



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

7 March 2017*

(Competition — Mergers — Regulation (EC) No 139/2004 — International express small package delivery services in the EEA — Acquisition of TNT Express by UPS — Decision declaring the merger incompatible with the internal market — Likely effects on prices — Econometric analysis — Rights of defence)

In Case T-194/13,

United Parcel Service, Inc., established in Atlanta, Georgia (United States), represented initially by A. Ryan, B. Graham, Solicitors, W. Knibbeler and P. Stamou, lawyers, and then by A. Ryan, W. Knibbeler, P. Stamou, A. Pliego Selie, F. Hoseinian and P. van den Berg, lawyers,

applicant,

v

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

defendant,

supported by

FedEx Corp., established in Memphis, Tennessee (United States), represented initially by F. Carlin, Barrister, G. Bushell, Solicitor, and Q. Azau, lawyer, then by F. Carlin, G. Bushell and N. Niejahr, lawyer,

intervener,

APPLICATION pursuant to Article 263 TFEU for annulment 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 (Fourth Chamber),

composed of M. Prek, President, I. Labucka (Rapporteur) and V. Kreuschitz, Judges,

Registrar: L. Grzegorzcyk, Administrator,

having regard to the written part of the procedure and further to the hearing on 6 April 2016,

* * Language of the case: English.

gives the following

Judgment

Background to the dispute

1. Parties to the concentration

- 1 United Parcel Service, Inc. ('UPS' or 'the applicant') and TNT Express NV ('TNT') operate on a global level in the specialist transport and logistics services sector.
- 2 In the European Economic Area (EEA), UPS and TNT (together 'the parties to the merger') are present on the international express small package delivery markets.
- 3 Those services involve an undertaking by the service provider to deliver small packages to another country in one day.
- 4 They are provided by international air and land distribution networks which rely on the integration of a certain number of assets (in particular local sorting centres, land-based and air hubs, road vehicles and aeroplanes).
- 5 FedEx Corp. ('FedEx' or 'the intervener') and DHL also operate on the markets for those services in the EEA.

2. Administrative procedure

- 6 On 15 June 2012, the applicant notified the European Commission of its proposed acquisition of TNT ('the merger') under Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1; 'the Merger Regulation'), as implemented by Commission Regulation (EC) No 802/2004 of 21 April 2004 (OJ 2004 L 133, p. 1).
- 7 By the merger, UPS envisaged obtaining control over the whole of TNT, within the meaning of Article 3(1)(b) of the Merger Regulation, through a takeover bid under Netherlands law.
- 8 By decision of 20 July 2012, the Commission found that the merger gave rise to serious doubts as to its compatibility with the internal market and decided to initiate detailed investigation proceedings in accordance with Article 6(1)(c) of the Merger Regulation.
- 9 On 26 July and 5 September 2012, the Commission extended the period for adopting a final decision by ten working days, pursuant to the second subparagraph of Article 10(3) of the Merger Regulation.
- 10 On 19 October 2012, the Commission sent the parties to the merger a statement of objections ('the SO'), in accordance with Article 18 of the Merger Regulation.
- 11 The parties to the merger replied to the SO on 6 November 2012.
- 12 On 12 November 2012, a hearing was held during which the applicant, assisted by its external economic counsel, was heard.
- 13 In addition, third parties demonstrating a sufficient interest, including DHL and FedEx, were allowed to submit their observations.

- 14 During the administrative procedure, FedEx also took part in a number of meetings with the Commission and submitted various observations and internal documents to it.
- 15 On 26 and 29 October 2012, the Commission authorised the applicant's external legal counsel to examine, in a data room, confidential extracts from internal documents provided by FedEx.
- 16 On 29 November 2012, the applicant presented a first series of commitments, pursuant to Article 8(2) of the Merger Regulation, with a view to rendering the merger compatible with the internal market.
- 17 On 16 December 2012, the applicant proposed a second series of commitments.
- 18 On 21 December 2012, the Commission sent a letter of facts to the applicant.
- 19 On 3 January 2013, the applicant proposed a third series of commitments.
- 20 By Decision C(2013) 431 of 30 January 2013, the Commission declared that the notified merger was incompatible with the internal market and with the EEA agreement (Case COMP/M.6570 — UPS/TNT Express) ('the contested decision').

3. The contested decision

- 21 By the contested decision, the Commission declared the merger incompatible with the internal market and with the Agreement on the European Economic Area pursuant to Article 8(3) of the Merger Regulation, considering that the merger would constitute a significant impediment to effective competition ('SIEC') in 15 EEA Member States, but not in 14 other States.
- 22 In the contested decision, the Commission referred to considerations relating to the markets in question, to the effects of the merger on competition and to the commitments proposed by the parties to the merger.

The markets

Supply

- 23 In recitals 17 to 35 of the contested decision, the Commission considered that the merger would not cause a SIEC on the air freight, freight forwarding and contract logistics markets.
- 24 In the contested decision, the Commission described the small package transport industry (recitals 36 to 48) and analysed the economies of scale of the services in question in the light of network density and territorial coverage (recitals 49 to 56).
- 25 In recitals 57 to 60 of the contested decision, the Commission emphasised that the services in question were highly differentiated in terms of speed of delivery, geographic coverage at the place of origin and at the location of destination, and quality as regards reliability, security, pick up times, comprehensiveness and tracking.
- 26 In the contested decision, the Commission analysed the market for small package transport services on the supply side, and distinguished the integrators, which it described as follows:
- '(62) Integrators are characterised by five basic elements: first, ownership of or full operational control over all transportation assets, including an air network with scheduled flights, through which a large proportion of the volumes handled by the company is carried. Second, a sufficient

geographic coverage on a global level. Third, a hub and spoke operating model. Fourth, a proprietary IT network, such that all relevant data runs across one network. Fifth and finally, integrators have the reputation of credibly delivering parcels on time (so-called 'end-to-end' credibility). There are four integrators in the whole world, all of which operate in Europe: UPS, TNT, DHL and FedEx.

(63) The main differentiation factor of an integrator is that it has operational control over the whole logistics of the small package delivery from origin to destination (including air transport) so that it can ensure delivery in accordance with a time commitment. The integrator deals with the sender of the consignment, uses its own resources to provide all the various steps in the cargo chain and delivers the consignment to the recipient. The ownership or at least an operational control of all the resources needed to make a delivery means that there are fewer steps in the otherwise very long chain of companies involved.'

27 In that category, the Commission placed UPS (recitals 64 to 67), TNT (recitals 68 to 71), DHL (recitals 73 to 77) and FedEx (recitals 78 to 81).

