Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

16 January 2019*

(Appeal — Merger control — Acquisition of TNT Express by UPS — Commission Decision declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement — Econometric model developed by the Commission — Failure to disclose amendments made to the econometric model — Infringement of the rights of the defence)

In Case C-265/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 16 May 2017,

European Commission, represented by T. Christoforou, N. Khan, H. Leupold and A. Biolan, acting as Agents,

appellant,

the other parties to the proceedings being:

United Parcel Service, Inc., established in Atlanta, Georgia (United States), represented by A. Ryan, Solicitor, F. Hoseinian, advokat, W. Knibbeler, S.A. Pliego and P. van den Berg, advocaten, and F. Roscam Abbing, advocate,

applicant at first instance,

FedEx Corp., established in Memphis, Tennessee (United States), represented by F. Carlin, Barrister, G. Bushell, Solicitor, and N. Niejahr, Rechtsanwältin,

intervener at first instance,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, Vice-President of the Court, acting as President of the First Chamber, A. Arabadjiev, E. Regan, C.G. Fernlund (Rapporteur) and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,

* Language of the case: English.

gives the following

Judgment

1 By its appeal, the European Commission asks the Court to set aside the judgment of the General Court of the European Union of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144; 'the judgment under appeal'), by which that court annulled 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* v *TNT Express*; 'the decision at issue').

Background to the dispute

2 It is apparent from the judgment under appeal that United Parcel Service, Inc. ('UPS') and TNT Express NV ('TNT') are two companies present on the markets for the international express delivery of small parcels.

3 On 15 June 2012, UPS notified the Commission of its proposed acquisition of TNT under Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

4 On 30 January 2013, the Commission adopted the decision at issue. The Commission declared that the notified merger was incompatible with the internal market and the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), after finding that it would be a significant impediment to effective competition on the markets for the services in question in 15 Member States, namely in Bulgaria, the Czech Republic, Denmark, Estonia, Latvia, Lithuania, Hungary, Malta, the Netherlands, Poland, Romania, Slovenia, Slovakia, Finland and Sweden.

The procedure before the General Court and the judgment under appeal

5 By application lodged at the Registry of the General Court on 5 April 2013, UPS brought an action for annulment of the decision at issue. In support of that action, UPS relied in particular on a plea alleging infringement of the rights of the defence in which it complained that the Commission had adopted the decision at issue by relying on a different econometric model from that which had been the subject of submissions by both parties during the administrative procedure.

6 By the judgment under appeal, the General Court allowed the application and annulled the decision at issue.

Forms of order sought by the parties

7 The Commission contends that the Court should:

– set aside the judgment under appeal;

– refer the case back to the General Court; and

– reserve the costs of the present proceedings.

8 UPS claims that the Court should:

– declare the appeal inadmissible and/or ineffective; or

– dismiss in its entirety; or

– in the alternative, give final judgment, retaining the operative part of the judgment under appeal and substituting the grounds; and

– order the Commission to pay the costs of the appeal and of the proceedings before the General Court.

The appeal

Admissibility

9 As a preliminary point, UPS claims that, because of certain procedural errors, the appeal must be dismissed as inadmissible and, in any event, ineffective.

10 In the first place, UPS submits that the Commission challenges certain factual findings made by the General Court in the judgment under appeal without, however, claiming distortion of the facts.

11 In that regard, it should be borne in mind that, in accordance with Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts and evidence have been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (judgment of 26 January 2017, *Masco and Others* v *Commission*, C-614/13 P, EU:C:2017:63, paragraph 35 and the case-law cited).

12 In the present case, it is clear that the errors of law relied on by the Commission in support of its appeal concern the observance by the General Court of procedural rules, such as the obligation to give reasons for its decisions and to adjudicate on the pleas in law and arguments before it. The Commission also contests the grounds on which the General Court concluded that the Commission ought to have disclosed amendments to the econometric model during the administrative procedure as well as the legal consequences of such a failure on the validity of the decision at issue. Contrary to UPS's submissions, the criticisms made to that effect by the Commission in respect of the judgment under appeal do not refer to factual findings but concern various errors of law allegedly committed by the General Court.

