

Case No COMP/M.6570
– UPS/ TNT Express

Only the English text is authentic.

MERGER PROCEDURE
REGULATION (EC) 139/2004

Article 8 (3) Regulation (EC) 139/2004
Date: 30/01/2013

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COMMISSION

Brussels, 30.1.2013
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PUBLIC VERSION

COMMISSION DECISION

of 30.1.2013

addressed to:

United Parcel Service Inc.

**declaring a concentration to be incompatible with the internal market
and the EEA Agreement**

(Case No COMP/M.6570 – UPS/ TNT EXPRESS)

(Only the English text is authentic)

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COMMISSION DECISION

of 30.1.2013

addressed to:
United Parcel Service Inc.
declaring a concentration to be incompatible with the internal market
and the EEA Agreement

(Case No COMP/M.6570 – UPS/ TNT EXPRESS)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹, and in particular Article 8(3) thereof,

Having regard to the Commission's decision of 20 July 2012 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations²,

Having regard to the final report of the Hearing Officer in this case³,

Whereas:

1. PARTIES

- (1) On 15 June 2012, the Commission received notification of a proposed concentration (hereinafter "the Transaction") pursuant to Article 4 of the Merger Regulation by which the undertaking United Parcel Service Inc. ("UPS" – United States of America) acquires sole control of the whole of the undertaking TNT Express N.V. ("TNT" – The Netherlands) within the meaning of Article 3(1)(b) of the Merger Regulation by way of

¹ OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

² OJ C137 of 7.5.2014, p.3.

³ OJ C137 of 7.5.2014, p.4.

a public takeover under Dutch law⁴. UPS is hereafter also referred to as "the Notifying party" and UPS and TNT are hereafter referred to as "the Parties".

- (2) UPS is one of the world's largest logistics providers with a worldwide turnover of EUR 40 850 million. It operates mainly in the small package delivery, freight transport and contract logistics sectors. UPS started operating in Europe in 1976 by establishing operations in Germany. At present, UPS is present in Europe with approximately 40 000 employees and a delivery fleet of 8 800 vehicles. UPS serves 55 intra-European airports, connects Europe with other continents through 12 intercontinental airports and operates 292 daily flight segments (of which 156 are intra-European and 136 are intercontinental). In 2011, the European small package operations of UPS generated approximately EUR 4 600 million in revenues, up from EUR 3 500 million in 2010. The main European air hub of UPS is located in Cologne.
- (3) TNT is based in the Netherlands. After having been established in Australia in 1946, TNT has expanded into a global enterprise. In 1996, KPN (Koninklijke PTT Nederland, the Dutch postal operator) launched a public bid for TNT and subsequently integrated TNT with PTT Post. In May 2011, shareholders accepted a proposal to split TNT Post Group into two separate entities: TNT (consisting of the small package and freight activities) and PostNL (consisting of the Dutch mail and domestic small package activities). TNT is active in the small package delivery and freight transport sectors and offers industry specific logistics solutions for fashion clothing and in-night transport. TNT employs 77 000 people worldwide of which 37 000 in Europe. In 2011, it had revenues of EUR 7 246 million. In 2010, its European small package operations generated EUR 2 200 million. In Europe, TNT has its air hub in Liège, Belgium. Outside Europe, TNT's network density is considerably lower and it is exploring partnerships for some of its non-European operations.

2. OPERATION AND CONCENTRATION

- (4) On 19 March 2012, UPS publicly announced that it intended to acquire 100% of the outstanding share capital in TNT through a public takeover offer under Dutch law. The total value of UPS's offer is around EUR 5 000 million. The project is supported by the supervisory and executive boards of TNT. UPS formally launched the public takeover on 26 June 2012. According to UPS, after completion of the Transaction, TNT and all its subsidiaries would become part of UPS.
- (5) The Transaction involves the acquisition of sole control by UPS over TNT. The proposed operation thus constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. UNION DIMENSION

- (6) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million⁵. Each of them has a Union-wide turnover in excess of EUR 250 million, and they do not achieve more than two-thirds of their aggregate Union-

⁴ OJ C 186, 26.06.2012, p.9.

⁵ Turnover calculated in accordance with Article 5 of the Merger Regulation.

wide turnover within one and the same Member State. The notified operation therefore has a Union dimension within the meaning of Article 1(2) of the Merger Regulation.