28 The Commission distinguished, first, the integrators, secondly, the incumbent postal operators, including Royal Mail, La Poste, PostNL and Austrian Post, which are also international network operators (recitals 82 to 84), thirdly, the national small package delivery companies, which also operate — to a lesser extent than the integrators and on the basis of partnerships — on the markets for the services in question (recitals 85 and 86), fourthly, the freight forwarders, which also operate on those markets, often by outsourcing those activities to the integrators (recital 87), fifthly, the smaller courier companies, which operate on the basis of close relationships with local customers (recital 88) and, sixthly, the intermediaries reselling the services in question (recital 89).

Demand

29 In recitals 90 to 94 of the contested decision, the Commission analysed the market for small package transport services on the demand side and noted a great deal of fragmentation. It found that the demand was made up of occasional customers and large international customers, the latter representing a significant share of the revenues of suppliers on the markets in question. It also noted that the demand was made up of express services and deferred services and that it was very variable in terms of origin-destination country pairs. Lastly, it noted that the demand consisted in the use of one or more suppliers depending on the services in question and on the size and preferences of customers, smaller customers generally preferring to use a single supplier for all services (bundling), whereas larger customers used the same supplier for all services (bundling), different suppliers for different services, or different suppliers for the same services.

30 In recital 95 of the contested decision, the Commission stated that it was apparent from its market investigation that the use of a single supplier for all services (bundling) was not a prominent feature.

31 The Commission indicated, in recital 96 of the contested decision, that it had not reported the details of its market investigation in the SO because the results were inconclusive in identifying a general trend, with the exception of the fact that large customers tend to use different suppliers.

32 In recital 97 of the contested decision, the Commission rejected the arguments of the parties to the merger according to which the use of a single supplier for all services would generate competitive pressure on the price of each service.

Price setting

- 33 In recitals 98 to 151 of the contested decision, the Commission examined the price setting process on the market for small package transport services.
- 34 It noted the existence of individual negotiations with the majority of customers (recitals 114 and 115), the importance of each customer's profile (recitals 116 to 123), the consideration of competitive constraints and of customers' willingness to pay (recitals 124 to 131) and the fact that the price differences could not be fully explained by cost differences (recitals 132 to 134).
- 35 After setting out the views of the parties to the merger (recitals 135 to 147), the Commission found that price discrimination occurred (recitals 148 to 151).

Definition of the relevant market

- 36 In the contested decision, the Commission defined the relevant market, materially and geographically, as regards the services concerned, namely the transport of small packages — not freight — (recitals 152 to 164) from one country to another within the EEA — not domestic transport or international transport outside the EEA — (recitals 165 to 187), using express services — not deferred services — (recitals 188 to 226), irrespective of the distance travelled (recitals 227 to 231) or the quality of service (recitals 232 to 237), contracts being negotiated at the national level for this type of service (recitals 239 to 243).
- 37 Thus, the Commission found that the services in question were intra-EEA international express small package delivery services ('the services in question').

The effects of the merger on competition

- 38 By way of introduction, and in order to summarise its overall assessment, the Commission, in recital 244 of the contested decision, stated the following:
- '(244) Although the relevant geographic markets are national, it is worth assessing the intra-EEA express deliveries market for small parcels first from a pan-European perspective. Intra-EEA express is a network industry — as acknowledged by UPS — requiring operators to ensure a presence in all countries. The required presence in turn entails investments in infrastructure all along the value chain (from pick-up, sorting, line-hauls, hubs, air network, planes and delivery). Although these investments can be reduced through outsourcing of parts of the value chain to third parties, outsourcing reduces the control over the network and ultimately the quality of the services rendered as well as operational efficiency. The companies offering high-end services in the EEA express delivery industry with a seamless express network covering all EEA countries, are the integrators that have the tightest control over their network. As such, the non-integrated players are unable to exert a sufficient competitive constraint on integrators. The smallest integrator on the European market, FedEx, is not a sufficient competitive constraint on the merging parties and DHL. In addition, no future entry of sufficient magnitude or possible expansion by existing players like FedEx appears likely and timely enough to defeat the harmful effects expected from the loss of competition caused by the transaction. In addition, neither buyer power nor efficiencies would appear sufficient to counter balance the loss of competition in the timeframe relevant for the assessment of this concentration.'

The non-integrators

39 In recitals 245 to 510 of the contested decision, the Commission found that the companies without an integrated network for small package delivery ('the non-integrators') exerted weak competitive pressure.

– The subsidiaries of La Poste and Royal Mail

40 As regards the subsidiary of La Post, DPD, and that of Royal Mail, GLS, the Commission noted their narrow geographic coverage (recitals 253 to 284), the perception of customers in terms of alternatives to the integrators (recitals 285 to 295), in particular as regards the quality of services (recitals 396 to 411), in relation inter alia to delivery times (recitals 412 to 420), their absence from long-haul markets (recitals 296 to 309) and their road transport networks which allowed them to provide express services only over short distances (recitals 310 to 318).

41 The Commission also considered that the supply of the services in question using sub-contractors for air transport revealed structural disadvantages vis-à-vis the integrators (recitals 319 to 374) and that an extension of the geographic coverage of the subsidiary of La Poste, DPD, and that of Royal Mail, GLS, was unlikely (recitals 375 to 395).

42 On the basis of its market investigation, the Commission found that the customers of the parties to the merger had used DPD and GLS for domestic and standard services (recitals 421 to 423), the information provided by the parties to the merger on multi-sourcing confirming the limited presence of the subsidiaries of La Poste and Royal Mail on the markets for the services in question (recitals 424 to 426).

43 In support of its analysis, the Commission referred to empirical evidence on the presence and activities of the subsidiaries of La Poste and Royal Mail, as provided by UPS (recitals 424 to 434), by TNT (recitals 435 to 439), by FedEx and by DHL (recitals 440 to 450), in order to support its conclusion concerning the weak competitive pressure exerted by the subsidiaries of La Poste and Royal Mail (recitals 451 and 452).

– Other postal operators

44 In recitals 453 to 468 of the contested decision, the Commission stated that most, if not all, postal operators in Europe provided express small package delivery services, but that only the subsidiaries of La Poste and Royal Mail had developed a pan-European footprint allowing them to compete, to a limited extent, with the integrators on the markets for the services in question (recital 453), which was also the case as regards Austrian Post (recital 455), PostNL (recital 456), Posten Norge (recital 457) and PostNord (recital 458).

45 In recital 459 of the contested decision, the Commission noted that, although almost all the public postal operators were members of the Express Mail Services (EMS) cooperative which regroups postal administrations within the meaning of the Universal Postal Union (UPU) convention, the quality of their services depended on each individual operator and was in any event inferior to that provided by commercial operators.

46 The Commission emphasised that not every incumbent operator offered intra-EEA express services other than for letters and that the others resold the services of integrators (recitals 460 to 461).

47 In recitals 462 to 466 of the contested decision, the Commission referred to the market investigation showing that the resellers did not exert competitive pressure on the integrators.

