

CLIENT ALERT

The General Court of the European Union Dismisses a EUR 1.7 Billion Damages Claim Against the European Commission For a Failed Merger

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On 23 February 2022, the General Court of the European Union (the “**General Court**”) issued a landmark judgment dismissing a request to hold the European Commission (the “**Commission**”) liable for the failure of a proposed acquisition, which it had blocked by a decision later annulled by the European Courts.

Background

In June 2012, a package delivery provider (the “**Bidder**”) announced its intention of acquiring its competitor (the “**Target**”, the “**Transaction**”). The implementation of the proposed Transaction required prior merger control clearance from the Commission. However, considering that the Transaction would have been a significant impediment to effective competition on the markets for international express small package delivery services in 15 Member States, the Commission prohibited the Transaction by decision of 30 January 2013.¹

¹ Commission, 30 January 2013, COMP/M.6570.

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The Bidder quickly issued a press release stating it would not go ahead with the Transaction. The Bidder nevertheless challenged the Commission's decision before the General Court, which annulled the decision on 7 March 2015.² This was confirmed by the Court of Justice of the European Union (the "**Court of Justice**") on 16 January 2019.³

In the meantime, in July 2015, the Target was subject to a competing bid and was later acquired by one of the Bidder's competitors. The Commission approved that merger on 8 January 2016.⁴

The request for damages resulting from the failure of the Transaction

The Bidder decided to sue the Commission for damages resulting from the failure of the Transaction. The key concern was whether the Bidder could engage the Commission's extra-contractual responsibility pursuant to Article 340 of the Treaty on the Functioning of the European Union ("**TFEU**"). Indeed, the European Courts quashed the Commission's decision, which prohibited the Bidder from acquiring the Target, due to three reasons: (i) the Commission's infringement of the Bidder's procedural rights (e.g., the Commission did not communicate all relevant documents to the Bidder during the merger control review), (ii) the failure to fulfill its obligation to state reasons, and (iii) its errors in the substantive assessment of the Transaction.

The practical question was whether the errors made by the Commission could result in it being liable to compensate the Bidder's alleged damages. To this end, the Bidder requested EUR 1.7 billion in compensation for its costs, associated with (i) the participation to the merger control procedure of the Transaction, (ii) the payment of contractual termination fees to the Target, and (iii) the loss of profit sustained as a result of the failed Transaction.

The General Court's Judgment

The General Court established that the extra-contractual liability of a European institution ("**EU institution**") could arise "*only if an irregularity is found that would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence*" (para 88). The General Court explained that there are three conditions to be satisfied in order to engage the extra-contractual responsibility of an EU institution, such as the Commission:

1. the EU institution must have carried out a "*sufficiently serious breach of a rule of law conferring rights on individuals*";
2. "*actual damage must be shown to have occurred*"; and

² General Court, 7 March 2017, case T-194/13.

³ Court of Justice, 16 January 2019, case C-265/17P.

⁴ Commission, 8 January 2016, COMP/M.7630.

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3. there must be a “*direct causal link*” between the EU institution’s breach and the damages sustained by the undertaking concerned.

While the General Court did not expand on the meaning of “actual damage”, it provided key elements as to the interpretation of the other two criteria.

First, the General Court observed that proving the Commission committed a breach of law is not enough to incur its responsibility. It is required that such breach must be sufficiently serious with regard to (i) the complexity of the situation at hand, (ii) the degree of clarity and precision of the rule breached and (iii) the discretion left by that rule to the Commission.

In this case, the illegality already recognized by the General Court was the Commission’s failure to communicate the econometric model it used in order to assess the effects of the Transaction on the markets concerned. The Commission had changed econometric models during the investigation without informing the Bidder, thus preventing the latter to submit observations on the new model.

The General Court observed that the procedural rules for merger control made it clear that the parties to a concentration had to be able to “*make known effectively their views on the accuracy and relevance of all the factors that the Commission intends to base its decision on*” (para 102). In that regard, the Commission had “*considerably reduced, or even no*” discretion (para 83). The General Court also observed that, if the Bidder had had access to the new econometric model, it could have been able to submit different results and potentially challenge the Commission’s view that the effects of the Transaction would be a significant impediment in the markets concerned.

The General Court therefore decided that the Commission’s failure to communicate the new econometric model to the Bidder constituted a sufficiently serious breach of the rule of law.

Second, the General Court explained that, to demonstrate a direct causal link between the breach of law and the alleged damage, the applicant must prove the breach of law was the only cause of the damage, overshadowing all other elements that led to the decision (*i.e.*, other elements of the Commission’s economic assessment of the proposed merger, or even the parties’ decision not to go through with the operation). In other words, the applicant must show that, should the breach of law not have happened, the merger would have been approved by the Commission and implemented by the parties.

The General Court argued that both the costs associated with the merger control procedure and the contractual termination fees owed to the Target were not a result of the Commission’s decision but a direct result of the Bidder’s choice to (i) participate in a merger control procedure and (ii) enter into contractual agreements, to divide among the

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parties, the risk that the Transaction would not obtain approval from the Commission (a risk inherent in every merger control procedure).⁵

As to the loss of profit allegedly caused by the Commission's decision, the General Court decided that the Bidder had not proved that the errors made by the Commission were sufficient to invalidate the entirety of the economic analysis of the Transaction, since there were many other elements justifying the prohibition decision. In short, the infringement of the Bidder's procedural rights did not have a decisive impact on the outcome of the merger control procedure.

According to the General Court, this was further justified by the fact that the Bidder decided not to pursue the Transaction as soon as the Commission prohibited it. In the Court's opinion, the failure of the Transaction and the consequential material loss were therefore caused by the Bidder's decision to abandon the Transaction, and not the Commission decision.

As a result, the General Court held that there was no direct causal link between the Commission's failure to communicate the new econometric model and the alleged damage.

Lessons Learned

The General Court's judgment is the latest event in a 10-year-old legal saga. It shows that bringing a claim for damages caused by a Commission's opposition to a proposed merger is time-consuming and its outcome remains highly uncertain. This may result in a frustrating situation where, despite having obtained the annulment of the Commission's prohibition decision in the first place, the parties then fail to be compensated for the financial and economic losses incurred by the absence of implementation of their proposed Transaction.

Should the bidder fail to secure a clearance decision and decide to challenge the Commission's prohibition decision before the courts, it may in theory continue to consider suing the Commission for damages despite the General Court's judgment. The standard of proof to demonstrate the Commission's sufficiently serious breach of law and the direct causal link with the damage is very high. To increase the chances of meeting such high standard of proof, it is advisable that the bidder *(i)* communicates with caution on the proposed transaction, and *(ii)* determines whether, should the Commission's prohibition decision be quashed by the courts, there are good chances that the Commission would be forced to clear the proposed transaction if re-notified.

The same applies to third parties to a merger if they entered into agreements based on the anticipation of the Commission's clearance, which was eventually not granted. This was the case here as a third party entered into

⁵ See also Court of Justice, 16 July 2009, case C-440-07 P.

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agreements with the Bidder conditioned on the realization of the Transaction. The third party also sued for damages, along with the Bidder, but the General Court also rejected the third party's demand.

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