The great train victory

The enduring significance of the GC's judgment in *European Night Services*

by ***Alex Nourry*** *and* ***Dan Harrison****

The judgment of the General Court (the GC) in *European Night Services* was a landmark judgment in EU competition law, for a number of reasons. It was the first ever judgment of the EU courts dealing with a joint venture. It contains oft-cited statements regarding the nature of object infringements and potential competition. Perhaps most importantly, it sent a strong signal to the European Commission that it needed to improve the quality of its antitrust decisions and, in doing so, contributed to the momentum towards modernisation of the procedural framework that ultimately led to the withdrawal of the EU notification regime for anticompetitive agreements.

Background

In some respects, the judgment is a product of its time. Agreements that fell within the scope of article 101(1) – which, at the time, was article 81(1) – still needed to be notified to the Commission, which was the only institution capable of issuing an exemption under article 101(3). By 1994, the Commission had a substantial backlog of cases and limited resources to devote to individual notifications. Moreover, the system created a temptation for the Commission to find that arrangements between dominant incumbent providers fell within the scope of article 101(1), so that it could attach conditions to its article 101(3) exemption, with a view to furthering the liberalisation of important sectors.

That was what happened in *European Night Services*. ENS was to be a joint venture between four national railway companies, each dominant in its home market, to provide overnight passenger services on four routes between the UK and continental Europe through the channel tunnel. The parent companies agreed to provide various services to the JV, including locomotives, train crews and traction over their networks. In 1994, the Commission issued a decision under Regulation 1017/68 (which at the time governed antitrust procedures in the rail, road and inland waterway sectors), finding that the notified arrangements fell within the scope of article 101(1) – having "as their object and effect the restriction of competition" – but were exempted under article 101(3). The exemption was for a period of eight years and was subject to conditions that required the parents to supply to certain third-party transport operators the same services that they were to supply to ENS.

In contrast to antitrust decisions that are presently issued by the Commission – which regularly run to hundreds or even thousands of pages and contain voluminous evidence and legal reasoning – the ENS decision was only seven pages long, and contained no quantitative supporting evidence, not even a single market share.

The GC's judgment

As noted above, in annulling the Commission's decision, the GC sent a strong signal that the Commission needed to improve the evidence and reasoning in its antitrust cases. The strength of that signal was underscored by the scale of the Commission's loss in the appeal. The GC found that the appellants succeeded on each and every ground on which they had appealed. Any one of those grounds – which are described below – would have been sufficient to justify the annulment of the decision.

No appreciable effect on interstate trade

The Commission had defined the relevant markets as those for the transport of business and leisure travellers on each of the four relevant routes, including travel by rail, air, coach and car. The GC found that ENS would have a market share of 4% or less on all of the business travel on the routes concerned and would reach only a 6%-7% share of leisure travel on two of the routes. The Commission's failure to refer to any of these market shares in its decision meant that it had not adequately reasoned its decision finding an appreciable restriction of interstate trade.

No restriction of competition

The Commission had found that the JV agreements (1) restricted actual and potential competition between the parents and between the parents and ENS; and (2) foreclosed third parties. It also found that the restriction was exacerbated by a network of other joint ventures between the parents.

In statements that have been much cited since, the GC held that:

> "[In] assessing an agreement under article [101(1)] of the treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned […] unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets […]. In the latter case, such restrictions may be weighed against their claimed procompetitive effects only in the context of article [101(3)] of the treaty".

Moreover, while "the examination of conditions of competition is based not only on existing competition between undertakings already present on the relevant market but also on potential competition", that assessment must establish that there are "real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to penetrate the relevant market and compete with the undertakings already established". Citing the Commission's own guidelines, the GC held that a JV cannot be said to restrict potential competition unless "each parent alone is in a position to fulfil the tasks assigned to the [joint venture] and […] it does not forfeit its capabilities to do so by the creation of the [joint venture]".