– Cooperative networks

- 48 In recitals 469 to 477 of the contested decision, the Commission referred to certain cooperative networks functioning in very different ways, such as NetExpress (recital 470) and EuroExpress (recital 471), the members of which remained independent, (recital 472) and which did not exert, in any event, competitive pressure on the parties to the merger on the markets for the services in question (recitals 473 to 477).

– Freight forwarders

- 49 After noting UPS's views (recitals 478 to 484), the Commission considered that, while the freight forwarders provided small package delivery services, and some provided intra-EEA deliveries, they did not constitute a strong competitive force on those markets and therefore did not exert competitive pressure on the markets for the services in question (recitals 487 to 507).

– Conclusion on non-integrators

- 50 In recitals 508 and 510 of the contested decision, the Commission concluded that the ground based operators, incumbent operators, cooperative networks and freight forwarders exerted limited competitive pressure on the integrators on the markets for the services in question, both from a demand-side and a supply-side perspective, in view of inter alia their very small market shares in comparison with those of the integrators.

The integrators

– FedEx

- 51 The Commission stated, in recitals 511 to 625 of the contested decision, that, amongst the integrators, FedEx was a weak competitor in Europe, having regard to its revenue on the markets for the services in question and its coverage of the EEA (recitals 513 to 526), to its network in the EEA (recitals 528 to 533), to its cost disadvantage in the EEA (recitals 534 to 546), to its presence on the domestic and deferred markets (recitals 547 to 552), FedEx's strength being mainly on extra-EEA markets (recital 553 to 564), and to the perception of FedEx on the part of customers (recitals 565 to 577) and on the part of competitors (recitals 578 to 589), FedEx being weaker on the markets for the services in question (recitals 590 to 598).
- 52 In recitals 599 to 622 of the decision under appeal, the Commission examined FedEx's expansion in the EEA.
- 53 The Commission concluded, in recitals 623 to 625 of the contested decision, that FedEx was lagging behind competitively on the markets for the services in question and that this gap could not be closed, in the very short term, by its expansion plans aimed at increasing its coverage and network density in the EEA so as to counter the other integrators on their intra-EEA express delivery networks.

– DHL

- 54 In recitals 626 to 630 of the contested decision, the Commission emphasised that, according to the parties to the merger, DHL was the most important competitor in Europe on the markets for the services in question, in terms of market shares (recital 626) and geographic coverage (recital 627) and because of the development and the density of its network in the EEA (recital 628).

Closeness of competition

– General considerations on the closeness of competition between UPS and TNT on a ‘differentiated market’

55 In recitals 631 to 635 of the contested decision, the Commission stated:

- ‘(631) In the present section the Commission presents an analysis of closeness of competition, which demonstrates that TNT and UPS are indeed close competitors on the intra-EEA express shipments market. The analysis shows that DHL is also a close competitor to the Parties, whereas, as demonstrated in sections 7.3 and 7.2.1, FedEx and the leading non-integrated companies DPD and GLS are more distant competitors to the Parties.
- (632) The analysis is helpful to determine which firms active on the intra-EEA express market offer products that are close substitutes to each other, and is informative about the level of competitive constraint that these firms currently exercise.
- (633) This is particularly relevant on a differentiated market such as the one at hand, where the products/services have different characteristics. One of the most important differentiating factors of the intra-EEA express market is the coverage of origins and of destinations which are offered by a particular supplier — that means the EEA countries to and from which express small packages can be shipped, and the extent of the coverage of geographic territories within those countries. There are also other differentiating factors such as the qualitative features of the service (reliability, quality of track-and-trace, and the offering of specific services such as premium morning or noon deliveries or special handling).
- (634) The mix of various differentiating factors of the service together with the commercial approach of the suppliers within the bidding (or similar customer selection process) determines how close substitutes the various suppliers will be when they compete for customers. The Commission has therefore not only analysed the firms with regard to the key characteristics (such as coverage of their services), but also assessed the degree of their substitutability from the customers’ perspective on the basis of all available evidence, notably customers’ evaluation from the market investigation, bidding analysis and the analysis of TNT’s exit interviews.
- (635) The purpose of the analysis is not only to determine the level of rivalry between the two merging firms, but also to identify those other firms which are currently representing close substitutes to the merging parties on this differentiated market. This is particularly relevant in this case, as all available evidence suggests that within the differentiated market at hand, a very limited set of suppliers are currently competing closely with each other compared to other firms present on the market.’

– Customers’ perception according to the market investigation

56 In recitals 636 to 652 of the contested decision, the Commission referred to customers’ replies to its questionnaires concerning the closeness of competition on the markets for the services in question, which, according to the Commission, clearly indicated close competition between the parties to the merger and DHL.

– Comparison of destinations served and delivery coverage for different express services

57 In recital 653 of the contested decision, the Commission stated that one of the most important differentiating factors between the companies providing the services in question was the coverage of origin and destination countries, since this determined the ability of the customer to ship small packages by a given express service (early morning, noon or end-of-day) from a particular origin to a given destination.

58 In recitals 654 to 658, the Commission compared, first, the integrators themselves, and, secondly, the integrators and the subsidiaries of La Poste and Royal Mail, in order to conclude, in recital 659, that, for customers who required broad geographic coverage in the EEA for the services in question, the parties to the merger were very likely to be the closest in terms of substitutability of services.

– Delivery times and premium services

59 In recitals 660 and 661 of the contested decision, the Commission noted that another factor differentiating the companies providing the services in question concerned the delivery times — the market being divided into three segments, namely the ‘pre-10:00 a.m.’ segment, the ‘pre-noon’ segment and the ‘end-of-day’ segment, in particular as regards certain products, the morning services being regarded as premium services.

60 On the basis of its analysis, the Commission considered that the parties to the merger competed closely with DHL, in contrast to the non-integrators’ relatively limited offering of premium services (recitals 662 to 665).

– Quality of services

61 In recital 666 of the contested decision, the Commission stated that, ‘as main integrators, the qualitative features of the Parties’ services such as track-and-trace or various add-on services are similar to each other, in contrast with the non-integrated companies (such as DPD and GLS) which are distant substitutes to the Parties’ services with respect to various quality criteria, as has been explained in the section on non-integrators (notably in Section 7.2.1.7, explaining why La Poste and Royal Mail’ international intra-EEA express services are perceived as distant substitutes for the Parties’ services with respect to various quality criteria).’

– Bidding

62 In recitals 667 to 684 of the contested decision, the Commission — on the basis of data from UPS (recitals 668 to 674), TNT (recitals 675 to 681) and DHL (recitals 682 to 684) — considered that the parties to the merger were, as regards bidding, competitively close, as was DHL, unlike FedEx and the non-integrators.

– TNT’s customer captivity

63 The Commission examined, in recitals 685 to 701 of the contested decision, the content of interviews held by TNT with its customers concerning their reasons for switching suppliers.

– Conclusion on the closeness of competition

64 In recitals 702 to 711 of the contested decision, the Commission considered, while responding to the observations submitted by the parties to the merger in response to the SO, that UPS and TNT were close competitors of DHL on the markets for the services in question.

