Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber, Extended Composition)

23 February 2022 *

(Non-contractual liability – Competition – Markets for international express small package delivery services in the EEA – Concentration – Decision declaring the concentration incompatible with the internal market – Annulment of the decision by a judgment of the Court – Rights of the defence – Sufficiently serious breach of a rule of law intended to confer rights on individuals – Causal link)

In Case T-834/17,

United Parcel Service, Inc., established in Atlanta, Georgia (United States), represented by A. Ryan, Solicitor, F. Hoseinian, W. Knibbeler, A. Pliego Selie and F. Roscam Abbing, lawyers,

applicant,

v

European Commission, represented by N. Khan, P. Berghe, M. Farley and R. Leupold Henning, acting as Agents,

defendant,

APPLICATION under Article 268 TFEU for compensation for the damage allegedly suffered by the applicant as a result of the unlawfulness of 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/TNT Express),

THE GENERAL COURT (Seventh Chamber, Extended Composition),

composed of S. Papasavvas, President, R. da Silva Passos, I. Reine, L. Truchot and M. Sampol Pucurull (Rapporteur), Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 28 October 2020,

gives the following

* Language of the case: English.

Judgment

I. Background to the dispute

1 In the European Economic Area (EEA), the applicant, United Parcel Service, Inc. ('UPS' or 'the applicant') and TNT Express NV ('TNT') are two companies present on the markets for international express small package delivery services.

2 On 26 June 2012, the European Commission published a notice of prior notification of a concentration (Case COMP/M.6570 – UPS/TNT Express) (OJ 2012 C 186, p. 9), pursuant to 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), as implemented by Commission Regulation (EC) No 802/2004 of 21 April 2004 (OJ 2004 L 133, p. 1).

3 On 11 January 2013, the Commission informed UPS that it intended to prohibit the proposed concentration between UPS and TNT.

4 On 14 January 2013, UPS published that information by means of a press release.

5 On 18 January 2013, the Advisory Committee provided for in Article 19 of Regulation No 139/2004 issued a favourable opinion on the Commission's draft decision declaring the concentration between UPS and TNT incompatible.

6 On 30 January 2013, the Commission adopted Decision C(2013) 431 declaring a concentration incompatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.6570 – UPS/TNT Express ('the decision at issue'). The Commission considered that the concentration between UPS and TNT 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.

7 By press release of the same date, UPS announced that it would not go ahead with the proposed concentration.

8 On 5 April 2013, UPS brought an action before the General Court for annulment of the decision at issue, registered as Case T-194/13, and an application for an expedited procedure, which was dismissed by the Court.

9 On 7 April 2015, FedEx Corp. announced an offer to purchase TNT.

10 On 4 July 2015, the Commission published a notice of prior notification of a concentration (Case M.7630 – FedEx/TNT Express) (OJ 2015 C 220, p. 15), concerning the transaction by which FedEx was to acquire TNT.

11 On 8 January 2016, the Commission adopted the decision declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case M.7630 – FedEx/TNT Express), a summary of which was published in the *Official Journal of the European Union* (OJ 2016 C 450, p. 12), relating to the transaction between FedEx and TNT.

12 By judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), the Court annulled the decision at issue.

13 On 16 May 2017, the Commission brought an appeal against the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), which the Court of Justice dismissed by judgment of 16 January 2019, *Commission* v *United Parcel Service* (C-265/17 P, EU:C:2019:23).

II. Procedure and forms of order sought

14 By application lodged at the Court Registry on 29 December 2017, UPS brought the present action.

15 By document lodged at the Court Registry on 29 January 2018, the Commission requested that the General Court stay the proceedings pending a ruling on the appeal in Case C-265/17 P or, in the alternative, adopt a measure of organisation of procedure to the effect that the Court would determine, first, whether the conditions for the European Union to incur liability under Article 340 TFEU were satisfied, save as to the existence of damage, and, accordingly, second, whether any submissions needed to be made by the parties on the quantum of the alleged damage until further order.

16 By decision of 6 February 2018, the President of the Chamber decided to stay the proceedings pending the delivery of the decision in Case C-265/17 P. By contrast, the Court did not grant the Commission's request for measures of organisation of procedure.

17 By document lodged at the Court Registry on 25 January 2019, the Commission again requested the adoption of a measure of organisation of procedure to the effect that the Court would determine, as a preliminary matter, whether the conditions for the European Union to incur liability under Article 340 TFEU were satisfied, to the exclusion of any issue concerning the existence of any damage alleged by UPS, therefore relieving the parties from having to address the quantum of the alleged damage until further order.

18 By document lodged at the Court Registry on 14 February 2019, UPS opposed that request, and the Court did not grant the Commission's request for measures of organisation of procedure.

19 Following a change in the composition of the Court, by decision of 17 October 2019 the President of the General Court, pursuant to Article 27(3) of the Rules of Procedure of the General Court, reallocated the case to a new Judge-Rapporteur, assigned to the Seventh Chamber.

20 Acting on a proposal from the Seventh Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

21 On a proposal from the Judge-Rapporteur, the Court (Seventh Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties, which replied within the prescribed period. The Court also put a question to the parties in writing, inviting them to answer that question at the hearing.

22 UPS claims that the Court should:

– award it compensation in the amount of EUR 1.742 thousand million and applicable interest;

– award it compensation for the taxes that will be imposed on the damages obtained, on the basis of the tax rate applicable on the day of the Court's decision; and

– order the Commission to pay the costs.

23 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

III. Law

A. Admissibility of certain pleas in law, arguments and evidence

24 The Commission raises the objection that UPS' pleadings are confused and do not comply with the requirements of either Article 76(d) or Article 85 of the Rules of Procedure, and that certain arguments and evidence submitted in support of those pleadings should therefore be declared inadmissible.

1. The alleged confused nature of UPS' line of argument

25 The Commission criticises UPS for having set out its arguments in a scattered way, without following the structure of the pleas in law in the application. The action relies on three pleas in law which correspond to each of the conditions for the European Union to incur non-contractual liability. However, according to the Commission, UPS advanced several arguments outside the plea to which their substance relates. Thus, in the application, UPS put forward arguments relating to illegality in the sections addressing the causal link. In the reply, UPS dealt with the two together, and, in the section addressing damage, raised arguments relating to the other two conditions for non-contractual liability on the part of the European Union. The Commission submits that the Court should not group those arguments together since, formally, they do not correspond to the stated plea in respect of which they are relied upon.

26 In the present case, it is true that, in the application, UPS set out part of its argument relating to the alleged illegalities under pleas relating to the other conditions for non-contractual liability on the part of the European Union, in particular the plea relating to the causal link. While that incoherence may contribute to making the action confused, it cannot render the action inadmissible, even in part, if the essential matters of law and fact on which the form of order sought is based are set out clearly and precisely in summary form, in accordance with Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure, thus enabling the defendant to safeguard its rights and the General Court to decide the case. In order to satisfy those requirements, an application seeking, as in the present case, compensation for damage allegedly caused by EU institutions must set out the evidence from which can be identified both the conduct of which the applicant accuses those institutions and

the reasons for which the applicant considers that there is a causal link between that conduct and the damage it claims to have suffered (see judgment of 14 December 2005, *FIAMM and FIAMM Technologies* v *Council and Commission*, T-69/00, EU:T:2005:449, paragraph 68 and the case-law cited).

27 Although the organisation of certain legal and factual arguments put forward by the applicant lacks rigour, the fact remains that the Court, as well as the Commission, is in a position to identify the matters of fact and of law on which the form of order sought by the applicant is based. Moreover, the Commission does not rely on any specific rule in support of its assertion that the Court cannot group together, according to their substance, arguments which are formally presented in a fragmentary way. In any event, such an assertion is difficult to reconcile with the fact that, in examining the pleas in the action, the Court is in no way required, in its reasoning, to follow the order in which those pleas were set out (judgment of 25 March 2010, *Sviluppo Italia Basilicata* v *Commission*, C-414/08 P, EU:C:2010:165, paragraph 57). The Court may, looking to the substance of the line of argument, reclassify it (see, to that effect, judgments of 19 November 1998, *Parliament* v *Gaspari*, C-316/97 P, EU:C:1998:558, paragraph 21, and of 28 July 2011, *Mediaset* v *Commission*, C-403/10 P, not published, EU:C:2011:533, paragraphs 92 and 93). It may therefore also, looking to the substance of the line of argument, examine it in an order which differs from that in which it was presented.

28 In those circumstances, rejecting part of the applicant's line of argument on the sole ground that its substance does not correspond exactly to the heading of the section of the pleading in which that argument is set out would be excessively formalistic and could be an obstacle to the exercise of the right to a judicial remedy guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

29 The Commission's plea of inadmissibility based on the confused nature of the action is unfounded and must be rejected.

2. The alleged infringement of Article 76(d) of the Rules of Procedure

30 The Commission raises the objection that UPS' pleadings do not comply with Article 76(d) of the Rules of Procedure, thus rendering certain arguments and evidence inadmissible.

31 In that regard, it should be borne in mind that, under Article 21 of the Statute of the Court of Justice of the European Union, applicable to the General Court by virtue of the first paragraph of Article 53 thereof, and Article 76(d) of the Rules of Procedure of the General Court, each application is required to state the subject matter of the proceedings and a summary of the pleas in law on which the application is based.

32 In order to guarantee legal certainty and the sound administration of justice, that summary of the pleas in law of the applicant must be sufficiently clear and precise to enable the defendant to prepare its defence and the competent court to rule on the action (judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 41).

33 Thus, in particular, it is necessary, for an action before the General Court to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may certainly be supported and supplemented on specific points by references to extracts from documents annexed thereto, a

general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application (judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 40).

34 It is not for the Court to seek and identify in the annexes the pleas on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (judgments of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 94, and of 9 March 2015, *Deutsche Börse* v *Commission*, T-175/12, not published, EU:T:2015:148, paragraph 354). Similar requirements are called for where a submission is made in support of a plea in law raised before the General Court (judgments of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 41, and of 16 September 2020, *BP* v *FRA*, C-669/19 P, not published, EU:C:2020:713, paragraph 54).

(a) Admissibility of UPS' argument concerning the infringement of procedural rights

35 The Commission submits that the argument by which UPS claims that its procedural rights were infringed on the ground that the efficiencies assessment criteria were not communicated to it before the decision at issue was adopted is inadmissible. According to the Commission, UPS confined itself, in paragraph 42 of the application, to making general and abstract criticisms of the decision at issue and of certain measures prior to that decision. Since the passages at issue were not identified precisely, that line of argument does not comply with the requirements of Article 76(d) of the Rules of Procedure.

36 It must be observed, however, that it is apparent from reading paragraph 42 of the application that UPS criticises the Commission, in essence, for not having seriously analysed the verifiability of the claimed efficiencies or set out in advance the criteria according to which those efficiencies would be assessed. UPS thus complains of a deficiency in the Commission's analysis and a lack of information on the subject matter and the standard of proof required. Therefore, UPS cannot be criticised for having failed to identify precisely in the application, among the measures adopted by the Commission, the particulars which UPS alleges were lacking.

37 Furthermore, it should be noted that paragraph 42 of the application refers to certain passages of the Statement of Objections and of the decision at issue. UPS thus identified precisely the particulars which it considered relevant in order to compare them with each other and to demonstrate that it was only at the stage of the decision at issue that the Commission disclosed its efficiencies analysis.

38 It follows that the pleas of inadmissibility raised by the Commission are unfounded and must therefore be rejected.

(b) Admissibility of UPS' argument concerning the error of assessment as regards the effects of the concentration on prices

(1) Paragraphs 34 to 37 of the application

39 The Commission contends that UPS' argument relating to the analysis of the effects of the concentration on prices, set out in paragraphs 34 to 37 of the application, is so laconic that it does not meet the requirements of Article 76(d) of the Rules of Procedure. According to the Commission, the application does not state the reasons why UPS considers that the econometric model used by the Commission was flawed.

40 However, it should be observed that, in paragraphs 34 to 37 of the application, UPS claims that the price concentration analysis is vitiated by serious errors. It is clear from reading those paragraphs and the application taken as a whole that UPS submits that the Commission departed significantly from accepted econometric practice by using, at the estimation stage, a different type of concentration variable from that used at the prediction stage and relies, as evidence, on the reports of two experts (Annexes A.8 and A.9 to the application). Although paragraphs 34 to 37 of the application are concisely worded, they summarise, in clear and precise terms, the substance of the technical criticisms levelled against the methodological choices made by the Commission. That summary is supported by the reference to the reports of those experts (Annexes A.8 and A.9 to the application), which contain extensive explanations of the technical errors thus alleged.

41 It follows from the foregoing that paragraphs 34 to 37 of the application satisfy the requirements of Article 76(d) of the Rules of Procedure. Consequently, the plea of inadmissibility raised by the Commission must be rejected as unfounded.

(2) The reference to Annex A.12 to the application

42 The Commission submits that UPS, in paragraph 34 of the application, referred to Annex A.12 to that application, which consists of a pleading in the case which gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), without identifying the passages which it specifically intended to rely on. Consequently, according to the Commission, that failure to comply with Article 76(d) of the Rules of Procedure means that that document is inadmissible.

43 However, by referring, in paragraph 34 of the application, to a document (Annex A.12 to the application) produced in the case which gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), UPS did not seek to remedy any deficiency in the statement in paragraphs 34 to 37 of the application by a general reference to reading that document. On the contrary, UPS thus emphasised that its criticisms of the econometric model used had already been put forward in that case. Annex A.12 consists of UPS' observations, dated 8 June 2016, on the Commission's answers of 26 April 2016 to the questions put by the Court in that case. In those observations, UPS had criticised the use at the prediction stage of a different model from that used at the estimation stage. UPS claimed that the Commission had thus acted in an unconventional and arbitrary way. That line of argument, which, as is apparent from the documents produced in the present case, had also been developed by UPS in the appeal proceedings in the case which gave rise to the judgment of 16 January 2019, *Commission* v *United Parcel Service* (C-265/17 P, EU:C:2019:23), is, in essence, identical to that set out in paragraphs 34 to 37 of the application.

44 It is apparent from those contextual elements that UPS thus reiterated the complaints raised in the case that gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), concerning the validity of the econometric model used in support of the decision at issue and that those elements contain a sufficiently clear and precise statement of the argument being made. Accordingly, the Commission cannot claim that it was not in a position to understand the content thereof or to prepare its defence. The plea of inadmissibility raised by the Commission must therefore be rejected.

(3) The reference to Annexes A.8 and A.9 to the application and Annexes C.1 and C.2 to the reply

45 The Commission submits that UPS merely made a general reference to reading certain annexes instead of setting out its argument clearly and precisely in its written pleadings. In response to the written questions put by the Court, the Commission contends, in the first place, that it disputed, in paragraph 22 of the defence, the admissibility of Annexes A.8 and A.9 to the application. The reasons why UPS considers that the econometric model used is incorrect should be included in the application itself, in accordance with Article 76(d) of the Rules of Procedure. The explanations provided in paragraph 36 of the application are insufficient in that regard. The Commission submits that a general reference to Annexes A.8 and A.9 to the application cannot remedy that deficiency by leaving it to guess the arguments which UPS wishes to put forward. The Commission states that it drew attention to that point in the rejoinder. In the second place, the Commission submits that UPS could not, at the stage of the reply, remedy those deficiencies by identifying with greater precision the relevant passages of Annexes A.8 and A.9 to the application and Annexes C.1 and C.2 to the reply.

46 However, it should be noted that, in paragraphs 24 to 29 of the defence, the Commission contested the content of those expert reports in detail. This shows that the Commission was in a position to defend its interests and that it did not, moreover, consider it necessary, at the stage of the defence, to produce in turn one or more expert reports in order to contradict those of UPS and thus to provide clarifications to the Court as to the technical aspects of the econometric model used.

47 In paragraphs 25 to 41 of the rejoinder, the Commission responded extensively to UPS' arguments set out in paragraphs 45 to 49 of the reply and substantiated by the two reports of those experts (Annexes A.8 and A.9 to the application), as well as their additional opinions (Annexes C.1 and C.2 to the reply). The Commission's claim that the reference to Annexes C.1 and C.2 to the reply is insufficiently precise is directly contradicted by the fact that the Commission identified, in footnote 32 to the rejoinder, the passages from those annexes specifically relied on by UPS in the reply. In order to refute the claims concerning the validity of its model, the Commission produced, as annexes to the rejoinder, two reports of an expert (Annexes D.5 and D.6 to the rejoinder), the admissibility of which is examined below in the light of Article 85(1) of the Rules of Procedure.

48 In those circumstances, the Commission cannot contend that it was not in a position to prepare its defence. UPS thus did not infringe Article 76(d) of the Rules of Procedure by referring, in its pleadings, to Annexes A.8 and A.9 to the application and to Annexes C.1 and C.2 to the reply in order to substantiate the technical aspects of its criticisms directed against the econometric model used by the Commission. Since the plea of inadmissibility raised by the Commission on that point is unfounded, it must be rejected.

(4) Paragraph 84 of the application

49 The Commission submits that the line of argument by which UPS, in paragraph 84 of the application, criticises the use of FedEx's market coverage data for 2012 instead of those for 2015 is inadmissible in the light of Article 76(d) of the Rules of Procedure. It contends that that line of argument does not appear in the application, but in the pleadings lodged in the case which gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), without indicating precisely the passages of those pleadings on which UPS seeks to rely.

50 However, it must be stated that, in paragraph 84 of the application, UPS clearly and precisely criticised the Commission for having used data concerning FedEx's situation in 2012 in its analysis of the effects of the concentration on prices, even though it was in possession of FedEx's projections for 2015.

51 In those circumstances, it cannot be held that UPS sought to remedy a lack of precision in the application by means of a general reference to the pleadings lodged in the case that gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144). Not only was UPS' argument set out intelligibly, it was also known to the Commission from the proceedings in that case. It should also be noted that the Commission itself referred to a reading of its pleadings in that case, in response to UPS' arguments. The Commission cannot therefore contend that it was not in a position to prepare its defence. In view of the identity of the parties and of the legal basis, namely the unlawful acts alleged against the Commission, between the action for annulment and the present action for damages, it is appropriate to declare admissible the references made in the arguments in the application, which are themselves admissible, to the account of the pleas put forward in support of the action for annulment and produced as annexes to the application in the present case (see, by analogy, judgment of 11 July 2007, *Schneider Electric* v *Commission*, T-351/03, EU:T:2007:212, paragraph 96). The plea of inadmissibility raised by the Commission must therefore be rejected.