4. PROCEDURE

- (7) Based on a market investigation, the Commission raised serious doubts as to the compatibility of the Transaction with the internal market and adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 20 July 2012 (the "decision opening proceedings").
- (8) The Parties submitted their written comments to the decision opening proceedings on 9 August 2012 (the "response to the decision opening proceedings").
- (9) Following a request by the Notifying party, non-confidential versions of certain key submissions of third parties collected during the first phase investigation were provided to UPS on a rolling basis as of 25 July 2012.
- (10) On 10 August 2012, the Commission addressed to UPS a decision pursuant to Article 11(3) of the Merger Regulation, requiring UPS to provide 2011 revenue data for both UPS and TNT. This information was necessary in order for the Commission to carry out a thorough assessment of all markets affected by the Transaction. Pursuant to Article 9 of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings⁶, the time limits referred to in Articles 10(1) and (3) of the Merger Regulation were suspended for the period between the end of the time limit fixed in the Request for information of 31 July 2012 pursuant to Article 11(2) of the Merger Regulation and the receipt of complete and correct information required by the decision adopted pursuant to Article 11(3) of the Merger Regulation. The time limits were effectively suspended between 7 August 2012 and 14 August 2012.
- (11) On 26 July 2012 and 5 September 2012, at the request of the Parties, the time limit for taking a final decision in this case was extended by ten working days each time pursuant to the second subparagraph of Article 10(3) of the Merger Regulation.
- (12) A Statement of Objections was sent to UPS on 19 October 2012 pursuant to Article 18 of the Merger Regulation and Protocol 21 of the EEA Agreement. The Parties submitted their written observations on the Statement of Objections on 6 November 2012 (the "response to the Statement of Objections").
- (13) Following the written request by the Notifying party, an Oral Hearing was held on 12 November 2012 and was attended by the Parties and their outside counsel and economic advisers, the Commission services and representatives from competition authorities of Belgium, Finland, Germany, Italy, the United Kingdom, and from the EFTA Surveillance Authority. Additionally, third parties which demonstrated sufficient interest within the meaning of Article 18(4) of the Merger Regulation, namely FedEx, DHL, GeoPost and Liège airport, were admitted to express their views at the Oral Hearing upon their request.
- (14) On 29 November 2012, UPS offered a first set of commitments, pursuant to Article 8(2) of the Merger Regulation, with a view to rendering the proposed concentration

⁶ OJ L 133, 30.4.2004, p.1.

compatible with the internal market. On 16 December 2012, UPS offered a first revised set of commitments pursuant to Article 8(2) of the Merger Regulation. On 3 January 2013, UPS offered a second revised set of commitments pursuant to Article 8(2) of the Merger Regulation.

- (15) A Letter of Facts was sent to the Notifying party on 21 December 2012. UPS submitted its written observations on the Letter of Facts on 4 January 2013.
- (16) The Advisory Committee discussed a draft of this Decision on 18 January 2013.

5. AIR CARGO, FREIGHT FORWARDING, CONTRACT LOGISTICS

5.1. Air Cargo

5.1.1. Market definition

5.1.1.1. Product market

- (17) The freight market has historically been divided into cargo transport services, whereby cargo companies sell space on their assets (such as trucks or aircraft), and freight forwarders which construct a "virtual" network consisting of third party assets (transportation capacity) on the basis of customers' requirements. Within cargo, the Commission has historically distinguished between intra-European and intercontinental cargo.
- (18) Air cargo is typically transported by three different types of air cargo carriers; (i) combination airlines, (ii) all-cargo airlines and (iii) integrators. Combination airlines are airlines that also transport passengers. These airlines carry cargo in the belly-space or main deck of passenger aircraft, but could also have dedicated freighter aircraft. All-cargo airlines exclusively operate dedicated freighter aircraft on both scheduled and non-scheduled departure times. Integrators generally combine cargo with small package volume in their air network, but can also operate dedicated aircraft for cargo services (on both scheduled and non-scheduled departure times).
- (19) Concerning the intra-European cargo market, the Commission has previously established that the relevant product market includes all modes of transport such as air, road and rail⁷.
- (20) With regard to intercontinental cargo transportation, the Commission has previously indicated that the relevant market is limited to air cargo. However, the Commission has also taken into account the argument according to which air and ocean cargo might exert competitive pressure on each other⁸. In the present case, the activities of the Parties are limited to the market for air cargo transport. In any event, for the purpose of this Decision, it is not necessary to decide whether, for intercontinental cargo, air and sea transport are part of the same product market, as the proposed concentration does not lead to a significant impediment to effective competition even on the basis of this narrower product market definition.

⁷ Case COMP/M.3770 – Lufthansa/Swiss, 4.07.2005, paragraph 19 and case COMP/M.5141 – KLM/Martinair, 17.12.2008, paragraph 29.

⁸ Case COMP/M.5141 – KLM/Martinair, 17.12.2008, paragraph 29.

