Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

21 December 2023*

(Appeal – Action for damages – Concentrations of undertakings – European Commission decision declaring the concentration to be incompatible with the internal market and the functioning of the EEA Agreement – Annulment of the decision on account of procedural defect – Non-contractual liability of the European Union – Causal link)

In Case C-297/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 May 2022,

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

appellant,

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, Z. Csehi (Rapporteur), M. Ilešič and I. Jarukaitis, Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, United Parcel Service Inc. ('UPS') asks the Court of Justice to set aside the judgment of the General Court of the European Union of 23 February 2022, *United Parcel Service* v *Commission* (T-834/17, 'the judgment under appeal', EU:T:2022:84), by which the General Court dismissed its action under Article 268 TFEU seeking compensation for the harm which it allegedly suffered 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 decision at issue').

Legal context

2 Article 7 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), entitled 'Suspension of concentrations', provides, in paragraph 1 thereof:

'A concentration with a Community dimension as defined in Article 1, or which is to be examined by the [European] Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).'

3 Article 10 of that regulation, entitled 'Time limits for initiating proceedings and for decisions', provides, in paragraph 5 thereof:

'Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1).

The concentration shall be re-examined in the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph.

The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7).'

Background to the dispute

4 The background to the dispute, as set out in paragraphs 1 to 13 of the judgment under appeal, is as follows:

'1 In the European Economic Area (EEA), the applicant, [UPS] 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) …

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 …

6 On 30 January 2013, the Commission adopted [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 [General] 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).'

The procedure before the General Court and the judgment under appeal

5 By application lodged at the Registry of the General Court on 29 December 2017, UPS brought an action seeking, first, compensation in the amount of EUR 1.742 thousand million for the damage which it allegedly suffered as a result of the unlawfulness of the decision at issue and, second, the grant of compensation for the taxes that will be imposed on the damages obtained.

6 According to the application, the alleged damage of EUR 1.742 thousand million was made up as follows:

– EUR 131 million, representing the net amount of the loss incurred by UPS as a result of the reverse break or termination fee (EUR 200 million gross) paid to TNT under the merger agreement for failure to complete the transaction;

– plus EUR 1.638 thousand million, reflecting the net value, after tax, of forgone cost synergies following the prohibition of the transaction;

– plus EUR 2.4 million, representing the legal fees incurred by UPS (EUR 3.7 million gross) relating to its intervention in the FedEx/TNT transaction;

– less EUR 29 million in avoided transaction costs (EUR 44.2 million gross).

7 By the judgment under appeal, the General Court dismissed UPS' action.

8 In the first place, as regards the illegalities resulting from the infringement of procedural rights, the General Court held, first, in paragraphs 94 and 123 of the judgment under appeal, that the infringement of UPS' rights of defence on account of the Commission's failure to communicate the final version of the econometric model had already been definitively established by the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144, paragraphs 221 and 222), which had become 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). According to the General Court, that infringement of UPS' rights of defence constitutes a sufficiently serious breach, on the part of the Commission, of a rule of EU law intended to confer rights on individuals.

9 Second, in paragraph 143 of the judgment under appeal, the General Court rejected as unfounded UPS' argument that the Commission also infringed UPS' procedural rights in the context of its efficiencies analysis on the ground that it failed to communicate the assessment criteria for those efficiencies.

10 Third, as regards the alleged infringement of procedural rights arising from a failure to communicate certain confidential FedEx documents, the General Court held, in paragraphs 172 and 182 of the judgment under appeal, that such infringement had not been established.

11 In the second place, as regards the alleged illegalities resulting from the alleged errors in the substantive assessment of the concentration, the General Court noted, first, in paragraph 228 of the judgment under appeal, having weighed up the interests involved, that the irregularities alleged by UPS in respect of the Commission's econometric model were not sufficiently serious to give rise to non-contractual liability on the part of the European Union.

12 Second, in paragraph 289 of the judgment under appeal, the General Court concluded that UPS had 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.