The effect of competitive pressure on ‘highly differentiated’ markets

- 65 In recitals 712 to 714 of the contested decision, the Commission found that, on some markets, the merger would reduce the number of suppliers of the services in question, including both integrators and non-integrators, from four to three.
- 66 In recitals 715 to 720 of the contested decision, the Commission considered that, on some markets, the merger would reduce the number of integrated suppliers of the services in question from three to two, in view of FedEx’s position.
- 67 In recitals 721 to 726 of the contested decision, the Commission measured the likely impact of the merger on prices and, in recitals 727 to 740, cited UPS’ analysis of the effects of the merger on prices.

Barriers to entry and to expansion on the markets for the services in question

- 68 In recital 741 of the contested decision, the Commission found as follows:
- ‘(741) Entry or expansion on the intra-EEA express market has to be considered under two different dimensions: the product offering and the geographic scope. Whatever the dimension, the barriers to entry/expansion are similar and can be summarized as follows: a new entrant on the intra-EEA express market would have to set up (i) an IT infrastructure, (ii) a sorting infrastructure all across the EEA and (iii) an air network. As it is evidenced by the absence of major entry over the last 20 years and the outcome of the market investigation, these barriers are very high and cannot be overcome through outsourcing.’
- 69 In support of its assessment, the Commission noted, first, that no major player had entered the market over the last 20 years (recitals 742 to 746), secondly, the assessment of the market under a product and a geographic dimension (recitals 747 to 750), thirdly, the fact that a new entrant on the markets for the services in question would have to build up infrastructure all across the EEA (recitals 751 and 752), fourthly, that it would have to have a proprietary IT system (recitals 753 to 759), fifthly, that it would have a sorting infrastructure spread all across the EEA (recitals 760 to 765) and, sixthly, that it would have to have its own air transport network (recitals 766 to 780).
- 70 In conclusion, the Commission found the following in recitals 781 and 782:
- ‘(781) The barriers to entry/expansion are cumulative since any new entrant on the intra-EEA express market would have to overcome them simultaneously in order to offer delivery services competing with the ones offered by the strongest players. To compete effectively requires setting up intra-EEA express network both in terms of product offering and geographic scope. Consequently, the new entrant would have to set up sophisticated infrastructure all across the EEA, including sorting centres, ensure an extensive and dense PUD [(Pick-Up & Delivery)] network, set-up an air network, ground network and line-hauls and a sophisticated IT network. This all entails significant costs, risks and time.
- (782) In addition, in order to ensure cost-efficiency and thus to provide effective competition, the entry/expansion should occur at sufficient scale and achieve a sufficient density of the network. As the small package delivery business is a network industry, economies of scale and density are key (as has been explained in section 6.1.3), and achieving those may require a very long time. Until sufficient economies of scale are achieved, operators would have to incur significant costs and risks, and may not be able to run the business profitably for a significant period of time before achieving a return on investments. This complexity underlines the difficulties of entry and expansion on this market.’

The likelihood, timeliness and sufficiency of entries or of expansion to counter the potential anti-competitive effects of the merger

- 71 In the contested decision, the Commission considered that neither the expansion plans of FedEx (recital 783) nor those of other operators (recitals 784 to 787) were capable of countering any anti-competitive strategy set in place by the parties to the merger (recital 788).

The existence of countervailing purchasing power

- 72 As regards the existence of countervailing purchasing power, the Commission, as a preliminary point, noted the following:

‘(789) Countervailing buyer power is defined in the horizontal merger guidelines as “the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers”. It relates to the ability of large buyers to extract in concentrated downstream markets price concessions from suppliers.

(790) The Guideline provides a non-exhaustive list of possible sources of countervailing buyer power, including the ability of a large buyer to switch, to sponsor entry or expansion or to refuse to purchase certain products from the merging parties if the merging parties raise the prices of the products for which the merger entails a lessening of competition.’

- 73 In recitals 791 to 799 of the contested decision, the Commission, after noting UPS’ views (recital 791), concluded that ‘customers do not have the ability to exert sufficient countervailing purchasing power to defeat price raises in the market for intra-EEA express delivery services after the merger’.

TNT’s position in the absence of the merger

- 74 The Commission, in recitals 800 to 806 of the contested decision, considered that it was necessary to take into account TNT’s current coverage and competitiveness and rejected UPS’ argument as to the likely degradation of TNT’s position with regard to long-haul express services.

Expected efficiency gains of the merger

- 75 As regards the expected efficiency gains of the merger, the Commission started by noting, in recitals 807 to 816 of the contested decision, the criteria set out in 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).

- 76 In recitals 817 to 848 of the contested decision, the Commission analysed the claims of efficiency gains made by the parties to the merger, in terms of cost savings through operational synergies (recitals 822 to 831), air network synergies (recitals 832 to 837) and management and administration cost synergies (recital 838), as well as the arguments of the parties to the merger concerning the verifiability of their data (recitals 839 to 841) and the allocation of the expected costs savings by service and by geographic zone (recitals 842 to 848).

- 77 In recitals 849 to 921 of the contested decision, the Commission assessed the efficiency gains claimed by the parties to the merger and their verifiability (recitals 850 to 892), the benefits for consumers (recitals 893 to 906), the merger specificity (recitals 907 to 910) and the synergies calculation (recitals 911 to 921).

Analysis by country

- 78 In recitals 923 to 939 of the contested decision, the Commission summarised its findings concerning the markets for the services in question.
- 79 In recitals 940 to 951 of the contested decision, the Commission found that the market share estimates provided by UPS were unreliable.
- 80 Next, the contested decision noted UPS' views and the Commission's assessment concerning the effects of the merger on the markets for the services in question by taking into account the likely effects of the merger on prices and the expected efficiency gains of the merger, as regards certain EEA countries, country-by-country, namely Bulgaria (recitals 952 to 1018), the Czech Republic (recitals 1019 to 1070), Denmark (recitals 1071 to 1148), Estonia (recitals 1149 to 1193), Finland (recitals 1194 to 1240), Hungary (recitals 1241 to 1317), Latvia (recitals 1318 to 1365), Lithuania (recitals 1366 to 1415), Malta (recitals 1416 to 1435), the Netherlands (recitals 1436 to 1563), Poland (recitals 1564 to 1633), Romania (recitals 1634 to 1679), Slovakia (recitals 1680 to 1743), Slovenia (recitals 1744 to 1798) and Sweden (recitals 1799 to 1849).

The Commission's general conclusion in the contested decision on the effects of the merger

- 81 In recital 1850 of the contested decision, the Commission concluded that the merger constituted a SIEC on the markets for the services in question in Bulgaria, the Czech Republic, Denmark, Estonia, Latvia, Lithuania, Hungary, Malta, the Netherlands, Poland, Romania, Slovenia, Slovakia, Finland and Sweden, that is to say in 15 EEA Member States.

