

The Role of the Efficiency Defence in EU Merger Control Proceedings Following *UPS/TNT*, *FedEx/TNT* and *UPS v Commission*

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I. Introduction

The importance of efficiencies – synergies, cost savings – has long been recognised in the context of antitrust review of mergers, whether in the USA, Europe, or other jurisdictions. The use of efficiencies in defence of substantively-problematic mergers, as an antidote to the potential anticompetitive effects of a merger, has a much more chequered history. In Europe, outright denial of the pro-competitive effects of merger-related efficiencies has evolved through a phase of somewhat reluctant acceptance of the theoretical benefits of efficiencies, into what is currently a codified willingness to assess and accept efficiencies in defence of otherwise problematic mergers.

On 7 March 2017 the General Court of the EU ('Court') issued its judgement¹ on the matter of the appeal by United Parcel Service, Inc. ('UPS') against the Commission decision to prohibit its acquisition of TNT Express NV ('TNT') in January 2013.² In that judgement, the Court annulled the Commission's prohibition decision, raising concerns about the lack of access afforded to the merging parties in *UPS/TNT* in respect of a finalised version of the econometric model used by the Commission as a basis for its blocking decision. Much of the economic evidence presented by the merging parties in that case had related to purported efficiencies that would be created by the merger, and the issue of whether those efficiencies would be sufficient to outweigh an expected negative effect on pricing as a result of the merger.

In the meantime, after the Commission's prohibition of *UPS/TNT* in 2013, FedEx Corp. ('FedEx') had stepped into the breach and successfully acquired TNT on the back of an unconditional approval of the transaction by the Commission in January 2016.³ Prospective efficiencies put forward by the merging parties in *FedEx/TNT* were accepted by the Commission as valid and capable of offsetting what the Commission ultimately characterised as hypothetical anticompetitive effects of the transaction.

Key Points:

- This paper examines some of the main findings of the European Commission in its *UPS/TNT* and *FedEx/TNT* merger reviews, the General Court's judgement in *UPS v. Commission*, and sets them in context of the overall approach to the efficiency defence in merger cases in Europe.
- The evolution of the position on efficiency defences in merger cases in the EU has been slow and the *TNT* decisions do not herald any major changes in the threshold that claimed efficiencies must reach in order to be accepted as counteracting a problematic merger.
- It is not realistic and perhaps not even appropriate to expect a major lowering of the threshold applied by the Commission, and cases such as *FedEx/TNT* demonstrate that the Commission does sometimes accept the validity of claimed efficiencies and the substantial economic evidence presented by merging parties.
- The most pragmatic expectation may be a refinement of the standard of proof applied by the Commission in respect of efficiency claims, such as to lead to an increase in the success of efficiency claims in narrowing the scope of remedies imposed in problematic merger cases, as opposed to efficiency claims alone overcoming major anti-trust concerns in the most problematic merger cases.

This article examines the Commission's approach in assessing merger-related efficiencies arguments in the light of the Commission's decisions in *UPS/TNT* and *FedEx/TNT*, and queries what impact the Court's decision in *UPS v Commission* might have on the conduct of future merger

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1 Case T-194/13 *United Parcel Service, Inc. v European Commission*, judgement of the General Court of 7 March, 2017.

2 Case COMP/M.6570 *UPS/TNT Express*, Commission Decision of 30 January, 2013.

3 Case COMP/M.7630 *FedEx/TNT Express*, Commission decision of 8 January, 2016.

proceedings,⁴ before examining what further changes in the treatment of efficiency claims in EU merger control proceedings might be most desirable. The article begins by providing a brief overview of the Commission's 'journey' in its treatment of efficiencies in merger control cases, before examining the Commission's decisions in the two TNT cases and assessing what, if anything, the Court's *UPS* judgement means for the Commission's future application of the rules on merger-related efficiencies. The author submits that the *UPS* judgement will not have a substantial impact on the Commission's practice in respect of the assessment of merger efficiencies *per se*, though it more likely will affect practice in respect of use of economic data and econometric modelling by DG Competition in its review of mergers.

In the author's view, the overall message from the series of TNT Decisions is one of continuity in respect of the role of efficiencies in merger reviews in Europe: given the starting point for the EU in terms of reluctance to even acknowledge the potential pro-competitive effects of merger efficiencies and the Commission's gradual evolution since then, the TNT decisions are neither surprising nor inconsistent with previous practice in this regard. Some slivers of light in the form of the Commission's apparent openness to efficiency claims in *FedEx/TNT* may yet give participants in tricky mergers some hope, though the threshold that merging parties are required to meet in order to bring home a successful efficiencies-based defence of their transaction remains high.