5.1.1.2. Geographic market

- (21) With regard to the geographic market definition for intra-European cargo, the Commission considers, in line with its previous decisional practice⁹, that this should be assessed on a Europe-wide basis and that alternative means of transport such as rail and air form part of the same intra-European market.
- (22) Concerning intercontinental air cargo transport, the Commission has held that, where there is sufficient infrastructure for onward communication of the goods (for example by road, rail or inland waterways) the relevant geographic market should be defined on a 'continent-to-continent' basis as this corresponds to the catchment area of the demand for the service. However, the Commission has also indicated that, for countries where infrastructural or regulatory conditions do not easily facilitate the onward transfer of the goods, a further division on a continent-to-country or country-by-country basis may be necessary. For the purpose of the current decision the relevant market definition may be left open given that, irrespective of the precise geographic market definition, the Transaction does not lead to a significant impediment to effective competition with respect to cargo transport.

5.1.2. *Competitive assessment (horizontal aspects)*

- (23) The activities of the Parties overlap in relation to intra-European air and road cargo. While UPS has not been able to provide data on rail freight, it has estimated that the combined market share of UPS and TNT would not exceed [0-5]*% of the overall market comprising air and road freight. If a separate market for air cargo would be considered, the combined market share of the Parties would be [10-20]*% ([10-20]*% for TNT and [0-5]*% for UPS). As regards the hypothetical road cargo market, which would account for more than 99% of the overall cargo market (in terms of value), the Parties' combined market shares would be less than [0-5]*% on this market.¹⁰
- (24) With regard to the intercontinental air cargo transport markets, UPS has submitted market shares estimates on the basis of three different methods: (i) the total export weight; (ii) the total import weight and (iii) a combination of the export and import weight (a so-called 50/50 view). On the basis of the proposed analysis, the combined market share of the Parties would be lower than [10-20]*% on all the combinations of continent-to-continent (or continent-to-country) on which UPS and TNT are active, with the exception of the air freight between Europe and Guatemala, where, under any of the above mentioned calculation methods, the combined market share of the Parties would remain lower than [30-40]*% and TNT has a market share well below [0-5]*%. In view of these elements, this overlap is unlikely to lead to significantly impede effective competition.

5.1.3. *Conclusion*

- (25) In light of the very small horizontal overlaps and the resulting low to moderate market shares, the Commission concludes that the concentration will not significantly impede effective competition in the cargo markets.

⁹ Case COMP/M.3770 – *Lufthansa/Swiss*, 4.07.2005, paragraph 19.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

¹⁰ Form CO, paragraphs 215 and 216.

5.2. Freight forwarding

5.2.1. Market definition

- (26) In earlier decisions the Commission defined freight forwarding as “*the organisation of transportation of items [...] on behalf of customers according to their needs*”¹¹. Freight forwarders do, contrary to cargo transport, therefore not own any part of the network they use, but they normally hire transportation capacity from third parties for the transportation of shipments.
- (27) The Commission has in its previous decisions taken into consideration some possible subdivisions of the freight forwarding product market including (i) between domestic and international¹² and (ii) between different modes of transportation (land, sea, air, rail)¹³. Concerning the geographic scope, the Commission precedents have both considered the possibility that the market would be national or EEA-wide¹⁴.
- (28) For the purpose of the current decision the relevant market definition may be left open given that, irrespective of the precise product and geographic market definition, the Transaction will not significantly impede effective competition with respect to freight forwarding.

5.2.2. Competitive assessment

- (29) Both UPS and TNT are active in ocean and air freight forwarding. According to the data submitted by UPS, the Parties’ combined market shares in ocean freight forwarding do not exceed [0-5]*% in any of the EU countries in which they are active. Concerning air freight forwarding, UPS has provided market shares based on three different methods, namely (i) export freight forwarding; (ii) import freight forwarding and (iii) a combination of export and import freight forwarding (a so-called 50/50 view). According to all these methodologies/estimates, the Parties’ combined market shares in air freight forwarding would not exceed [10-20]*% in any alternative market in any of the EEA country in which they are active, with the exception of the market for imports into the Czech Republic and Finland, where their combined market share is in any case well below [20-30]*%.

5.2.3. Conclusion

- (30) On the basis of the above analysis, the Transaction will not lead to a significant impediment to effective competition on the freight forwarding market and on any of its segments.

5.3. Contract logistics

5.3.1. Market definition

- (31) Contract logistics services is the part of the supply chain process that plans, implements and controls the efficient, effective flow and storage of goods, services and related information from the point of origin to the point of consumption in order to meet

¹¹ See case COMP/M.1794 – *Deutsche Post/Air Express International*, 7.02.2000, paragraph 8.