(c) Admissibility of UPS' argument relating to the error of assessment as regards the efficiencies

(1) Paragraph 46 of the application

52 The Commission submits that the argument in paragraph 46 of the application by which UPS claims, first, that the evidence produced during the administrative procedure excluded an incompatibility decision, second, that the Commission accepted the synergies in principle and, third, that if the Commission had applied to the efficiencies the approach subsequently followed in the control of the concentration between FedEx and TNT, it would have had to accept a much higher proportion of the synergies claimed, is inadmissible because it is contrary to Article 76(d) of the Rules of Procedure. The Commission submits that those claims are insufficiently substantiated and states that it has already refuted them in the case which gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144).

53 It should be noted, however, that those criticisms made by the Commission relate more to the question whether UPS' claims in paragraph 46 of the application concerning the efficiencies analysis are sufficiently substantiated to satisfy the Court than to the question whether the application contains the summary of the pleas in law required by Article 76(d) of the Rules of Procedure.

54 In any event, it must be stated that paragraph 46 of the application is drafted in sufficiently clear and precise terms to enable the defendant to prepare its defence and the Court to rule on the action. The Commission thus responded exhaustively to UPS' argument in paragraphs 55 to 97 of the defence. The Commission's submission is therefore unfounded.

(2) The reference to Annex C.6 to the reply

55 The Commission contends that, in paragraph 82 of the reply, UPS refers to extracts from the concentration notification form attached to Annex C.6 to the reply without identifying precisely the relevant passages of that annex on which it relies. According to the Commission, such a reference is contrary to Article 76(d) of the Rules of Procedure.

56 However, it must be noted that, in paragraphs 41 to 46 of the application, UPS set out, admittedly in summary form, yet clearly and precisely, the line of argument by which it takes issue with the Commission for not disclosing during the administrative procedure the criteria which it intended to apply in order to evaluate the claimed efficiencies. In particular, in paragraph 44 of the application, UPS claimed, first, that the Commission was required, before adopting its decision, to set out its objections to the verifiability of claimed efficiencies and to give the parties which have notified a concentration a meaningful opportunity to comment in that regard. UPS maintained, second, that the file showed that it had provided significant evidence supporting its efficiency claims as early as the notification through the Form CO. Furthermore, in paragraph 82 of the reply, UPS expressly referred to the relevant section of the Form CO and, in particular, to paragraph 96 thereof.

57 That statement of complaints by UPS meets the requirements of clarity and precision laid down in Article 76(d) of the Rules of Procedure. In those circumstances, the Commission cannot reasonably contend that it was not in a position to prepare its defence, without prejudice to the question whether the production of Annex C.6 to the reply at the stage of lodging the reply was out of time and, consequently, inadmissible, which will be examined below in the light of Article 85 of the Rules of Procedure.

58 It follows that the Commission's plea of inadmissibility must be rejected.

(3) The reference to Annexes C.7 and C.37 to the reply

59 The Commission contends that UPS, in breach of Article 76(d) of the Rules of Procedure, referred generally to its statement of 4 July 2019 relating to synergies (Annex C.7 to the reply) in paragraphs 90, 92 and 107 of the reply, without specifying the relevant passages on which it relied. It advances the same argument against the reference made in paragraphs 106 and 108 to 110 of the reply, allegedly with insufficient precision, to the second expert report provided by FTI Consulting in order to evaluate three expert reports produced by the Commission as annexes to its defence ('the second FTI report') (Annex C.37 to the reply).

60 However, it must be observed that paragraphs 90 to 98 of the reply contain a detailed and comprehensive account of the arguments by which UPS contests the first expert report issued by Oxera in order to assess the synergies which UPS expected to derive from the acquisition of TNT ('the first Oxera report') (Annex B.7 to the defence), which was submitted by the Commission at the stage of the defence. The various technical aspects of UPS' line of argument are supported and supplemented by Annex C.7 to the reply, which sets out the methods used by UPS to assess efficiencies. Contrary to the Commission's contention, UPS did not circumvent its obligation to set out its arguments in summary form, yet clearly and precisely, by making a general and imprecise reference to Annex C.7 to the reply or by diverting that document from its purely evidential and instrumental function. The Commission cannot therefore successfully contend that UPS infringed Article 76(d) of the Rules of Procedure.

61 As regards the reference to the second FTI report (Annex C.37 to the reply), it should also be noted that paragraphs 108 to 110 of the reply contain a clear and precise summary of the argument by which UPS contests the two expert reports produced by the Commission (first Oxera report, in Annex B.7 to the defence, and first Schoutens report, in Annex B.39 to the defence). For reasons analogous to those set out above with regard to the reference to Annex C.7 to the reply, the Commission's allegation of infringement of Article 76(d) of the Rules of Procedure is unfounded.

62 In the light of all the foregoing considerations, the Commission's complaints alleging infringement of Article 76(d) of the Rules of Procedure are unfounded and must therefore be rejected.

3. The alleged infringement of Article 85 of the Rules of Procedure

63 The Commission raises the objection that a number of items of evidence submitted belatedly by UPS are inadmissible, which UPS disputes, objecting in turn that certain evidence submitted belatedly by the Commission is inadmissible.

64 In order to rule on those complaints, it should be borne in mind that, in accordance with Article 76(f) of the Rules of Procedure, any application is to contain, where appropriate, any evidence produced or offered. Under Article 81(1) of those rules, the defence must contain the pleas in law and arguments relied on and, where appropriate, the evidence produced or offered.

65 Article 85(1) of the Rules of Procedure provides that evidence produced or offered is to be submitted in the first exchange of pleadings. Article 85(2) of those rules adds that in reply or rejoinder a party may produce or offer further evidence in support of its arguments, provided that the delay in the submission of such evidence is justified.

66 Although, in accordance with the time-bar rule laid down in Article 85(1) of the Rules of Procedure, the parties must state the reasons for the delay in submitting or offering new evidence, the Courts of the European Union have jurisdiction to review the merits of the reasons for the delay in submitting or offering that evidence and, depending on the case, the content of that evidence and also, if its belated production is not justified to the requisite legal standard or substantiated, jurisdiction to reject it. The belated submission or offer of evidence by a party may be justified, in particular, by the fact that that party did not previously have the evidence in question at its disposal, or if the belated production of evidence by the opposing party justifies

the file being supplemented, in such a way as to ensure observance of the *inter partes* principle (judgment of 16 September 2020, *BP* v *FRA*, C-669/19 P, not published, EU:C:2020:713, paragraph 41).

(a) Admissibility of Annexes C.6, C.7 and C.37 to the reply

67 The Commission contends that UPS produced Annexes C.6, C.7 and C.37 to the reply with the sole aim of remedying deficiencies in the application. According to the Commission, that belated and unjustified production should render those annexes inadmissible pursuant to Article 85 of the Rules of Procedure.

68 However, as has already been stated, it is apparent from paragraph 82 of the reply that Annex C.6 to the reply is produced in order to refute the Commission's argument, in paragraph 47 of the defence, that UPS did not address the issue of efficiencies in the Form CO. Annex C.7 to the reply is intended to refute the first Oxera report (Annex B.7 to the defence) produced by the Commission. The second FTI report (Annex C.37 to the reply) is intended to invalidate two other expert reports produced by the Commission (the first Oxera report, in Annex B.7 to the defence, and the first Schoutens report, in Annex B.39 to the defence).

69 Evidence in rebuttal and the amplification of the offers of evidence submitted in response to evidence in rebuttal from the opposite party in the defence are not covered by the time-bar rule laid down in Article 85(1) of the Rules of Procedure (judgment of 17 December 1998, *Baustahlgewebe* v *Commission*, C-185/95 P, EU:C:1998:608, paragraph 72, and order of 21 May 2019, *Le Pen* v *Parliament*, C-525/18 P, not published, EU:C:2019:435, paragraph 48).

70 Consequently, Annexes C.6, C.7 and C.37 cannot be held to be inadmissible pursuant to Article 85(1) of the Rules of Procedure.

(b) Admissibility of the reports of the econometrics expert produced by the Commission

71 In reply to the written questions put by the Court, UPS disputes the admissibility of the two reports of an econometrics expert produced by the Commission as annexes to the rejoinder (Annexes D.5 and D.6 to the rejoinder). UPS submits, in essence, that the Commission produced those reports belatedly and without justification.

72 The Commission contends that those two reports are admissible.

73 However, it must be borne in mind that, pursuant to Article 81(1) and Article 85(1) and (2) of the Rules of Procedure, the pleas in law and arguments and evidence produced or offered must, in principle, be set out in the defence, since the defendant must give reasons for the delay in producing or offering further evidence, failing which the evidence will be rejected (see, to that effect, judgment of 15 November 2007, *Hungary* v *Commission*, T-310/06, EU:T:2007:343, paragraph 164 and the case-law cited).

74 In the present case, the Commission produced, at the stage of the rejoinder, the two reports of an economist, dated 16 October 2019, that is to say, after the defence had been lodged. The Commission produced those reports in support of its response to pleas in law and arguments put forward not in the reply, but in the application.

75 In paragraphs 26 and 27 of the rejoinder, the Commission stated that it intended to respond to the argument advanced by UPS in paragraphs 35 and 36 of the application, by which UPS essentially raised the question whether the difference in nature between the concentration variable used at the estimation stage and that used at the prediction stage was acceptable, having regard to the specific circumstances of the proposed concentration. To that end, the Commission put forward, in essence, two arguments. The first, set out in paragraphs 28 to 50 of the rejoinder, is that none of the econometric models successively proposed by UPS during the administrative procedure was acceptable. In order to substantiate that argument, the Commission produced the first report of that expert (Annex D.5 to the rejoinder). By its second argument, set out in paragraphs 39 to 41 of the rejoinder, the Commission states that the model which it eventually adopted was justified and reasonable in the light of the particular circumstances of the proposed transaction. In support of that argument, the Commission relies on the second report of that expert (Annex D.6 to the rejoinder).

76 It must be stated that the Commission's line of argument does not differ significantly from that set out in paragraphs 21 to 31 of the defence.

77 In those circumstances, it must be accepted that the two reports of the expert appointed by the Commission (Annexes D.5 and D.6 to the rejoinder) were produced belatedly, without the Commission justifying that delay in the rejoinder. It must therefore be held that those reports are inadmissible.

78 At the hearing, the Commission stated that, while ideally those two reports should have been produced at the stage of the defence, they constitute no more than a rebuttal of the reports drawn up by UPS' experts (Annexes A.8 and A.9 to the application), as well as their additional opinions (Annexes C.1 and C.2 to the reply). The Commission added that, since UPS had been able to comment in writing on the admissibility and the substance of its expert's reports, following a measure of organisation of procedure taken by the Court, the question of the admissibility of those reports no longer arose.

79 However, contrary to what the Commission contends, the expert reports which it produced are not intended to respond specifically to the two additional expert opinions produced by UPS at the stage of the reply (Annexes C.1 and C.2 to the reply). Furthermore, the fact that, in the present case, the Court invited UPS to comment in writing on the admissibility and substance of the first report of the Commission's expert does not mean that that report is admissible. In accordance with Article 85(4) of the Rules of Procedure, it is without prejudice to the decision to be taken by the Court on the admissibility of the evidence submitted belatedly that the other parties were given an opportunity to comment on that evidence.

80 Since UPS' submission is well founded, the reports submitted by the Commission (Annexes D.5 and D.6 to the rejoinder) must be declared inadmissible on account of their belated and unjustified production.

B. Substance

1. The conditions for non-contractual liability of the European Union

81 Under the second paragraph of Article 340 TFEU, in the case of non-contractual liability, the European Union is, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties.

82 According to settled case-law, in order for the European Union to incur non-contractual liability, three cumulative conditions must be satisfied: the rule of law infringed must be intended to confer rights on individuals and the breach must be sufficiently serious; actual damage must be shown to have occurred; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (judgment of 13 December 2018, *European Union* v *Kendrion*, C-150/17 P, EU:C:2018:1014, paragraph 117; see also, to that effect, judgment of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraphs 39 to 42). The cumulative nature of those conditions means that if one of them is not satisfied, the European Union cannot incur non-contractual liability (see, to that effect, judgments of 9 September 1999, *Lucaccioni* v *Commission*, C-257/98 P, EU:C:1999:402, paragraphs 63 and 64, and of 15 June 2000, *Dorsch Consult* v *Council and Commission*, C-237/98 P, EU:C:2000:321, paragraph 54).

83 A sufficiently serious breach of a rule of law intended to confer rights on individuals is established where the breach is one that implies that the institution concerned manifestly and gravely disregarded the limits set on its discretion, the factors to be taken into consideration in that connection being, inter alia, the complexity of the situations to be regulated, the degree of clarity and precision of the rule breached and the measure of discretion left by that rule to the EU institution (see, to that effect, judgments of 19 April 2007, *Holcim (Deutschland)* v *Commission*, C-282/05 P, EU:C:2007:226, paragraph 50, and of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 30).

84 The requirement that there be a sufficiently serious breach of a rule of EU law stems from the need to strike a balance between, on the one hand, the protection of individuals against unlawful conduct of the institutions and, on the other, the leeway that must be accorded to the institutions in order not to paralyse action by them (judgment of 10 September 2019, *HTTS* v *Council*, C-123/18 P, EU:C:2019:694, paragraph 34).

85 That balancing exercise proves all the more important because the Commission is responsible for defining and implementing EU competition policy and for that purpose has a discretion (judgment of 23 April 2009, *AEPI* v *Commission*, C-425/07 P, EU:C:2009:253, paragraph 31).

86 It is true that making it easier for the European Union to incur liability by extending the concept of a sufficiently serious breach of EU law to any failure to fulfil a legal obligation, which, regrettable though it may be, can be explained, inter alia by objective constraints to which the Commission is subject, would risk compromising, or even inhibiting, the Commission's action in the control of concentrations. However, a right to compensation must be available for persons who have suffered damage resulting from the conduct of the Commission where such conduct takes the form of an action which, without objective justification or explanation, is manifestly contrary to the rule of law and seriously detrimental to the interests of those persons (see, to that effect,

judgments of 11 July 2007, *Schneider Electric* v *Commission*, T-351/03, EU:T:2007:212, paragraphs 123 and 124, and of 9 September 2008, *MyTravel* v *Commission*, T-212/03, EU:T:2008:315, paragraphs 42 and 43).

87 Such a definition of the threshold for the establishment of non-contractual liability of the European Union is conducive to protection of the room for manoeuvre and freedom of assessment which must be enjoyed by the Commission, both in its discretionary decisions and in its interpretation and application of the relevant provisions of EU competition law, without thereby leaving third parties to bear the consequences of flagrant and inexcusable misconduct (see, to that effect, judgment of 11 July 2007, *Schneider Electric* v *Commission*, T-351/03, EU:T:2007:212, paragraph 125).

88 Thus, non-contractual liability of the European Union can 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 (judgment of 10 September 2019, *HTTS* v *Council*, C-123/18 P, EU:C:2019:694, paragraph 43).

2. The alleged illegalities

89 UPS submits that the decision at issue and the procedure that led to its adoption are vitiated by several illegalities which constitute sufficiently serious breaches of EU law. According to UPS, the Commission infringed UPS' procedural rights, failed to fulfil its obligation to state reasons and erred in its substantive assessment of the concentration, first, by departing from conventional econometric methods for the price concentration analysis, second, by conducting a static analysis of the competitive pressure exerted by FedEx and, third, by inadequately assessing the efficiencies.

90 It is appropriate to examine in turn the claims relating to the infringement of UPS' procedural rights, the failure to fulfil the obligation to state reasons and the validity of the assessments contained in the decision at issue.

(a) The infringement of UPS' procedural rights

91 In support of the illegality relating to the infringement of its procedural rights, UPS claims that the Commission, first, failed to communicate the econometric model used, second, failed to communicate the efficiencies assessment criteria and, third, failed to communicate certain confidential FedEx documents.

(1) The failure to communicate the econometric model used

92 UPS submits that the General Court, and then the Court of Justice, have already held that the Commission had infringed its rights of defence by failing to communicate to it the final version of the econometric model used to analyse the effects of the concentration on prices. According to UPS, that is a manifest and serious breach of a rule of law intended to confer rights on individuals, which cannot be justified either by time constraints or by the complexity of the case.

93 The Commission submits that the infringement of UPS' rights of defence cannot be characterised as a sufficiently serious breach of EU law, given, first, the lack of clarity of EU law at the date of adoption of the decision at issue in relation to the obligation incumbent on it to communicate the final version of the econometric model and, second, the existence of time constraints in the assessment of the proposed concentration.

94 It should be borne in mind that the illegality alleged by UPS has already been definitively established. The Court annulled the decision at issue in its entirety, on the ground that the Commission had infringed UPS' rights of defence by failing to communicate the final version of its econometric model to UPS (judgment of 7 March 2017, *United Parcel Service* v *Commission*, T-194/13, EU:T:2017:144, paragraphs 221 and 222). That judgment became final after the Commission's appeal was dismissed by the judgment of 16 January 2019, *Commission* v *United Parcel Service* (C-265/17 P, EU:C:2019:23).

95 It is not disputed that the principle of respect for the rights of the defence, in procedures for the control of concentrations, falls within the category of rules of law intended to confer rights on individuals (see, to that effect, judgment of 16 July 2009, *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459, paragraph 162).

96 By contrast, the parties disagree as to whether the infringement of UPS' rights of defence is sufficiently serious to give rise to non-contractual liability on the part of the European Union.

97 In that regard, 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 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 28).

98 For procedures for the control of concentrations, 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 of the Commission's objections be given to the parties which have notified a concentration, with an indication to those parties of the period within which they may inform the Commission of their views in writing (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 29).

99 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. 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 (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 30).

100 In order to analyse prospectively the effects of a concentration on the factors determining the state of competition on the affected markets, 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 parties which have notified a concentration are able to submit their observations in that regard (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 33).

101 The disclosure of such models and methodological choices underlying their development is all the more necessary as it contributes to ensuring that the procedure is fair, in accordance with the principle of good administration enshrined in Article 41 of the Charter (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 34).

102 Observance of the rights of the defence before the adoption of a decision relating to the control of a concentration therefore requires the parties which have notified a concentration 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 (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 31).

103 Subsequent to the statement of objections, the Commission cannot 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, establish 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 (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 37).