The article concludes by suggesting that while a fundamental shift in policy is unlikely and in any event at odds with the gradual development of the legal position on this issue over previous years, it would nonetheless be desirable to achieve some form of loosening of the standard of proof in respect of defensive efficiency claims in EU merger control proceedings. The author submits that achieving such an outcome would not necessitate a wholesale change of approach by the Commission, nor a policy-driven overhaul of the existing rules, rather it would require a refinement in the Commission's interpretation of the standard of proof that merging parties must reach in order to lodge a successful, efficiencies-based defence of their merger. In this regard, the author further submits that a 'successful' defence should not necessarily be expected to involve the resolution of the most problematic types of merger on the strength of efficiencies alone; rather, successful efficiency

claims may be those which are accepted by the Commission in shaping the final form of any remedies adopted in order to approve an otherwise problematic merger. In this sense, the success of efficiencies arguments made by merging parties is measured in the mitigation of remedies imposed. Ultimately, in the longer term, there are few indications in the wake of the TNT Decisions that the holy grail of a merger presenting major anticompetitive issues being 'neutralised' through the acceptance of substantial efficiency claims, is imminent.

II. The role of efficiency claims in defence of mergers under EU merger control

A. General recognition in economic theory

The relevance of efficiencies in the context of mergers has been, historically, well-recognised in economic writing, if not fully accepted (and put into practice) by antitrust regulators. Oliver E. Williamson's influential 1968 paper on 'economies' in antitrust forms the generally-accepted framework for assessment of efficiencies against potential consumer harm arising from a merger.⁵ The general assumption on efficiencies in the context of merger control is that efficiencies arising from a merger may either (a) be so convincing as to completely remedy any potential negative impact on competition arising from the transaction to mean that no structural or other remedy needs to be imposed on the merging parties, or (b) constitute an effective counterbalance to potential anticompetitive effects such as to mean that the scope of any remedy imposed on the merging parties can be limited accordingly.

Several potential shortcomings in the procedure around assessment of efficiencies in the context of mergers have been identified, including the fact that any projection of efficiencies are built on a number of assumptions about future economic conditions and commercial behaviour, while the burden of showing projected efficiencies falls on the merging parties – meaning that (it is argued) only the most optimistic economic evidence will be presented to regulators, ignoring modelling that would show plausible alternative outcomes arising from the merger.⁶ Concerns in respect of the former theory – that projected efficiencies may not actually materialise – are far from unique to

4 For the sake of convenience, the term 'TNT Decisions' is used in this article as a shorthand term for the *UPS/TNT* and *TNT/FedEx* Commission decisions, and the Court's *UPS v Commission* decision, collectively.

5 Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, *The American Economic Review*, Vol. 58, No. 1 (March 1968), 18–36.

6 François-Charles Laprèvote, *Abandon All Hope, ye Who Enter Here? Efficiencies in European Merger Control: A Few Lessons from Recent Decisional Practice*, *Concurrences Journal* No. 2, May 2014, para. 8.

efficiencies analyses and could be applied to economic modelling and forecasts produced in respect of all sorts of theories of harm, by both merging parties and antitrust regulators. Concerns in respect of the latter theory – that merging parties are prone to present the most favourable data possible – might be of real concern in a regulatory vacuum, but given the amount and level of critical scrutiny to which economic evidence is subjected in contemporary reviews of major merger cases, this should not be a major barrier to building a meaningful picture of potential efficiencies arising from a merger.

B. In the EU, acknowledgement does not equal acceptance

Efficiencies have been taken into account for many years in US merger review, a formerly-implicit approach that has now been explicitly codified to some extent in the US Horizontal Merger Guidelines (*'a primary benefit of mergers to the economy is their potential to generate significant efficiencies... which may result in lower prices, improved quality, enhance service, or new products'*).⁷ Although the concept is explicitly recognised, in the context of more problematic mergers which actually raise the prospect of anticompetitive effects, the US agencies place a significant burden placed on merging parties to demonstrate how claimed efficiencies are verifiable and how they are so substantial as to offset potential competition concerns raised by an otherwise problematic transaction. Efficiency claims in merger reviews in the US have tended to succeed mostly in cases lacking significant anticompetitive concerns, though some merging parties have succeeded in having their transactions cleared (or avoiding in-depth reviews) through the assertion of convincing efficiencies claims.⁸

In the context of EU merger review specifically, the Commission had a historically sceptical view of the role of efficiencies. Throughout the 1990s the Commission repeatedly dismissed purported efficiencies put forward by merging parties, questioning in particular the

mitigating effect of any claimed efficiencies on anticompetitive effects.⁹ Something of an apparent watershed occurred in the early 2000s, culminating in a decisive shift of policy with the introduction of the recast Merger Regulation in 2004 ('Merger Regulation').¹⁰ The Merger Regulation specifically noted in its preamble that *'[I]t is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers... and that, as a consequence, the concentration would not significantly impede effective competition'*.¹¹ The main part of the Merger Regulation in this regard is Article 2(1)(b) which states that the Commission must take into account 'the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition'.

