

**Final Report of the Hearing Officer <sup>(1)</sup>****UPS/TNT Express****(COMP/M.6570)**

(2014/C 137/04)

**I. BACKGROUND**

1. On 15 June 2012, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation <sup>(2)</sup> by which UPS acquires sole control, within the meaning of Article 3(1)(b) of the Merger Regulation, of TNT by way of a public takeover under Dutch law. (UPS and TNT are referred to as 'the Parties'). On 20 July 2012, the Commission initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation.

**II. WRITTEN PROCEDURE****The Statement of Objections**

2. A Statement of Objections ('SO') was addressed to UPS on 19 October 2012. UPS was granted 10 working days to submit a written reply. In the SO, the Commission's preliminary findings indicated that the notified concentration would raise competition concerns in the markets for international intra-EEA express small package delivery services in 29 EEA Member States.

**Access to file**

3. UPS was granted access to the file via CD-ROMs on 22, 26 and 29 October, 28 November, 13 and 21 December 2012 and 17 January 2013. In addition, two data rooms were organised in this case. One, concerning a selection of extracts from internal presentations and replies to requests for information of FedEx, took place, upon FedEx' consent, on 26 and 29 October 2012 and was attended by three UPS outside counsels. The second, concerning bidding data, took place on 26 October 2012 and was attended by UPS' economic advisers.

4. On 25 October 2012, UPS requested additional access to the file. In response DG Competition partially provided less-redacted versions of documents and granted UPS access via its outside counsels in a data room; partially DG Competition rejected the request. Shortly thereafter UPS referred the matter to me. It asked for additional access to the internal presentations of FedEx detailing the company's expansion plans in Europe, extracts of which UPS' external counsels had seen in the data room. UPS argued that since FedEx had played a key role in the investigation acting almost as a *'plaintiff'* and as the *'main evidence'* held against the proposed transaction, UPS had an *'unequivocal right'* to review all documents submitted by FedEx without redactions. According to UPS, access to these documents would allow it to understand FedEx' objections against the proposed transaction and to assess the plausibility of FedEx' submissions on the basis of other evidence in the file and publicly available data.

5. I rejected UPS' request for the following reasons. First, UPS has no *'unequivocal right'* to see all FedEx documents in the Commission file un-redacted because of any special position it may have in this proceeding. The rules and standards for access to the file do not vary in function of the position an information provider adopts in a proceeding. Secondly, UPS had been given full access, either via CD-ROMs or through data room exercises, to the adverse evidence relied upon by the Commission in the SO. Thirdly, the redacted information appeared to consist of very sensitive business secrets and UPS had not shown that access to the information was *'indispensable'* for the exercise of its rights of defence, as required by Article 8(4) of Decision 2011/695/EU. Finally, I could not find — as UPS alleged — that the content of the redacted documents submitted by FedEx was inconsistent with the findings reached by the Commission in the SO with regard to FedEx' expansion plans.

<sup>(1)</sup> Pursuant to Articles 16 and 17 of Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29) ('Decision 2011/695/EU').

<sup>(2)</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

6. However, since the Commission file did not contain descriptions of the non-accessible internal presentations, I requested FedEx to provide justifications for its confidentiality claims and summaries of the information redacted, so as to better enable UPS to fully exercise its rights of defence.

7. UPS also sought full disclosure of other FedEx documents. However, since the notifying party received for some of them less redacted versions from DG Competition while its request was pending with me, I considered that the request had been satisfied. For other documents, I referred the matter, in accordance with Article 3(7) of Decision 2011/695/EU, to DG Competition, as UPS had not first raised the matter with it.

### **Third persons**

8. Three competitors of the merging entities, i.e., DHL, FedEx, and GeoPost, and one airport, i.e., Liege Airport, demonstrated 'sufficient interest' within the meaning of Article 18(4) of the Merger Regulation and were, thus, given the opportunity to be heard as third persons in writing and orally.

#### *Better information*

9. DHL and FedEx complained that the edited version of the SO they had received was so heavily redacted that they could not fully understand the nature and subject matter of the merger procedure. DHL, in particular, sought the disclosure of the sections of the SO analysing efficiency claims, price concentration and bidding data.

10. DG Competition rejected these complaints on the ground that the information of third persons is left to its discretion as long as the legal minimum requirement is fulfilled.

#### *Access to the reply to the SO*

11. In preparation for the oral hearing, FedEx requested access to a non-confidential version of UPS' reply to the SO as it anticipated that a part of UPS' observations would focus on FedEx' particular position in this proceeding.