13 In the third place, as regards the existence of a causal link between the illegality resulting from the failure to communicate the econometric model and the three types of alleged damage for which UPS sought compensation on the ground that it was impossible to implement the proposed concentration, the General Court found, first of all, in paragraph 343 of the judgment under appeal, that the claim for compensation for damage concerning the costs associated with UPS' participation in the procedure for the control of the transaction between FedEx and TNT had to be dismissed.

14 Next, in paragraph 350 of the judgment under appeal, the General Court held that, since the payment by UPS of a termination fee of EUR 200 million to TNT was the direct consequence of the agreement between those two undertakings, it had not been established that the infringement of UPS' procedural rights or the other infringements alleged by UPS were the determining cause of that damage.

15 As regards, lastly, the loss of profit suffered by UPS on account of the fact that it was impossible to implement the proposed concentration, the General Court held, first, in paragraph 353 of the judgment under appeal, that the purpose of UPS' claim had to 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. Since it was only in response to questions put by the General Court that UPS had stated that the claim for damages included, in a certain way, a loss of opportunity, the General Court held that that new head of damage had been pleaded out of time and was, accordingly, inadmissible.

16 Second, in paragraphs 355 and 358 of the judgment under appeal, the General Court noted that UPS had neither proved, nor provided that court with evidence which enabled it to conclude, with the requisite certainty, that the alleged errors in the design of the econometric model used were sufficient to invalidate in its entirety the economic analysis of the proposed concentration, as well as the finding of a significant impediment to effective competition. The General Court also held, in the abovementioned paragraphs of the judgment under appeal, that it could not be concluded that the infringement of the rights of the defence had had a decisive impact on the outcome of the procedure for the control of the proposed operation.

17 Third, in paragraph 365 of the judgment under appeal, the General Court concluded that, since UPS decided as early as 14 January 2013 not to go ahead with its proposed acquisition of TNT, 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 had the effect of breaking any direct causal link between that irregularity and the damage alleged.

18 In paragraph 371 of the judgment under appeal, the General Court concluded that it had not been established that the infringement of UPS' procedural rights or the other infringements alleged by UPS were the determining cause of its alleged loss of profit, and that the claim for compensation for that damage therefore had to be dismissed.

Forms of order sought by the parties before the Court of Justice

19 UPS claims that the Court should:

– set aside the judgment under appeal;

– award UPS compensation together with applicable interest for the damage suffered, as claimed at first instance, in accordance with the procedure provided for under Article 340 TFEU;

– in the alternative, refer the case back to the General Court; and

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

20 The Commission contends that the Court should:

– dismiss the appeal; and

– order UPS to pay the costs.

The appeal

21 In support of its appeal, UPS raises six grounds. The first ground of appeal alleges that the General Court erred in law, first, in holding that the serious errors attributable to the Commission in relation to the econometric model used by that institution were not such as to give rise to non-contractual liability on the part of the European Union and, second, in concluding that there was no causal link with the alleged damage. The second ground of appeal alleges that the General Court erred in law in finding that the termination fee was irrecoverable since it had been concluded voluntarily. The third ground of appeal alleges that the General Court erred in law in holding that the causal link between the serious infringement committed by the Commission and the damage relating to the loss of profit had been broken as a result of the actions taken by UPS following the decision at issue. The fourth ground of appeal alleges that the General Court erred in law in holding that the Commission had discretion to accept efficiencies and thus that the Commission did not commit a sufficiently serious error as regards the assessment of efficiencies. The fifth ground of appeal alleges that the General Court erred in law in holding that UPS had not submitted to the hearing officer the necessary requests for FedEx documents. The sixth ground of appeal alleges that the General Court erred in law in finding that the damage resulting from the loss of opportunity constituted a new head of damage which was, accordingly, inadmissible.

The third ground of appeal

Arguments of the parties

22 By its third ground of appeal, which it is appropriate to examine in the first place, UPS complains, in essence, that the General Court erred in law, in paragraphs 364 and 365 of the judgment under appeal, in stating that the actions taken by UPS following the decision at issue had had the effect of breaking the direct causal link between the serious infringement committed by the Commission and the damage relating to the loss of profit suffered by UPS on account of the fact that it was impossible to implement the proposed concentration. According to UPS, the actions which it took were the direct consequence of the decision at issue.