Although the recast Merger Regulation specifically recognised the possibility of efficiencies counteracting possible anticompetitive effects of a merger, this 'watershed' development in EU merger policy was considerably circumscribed by the fine print issued by the Commission in the form of its Horizontal Merger Guidelines.¹² The Horizontal Merger Guidelines and, latterly, the Non-Horizontal Merger Guidelines¹³ (collectively, 'Merger Guidelines') built on the apparent change in the Merger Regulation, by setting out three main conditions which should be met in order for claimed efficiencies to be accepted as valid in defence of an otherwise problematic merger: (i) efficiency claims should be verifiable to the extent that the Commission can be 'reasonably certain' that the claimed efficiencies are 'likely to materialise'; (ii) efficiencies should arise directly as a result of the merger (be 'merger-specific'); and (iii) efficiencies should benefit consumers in the markets where anticompetitive effects could otherwise be expected to arise.¹⁴

This series of developments brought EU merger policy in line with the longer-established US policy on an efficiencies defence – one commentator noted that 'the efficiency defense is deliberately described in a way that

7 US Department of Justice and Federal Trade Commission Horizontal Merger Guidelines 2010, para. 10. An 'efficiencies defence' in certain circumstances was recognised already in 1997 amendments to the prior US Horizontal Merger Guidelines.

8 See, for example, the US Department of Justice Antitrust Division's Statement on the Closing of its Investigation of Whirlpool's acquisition of Maytag, where it specifically acknowledged the cost saving and other efficiencies, which were likely to benefit consumers, as a reason for not finding that the transaction would result in damage to consumer welfare (US Department of Justice Antitrust Division press release of 29 March 2006).

9 See e.g. Case IV/M.53 *Aérospatiale-Alenia/Havilland*, Commission Decision of 2 October 1991, para. 65; see also Case IV/M.126 *Accor/Wagon-Lits*, Commission Decision of 28 April 1992; Case IV/M.469 *MSG/*

Media Service, Commission Decision of 9 November 1994; Case IV/M.1313 *Danish Crown/Vertjyske Slagterier*, Commission Decision of 9 March 1999.

10 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, 2004 O.J. L/24/1.

11 *Ibid.*, recital 29.

12 *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, Official Journal, 2004 /C 31/03.

13 *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, Official Journal 2008/C 265/07.

14 *Ibid.*, paras 76–88.

makes it difficult to establish'.¹⁵ Despite the ostensible change of heart on the part of the Commission in its merger control enforcement policy, though, it remained reticent in its application of the new 'rules' on the use of an efficiency defence in merger control proceedings. The Commission's reticence has manifested itself in DG Competition's decisional practice: through a markedly strict interpretation of the principles outlined in the Merger Guidelines, the Commission has demonstrated a willingness to acknowledge the possibility of certain efficiencies arising from particular mergers, but that recognition of potential efficiencies has not – as a general rule – translated into an acceptance on the part of the Commission that the acknowledged efficiencies are in fact sufficient to offset concerns in respect of potential significant impediments to effective competition ('SIECs'), where mergers raise such issues.¹⁶

The narrow interpretation by the Commission of the criteria for mounting a successful efficiency defence is not the only factor at work; other elements leading to a relatively small number of cases featuring concerted efficiencies-related arguments include a reluctance on the part of merging parties to turn too-readily to efficiencies arguments in defence of their merger, for fear of being construed as giving a constructive admission that their merger is certain to have anticompetitive effects, and being seen to turn to a measure of last resort in grappling for justification in the form of efficiencies.¹⁷ Ultimately, though, the strict approach adopted by the Commission in interpreting the assessment criteria for efficiency claims, and the resultant formidable standard of proof placed on merging parties, has seen few successful (consequential) defensive efficiency claims in EU merger control proceedings.

III. The Commission's TNT decisions

A. UPS/TNT – efficiencies recognised, but rejected

The decision by the Commission in January 2013 to prohibit the proposed acquisition of TNT by UPS represented an important milestone in the evolution of the Commission's approach to assessing efficiencies as a defence in merger control proceedings. In this case the merging parties themselves had accepted that

anticompetitive effects would arise in respect of particular services provided by the parties, but had put forward a substantial amount of evidence and work that they claimed demonstrated that any negative impact on competition would be neutralised by efficiencies. While the Commission did accept that the merger would give rise to a few of the many efficiencies claimed by the merging parties, it concluded that those potential efficiencies would not outweigh likely price increases on certain markets.

The case involved a combination of two of the four main express delivery 'integrators' in Europe – firms who control a complete integrated air and ground delivery network, supported by sophisticated IT and related logistics systems. Although a large number of smaller ground-based operators are active in Europe, the Commission found that they did not pose a competitive constraint due to their lack of air infrastructure and their generally lower levels of reliability (which certain customers of the larger integrators would be unwilling to contemplate as an alternative). The Commission also found that FedEx, the 'fourth' integrator active in Europe, did not pose a sufficient competitive constraint on UPS, TNT and DHL, due in part to its lack of density and scale of its European network. Price discrimination was an important element in the Commission's reasoning in this regard, and the Commission concluded from various economic studies that many customers of the merging parties would not consider switching to FedEx as a credible alternative.

