SLAUGHTER AND MAY

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Court of Justice confirms annulment of Commission's prohibition decision in UPS / TNT Express

On 16 January 2019 the European Court of Justice (CJ) **confirmed** the annulment of the European Commission's decision to block the acquisition of TNT Express by United Parcel Service (UPS), concluding that the Commission had breached UPS's rights of defence.

Background

On 30 January 2013 the Commission **announced** its decision to prohibit the proposed acquisition by UPS of TNT, on the grounds that it would have reduced the number of significant players in the market for express delivery of small packages 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 its assessment of these negative effects of the concentration the Commission relied on a different econometric model from that which had been the subject of submissions by both parties during the administrative procedure.

UPS successfully **appealed** the prohibition decision to the European General Court (GC), arguing that its rights of defence had been infringed due to the Commission's failure to disclose the final version of the econometric model ultimately relied upon in its prohibition decision, thereby denying the parties the opportunity to submit observations on the amendments made. (The GC judgment is covered in a **previous edition** of the Newsletter).

The Commission subsequently brought an appeal before the CJ to have the judgment of the GC set aside.

Rights of the defence

The Commission argued that it was not required to communicate the final version of the econometric model before adopting the final decision.

The CJ rejected this argument. It pointed out that the rights of defence and the rights of access to the file in merger control proceedings before the Commission require that the notifying parties are able to make known effectively their views on the accuracy and relevance of all the factors on which the Commission

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intends to base its decision. Where this is based on econometric models, the notifying parties must be able to submit their observations on those models.

Arguments by the Commission that the econometric model ultimately used in its decision was only marginally different from that which was presented to UPS were rejected by the GC (as confirmed by the CJ), finding that the changes made to the final model could not be regarded as "negligible".

The CJ responded to assertions by the Commission that sharing any updates would prevent it taking the speedy decisions necessary in merger control with a statement that the Commission "*is required to reconcile this need for speed with observance of the rights of the defence*".[1] The Commission is accordingly not allowed, after disclosure of the statement of objections, to modify the substance of an econometric model on which it intends to base its objections, without bringing these modifications to the attention of the undertakings concerned, allowing them to submit comments on the amendments. The CJ further observed that the Commission adopted the final version of the econometric model more than two months before the adoption of its decision in January 2013, providing it ample time in which to consult with UPS.

On this basis the CJ found that the GC was correct to conclude that the Commission was required to communicate the final econometric analysis model to the applicant before adopting the decision.

Consequences of the infringement

The CJ proceeded to consider whether the prohibition decision should be annulled as a consequence of UPS's rights of defence being infringed.

Standard of proof

The Commission argued that in order for the decision to be annulled, UPS would have to demonstrate that, but for the procedural irregularity, the Commission's decision would have been different, constituting a high standard of proof for the applicant. The CJ did not agree and instead upheld the position taken by the GC that UPS only had to show that the irregularity has denied them the chance to better defend themselves, even if that chance is slight. It thus need not be proven that in the absence of the procedural irregularity, the decision would have been different in content.

The CJ further clarified that raising the standard of proof to be met in order to annul a decision due to an infringement of the rights of defence 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*".[2]

The CJ also rejected an argument of the Commission that UPS's plea alleging infringement of the rights of defence was ineffective due to the fact that, with regard to the Danish and Netherlands markets, the

[1] Case C-265/17 P, *Commission v United Parcel Service*, judgment of 16 January 2019, para. 38.
[2] Ibid, para. 55.

Commission found that there was a significant impediment to effective competition, irrespective of any consideration of the econometric model.

Next steps and wider implications for merger review

Whilst the decision recognises that econometric models are an "appropriate" tool for predicting the competitive effects of a merger, the CJ has emphasised the need for objectivity so as not to "prejudge" the outcome and undermine trust in EU merger reviews. Accordingly, where the Commission uses econometric models, it must do so diligently. This case therefore provides a useful precedent for challenging the decisions of the Commission, and reinforces the importance of due process in merger review; a positive result for notifying parties in a merger review context.

It is also worth noting that UPS has lodged an action for damages against the Commission, claiming €1.7 billion in compensation for the loss suffered as a result of the Commission's prohibition decision.[3] This claim had been stayed until the CJ judgment, so it will be interesting to see the outcome of these proceedings.

Other developments

Merger control

CMA imposes penalty on Ausurus and European Metal Recycling for failure to comply with an initial enforcement order

On 10 January 2019 the Competition and Markets Authority (CMA) published its **decision** fining Ausurus Group Ltd and its subsidiary European Metal Recycling Ltd (EMR) a total of £300,000 for breaching an initial enforcement order (IEO) made on 11 September 2018. The IEO followed the CMA's investigation of Ausurus's completed acquisition (through EMR) of CuFe Investments Limited, including its wholly-owned subsidiary Metal & Waste Recycling Limited.