23 UPS submits, in the first place, that, by concluding that UPS had decided to ‘abandon’ the proposed concentration, the General Court erred in law in that it reached a legally incorrect conclusion based on a manifestly distorted understanding of the available evidence. UPS

maintains that it did not abandon its proposed acquisition, since it sought the annulment of the decision at issue before the General Court and applied for an expedited procedure. In addition, UPS argues that it was contractually committed to proceed with its offer provided that the Commission did not prohibit it. It submits that, by a press release of 14 January 2013, it informed capital markets that, if the Commission were indeed to adopt a prohibition decision, UPS would then be legally unable to complete the offer which would lapse in accordance with its contractual terms. UPS states that, subsequently, on 30 January 2013, the date of the decision at issue, it published a press release explaining the necessary contractual steps taken as a result of that decision. As regards those contractual steps, UPS maintains that the General Court cannot penalise it for taking the action necessary to act in accordance with Article 7 of Regulation No 139/2004, which provides that concentrations that have been prohibited cannot be implemented.

24 In the second place, UPS claims that the General Court's conclusion that the causal link between the serious error committed by the Commission and the damage relating to the loss of profit suffered by UPS on account of the fact that it was impossible to implement the proposed concentration was broken because it had not submitted a second offer for the acquisition of TNT or launched a competing offer in reaction to the offer from FedEx, is erroneous and does not reflect business reality.

25 First, UPS submits that it had no expectation of a different outcome since the proceedings for annulment of the decision at issue were still pending and the Commission was vigorously defending the lawfulness of that decision. Moreover, it argues that no party can be required to keep notifying the transaction in the hope of finally obtaining approval, regardless of whether that were possible under the rules on public takeover offers, from a commercial perspective or otherwise.

26 Second, apart from the fact that, according to UPS, such a new offer would not have been approved or would have been highly unlikely to be approved by the Netherlands financial regulatory authority under the Netherlands rules on public takeover offers, which required that authority to approve a public takeover offer memorandum before a party could proceed with that takeover, UPS maintains that it is incorrect and unrealistic to suggest that it could have launched a revised offer before the General Court annulled the decision at issue.

27 Third, it submits that, by the time the General Court annulled the decision at issue, TNT had been acquired by FedEx and it was no longer possible for UPS to bid to acquire TNT. According to UPS, in those circumstances, it was also prevented from asking the Commission to resume its assessment of a UPS bid for TNT. It argues that the General Court agreed to give the procedure priority treatment but that the annulment did not occur until over one year after FedEx acquired TNT.

28 The Commission contends that the third ground of appeal is, in part, inadmissible and, in part, unfounded.

Findings of the Court

29 It should be recalled, as a preliminary point, that, according to settled case-law, where the General Court has established or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU solely to review their legal characterisation and the legal conclusions which were drawn from them (judgment of 14 October 2021, *NRW.Bank* v *SRB*, C-662/19 P, EU:C:2021:846,

paragraph 35). The assessment of the facts is not therefore, other than in cases where the evidence produced before the General Court has been distorted, a point of law which is subject, as such, to review by the Court of Justice (judgment of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 68).

30 Where an appellant alleges distortion of the evidence by the General Court, that party must, pursuant to Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice, indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in that party's view, led to such distortion. In addition, according to settled case-law, that distortion must be obvious from the documents in the Court's file, without any need to carry out a new assessment of the facts and the evidence (judgment of 10 November 2022, *Commission* v *Valencia Club de Fútbol*, C-211/20 P, EU:C:2022:862, paragraph 55 and the case-law cited).

31 Such distortion presupposes that the General Court has manifestly exceeded the limits of a reasonable assessment of the evidence. In that regard, it is not sufficient to show that a document could be interpreted differently from the interpretation adopted by the General Court (judgments of 28 January 2021, *Qualcomm and Qualcomm Europe* v *Commission*, C-466/19 P, EU:C:2021:76, paragraph 44, and of 16 February 2023, *Commission* v *Italy*, C-623/20 P, EU:C:2023:97, paragraph 128).