Having carried out price concentration analyses in relation to the market for intra-EEA express deliveries of small packages (using differences in the level of market concentration within a particular market sector or industry in order to establish any relationship between prices and concentration), the merging parties' own economic evidence pointed towards potential price increases in most EEA countries, in spite of the fact that DHL was the largest player in integrated express services in most of these countries, with the merging parties representing the second and third largest players.¹⁸

In response to the Commission's concerns in respect of potential price increases in services for the express delivery of small packages within the EEA, the merging parties put forward an efficiencies-based defence, arguing that the merger would lead to substantial cost savings (estimated to be in the region of €500 million per year),

15 Robert Pitofsky, *Efficiency Consideration and Merger Enforcement: Comparison of US and EU Approaches*, 2006 Fordham Corp. L. Inst. 287 (Barry E. Hawk, ed. 2007).

16 See, for example, Case COMP/M.4854 *TomTom/TeleAtlas*, Commission Decision of 14 May 2008, paras 246–250; Case COMP/M.5152 *Posten AB/Post Danmark A/S*, Commission Decision of 21 April 2009.

17 See N. Levy and C. Cook, *European Merger Control Law: A Guide To The Merger Regulation*, Vol. 1, 15–23.

18 *UPS/TNT* (footnote 2, *supra*), see in particular Section 7.5.2.2.

arising from reductions in costs associated with management, administration, ground transportation and the air network. In applying the Merger Guidelines criteria, the Commission assessed whether the claimed efficiencies were (i) verifiable, (ii) merger-specific, and (iii) to the benefit of consumers.

As regards the first criterion – verifiability – the Commission concluded that it could not verify many of the claimed efficiencies – particularly in respect of ground transportation costs and in respect of management and administration overheads.¹⁹ Aside from the verifiability of the claimed efficiencies, the Commission was particularly unpersuaded as regards the prospects of any cost savings being passed through to consumers, with a consequent elimination of price increases. The Commission focused on the fact that many of the likely cost savings put forward by the merging parties related to fixed costs, whereas its preference is for reductions in variable or marginal costs, which it sees as more likely to lead to reductions in prices for consumers.²⁰ Ultimately, the Commission was unconvinced as to how reductions in cost items such as administrative overheads would be allocated to individual services in the specific markets that were the subject of concern in this case.²¹ In respect of merger specificity, the Commission did accept that the claimed efficiencies were sufficiently closely linked to the merger, and could not be achieved through any realistic alternative.²²

The Commission's approach in this case represented something of a disappointment for those hoping to see a narrowing of the gap between the apparently significant role afforded to the efficiency defence that a simple reading of the Merger Regulation and Merger Guidelines would suggest, and the Commission's assessment of efficiency claims in practice. The Commission's *UPS/TNT* decision echoed in some respects another prohibition decision that was taken in the year preceding the *UPS/TNT* decision – in relation to the Deutsche Börse/NYSE merger notification ('*DB/NYSE*').²³ The merging parties in that case also put forward substantial amounts of evidence in mounting an efficiency defence in respect of products in relation to which the Commission considered the merged entity would have a 'near-monopoly' – European interest rate derivatives and exchange-traded derivatives.²⁴ In support of the merging parties' claims, five economic

reports were submitted to the Commission, covering ground such as purported reductions in IT/system access costs for customers, savings related to synergies arising from the integration of trading platforms, and benefits to the economy at large including improved economic growth.²⁵ The Commission ultimately rejected most of the parties' efficiency claims, with the exception of some collateral savings which it did not consider sufficient to offset potential competition concerns. In the Commission's view, the parties had failed to provide sufficient evidence of verifiable efficiencies which could be passed on to customers; some of the factors relied on in the Commission's rejection of the claimed efficiencies mirror some used in its reasoning in *UPS/TNT*, for example the fact that most savings would arise from fixed cost savings that would be unlikely to be passed on to consumers in the form of price reductions.

B. *FedEx/TNT* – efficiency claims accepted, but not decisive

While FedEx's proposed acquisition of TNT in 2015 did give rise to sufficient potential serious concerns in respect of the markets for express delivery of small packages intra-EEA and from the EEA to extra-EEA as to lead the Commission to open an in-depth, Phase II investigation, the Commission ultimately concluded that the transaction would not give rise to a significant impediment to effective competition, and in the end approved the merger.²⁶ A key distinguishing feature in the *FedEx/TNT* case, when compared with the *UPS/TNT* case, was the perceived lack of closeness of competition between FedEx and TNT: the Commission considered that a combination of FedEx's limited presence in Europe, TNT's focus on intra-European deliveries, and the strong competition from the two largest integrators – DHL and UPS – meant that sufficient competition would remain in each relevant market.

This distinction also puts the Commission's consideration of the merging parties' efficiency claims in a different context: ultimately, the merger would have been approved by the Commission irrespective of the outcome of its deliberations as regards the claimed efficiencies. Nevertheless, the Commission did conduct a full analysis of the evidence of prospective efficiencies put forward by the merging parties, and concluded that the efficiencies did meet the three-pronged Merger Guidelines criteria,

19 *Ibid.*, Section 7.10.3, and see in particular paras 864–868 and 889–892.

Note, however, that the Commission did accept the verifiability of certain cost savings claimed in respect of the European air network, finding that they were convincing, being derived from economies of scale and re-optimised routes across a combined network (see paras 869–876).

20 *Ibid.*, para. 893 *et infra*.