The commitments proposed by the parties to the merger

- 82 In recitals 1851 to 1942 of the contested decision, the Commission described the commitments proposed by the parties to the merger and, in recitals 1943 to 2106, its negative assessment of those commitments.

Procedure and forms of order sought

- 83 By application lodged at the Court Registry on 5 April 2013, the applicant brought the present action for annulment of the contested decision.
- 84 By letter accompanying the application, the applicant drew the Court's attention to the fact that the application and its annexes were confidential and contained business secrets concerning it.
- 85 Accordingly, pursuant to Article 6(3) of the Instructions to the Registrar of the General Court, the applicant requested that that information be omitted from the documents relating to the case to which the public had access.
- 86 In addition, in the event of intervention by a third party, the applicant informed the Court of its intention to request the Court that its business secrets be omitted from any document sent to the intervener, under Article 116(2) of the Rules of Procedure of the General Court of 2 May 1991.
- 87 By a separate document lodged at the Court Registry on the same day, the applicant submitted an application for the case to be decided under an expedited procedure in accordance with Article 76a of the Rules of Procedure of 2 May 1991.

- 88 By letter lodged at the Court Registry on 12 April 2013, the Commission acknowledged receipt of the applicant's application and its application for the case to be decided under an expedited procedure and requested an extension from the Court of the time limit for it to file its defence.
- 89 By document lodged at the Court Registry on 17 April 2013, the Commission submitted its observations on the applicant's application for an expedited procedure.
- 90 By decision of 7 May 2013, the applicant's application to decide the present case by expedited procedure was dismissed.
- 91 By decision of 7 May 2013, it was decided that there was no longer any need to adjudicate on the Commission's application for an extension of the time limit for it to lodge its defence.
- 92 By letter lodged at the Court Registry on 15 May 2013, the Commission requested that the Court grant an extension of the time limit for it to lodge its defence.
- 93 On 27 May 2013, that application was granted.
- 94 By letter lodged at the Court Registry on 25 June 2013, the Commission once again requested that the Court grant an extension of the time limit for it to lodge its defence.
- 95 By document lodged at the Court Registry on 17 June 2013, FedEx requested leave to intervene in the dispute in support of the form of order sought by the Commission ('the application for leave to intervene').
- 96 By letters from the Court Registry of 25 June 2013, the applicant and the Commission were requested to submit their observations, at the latest by 18 July 2013, on the request for leave to intervene.
- 97 On 2 July 2013, the Commission was granted an extension of the time limit for it to lodge its defence.
- 98 By letter sent to the Court Registry on 5 July 2013, the applicant requested the Court to extend until 1 August 2013 the time limit set, in the context of its application for confidential treatment, to lodge the non-confidential version of the application for FedEx, having regard to the volume of the file and the amount of sensitive information and to the fact that the contested decision was not yet available to the public because the Commission was at that time handling a large number of applications for confidential treatment.
- 99 The Commission lodged its defence on 9 July 2013, and lodged its observations on the request for leave to intervene on 10 July 2013.
- 100 By letter from the Court Registry of 11 July 2013, the applicant's request for an extension of the time limit for lodging the non-confidential version of the application for FedEx was granted.
- 101 The applicant submitted its observations on the application for leave to intervene on 17 July 2013.
- 102 By documents lodged at the Court Registry on 31 July 2013, the applicant requested that certain confidential information be removed from the procedural documents served on FedEx, including the application and annexes. The applicant produced a list and the non-confidential versions of those documents.
- 103 In its letter, the applicant stated, first of all, that, during the proceedings, it would extend its request for confidential treatment with regard to FedEx to other documents produced to the Court, such as the Commission's defence and its reply.

- 104 Next, the applicant explained that the information in respect of which it was requesting confidentiality concerned the analysis of the effects of the merger as regards prices and increased efficiency, information on its operational and commercial strategies and data relating to the undertakings which it had proposed to the Commission during the administrative procedure.
- 105 Finally, the applicant drew the attention of the Court to the fact that certain documents in the file contained confidential information and business secrets concerning third parties, in particular TNT, in whose name it did not consider it could request confidential treatment, while indicating to the Court the documents in question concerning TNT.
- 106 By letter lodged at the Court Registry on 9 August 2013, the Commission submitted its observations on the application for confidential treatment, pointing out that certain documents in the file, but not its defence, contained confidential information concerning TNT and, in essence, that, if the applicant, which had adduced those documents during the administrative procedure, actually considered that it was not in a position to extend its request for confidential treatment in that regard, it should review the content of the application to that end.
- 107 By decision of the Registrar of 20 August 2013, the applicant was requested to put into order, by 5 September 2013, the non-confidential versions from which all information concerning TNT had been removed.
- 108 On 2 September 2013, the applicant lodged its reply.
- 109 By document lodged at the Court Registry on the same day, the applicant, citing Article 64(3)(e) and (4) and Article 65 of the Rules of Procedure of 2 May 1991, requested the Court, as measures of organisation of procedure or measures of inquiry, to order the Commission to produce the documents provided by FedEx during the administrative procedure.
- 110 The applicant stated that its request for measures of organisation of procedure or of inquiry related essentially to the plea in law alleging infringements of the rights of the defence.
- 111 On 5 September 2013, the applicant lodged at the Court Registry a non-confidential version, with regard to FedEx and covering TNT, of the application and its annexes, including Annex A.1, namely the contested decision.
- 112 On 5 September 2013, the applicant confirmed that its request of 31 July 2013 concerned different categories of information, without, however, stating the grounds for the allegedly confidential nature of that information.
- 113 By decision of the Court of 30 September 2013, the present case was re-allocated to the Fourth Chamber.
- 114 By order of the President of the Fourth Chamber of the Court of 21 October 2013, FedEx was granted leave to intervene in support of the form of order sought by the Commission.
- 115 FedEx received all the procedural documents served on the parties, including the non-confidential versions of the application and its annexes, as amended by the applicant on 5 September 2013.
- 116 By letter of 8 November 2013, the Commission submitted its observations on the applicant's request for measures of organisation of procedure of 2 September 2013, contending that the request should be rejected in the light of its lateness and lack of usefulness to the proper conduct of the procedure.
- 117 By letter lodged at the Court Registry on 6 December 2013, the intervener raised detailed objections with regard to the applicant's request for confidential treatment as sent to it by the Court Registry.