32 In this instance, by the present ground of appeal, UPS does not complain that the General Court erred in its legal characterisation of the facts in holding, in paragraph 365 of the judgment under appeal, that the fact that UPS decided not to go ahead with the proposed concentration aimed at acquiring TNT as soon as the decision at issue was announced, and therefore well before FedEx announced its offer to purchase TNT, constitutes an act which broke the direct causal link between the irregularity committed by the Commission when it adopted the decision at issue and the damage alleged. By contrast, UPS does complain that the General Court distorted the evidence when it held, in paragraphs 364 and 365 of the judgment under appeal, that UPS had decided not to go ahead with that transaction.

33 In that regard, it should be noted that, in paragraphs 364 and 365 of the judgment under appeal, the General Court observed, in its assessment of the facts against which there is no appeal, that UPS, by its first press release of 14 January 2013, had stated unequivocally that it had taken the decision to abandon the proposed concentration with TNT and, by a second press release of 30 January 2013, had announced the withdrawal of its offer for TNT and the decision of those two undertakings to terminate their merger protocol. The General Court thus found, in its absolute discretion, that UPS had decided as early as 14 January 2013 not to go ahead with its acquisition of TNT and that it had never gone back on that decision, which was also demonstrated by the fact that 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.

34 It must be stated that, by the arguments which it develops in support of the present ground of appeal, UPS merely puts forward an interpretation of the documents, namely, in the present case, the press releases of 14 and 30 January 2013, and of the factual circumstances surrounding those press releases, which is different from the interpretation adopted in the judgment under appeal, without establishing in that regard that the General Court obviously distorted the documents in the case file and exceeded the limits of a reasonable assessment of the evidence by concluding that UPS had decided not to go ahead with the concentration at issue. In that respect, it should

also be noted that UPS does not complain that the General Court distorted the evidence when it held, in paragraph 363 of the judgment under appeal, that the merger protocol of 19 March 2012 gave UPS the option of extending its offer for TNT in the event of a declaration of incompatibility, at its sole discretion.

35 As regards the line of argument, put forward in that context by UPS, concerning the relevance of the fact that no second offer to acquire TNT or competing offer in reaction to FedEx's offer was submitted, it also cannot demonstrate that there was distortion. By that line of argument, UPS, far from calling into question the factual assessment made by the General Court in paragraph 365 of the judgment under appeal, according to which UPS neither submitted a second offer to acquire TNT nor launched a competing offer in reaction to FedEx's offer, acknowledges the accuracy of that assessment of the facts, merely relying on circumstances which, according to UPS, justify such facts.

36 In those circumstances, the third ground of appeal must be rejected as unfounded.

The second ground of appeal

Arguments of the parties

37 By its second ground of appeal, UPS complains, in essence, that the General Court erred in law, in paragraphs 346, 347 and 350 of the judgment under appeal, in rejecting the existence of a causal link between the sufficiently serious error attributable to the Commission and the termination fee on the sole ground that that fee had been freely consented to.

38 UPS submits, first of all, that, when the damage suffered by a private individual is directly caused by a sufficiently serious error on the part of an EU institution, the non-contractual liability of the European Union is incurred, irrespective of the fact that the act from which the damage originates is a contract between individuals where the underlying obligation was concluded prior to that sufficiently serious error being committed. In that regard, UPS states that, if the General Court's reasoning were followed, the European Union would never be liable for damage suffered by individuals as a result of a sufficiently serious error attributable to an institution where the individuals involved entered into an underlying contractual relationship willingly or with consent. It maintains that the General Court considered the alleged willingness and free consent of individuals affected by an act of an EU institution to be decisive factors for determining the existence of a causal link. UPS argues, however, that Article 340 TFEU does not in any way exclude from its ambit compensation for heads of damage linked to contractual arrangements between individuals that have been entered into willingly and with free consent.

39 Next, according to UPS, although the existence of a termination fee stems from the merger protocol of 19 March 2012, that is not the case as regards the payment of that fee, which was caused by the decision at issue. In that regard, it submits that the present case is distinguishable from that which gave rise to the judgment of 16 July 2009, *Commission* v *Schneider Electric* (C-440/07 P, EU:C:2009:459). UPS argues that, in that case, Schneider could have avoided the loss alleged if it had continued with the merger control procedure in order to obtain approval for the acquisition of Legrand after the annulment by the General Court of the prohibition of the concentration already implemented, but it chose to abandon the procedure. However, UPS maintains that, in the present case, it could not have avoided payment of the termination fee in view of the fact that that fee was, in practice, mandatory.