21 *Ibid.*, paras 897–900.

22 *Ibid.*, para. 910.

23 Case COMP/M.6166 *Deutsche Börse/NYSE Euronext*, Commission Decision of 1 February 2012.

24 *Ibid.*, paras 814 and 1131.

25 *Ibid.*, para. 1146.

26 *FedEx/TNT* (footnote 3, *supra*).

meaning that they ‘would be sufficient to offset any theoretical harm associated with the [T]ransaction’.²⁷

The merging parties succeeded in convincing the Commission that the claimed efficiencies were merger-specific and not achievable by reasonable, alternative means. The Commission also accepted that the efficiencies were in fact verifiable, and would likely be passed on to consumers. In this respect, the merging parties were more successful than was the case in *UPS/TNT*. Specifically, the Commission accepted that a large number of the claimed cost savings related to variable costs (rather than fixed costs), and that the significant economies of scale that could be achieved could be passed on to consumers in the form of price reductions.²⁸ In addition to recognising and accepting the specific efficiencies identified and claimed by the merging parties in respect of the intra-EEA and extra-EEA express delivery markets, the Commission also contemplated that additional synergies in the various markets for extra-EEA express deliveries would be realised over time, due to the majority of intercontinental air transport shifting from TNT to FedEx.²⁹

Of course a crucial difference between the *FedEx/TNT* case and *UPS/TNT* was the fact that the efficiency claims in *FedEx* did not play the decisive role that they did in *UPS/TNT*: the circumstances in *FedEx*, including in particular the demonstrable lack of closeness of competition between FedEx and TNT, meant that the case did not, ultimately, hang on the question of whether or not the parties’ economic evidence of claimed efficiencies would be sufficiently robust for the Commission’s review. There have been a handful of other cases in which the Commission has accepted efficiency claims, in some cases even where, arguably, the efficiencies claimed played a decisive role.³⁰ In general, however, efficiency claims continue to play a non-decisive role – a trend continued rather than disrupted by *FedEx/TNT*.

IV. The Court’s TNT decision – *UPS v Commission*

A. Background and Court’s findings

On 7 March 2017 the Court issued its judgement on the appeal brought in 2013 by UPS, against the Commission’s

UPS/TNT prohibition decision. The Court’s judgement, annulling the Commission’s *UPS/TNT* decision in its entirety, was significant if no other reason than it represented the first annulment of a Commission merger decision in more than a decade.

UPS had put forward several pleas in law, alleging errors of law and manifest errors of assessment by the Commission, the infringement of its rights of defence and, thirdly, an infringement of the obligation to state reasons.³¹ The second plea in law – alleged infringement of UPS’s rights of defence – was split between allegations in respect of the likely effects of the merger on prices, the expected efficiency gains as a result of the merger, the future competitive position of FedEx, and the number of SIEC Member States identified by the Commission in its merger assessment.³² It was this second plea, and more particularly the first part of the second plea, that formed the backbone of the Court’s judgement, finding as it did in relation to this part of the second plea that the Commission’s *UPS/TNT* decision should be annulled in its entirety.³³

As a result, the *UPS v Commission* judgement does not offer much in terms of clarification of the Commission’s treatment of the efficiencies claims on a substantive basis, since the Court does not deal in detail with arguments brought by UPS that the Commission had committed manifest errors of assessment in its treatment of the merging parties’ efficiency claims. Nevertheless, the judgement does deal with issues related to the Commission’s practices as regards economic evidence presented by merging parties in defence of their mergers. The Court focused on an allegation by UPS that the Commission had infringed the merging parties’ rights of defence by using an altered version of an econometric model as a basis for its findings of SIECs in its final decision – one that had not been made available to the parties and in relation to which, therefore, they could not have exercised any ability to challenge the Commission’s model or defend themselves.

The Commission responded that the parties were well aware of the econometric model being used by it in respect of the net effect of any likely price increases in various markets where the Commission had identified preliminary competition concerns. The Commission emphasised that the final model used by it was ‘only

27 *Ibid.*, para. 587 (see also para. 804 in respect of deliveries from EEA to extra-EEA).

28 *Ibid.*, para. 556–567.

29 *Ibid.*, paras 773–775; the Commission did not ultimately assess the efficiencies claimed in relation to these synergies.

30 See, for example, Case COMP/M.4057 *Korsnäs/Assidoman Cartonboard*, Commission Decision of 12 May 2006, paras 57–64. See also Case COMP/M.6360 *Nynas/Shell/Harburg Refinery*, Commission Decision of 2 September 2013, paras 402–476, where the Commission accepted that

various verifiable cost savings arising from the merger would likely be passed on to consumers – though in the context of what is widely considered to be a case focused primarily on a ‘failing firm’ defence (albeit with secondary elements of an efficiencies defence).

31 *UPS v Commission* (footnote 1, *supra*), para. 157.

32 *Ibid.*, para. 158.