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Applying these principles to the Commission's decision, the GC found that:

- There was no restriction of actual competition between the parents, or between the parents and ENS. Due to exclusive rights enjoyed by the parents in their home territories, there was no actual competition between them on the relevant routes.
- Possibilities of potential competition through the creation of "railway undertaking" subsidiaries in other member states were found to be based on "a hypothesis unsupported by any evidence or any analysis of the structures of the relevant market". In particular, no such undertakings had been set up and it was unrealistic to expect that they would be, "given the novelty and the specific features of the night rail services in question", the "prohibitive cost of the investment required" and "the fact that there are no economies of scale in the operation of a single route". The Commission's argument that there was "in theory no legal obstacle" to such competition therefore ignored the economic context and characteristics of the relevant market.
- The Commission had asserted that there was an upstream market in the provision of "necessary rail services" (eg train paths and locomotives) – on which ENS's parents were dominant – and a downstream market in passenger transport, on which "transport operators" such as ENS operated, and which risked foreclosure due to the ENS JV. That distinction, said the GC, was "fictitious" since, for various reasons, only those active on the upstream market could offer passenger transport services to the public and ENS was simply a vehicle through which its parents could offer those services.
- The Commission had relied on a theory of harm whereby the extent and intensity of a restriction of competition caused by a JV may be aggravated if its competing parents are also party to several other joint ventures. However, other JVs between ENS's parents related to freight (not passenger) rail transport, and those parents were not themselves active on those freight markets.

Disproportionate and unnecessary conditions for exemption

As the Commission had not shown there to be any restriction of competition, no exemption was necessary and no conditions could be imposed. However, even if the agreement had fallen within article 101(1), the lack of any analysis or evidence concerning the market, conditions of competition or extent of the alleged competitive restrictions meant that the Commission was not in a position to assess whether the conditions it had imposed really were indispensable for the purpose of granting an exemption under article 101(3). Even if the Commission had made such an assessment, it could not have imposed a requirement to supply services to third parties, as those services were not "essential facilities".

In language that was echoed two months later in the CJEU's *Oscar Bronner* judgment, the GC held that ENS's facilities:

> "could not be considered 'necessary' or 'essential' for entry to the relevant market unless such infrastructure, products or services are not 'interchangeable' and unless, by reason of their special characteristics – in particular the prohibitive cost of and/or time reasonably required for reproducing them – there are no viable alternatives available to potential competitors of the joint venture, which are thereby excluded from the market".

On the facts, that was not the case, not least because the relevant market comprised other forms of transport, not just rail.

Finally, even if the Commission had been justified in imposing the relevant conditions for an exemption, the General Court stated that the eight-year duration of the exemption would have been too short. The Commission had erred in basing the duration on "the period for which it can reasonably be supposed that market conditions will remain substantially the same" and should instead have considered the length of time required to ensure a proper return on the considerable investment that had been required.

Impact

The resounding victory for the appellants sent an important message to the Commission: the EU courts expected higher standards. That led the Commission to bolster the resources it devoted to making its antitrust decisions economically and legally robust. That, in turn, increased the momentum for a system that allowed the Commission to target those resources effectively, instead of constantly fighting a backlog of applications for exemption and comfort letters: a system that was ultimately enshrined four years later in Regulation 1/2003. Some years later, the EU courts sent a similar signal – in cases such as *Airtours* and *Tetra Laval* – that led to improvements in the evidence and reasoning of the Commission's merger control decisions.

The judgment may have been a product of its time, but its impact on EU law has been enduring, having since been cited in over 100 advocate generals' opinions and judgments of the EU courts. In particular, the GC's insistence that parties cannot be identified as potential competitors on the basis of mere hypotheses, without credible possibilities for competition in the actual market conditions, remains relevant for a number of ongoing cases and appeals, such as the various pharmaceutical pay-for-delay cases. In its subsequent judgment in *Metropole*, the GC described *European Night Services* as "part of a broader trend in the case-law" – including also the landmark judgments in *Société technique minière, Delimitis, Nungesser, Coditel* and *Pronuptia* – which emphasised the importance of demonstrating a restriction of competition rather than a mere restriction of the freedom of action of one or more of the parties.

Ironically, the immediate commercial impact of the judgment was limited. There never were any European night services. Unforeseen and insurmountable technical difficulties over the operation of the specially-commissioned trains prevented the services from being launched. The judgment's wider commercial and legal impact, however, is clear. By emphasising the importance of commercial reality over unsupported hypotheses, it has allowed numerous other co-operative arrangements between competitors – including other JVs in the rail sector – to proceed with increased legal certainty, and spurred greater rigour in the Commission's competition analyses. It therefore stands not just as a great train victory but a victory for all businesses subject to EU competition law.

Alex Nourry represented European Night Services and Eurostar (UK) Ltd before the General Court, along with Thomas Sharpe QC