



Press and Information

General Court of the European Union
PRESS RELEASE No 34/22
Luxembourg, 23 February 2022

Judgments in Cases T-834/17 and T-540/18
United Parcel Service v Commission and ASL Aviation Holdings and ASL
Airlines (Ireland) v Commission

The General Court dismisses two actions for damages brought by UPS and ASL Aviation Holdings

The two companies sought compensation for the economic damage allegedly suffered as a result of the unlawfulness of the Commission decision declaring a notified concentration incompatible with the internal market

By decision of 30 January 2013 ('the decision at issue'),¹ the European Commission declared incompatible with the internal market a notified concentration between United Parcel Service, Inc. and TNT Express NV ('TNT'), two undertakings present on the markets for international express small package delivery services.

While publically announcing that it would not go ahead with that concentration, UPS brought an action before the General Court for annulment of the decision at issue. By judgment of 7 March 2017,² the General Court upheld that action and, by judgment of 16 January 2019,³ the Court of Justice dismissed the appeal brought by the Commission against that judgment.

In the meantime, the Commission had declared compatible with the internal market a notified concentration between TNT and FedEx Corp., a competitor of UPS.⁴

At the end of 2017, UPS brought an action for damages against the Commission, seeking compensation for the economic damage allegedly suffered as a result of the unlawfulness of the decision at issue.⁵ In 2018, an action for damages was also brought by the companies ASL Aviation Holdings DAC and ASL Airlines (Ireland) Ltd (together, 'the ASL companies'), which, before the adoption of the decision at issue, had concluded commercial agreements with TNT that were to be implemented following clearance of the concentration between UPS and TNT.⁶

Those two actions for damages are dismissed by the Seventh Chamber (Extended Composition) of the General Court.

Findings of the General Court

Dismissal of the action for damages brought by UPS (Case T-834/17)

By its action for damages, UPS claimed that, by adopting the decision at issue, the Commission had committed sufficiently serious breaches of EU law capable of giving rise to non-contractual liability on the part of the European Union. According to UPS, the Commission had, first, infringed

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/TNT Express); see also the Commission's press release IP/13/68.

² Judgment of the General Court of 7 March 2017, *United Parcel Service v Commission*, [T-194/13](#) (see also [Press Release No 23/17](#)).

³ Judgment of 16 January 2019, *Commission v United Parcel Service*, [C-265/17 P](#) (see also [Press Release No 3/19](#)).

⁴ Decision of 8 January 2016 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case M.7630 – FedEx/TNT Express), a summary of which was published in the *Official Journal of the European Union* (OJ 2016 C 450, p. 12).

⁵ Case T-834/17, *United Parcel Service v Commission*.

⁶ Case T-540/18, *ASL Aviation Holdings and ASL Airlines (Ireland) v Commission*.

its procedural rights during the administrative procedure, second, failed to fulfil the obligation to state reasons and, third, erred in its substantive assessment of the notified concentration.

As a preliminary point, the General Court recalls that in order for the European Union to incur non-contractual liability, three cumulative conditions must be satisfied: there must be a sufficiently serious breach of a rule of law conferring rights on individuals; actual damage must be shown to have occurred; and there must be a direct causal link between the breach and the damaged sustained.

As regards, in the first place, the alleged infringement of UPS' procedural rights during the administrative procedure, UPS claimed, first, that the Commission failed to communicate the final version of the econometric model used to analyse the effects of the notified concentration on prices and the criteria for assessing the efficiencies deriving from that concentration. Second, UPS claimed that the Commission had infringed its right of access to information provided by FedEx during the administrative procedure.

With regard to the failure to communicate the final version of the econometric model used by the Commission, the General Court observes that, under the applicable legislation, the Commission was under an obligation to bring that final version to UPS' attention. Since the Commission had considerably reduced, or even no, discretion in that regard, it committed a sufficiently serious breach of UPS' rights of defence by failing to communicate that model to UPS. In the light of the case-law on observance of the rights of the defence and the judgment of the Court of Justice of 16 January 2019, that infringement of UPS' rights was not, moreover, excusable on account of an alleged lack of clarity of EU law, as contended by the Commission.

The General Court also rejects the Commission's argument in its defence based on the fact that the finalisation of the econometric model had been preceded by numerous exchanges with UPS. By failing to communicate the final version of the econometric model, the Commission not only avoided a procedural constraint intended to safeguard the legitimacy and fairness of the European Union's procedure for the control of concentrations, but also placed UPS in a position where it was unable to understand part of the grounds of the decision at issue.

By contrast, as regards the failure to communicate to UPS the criteria for assessing the efficiencies deriving from the notified concentration, the General Court observes that no provision of EU law applicable to the control of concentrations requires the Commission to define in advance, in the abstract, the specific criteria on the basis of which it intends to accept that an efficiency may be regarded as verifiable. In those circumstances, UPS' line of argument seeking to show that the Commission was required to communicate to it the specific criteria and standards of proof which it intended to apply in order to determine whether each of the efficiencies relied on was verifiable is unfounded in law.

The General Court also rejects the argument that the Commission had infringed UPS' right of access to certain documents provided to the Commission by FedEx during the administrative procedure. Since UPS had not exercised its rights of access in due time and in the manner prescribed by the applicable legislation (failure to refer the matter to the hearing officer), it did not meet the conditions for obtaining compensation for alleged damage resulting from the infringement of those rights.

