decision was only marginally different from that which was presented to UPS. Despite the existence of numerous similarities, the GC concluded that the changes made to the final model could not be regarded as "*negligible*".[4]

Accordingly, the GC concluded that the Commission was required to communicate the final model to UPS before adopting its decision and that its failure to do so had infringed UPS's rights of defence.

The GC then proceeded to consider whether the annulment of a merger decision would be warranted. In this regard, the GC rejected the Commission's arguments that the applicant must demonstrate that, in the absence of the procedural irregularity, the Commission's decision would have been different. Instead, the GC (referring to the European Court of Justice (ECJ) judgment in *Solvay*[5]) stated that UPS only had to show that *"there was even a slight chance that it would have been better able to defend itself"*.[6]

In this regard, the GC firstly emphasised that the Commission had relied on the econometric analysis to identify SIEC States. The GC noted that when the SO was adopted the Commission had provisionally found there to be 29 SIEC States – a number which had dropped to only 15 States by the time of the decision. Secondly, during the administrative procedure, UPS had significantly influenced the development of the econometric model by providing solutions to technical problems it had identified with the model. In light of this, the GC concluded that UPS might have been able to better defend itself had it been able to review the final version of the econometric model in question.

Moreover, the Commission expressly acknowledged that the results of its new econometric analysis had caused a decrease in the number of SIEC States after the SO was issued. The results were therefore

[3] Paragraphs 199 - 200, Case T-194/13, *UPS v Commission*, judgment of 7 March 2017.
[4] *Ibid* paragraph 205.
[5] Case C-109/10P *Solvay v Commission*, judgment of 25 October 2011.
[6] Paragraph 210, Case *T-194/13, UPS v Commission*, judgment of 7 March 2017.

capable of countering the qualitative information which had been taken into account in relation to certain States. This led the GC to conclude that UPS had been deprived of information which, provided it would have been exchanged with it in due time, could have enabled it to submit different results on the merger's effects on prices. Had UPS been able to make such submissions, the scope of the information taken into consideration by the Commission may have been reassessed and may, accordingly, have reduced the number of SIEC States.[7]

The GC therefore concluded that the Commission had infringed UPS's rights of defence by failing to communicate the final version of its econometric model and that the contested decision must be annulled.

Some thoughts

The GC currently has 12 merger related appeals pending before it, including a record number of eight cases which were brought to it in 2016. The majority of these cases concern the telecommunications sector - an area which has been heavily scrutinised by the Commission recently. The outcome of these cases remains to be seen but it should be noted that the GC's track record with appeals generally does not bode well for notifying parties considering an appeal of an unfavourable Commission merger decision. In particular, of the total number of Commission prohibition decisions that have been appealed since 2003, only around 25 per cent have been successful before the GC and resulted in annulment.

However the UPS ruling highlights a number of encouraging points for notifying parties in a merger review context. In its strictest interpretation, the Commission will be required to disclose all the economic modelling it uses if it wishes to rely upon the results of that modelling in its decisions. Where the results are finely balanced, the judgment might deter the Commission from relying on economic analysis to avoid protracted consultation with notifying parties which puts pressure on the Commission's tight deadlines. More generally, the ruling may lead to greater scrutiny of the Commission's merger review process.

Beyond providing a useful precedent for challenging the Commission's decisions, the GC's judgment buttresses the rights of notifying parties whilst also reinforcing the importance of due process in merger review - a welcome result for notifying parties at all stages of the process.

Other developments

Antitrust

ECJ clarifies scope of publishing leniency information in European Commission decisions

On 14 March 2017 the ECJ handed down its **judgment**[8] in an appeal by German chemicals company Evonik against a **judgment**[9] by the GC in 2015.[10] This provides clarification on the extent to which information

[7] *Ibid* paragraphs 217 - 218.
[8] Case C-162/15 P *Evonik Degussa GmbH v European Commission*, judgment of 14 March 2017.
[9] Case T-341/12, *Evonik Degussa GmbH v European Commission*, judgment of 28 January 2015.
[10] Evonik Industries AG was formerly known as Evonik Degussa GmbH, the latter of which is named in both judgments.

provided in the context of a cartel leniency application may be published in the European Commission's non-confidential public decision. The issue of access to this type of sensitive material is becoming increasingly significant in the context of private actions for damages in national courts.

In 2006 the Commission fined several participants in a hydrogen peroxide cartel. Evonik had provided the Commission with information on the arrangements in its leniency application. The point at issue in the GC and ECJ cases arose from the refusal by a Commission hearing officer[11] to review Evonik's request that information which was supplied as part of its leniency application be excluded from the Commission's public decision.

The GC had supported the Commission's view that it could publicly disclose such information and Advocate-General Maciej Szpunar reiterated this stance in his subsequent **opinion**. However, the ECJ has partially upheld the appeal. In particular, it held that the hearing officer is not limited to reviewing the disclosure of specifically confidential matters (such as business secrets and personal data) but must also examine any claim of confidentiality based on general principles of EU law. Therefore the GC had erred in law in finding that the hearing officer had been correct to decline competence to review Evonik's objections to the publication on the basis of the principles of the protection of legitimate expectations and equal treatment.