The CMA found that Ausurus and EMR had failed to comply with the IEO in two respects:

- Firstly, CuFe Investments' customers had been directed to make payments into, and payments had been made to CuFe Investments' suppliers from, bank accounts belonging to Ausurus, in both cases without the CMA's consent having been sought.
- Secondly, Ausurus and EMR failed to give the managing director of Metal & Waste Recycling a clear delegation of authority to take decisions without consulting or obtaining permission from Ausurus or EMR.

The CMA found that Ausurus and EMR had no reasonable excuse for the failure to comply. It considered a financial penalty was appropriate in order to act as a deterrent, and given the serious nature of the

[3] Case T- 834/17, *United Parcel Service v Commission*, action brought on 29 December 2017.

breaches. It concluded that a fine of £150,000 for each breach was an "appropriate and proportionate penalty". The fine represents the CMA's second ever in respect of a breach of an IEO, the first being the £100,000 fine imposed on Electro Rent on 11 June 2018. Such actions indicate the importance of complying with IEOs and other hold-separate obligations.

Antitrust

Hong Kong Competition Commission opens investigation into "Hong Kong Seaport Alliance"

On 10 January 2019 the Hong Kong Competition Commission (HKCC) **announced** that it had opened an investigation into the "Hong Kong Seaport Alliance". On 9 January 2019 COSCO SHIPPING Ports Limited **announced** that COSCO-HIT Terminals (Hong Kong) Limited, Asia Container Terminals Limited, Hongkong International Terminals Limited and Modern Terminals Limited have formed the "Hong Kong Seaport Alliance" (the Alliance) by signing a "Hong Kong Seaport Joint Operating Alliance Agreement" (the Agreement). The Alliance will jointly manage 23 (out of 24) berths across 8 (out of 9) terminals of the Kwai Tsing Container Terminals in Hong Kong, the sixth busiest port in the world. This accounts for 95 per cent of Hong Kong's container terminal operations.

The HKCC is investigating whether the Agreement may constitute a contravention of the First Conduct Rule of the Competition Ordinance (the equivalent of Article 101 of the Treaty on the Functioning of the European Union).

On 9 January 2019 the Hong Kong Shippers' Council **expressed** deep concern over the negative impact on competition brought about by the Alliance, and cautioned that there is no mechanism to monitor or regulate competition between the members of the Alliance. It also noted that terminal handling charges in Hong Kong have been the highest in the world, and it is necessary to ensure that benefits from improved productivity are passed down to shippers and that costs of shipping through Hong Kong are lowered. It has been reported that the Hong Kong Shippers' Council was set to file a complaint with the HKCC. It was in response to various media reports that the HKCC took the unusual step to issue a press release stating that it has opened an investigation into the matter.

Terms of the Agreement have not been made public and therefore the precise nature and scope of the HKCC's case is unclear. However, given the significant impact of the Alliance on the port of Hong Kong and the media attention it has already received, we can expect that the industry will be closely following the HKCC's investigation with interest.

General competition

Commissioner Vestager's speech on competition and "European champions"

On 9 January 2019 EU Competition Commissioner Margrethe Vestager gave a **speech** at the WELT Economic Summit in Berlin, on the topic of competition law and the creation of European business champions.

While Vestager welcomed the prosperity and stability that European businesses help create, she also claimed that European business champions cannot be built "*with mergers that harm competition, or by looking the other way when Europe's businesses break our rules*".

This view formed part of a broader message which emphasised the importance of European businesses "*doing [their] bit to help build a better, more secure, more prosperous, more sustainable society*". Vestager suggested ways in which European business champions could assume responsibility and make positive contributions to society. These ranged from making efforts to protect the environment; developing ethical technology in order to protect "fundamental values"; paying their fair share of taxes (with particular reference to digital companies); and offering jobs that give workers the opportunity to develop skills.

Vestager also addressed issues relating to global competition, since "*a level playing field requires more than competition enforcement in Europe*". In particular, she mentioned the need to apply existing trade defence mechanisms to maintain fair competition worldwide and urged the European Parliament and Member States to make progress on the Commission's proposal to create an international procurement instrument.[4] Once adopted, Vestager said, this instrument will help make reciprocity in trade negotiations with third parties a reality.

The speech was made at a time when the Commission is investigating the merger between railway equipment manufacturers Siemens and Alstom, which has been described by the parties as creating a "European champion". The transaction is currently subject to a Phase II investigation and has received publicity in light of concerns raised by various stakeholders, including regarding the ability of the proposed remedies package to prevent potential anti-competitive effects.

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[4] The **international procurement instrument** is a tool to promote open access to public procurement markets around the world.