104 It follows that the Commission was under an obligation, before adopting the decision at issue, to bring to UPS' attention the changes made to the econometric model used to assess the effects of the concentration on prices. That obligation stems from the application of Article 18(3) of Regulation No 139/2004, which requires the Commission to set out its objections with sufficient clarity and precision in order to ensure that the party which has notified a concentration has the opportunity to be heard before the adoption of the decision at issue. The Commission had considerably reduced, or even no, discretion in that regard (see, to that effect, judgment of 16 July 2009, *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459, paragraph 166). Those considerations tend to show that, by failing to communicate its econometric model to UPS, the Commission manifestly and seriously disregarded the limits on its discretion.

105 The Commission considers, however, that that is not the case here and puts forward two arguments in that regard.

106 The first argument consists of maintaining that, when the decision at issue was adopted, the case-law was not yet clear on the obligation to communicate econometric models.

107 It must be borne in mind that the difficulties in applying or interpreting the relevant rules of EU law in the adoption of a measure subsequently called into question in order to establish the non-contractual liability of the European Union are taken into account when assessing the conduct of the institution concerned in order to determine whether it committed a sufficiently serious breach of a rule of EU law. Those parameters all relate to the date on which the decision or the conduct was adopted by that institution. It follows that the existence of a sufficiently

serious breach of a rule of EU law must necessarily be assessed on the basis of the circumstances in which the institution acted on that particular date (see, to that effect, judgment of 10 September 2019, *HTTS* v *Council*, C-123/18 P, EU:C:2019:694, paragraphs 44 and 46).

108 It is true that the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), is the first to have examined whether the Commission could rely on an econometric model without first having given the undertaking which notified a concentration the opportunity to be heard on modifications to that model. However, the case-law relating to the principle of respect for the rights of the defence and the right to be heard was already abundant before delivery of that judgment. Thus, in a legislative and factual context different from that of the present case, the Court of Justice and the General Court had already held, in essence, that the Commission, by relying on a report which it had amended on its own initiative, without taking the precaution of asking the undertaking concerned what impact its unilateral action might have on the reliability of the information which that undertaking had provided to it, had committed a sufficiently serious breach of a rule of EU law (see, to that effect, judgments of 10 July 2003, *Commission* v *Fresh Marine*, C-472/00 P, EU:C:2003:399, paragraph 30, and of 24 October 2000, *Fresh Marine* v *Commission*, T-178/98, EU:T:2000:240, paragraphs 80 to 82).

109 Moreover, it is important to note the terms in which the Court of Justice rejected the Commission's line of argument directed against the grounds of the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), which led to the annulment of the decision at issue on the ground that UPS' rights of defence had been infringed. The Court of Justice considered that, with regard to the observance of the rights of the defence, the question of whether failure to disclose to the parties to a concentration an econometric model justified the annulment of the Commission decision did not depend on the prior classification of that model as an incriminating or exculpatory piece of evidence. Given the importance of econometric models for the prospective analysis of the effects of a merger, raising the standard of proof required to annul 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 was 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 (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraphs 54 and 55).

110 The judgment of 16 January 2019, *Commission* v *United Parcel Service* (C-265/17 P, EU:C:2019:23), therefore does not permit the inference that, on the date of adoption of the decision at issue, there was uncertainty as to the interpretation both of the principle of respect for the rights of the defence laid down, inter alia, in Article 18(3) of Regulation No 139/2004, and of the consequences to be drawn from an infringement of the rights of the defence resulting from the failure to communicate an econometric model such as that at issue in the present case.

111 In those circumstances, the Commission's contention that the infringement of UPS' rights of defence must be regarded as excusable on account of an alleged lack of clarity of EU law at the date of adoption of the decision at issue must be rejected.

112 The Commission's second argument consists of maintaining that, in view of the time constraints under which it had to assess the transaction between UPS and TNT in all its complexity, the infringement of UPS' rights of defence cannot be regarded as a sufficiently serious breach. According to the Commission, those time constraints cannot be downplayed. It was only two

months before the adoption of the decision at issue that the Commission made additional changes to the econometric model. During those two months, it had to analyse the response to the Statement of Objections (346 pages), arrange state of play meetings, communicate its provisional findings to UPS and evaluate its proposed commitments, consult the Member States and draw up the decision at issue (450 pages), even though UPS had submitted its price concentration analysis at a late stage in the procedure.

113 It is true that it is for the Commission to reconcile the need for speed, which characterises the general scheme of Regulation No 139/2004, with observance of the rights of the defence (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 38).

114 However, as regards the circumstances of the present case, it has already been held 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. Although not negligible, those changes were not communicated to UPS. The Commission did not provide 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 submit observations on those changes (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraphs 41 and 42), even though the communication of the change made to the econometric model did not involve any technical or administrative difficulties and the Commission then had sufficient time to adopt the decision at issue after hearing UPS.

115 In the light of those factors, the justification given by the Commission for the existence of time constraints is unfounded.

116 The Commission objects, however, that, in view of the context in which the decision at issue was adopted, the failure to communicate the final changes to the econometric model does not support the conclusion that there was a sufficiently serious breach of a rule of EU law. It maintains that the analysis of the effects of the concentration on prices in the decision at issue was the result of an iterative process of dialogue with UPS, which would mitigate the error made. After taking UPS' suggestions into consideration, the Commission ultimately decided to use the most appropriate model, for the reasons set out in recitals 727 to 740 of the decision at issue.

117 In order to determine whether the unlawful act committed by the Commission can give rise to liability on the part of the European Union, it must be emphasised, in addition to the particular importance of fundamental guarantees in the EU legal order, that the methodological bases underpinning the econometric models used for the prospective analysis of a concentration must be as objective as possible in order not to prejudge the outcome of that analysis in one way or the other. 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 European Union's merger control procedure (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 53).

118 By thus avoiding a procedural constraint which was nevertheless intended to safeguard the legitimacy and fairness of the European Union's procedure for the control of concentrations, the Commission also placed UPS in a position where it was unable to understand part of the grounds of the decision at issue.

119 As regards the Commission's argument that the infringement of the rights of the defence was not sufficiently serious, on the ground that UPS would have been able to understand the changes made in the final version of the econometric model because of the discussions which preceded its finalisation, it must be recalled that the Court has already definitively held that, although there were numerous similarities between the final econometric model and those discussed previously, the changes made were not negligible, and that the use of different concentration variables at different stages of the analysis was not discussed repeatedly at any point during the administrative procedure (judgment of 7 March 2017, *United Parcel Service* v *Commission*, T-194/13, EU:T:2017:144, paragraphs 204 to 209).

120 It was only in the proceedings in the case which gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), that UPS was able, following a measure of organisation of procedure adopted by the Court on 11 April 2016, to acquaint itself with the changes made in the final version of the econometric model.

121 The Commission's argument that the infringement of the rights of the defence is mitigated by the fact that the finalisation of the econometric model had been preceded by numerous exchanges with UPS is therefore unfounded.

122 Since it had not been provided with the final version of the econometric model, UPS was thus deprived of information which, had it been communicated to UPS in due time, could have allowed it to submit different results on the effects of the merger on prices, which might have given rise to a reassessment of the scope of the information taken into consideration by the Commission and, accordingly, a reduction in the number of States in which there would be a significant impediment to effective competition (judgment of 7 March 2017, *United Parcel Service* v *Commission*, T-194/13, EU:T:2017:144, paragraph 218). It must therefore be held that the infringement of UPS' rights of defence is manifest and serious.

123 The infringement of UPS' rights of defence therefore constitutes a sufficiently serious breach, on the part of the Commission, of a rule of EU law intended to confer rights on individuals.

(2) The alleged failure to communicate the efficiencies assessment criteria

124 While agreeing that the burden of proving efficiencies falls on the party which has notified a concentration, UPS submits that the Commission is required to define, before adopting the final decision, the standard of proof which it requires for the claimed efficiencies to be considered verifiable within the meaning of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5; 'the Guidelines'). Without prior disclosure of those criteria, the Commission would have an arbitrary power to accept or reject the claimed efficiencies, and neither the party which has notified a concentration nor the Courts of the European Union would be in a position to carry out the slightest review. The Commission could have explained at the stage of the Statement of Objections or the letter of facts, which supplemented that statement, in accordance with paragraph 111 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ 2011 C 308, p. 6), the reasons why it intended to accept certain efficiencies and reject others. However, according to UPS, it did not do so.

125 In line with what has already been held with regard to the failure to communicate the econometric model, UPS submits that the failure to communicate the efficiencies assessment criteria resulted in an infringement of its rights of defence. UPS claims that the Commission is under an obligation

to set out its objections to the verifiability of the claimed efficiencies and to give the parties which have notified a concentration the opportunity to comment in that regard. According to UPS, the Commission failed to fulfil that obligation, thus making it impossible for UPS to demonstrate the existence of efficiencies.

126 Furthermore, although UPS provided, as early as the submission of the notification form, ample evidence of efficiencies, the Commission merely rejected that evidence as insufficient, without making a request for information. It was only at the end of the administrative procedure that the Commission attempted to engage with UPS – to a limited extent – regarding efficiencies. However, it is implausible that the Commission would have had time to take into consideration the information last provided by UPS on 20 November 2012, given the position it took at the state of play meeting on the same day.

127 Lastly, it is only at the stage of the proceedings before the Court in the case which gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), that UPS considers that it was in a position to engage in a substantive discussion with the Commission on that point.

128 The Commission contests that line of argument.

129 It must be borne in mind that, to declare a concentration incompatible with the internal market, the Commission has to prove, in accordance with Article 2(3) of Regulation No 139/2004, that the implementation of the notified concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position (judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 26).

130 It is apparent from the case-law that the decisions of the Commission as to the compatibility of concentrations with the internal market must be supported by a sufficiently cogent and consistent body of evidence. Thus, where the Commission takes the view that a concentration should be prohibited, it is incumbent upon it to produce convincing evidence in support of that conclusion (see, to that effect, judgments of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 50, and of 6 June 2002, *Airtours* v *Commission*, T-342/99, EU:T:2002:146, paragraph 63).

131 In that context, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring a concentration incompatible with the internal market is particularly important. However, it cannot be deduced therefrom that the Commission must comply with a higher standard of proof in relation to decisions prohibiting concentrations than in relation to decisions approving them. The case-law referred to in paragraph 130 above merely reflects the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the case of the control of concentrations, to support the conclusions underpinning the Commission's decisions. In that regard, the inherent complexity of a theory of competitive harm put forward in relation to a notified concentration is a factor which must be taken into account when assessing the plausibility of the various consequences such a concentration may have, in order to identify those which are most likely to arise, but such complexity does not, of itself, have an impact on the standard of proof which is required (judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraphs 50 and 51).

132 Regulation No 139/2004 does not contain any provisions relating to efficiencies. However, recital 29 thereof states the following:

'In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.'

133 The guidance from the Commission referred to in recital 29 of Regulation No 139/2004 is set out in points 76 to 88 of the Guidelines.

134 It is apparent from points 76 and 77 of the Guidelines that it is possible that efficiencies counteract the adverse effects of the concentration on competition. The Commission may thus decide that there are no grounds for declaring a concentration incompatible where that institution is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the concentration are likely to increase the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers.

135 To that end, it is apparent from point 78 of the Guidelines that three cumulative conditions must be satisfied: those efficiencies must, first, benefit consumers, second, be merger-specific and, third, be verifiable.

136 The condition relating to the verifiability of efficiencies is further elaborated upon in points 86 to 88 of the Guidelines. It is apparent from point 86 of those guidelines that the purpose of that condition is to enable the Commission to 'be reasonably certain that the efficiencies are likely to materialise, and be substantial enough to counteract a merger's potential harm to consumers'. That point states that the more precise and convincing the efficiency claims are the better the Commission can evaluate the claims. In that regard, point 86 of the Guidelines states that, where reasonably possible, efficiencies and the resulting benefit to consumers should therefore be 'quantified' and that, 'when the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one'.

137 Lastly, the issue of the burden of proof and the description of the evidence relevant to the assessment of efficiency claims are the subject of points 87 and 88 of the Guidelines, which are worded as follows:

'87. Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is, therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.

88. Evidence relevant to the assessment of efficiency claims includes, in particular, internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and consumer benefit, and pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit.'

138 It is thus clear from the Guidelines that it is for the party which has notified a concentration to adduce precise and compelling evidence enabling, as far as possible, the expected efficiencies to be quantified. That situation differs from the burden of proving the foreseeable effects of the concentration, a burden which is borne by the Commission and from which it follows that the econometric models used for that purpose are communicated to the parties which have notified a concentration, since those models are a decision-making tool (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 33).

139 It is true that those indications given in the Guidelines state, in general terms, that only efficiencies supported by evidence allow for an objective assessment of their scope and likelihood. The Guidelines provide indicative examples of relevant information in that regard, in particular internal documents intended for the undertakings concerned. However, the generality of the wording used in the Guidelines is understandable, if not inevitable, on account of the heterogeneity of the individual situations of undertakings, of the likely efficiencies and of the characteristics of the markets on which the Commission has to carry out its control when a concentration is notified to it. It cannot therefore be reasonably expected that the Commission, by means of an instrument such as the Guidelines, will define in advance, extensively and in great detail, all the criteria on the basis of which those efficiencies may be regarded as verifiable.

140 Likewise, no provision of Regulation No 139/2004 or the Guidelines requires the Commission, where the parties which have notified a concentration have put forward arguments based on efficiencies, to define in advance, in the abstract, the specific criteria on the basis of which it intends to accept that an efficiency may be regarded as verifiable.

141 It should be noted in that regard that it has already been held, in the context of anti-dumping legislation, that the institution, when it exercises the discretion conferred on it by that legislation without explaining in detail and in advance the criteria which it intends to apply in every specific situation, does not breach the principle of legal certainty (see, to that effect, judgments of 5 October 1988, *Brother Industries* v *Council*, 250/85, EU:C:1988:464, paragraph 29, and of 7 May 1991, *Nakajima* v *Council*, C-69/89, EU:C:1991:186, paragraph 118). That situation is analogous to that in the present case, in which Regulation No 139/2004 confers on the Commission a discretion to assess the efficiencies claimed by the parties which have notified a concentration without requiring it to define in advance and in the abstract the relevant criteria for that purpose.

142 In those circumstances, UPS' line of argument seeking to show that the Commission was required to communicate to it the specific criteria and standards of proof which it intended to apply in order to determine whether each of the efficiencies relied on was verifiable is unfounded in law.

143 In the light of the foregoing considerations, the Court must reject as unfounded the argument that the Commission infringed UPS' procedural rights in the efficiencies analysis on the ground that it failed to communicate the assessment criteria for those efficiencies.

(3) The alleged failure to communicate certain confidential FedEx documents

144 UPS complains that the Commission failed to grant it access to all the information provided by FedEx during the administrative procedure, or at least failed to grant such access to its lawyers, in order to enable them to verify its content independently. UPS submits that it was deprived of the opportunity to assess the probative value of the information provided by FedEx, even though that information influenced the Commission's decision to abandon, for 14 national markets, the complaints relating to the existence of a significant impediment to effective competition, while maintaining them for 15 other national markets.

145 UPS submits that that material linked to FedEx could also have been relevant in the 15 other markets in respect of which the Commission incorrectly maintained its complaints of a significant impediment to effective competition. UPS claims that its suspicions are reinforced by the changing nature of the justifications put forward in turn by the Commission in the course of the procedure in order to challenge the relevance of FedEx's internal documents.

146 Neither UPS nor the Court was in a position to verify the accuracy of the information submitted by FedEx. Had it been aware of that information, UPS considers that it could have established that the 15 national markets in respect of which the Commission found that there would be a significant impediment to effective competition could not be distinguished from the other 14 markets. UPS suspects FedEx of having sought to convince the Commission to prohibit the proposed concentration between UPS and TNT by downplaying its expansion plans in Europe. UPS relies on certain contradictions between FedEx's observations during the administrative procedure and its public statements to investors.

147 UPS states that its argument relates not to access to FedEx's confidential documents that were used as incriminating evidence, but to the question whether it could be denied access to FedEx's other confidential documents, which are relevant to assessing the probative value of those used as incriminating evidence. UPS claims, in that regard, that it is not for the Commission to decide which documents are of use for the defence of the undertaking which has notified a concentration.

148 It was only following the measures taken by the Court in the case that gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), that it was able to obtain knowledge of certain information sent by FedEx to the Commission. The few documents thus consulted by UPS contradict the distinction drawn by the Commission between national markets according to whether or not they show a significant impediment to effective competition.

149 UPS claims that the Commission cannot maintain that it is for UPS to prove that the documents to which it never had access had an impact on the decision at issue, as is apparent from paragraph 63 of the judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686), or rely on the judgment of 14 December 2005, *General Electric* v *Commission* (T-210/01, EU:T:2005:456), since that judgment did not concern access to documents which contradict the incriminating value of the statements of a third party.

150 According to UPS, the Commission came into possession of the FedEx documents five months before the adoption of the decision at issue. In those circumstances, the Commission cannot rely on any time constraints to excuse the infringement of UPS' rights of defence.

151 It is only once it has been granted access to those documents that UPS considers that it will be in a position to explain the counterfactual scenario precisely. UPS requests that the Court order the Commission, by way of measure of organisation of procedure or measures of inquiry, to produce all internal FedEx documents which the Commission has in its possession.

152 The Commission denies any infringement of UPS' procedural rights.

153 It should be noted that UPS does not claim that the Commission failed to disclose the internal FedEx documents on which the decision on the incompatibility of the concentration between UPS and TNT was based. Nor does UPS dispute the confidential nature of the internal FedEx documents to which it requested access during the administrative procedure, or which were sent to it in redacted versions or by means of summaries. By contrast, UPS claims that its rights of defence were infringed in so far as the Commission did not allow it to consult all the internal FedEx documents in their unredacted confidential versions. Considering that all those documents were potentially exculpatory evidence, UPS maintains that the Commission should, at the very least, have granted it 'restricted' access to enable its external legal counsel to assess their evidential value independently, while respecting their confidentiality.

154 In the control of concentrations, the Commission is required to communicate to the parties which have notified a concentration all the factors that it intends to base its decision on in order to enable those parties to be heard (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 31). Before adopting a decision such as the decision at issue, Article 18(1) of Regulation No 139/2004 requires the Commission to give 'the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them'. According to Article 18(3) of that regulation, 'the Commission shall base its decision only on objections on which the parties have been able to submit their observations' and 'the rights of the defence shall be fully respected in the proceedings'.