40 Lastly, UPS submits that the General Court failed to address its argument that the inclusion of the termination fee in the merger protocol of 19 March 2012 was, in practice, mandatory. In that regard, UPS states that the argument that the termination fee is irrecoverable on the sole ground that the fee had been freely consented to is incorrect. It argues that, in practice, undertakings targeted by a public takeover bid insist upon the inclusion of a termination fee.

41 The Commission contends that that ground of appeal should be rejected as unfounded.

Findings of the Court

42 As a preliminary point, it should be noted that the General Court found, in paragraphs 344 and 345 of the judgment under appeal, that the payment of the termination fee stemmed from a contractual obligation arising from the terms of the merger protocol of 19 March 2012. That protocol provided that UPS' public takeover bid for TNT's share capital was concluded subject to the condition precedent of clearance from the Commission and that the failure to fulfil that condition constituted a ground for termination of the merger protocol, enabling TNT to obtain, upon first request, the payment by UPS of a termination fee of EUR 200 million.

43 In paragraphs 346 and 347 of the judgment under appeal, the General Court stated that that contractual commitment was 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 was pointed out by the Court of Justice in paragraph 203 of the judgment of 16 July 2009, *Commission* v *Schneider Electric* (C-440/07 P, EU:C:2009:459), is inherent in every merger control procedure. The General Court stated, referring to paragraph 205 of the abovementioned judgment, 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.

44 In the first place, with regard to the complaint raised by UPS, as summarised in paragraph 38 above, it must be held that the judgment under appeal cannot be interpreted as seeking to preclude the liability of an EU institution in all cases where the alleged damage is based on contractual relationships. It is true that, taken in isolation, the General Court's observation, in paragraph 347 of the judgment under appeal, 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, could support such an interpretation. However, and as is apparent from a reading of paragraphs 344 to 347 of the judgment under appeal, taken as a whole, the General Court's reasoning is specific to the contractual clause at issue in the present case, by which the parties divided among themselves, at their discretion, the risk that the proposed transaction would not obtain prior approval from the Commission, by fixing a lump sum of EUR 200 million.

45 In the second place, as regards UPS' argument relating to the claim that a termination fee is, in practice, mandatory, it is sufficient to note that that argument seeks to call into question the finding made by the General Court in paragraphs 346 and 347 of the judgment under appeal, in its assessment of the facts against which there is no appeal, according to which the termination fee agreed in the present case was freely consented to, without alleging or demonstrating the slightest distortion.

46 Consequently, that argument is, in accordance with the case-law referred to in paragraph 29 above, inadmissible at the appeal stage.

47 In the third place, as regards the complaint alleging a failure to state reasons in that the General Court did not address UPS' argument that the fee had not been freely consented to but was, in practice, mandatory, it should be borne in mind that the obligation on the General Court to state reasons under the second paragraph of Article 296 TFEU and Article 36 of the Statute of the Court of Justice of the European Union requires it to disclose in a clear and unequivocal manner the reasoning that it has followed, in a way that allows the interested parties to understand the justification for the decision taken and permits the Court of Justice to exercise its powers of review. That obligation does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to understand the grounds of the General Court's judgment and provides the Court of Justice with sufficient information to exercise its powers of review when examining an appeal (judgment of 2 February 2023, *Spain and Others* v *Commission*, C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paragraph 113 and the case-law cited).

48 In the present case, it is sufficient to note that the General Court specifically addressed UPS' argument that the fee was, in practice, mandatory, by stating, in paragraph 346 of the judgment under appeal, that the contractual commitment to divide among UPS and TNT 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, had been freely consented to.

49 Accordingly, the second ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

The first part of the first ground of appeal

Arguments of the parties

50 By the first part of the first ground of appeal, UPS complains, in essence, that the General Court, in particular in paragraphs 356 to 358 of the judgment under appeal, erred in law and distorted the decision at issue in holding that the econometric model used by the Commission was only one of the factors justifying the prohibition and that UPS had not demonstrated that the serious errors of law identified had a decisive impact on the outcome of the decision at issue.