¹² See case COMP/M.5152 – *Posten AB/Post Danmark AS*, 21.04.2009.

¹³ See case COMP/M.1794 – *Deutsche Post/Air Express International*, 7.02.2000, paragraph 9.

¹⁴ See cases COMP/M.1794 – *Deutsche Post/Air Express International*, 7.02.2000, paragraphs 13 and 14. and COMP/M.3496 – *TNT Forwarding Holding/Wilson Logistics*, 2.08.2004, paragraph 9.

customers' requirements¹⁵. This part of the supply chain has as its focal point the provision of warehousing and management of the flow of goods for customers¹⁶.

- (32) In Deutsche Post/Exel,¹⁷ the Commission observed that it had considered whether the contract logistics market should be segmented “i) into cross-border and domestic logistics, ii) by reference to the type of good handled or the industry serviced or iii) into lead logistics providers (“LLPs”) and traditional logistics providers (“3LPs”). In the end however, the Commission considered that a distinction of separate product markets did not seem warranted.”
- (33) Concerning the geographic scope of the market, the Commission has previously found that the contract logistics market is European, allowing a possible segmentation into national markets. However, for the purpose of this Decision, the precise geographic scope can be left open because under any possible definition the Transaction will not significantly impede effective competition with respect to contract logistics.

5.3.2. *Competitive assessment*

- (34) According to the estimates provided by UPS, the combined market share of the Parties would be lower than [0-5]*% on any EEA country-wide market on any alternative market, with the exception of the Netherlands and the United Kingdom, where it is in any case below [10-20]*%. Therefore, the markets for contract logistics services are not horizontally affected.

5.3.3. *Conclusion*

- (35) On the basis of the very limited market shares of the Parties, the horizontal overlaps of the Parties' operations in the contract logistics market will not significantly impede effective competition.

6. **SMALL PACKAGES**

6.1. **Introduction to the small package delivery industry and international express deliveries**

6.1.1. *Notion of small package and small package transport infrastructures*

- (36) A "small package" is commonly defined according to weight. This allows for differentiation of small package delivery services from freight on the basis of weight limits. Although there is no clear definition of what constitutes a small package, the upper weight limit is in general terms determined by the weight a single person can handle without specific equipment. Therefore, all palletised volume is excluded from the small package market as such volume requires specific handling equipment (forklift) and special vans/trucks for pick-up and delivery¹⁸.
- (37) The upper weight limit commonly used in the small package market is 31.5 kg (70 imperial pounds) per package which is an estimate of the maximum weight that can be

¹⁵ Case COMP/M.6059 – *Norbert Dentressangle/Laxey Logistics*, 21.03.2011, paragraph 9.

¹⁶ Case COMP/M.1895 – *Ocean Group/Exel (NFC)*, 3.5.2000, paragraph 7.

¹⁷ Case COMP/M.3971 – *Deutsche Post/Exel*, 24.11.2005, paragraphs 12 and 13.

¹⁸ Form CO, paragraph 118.

handled by one man¹⁹. Similarly, in the airline industry, the maximum baggage weight is 32 kg – considered to be the maximum limit at which a baggage handler can carry luggage and cargo without back injury²⁰. The vast majority of international consignments weigh less than 30 kg²¹.

- (38) At the lower end of small packages, there used to be a separate category of "parcels". A parcel has normally a weight limit of 2kg. The notion of a parcel is still used in the framework of universal postal service obligations. However, since not only postal operators but also all small package delivery companies transport parcels, the distinction between parcels and packages has become blurred, and the term small packages as used for this decision includes also parcels.
- (39) The Parties however recognise that different market participants use different weight limits per package. The reason for differing weight limits for certain services and/or destinations has to do with the limitations of the operational network, infrastructure, assets and processes used to deliver a given service. The types of network, aircraft, road vehicles and delivery vehicles used play a role as well as the depot and hub facilities²².
- (40) The infrastructure used in the industry also imposes limitations on the weight of the product. The standard infrastructure needed for sorting of small packages, such as the conveyor belts, are adapted to handle packages up to 70 kg²³.
- (41) This infrastructure is widely used by UPS and in the industry in general. [Details regarding UPS' infra-structure and network]*²⁴.
- (42) [Details regarding TNT's infra-structure and network]*²⁵. For the purpose of this Decision, small packages are packages with a weight limit of 31.5kg (see Section 6.2.1.1).
- (43) An apparent differentiation exists between small package operators and freight operators. Small package operators, in comparison to freight operators, generally offer more sophisticated technology to enable customers to organise their shipments. In addition, although small packages and freight can be transported over long-distances using the same network (using trucks and aircraft), sorting, pick-up and delivery are generally done differently. The sorting of small packages is generally done by hand or on conveyer belts, while freight requires more heavy equipment to move packages. Moreover, the vans used by small package companies to do pick-ups and deliveries generally cannot handle (palletised) freight. Pick-ups and deliveries of freight will therefore mostly be done with larger trucks²⁶. [Details regarding TNT's infra-structure and network]*²⁷.