33 At the time of writing it has been reported that the Commission had lodged an appeal against the General Court’s decision.

marginally different' from the models that were discussed with UPS during its merger review procedure.³⁴ The Court, however, found that those further changes to the final model 'cannot be regarded as negligible'.³⁵ The Court recalled the Court of Justice of the EU's finding in *Solvay v Commission*³⁶ in judging that UPS did not have to demonstrate that the Commission's decision would have been different in content in the absence of the alleged procedural irregularity, but merely that there was 'even a slight chance that it would have been better able to defend itself'.³⁷ Considering that this threshold was met in the present case, the Court ordered the annulment of the Commission's *UPS/TNT* prohibition decision in its entirety.

In support of its assertion that the Commission should have afforded it the opportunity to examine and contest its final econometric model, UPS argued that the Commission's duty to do so was particularly acute given that, in its view, the Commission had tampered with the methods and results of economic studies submitted by UPS, in order to act as a counterweight to factors that the Commission had accepted after issuing its Statement of Objections (UPS argued that the Commission had accepted some of the efficiency gains put forward by the merging parties, and factors related to FedEx's expansion plans).³⁸

B. The *UPS* judgement in context

Ultimately, in *UPS v Commission*, the Court did not need to rule on the Commission's actual substantive assessment of the efficiencies claimed by the merging parties. The Court has had cause to review the substance of the Commission's practices in assessing efficiency claims in previous cases – for example in *Ryanair v Commission*³⁹ and in *Deutsche Börse v Commission*.⁴⁰ In the former case,⁴¹ the Court rejected Ryanair's arguments in respect of how the Commission had assessed its efficiency claims, and while rejecting those arguments it reaffirmed the established principle that the Court has a wide margin of discretion with regard to economic matters. The Court did, however, clarify that despite the Commission's margin of discretion in this regard, the Court was nonetheless entitled to examine

the Commission's interpretation of information of an economic nature, including 'whether the evidence is factually accurate, reliable and consistent... also whether that evidence contains all the information which must be taken into account in order to assess a complex situation'.⁴² Having conducted an assessment of Ryanair's pleas, the Court rejected its central assertion that the Commission had failed to correctly apply the three criteria of the Merger Guidelines in respect of efficiencies which it claimed would arise from its acquisition of rival airline Aer Lingus.

Deutsche Börse's appeal in *Deutsche Börse v Commission* included pleas in respect of the way in which the Commission has performed its assessment of claimed efficiencies in *DB/NYSE*.⁴³ Its second set of principle pleas concerned an alleged manifest error in assessment by the Commission of the merging parties' claimed efficiencies – in particular in respect of the 'customer benefit' criterion under the Merger Guidelines.⁴⁴ The Commission had found in its decision that the merged entity would be able to 'claw back' some of the collateral savings arising from the merger, in the form of price increases. The Court determined that nothing in the Merger Guidelines prevented the Commission from assessing the potential for claw back in respect of projected efficiencies, and in fact ultimately the Court confirmed the onus placed on the merging parties to demonstrate that customers will ultimately benefit from claimed efficiencies – including by ensuring that cost savings passed on to customers are protected from the potential for claw back by the merged entity.⁴⁵ In this sense, the Court confirmed the high standard of proof placed on merging parties in defending their efficiency claims.

The Court also addressed a claim by Deutsche Börse that the Commission had infringed the applicants' rights of defence in respect of treatment of economic evidence and efficiencies claims (in some ways similar to the type of issue on which the Court's annulment decision in *UPS v Commission* turned). Deutsche Börse claimed that the Commission had infringed its defence rights by not affording it the opportunity to submit observations on the Commission's changing views on purported efficiency gains. In its final decision in *DB/NYSE*, the Commission had contested and ultimately not accepted calculations of

34 *Ibid.*, para. 204.

35 *Ibid.*, para. 205.

36 Case C-109/10 P *Solvay v Commission*, judgement of 25 October 2011, ECLI:EU:2011:686.

37 *Ibid.*, para. 210.

38 *Ibid.*, para. 183.

39 Case T-342/07 *Ryanair Holdings plc v European Commission*, judgement of 6 July 2010, II-03457.

40 Case T-175/12 *Deutsche Börse AG v. European Commission*, judgement of 9 March 2015, ECLI:EU:2015:148.

41 Involving an appeal by Ryanair against the Commission's findings in Case COMP/M.4439 *Ryanair/Aer Lingus (I)*, Commission Decision of 27 June 2007.

42 *Ryanair v Commission* (footnote 39, *supra*), para. 30.

43 Footnote 22 *supra*.

44 *Deutsche Börse v. Commission* (footnote 40 *supra*), paras 235–375.