155 As regards documents other than those relied on in support of the objections communicated by the Commission, access to the file is not automatic but must be requested. Article 17(1) of Regulation No 802/2004 provides that, 'if so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections, for the purpose of enabling them to exercise their rights of defence' and that 'access shall be granted after the notification of the statement of objections'. Those provisions are reflected in paragraph 7 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles [101] and [102 TFEU], Articles 53, 54 and 57 of the EEA Agreement and [Regulation No 139/2004] (OJ 2005 C 325, p. 7; 'the Commission Notice on access to the file'), according to which 'access is granted, upon request, to the persons, undertakings or associations of undertakings, as the case may be, to which the Commission addresses its objections'.

156 That request for access to the file must be submitted to the Directorate-General (DG) for Competition before being addressed, if necessary, to the hearing officer. Article 3(7) of Decision 2011/695/EU 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 2011 L 275, p. 29) provides that any issue regarding the effective exercise of the procedural rights of the parties concerned is first to be raised with DG Competition and, if not resolved, may be referred to the hearing officer. Article 7(1) of Decision 2011/695 provides in that regard that, where a party which has exercised its right of access has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are

necessary for the proper exercise of the right to be heard, it may make a reasoned request for access to those documents to the hearing officer. Those provisions form, in essence, the subject of paragraph 47 of the Commission Notice on access to the file. In order to facilitate access to the file, paragraph 45 of the Commission Notice on access to the file provides that the Commission is to give the parties 'an enumerative list of documents setting out the content of the Commission file'.

157 In order to ensure the effectiveness of the right of access in merger control procedures, a request for access to the file must be submitted in good time. As stated in paragraph 28 of the Commission Notice on access to the file, it is apparent from a combined reading of Article 18(1) and (3) of Regulation No 139/2004 and Article 17(1) of Regulation No 802/2004 that the parties which have notified a concentration will be given access to the Commission's file upon request at every stage of the procedure following the notification of the Commission's objections up to the consultation of the Advisory Committee. Article 3(7) of Decision 2011/695 provides, moreover, that requests related to a measure for which a time limit applies must be made in due time, within the original time limit. It follows that a request for access to the file submitted to DG Competition or to the hearing officer after the Advisory Committee has delivered its opinion on the Commission's draft decision must be regarded as out of time.

158 In the present case, UPS' argument is, in part, too general to support the conclusion that the undisclosed documents were at least potentially necessary for the exercise of its rights of defence. UPS submits that all of FedEx's confidential internal documents should have been disclosed to it, since they would have enabled it to understand the factors on which the Commission had relied in order to accept the existence of a significant impediment to effective competition on 15 national markets and to rule it out for 14 others, without providing further details.

159 However, UPS relies more specifically on two groups of internal confidential documents that FedEx sent to the Commission, one before the Statement of Objections of 19 October 2012 and the other after that statement. According to UPS, those documents explain why the Commission abandoned the concerns initially expressed in the Statement of Objections with regard to 14 national markets.

160 The first group consists, according to UPS, of 484 internal FedEx documents which the Commission had in its possession since 10 August 2012. The second group refers to certain documents which FedEx submitted to the Commission on 9 and 15 November 2012, relating to its expansion plans, to which UPS' lawyers claim to have had partial access, following a measure of organisation of procedure adopted by the Court on 11 April 2016 in the case which gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144).

(i) Access to the 484 internal confidential FedEx documents placed on the file on 10 August 2012

161 UPS, in paragraph 52 of the application, claims that the Commission, which was in possession of most of FedEx's internal documents since 10 August 2012, could have granted it access to exculpatory evidence, at the latest at the time of the letter of facts. However, it failed to do so, thereby manifestly and gravely disregarding the rights of the defence. At the stage of the reply, UPS requested that the Court order the Commission to produce all internal FedEx documents in its possession. When questioned in writing on that point, UPS referred to 484 internal FedEx documents concerning that undertaking's expansion plans.

162 The Commission contends, in essence, that the decision at issue is not based on any FedEx documents to which UPS did not have access and that, as to the remainder, UPS did not request access to the 484 documents in question during the administrative procedure.

163 It should be noted that the parties agree that FedEx sent the 484 documents in question on 10 August 2012 in response to a request for information from the Commission of 2 August 2012. UPS does not claim that those documents do not appear on the enumerative list of documents setting out the content of the file. In footnote 49 to Annex A.14 to the application, UPS states that it managed to identify the existence of those documents by consulting the non-confidential letter of FedEx's lawyers of 10 August 2012 accompanying the transmission of the documents in question (document bearing the reference ID 6459). Although it did not specify at the hearing when it became aware of the existence of those documents, UPS stated that it had requested access to them during the administrative procedure and had referred the matter to the hearing officer for that purpose on 30 October 2012.

164 However, it must be noted that the request for access to the file that UPS sent to DG Competition on 25 October 2012 contains no reference to those documents. In its request, UPS requested, out of the 7 299 documents in the index of the administrative file, access to the 1 122 documents emanating from third parties which were not disclosed, without any justification on the part of the Commission.

165 The Commission replied to UPS, by email of 25 October 2012, that, out of all the documents in the file to which it had had a right of access since the Statement of Objections, only 323 documents were inaccessible by reason of business secrets and 1 177 other documents were accessible in a non-confidential version.

166 It must be noted that, in its request to the hearing officer of 30 October 2012, aside from the requests for access relating to certain specific documents that were identified by their reference or, at the very least, identifiable, UPS confined itself to relying, in general terms, on its right to review 'directly or through [its] legal representatives any potentially exculpatory evidence contained in the Commission's file, in particular internal strategy data originating from FedEx'.

167 Not only does UPS have no such unlimited and absolute right of access to the confidential information in the file, but it could not reasonably expect the hearing officer to interpret that vague and abstract request as referring specifically to the 484 documents attached by FedEx to its reply of 10 August 2012 to the Commission's questions.

168 UPS has not proved that, during the remainder of the administrative procedure, it requested access to the 484 documents in question, either in the request for access sent to the Commission on 26 November 2012 or in that of 4 January 2013, in response to the letter of facts.

169 It is apparent from those factors that, having failed to demonstrate that it made a request to that effect, UPS did not exercise its right of access to the 484 documents that FedEx sent to the Commission on 10 August 2012 and which were placed on the file, under the conditions laid down in Article 3(7) of Decision 2011/695.

170 The Court has already rejected, in the context of proceedings under Article 101 TFEU, a plea for annulment alleging infringement of the right of access to the file, on the ground that the party relying on it had not made use of that right during the administrative procedure (judgment of 9 December 2014, *SP* v *Commission*, T-472/09 and T-55/10, EU:T:2014:1040, paragraph 294).

The Court has also held that a party which learned during the administrative procedure that the Commission had documents which might be useful for its defence had to make an express request to the Commission for access to those documents. If that party does not do so during the administrative procedure, its right to do so is barred in any action for annulment brought against the final decision (judgments of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraph 383, and of 26 April 2007, *Bolloré and Others* v *Commission*, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, EU:T:2007:115, paragraphs 49 and 59).

171 Those decisions may be transposed to an action for damages resulting from an alleged infringement of the right of access to the file in a merger control procedure. A party which has notified a concentration which fails to submit a request for access to the file to DG Competition and then, if its request is rejected, to the hearing officer cannot claim subsequently that it meets the conditions for obtaining compensation for alleged damage resulting from the infringement of the right of access, when it did not exercise that right in due time and in the prescribed manner.

172 Accordingly, UPS' argument alleging infringement of the right of access to the 484 internal confidential FedEx documents sent to the Commission on 10 August 2012 must be rejected.

(ii) Access to the documents submitted by FedEx on 9 and 15 November 2012

173 It should be borne in mind that, in the Statement of Objections of 19 October 2012, the Commission expressed the view (see, in particular, Sections 7.1.3.2 and 7.1.3.7 of that statement) that one of the reasons why FedEx was not a sufficiently powerful competitor to offset the effects of the transaction between UPS and TNT related to the low coverage of its network compared with those of its competitors. The Commission also noted, in Section 7.1.3.8 of that statement, that FedEx's recent acquisitions and expansion plans would not enable FedEx to close the gap between itself and its main competitors in the near future. On the basis of that evidence, the Commission concluded, in Section 7.1.3.9 of that statement, that FedEx's position was too weak to impose a significant competitive constraint to counteract the negative effects of the proposed concentration on competition.

174 It is apparent from the documents in the file that, by email of 26 October 2012, the Commission sent FedEx a request for additional information concerning that undertaking's infrastructure. That request, intended in particular to inform the Commission of FedEx's expansion plans, sought more specifically to obtain for each EEA country:

– a map showing the location of the infrastructure used by FedEx for the delivery of small packages, as well as the infrastructure which was planned to be used before the end of 2015;

– the list of subcontractors used for the pick-up and delivery ('the PUD') of small packages, as well as those which FedEx planned to use before the end of 2015, indicating for each of them their location and catchment area. That information was to be provided in the form of a table, organised under headings that made it possible to identify and locate each undertaking and to provide data on its position and weight in the FedEx network (air, ground or local), indicating, inter alia, its sorting capacity in 2011, its catchment area, the number of routes served, the daily movement of trucks and the size of the fleet of delivery vehicles. The Commission also asked

FedEx to specify the proposed date for the start of planned operations from facilities that were not yet operational.

175 The purpose of that request was to supplement the information on which the Commission's provisional analysis set out in the Statement of Objections as to FedEx's competitive position on the intra-EEA market for express deliveries was based.

176 In response, FedEx sent the Commission the maps and tables requested on 9 November 2012. On 15 November 2012, FedEx produced a revised version of those documents.

177 It is common ground that the Commission did not forward those documents to UPS during the administrative procedure. It was only in the proceedings in the case which gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), that UPS was ultimately able to acquaint itself with the non-confidential version of those documents, following a measure of organisation of procedure taken by the Court on 11 April 2016.

178 That being the case, the Commission argued at the hearing that any infringement of UPS' rights of defence in that regard could be ruled out, since UPS had not referred the matter to the hearing officer in order to challenge DG Competition's refusal to grant access. The Commission stated that, since that refusal was dated 11 January 2013, UPS could still contact the hearing officer until 18 January 2013, the date of the meeting of the Advisory Committee, which UPS failed to do.

179 It is true that UPS exercised its right of access to the file, since it submitted to DG Competition on 4 January 2013 a restricted request for access via a data room in its response to the letter of facts, that request relating in particular to the responses to the requests for information bearing the references Q30 and Q31.

180 However, it is apparent from the file that UPS did not refer DG Competition's refusal of 11 January 2013 to the hearing officer, even though UPS had a time limit that would expire, in accordance with Article 18(1) and (3) of Regulation No 139/2004 and Article 17(1) of Regulation No 802/2004, on the date of the meeting of the Advisory Committee, that is to say, in the present case, on 18 January 2013. Moreover, UPS has not claimed that those rules were vitiated by any illegality whatsoever.

181 In those circumstances, it must be held that, since it did not submit a request for access to the file to the hearing officer, UPS cannot claim subsequently that it meets the conditions for obtaining compensation for alleged damage resulting from the infringement of that right, which it did not exercise in due time and in the prescribed manner.

182 It follows from the foregoing that UPS' line of argument alleging infringement of its right of access to FedEx's replies of 9 and 15 November 2012 is unfounded.

183 Moreover, since UPS did not first submit to DG Competition or, in the event of refusal, to the hearing officer a request for access to the 484 internal confidential FedEx documents sent to the Commission on 10 August 2012 and a request for access to FedEx's replies of 9 and 15 November 2012, it is not necessary to grant UPS' request for measures of organisation of procedure concerning the production of those documents.

(b) The alleged infringement of the obligation to state reasons

184 UPS submits that the Commission failed to provide an adequate statement of reasons for the decision at issue as regards the standard of proof required to differentiate, on the basis of the price concentration analysis, efficiencies and FedEx's competitiveness, between the 15 national markets on which there would be a significant impediment to effective competition and the 14 other national markets. Accordingly, neither UPS nor the Court could verify how the Commission, on the basis of those three factors, had drawn a distinction between those markets or to assess the merits of the conclusions on the closeness of competition. UPS asserts that, while inadequate reasoning does not on its own give rise to damages, it underscores in this case the Commission's grave disregard of the rule of law.

185 The Commission contends that any inadequacy in a statement of reasons is not sufficient to give rise to non-contractual liability on the part of the European Union.

186 It must be borne in mind that, in order to determine whether the alleged illegality is capable of giving rise to non-contractual liability on the part of the European Union, the Court must be able to understand the scope of the alleged infringement. It is for the applicant to identify the conduct complained of, failing which its complaint will be inadmissible. UPS' argument in paragraph 73 of the application does not make it possible to determine how the alleged infringement of the obligation to state reasons constitutes a sufficiently serious breach. In those circumstances, the present complaint is inadmissible.

187 In any event, it should be noted that UPS' argument relating to the failure to state reasons set out in paragraph 73 of the application is in fact indissociable from the argument put forward in order to demonstrate the unlawfulness of the failure to communicate the criteria for the evaluation of efficiencies, for the assessment of the effects of the concentration on prices and for the assessment of the countervailing competitive force that FedEx might exercise. UPS submits that the assessment of the transaction between itself and TNT is vitiated by errors in the analysis of the effects of the concentration on prices and the efficiencies analysis, a difference in treatment in relation to the transaction between FedEx and TNT, and errors of assessment of FedEx's situation. Thus, UPS relies on the existence of one or more sufficiently serious breaches in that, in the decision at issue, the Commission found that there would be a significant impediment to effective competition on the markets for the services at issue in 15 Member States.

188 In that regard, it must be borne in mind that the obligation to state reasons established in Article 296 TFEU is an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue. The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are not supported or are vitiated by errors, such defects will vitiate the substantive legality of the decision, but not the statement of reasons in it (judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 181).

189 Infringement of the essential procedural requirement to state reasons for EU measures cannot entail material damage distinct from that resulting from the lack of a basis for the measure in question. Any inadequacy in the statement of reasons for an EU measure is not, in principle, in itself such as to give rise to liability on the part of the European Union (see, to that effect,

judgments of 30 September 2003, *Eurocoton and Others* v *Council*, C-76/01 P, EU:C:2003:511, paragraph 98 and the case-law cited, and of 10 September 2019, *HTTS* v *Council*, C-123/18 P, EU:C:2019:694, paragraph 103).

190 In the light of the foregoing, UPS' arguments alleging infringement of the obligation to state reasons must be rejected and it is necessary to examine UPS' arguments alleging errors in the assessment of the proposed transaction.

(c) The alleged errors in the assessment of the proposed transaction

191 UPS submits that the assessment of the transaction between itself and TNT is vitiated by errors in the analysis of the effects of the concentration on prices and in the efficiencies analysis, a difference in treatment in relation to the transaction between FedEx and TNT and errors of assessment of FedEx's situation, which, taken individually or together, are such as to give rise to non-contractual liability on the part of the European Union.

(1) The analysis of the effects of the concentration on prices

192 UPS relies on two types of errors affecting the model adopted by the Commission. These are (i) the failure to take into consideration certain FedEx data and (ii) errors in the design of the Commission's econometric model.

(i) The failure to take into consideration certain FedEx data

193 In UPS' opinion, the Commission excluded certain FedEx data which were nonetheless useful for modelling the effects of the concentration on prices. According to UPS, although the objective of the price concentration analysis was to predict the impact on prices for 2015, the Commission took into consideration FedEx's data for 2012. It was, however, in possession of information relating to FedEx's plans due to be completed by 2015, but did not take it into account. UPS submits that, without that manifest error, the model showed almost no price increases in 13 of the 15 States in which the Commission found that there would be a significant impediment to effective competition. According to UPS, if the Commission had used the data available to it, it would have found that price increases could not reliably be predicted and that there was no basis for a negative decision.

194 It must be stated that, in estimating the relationship between the concentration level and the prices observed, the Commission relied on the data available when the model was finalised, that is to say, in 2012. As regards, more specifically, the concentration variable, the Commission took into consideration the rate of coverage of the respective networks of competitors as observed at the time in order to give an accurate picture thereof. To include among those data prospective elements, which by their nature are purely hypothetical, such as the projections made by FedEx regarding the expansion of its network after almost three years, would have introduced an additional degree of uncertainty which is difficult to reconcile with the objective of achieving a reliable model. However, that does not mean that those data were not relevant for the purposes of analysing the proposed transaction, since the Commission, in its general or 'qualitative' analysis, examined FedEx's ability to exercise in the future countervailing competitive force against the entity resulting from the proposed transaction. In those circumstances, UPS' line of argument alleging failure to take into consideration, for the purposes of the econometric model, FedEx's projections regarding the expansion of its network by 2015 must be rejected.

(ii) The errors in the design of the Commission's econometric model

195 UPS submits that the Commission disregarded the limits imposed on its discretion by using a model that departs significantly from standard econometric practice, which is to use the same model at both stages of the analysis. At the prediction stage, the Commission used a different model from that used at the estimation stage.

196 UPS claims, in essence, that the Commission, by using a concentration variable that was discrete – that is to say, in the form of an integer – at the estimation stage, but continuous – in the form of a decimal – at the prediction stage, made a manifest and serious error affecting the reliability of the model taken as a whole. In order to predict the effects of the concentration, the Commission relied on a model that was inconsistent with practice in that area and devoid of any empirical basis. No ordinarily prudent and diligent administrative authority would, in similar circumstances, have predicted the effects of the concentration on prices on the basis of such a model.

197 UPS relies in support of its claims on two reports of experts in econometrics who are professors of economics in the United States at the University of Chicago and the Massachusetts Institute of Technology, respectively. Those reports, dated 30 November 2017 and 1 December 2017 respectively, were initially prepared, at the request of UPS, in order to assist UPS in the case that gave rise to the judgment of 16 January 2019, *Commission* v *United Parcel Service* (C-265/17 P, EU:C:2019:23) and were subsequently annexed to the application in the present proceedings (Annexes A.8 and A.9 to the application). UPS produced, at the stage of the reply, two additional opinions from those experts (Annexes C.1 and C.2 to the reply).

198 According to those experts, the model used by the Commission is non-intuitive, non-standard and arbitrary. It is apparent from the two reports that the standard methodology followed for models aimed at quantifying the foreseeable effects of a concentration on price levels consists of using the same model at each of the two stages and not a different model at each stage.

199 The two reports also criticise the fact that the prediction model used by the Commission was not tested, which constitutes a departure from the methods normally used in the development of econometric models.