¹⁹ “Traditionally the maximum weight of a parcel (whether express or not) is usually considered to be about 31.5kg. This is an estimate of the maximum weight that can be handled by one man.” Transport Intelligence, *International Express Parcels 2012*, p.103.

²⁰ Form CO, paragraph 125.

²¹ Form CO, paragraph 119.

²² Form CO, paragraph 119.

²³ Form CO, paragraph 119.

²⁴ Form CO, paragraph 123.

²⁵ Form CO, paragraph 124.

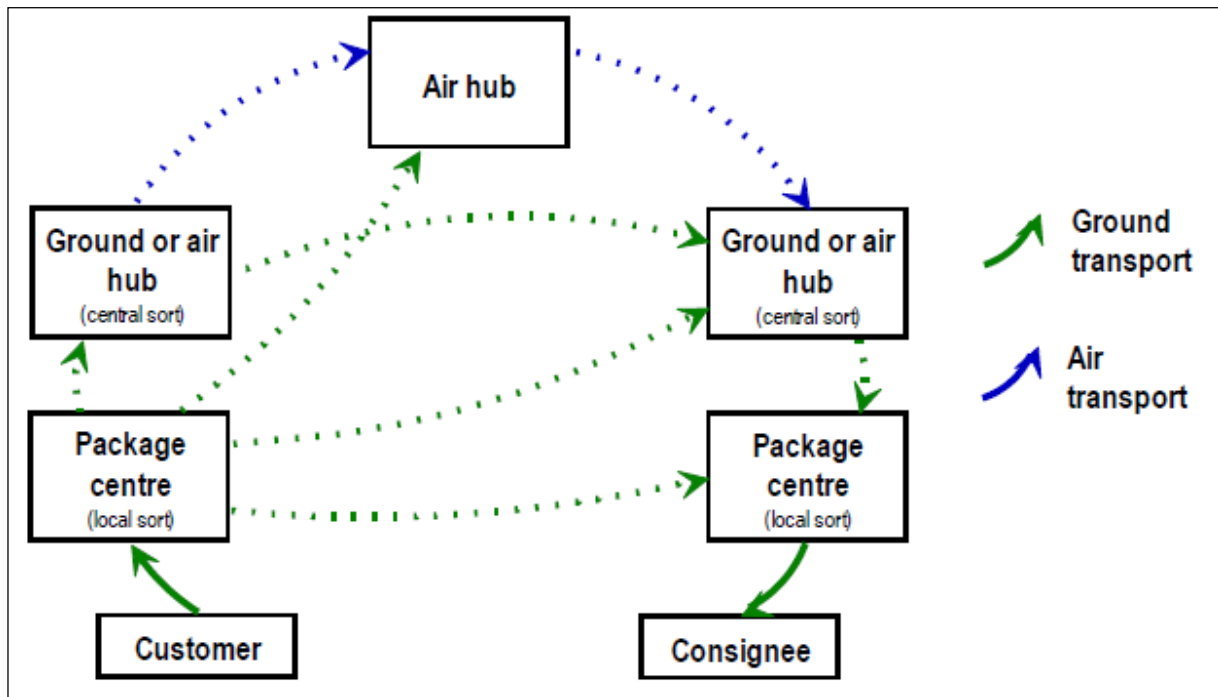
²⁶ Form CO, paragraph 128.

²⁷ Form CO, paragraph 129.

6.1.2. Value Chain

- (44) When transporting a package from the sender to the receiver, different shipments will pass through a different number of “nodes”²⁸ before reaching their final destination. There may be cases where a parcel travels through a number of different hubs before reaching its final destination (particularly for long-distance deliveries and those to more distant destinations and/or using air transport), while in other cases packages travel directly from one local hub to another (rather than via a larger intermediate). Figure 1 provides an overview of the different logistical activities involved in transporting a package from a sender to a receiver.