51 The Commission contends that that part of the ground of appeal is, in part, inadmissible and, in part, unfounded.

Findings of the Court

52 It should be recalled that the General Court held, in paragraphs 354 to 358 of the judgment under appeal, that the sufficiently serious breach of UPS' procedural rights, as established in paragraph 123 of that judgment, or the alleged errors in the design of the econometric model

used by the Commission, could not be regarded as being the cause of the material damage linked to the loss of profit suffered by UPS on account of the fact that it was impossible to implement the proposed concentration.

53 The General Court concluded, in paragraph 365 of the judgment under appeal, that, 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.

54 Since, as is apparent from the grounds set out in paragraphs 32 to 36 above, the arguments by which UPS disputed that finding made by the General Court in paragraph 365 of the judgment under appeal have been rejected, it must be stated that paragraphs 355 to 358 of the judgment under appeal are included purely for the sake of completeness as regards the assessment of the causal link between the infringement of UPS' procedural rights or the other alleged infringements committed by the Commission, on the one hand, and the alleged material damage linked to the loss of profit suffered by UPS on account of the fact that it was impossible to implement the proposed concentration, on the other.

55 According to the settled case-law of the Court of Justice, arguments directed against grounds included in a decision of the General Court purely for the sake of completeness cannot lead to the decision being set aside and are therefore ineffective (order of 17 January 2023, *Theodorakis and Theodoraki* v *Council*, C-137/22 P, EU:C:2023:41, paragraph 43 and the case-law cited).

56 It follows that the first part of the first ground of appeal must be rejected as ineffective.

The second part of the first ground of appeal and the fourth and fifth grounds of appeal

Arguments of the parties

57 By the second part of the first ground of appeal, UPS submits that the General Court erred in law in finding, in paragraphs 216 and 226 of the judgment under appeal, that the mere fact that the Commission used an econometric model vitiated by irregularities, namely a non-standard method based on untested and unverified assumptions, without examining the reliability of its results and the sensitivity of the model, is not a sufficient basis for concluding that those irregularities are sufficiently serious to give rise to non-contractual liability on the part of the European Union.

58 By the fourth ground of appeal, which is divided into three parts, UPS maintains that the General Court erred in law, in particular in paragraphs 124 to 143 and in paragraphs 229 to 289 of the judgment under appeal, in the assessment of efficiencies.

59 By the fifth ground of appeal, UPS complains, in essence, that the General Court erred in law, in paragraphs 172, 182 and 183 of the judgment under appeal, in concluding that UPS had not been sufficiently specific in its requests for access to documents concerning FedEx's competitiveness, which had caused it to lose its right of access to certain FedEx documents.

60 The Commission disputes all the arguments put forward in the context of that part and of those grounds of appeal.

Findings of the Court

61 As was recalled by the General Court in paragraph 82 of the judgment under appeal, it is apparent from the settled case-law of the Court of Justice that the European Union may incur non-contractual liability under the second paragraph of Article 340 TFEU only if a number of conditions are satisfied, namely the unlawfulness of the conduct alleged against the EU institution, the fact of damage and the existence of a causal link between the conduct of that institution and the damage complained of. As the Court of Justice has previously held, if any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability on the part of the European Union (judgment of 25 February 2021, *Dalli* v *Commission*, C-615/19 P, EU:C:2021:133, paragraphs 41 and 42 and the case-law cited). Nor is the EU judicature required to examine those conditions in any particular order (judgment of 5 September 2019, *European Union* v *Guardian Europe and Guardian Europe* v *European Union*, C-447/17 P and C-479/17 P, EU:C:2019:672, paragraph 148 and the case-law cited).