12. I rejected this request pointing out that neither the applicable law nor the Best Practices of the Commission entitle third persons to obtain the reply of the notifying party to the SO. The Commission is, furthermore, equipped with all necessary investigatory and other means to ascertain the evidentiary value of the information it receives. The oral hearing is thus neither the only nor necessarily the most appropriate forum to assess the credibility of third persons. Moreover, since UPS addressed the issue of its credibility in its presentation at the Oral Hearing, FedEx was informed about UPS' most salient arguments and had the opportunity to react to them.

### **III. ORAL PROCEDURE**

13. The notifying party requested an Oral Hearing, which was held on 12 November 2012. Three closed sessions took place at the Hearing. Two concerned UPS' presentation on efficiencies and the price concentration analysis. The third related to FedEx' presentation on the scale and service coverage of its operations in Europe. For the notifying party the same outside counsels attended who participated in the data room of 26 and 29 October.

14. UPS also asked for a closed session for a presentation on the theory of harm, where a representative of TNT would discuss customer behaviour on the basis of country-specific case studies. I rejected this request as I considered that it was not necessary for UPS' right to be heard orally that the TNT representative refers to confidential information. Moreover, I considered that the presence of competitors during TNT's presentation would be beneficial to clarify relevant facts, as they also have customers and may express views on their behaviour. This was indeed the case, as during the hearing DHL took position on certain demand-related issues.

#### IV. PROCEDURE AFTER THE ORAL HEARING

##### Remedies

15. In November 2012, the notifying party submitted a first remedies package, which the Commission considered insufficient to solve the competition concerns arising from the merger. Subsequently, UPS submitted two revised remedies packages in December 2012 and January 2013, consisting of the divestment of assets in a number of EU countries where competition concerns had been identified. The Commission continued to consider these remedies insufficient, in particular in view of the inadequacy of the proposed buyer to qualify as a suitable purchaser and a future viable competitor in the EEA.

##### Letter of Facts

16. On 21 December 2012, the Commission sent to UPS a Letter of Facts informing it about additional evidence in support of its findings regarding FedEx' competitive position in fourteen Member States. UPS was granted two working days to submit written observations. In its written comments, UPS complained that the Letter of Facts was sent at a time when it had no possibility any longer to modify the proposed remedies. It also reiterated its request for access to internal FedEx documents, which DG Competition again rejected. Finally, it requested minutes of meetings between the Commission and FedEx, which it received.

17. UPS did not refer these claims to me in accordance with Article 3(7) of Decision 2011/695/EU, thus I did not have to intervene on these matters. However, as regards the point concerning the timing of the Letter of Facts, I do not find that UPS' rights of defence have been violated. In my view, UPS had sufficient time to modify the remedies, which is confirmed by the fact that it submitted revised remedies one day before its written comments. More importantly, the Letter of Facts did not change the scope or content of the Commission's competition assessment, which UPS was made aware of in meetings after the Oral Hearing. Therefore, the Letter of Facts did not introduce any new element which UPS could have not taken into account before to prepare a revised remedies package. As regards access to FedEx internal documents, I refer to my observations above (para. 5).

18. On 21 January 2013, UPS sent me a request to reassess DG Competition's refusals to grant it access to FedEx' internal documents, in particular with regard to FedEx' expansion plans, and to incorporate the alleged shortcomings as regards the extent and timing of the access to file in this Final Report. Having carried out the requested review, I cannot find that UPS' rights to access the file were violated. Firstly as regards the extent of the access to file, UPS was granted the opportunity to see all the adverse evidence, including confidential information, concerning FedEx' expansion plans, on which the SO and the Letter of Facts were based upon. Access was not limited to the 15 SIEC countries but was granted to summaries for all those EEA countries for which such plans exist. UPS also had access to all other FedEx' submissions, except for the confidential information contained therein. Furthermore, as regards FedEx' confidential information, UPS received justifications for the redactions and descriptions or summaries of the inaccessible parts. On this basis, I consider that the rules for access to file have been complied with. Secondly as regards the timing of the access to file, since UPS did not sufficiently substantiate its claim, I could not review it.

19. In its request, UPS appears to suggest that the Commission withdrew the objections raised in the SO with regard to certain Member States solely after reassessing FedEx' expansion plans on the basis of internal documents submitted before the SO and new information provided thereafter. This suggestion is not correct according to the information I have received from DG Competition. The Commission amended its objections in view of the new information obtained from FedEx and, equally important reconducted price concentration analysis and the evaluation of the efficiencies, which became to a large part only possible after UPS had provided DG Competition with more information.

**V. THE DRAFT COMMISSION DECISION**

20. In my opinion the draft Decision relates only to objections in respect of which the parties have been afforded the opportunity to make known their views.

**VI. CONCLUDING REMARKS**

21. Overall, I conclude that all participants in the proceedings have been able to effectively exercise their procedural rights in this case.

Michael ALBERS

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