Figure 1: Overview of steps in small package delivery



Source: Further Synergies Submission, 4 September 2012, p.3

- (45) A small package delivery company has both operational and management activities which are typically built around a so called hub-and-spoke system. The main functions in the chain are as follows: pick-up by a van from customer's location - processing and sorting the packages in the sorting centres and hubs - transport between different centres or hubs (line-haul) – for longer distances shipments air transport from the origin air hub to a main European air hub – sort in the main air hub – transport by trucks or vans or trucks to local hubs or sorting centres (line-haul) – sort in those centres – dispatch by vans to the destination address (last mile).
- (46) Some of the functions are core functions in the operation of the networks and are almost always run directly by the suppliers; this is the case for the operation of (air and ground) hubs and sorting centres. The network is supported by the use of sophisticated IT infrastructure. Especially the operational activities at hubs require knowledge of the small package company's services, labelling, operations and flows. The workforce is

²⁸ A node is a connection point within a network.

typically employed by the network owner, with the use of temporary labour in case of volume peaks.

- (47) Some functions of the operational chain can be outsourced to varying degrees, for instance pick-up and delivery and transport between centres or hubs. This usually involves outside service providers (OSPs, also referred to as "subcontractors"), and authorised service contractors (ASCs, also referred to as "agents/contractors"). While OSPs generally provide pick up, delivery and certain sort functions to small package companies, an ASC represents a small package company within a particular area (mostly a singly country), and enters into direct relationships with the clients (in that country). In both models, the vans and drivers usually carry the brand of the small package company such as UPS. If ASC and OSP are employed, they usually have to follow strict requirements of the small package company, matching the standards and operations of the whole chain.
- (48) The way in which the small package delivery company keeps operational control over the outsourced activities is decisive for the quality of the service. For that reason companies with high quality networks such as the integrators referred to in Recital (62) keep tight operational control over all outsourced activities in their networks.

6.1.3. *Economies of density/scale applying to small package delivery*

- (49) Small package delivery is subject to significant economies of density/scale in the same way as other network industries. Small package delivery benefits from the effects of a larger degree of territorial coverage or density. The larger the density of the network is at the origin and destination end the lower will the unit costs of the service provision for the provider be. This gives an advantage to operators that have larger geographical coverage and densities.

6.1.3.1. Effect of network density on pick-up and delivery costs

- (50) The small package transport process starts with the pick-up operation. Pick-up is accomplished using vans or tractor trailers (also called "feeders") which collect packages from customer locations and bring them to a local package centre. The delivery operation at the other end of the process is carried out in the same way but in reverse: feeders move to centres, which dispatch packages to customers. Pick-up and delivery operations are commonly referred to in the business as "PUD" (Pick-Up and Delivery)²⁹. PUD involves operating vehicles that transport parcels from local centres to and from customer (receiver/sender) locations as well as operating the local centres including final stage sorting facilities. [Details regarding the Parties' cost structure]^{*30}. Therefore, management will focus within PUD on how to maximise the number of deliveries a driver/vehicle can make in a day by increasing the number of stops of the vehicle and the number of packages in the vehicle as much as possible³¹.
- (51) As underlined by the Parties, a greater density of the network allows the service provider to achieve a better use of the capacity of its vehicles and a rise in stops (drops) per route and to experience a significant fall in total distance travelled per service

²⁹ UPS, *Efficiencies Paper*, 4 May 2012, p.10.

³⁰ [Details regarding the Parties' cost structure]*

³¹ UPS, *Further Synergies Submission*, 4 September 2012, paragraph 2.19.

provided. Each increase in the network density leads to a lowering of the costs of handling additional volumes, since it reduces the average distance between stops³².

- (52) A larger density network brings more clients per square kilometre which allows a reduction of the distance between customers. Therefore single vehicle journeys will be shorter in distance and will allow a larger number of small packages to be picked-up and delivered per square kilometre. This lowers the variable costs per unit picked-up or delivered and is referred to as economies of density gains³³.
- (53) The increase in network density leads to a reduction of the catchment area of each PUD vehicle. An increase in network density allows a service provider to offer more reliable services (more accurate times of delivery and wider guaranteed services) and also later pick up options and earlier delivery options to its customers. As the length of individual routes decreases, the frequency of pick-ups and deliveries can be increased, as the same vehicle can make the same route more times in any given day³⁴.