- 118 On 12 December 2013, the Court Registry informed the intervener that, following its objections to the request for confidential treatment, the time limit for lodging the statement in intervention had been extended *sine die* and that it would be fixed afresh after the adoption of an order on the confidential treatment.
- 119 On 30 January 2014 the Commission lodged its rejoinder.
- 120 On the same day, the applicant supplemented its request for confidential treatment with regard to the rejoinder.
- 121 On 20 March 2014, the applicant was requested, with regard to its request for confidential treatment of Annex A.1 to the application, namely the non-confidential version of the contested decision, to state, in respect of each piece of information removed, the grounds forming the basis of its request for confidential treatment.
- 122 In addition, the applicant was requested not to include in its response any information, concerning itself or TNT, which it considered to be confidential as regards the intervener.
- 123 In any event, the applicant was requested to remove from the confidential version of the contested decision only those passages strictly necessary to maintain confidentiality as regards the intervener.
- 124 By letters of 3 April 2014, the intervener was requested to submit its observations on the request for confidential treatment concerning it, as actually lodged by the applicant.
- 125 By facsimile sent to the Court Registry on 25 April 2014, the intervener stated that it did not object to the request for confidential treatment as actually lodged by the applicant.
- 126 By letter from the Registry of 8 May 2014, the parties were informed that the time limit for lodging the statement in intervention was set as 20 June 2014.
- 127 By document lodged at the Court Registry on 26 June 2014, the intervener lodged its statement in intervention.
- 128 The applicant submitted its observations on that pleading on 6 October 2014 and disputed its admissibility.
- 129 By document lodged at the Court Registry on 1 July 2015, the applicant requested that the present action be given priority treatment.
- 130 On 16 July 2015, pursuant to Article 89(2)(c) of the Rules of Procedure of the General Court, the Court requested the parties to reply in writing to some questions.
- 131 The parties complied with that request within the time allowed.
- 132 By decision of 4 August 2015, the Court granted the request for priority treatment, under Article 67(2) of the Rules of Procedure.
- 133 By letter of 4 August 2015 and pursuant to Article 89(2)(a) of the Rules of Procedure, the Court granted the applicant's request for measures of organisation of procedure and asked the Commission to produce certain documents submitted by FedEx during the administrative procedure.
- 134 On 12 August 2015, the Commission refused to produce the documents requested to ensure their confidentiality.

- 135 By order dated 25 September 2015, the Fourth Chamber of the Court required the Commission, under Article 91(b), Article 92(3) and Article 103 of the Rules of Procedure, to produce the documents requested.
- 136 On 2 October 2015, the Commission produced the documents requested.
- 137 By order dated 27 October 2015, the Fourth Chamber of the Court required the Commission, under Article 91(b), Article 92(3) and Article 103 of the Rules of Procedure, to produce additional documents.
- 138 By order dated 11 December 2015, the Fourth Chamber of the Court, under Article 91(b), Article 92(3) and Article 103 of the Rules of Procedure, granted leave to the applicant's representatives to consult a confidential document at the Court Registry, provided that they sign a confidentiality undertaking.
- 139 On 17 December 2015 the applicant's representatives sent the signed confidentiality undertakings to the Court Registry.
- 140 Between 15 January 2016 and 12 February 2016, the applicant's representatives were able to consult the confidential document at the Court Registry.
- 141 On 12 February 2016, the Court, under Article 89(2)(a) of the Rules of Procedure, requested the parties to send, within two weeks, their written observations, if any, on the confidential document.
- 142 On 26 and 29 February 2016, respectively, the applicant and the Commission submitted to the Court their observations on the content of the confidential document consulted in a data room.
- 143 Acting on a proposal from the Judge-Rapporteur, the Court decided to open the oral part of the procedure.
- 144 In accordance with Article 109 of the Rules of Procedure, the Court, by letter of 18 March 2016, invited the parties to submit their observations on whether it was necessary to hold part of the hearing *in camera*.
- 145 On 29 March 2016, the Commission replied to the Court's invitation, stating that it was not necessary to hold the hearing *in camera*, unless the content of the document consulted in a data room by the applicant's representatives as from 15 January 2016 were to be discussed.
- 146 On 31 March 2016, the applicant replied to the Court's invitation, stating that it had no objection to the hearing being held in open court and that, to the extent that the content of the confidential document that its representatives had consulted in a data room as from 15 January 2016 would be discussed, it did not oppose a hearing being held *in camera*.
- 147 On the same day, the intervener submitted that it was necessary to hold the hearing entirely *in camera*, and not partly as the Court had suggested, because of the numerous differences between, on the one hand, the non-confidential version of the contested decision in the file and, on the other, the public version of the contested decision, those differences being set out in an appendix to the intervener's observations.
- 148 On 5 April 2016, the Court decided, after hearing the parties, to hold the hearing entirely *in camera*.
- 149 The parties presented oral argument and replied to the Court's oral questions at the hearing on 6 April 2016.

- 150 By measure of organisation of procedure of 11 April 2016, the Court, pursuant to Article 89(3)(a) and (d) of the Rules of Procedure, asked the Commission to produce certain documents to which it had referred at the hearing of 6 April 2016 and to reply to a question in writing.
- 151 On 26 April 2016, the Commission produced the documents requested and replied to the Court's question within the prescribed period.
- 152 On 8 June 2016, the applicant submitted its observations on the documents and the reply submitted by the Commission on 26 April 2016.
- 153 By decision of 4 October 2016, the Court closed the oral part of the procedure.
- 154 In the application, the applicant claims that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 155 The Commission contends that the Court should:
- dismiss the action in its entirety;
 - order the applicant to pay the costs, including those of the intervener.
- 156 The intervener claims that the Court should:
- dismiss the action in its entirety;
 - order the applicant to pay the costs.

Law

- 157 In support of its action, the applicant puts forward, in essence, three pleas in law. By the first, the applicant alleges errors of law and manifest errors of assessment, by the second, infringement of its rights of defence and, by the third, infringement of the obligation to state reasons.
- 158 The second plea in law, which it is appropriate to examine first, is essentially divided into four parts, alleging infringements of rights of the defence relating, respectively, to the likely effects of the merger on prices, to the expected efficiency gains as a result of the merger, to the future competitive position of FedEx and to the number of SIEC Member States.
- 159 In the context of the first part of the second plea in law, the applicant submits that, during the administrative procedure, it exchanged analyses of the merger in terms of prices and estimates in terms of efficiency gains with the Commission, calculating the expected net effects of the merger on the prices in various national markets.
- 160 According to the applicant, the analysis of the merger in terms of prices in the contested decision is materially different from all the versions that it was able to consult during the administrative procedure, which infringes its rights of defence.
- 161 In annex to the application, the applicant produces a report listing the changes which, in its view, were made to the model that it used and setting out the technical reasons why it was not able to replicate the results set out in the contested decision.