13 UPS argues, in the second place, that the appeal is inadmissible because, in particular in the first two parts of its first ground of appeal, the Commission merely repeats the arguments that the General Court rejected, inter alia, in paragraphs 176, 181, 185, 186, 198 and 203 to 209 of the judgment under appeal.

14 It is indeed the case that an appeal is inadmissible in so far as it merely repeats the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly rejected by it. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake on appeal (judgment of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission*, C-449/14 P, EU:C:2016:848, paragraph 28).

15 On the other hand, provided that the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. If an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (judgment of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission*, C-449/14 P, EU:C:2016:848, paragraph 29).

16 In the present case, contrary to the submissions of UPS, the Commission does not merely reproduce in its appeal the arguments it put forward at first instance. The Commission criticises the legal grounds relied on by the General Court in the judgment under appeal, in particular in the first two parts of its first ground of appeal, by which it alleges that the General Court failed to rule on certain arguments in its defence.

17 In the third place, UPS contends that the appeal must in any event be rejected as ineffective as it cannot lead to the referral of the case back to the General Court, as requested by the Commission. In the event that the appeal is upheld, UPS requests the Court to retain, by substitution of grounds, the annulment of the decision at issue due to inadequate statement of reasons and the Commission's infringement of the rights of the defence.

18 In that regard, it is sufficient to note that the question whether an appeal is, in whole or in part, ineffective relates, not to the admissibility of the appeal, but rather to its merits.

19 In the light of these factors, UPS's argument contesting the admissibility of the appeal and of some of its grounds must be rejected in its entirety.

Substance

20 In support of its appeal, the Commission sets out four grounds. In essence, by those grounds, the various parts of which overlap in part, the Commission alleges that the General Court made three errors of law. The first two relate to an infringement of the rights of the defence and the consequences arising therefrom, and the third alleges infringement of the obligation on the General Court to state reasons for its decisions.

Infringement of the rights of the defence

– *Arguments of the parties*

21 In the second and third parts of its first ground of appeal, the Commission contests the ground in paragraph 209 of the judgment under appeal, according to which 'the Commission cannot claim that it was not required to communicate the final econometric analysis model to the applicant before adopting the [decision at issue]'.

22 The Commission claims there is no such requirement.

23 In the first place, the Commission takes the view that, after the statement of objections stage, it is not obliged to disclose any subsequent interim assessments of the issues on which it based its objections, as these assessments may change in the course of the procedure. In the present case, the examination of the relationship between the concentration level and prices was conducted on the basis of data supplied by UPS and TNT. The methodology by which those data were assessed through an econometric model was refined in the light of the arguments put forward by UPS. Where the Commission's assessment of those data is challenged, that is not a matter relating to the rights of the defence, but rather to the analysis of the substance of the decision at issue.

24 In the second place, the Commission disputes the reasoning in paragraphs 199 and 200 of the judgment under appeal, which the General Court relied on when it found, in paragraph 209 of that judgment, that the Commission was required to disclose to UPS the final version of the model before adopting the decision at issue. It submits that the reference to the judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala* (C-413/06 P, EU:C:2008:392, paragraph 61), in paragraph 200 of the judgment under appeal, is irrelevant. It is apparent from that judgment that, although the Commission cannot, in its final decision, rely on objections other than those communicated to the undertakings, such communication is nonetheless provisional and subject to amendments, as the only requirement in that regard is that reasons be given in support of the final decision.

25 As regards the reference to the judgment of 9 March 2015, *Deutsche Börse* v *Commission* (T-175/12, not published, EU:T:2015:148, paragraph 247), in paragraph 199 of the judgment under appeal, the Commission also takes the view that it is irrelevant. In that judgment, the General Court rejected the argument alleging infringement of the rights of the defence on the ground that the Commission is not obliged to adhere to the assessments made in the statement of objections or to explain in the final decision any differences from its assessments in that statement.