6.1.3.2. Density effects from ground feeder network³⁵

- (54) Once packages arrive in the local package centre they are sorted (local sort) and distributed further by truck (ground feed or line-haul) either to another package centre or hub location in the ground network or, if the service involves air transportation, to an airport facility. The Parties state that most of their shipments, both domestically and across European borders, are achieved through ground transportation. In relation to international express services, however, a large part is shipped by air, in the case of UPS more than [80-90]*%³⁶, although around [50-60]*% of international express services are short-haul, where parcels could be transported using ground-based line-haul (feeder) networks. These networks connect the Parties' ground hubs and package centres around Europe.
- (55) The density of the ground feed network also influences the costs of the service provider. Density allows where the volumes justify it to have direct routes not only run from hub-to-hub and then hub-to-package centre, but also in some cases directly from package centre to package centre. This brings advantages both in reduced fuel and driver hours, and also in fewer sorts (and associated reductions in damage and errors). To ensure efficient ground feed, traffic operators have to aim for high utilisation of the transport vehicles. This will often lead to packages travelling indirectly between their origin and destination hubs, with intermediate stops and sorting processes in order to combine volumes and increase vehicle utilisation.
- (56) In the case of feeder, the main drivers of cost reduction for the parcel operator are higher utilisation of transport vehicles and facilities, and more direct connections between hub/package centre locations, leading to shorter average transport distances and fewer sorts (resulting in both less sorting time, fewer errors and less damage).

³² UPS, *Further Synergies Submission*, 4 September 2012, paragraph 2.19.

³³ UPS, *Efficiencies Paper*, 4 May 2012.

³⁴ UPS, *Efficiencies Paper*, 4 May 2012.

³⁵ UPS, *Further Synergies Submission*, 4 September 2012, paragraphs 4.1 to 4.7.

³⁶ Form CO, paragraph 137.

6.1.4. *Small package delivery is a highly differentiated sector*

- (57) Small package delivery constitutes a highly differentiated activity where providers are able to differentiate the service supplied across a vast number of dimensions. These parameters can be grouped by: speed of delivery (ranging from early morning next day express services to two or more days standard delivery); geography (ranging from domestic to international extra-EEA services) and quality of service (such as reliability, security, late pick up time, comprehensive track and trace ability).
- (58) Each customer is likely to have different needs depending on the location from which its shipments depart and where its shipments need to go. Each customer will also have varying needs as to the speed at which its shipments need to reach their destination. For the same customer on the same lane (origin-destination pair), some shipments may be particularly urgent due to their nature (such as spare parts or blood samples) or require higher security (such as high value goods)³⁷. In the computer industry, time-to-market is very important. If for example, a large computer company needs to upgrade a line of computers with new processors, it needs to ensure that delivery occurs as quickly as possible. The greater the importance of a shipment (in terms of its role in a value chain) and the higher its value, the more likely it is that high quality express services will be used. One and the same customer can ship both high value products (such as computer chips) with express services and low value products (such as a computer mouse) with deferred services. The use of express services as part of a value chain enables companies to reduce their warehousing costs and implement just-in-time processes. For luxury goods, rapid and secure delivery to stores is also important. Depending on its specific needs, each customer may face a different set of competitive alternatives given that different suppliers offer different services³⁸ and different qualities of services.
- (59) With respect to quality differentiation, several aspects are important in the small package delivery market. First, there is reliability the commitment that a package will be delivered at a certain point in time with a high level of certainty whether this is early morning, noon or end-of-day. This point was confirmed in a 2003 study submitted by the Notifying party in its response to the decision opening proceedings³⁹: "*Reliability is the most important aspect of the choice of a particular operator*". Second, efficient track-and-trace systems are also very important as they are directly linked to reliability and quality. Frequent scanning of small packages enables companies to follow their package virtually all through the way from pick-up to delivery. Frequent scanning is associated with fewer losses as problems can be identified and located more efficiently. With highly sophisticated IT and an integrated network, real-time tracking can be offered.
- (60) Moreover, coverage at *both* the location of origin and the location of destination are important. If a supplier has a very dense network in the country of origin of a customer but a limited coverage in the country of destination of that customer's package, then it will not be considered a strong competitor in comparison with other companies or "competitors" that have a good coverage at both ends. Similarly, a good coverage in the

³⁷ Agreed non-confidential minutes of the meeting between FedEx and the case team on 9 August 2012, paragraph 8.

³⁸ For instance, UPS confirmed to be offering "*five services (Express Plus, Express, Express Saver, Standard and Expedited) throughout Europe [...]*", see Form CO, footnote 3.

³⁹ See the Oxera study of 2003, submitted as Annex 3 to the Notifying party's response to the decision opening the proceedings.

country of destination but with a limited ability to pick-up packages in the country of origin will weaken a supplier in comparison to competitors with a dense network at both ends. For customers with needs to deliver shipments across multiple lanes, a wide geographic coverage will constitute an important differentiation factor.

6.1.5. *A diverse competitive landscape*

(61) There are a number of different operators active in the industry, such as integrators, national and local postal operators, partner networks, freight forwarders and others, each with a different operating model based on the structure and type of its network. The main features of the various operators will be presented in Sections 6.1.5.1 to 6.1.5.6.