45 *Ibid.*, paras 267–280.

certain efficiencies that had been put forward by the merging parties in their response to the Commission's Statement of Objections. The Commission's refutation of the parties' calculations (in respect of certain liquidity benefits) constituted, in the view of Deutsche Börse, new evidence and conclusions in respect of which it should have been afforded an opportunity to submit observations. In its judgement, however, the Court rejected this part of Deutsche Börse's plea (along with all other pleas related to the Commission's treatment of the merging parties' efficiency claims), finding that the Commission's criticisms of the parties' calculations related to liquidity benefits were simply a refutation of the parties' submission in this regard, and not new evidence as such.⁴⁶ In any event, the Court pointed out that the parties had, in fact, been made aware of the Commission's scepticism about the parties' calculations in this regard, and given an opportunity to submit further evidence 'to substantiate the validity of their calculations'.⁴⁷

V. Analysis – impact of the TNT decisions and recommendations on efficiency defences

A. Impact of the TNT decisions

So to what extent do the Commission's TNT decisions, and the Court's *UPS* judgement, 'move the needle' in terms of developing the legal position of merger-related efficiency defences in Europe? The net result of these cases would appear to be more confirmation than reformation: the strict application of the three-pronged verifiability/specificity/tangibility test by the Commission in *UPS/TNT* does not represent a departure from its approach in prior cases, and indeed can be seen as consistent with its approach to efficiency claims in subsequent cases such as *DB/NYSE*. The Commission's decision in *FedEx/TNT* does offer an illustration of a case where the Commission has been convinced by parties' efficiency claims. This, in the context of a case where efficiencies claims did not play a decisive role, is not unusual in itself – though it is relatively rare. Rather, the search continues for a merger case raising serious competition concerns, where the Commission nonetheless accepts that claimed efficiencies will effectively neutralise those anticipated anticompetitive effects.

The Court's judgement in *UPS v Commission* does not, the author submits, contain any findings that could have a substantial impact on the Commission's application of its test on defensive efficiency claims in the context of

mergers. The Court was in a position to annul the Commission's entire *UPS/TNT* decision on the basis of one ground of *UPS*'s application, and the inclusion in the judgement of any further consideration of the merits of arguments about the Commission's substantive assessment of the merging parties' efficiencies defence was rendered unnecessary. The Court's finding in respect of the infringement of the applicant's rights of defence could, conceivably, have an impact on the Commission's practices in respect of use of economic evidence and econometric modelling more generally: the Commission can expect the Court to hold it to a strict standard in the disclosure of economic modelling carried out by the Chief Economist Team as part of merger proceedings, requiring the disclosure of modelling for comments, even at a very late stage in proceedings. Whether the Court's decision will lead to an increasing reluctance on the part of the Commission to base its merger decisions in more controversial cases on complex economic modelling rather than purely qualitative evidence that has been disclosed to the merging parties remains to be seen.⁴⁸

B. Is a fundamental change in approach merited?

The author submits that perhaps the most relevant questions to ask at this juncture are not so much why the Commission has not been more accepting of efficiencies defences in large, problematic mergers and what can be done to encourage that development, but more whether there should be any real expectation in that regard. As has been described, it took a relatively long while for even the principle of pro-competitive efficiencies claims to be accepted into the letter of EU merger control rules – beginning from a starting position of true scepticism on the part of the Commission as to the relevance of efficiencies claims in the context of defending problematic mergers. In the intervening years, the Commission's position has evolved to accept the principle of efficiencies having pro-competitive effects in the context of potentially anticompetitive mergers, codifying that theoretical acceptance in the Merger Regulation and Merger Guidelines, and then in practice accepting efficiency claims in a number of cases – though usually in respect of non-problematic mergers where the acceptance or rejection of efficiency claims is not decisive.

Is the next logical and desirable step in this evolution a policy-driven effort to broaden the scope of the substantive test for claimed efficiencies, such as to allow for the routine (or at least more frequent) acceptance of efficiency claims in defence of large, substantively-challenging

⁴⁶ *Ibid.*, paras 351–353.

⁴⁷ *Ibid.*, para. 353.

⁴⁸ And subject, of course, to the outcome of the Commission's reported appeal against the General Court's decision.

mergers? Contemplating this question already moves one step beyond consideration of whether it is appropriate to regard the treatment of merger-related efficiency claims in Europe as being on a linear evolutionary journey. A further liberalisation of the Commission's approach to accepting efficiency claims in defence of problematic mergers is not necessarily an automatic or natural next step. Although the Court's *UPS* judgement did not deal with the substance of how the Commission has applied its test in rejecting the majority of the efficiencies claimed in *UPS/TNT*, in other cases where the Court has had cause to reach findings on the Commission's approach to applying that test,⁴⁹ it has generally not found the Commission's interpretation of the Merger Regulation and Merger Guidelines to be wanting.⁵⁰ In this sense, despite judicial challenges by parties disappointed by the Commission's perceived intransigent stance in its narrow application of the three-pronged efficiencies test, none of the cases brought so far have led the Court to identify a persistent or significant gap between, on the one hand, the letter of the law in the Merger Regulation and Merger Guidelines and, on the other, the Commission's interpretation of those rules and application of them in specific merger cases.

C. Incremental change – tweaking the standard of proof

While not excluding the desirability of convincing efficiency claims being accepted as valid as a defence for otherwise problematic mergers, the author submits that the next realistic development in EU merger policy would be a loosening of the Commission's hitherto strict interpretation of the efficiencies defence test. Such a change would not represent a radical departure from existing practice and could, in the author's view, constitute a logical alignment of the Commission's practice in merger control proceedings with the rules intended to be applied under the Merger Regulation and Merger Guidelines. The net effect could be defensive efficiency claims playing a

decisive role more regularly in, for example, narrowing the scope of remedies that need to be put forward by the merging parties in order to deal with serious antitrust concerns identified by the Commission. In this sense, a more flexible interpretation of the test would assist merging parties falling into the category of cases where an efficiency defence can play a decisive role in respect of curtailing remedies requirements, as opposed to those cases where an efficiency defence is put forward as a solution in itself, regardless of remedies proposed.