26 In the third place, the Commission submits that the approach adopted by the General Court is incompatible with the scheme and time limits of Regulation No 139/2004. The General Court implied in the judgment under appeal that the Commission must disclose to the notifying parties all its internal views before adopting its decision. According to Article 17(3) of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1), the right of access to the file does not extend to the Commission's internal documents. Such an approach, which the General Court did not, in any event, limit to econometric analyses, might endanger the merger control procedure, which is subject to very short deadlines.

27 UPS contests those arguments.

– *Findings of the Court*

28 As a preliminary point, it should be noted that observance of the rights of the defence is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect an individual (judgment of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraph 36).

29 For merger control procedures, that principle is laid down in Article 18(3) of Regulation No 139/2004 and, in more detail, in Article 13(2) of Regulation No 802/2004. Those provisions require, among other things, that written notice be given to the notifying parties of the Commission's objections, with an indication to those parties of the period within which they may inform the Commission of their views in writing (judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 62).

30 Those provisions are supplemented by those relating to access to the file, which is a corollary of the principle of respect for the rights of the defence (judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 68). Accordingly, it is apparent from Article 18(3) of Regulation No 139/2004 and from Article 17 of Regulation No 802/2004 that, after the statement of objections has been disclosed, access to the file is open to the parties directly involved, subject, inter alia, to the legitimate interest of undertakings in ensuring that their commercial secrets are not disclosed, such access to documents not extending to confidential information or to the internal documents of the Commission or the competent authorities of Member States.

31 Observance of the rights of the defence before the adoption of a decision relating to merger control therefore requires the notifying parties to be put in a position in which they can make known effectively their views on the accuracy and relevance of all the factors that the Commission intends to base its decision on (see, by analogy, judgment of 22 October 2013, *Sabou*, C-276/12, EU:C:2013:678, paragraph 38 and the case-law cited).

32 As regards the econometric models used in merger control procedures, it should be recalled that the necessary prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition on the markets affected. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely (judgment of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraphs 42 and 43).

33 To that end, the use of econometric models allows better understanding of the planned operation by identifying and, where relevant, quantifying some of its effects, and thus contributes to the quality of the Commission's decisions. It is therefore necessary that, where the Commission intends to base its decision on such models, the notifying parties are able to submit their observations in that regard.

34 The disclosure of such models and methodological choices underlying their development is all the more necessary as it contributes, as the Advocate General observed in point 43 of her Opinion, to ensuring that the procedure is fair, in accordance with the principle of good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union.

35 The Commission claims, however, not to be obliged to disclose all amendments to a model developed with the cooperation of the parties to the operation on which the statement of objections is based. The Commission states that, at that stage, changes may be made to the statement of objections and the amendments to the models are equivalent to internal documents, which cannot be accessed pursuant to the right to have access to the file.

36 Admittedly, the statement of objections is inherently provisional and subject to amendments to be made by the Commission in its further assessment on the basis of the observations submitted to it by the parties and subsequent findings of fact (judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 63). Because it is provisional, the statement of objections does not prevent the Commission from altering its standpoint in favour of the undertakings concerned and it is not obliged, in doing so, to explain any differences with respect to its provisional assessments as set out in that statement (judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraphs 63 to 65).

37 However, those considerations do not permit the inference that, subsequent to the statement of objections, the Commission can modify the substance of an econometric model on which it intends to base its objections without that modification being brought to the attention of the undertakings concerned and allowing them to submit their comments in that regard. Such an interpretation would be contrary to the principle of observance of the rights of the defence and the provisions of Article 18(3) of Regulation No 139/2004, which, first, require the Commission to base its decisions only on objections in respect of which the interested parties have been able to comment and, second, establishes a right of access to the file which is available, at least, to the parties directly concerned. Further, such material cannot be classified as an internal document within the meaning of Article 17 of Regulation No 802/2004.