62 Since the second and third grounds of the present appeal have been rejected, it must be held that the findings made by the General Court in paragraphs 350 and 365 of the judgment under appeal, according to which the causal link has not been established either in relation to the alleged damage consisting of the payment of the termination fee or in relation to the alleged loss of profit suffered by UPS on account of the fact that it was impossible to implement the proposed concentration, have not been effectively challenged by UPS. In addition, the General Court's findings in paragraph 343 of the judgment under appeal concerning the absence of a causal link in respect of the damage relating to the costs associated with UPS' participation in the procedure for the control of the transaction between FedEx and TNT have not been called into question by UPS.

63 Accordingly, the General Court was correct in establishing, in the judgment under appeal, that there was no causal link in relation to the three separate types of damage alleged.

64 It is settled case-law that, in the context of an appeal, where one of the grounds adopted by the General Court is sufficient to sustain the operative part of its judgment, any defects that might vitiate other grounds of the judgment concerned cannot influence that operative part and, accordingly, a plea relying on such defects is ineffective and must be dismissed (judgment of 14 October 2014, *Buono and Others* v *Commission*, C-12/13 P and C-13/13 P, EU:C:2014:2284, paragraph 47 and the case-law cited; see, to that effect, judgment of 28 October 2021, *Vialto Consulting* v *Commission*, C-650/19 P, EU:C:2021:879, paragraph 86).

65 In those circumstances, the arguments by which UPS seeks to demonstrate, in the context of the second part of the first ground of appeal and the fourth and fifth grounds of appeal, the existence of sufficiently serious breaches of rules of law that are additional to the infringement concerning the rights of the defence, which was definitively established by the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144, paragraphs 221 and 222), even if they were well founded, cannot lead to the judgment under appeal being set aside. Those arguments must therefore be rejected as ineffective.

The sixth ground of appeal

Arguments of the parties

66 By its sixth ground of appeal, UPS complains that the General Court erred in law, in paragraph 353 of the judgment under appeal, in concluding that the damage claimed under the head of loss of profit pertained solely to the total estimated loss of synergies, and that any claim for compensation made to the General Court in an amount below that total estimated loss of profit would constitute a new head of damage which would be inadmissible due to being pleaded out of time. In particular, UPS submits that, if, according to the General Court, UPS is not entitled to full compensation for the alleged loss resulting from forgone synergies, it would of course be for that court to determine, in the exercise of its unlimited jurisdiction, to what extent the compensation to be awarded should be less than the total amount claimed.

67 The Commission contends that that ground of appeal must be rejected as unfounded.

Findings of the Court

68 It should be noted that UPS' line of argument is based on the premiss that, contrary to what the General Court held in paragraph 353 of the judgment under appeal, the material damage linked to the loss of profit includes the damage resulting from the loss of opportunity which, accordingly, is a *minus* in relation to the damage initially claimed, that is to say, an amount lower than the total amount claimed.

69 However, it is apparent from paragraphs 5 and 6 above that the General Court was correct to hold, in paragraph 353 of the judgment under appeal, that the claim for compensation for the loss of opportunity constituted a new head of damage, which had not been raised in the application. Since the damage linked to the loss of the opportunity to implement the proposed concentration is fundamentally distinct from the damage linked to the loss of profit resulting from the prohibition of that concentration, the first head of damage cannot be regarded as constituting a *minus* in relation to the second. The General Court therefore did not err in law in finding that the head of damage linked to the loss of opportunity, which had been raised in the proceedings before the General Court only in response to questions put by that court, was pleaded out of time and was, accordingly, inadmissible (see, to that effect, judgments of 27 January 2000, *Mulder and Others* v *Council and Commission*, C-104/89 and C-37/90, EU:C:2000:38, paragraph 47, and of 7 November 2019, *Rose Vision* v *Commission*, C-346/18 P, EU:C:2019:939, paragraph 43).

70 Consequently, the sixth ground of appeal must be rejected.

71 Since none of the grounds relied on by UPS in support of its appeal has been upheld, that appeal must be dismissed in its entirety.

Costs

72 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.

73 Under Article 138(1) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

74 Since UPS has been unsuccessful and the Commission has applied for costs to be awarded against it, it must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders United Parcel Service Inc. to pay the costs.

Regan Lenaerts Csehi

Ilešič Jarukaitis

Delivered in open court in Luxembourg on 21 December 2023.

A. Calot Escobar
Registrar

E. Regan
President of the Chamber