In several challenging merger cases over recent years, merging parties have spent substantial resources on economic research and the compilation of detailed economic studies as evidence of claimed efficiencies, only to have the Commission reject the content of those studies and econometric models. In addition to cases such as *UPS/TNT* and *DB/NYSE*, the Commission has also rejected econometric studies in cases such as *Western Digital/Viviti*,⁵¹ where the Commission dismissed the parties' claimed efficiencies while imposing structural remedies on the parties, approving the transaction at the end of a Phase II investigation. *Hutchison 3G Austria/Orange Austria* is another example of the Commission rejecting efficiency claims (in that case in respect of various network and technological advantages, as well as cost savings, that the merger would bring to consumers) and then ultimately approving the transaction with commitments.⁵²

The Merger Guidelines do not apply a test of 'certainty' in respect of the level of confidence that the Commission needs to have in order to accept the efficiency claims of merging parties; under point 86 of the Horizontal Merger Guidelines, the Commission must be 'reasonably certain that the efficiencies are likely to materialise',⁵³ in order to find that they meet the verifiability threshold. It is arguable that the Commission's application of this test has been stricter in practice than the language of the Merger Guidelines would suggest. For cases noted above such as *Western Digital* and *Hutchison 3G Austria*, where the Commission has expressed scepticism in response to cost

49 See, for example, *Ryanair v Commission* (footnote 39 *supra*), and more recently *Deutsche Börse v Commission* (footnote 40 *supra*).

50 At least, not in respect of specific questions related to how the Commission has interpreted the requirement on it to appropriately test the verifiability, merger-specificity and consumer benefit of claimed efficiencies (other issues related to e.g. treatment of econometric evidence and merging parties' rights of defence have obviously raised separate issues).

51 Case COMP/M.6203 *Western Digital Ireland/Viviti Technologies*, Commission Decision of 23 November 2011. In that case (ultimately subject to a conditional approval), the economic evidence submitted was in part based on previous transactions, according to which the merged entity would be able to reduce its fixed and variable costs by a substantial amount. The Commission rejected these submissions on grounds of lack

of verifiability, finding them to be 'speculative' since they were based on a previous market structure that was more competitive than it would be post-merger – see in particular paras 1004–1007 of the decision. The Commission also found shortcomings in the claimed efficiencies in respect of the ability to show consumer benefit, while recognising that some of the claimed efficiencies could be beneficial to consumers, but that the parties had not sufficiently proven how that would happen

52 Case COMP/M.6497 *Hutchison 3G Austria/Orange Austria*, Commission Decision of 12 December 2012. See also the Commission's assessment of the merging parties' efficiencies discussion in Case COMP/M.6992 *Hutchison 3G UK/Telefonica Ireland*, Commission Decision of 28 May 2014 and in particular paras 883–886.

53 Footnote 12, *supra*.

savings projected on the basis of past market features and conduct, the Merger Guidelines specifically provide that 'historical examples' of efficiencies and consumer benefit are relevant evidence in the Commission's assessment of the verifiability of efficiency claims.⁵⁴

A general lowering of the standard of proof applied by the Commission in its assessment of efficiency claims need not be a drastic move: the author submits that if the Commission were more flexible in its willingness to accept the value of, for example, economic evidence based on prior practice, this would be a perfectly coherent approach in view of the principles set down in the Merger Guidelines. Further, speculation is an inescapable characteristic of efficiency claims – that is by definition part of the overall calculations made by parties (and by the Chief Economist Team at DG Competition) when preparing economic evidence and modelling in support of such claims. A renewed recognition by the Commission of the simple principle that efficiency claims are, by their nature, projections, may help to redirect the focus of the Commission's efforts in assessing the verifiability of claimed efficiencies

towards determining the likelihood of efficiencies being established, not absolute certainty that they will be realised. Such a realignment of the Commission's focus need not involve any dilution of the vigour with which the Commission tests the robustness of economic evidence put forward by merging parties.

Even in the cases where the Commission does not find that purported efficiencies would be sufficient to deal completely with the anticompetitive effects that a merger would have, the potentially beneficial effect of the efficiencies can nonetheless be recognised in a corresponding reduction in the scope of the remedies ultimately imposed to deal with the competition concerns. It is possible that claimed efficiencies have, in fact, played a role in the Commission's assessment of the sufficiency of remedies put forward in certain cases, but even as simple a move as making an explicit link between the pro-competitive effect of efficiencies and the scope of the remedies required would help to avoid the perception at least of wholesale dismissal of efficiency claims by merging parties.

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⁵⁴ Point 88, *Horizontal Merger Guidelines*, footnote 12 *supra*.