Regarding, in the second place, the alleged failure by the Commission to fulfil the obligation to state reasons, the General Court recalls that an inadequacy in the statement of reasons for an EU measure is not, in principle, in itself such as to give rise to liability on the part of the European Union.

As regards, in the third place, UPS' argument alleging errors in the substantive assessment of the notified concentration, the General Court, while confirming that the Commission made certain errors, observes that those errors do not constitute sufficiently serious breaches of EU law to be capable of giving rise to non-contractual liability on the part of the European Union. In that regard, the General Court states that, even though the Commission used, in disregard of its own rules

(Best practices for the submission of economic evidence), an econometric model that departs significantly from standard economic practice, it enjoyed considerable discretion in defining that model. Moreover, in order to carry out its analysis of the effects of the notified concentration, the Commission did not rely exclusively on that econometric model, but also carried out a general analysis of the characteristics of the market in question, highlighting the nature and characteristics of that market and the consequences flowing from the proposed transaction.

In the last place, the General Court concludes that UPS has failed to demonstrate the existence of manifest and serious errors in the assessment of the verifiability of the efficiencies and of FedEx's competitive situation in the proposed concentration, and to provide any indication of unequal treatment between the decision relating to the transaction between FedEx and TNT and the decision at issue.

After thus establishing that the sufficiently serious breach of UPS' procedural rights during the administrative procedure was limited to the failure to communicate the final version of the econometric model used by the Commission to analyse the effects of the notified concentration on prices, the General Court examines, next, whether there is a direct causal link between that illegality and the types of damage relied on by UPS, namely, first, the costs associated with its participation in the procedure for the control of the notified concentration between FedEx and TNT, second, the payment to TNT of a contractual termination fee following the termination of the merger protocol concluded with TNT and, third, the loss of profit on account of the fact that it was impossible to implement that merger protocol.

As regards, first of all, the costs associated with UPS' participation in the procedure for the control of the notified concentration between FedEx and TNT, the General Court holds that that participation was clearly the result of UPS' free choice. Thus, the infringement of UPS' procedural rights during the procedure for the control of the notified concentration between itself and TNT cannot be regarded as the determining cause of the costs associated with its participation in the procedure for the control of the concentration between FedEx and TNT. Likewise, given that the payment of a termination fee to TNT stemmed from a contractual obligation arising from the terms of the merger protocol between UPS and TNT, the illegalities vitiating the decision at issue could not constitute the determining cause of the payment of that fee to TNT.

Regarding, lastly, the alleged loss of profit sustained by UPS, the General Court observes that it cannot be presumed that, had UPS' procedural rights not been infringed in the procedure for the control of the concentration itself and TNT, that concentration would have been declared compatible with the internal market. Furthermore, UPS has neither proved, nor provided the Court with evidence which would enable it to conclude that, without that infringement, the Commission would have declared that transaction compatible with the internal market. Moreover, the fact that UPS decided not to go ahead with the proposed concentration as soon as the decision at issue was announced had the effect of breaking any direct causal link between the illegality identified and the damage alleged.

In the light of the foregoing, the General Court concludes that UPS failed to establish that the infringements of its procedural rights in the procedure for the control of the concentration between itself and TNT constituted the determining cause of the types of damage alleged. Thus, it dismisses the action for damages in its entirety.

Dismissal of the action for damages brought by the ASL companies (Case T-540/18)

The action for damages brought by the ASL companies sought compensation for the alleged loss of profit resulting from the fact that it was impossible to implement the commercial agreements concluded with TNT on account of the decision at issue. In support of that application, the ASL companies relied on a breach of their fundamental rights and those of UPS by the Commission, as well as the existence of serious and manifest errors in the Commission's assessment of the notified concentration between UPS and TNT.

In the first place, the General Court holds that the ASL companies cannot rely, as a basis for their own claim for compensation, on a breach of UPS' rights of defence in the procedure for the control of the concentration between UPS and TNT. In accordance with the settled case-law of the General Court, it is necessary that the protection afforded by the rule relied on in support of an action for damages is effective as regards the person who relies on it and, therefore, that that person is among those on whom the rule in question confers rights.

In the second place, the General Court rejects as unfounded the line of argument put forward by the ASL companies based on the fact that the Commission infringed, in the procedure for the control of the concentration between UPS and TNT, their fundamental rights and in particular their right to sound administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union. In that regard, the General Court states that, in so far as the ASL companies had freely chosen not to participate in that procedure, they could not rely on an alleged infringement by the Commission of their fundamental rights in the context of that procedure.

In the third place, the General Court rejects as inadmissible the plea alleging the existence of serious and manifest errors committed by the Commission in the assessment of the concentration between UPS and TNT, given that the ASL companies confined themselves to referring in that regard to the application lodged by UPS in Case T-834/17.

In the light of those considerations, the General Court, finding that the ASL companies have not established the existence of sufficiently serious breaches of EU law vitiating the decision at issue, dismisses their action as unfounded.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The full text of the judgments ([T-834/17](#) and [T-540/18](#)) is published on the CURIA website on the day of delivery.

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Pictures of the delivery of the judgment are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106.