200 In order to contest those documents, the Commission did not submit admissible expert reports to the Court. It submits, however, that the question whether the model is consistent with standard econometric practice is not relevant for the purposes of the present action. According to the Commission, the only relevant question is whether, in the light of the circumstances of the case, the combination of a discrete concentration variable at the estimation stage and a continuous concentration variable at the prediction stage constitutes a sufficiently serious breach of EU law. In order to answer that question, it is necessary to determine whether that combination is acceptable, not in the light of the standard practice followed for econometric models, but in the light of the specific circumstances of the concentration examined. While acknowledging that it committed a procedural irregularity by failing to communicate the final econometric model to UPS, the Commission submits that its analysis of the effects of the concentration on prices is not vitiated by a serious material error and that the use of different types of variables at the two stages of the analysis is not sufficiently serious to give rise to liability on the part of the European Union.

201 First of all, as regards the extent of the discretion enjoyed by the Commission, it must be borne in mind that, in the control of concentrations, the Commission enjoys a degree of latitude regarding the choice of the econometric instruments available to it and the choice of the appropriate

approach to the study of any matter, provided that those choices are not manifestly contrary to the accepted rules of economic discipline and are applied consistently (judgment of 9 September 2008, *MyTravel* v *Commission*, T-212/03, EU:T:2008:315, paragraph 83).

202 Moreover, it must be stated that the definition of the econometric model intended to predict the effects of the concentration on price levels and the monitoring of the data which feed it and the various stages and tests necessary for its development are based on choices relating to factors which are both technical and complex, choices which fall within the Commission's discretion.

203 It follows that UPS' argument relating to the consistency of the model with standard practice in that area is a relevant factor in determining whether there has been a serious breach of EU law. Nevertheless, as the Commission rightly points out, any departure from the accepted rules of economic discipline is not, in itself, sufficient for it to be concluded that there was a sufficiently serious irregularity to give rise to non-contractual liability on the part of the European Union.

204 Next, the parties agree that the econometric model used by the Commission in the present case is intended, on the basis of the data observed on the relevant market relating to the concentration and the price level, to establish, at an initial stage known as the 'estimation' stage, a function explaining the relationship between those two variables. It is then possible, at a second stage, known as the 'prediction' stage, to determine the effect of a given variation in the concentration level on price levels, bearing in mind that that effect is not constant, but may vary according to the initial concentration level.

205 The Commission contends that the approach followed in its econometric model was justified in the light of the circumstances and the characteristics of the transaction between UPS and TNT. As regards the estimation stage, it explains that it considered that the use of a continuous concentration variable gave rise to econometric difficulties. In order to resolve those difficulties within the time constraints imposed on it, the Commission considered it necessary to apply a discrete concentration variable at the estimation stage in order to avoid a material error.

206 It should be noted, however, that UPS does not dispute the use of the discrete concentration variable used by the Commission at the estimation stage.

207 As regards the prediction stage, the Commission maintains that it could not use the discrete variable used at the estimation stage. With three ranges of concentration, such a discrete variable would have made no provision for any effect on prices where the variation in the concentration level would have remained within a given range. Such a result would be unrealistic and contrary to the observations made at the estimation stage. In those circumstances, the Commission explains that it considered that it had no choice, in order to avoid a material error, other than to revert to a continuous variable at the prediction stage, despite the fact that it had used a discrete concentration variable at the estimation stage. According to the Commission, that solution was appropriate and reasonable. There was therefore no substantive error or, a fortiori, serious error, irrespective of whether that method was consistent with econometric practice.

208 The Commission thus maintains that the assertion by one of UPS' experts that it changed the coefficients of the model between estimation and prediction is incorrect. The Commission states that it used the coefficients resulting from the estimation and, at the prediction stage, interpolated them. That interpolation was a hypothesis added at the prediction stage. That hypothesis of

piecewise linear interpolation was intended to complete the estimation model in order to obtain a prediction model. The segmented linear model used at the prediction stage is a form of non-linearity.

209 It should be observed that, by those arguments, the Commission explains the reasons which led it to alter the estimation model in order to predict the effects of the concentration on prices. The Commission acknowledges that it added several features to the model used for the estimation in order to be able to make predictions using a continuous concentration variable. It must therefore be confirmed, in accordance with the statements of UPS' experts, that the estimation and the prediction are based on models that are not identical.

210 The Commission also does not dispute UPS' experts when they claim that it did not follow standard econometric practice, which is nevertheless the basis for the rules of best practice that the Commission itself defined.

211 It should be noted in that regard that the Commission set the course of action which it intended to follow for the submission of evidence and the collection of economic data by publishing the document SEC(2011) 1216 final of 17 October 2011, entitled 'Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases' ('the Best Practices'), accompanying the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ 2011 C 308, p. 6). It has already been held that, by such notices, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations (see, to that effect, judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 211, and of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 28).

212 The Best Practices seek to frame economic analysis in such a way that the Commission and the Courts of the European Union can evaluate its relevance and significance. They apply, in particular, to merger control, in respect of both the parties to the proceedings and the Commission (points 2 and 6 of the Best Practices). According to point 15 of the Best Practices, economic or econometric analysis that does not strictly meet the standards set out in those best practices will normally be given less probative value and may not be taken into consideration.

213 Compliance with the standard techniques prevailing in economic or econometric analysis is the principal means envisaged by the Best Practices to ensure the effective use of reliable and relevant evidence (points 2 and 3 of the Best Practices). In addition to the quality of the data (points 20 and 33 of the Best Practices), the Best Practices thus refer to the need to take into account only hypotheses which are tested and consistent in relation to the characteristics of the market under consideration, to verify the quality of data and empirical methodologies and to examine possible alternatives, as well as the robustness of the results obtained (points 3, 10, 13, 15, 24 and 26 of the Best Practices). The numerous references to the robustness of results and to sensitivity to changes in the data or to the choice of empirical method and precise modelling assumptions (points 15, 32, 40 and 41 of the Best Practices, as well as Sections C and E of Annex 1 thereto) reveal the importance attached by the Commission to that concept. In particular, Section E of Annex 1 to the Best Practices provides that all empirical work should be

accompanied by a thorough robustness analysis and that an economic model should generally be accompanied by a sensitivity analysis with respect to the key variables, to the extent that only the plausible but not the exact value of each variable can be determined.

214 The Best Practices also attach particular importance to transparency (see points 6, 10, 15, 24, 26, 28, 29 and 43 of the Best Practices, as well as Sections C and D of Annex 1 thereto), which is regarded as a factor of accountability and of credibility (points 6 and 43 of the Best Practices). They thus state that explanations and reasons must be given for methodological choices so that their advantages and disadvantages (points 24, 26 and 28 of the Best Practices), and also their limitations (point 43 of the Best Practices), are made explicit. A reasoned justification should be given when applying statistical techniques that deviate from generally accepted methods (point 29 of the Best Practices).

215 In the present case, the Commission did not comply with its own rules of best practice, since it relied on a non-standard method based on untested and unverified assumptions, without examining the robustness of its results and the sensitivity of the model, or revealing to the parties those choices and the reasons which might justify them. It is important to note the contrast between, on the one hand, the importance which the Best Practices attach to transparency and, on the other, the way in which, in the present case, the Commission unilaterally changed the model for the prediction stage, without revealing to the parties the nature of those changes. That departure from the principles deriving from the Best Practices is, moreover, borne out by the Commission's argument in the present proceedings, where it acknowledges that, if UPS had been able to acquaint itself with the revised model, subsequent discussions would then probably have related to the problems associated with those changes.

216 In spite of those factors, the fact that the decision at issue is based in part on the econometric model is not sufficient for it to be concluded that there is an illegality such as to give rise to non-contractual liability on the part of the European Union. The Commission rightly points out that the econometric model is only one of the factors taken into consideration for the purposes of assessing the proposed transaction. However useful it may be in refining the understanding of the functioning of the markets affected by the proposed transaction, a quantitative analysis based on an econometric model, by its very nature, cannot generally constitute the only evidence in support of an incompatibility decision. Any model is based on simplifications of reality, as the Commission rightly points out in point 12 of the Best Practices. That limitation inherent in the modelling technique means that econometric studies have probative value which cannot be equated with substantive evidence of a fact.

217 In the present case, in order to conclude that there would be a significant impediment to effective competition on 15 national markets on the basis of non-coordinated effects, in the decision at issue the Commission relied, first, on a general analysis of the characteristics of the market in question and, second, on a quantitative analysis, whereby the extent of the foreseeable effects of the concentration on price levels could be discerned, after including the claimed efficiencies in that analysis.

218 In accordance with point 24 of the Guidelines, the review of the existence of non-coordinated effects on an oligopolistic market requires, in essence, verification, first, of the direct effects of the concentration on the incentives for the merging parties to increase their prices and, second, of the effects which the concentration may have on the incentives for the other members of the oligopoly to react to the concentration by increasing their prices.

219 The Commission emphasised the oligopolistic structure of the relevant market, on which DHL, UPS, TNT and FedEx together hold between 90% and 95% of shares (recital 509 of the decision at issue). DHL was the largest competitor in terms of market share, geographic coverage and the development and density of its network within the EEA. TNT and UPS were close competitors to DHL (recitals 626 to 630 of the decision at issue). By contrast, because of much more limited networks, FedEx was too distant to compete fully with DHL and with UPS and TNT (recitals 511 to 625; 631 to 635 and 702 to 711 of the decision at issue).

220 The Commission considered that the merger would reduce the number of suppliers from four to three (recitals 712 to 714 of the decision at issue) and, on certain national markets, from three to two, given FedEx's weak position (recitals 715 to 720 of the decision at issue). This is the case, among the 15 national markets on which there would be a significant impediment to effective competition, in the following Member States: Czech Republic (recital 1061 of the decision at issue); Denmark (recital 1135 of the decision at issue); Estonia (recital 1186 of the decision at issue); Latvia (recital 1359 of the decision at issue); Lithuania (recital 1411 of the decision at issue); Malta (recital 1430 of the decision at issue); Poland (recital 1627 of the decision at issue); Slovenia (recital 1788 of the decision at issue); Slovakia (recital 1734 of the decision at issue); Finland (recital 1226 of the decision at issue); and Sweden (recital 1839 of the decision at issue).

221 In four national markets on which there would be a significant impediment to effective competition (Czech Republic, Denmark, Lithuania and the Netherlands), the entity formed by UPS and TNT would become the market leader with a market share exceeding 50% (recitals 1048 to 1049, 1121, 1393 to 1394 and 1502 to 1503 of the decision at issue).

222 In addition, the Commission found that the relevant market was characterised by the existence of high barriers to entry and to expansion. Owing to the need to build up infrastructure all across the EEA and to have sorting centres, an IT network, a PUD network and an air and ground transportation network, those barriers being cumulative, no major player had entered the market over the last 20 years. On the basis of those factors, the Commission considered that neither the expansion plans of FedEx nor those of other operators were capable of countering any anticompetitive strategy set in place by the parties to the merger (recitals 741 to 788 of the decision at issue).

223 The Commission also found that customers did not have sufficient countervailing purchasing power to defeat price raises in the market after the merger (recitals 791 to 799 of the decision at issue).

224 Those factors, which fall within the general assessment of the concentration, are linked primarily to the structure of the market and are not disputed by UPS. They make it possible to qualify the significance of the reasoning set out, in recitals 721 to 740 of the decision at issue, concerning the quantification of the likely impact of the merger on prices.

225 It must also be emphasised that certain limits on the analysis of the effects of the concentration on prices appeared in the light of the specificities of certain national markets. For example, the Commission noted that the model did not make it possible to capture particularities of the Dutch market or of the Swedish market (recitals 1545, 1844 and 1845 of the decision at issue).

226 In those circumstances, UPS' assertion that, in the absence of the irregularities affecting the analysis of the effects of the concentration on prices, no competition authority would have opposed the proposed transaction is based on a misreading of the decision at issue. Contrary to

what UPS claims, the mere fact that the Commission used a model vitiated by irregularities is not sufficient to conclude that those irregularities are sufficiently serious to give rise to non-contractual liability on the part of the European Union.

227 It is also necessary to bear in mind the usefulness of econometric models, in particular in the control of a concentration that may give rise to non-coordinated effects on an oligopolistic market. The Commission must have leeway in order not to paralyse its ability to take action or to inhibit its use of such quantitative instruments which, by their rigour and objectivity, contribute to the quality of economic analysis.

228 In the light of all those factors and having weighed up the interests involved, it must be concluded that the irregularities alleged by UPS in respect of the Commission's econometric model are not sufficiently serious to give rise to non-contractual liability on the part of the European Union. UPS' line of argument must therefore be rejected.

(2) The efficiencies

(i) Preliminary observations

229 UPS submits that the efficiencies analysis in the decision at issue is vitiated by an illegality constituting a sufficiently serious breach. According to it, no ordinarily prudent and diligent competition authority would have concluded that the nature and quantity of the evidence submitted during the administrative procedure did not make it possible to consider, with reasonable certainty, that those efficiencies were likely to materialise, within the meaning of point 86 of the Guidelines.

230 UPS claims that, if the Commission had accepted even a fraction of the claimed efficiencies other than the EUR 65 million of synergies in respect of air transport and ground handling services in Europe, it would no longer have been able to prohibit the transaction, despite its flawed and non-standard analysis of the effects of the concentration on prices. Had the Commission assessed the transaction between UPS and TNT with the same methodology as that used in the case concerning the transaction between FedEx and TNT, it would have had to accept a much higher percentage of the synergies claimed.

231 UPS disputes that the burden of proof in relation to efficiencies falls entirely on the party which has notified a concentration. It submits that such an interpretation would allow the Commission to reject any claimed synergy without providing any explanation.

232 As previously stated in the examination of the complaints relating to the failure to communicate the efficiencies assessment criteria, it is for the party which has notified a concentration to adduce precise and compelling evidence enabling, as far as possible, the expected efficiencies to be quantified, notwithstanding the Commission's obligation to examine carefully and impartially all the relevant aspects and to state adequate reasons for its assessment. Accordingly, UPS' argument alleging infringement of the rules governing the burden of proof is unfounded.

(ii) The evaluation of the efficiencies claimed by UPS

233 UPS submits that, if it had been able to acquaint itself with the criteria on the basis of which most of the synergies that it expected to derive from the transaction between itself and TNT were rejected as unverifiable by the Commission, it would have been able to convince the Commission of the existence of those efficiencies.

234 However, that argument has already been rejected following the examination of the complaints relating to the failure to communicate the efficiencies assessment criteria.

235 UPS adds that those synergies were the rationale for its proposed acquisition of TNT. As a result of the complementarity of those undertakings' networks, UPS claims that it would have been able to reduce its costs and compete more effectively with DHL, its main rival on the European market. During their negotiations, its board of directors and that of TNT forecast, on the basis of experts' analyses, conservatively and in accordance with the applicable Netherlands legislation, synergies of between EUR 400 million and EUR 550 million per year (the median being EUR 503 million per year), an estimate reflected in the price of the public takeover bid of EUR 9.50 per share.

236 UPS states that it submitted those forecasts to the Commission, so that the Commission would take them into account in its assessment of the proposed transaction, in accordance with Article 2(1)(b) of Regulation No 139/2004 and point 76 et seq. of the Guidelines. However, the Commission accepted to take into consideration only the synergies linked to the European air network and ground handling during the first three years following the conclusion of the transaction, amounting to EUR 65 million per year.

237 UPS asserts that, by thus rejecting the balance of EUR 438 million of annual synergies on the ground that they were unverifiable, the Commission made a serious error of assessment.

238 UPS claims that the Commission failed to take into consideration the following synergies, which are examined in greater detail below:

– European air network and ground handling (Year 4): EUR 43 million;

– administrative costs: EUR 210 million;

– transatlantic air transport: EUR 25 million;

– common carriage: EUR 33 million;

– line haul/hub and feeder: EUR 22 million;

– facilities: EUR 17 million;

– the PUD network: EUR 40 million;

– outside service providers: EUR 48 million.

239 UPS submits that, even if only a small fraction of the rejected efficiencies were accepted as verifiable, it is clear that the basis for the prohibition decision would have collapsed.

– *European air network and ground handling (Year 4)*

240 UPS criticises the Commission for having rejected, in recital 905 of the decision at issue, the synergies linked to the air network and to ground handling beyond the three years following the concentration between itself and TNT, on the ground that such a time horizon carried greater uncertainty and slower benefits for consumers. According to UPS, that assessment is manifestly erroneous and contradictory, since, in recital 902 of that decision, the Commission recognised that the synergies would be the same during the fourth year, reflecting the phased rollout of the integration.

241 In order to respond to that line of argument, it must be recalled that taking the claimed synergies into consideration consists, by definition, in assessing the present value of future flows, in the form of gains or savings, an assessment which necessarily depends on the time horizon and the probability of those gains or savings being realised. Thus, points 83 and 87 of the Guidelines state that, in general, the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them or consider them probable. In recitals 905 and 906 of the decision at issue, the Commission chose to limit, in principle to the first three years, the expected efficiencies to be taken into consideration. By contrast, in its overall assessment, the Commission stated that it would take into consideration the projections for the fourth year, while reducing the weight to be given to them in view of the uncertainties and complexity of the integration of air networks and ground handling services.

242 UPS' line of argument consists essentially in asserting that the credibility of its projections of future efficiencies is greater than that which the Commission has actually acknowledged. However, in view of the uncertain nature of those efficiencies and the time horizon relied on by UPS, none of its arguments supports the conclusion that the Commission committed a sufficiently serious breach of a rule of law intended to confer rights on individuals that is capable of giving rise to non-contractual liability on the part of the European Union.

– *Administrative costs*

243 According to UPS, the administrative synergies result from the combination of its and TNT's headquarters and central overhead functions in Europe. The expected efficiencies should have reached the sum of EUR 210 million over four years as a result of a reduction in the combined workforce of 11% for management roles and 12% for administrative roles, those targets being lower than those it had achieved previously.

244 In recital 891 of the decision at issue, the Commission disregarded those savings on the ground that they related to fixed costs which could not be passed on to consumers. UPS submits that that reasoning is erroneous and contradictory. While the Commission applied an efficiencies pass-through rate of 67% to average total costs (variable costs and fixed costs), it should have applied that rate to administrative costs and considered that 67% of the savings made on those costs would be passed on to consumers, the remainder being absorbed by UPS. Conversely, if the Commission intended, in accordance with recital 891 of the decision at issue, to refuse to apply that rate to fixed costs, it should then, for the sake of consistency, have applied a higher pass-through rate to variable costs. That would have resulted in greater efficiencies for UPS and a reduction in the number of markets potentially affected by a significant impediment to effective competition.