- 162 The applicant submits, in response to the Commission's reply to the measure of organisation of procedure adopted by the Court after the hearing, that the econometric model used in the contested decision is a highly restrictive version of a non-linear approach, or even a 'segmented linear' approach, which was never discussed during the administrative procedure.
- 163 The applicant submits that the Commission used a linear model within each range.
- 164 Furthermore, it argues that it is contrary to standard economic practice to use two different concentration variables at the estimation stage and at the prediction stage, which constitute the two stages of the Commission's econometric analysis.
- 165 In order to represent the degree of concentration on the market, at the estimation stage the Commission used a discrete concentration variable, in accordance with the applicant's recommendations in that respect, whereas, at the prediction stage, it used a continuous variable.
- 166 Accordingly, the applicant submits that, by using such a variable at the prediction stage, the Commission did not analyse the price developments from one range to another, but merely the development of prices within each range.
- 167 The applicant adds that it did not draw up those ranges, rather they were chosen arbitrarily by the Commission.
- 168 The applicant therefore could not challenge effectively the reliability of the econometric model in question, chosen by the Commission in the contested decision, or the differences between the Commission's results and those which the applicant calculated in its last econometric analysis sent to the Commission on 16 November 2012.
- 169 The fact that it cannot replicate the Commission's results demonstrates that the Commission failed to hear the applicant before changing, substantially and to the applicant's detriment, an econometric model vital to the conclusions contained in the contested decision.
- 170 If the Commission had heard the applicant on the changes in question before adopting the contested decision, the applicant would have been able to verify the results used in the contested decision and, above all, to express its views on the appropriateness of such a significant change.
- 171 In addition, while referring to the examination of the third part of the second plea in law, relating to FedEx's future competitive position, the applicant submits, in essence, that it did not have access to FedEx's 2015 coverage data sufficiently early in the administrative procedure and, accordingly, that it was not able to propose appropriate commitments.
- 172 The Commission, on the other hand, challenges, primarily, the admissibility of the applicant's legal and economic arguments, on the ground that they were set out in an annex to the application, and the annexes have a purely evidential and instrumental function.
- 173 According to the Commission, the application contains no explanation of the alleged differences, except by reference to an annex, with the result that those arguments are inadmissible, pursuant to Article 44(1)(c) of the Rules of Procedure of 2 May 1991, since the essential elements of the plea in law are not set out in the application.
- 174 The applicant contests that claim of inadmissibility, arguing that the essential elements of its line of argument are clearly present in the body of the application and that the reference to Annex A.6 of the application was intended merely to support those main arguments by providing technical details.

- 175 It is indicated in the application that the econometric model in question is substantially different from all of the econometric models that the applicant was able to examine during the administrative phase and that this is supported *inter alia* by the fact that the applicant was not able to understand that model fully or to verify the results derived from it.
- 176 In the alternative, the Commission submits that the first part of the second plea in law is ineffective and, in any event, unfounded.
- 177 It argues, first of all, that its final analysis of the likely effects of the merger on prices is not materially different from that submitted by the applicant, as can be seen from an annex to its defence.
- 178 According to the Commission, as outlined in recitals 727 to 740 of the contested decision, the changes made concerned (i) the assumptions in the econometric model concerning the effects of increasing concentration on the initial price levels and (ii) the definition of the concentration variable.
- 179 Next, the Commission argues that it was not required to hear the applicant before adopting the econometric model in question.
- 180 In support of that argument, the Commission submits that the applicant presented five studies relatively late in the administrative procedure, but that, nevertheless, all the studies were extensively discussed at various state of play meetings. The Commission states that it also gave its preliminary views on the applicant's last study, submitted on 16 November 2012, at the state of play meeting of 11 December 2012 and that, given the late date at which that last study was submitted, its 'final assessment had to be left to the [contested] decision'.
- 181 Lastly, the Commission submits that its approach is in accordance with the case-law on the rights of the defence in the context of mergers, in that, since the decision need not be a copy of the SO, it is entitled to revise or supplement the elements of fact or law set out in support of its objections and to supplement the SO in the light of the responses made by the applicant during the administrative procedure, provided that the contested decision sets out the same objections as those set out in the SO, which is the case here.
- 182 In the reply, in the first place, the applicant submits that, if the Commission had erroneously considered that the applicant was barred from submitting updated studies in November 2012, the Commission should have used exactly the same price concentration analysis in the contested decision as it had used in the SO, enabling the applicant to challenge the substantive errors of that analysis before the Court, since it follows from the case-law that the Commission may reject the arguments raised in response to the SO on the basis of arguments and reasons not mentioned in the SO, but that it may not rely on elements other than those set out in the SO.
- 183 In the present case, the Commission could have, at most, rejected the studies submitted by the applicant in November 2012 without hearing the applicant further. However, according to the applicant, the Commission could not forgo hearing it, since it had tampered with the methodologies and results of those studies in order to use the new results to oppose the merger, as a counterweight to factors it had accepted after the SO, namely the efficiency gains and FedEx's expansion plans.
- 184 In the second place, the 'lateness' of the applicant's submissions, as alleged by the Commission, is the result of the Commission's own conduct during the administrative procedure.
- 185 In the rejoinder, the Commission contends that the applicant's rights of defence would be breached only where it could demonstrate that the Commission relied on the econometric analysis in question in order to support its objection and that that objection could be proved only by reference to that

analysis. The Commission adds that the applicant would also have to show that its findings in the contested decision as regards the SIECs would have been different if that analysis had to be disallowed as evidence.

186 According to the Commission, it can be seen from the contested decision that, on the Danish and Netherlands markets, a SIEC would have been found even if the expected net effect of the econometric analysis in question were negative, with the result that the Commission's findings, according to which a SIEC was likely on those markets, would not have been different if that analysis had to be disallowed as evidence.

187 In that respect, the Court notes that, in the first part of the second plea in law, the applicant does not contest the merits of the econometric analysis in question — which is the subject matter of the first part of the first plea in law — but rather questions whether the Commission could use the econometric model in question in the contested decision, since it was not presented to the applicant before the adoption of the contested decision, in breach of its right to be heard and, more generally, its rights of defence.

188 In that context, the parties disagree as to whether the econometric model in question, used by the Commission in the contested decision, differs from the last econometric model submitted to the applicant by the Commission during the administrative procedure and, if so, to what extent.

189 Before assessing the merits of the applicant's line of argument, it is appropriate to verify its admissibility, which is contested by the Commission.

1. Admissibility of the first part of the second plea in law

190 The Commission disputes the admissibility of the first part of the second plea in law, alleging a breach of the applicant's rights of defence as regards the likely effects of the merger on prices, on the ground that the requirements set out in Article 44(1)(c) of the Rules of Procedure of 2 May 1991 are not met.

191 In that regard, it must be noted that, under that provision, and moreover under Article 76(d) of the Rules of Procedure, an application must state the subject matter of the proceedings and a summary of the pleas in law, and that that statement must be sufficiently clear and precise as to enable the defendant to prepare its defence and the Court to rule on the application, if necessary without any other supporting information

192 It should also be noted that, in particular, it is necessary, for an action before the 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 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 above mentioned 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).

193 In the present case, the applicant submits that the Commission infringed its rights of defence by substantially changing — without hearing its views in that regard — the econometric model that it had submitted concerning the likely effects of the merger on prices.