The ECJ also concluded that the Commission is not prohibited from publishing information relating to the elements constituting the infringement of EU competition law which was provided in the context of a leniency application, as the leniency regime only affords protection in relation to (i) the determination of the fine and (ii) the non-disclosure of the documents and statements received in accordance with that regime.

The ECJ clarified that "*the publication, in the form of verbatim quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency differs from the publication of verbatim quotations from that statement itself. Whereas the first type of publication should be authorised, subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information, the second type of publication is not permitted in any circumstances*".[12]

European Commission fines six car air conditioning and engine cooling suppliers in cartel settlement

On 8 March 2017 the European Commission **announced** fines totalling €155 million for six companies which had been engaged in one or more of four cartels relating to the supply of air conditioning and engine cooling components to various car manufacturers operating within the EEA.[13]

The Commission found that the six companies co-ordinated prices and/or markets and exchanged sensitive information at meetings in both Europe and Japan and through other collusive phone and email communications between 2004 and 2009.

[11] The hearing officer's role is to protect the companies' procedural rights during Commission cases.
[12] Paragraph 87, Case C-162/15 P *Evonik Degussa GmbH v European Commission*, judgment of 14 March 2017.
[13] The companies which have been fined are two European suppliers (Behr and Valeo) as well as four Japanese suppliers (Calsonic, Denso, Panasonic and Sanden).

Since all six companies admitted that they had been involved in and were liable for the cartels and agreed to settle the case, they each benefited under the **2008 Settlement Notice** from a reduction of 10% in the amount of any fines imposed upon them. Additionally, Panasonic (which participated in one of the cartels) received full immunity under the **2006 Leniency Notice** and Denso (which participated in all four cartels) was similarly not fined for its involvement in three of the cartels because they each revealed the existence of the respective cartels to the Commission. Denso avoided aggregate fines of €287 million while Panasonic avoided aggregate fines of €200,000. The Commission also reduced any fines imposed to reflect the companies' co-operation.

This is the Commission's sixth cartel decision in the car components sector since 2012. The global investigation also involved several other authorities, including in the Unites States and Japan.

European Commission introduces new anonymous whistleblowing tool

On 16 March 2017 the European Commission **announced** the launch of a new **tool** to assist individuals in alerting it to cartels and other anti-competitive practices. It will complement and reinforce the existing leniency programme, which enables companies to report their involvement in such illegal behaviour in exchange for a reduction of the fine imposed on them.

The tool will enable individuals to maintain their anonymity by making use of a specially designed encrypted messaging system run by an external service provider. The intermediary service provider will relay only the content of received messages to the Commission without disclosing any metadata which could identify the whistleblower.

Individuals who are willing to reveal their identity may contact the Commission directly using a dedicated phone number and email address.

The Commission anticipates that the new tool will improve the precision and reliability of the information which is divulged and therefore increase the likelihood of successful prosecution.

In parallel, on 20 March 2017 the Competition and Markets Authority (CMA) **announced** the launch of an **advertising campaign** to encourage those who have witnessed illegal cartel activity to report it, by offering a reward of up to £100,000 as well as promising them anonymity.

General competition

CMA consults on changes to market investigations

The CMA has published a **consultation document** that sets out its proposed changes to the way in which it conducts market investigations. This is the first step in a broader long-term process of consolidation and review of the CMA's markets guidance, which it committed to in its **Annual Plan for 2016/2017**.

The main changes that are proposed in the consultation document relate to:

- the streamlining of the market investigation process by (i) interacting with stakeholders earlier and in a more flexible manner, (ii) reducing the number of set-piece consultations, and (iii) considering potential remedies at an early stage; and

- strengthening synergies between market studies and market investigations (while maintaining independence of decision-making) by (i) introducing the option for the Board to provide an advisory steer on the scope of a market investigation (in cases where the CMA has conducted the market study) and (ii) permitting preparatory work for the market investigation to be carried out during the latter stages of market studies.

The deadline for comments on the CMA's proposals is 2 May 2017. A roundtable event to provide stakeholders with an opportunity to discuss the proposals is expected to take place on 29 March 2017 at the CMA's offices.

Regulatory

Ofcom agrees Openreach separation from BT

On 10 March 2017 **BT** and the Office of Communications (**Ofcom**) each announced that BT has made a formal notification to Ofcom setting out proposals in relation to the restructuring and legal separation of Openreach, its network division. BT's **commitments** mean that, while it will continue to own Openreach's assets, Openreach will become a legally distinct company within BT Group with its own staff, management, strategy, annual operating plans and a legal purpose to serve all of its customers equally.

Ofcom's announcement indicates that BT's commitments, combined with regulation resulting from Ofcom's regular market reviews, will form a comprehensive solution to problems in the market that Ofcom identified in its **Strategic Review of Digital Communications**.

On 17 March 2017 Ofcom published a **consultation document** setting out (i) further detail on how BT's commitments address Ofcom's competition concerns, (ii) proposals to release BT from the undertakings it had previously given in relation to Openreach, and (iii) proposals to monitor and enforce the new structure for Openreach. The closing date for responses is 14 April 2017.

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