245 It should be borne in mind, however, that in recital 891 of the decision at issue the Commission acknowledged, in essence, that, from an accounting point of view, administrative costs could be shared between the various national services and markets according to the volumes of packages handled. However, from an economic point of view, that method of allocation did not make it possible to determine how those fixed costs contributed to determining the price of each additional contract. Considering that the answer to the question as to the extent to which the administrative cost savings were likely to influence the prices of the relevant products to justify their being taken into account was uncertain, the Commission, in recital 892 of the decision at issue, found that those savings, as submitted by UPS, were not verifiable and could not, therefore, be taken into account. It is also apparent from that recital of the decision at issue that the considerations relating to the passing on to consumers of the savings linked to administrative costs were presented only in the alternative, had those savings been deemed verifiable.

246 By their nature, the synergies linked to the reduction in administrative costs following the merger result in a reduction in the undertaking's fixed costs. As stated in point 80 of the Guidelines, cost efficiencies that lead to reductions in variable or marginal costs are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs; the former are, in principle, more likely to result in lower prices for consumers. The Commission did not therefore err in rejecting the synergies associated with the reduction in administrative costs on the ground that they were not relevant for the purposes of the efficiencies analysis. Since UPS' criticisms concerning the passing on of those savings to consumers are directed against subsidiary assessments, they are irrelevant and must be rejected.

247 It follows that none of the factors relied on by UPS, as regards the efficiencies linked to the reduction in administrative costs, make it possible to infer that the Commission committed a sufficiently serious breach of a rule of law intended to confer rights on individuals that is capable of giving rise to non-contractual liability on the part of the European Union.

– *Transatlantic air transport*

248 UPS criticises the assessment by which the Commission, in recitals 882 and 883 of the decision at issue, disregarded the cost savings estimated at EUR 25 million in respect of transatlantic air transport, on the ground that that estimate was not verified. UPS emphasises that it intended to remove the single transatlantic route between Liege (Belgium) and New York (United States), since it had ample capacity to absorb 75% of the volume of that route. According to UPS, the Commission rejected the calculations which had led to an estimate of EUR 25 million on the ground that they were based on the assumption that TNT operated a Boeing 767, whereas in fact it operated a Boeing 777. According to UPS, since the costs of a Boeing 777 are higher than those of a Boeing 767, the savings made would only have been greater.

249 However, it should be noted that, in recitals 881 to 883 of the decision at issue, the Commission did not reject the existence of the claimed efficiencies. It considered that those efficiencies were not verifiable, since UPS had based its calculations on the situation of TNT's network in 2007, without taking into consideration the fact that TNT subsequently had used larger aircraft.

250 In order to demonstrate that that assessment was incorrect, UPS provided a number of calculations in support of the application to substantiate the scale of the gains that it expected from the synergies arising from transatlantic air transport services. It must be noted that that evidence was not submitted to the Commission during the administrative procedure, notwithstanding the fact that paragraph 725 of the Statement of Objections drew UPS' attention

to the fact that it was difficult to verify its estimates of efficiencies. UPS thus produces several spreadsheets relating to the use of its transatlantic air transport capacity in 2012 (Annex A.35 to the application), which, as UPS itself admits, were not produced during the administrative procedure. It was however for UPS to adduce evidence, during the administrative procedure, not only of the efficiencies which it claimed to exist, but also of the verifiable factors on which it relied in order to quantify them. UPS' argument relating to transatlantic air services is unfounded and must be rejected.

– *Common carriage*

251 UPS expected to make savings by transporting on its own aircraft the packages which TNT carried on commercial flights operated by third parties. In recital 889 of the decision at issue, the Commission disregarded those savings on the ground that UPS had not demonstrated that it was able to absorb TNT's volume on its own aircraft. UPS claims the Commission failed to raise that question during the administrative procedure when UPS had available all the evidence to reply convincingly to it.

252 Contrary to what UPS claims, it was not for the Commission to invite it to provide evidence to substantiate the claimed efficiencies. It was for UPS to adduce evidence not only of the efficiencies which it claimed to exist, but also of the verifiable factors on which it relied in order to quantify them. UPS' line of argument is unfounded and must therefore be rejected.

– *Line haul*

253 According to UPS, the proposed acquisition would have enabled it to rationalise its intra-EEA long-distance trucking network by combining it with that of TNT, thanks to its 'hub feeder network optimisation model' ('the HFNO model') applied to the data from three markets (Germany, Italy and the United Kingdom), which constitute a good cross-section of the networks of the different European markets. In recitals 866 and 867 of the decision at issue, the Commission disregarded those savings on the ground that the justifications provided were partial and unreliable. UPS disputes that assessment. It claims that the estimates of its future single network were solid, prudent and reliable. UPS states that it managed to estimate, with a margin of conservatism, cost synergies of around 15%. Even though it had to amend those synergies in the light of the data provided by TNT, UPS nevertheless considers that the differences thus observed are not significant and can be explained by methodological differences between itself and TNT.

254 The Commission disputes those claims. It submits, in particular, that UPS asserts, but fails to demonstrate, that the markets in Germany, Italy and the United Kingdom constitute a 'good cross-section', without providing any evidence to make it possible to verify the truth of that assertion.

255 In that regard, it should be noted that, according to recitals 865 and 866 of the decision at issue, the claimed efficiencies were calculated by UPS on the basis of its HFNO model on the basis of data relating to three national markets. UPS considered that those results could be extended to all the other markets without giving any reason for doing so. The Commission thus relied, in essence, on the lack of evidence that the cross-section used by UPS was representative.

256 It appears, however, that in its reply to the Statement of Objections, UPS provided a document (Annex 4.8 to the Statement of Objections) explaining the reasons for the selection of the three national markets comprising the cross-section. It is apparent from that document that those

markets illustrate three examples of the relationship between UPS' volumes and those of TNT, namely higher volumes (Germany), lower volumes (Italy) and equal volumes (United Kingdom). Those three markets were then modelled as a single network. In those circumstances, the Commission cannot claim that UPS failed, during the administrative procedure, to provide explanations as to the methodology followed in order to select a cross-section of the three markets which it considered to be representative.

257 Leaving aside that error, it should be noted that, according to recital 867 of the decision at issue, the Commission invited UPS to clarify its calculations based on that cross-section by taking into account TNT's data. Following that recalculation, it became apparent that, for certain national markets, the results obtained differed significantly from UPS' initial estimates. On account of those differences, the Commission considered that the quantification of the expected efficiencies was uncertain.

258 It must be held that the existence of those differences, described as 'significant', is such as to cast doubt on the validity of the estimate of the efficiencies put forward by UPS on the basis of its HFNO model. Although UPS disputes the significance of those differences, it has not, however, put forward any specific arguments in that regard, nor put forward figures capable of calling into question the validity of the finding made in recital 867 of the decision at issue. UPS, while acknowledging the existence of such differences, maintained that they were not due to substantive differences between the estimated data and the actual data but due to the choice of a different basis on which TNT allocated its costs.

259 In the light of those factors, it must be held that UPS has failed to demonstrate that the Commission committed a sufficiently serious breach of a rule of law intended to confer rights on individuals that is capable of giving rise to non-contractual liability on the part of the European Union, when it decided that the estimate of the efficiencies relating to the long-distance trucking network was too uncertain to be considered verified. UPS' argument must therefore be rejected.

– *Facilities*

260 UPS complains that, in recital 863 of the decision at issue, the Commission disregarded as not verified the projected savings relating to the rationalisation of the facilities which would become redundant as a result of the proposed concentration, on the ground that the data provided covered only a few countries. UPS submits that that assessment is incorrect: it states that it provided the Commission with detailed calculations for 112 of the 118 facilities which it planned to close.

261 It should be noted that, in recital 862 of the decision at issue, the Commission stated that UPS had calculated the expected savings in the rationalisation of its facilities on the basis of an estimate of the annual cost per facility multiplied by the net number of facilities to be closed. The figure thus reached was then multiplied by the average annual value of the operating costs of a facility, estimated at EUR 330 000. The result of that calculation (EUR 18 million) was then adjusted and reduced to EUR 17 million.

262 In recitals 863 and 864 of the decision at issue, the Commission considered that method to be imprecise in two respects. First, it was based on data relating to a small number or group of countries despite the fact that expected savings were specific to each country. Second, that method was based on the premiss that all the costs associated with a site intended for closure

would be a saving. Since the volumes processed by those facilities would have to be transferred to other facilities, it would have been necessary to calculate the net saving by comparing the processing costs before the merger with the additional costs after the merger.

263 The Commission's second objection amounts, in essence, to the criticism that in its assessment of the projected savings, UPS did not sufficiently distinguish between those relating to fixed costs and those relating to variable costs. As has already been pointed out with regard to the efficiencies relating to administrative cost synergies, cost efficiencies that lead to reductions in variable or marginal costs are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs.

264 It is clear, however, that UPS' argument does not address that issue and focuses exclusively on the first problem raised by the Commission. In those circumstances, that argument does not make it possible to infer that the Commission committed a sufficiently serious breach of a rule of law intended to confer rights on individuals that is capable of giving rise to non-contractual liability on the part of the European Union, when it considered that the estimate of savings linked to the closure of redundant facilities could not be used because of its lack of reliability.

– *PUD network*

265 UPS complains that, in recitals 853 and 854 of the decision at issue, the Commission disregarded the quantification of the synergies expected from the rationalisation of the PUD network, on the ground that its calculations could not be verified.

266 UPS submits, first, that the Commission did not call into question the existence of those synergies, but only their evaluation. According to UPS, the Commission failed to set out the criterion on the basis of which it was prepared to accept such calculations and to put questions to UPS.

267 However, it was not for the Commission to invite UPS to provide evidence to substantiate the claimed efficiencies. It was for UPS to adduce evidence not only of the efficiencies which it claimed to exist, but also of the verifiable factors on which it relied in order to quantify them. This first argument put forward by UPS must therefore be rejected.

268 Second, as regards UPS' argument that the justifications relied on by the Commission in support of rejecting the efficiencies were never communicated to it during the administrative procedure, it should be recalled that that argument has already been rejected following the analysis of the complaints relating to the failure to communicate the efficiencies assessment criteria.

269 Third, UPS submits that the Commission's reasons for not taking into account the efficiencies relating to the PUD network are manifestly erroneous.

270 It should be recalled that, in recitals 851 and 852 of the decision at issue, the Commission acknowledged the existence of efficiencies resulting from the synergies relating to the combination of the PUD networks. However, in recitals 853 and 854 of that decision, it rejected UPS' assessment of their amount on the ground that they were unreliable. More specifically, the Commission emphasised the poor representativeness and the age of the data provided by UPS.

271 As regards the representativeness of the data, it is apparent from recital 824 of the decision at issue that UPS relied on an estimate of the driver savings on each national market (EUR 45 million), adjusted downwards in order to arrive at an estimate of EUR 40 million. The Commission pointed

out, however, that that calculation was based on detailed data only in respect of the German, French and Benelux (comprising Belgium, Luxembourg and the Netherlands) markets, as well as the Ireland and United Kingdom markets. The remainder of the market was divided into two groups, namely 'Eastern Europe' and 'rest of Europe', for which UPS estimated the average reduction of drivers, without providing any explanation in that regard. Since the PUD network savings were closely linked to the conditions of each market, the Commission found, in recital 853 of the decision at issue, that UPS should have relied on the data relating to each market rather than applied an estimate to a group of countries. The Commission concluded that the estimate of synergies relating to the PUD network was not reliable for those two groups.

272 In that regard, UPS observes that the countries falling within the categories 'Eastern Europe' and 'rest of Europe' accounted for only EUR 9 million of the EUR 40 million forecast savings, the other countries being divided into four groups according to the characteristics of their networks (namely the number of drivers and the number of stops per mile).

273 It should however be noted that UPS does not dispute the Commission's main objection that data specific to each market were not taken into account, despite the differences in costs between those markets. The assessment of the claimed efficiencies is intended to ascertain, on the markets giving rise to a significant impediment to effective competition, whether those efficiencies are capable of counterbalancing the anticompetitive effects which the concentration is likely to produce. Where, as in the present case, those anticompetitive effects are localised within the territory of certain Member States, it is necessary to be able to ascertain, on each of those national markets, whether the claimed efficiencies will result in a net advantage for consumers.

274 Accordingly, in the absence of any evidence to the contrary produced by UPS, it must be agreed that the approach followed by UPS, which consisted in favouring the application, in respect of a set of countries, of a single rate derived from a model composed of four groups of national markets, appears less precise and less reliable than that of relying on the data of each market to arrive at an average estimate applicable to all of the markets.

275 In addition, it should be noted that, of the 15 national markets on which there would be a significant impediment to effective competition, only the Netherlands did not fall within the 'Eastern Europe' category or the 'rest of Europe' category. As UPS itself conceded, the total value of the efficiencies linked to the PUD network amounted only to EUR 9 million for those two groups of national markets. It is therefore highly unlikely that the Netherlands market could, on its own, represent savings that would justify synergies being evaluated up to the amount of EUR 40 million claimed by UPS. It follows that the efficiencies relevant for evaluating the situation of the national markets on which the Commission concluded that there would be a significant impediment to effective competition are likely to be considerably less than the EUR 40 million in efficiencies claimed. UPS' argument therefore does not call into question the validity of the assessment, set out in recital 855 of the decision at issue, that the data relating to markets other than Germany, France, Ireland and the United Kingdom do not make it possible to establish that the efficiencies estimated for the other markets are verifiable.

276 As regards the age of the data, it is apparent from recital 854 of the decision at issue that the Commission noted that UPS had relied on a model developed in 2007 on the basis of data from 2002 in order to evaluate the efficiencies resulting from the optimisation of the PUD network in discussions which already related to the possibility of acquiring TNT.

277 In order to update those results on the basis of the situation in 2011, UPS reduced those estimates by varying proportions from one market to another, without explaining the method used other than by describing it as 'conservative'.

278 UPS claims that its calculations were detailed and reliable and took into account its growth rates between 2007 and 2011, as well as variations in the PUD network density.

279 However, the two documents relied on by UPS in support of those claims (Annexes A.38.1 and A.38.2 to the application) confirm the description of the methodology set out in recital 854 of the decision at issue. Those documents do not contain any precise indications as to how the results of the study carried out in 2007 were updated in 2011. They are confined to asserting that, since the bases for that analysis were sound, UPS had taken the decision merely to adjust downwards and significantly those initial cost savings estimates in order to reflect the uncertainties arising from changes in market conditions.

280 In those circumstances, it must be concluded that UPS has failed to demonstrate that the Commission committed a sufficiently serious breach of a rule of law intended to confer rights on individuals that is capable of giving rise to non-contractual liability on the part of the European Union.

– *Outside service providers*

281 In recitals 857 to 861 of the decision at issue, the Commission stated that UPS' estimate of the efficiencies associated with the rationalisation of costs in terms of subcontracted PUD is even more uncertain than that of the efficiencies from UPS' own PUD network, since that estimate is based on extremely simplified assumptions rather than on data specific to each national market. The Commission thus noted that UPS did not provide any explanation in support of the alleged 6% reduction, since it confined itself to stating that that rate reflected the greater combined volumes and the resulting benefits for sorting. In addition, the consultants hired by UPS revealed that the data relating to TNT's volumes differed from those used in order to calculate the efficiencies, although UPS did not attempt to use those data to arrive at a more realistic measure of efficiencies. The Commission concluded that it was not in a position to verify the order of magnitude of the efficiencies linked to outside service providers and rejected the efficiencies claimed by UPS as unverifiable.

282 UPS takes issue with the Commission for considering that its projections were not based on a detailed country-by-country analysis, but on an average rate of 6%, and appeared unreliable. UPS claims that that analysis is manifestly erroneous.

283 UPS submits, first, that the use of an average rate across countries is consistent with the approach described above with regard to the PUD network for countries falling within the 'rest of Europe' category.

284 It must be borne in mind that, in accordance with the principles governing the burden of proving efficiencies, it was for UPS to justify the application of the 6% rate across national markets, in particular on account of the differences in costs between those markets. It must be held, as has already been stated with regard to the PUD network, that the approach of using an average rate of saving applicable to a set of countries, without specific justification, appears less precise and

less reliable than that of relying on the data of each market to arrive at an average estimate applicable to all of the markets. It follows that UPS' argument has revealed nothing to suggest that the reasons set out by the Commission in recital 858 of the decision at issue are erroneous.

285 Second, UPS complains of methodological inconsistency. According to UPS, the Commission accepted the use of average rates for the same group of countries in respect of the European air network and ground handling (Year 4) synergies, but rejected such use as regards PUD by outside service providers.

286 However, as has already been noted as regards the efficiencies linked to PUD costs, it is apparent from recitals 824, 853 and 858 of the decision at issue that those costs are closely linked to local conditions prevailing in each national market. The Commission observes that that situation is not comparable to that of the European air network or that of ground handling services, and UPS has not rebutted that point. In the light of those justifications, it must be accepted that, because of those differences, UPS' argument fails to demonstrate that there is a methodological inconsistency that could constitute a manifest and serious error of assessment.

287 Third, UPS explains why, after the use of TNT's data, the results from its model did not change materially. According to UPS, the main change concerned the synergy reallocation criterion, but did not alter the overall assessment of the synergy amount.

288 However, that argument does not call into question the factors set out in recitals 859 and 860 of the decision at issue, from which it is apparent that, in spite of data relating to TNT's real volumes that were very different from those initially estimated by UPS and, consequently, a significant revision of the savings initially projected, in particular for the German market and the Ireland and United Kingdom markets, UPS did not seek to assess more precisely the expected efficiencies for each of the relevant national markets.

289 In the light of all those factors, it must be concluded that UPS has failed to demonstrate the existence of errors in the assessment of the verifiability of the alleged efficiencies that are capable of giving rise to non-contractual liability on the part of the European Union.

(3) The alleged difference in treatment in relation to the transaction between FedEx and TNT

290 UPS claims that there was a difference in treatment between the concentration between itself and TNT and the concentration between FedEx and TNT. Whereas, following rigorous estimation work, UPS publicly announced that it expected to derive EUR 503 million in synergies from the acquisition of TNT as early as the first year, FedEx, for its part, did not disclose any estimate to the public. The Commission nevertheless accepted the synergies put forward by FedEx, after putting questions to it, on the basis of the calculations made by consultants hired for the procedure for the control of that concentration which had never been publicly disclosed, which is inexplicable for a publicly listed company.

291 UPS complains in that regard that the Commission assessed synergies on the basis of a much stricter test than that which it used for the concentration between FedEx and TNT. If the Commission had treated UPS in the same way as FedEx, it would have had to accept all the claimed efficiencies. According to UPS, in the transaction between FedEx and TNT, the Commission accepted a large number of synergies which were not, however, substantiated by

evidence with as much probative value as that on which UPS relied. FedEx refused to publish any quantification of potential synergies as from its purchase offer and never submitted internal documents in that regard.