38 Moreover, it must be noted that the need for speed, which characterises the general scheme of Regulation No 139/2004, requires the Commission to comply with strict time limits for the adoption of the final decision (judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 49). The Commission is required to reconcile this need for speed with observance of the rights of the defence.

39 In the present case, having correctly set out, in paragraphs 199 and 200 of the judgment under appeal, the requirements arising from the principle of observance of the rights of the defence, the General Court made various factual findings, which were not challenged by the Commission in its appeal.

40 Thus, the General Court found, in paragraphs 201 and 211 to 213 of the judgment under appeal, that the Commission had relied on the final version of the econometric model in identifying the number of Member States on whose territory the proposed merger would lead to a significant impediment to effective competition.

41 The General Court observed, in paragraph 202 of the judgment under appeal, that the final version of the econometric model had been adopted on 21 November 2012, that is to say more than two months before the adoption of the decision at issue and, in paragraph 203, that the Commission had not sent the final version to UPS. In paragraphs 205 to 208 of the judgment under appeal, the General Court found that, when compared with the models discussed during the administrative procedure, the amendments included in the final version were not negligible.

42 In addition, as the Advocate General noted in point 61 of her Opinion, the Commission has not provided any information indicating the specific reasons for which it would have been impossible in practice, at that time, to give UPS a short deadline for it to comment on the final version.

43 In the light of those factors, the General Court therefore did not err in law when it concluded, in paragraph 209 of the judgment under appeal, that 'the Commission cannot claim that it was not required to communicate the final econometric analysis model to the applicant before adopting the [decision at issue]'.

44 Accordingly, the second and third parts of the first ground must be rejected as unfounded.

The consequences to be drawn from an infringement of the rights of defence

– *Arguments of the parties*

45 In the first and second parts of the second ground of appeal and the first and second parts of the fourth ground, the Commission challenges the General Court's assessment, in paragraph 210 of the judgment under appeal, by which it held that 'the applicant's rights of defence were infringed, with the result that the [decision at issue] should be annulled, provided that it has been sufficiently demonstrated by the applicant not that, in the absence of that procedural irregularity, the [decision at issue] would have been different in content, but that there was even a slight chance that it would have been better able to defend itself (see, to that effect, judgment of 25 October 2011, *Solvay* v *Commission*, C-109/10 P, EU:C:2011:686, paragraph 57)'.

46 In the first place, the Commission submits that the General Court erred in law in applying to the present case the test applied in the case-law established in paragraph 57 of the judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686).

47 While that test relates only to the consequences to be drawn from the failure to disclose an exculpatory piece of evidence, the econometric model at issue is not an item of evidence, but rather a tool allowing the Commission to assess the likely effects of the merger on prices. Even if it were an item of evidence, that model could only be a potentially exculpatory item of evidence. The mere fact that the model led to the number of national markets in which the merger may constitute a significant impediment to effective competition being reduced from 29 to 15 is insufficient in that regard. Furthermore, the fact that one of the factors relied on by the Commission was more

disadvantageous in the statement of objections than in the final decision would not in itself allow it to be concluded that the evidence relevant to the assessment of those factors had become, at the decision stage, exculpatory evidence.

48 The Commission infers from this that the General Court should have applied the rule on the infringement of the rights of the defence resulting from the failure to disclose incriminating evidence established in the judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 72 and 73), according to which the removal as evidence of an incriminating document not disclosed can lead to the annulment of the contested decision only in the absence of any other documentary evidence of which the parties were aware during the administrative procedure.

49 In the second place, the Commission submits that, even if UPS's rights of the defence had been infringed, such an infringement could not, in any event, lead to the annulment of the decision at issue, contrary to what was held by the General Court in paragraph 222 of the judgment under appeal.

50 The Commission notes that it argued at first instance that, in order to declare a merger incompatible with the internal market, it is sufficient to find a significant impediment to effective competition on just one market. In Denmark and the Netherlands, the proposed operation would have resulted in both a significant impediment to effective competition and an overall negative effect on prices. For those two markets at least, any error as regards the econometric model concerning the price level would therefore be of no consequence, as a finding of an impediment to competition is based on other factors. In view of those factors, the Commission claims that the General Court should have dismissed the plea alleging infringement of the rights of the defence as ineffective.