- 194 It must be pointed out that the matters of fact and law on which the applicant bases the first part of its second plea in law are immediately intelligible from a reading of the application. Although the applicant indeed refers to Annex A.6 to the application in order to demonstrate the alleged changes, its line of argument criticising the use of the econometric analysis in question can be seen, albeit summarily, from the text of the application itself.
- 195 In addition, it must also be pointed out that the Commission was able, in its defence, to respond to the first part of the second plea in law raised by the applicant, which reinforces the point that, although it is true that the first part of the second plea in law is not set out in detail, the content of that part is clear.
- 196 Moreover, although the Court had to refer to Annex A.6 in order to assess the evidence supporting the first part of the second plea in law, it did not have to seek and identify in Annex A.6 to the application the arguments raised in support of the first part of the second plea in law.
- 197 It follows from the foregoing that the present part of the second plea in law is admissible having regard to the requirements of Article 76(d) of the Rules of Procedure.

2. The merits of the first part of the second plea in law

- 198 In order to assess the first part of the second plea in law, relating to the likely effects of the merger on prices, the Court must verify whether the applicant's rights of defence were affected by the circumstances in which the econometric analysis in question was based on an econometric model different from that which had been the subject of an exchange of views and arguments during the administrative procedure.
- 199 In that regard, it must be recalled, as a preliminary point, that observance of the rights of the defence is a general principle of EU law enshrined in the Charter of Fundamental Rights of the European Union which must be guaranteed in all proceedings, including merger proceedings before the Commission (see, to that effect, judgment of 9 March 2015, *Deutsche Börse v Commission*, T-175/12, not published, EU:T:2015:148, paragraph 247).
- 200 It has also been held that the right to a fair hearing, which forms part of the rights of the defence, requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim (see judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, EU:C:2008:392, paragraph 61 and the case-law cited).
- 201 In the present case, in the first place, it must be noted that, as can be seen from recitals 721 to 740 of the contested decision, the Commission relied inter alia on the econometric analysis in question in order to identify the number of SIEC States.
- 202 In that regard, the Commission adopted the final version of its econometric model on 21 November 2012, more than two months before the adoption of the contested decision on 30 January 2013, as is clear from the documents submitted by the Commission in annex to its rejoinder.
- 203 It is also clear from the documents in the file that the final version of the econometric model was not communicated to the applicant, since, according to the Commission, it was unnecessary to make such a communication because it was clear from the Commission's numerous exchanges with the applicant during the administrative procedure.

- 204 The Commission emphasises, in essence, that the final model, as presented in the contested decision, is only marginally different from the models that were discussed with the applicant during the administrative procedure.
- 205 Although there are indeed numerous similarities between the final econometric model and those discussed during the administrative procedure, the changes made to the final model nevertheless cannot be regarded as negligible.
- 206 It can be seen from the observations of the Commission and of the applicant submitted after the hearing that the Commission relied on two different variables at the stage of the statistical estimation of the effects of the loss of a competitor on prices and at the stage of the prediction of the effects of the merger on prices.
- 207 Thus, the Commission relied on a discrete variable at the estimation stage and on a continuous variable at the prediction stage.
- 208 Although the use of a discrete variable had been discussed repeatedly during the administrative procedure, it does not appear from the file that that was also the case as regards the use of different variables at the different stages of the econometric analysis.
- 209 Accordingly, the Commission cannot claim that it was not required to communicate the final econometric analysis model to the applicant before adopting the contested decision.
- 210 Accordingly, the applicant's rights of defence were infringed, with the result that the contested decision should be annulled, provided that it has been sufficiently demonstrated by the applicant not that, in the absence of that procedural irregularity, the contested decision would have been different in content, but that there was even a slight chance that it would have been better able to defend itself (see, to that effect, judgment of 25 October 2011, *Solvay v Commission*, C-109/10 P, EU:C:2011:686, paragraph 57).
- 211 In that regard, first, it must be emphasised that the Commission relied on the econometric analysis in order to find that there were SIEC States.
- 212 When the SO was adopted, the Commission had, as it stated at the hearing, made a provisional finding that there were 29 SIEC States on the basis of an econometric analysis showing a significant increase in prices following the merger.
- 213 In addition, as the Commission expressly acknowledges, the subsequent results of the econometric analysis showing a less significant increase in prices also led it to decrease the number of SIEC States to 15 in the contested decision.
- 214 Secondly, the applicant was already able, during the administrative procedure, to have a significant influence on the development of the econometric model proposed by the Commission, since it raised technical problems to which it provided solutions, as the Commission expressly acknowledges.
- 215 Accordingly, in the light of the foregoing, it must be held that, during the administrative procedure that led to the adoption of the contested decision, the applicant might have been better able to defend itself if it had had at its disposal, before the adoption of that decision, the final version of the econometric model chosen by the Commission on 21 November 2012.
- 216 That conclusion cannot be called into question by the Commission's claim that its findings were based on a wide range of information, both quantitative — including the econometric analysis — and qualitative.

- 217 As noted in paragraph 213 above, the Commission expressly acknowledges that it relied, inter alia, on the new results of the econometric analysis in order to reduce the number of SIEC States after the SO, so those results were capable, at least as regards certain States, of countering the qualitative information taken into account by the Commission.
- 218 Accordingly, it must be found that the applicant was deprived of information which, had it been communicated to the applicant 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 SIEC States.
- 219 In the second place, when assessing alleged infringements of the rights of the defence in the context of merger control proceedings, it is indeed necessary to take into account the necessity for speed, which characterises the general scheme of the Merger Regulation (see, to that effect, judgment of 14 December 2005, *General Electric v Commission*, T-210/01, EU:T:2005:456, paragraph 701).
- 220 Nevertheless, in the present case, as the Commission acknowledges in its written submissions, the econometric analysis was already very stable before the state of play meeting of 20 November 2012, more than two months before 30 January 2013, the date of the contested decision, with the result that the Commission was free, at the very least, to communicate the essential elements of the chosen econometric model to the applicant.
- 221 Accordingly, it must be concluded that the Commission infringed the applicant's rights of defence by failing to communicate the final version of its econometric model to the applicant.
- 222 Consequently, the first part of the second plea in law of the action must be upheld and the contested decision must be annulled in its entirety, without it being necessary to examine the other parts of the second plea in law, or the other pleas in law put forward in the action.

Costs

- 223 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. Since the applicant has applied for costs and the Commission has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the applicant. The intervener must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

- 1. Annuls Commission Decision C(2013) 431 of 30 January 2013 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.6570 — UPS/TNT Express);**
- 2. Orders the European Commission to bear its own costs and to pay those incurred by United Parcel Service, Inc.;**
- 3. Orders FedEx Corp. to bear its own costs.**

Prek

Labucka

Kreuschitz

Delivered in open court in Luxembourg on 7 March 2017.

E. Coulon
Registrar

M. Prek
President