292 In the decision relating to the transaction between FedEx and TNT, the Commission accepted synergies relating to transatlantic air transport on the basis of the buyer's transport capacities, without requesting detailed calculations. In the absence of any further information in the public version of the decision on the transaction between FedEx and TNT, UPS suggests that the Court should obtain that information by way of a measure of inquiry.

293 As regards the PUD network, UPS observes that, in the case concerning the transaction between FedEx and TNT, the Commission agreed to take that type of synergy into consideration despite the submission of less detailed evidence than that which UPS had put forward.

294 It should be recalled that the Commission must analyse each concentration in the light of its own characteristics and those of the relevant market. All concentrations must be assessed individually and in the light of the applicable factual and legal circumstances (see, to that effect, judgment of 16 May 2018, *Deutsche Lufthansa* v *Commission*, T-712/16, EU:T:2018:269, paragraph 131). When the Commission takes a decision on the compatibility of a concentration with the internal market on the basis of a notification and a file pertaining to that transaction, an applicant is not entitled to call the Commission's findings into question on the ground that they differ from those made in a different case, on the basis of a different notification and a different file, even where the markets at issue in the two cases are similar, or even identical (see, to that effect, judgments of 14 December 2005, *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraph 118, and of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 142).

295 In the present case, although relating to the same market, the transactions between UPS and TNT and FedEx and TNT, which were notified approximately three years apart, do not involve the same parties. By their very nature, efficiencies are directly linked to the individual characteristics of the parties to the concentration.

296 On account, in particular, of FedEx's characteristics and the closeness of competition between UPS and TNT, the Commission concluded that the transaction between FedEx and TNT did not give rise to a significant impediment to effective competition. The entity resulting from that merger would be faced with two strong competitors, DHL and UPS (recitals 444 to 446 and 630 to 689 of the decision relating to the transaction between FedEx and TNT), while FedEx and TNT, although in competition with each other, offer complementary services to a certain extent and are not close competitors. FedEx specialises in routes between the EEA and the rest of the world, while TNT's offer focuses on international routes within the EEA (recitals 590, 591 and 687 to 689 of the decision relating to the transaction between FedEx and TNT), and TNT cannot, moreover, be regarded as a competitor likely to have a special competitive position as a 'maverick' or a significant source of expansion on the market (recitals 650 and 692 to 714 of the decision relating to the transaction between FedEx and TNT). The analysis of the effects of the concentration on prices has not demonstrated a statistically significant impact on prices and, in any event, the Commission states that the expected efficiencies would outweigh that impact (recitals 468 to 497, 515 to 588 and 771 to 805 of the decision relating to the transaction between FedEx and TNT).

297 It must therefore be held that the concentrations between UPS and TNT and between FedEx and TNT differ significantly on many points, in particular the fact that FedEx and TNT were not close competitors, a point which is relevant to the examination of the synergies resulting from the combination of those undertakings and which UPS does not dispute.

298 In addition, the applicant does not substantiate its argument that the evidence which it submitted to the Commission with regard to expected synergies was assessed against a different standard of proof from that applied in connection with the concentration between FedEx and TNT. In particular, it does not show that the evidence which it provided in respect of transatlantic air transport and the PUD network had similar probative value and relevance to those which had been accepted in connection with that concentration, with the result that the Commission treated identical or similar evidence differently.

299 In the absence of any indication of unequal treatment or any allegation or evidence relating to another ground of illegality, the finding of differences in the assessment of efficiencies between the decision relating to the transaction between FedEx and TNT and the decision at issue does not support the conclusion that the unequal treatment which UPS claims to have suffered did occur. Accordingly, UPS' argument on that point must be rejected, without it being necessary to grant UPS' requests for a measure of inquiry.

(4) FedEx's situation

(i) The closeness of competition between FedEx and UPS

300 UPS submits that, by concluding in the decision at issue that, unlike FedEx, UPS, TNT and DHL were close competitors the Commission committed a sufficiently serious breach of EU law. That conclusion was based on the assumption that DHL would adapt to the price increases resulting from the concentration between UPS and TNT but FedEx would not be able to counteract them. However, in UPS' opinion, the Commission had no basis for concluding that price increases would result from the concentration between UPS and TNT. On the contrary, the analysis of the effects of the concentration on prices and the efficiencies analysis showed that the transaction would be pro-competitive.

301 UPS recalls that it pleaded to that effect under the third plea in its action in Case T-194/13 and demonstrated the lack of rigour with which the Commission analysed the responses to the market questionnaire, in particular as regards the Czech, Bulgarian, Danish and Maltese markets. The Commission's refusal to explain how the responses to the questionnaire for those Member States justified a finding of a significant impediment to effective competition makes it impossible to understand the standard of proof required to reach such a finding. UPS produces, at the stage of the reply, an account of the responses of large and small customers to the Phase II market investigation for the Bulgarian, Czech, Danish and Maltese markets, which, in its view, confirm that it was not reasonable to conclude that FedEx was not a close competitor of UPS.

302 UPS takes issue with the Commission for considering that TNT was a close competitor of UPS, but that FedEx was not. Even on the Czech market, in respect of which the Commission considered its analysis to be particularly strong, the responses to the questionnaire unequivocally indicate that there was no evidence that UPS and TNT were in close competition. On the contrary, the responses indicate that the undertakings envisaged UPS, TNT, FedEx and DHL as

perfect alternatives to each other, on account of certain characteristics of the services offered, or that UPS' closest competitors or those of TNT did not supply services with those characteristics. According to UPS, the same is true of the Bulgarian, Danish and Maltese markets.

303 It must be borne in mind that, in the decision at issue, after reaching the conclusion that the intra-EEA market for the express delivery of small packages was dominated by four integrators, namely DHL, UPS, TNT and FedEx (recital 510 of the decision at issue), the Commission considered that, out of those undertakings, FedEx was a much weaker and more distant competitor to UPS, TNT and DHL. The Commission relied on FedEx's revenue on the intra-EEA market (recitals 513 to 517 of the decision at issue), its coverage of the EEA market for the express delivery of small packages (recitals 518 to 527 of the decision at issue) and the weakness of its network in the EEA compared to those of the other three integrators (recitals 528 to 533 of the decision at issue). Furthermore, the Commission noted that, since FedEx operates on a smaller scale, it had significantly higher PUD costs than those of its competitors, thereby limiting its ability to exert competitive pressure on the market, notwithstanding the adoption, in 2011, of an organic expansion plan extending to 2017 (recitals 534 to 546 and 599 to 625 of the decision at issue).

304 The Commission also emphasised FedEx's weak presence on both domestic and deferred delivery markets (recitals 547 to 552 of the decision at issue), its presence being significantly stronger in the segment of services to extra-EEA destinations (recitals 553 to 564 of the decision at issue). Those factors were confirmed by the market investigation, which shows that customers perceive FedEx as a weaker player than the other integrators on the intra-EEA express delivery services market (recitals 565 to 576 and 590 to 598 of the decision at issue), and by the statements of its competitors (recitals 578 to 589 of the decision at issue).

305 In contrast to FedEx's situation, the decision at issue shows that UPS and TNT are close competitors (recitals 631 to 702 of the decision at issue). In support of that finding, the Commission relied on the responses of customers to the market investigation (recitals 636 to 652 of the decision at issue) and the similarity between DHL, UPS and TNT in terms of services offered and coverage (recitals 653 to 659 of the decision at issue). According to the latter criterion, FedEx is the weakest of those four undertakings in 21 EEA markets and, in 17 of those markets, the gap between FedEx and its closest competitor is at least 20 percentage points (recital 654 of the decision at issue).

306 The Commission also emphasised the similarities between UPS and TNT in terms of the offering of early morning delivery services (recitals 660 to 665 of the decision at issue) and the qualitative features of the services offered (recital 666 of the decision at issue). As regards bidding, the Commission stated that DHL, UPS and TNT were close competitors, whereas FedEx's situation was more distant (recitals 667 to 684 of the decision at issue).

307 The Commission refuted the conclusions drawn from TNT's analysis of the information provided by its former customers as to which undertakings were offering competing services, considering that that opinion survey was of limited usefulness, owing to the limitations inherent in the methodology used (recitals 685 to 701 of the decision at issue).

308 In recitals 705 to 707 of the decision at issue, the Commission rejected the observations in response to the Statement of Objections by which UPS maintained that the analysis of the closeness of competition did not sufficiently take into account the influence of the differentiation

of services on the representativeness of market shares as an indicator of closeness of competition, but also competitors' diversion ratios and the lack of quantification of the number of customers for which DHL would not be a viable alternative, to the detriment of itself and TNT.

309 Lastly, in recitals 708 to 711 of the decision at issue, the Commission refuted certain additional arguments put forward by UPS in response to the Statement of Objections concerning the analysis of the closeness of competition. UPS maintained that it was not a close competitor of TNT, since the two undertakings had fundamentally different profiles. It criticised the Commission for following a binary approach ('in' or 'out') and for focusing solely on the long-haul market segment.

310 UPS criticises the Commission's assessment of the responses to the questionnaires relating to the Bulgarian, Czech, Danish and Maltese markets. However, even if those errors were established, it is sufficient to note, on the basis of all the factors in the decision at issue referred to above, that the market questionnaires constitute only one of the factors on which the Commission relied. While surveys of that type make it possible to identify consumers' or producers' perceptions of their respective positions and to collect data in that regard, their usefulness lies in the fact that they make it possible to supplement and improve the understanding of objective factors such as market shares, network density or the structure of supply, without however replacing those factors. In those circumstances, even if an error of assessment could be established in the analysis of the replies to the questionnaires concerning those four markets, such an error is not in any event capable of calling into question the other factors on the basis of which the Commission concluded that FedEx was not a close competitor of UPS, TNT and DHL, factors which, moreover, UPS has not disputed.

311 Accordingly, none of the arguments put forward by UPS in the present action invalidates the assessment of FedEx's closeness as a competitor.

(ii) FedEx's expansion plans

312 UPS disputes the grounds on which the Commission considered that it was unlikely that FedEx would expand in Europe in such a way as to counteract the effects of the concentration between UPS and TNT, which were liable to create a significant impediment to effective competition in 15 Member States. UPS sets out in greater detail its arguments relating to each of the six points set out below regarding FedEx's role.

– *FedEx's progress in Europe*

313 According to UPS, the Commission erred in stating, in recital 611 of the decision at issue, that FedEx's expansion plans in Europe were slipping. That assessment is directly contradicted by the statements of FedEx's senior executives of 19 June 2012 and 9 and 10 October 2012, according to which FedEx expected to derive almost 75% of the 350 million United States dollars (USD) in profit improvements from its international activities by the end of 2015. UPS insists that significant weight should be attached to such public statements on account of the US securities legislation.

314 It is true that statements made by senior executives of undertakings to investors may constitute relevant evidence for assessing the effects of a proposed concentration. However, the fact that those statements fall within the scope of securities legislation which is intended, inter alia, to ensure their accuracy, if necessary subject to penalties, does not mean that the Commission is

required, as a result of that legislation, to presume that such statements are accurate or credible. As with any other relevant evidence, it is for the Commission to act with all due diligence in examining the relevance, but also the credibility and verifiability of such statements for the purposes of the control procedure.

315 In the present case, it is apparent from the file that the Commission became aware of statements made by FedEx senior executives who, addressing investors, had described the progress and projections relating to the expansion plans in more optimistic terms than those used up to that point in the procedure relating to the merger between UPS and TNT. In view of that dissonance, which was criticised by UPS, the Commission requested additional information from FedEx, in particular regarding the statements of October 2012 (documents bearing the references ID 7399 and ID 7400), a request with which FedEx complied (document bearing the reference ID 7418). The Commission gave UPS limited access to that confidential reply during the data room procedure which took place on 26 and 29 October 2012.

316 The Commission continued its investigations by asking FedEx, on 16 November 2012, for additional information (request bearing the reference Q30) on the changes made to the expansion plans and for the latest report on the status of those plans as presented to senior management. In its reply of 19 November 2012, FedEx confirmed that its initial objectives would not be achieved, owing, first, to the fact that they were based on hypotheses which had proved to be overly optimistic and, second, to a deterioration in its performance and the economic conditions.

317 It is clear from that reply that FedEx revised downwards its market share and turnover objectives for the intra-EEA services market. It follows that the statements attributed to FedEx in recital 611 of the decision at issue correspond exactly to the wording in FedEx's reply of 19 November 2012, to which UPS had access, in non-confidential form, at the stage of the letter of facts.

318 It should also be noted that the statements of FedEx's senior executives relied on by UPS related not to the relevant market but to all of FedEx's activities with the exception of the United States. Contrary to what UPS claims, those statements made by FedEx senior executives in their periodic meetings with investors do not contradict or undermine the probative value of the evidence gathered by the Commission, which tends to demonstrate the difficulties encountered by FedEx in implementing its organic expansion plan.

319 UPS' argument is therefore unfounded and must be rejected.

– *FedEx's cost gap in relation to its competitors*

320 UPS takes issue with the Commission for finding, in recital 545 of the decision at issue, that FedEx's PUD costs prevented FedEx from being competitive in the medium term. UPS maintains that:

– the Commission simply followed FedEx's line of reasoning without scrutinising the underlying evidence;

– since PUD costs constitute only part of the relevant intra-EEA costs, there was no logical reason to examine them in isolation, even though FedEx's air transportation costs, for example, are probably closer to UPS' own;

– the cost gap alleged by the Commission is contradicted by the existence of 14 national markets without a significant impediment to effective competition.

321 However, it should be borne in mind that, in recital 545 of the decision at issue, the Commission found that FedEx, as part of its 2011 organic expansion plan, began to invest in new facilities such as sorting centres in order to increase its total capacity and achieve geographical coverage and network density that would allow it to bring down its costs. Despite those investments, it is apparent from FedEx's reply of 19 November 2012 that FedEx expected its PUD costs to remain several times higher than those of its competitors.

322 Contrary to UPS' assertions, it is apparent from the decision at issue that the Commission's analysis is based on a body of evidence which corroborates the difference in per-unit processing costs between FedEx and its competitors that may naturally be inferred from the relative weakness of its coverage and the density of its network. The Commission thus relied on internal FedEx documents annexed to its reply of 19 November 2012. As is apparent from recitals 535 and 536 of the decision at issue, the Commission also relied on internal databases relating to the commercial offers made by FedEx and on the calls for tenders to which it responded, since those databases made it possible to assess FedEx's price competitiveness in relation to that of its competitors.

323 Given the objective differences in nature and function between those two types of network, it does not appear illogical for the Commission to have thus focused on the PUD network rather than on the air network in order to highlight the differences in competitiveness between FedEx and its competitors. The fact that UPS emphasises that its air transportation costs are probably similar to those of FedEx tends, moreover, to support that analysis.

324 Lastly, it must be stated that the question of the cost gap between FedEx and its competitors is only one of the factors for assessing the ability and incentive of that undertaking to respond to a price increase by the entity resulting from the merger between UPS and TNT. That gap is not a direct cause of the finding of a significant impediment, but an indication making it possible to evaluate why it was unlikely that FedEx would expand in Europe in such a way as to counteract the effects of the concentration between UPS and TNT within a short period. Accordingly, UPS' argument that the analysis of FedEx's PUD costs is contradicted by the existence of 14 national markets without a significant impediment to effective competition is therefore based on a false premiss.

325 UPS' argument must therefore be rejected.

– *FedEx's projected volume growth*

326 UPS criticises the Commission for deciding, in recital 614 of the decision at issue, to reject FedEx's growth forecasts, on the ground that it was difficult to predict with certainty whether FedEx's growth strategy would succeed, without carrying out an in-depth analysis of that strategy's chances of success.

327 However, this argument put forward by UPS is based on a misreading of the decision at issue. As has already been stated with regard to FedEx's progress in Europe and the cost gap between FedEx and its competitors, the Commission carried out an in-depth analysis of the likely effects of the implementation of FedEx's expansion plan and FedEx's incentives to pursue, or even accelerate,

its expansion plans following the concentration between UPS and TNT, on the basis of FedEx documents to which UPS could have had access or to which it actually had access during the administrative procedure, even if only in a restricted form.

328 That argument must therefore be rejected.

– *The countries not focussed on by FedEx in the first phase of its expansion plans*

329 UPS takes issue with the Commission for finding, in recital 613 of the decision at issue, that FedEx had decided not to include certain countries (such as Bulgaria, for example) in its first phase of expansion, owing to a lack of sufficiently developed infrastructure. According to UPS, since there was no verifiable evidence and it was not afforded the opportunity to comment during the administrative procedure on that 'first phase', that analysis should not have been included in the decision at issue.

330 By that line of argument, UPS merely criticises the facts referred to in paragraph 613 of the decision at issue, on the ground that that decision is based on evidence to which it claims not to have had full access. However, that evidence relating to the various phases of FedEx's expansion plan was communicated to UPS in the letter of facts and in the form of tables annexed thereto. It is true that most of the figures were redacted on account of their confidential nature. However, some of those figures were replaced by indications in the form of a range of values, thereby providing an order of magnitude. The letter of facts thus indicated that FedEx had no plans to open new sorting centres in Bulgaria in the next two years or to increase its sorting capacity.

331 The Commission added that FedEx's plans were now reduced by comparison with the original plans and provided figures in that regard. Although provided in the form of ranges, those data are sufficiently precise to allow UPS to understand their scope. As to the remainder, UPS' argument is not supported by any matter of law or of fact from which it may be concluded that the Commission committed a sufficiently serious breach capable of giving rise to non-contractual liability on the part of the European Union. In those circumstances, UPS' argument must be rejected.

– *FedEx's coverage on the destination side*

332 UPS disputes the Commission's assessment, in recital 1008 of the decision at issue, that, given FedEx's low coverage on the destination side, FedEx was not capable of exerting significant competitive pressure on the entity formed by the merger between UPS and TNT. UPS claims that that assessment is incorrect. The Commission failed to take into account FedEx's plans to cover, from 2015 onwards, more EEA business addresses than UPS did.

333 However, it must be stated that UPS' line of argument merely alleges that there was an error of assessment affecting 'for instance' recital 1008 of the decision at issue without, however, indicating which other recitals would also be vitiated as a result of that error. Leaving aside that lack of precision, UPS does not put forward any legal or factual matter to demonstrate that recital 1008 of the decision at issue is vitiated by an error from which it may be found that the Commission committed a sufficiently serious breach capable of giving rise to liability on the part of the European Union. That argument must therefore be rejected.