51 Finally, according to the Commission, UPS cannot claim that, if it had been aware of the final version of the econometric model, it would have been able to propose corrective measures.

52 UPS disputes the Commission's arguments.

– *Findings of the Court*

53 As stated in paragraphs 32 to 34 above, econometric models are, by their nature and purpose, quantitative tools appropriate for the purpose of carrying out the prospective analysis that the Commission undertakes in merger control proceedings. The methodological basis underpinning those models must be as objective as possible in order not to prejudge the outcome of that analysis one way or another. Accordingly, those factors contribute to the impartiality and quality of the Commission's decisions which, ultimately, is the basis of the trust that the public and businesses place in the legitimacy of the Union's merger control procedure.

54 Given these characteristics, an econometric model cannot be characterised as an exculpatory or incriminating piece of evidence on the basis of the content of the results it produces and the subsequent use made of it for the purposes of raising or dismissing certain objections to a merger. With regard to observance of the rights of the defence, the question of whether failure to disclose to the parties to a merger an econometric model justifies the annulment of the Commission decision does not depend on the prior classification of that model as an incriminating or exculpatory piece of evidence, as the Advocate General stated, in essence, in point 40 of her Opinion.

55 Given the importance of econometric models for the prospective analysis of the effects of a merger, raising the standard of proof required to cancel a decision due to an infringement of the rights of the defence resulting, as in the present case, from failure to disclose the methodological choices, especially as regards statistical techniques, which are inherent to those models, as is advocated, in essence, by the

Commission, would run counter to the objective of encouraging it to show transparency in the development of econometric models used in merger control procedures and undermine the effectiveness of subsequent judicial review of its decisions.

56 It follows from the above that the General Court did not err in law when it held, in paragraph 210 of the judgment under appeal that 'the applicant's rights of defence were infringed, with the result that the [decision at issue] should be annulled, provided that it has been sufficiently demonstrated by the applicant not that, in the absence of that procedural irregularity, the [decision at issue] would have been different in content, but that there was even a slight chance that it would have been better able to defend itself (see, to that effect, judgment of 25 October 2011, *Solvay* v *Commission*, C-109/10 P, EU:C:2011:686, paragraph 57).'

57 Consequently, contrary to what is claimed by the Commission, the General Court was not entitled to reject as ineffective the plea alleging infringement of the rights of defence relied on by UPS at first instance due to the fact that, with regard to the Danish and Netherlands markets, the Commission found that there was a significant impediment to effective competition, irrespective of any consideration of the econometric model.

58 Accordingly, the first and second parts of the second ground of appeal and the first and second parts of the fourth ground must be rejected.

Breach of the obligation to state reasons

– *Arguments of the parties*

59 In the first place, in the first part of the first ground of appeal and the second part of the third ground the Commission contests paragraph 198 of the judgment under appeal, worded as follows:

'In order to assess the first part of the second plea in law, relating to the likely effects of the merger on prices, the Court must verify whether the applicant's rights of defence were affected by the circumstances in which the econometric analysis in question was based on an econometric model different from that which had been the subject of an exchange of views and arguments during the administrative procedure.'

60 Accordingly, the Commission argues that the General Court failed to adjudicate on the Commission's arguments, summarised in paragraph 181 of the judgment under appeal, in which it submitted that, as the statement of objections is only provisional, it was entitled to revise or add elements subsequently, provided that the decision contained the same objections as those already disclosed to the parties. However, the failure to take into consideration, in a legally correct manner, any argument on which a party relied at first instance is an error of law (judgment of 2 April 2009, *France Télécom* v *Commission*, C-202/07 P, EU:C:2009:214, paragraph 41). Given the absence of any explanation as to why it considered that it was not necessary to address the Commission's principal argument, the General Court infringed its obligation to state reasons (judgment of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, C-288/11 P, EU:C:2012:821, paragraph 83).