– *The country-by-country analysis*

334 UPS submits that the country-by-country analysis carried out by the Commission in Section 7.11 of the decision at issue does not support the conclusion that FedEx would not be an effective competitive constraint in a particular country. According to UPS, the Commission confined itself to a few observations that lacked sufficient reasoning because they were vague or superficial and, in any event, incorrect. By way of example, UPS relies on the analysis for Sweden, in respect of which the assessment contained in the decision at issue is contradicted by the fact that, according to all the projections available at the time, FedEx was expected to achieve, in 2015, a coverage rate and market share equal to or greater than those of TNT.

335 It must be stated, however, that, contrary to what UPS claims, Section 7.11 of the decision at issue contains a detailed and comprehensive analysis of all the relevant factors on the basis of which the Commission was able to conclude that there would be a significant impediment to effective competition. The example of the projections put forward by FedEx with regard to the Swedish market, on which UPS relies, cannot, in any event, invalidate the Commission's finding on a number of national markets as to the relative weakness of the competitive constraint exerted by FedEx by comparison with DHL and an entity consisting of UPS and TNT. UPS' argument is confined to vague and general criticism of that analysis. In the absence of any matter of law or of fact from which it may be concluded that that analysis is vitiated in such a way that the Commission can be found to have committed a sufficiently serious breach capable of giving rise to liability on the part of the European Union, that argument must be rejected.

(d) The claim concerning the alleged illegalities

336 It follows from the foregoing that, of all the alleged illegalities, only that relating to the failure to communicate the econometric model is sufficiently serious to give rise to non-contractual liability on the part of the European Union.

3. The causal link

337 UPS submits, in essence, that the Commission would not have been able to prohibit the proposed transaction. After FedEx acquired TNT, UPS claims that it could no longer notify that transaction. For the purposes of the present action, it is for UPS to prove that the administrative file did not enable the Commission to declare the transaction between UPS and TNT incompatible. To require UPS to demonstrate that the Commission would have adopted a decision declaring that transaction compatible would amount to imposing on it an insurmountable burden of proof.

338 UPS submits that it is entitled to compensation for all the damage suffered as a result of the adoption of the decision at issue. That compensation covers the costs which it would not have incurred but for the adoption of that decision as well as the resulting loss of profit which it estimates at EUR 1 638 million, after tax, reflecting the net value of the synergies of the proposed transaction.

339 UPS states that it was contractually obliged to compensate TNT under a termination clause, which is common in the course of trade. UPS recalls that its purchase offer could not be fulfilled because the condition precedent relating to the Commission's clearance of that concentration was

not met. Consequently, it had to pay TNT a termination fee of EUR 200 million, for a net amount of EUR 131 million after tax. In addition, it is necessary to deduct from the value of the alleged damage EUR 29 million in respect of avoided transaction costs.

340 UPS claims to have incurred EUR 3 708 813.61 in legal fees for its intervention in the procedure for the control of the concentration between FedEx and TNT, that is to say, a loss after tax of EUR 2.4 million.

341 It should be recalled that the condition under the second paragraph of Article 340 TFEU relating to a causal link concerns a sufficiently direct causal nexus between the conduct of the EU institutions and the damage, the burden of proof of which rests on the applicant, so that the conduct complained of must be the determining cause of the damage (judgment of 13 December 2018, *European Union* v *Kendrion*, C-150/17 P, EU:C:2018:1014, paragraph 52).

342 In the present case, UPS alleges three separate types of damage for which it seeks compensation on the ground that it was impossible to implement the proposed transaction, namely, first, the costs associated with its participation in the procedure for the control of the transaction between FedEx and TNT, second, the payment to TNT of a contractual termination fee and, third, the loss of profit sustained. UPS submits, in essence, that the alleged illegalities are the direct cause of those three types of damage.

343 As regards, first of all, UPS' participation in the procedure for the control of the concentration between FedEx and TNT, that is clearly the result of its free choice. It is not a direct consequence of the decision at issue or, a fortiori, of the infringement of its procedural rights. Accordingly, neither the infringement of its procedural rights nor the other infringements alleged by UPS can be regarded as the determining cause of the damage in the form of the costs incurred during its participation in the procedure concerning the transaction between FedEx and TNT. The claim for compensation for that damage must therefore be dismissed.

344 Next, as regards the termination fee, it is common ground that the payment of that fee stems from a contractual obligation arising from the terms of the merger protocol between UPS and TNT of 19 March 2012 (Annex C.3 to the reply).

345 It appears that that protocol provided (clause in paragraph 4.3.b of the protocol) that UPS' public takeover bid for TNT's share capital was concluded subject to the condition precedent of clearance from the Commission. If that condition was not met, it was for UPS to declare it. The failure to fulfil that condition precedent also constituted a ground for termination of the merger protocol (clause in paragraph 15.1.c of the protocol), enabling TNT to obtain, upon first request, the payment by UPS of a termination fee of EUR 200 million (clause in paragraph 16 of the protocol) after notifying it of the termination of that protocol.

346 That contractual commitment is the result of the parties' willingness to divide among themselves, at their discretion, the risk that the proposed transaction would not obtain prior approval from the Commission, a risk which, as pointed out by the Court of Justice, is inherent in every merger control procedure (see, to that effect, judgment of 16 July 2009, *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459, paragraph 203).

347 It has already been held that the harmful consequences of contractual commitments freely consented to by the addressee of a Commission decision could not constitute the determining cause of the damage suffered as a result of illegalities vitiating that decision (see, to that effect, judgment of 16 July 2009, *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459, paragraph 205).

348 Similarly, when a decision requiring the payment of a fine is coupled with the option of lodging a security intended to ensure that payment along with interest on late payment, pending the outcome of an action brought against that decision, the loss consisting of the guarantee fees results, not from that decision, but from the interested party's own choice to lodge a security rather than to fulfil its repayment obligation immediately. In those circumstances, the Court found that there is no direct causal link between the conduct complained of on the part of the Commission and the damage alleged (see, to that effect, judgments of 28 February 2013, *Inalca and Cremonini* v *Commission*, C-460/09 P, EU:C:2013:111, paragraphs 118 and 120, and of 21 April 2005, *Holcim (Deutschland)* v *Commission*, T-28/03, EU:T:2005:139, paragraph 123, and order of 12 December 2007, *Atlantic Container Line and Others* v *Commission*, T-113/04, not published, EU:T:2007:377, paragraph 38).

349 That approach is applicable where, in similar circumstances, the alleged damage is the consequence not of the provision but of the maintenance of a bank guarantee, such damage being the consequence of the undertaking's own decision not to put an end to that guarantee despite the financial consequences which that entailed (see, to that effect, judgment of 13 December 2018, *European Union* v *Kendrion*, C-150/17 P, EU:C:2018:1014, paragraph 59).

350 Since the payment by UPS of a termination fee of EUR 200 million to TNT is the direct consequence of the agreement between those two undertakings, it has not been established that the infringement of UPS' procedural rights or the other infringements alleged by UPS are the determining cause of that damage. The claim for compensation for that damage must therefore be dismissed.

351 Lastly, as regards the loss of profit suffered on account of the fact that it was impossible to implement the proposed transaction, following written and oral questions put by the General Court, UPS states that that damage corresponds to the net value of the synergies which it hoped to achieve by means of that transaction or, at least, to the loss of opportunity to achieve such synergies.

352 The Commission disputes the admissibility of the line of argument alleging loss of opportunity and contends that the application was not based on such a claim, but on the certainty of having been deprived of the gains that were to result from the expected synergies.

353 As is apparent from the application, the applicant claims that, in the absence of one or more of the alleged infringements, it would have acquired TNT and realised the benefits stemming from the transaction. It thus alleges damage corresponding to an amount of EUR 1 638 million 'reflecting the net value of forgone cost synergies on an after-tax basis' following the prohibition of the transaction. The applicant's claim for damages is thus based on the belief that the illegalities which vitiate the decision at issue prevented it from acquiring TNT in connection with the concentration at issue. The purpose of such a claim must be interpreted as being not compensation for the loss of the opportunity to conclude that transaction, but compensation for the certain loss of the cost synergies. That is not called into question by the fact that, in response to questions put by the Court, the applicant stated that the claim for damages included, in a certain way, a loss of

opportunity. That new head of damage was pleaded out of time and is, accordingly, inadmissible (see, to that effect, judgment of 20 September 2011, *Evropaïki Dynamiki* v *EIB*, T-461/08, EU:T:2011:494, paragraph 210).

354 As regards the material damage linked to the loss of profit for which UPS seeks compensation, the decisive question is whether the infringement of UPS' procedural rights is the cause of that damage.

355 It cannot be presumed that, had UPS' procedural rights not been infringed, the concentration would have been declared compatible. The analysis of the causal link cannot start from the incorrect premiss that, in the absence of an unlawful measure, the institution would have refrained from acting or would have adopted a contrary measure, which could also amount to unlawful conduct on its part, but must be based on a comparison between the situation arising, for the third party concerned, from the wrongful measure and the situation which would have arisen for that third party if the institution's conduct had been in conformity with the law (judgment of 11 July 2007, *Schneider Electric* v *Commission*, T-351/03, EU:T:2007:212, paragraph 264).

356 Thus, the fact that the failure to communicate the econometric model led to the annulment of the decision at issue does not mean that, in the absence of that irregularity, the Commission would have been required to declare the transaction between UPS and TNT compatible with the internal market.

357 It is necessary, where there has been a breach of the rights of the defence affecting a decision declaring a merger of undertakings incompatible with the internal market, not to postulate that, in the absence of that breach, the notified concentration would have been declared compatible, explicitly or implicitly, but rather to assess the effects which the defect identified may have had on the decision that was reached. It is therefore necessary, in order to adjudicate on the existence of a sufficient causal link between the failure found and the damage claimed, to assess the impact of the infringements of the rights of the defence on the subsequent procedural stages of the investigation of the transaction (see, to that effect, judgment of 11 July 2007, *Schneider Electric* v *Commission*, T-351/03, EU:T:2007:212, paragraphs 266 and 268).

358 In the present case, although the alleged errors in the design of the econometric model used may have contributed to weakening its probative value, the applicant has neither proved, nor provided the Court with evidence which would enable it to conclude, with the requisite certainty, that those errors were sufficient to invalidate in its entirety the economic analysis of the transaction between UPS and TNT, as well as the finding of a significant impediment to effective competition. Furthermore, as is apparent from paragraphs 216 to 226 above, the Commission's decision not to clear the proposed concentration is based on the economic analysis of several factors, not only on the analysis carried out on the basis of the econometric model used. It cannot therefore be concluded that that infringement of the rights of the defence had a decisive impact on the outcome of the procedure for the control of the proposed operation.

359 In addition to the foregoing considerations, it must be borne in mind that an incompatibility decision remains in any event subject to review by the EU judicature (see, to that effect, judgment of 16 July 2009, *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459, paragraph 203).

360 Article 10(5) of Regulation No 139/2004 provides that, where the Court annuls a Commission decision, the concentration is to be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1) of that regulation. That mechanism thus guarantees that the undertaking which has notified a concentration can obtain, in compliance with the Court's decision, a fresh assessment of the notified concentration, since that transaction cannot, in any event, be implemented without prior control by the Commission.

361 If an undertaking which has notified a concentration decides not to go ahead with the concentration without waiting for a new Commission decision at the end of the resumed procedure, that decision is the direct cause of the abandonment of the transaction and of the possible material consequences thereof. That was the situation which gave rise to the judgment of 16 July 2009, *Commission* v *Schneider Electric* (C-440/07 P, EU:C:2009:459). In that case, after having obtained the annulment of the incompatibility decision by the Court, the undertaking which had notified a concentration preferred to abandon the proposed concentration before the resumed procedure was concluded. It has thus been held that the direct cause of the alleged damage relating to the loss in value of a transfer suffered after the annulment of a negative decision and a divestiture decision was the decision of the undertaking which had notified a concentration to allow completion of the transfer in question for fear of not obtaining, on resumption of the procedure, a decision upholding the compatibility of the concentration (see, to that effect, judgment of 16 July 2009, *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459, paragraphs 202 to 205).

362 In the present case, under Article 10(5) of Regulation No 139/2004, after the annulment of the decision at issue, the Commission should have resumed the procedure for the control of the concentration between UPS and TNT and, in compliance with the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), communicated to UPS the econometric model which it intended to use in order to quantify the foreseeable effect of the concentration on prices. It was also necessary for the Commission still to be competent to control the notified transaction. In the absence of a concentration, it does not have the competence to adopt a decision under Regulation No 139/2004 (see, to that effect, judgment of 28 September 2004, *MCI* v *Commission*, T-310/00, EU:T:2004:275, paragraph 96).

363 The merger protocol required UPS not only to declare a negative decision by the Commission preventing the condition precedent to which the purchase offer was subject from being met, but also that protocol (clause in paragraph 2.10.b of the protocol) provided in such a case that UPS could, at its sole discretion and subject to the agreement of the Netherlands Authority for the Financial Markets, extend its initial offer for one or more periods of time which the parties considered to be reasonably necessary in order for the condition precedent of a declaration of compatibility by the Commission to be met. The merger protocol thus gave UPS the option of extending its offer for TNT in the event of a declaration of incompatibility, at its sole discretion.

364 UPS announced, by press release of 14 January 2013, that it had been informed by the Commission of the latter's intention to prohibit the proposed transaction. In its press release, UPS reported the remarks made by its Chairman, stating unequivocally that it had taken the decision to abandon the proposed transaction. After the adoption of the decision at issue, UPS, by a second press release of 30 January 2013, announced, first, the withdrawal of its offer for TNT and, second, that the two undertakings had decided to terminate their merger protocol.

365 In those circumstances, it must be held that UPS decided as early as 14 January 2013 not to go ahead with its acquisition of TNT, that is to say, more than two years before FedEx announced its offer to purchase TNT. The facts also show that UPS never went back on that decision. UPS did not submit a new offer for TNT after the decision at issue or react to FedEx's offer by launching a competing offer. Thus, even if the irregularity committed by the Commission when it adopted the decision at issue could have caused UPS a loss of profit, the fact that that undertaking decided not to go ahead with the proposed transaction as soon as the decision at issue was announced had the effect of breaking any direct causal link between that irregularity and the damage alleged.

366 UPS submits, however, that, when the Court annulled the decision at issue, it was too late to launch a new offer, since FedEx had acquired TNT in the meantime. UPS considers that proceedings before the Court are not fit for the purpose of reviewing merger control decisions.

367 However, the fact that the annulment of the decision at issue occurred after FedEx's acquisition of TNT has no bearing on the alleged causal link between the procedural illegality found and the damage alleged. Apart from the fact that UPS abandoned its proposed acquisition of TNT more than two years before FedEx announced its offer for TNT and did not at any time submit a competing offer, it must be pointed out that, in view of the autonomous nature of the action for damages, UPS was under no obligation whatsoever to bring an action for annulment beforehand.

368 Furthermore, at the hearing, UPS argued that it was impossible for it to proceed with the concentration with TNT following the Commission's refusal, in view of the Netherlands legislation on public takeover bids. However, it should be noted that UPS' argument on that point is unsubstantiated, since UPS has not provided any national law in support of that argument, and does not, therefore, support the conclusion that it was constrained, independently of its wishes, to abandon the concentration with TNT.

369 As regards UPS' criticisms of the EU judicial system in general and the effectiveness of remedies in merger control in particular, they are not supported by any legal arguments. In so far as those criticisms may be understood as seeking to challenge the lawfulness of the system of legal remedies established by the FEU Treaty, on the ground that it does not ensure UPS effective judicial protection within the meaning of Article 47 of the Charter, it is sufficient to recall that the fact that the applicant may be unable to establish the existence of unlawful conduct on the part of the EU institutions, of the damage alleged and of a causal link between such conduct and such damage does not mean that it has been denied effective judicial protection (see, to that effect, judgment of 12 September 2006, *Reynolds Tobacco and Others* v *Commission*, C-131/03 P, EU:C:2006:541, paragraph 84).

370 Moreover, it is for the Member States alone to reform the system of remedies established by the Treaty, since such a power goes beyond the jurisdiction conferred by the Treaty on the Courts of the European Union (see, to that effect, judgment of 25 July 2002, *Unión de Pequeños Agricultores* v *Council*, C-50/00 P, EU:C:2002:462, paragraphs 44 and 45, and order of 24 November 2016, *Petraitis* v *Commission*, C-137/16 P, not published, EU:C:2016:904, paragraph 24).

371 It follows from the foregoing that it has not been established that the infringement of UPS' procedural rights or the other infringements alleged by UPS are the determining cause of its alleged loss of profit. The claim for compensation for that damage must therefore be dismissed.

372 In the light of all the foregoing considerations, the action must be dismissed in its entirety.

IV. Costs

373 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 135(2) of the Rules of Procedure, the Court may order a party, even if successful, to pay some or all of the costs, if this appears justified by the conduct of that party, including before the proceedings were brought, especially if that party has made the opposite party incur costs which the Court holds to be unreasonable or vexatious.

374 According to the case-law, Article 135(2) of the Rules of Procedure should be applied where the dispute is in part attributable to the conduct of an EU institution or body (judgments of 8 July 2015, *European Dynamics Luxembourg and Others* v *Commission*, T-536/11, not published, EU:T:2015:476, paragraph 391, and of 23 April 2018, *CRM* v *Commission*, T-43/15, not published, EU:T:2018:208, paragraph 105). In the present case, by failing to communicate the final version of the econometric model used in support of the decision at issue, the Commission placed UPS in a situation in which it was unable to understand the methodology on which the Commission relied in order to quantify the foreseeable effects of the proposed concentration on price levels. After obtaining the annulment of the decision at issue, UPS brought the present action seeking compensation for the damage which it claims to have suffered. UPS, although unsuccessful, has nevertheless demonstrated that the Commission committed a sufficiently serious breach of its procedural rights. In those circumstances, it is appropriate, pursuant to Article 135(2) of the Rules of Procedure, to order the Commission to bear its own costs and to pay one third of the costs incurred by UPS, and to order UPS to bear two thirds of its own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders the European Commission to bear its own costs and to pay one third of the costs incurred by United Parcel Service, Inc.;**

3. **Orders United Parcel Service to bear two thirds of its own costs.**

Papasavvas da Silva Passos Reine

Truchot Sampol Pucurull

Delivered in open court in Luxembourg on 23 February 2022.

E. Coulon S. Papasavvas
Registrar President

Table of contents