61 In the second place, in the first part of the third ground of appeal, the Commission criticises the General Court for having failed to take formal note of the arguments raised at first instance in its replies to the questions put by the Court at the hearing of 6 April 2016, according to which the use in the econometric model of a continuous variable for the prediction stage was not only warranted, but 'follows intuitively' from UPS's methodology as regards the estimation stage. It cannot be maintained that the judgment under appeal states reasons, even implicit ones, in that regard, which means that the General Court cannot be said to have examined the Commission's arguments.

62 In the third place, in the second part of the second ground of appeal and the third part of the fourth ground, the Commission claims that, in paragraphs 198 to 222 of the judgment under appeal, the General Court failed to respond to the Commission's arguments that UPS's plea alleging infringement of the rights of the defence was ineffective because the finding of a significant impediment to effective competition on the Danish and Netherlands markets was not based exclusively on the results of the econometric model. It is contradictory for the judgment under appeal to annul the decision at issue on the basis of infringement of the rights of the defence while at the same time stating, in paragraphs 217 and 218 of the judgment under appeal, that the final version of the econometric model, first, was 'capable, at least as regards certain States, of countering the qualitative information taken into account by the Commission' and, second, that it had allowed the Commission to reduce the number of Member States in which the merger would have given rise to a significant impediment to effective competition.

63 UPS disputes the Commission's arguments.

– *Findings of the Court*

64 As regards the first complaint, set out in the first part of the first ground of appeal and the second part of the third ground, it is sufficient to note that, for the reasons given in paragraphs 198 to 209 of the judgment under appeal, the General Court addressed implicitly, but necessarily, the Commission's argument summarised in paragraph 181 of the judgment under appeal. Accordingly, the first complaint must be rejected as unfounded.

65 As regards the second complaint, set out in the first part of the third ground of appeal, it should be recalled that, for the reasons given in paragraphs 198 to 208 of the judgment under appeal, the General Court justified in law its assessment in paragraph 209 of that judgment that 'the Commission cannot claim that it was not required to communicate the final econometric analysis model to the applicant before adopting the [decision at issue]'.

66 In particular, the General Court held in paragraph 205 of the judgment under appeal that the amendments made by the Commission to the econometric model were not negligible. In addition, the General Court noted in paragraph 207 of the judgment under appeal that 'the Commission [had] relied on a discrete variable at the estimation stage and on a continuous variable at the prediction stage', and held in paragraph 208 of that judgment that 'although the use of a discrete variable had been discussed repeatedly during the administrative procedure, it [did] not appear from the file that that [had also been] the case as regards the use of different variables at the different stages of the econometric analysis'.

67 For those reasons, the General Court had justified in law its decision and implicitly, but necessarily, rejected the Commission's arguments that UPS had 'intuitively' been able to identify the amendments to the econometric model. Accordingly, the second complaint must be rejected as unfounded.

68 With regard to the third complaint in the second part of the second ground of appeal and in the third part of the fourth ground, it is sufficient to note that those arguments are based on the premiss that the General Court erred in law when it held, in paragraph 210 of the judgment under appeal, that the infringement of the rights of the defence established would lead to annulment 'provided that it has been sufficiently demonstrated by the applicant not that, in the absence of that procedural irregularity, the [decision at issue] would have been different in content, but that there was even a slight chance that it would have been better able to defend itself'. For the reasons previously set out in paragraphs 53 to 58 above, that premiss is incorrect. Accordingly, the third complaint must be dismissed as unfounded.

69 It follows from all the above considerations that the appeal must be dismissed in its entirety.

Costs

70 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since UPS applied for costs against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders the European Commission to pay the costs.

Silva de Lapuerta Arabadjiev Regan

Fernlund Rodin

Delivered in open court in Luxembourg on 16 January 2019.

A. Calot Escobar
Registrar

K. Lenaerts
President