6.1.5.1. Integrators: UPS, TNT Express, DHL and FedEx

(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)⁴⁰. 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.

Figure 2: Integrator Supply Chain Model



Source: Transport Intelligence, *International Express Parcels 2012*, p.37

⁴⁰ Agreed minutes of a meeting of 8 May 2012 with DHL.

UPS

- (64) UPS is one of the largest transportation groups in the world⁴¹. Its operations are principally divided between package and non-package activities. In the United States, the company is the market leader within the ground package market. Since the mid-1990s, UPS has focused on providing complete supply chain solutions rather than simply developing package delivery services. During this period, it established a logistics operation. Through acquisitions it has grown into one of the largest logistics players in the United States and into a significant one in Europe. It has also added freight forwarding and banking to its portfolio of services. As one of the 'big four' integrators, UPS owns and operates a substantial amount of transport assets.
- (65) With 398 300 employees around the world, UPS reported revenues of EUR 40 850 million for 2011. Concerning package operations, UPS covers more than 220 countries and territories in the service area and runs a fleet of 92 258 road vehicles, 229 UPS jet aircraft and 298 chartered aircraft, and has 1 860 operating facilities and 8.8 million daily customers⁴².
- (66) UPS's European network has its central hub in Cologne/Bonn, Germany. Its hub's package sorting capacity is going to be increased by the end of 2013 *"from today's 110 000 to 190 000 packages per hour, ensuring UPS's Cologne/Bonn air hub remains one of the most advanced sorting facilities in the world"*⁴³.
- (67) UPS originally chose Cologne/Bonn as the location for its European air hub on account of its excellent location at the heart of Europe's most productive economic region. Moreover, Cologne/Bonn Airport also offers UPS the possibility to fly at night until at least the year 2030⁴⁴.

TNT

- (68) TNT provides on-demand door-to-door delivery services for customers sending documents, parcels and freight. It offers national, regional and global express and deferred delivery services⁴⁵, mainly for business-to-business customers.
- (69) In 2010, TNT NV decided to separate its divisions into two companies: Mail and Express. The separation took place through the demerger of the Express activities by TNT NV. TNT NV, now PostNL, retained a 29.9% minority financial shareholding in TNT.
- (70) As to the focus of TNT's activities per geographic region, as shown in Figure 3, TNT generates most of its volume in [Geographic distribution of TNT's activities]*.
- (71) TNT has 63 head offices, employs more than 77 000 people and runs a fleet of 30 239 road vehicles and 50 aircraft. It operates 2 653 depots and sorting centres in over 200 countries. In 2011, its overall reported revenues rose by 2.7% to EUR 7 246 million.

⁴¹ "We believe that our integrated global ground and air network is the most extensive in the industry. We handle all levels of service (air, ground, domestic, international, commercial, residential) through a single pickup and delivery service network." in UPS, *Annual Report UPS*, p.10.

⁴² <http://www.pressroom.ups.com/Fact+Sheets/UPS+Fact+Sheet> consulted on 02 October 2012.

⁴³ http://www.ups.com/content/ru/en/about/news/20110926_hub.html consulted on 07 January 2013.

⁴⁴ http://www.ups.com/content/ru/en/about/news/20110926_hub.html consulted on 07 January 2013.

⁴⁵ http://www.tnt.com/express/en_gb/site/home/services.html consulted on 11 January 2013.

Figure 3: [Geographic distribution of TNT's activities]*

[...]*

Source: [...]*

- (72) TNT's European network has its central air hub in Liège, Belgium. In Europe, the company operates a combination of road and air networks that connects its domestic platforms. The road network connects 39 countries through 20 road hubs; the air network connects 65 destinations through a fleet of 46 aircraft.

DHL

- (73) DHL operates a network for intercontinental transport and cross-border transport within continents, via road, rail and air, providing both standard products and tailored solutions to customers⁴⁶. Through its Express division, DHL provides customers with a wide range of delivery options: from emergency same day, through guaranteed time-critical next day, to less urgent day certain options, differentiated between national and cross-border deliveries⁴⁷.
- (74) DHL Express is the result of the consolidation of the former DHL Worldwide Express business and the Deutsche Post Euro Express parcels business and offers worldwide express delivery of documents and parcels, time-certain delivery, a range of e-commerce tools and an express logistics network, as well as technology for the electronic tracking of shipments⁴⁸.
- (75) The courier business is organised by geographical regions, with Europe representing the bulk of the revenues and a major contributor to profitability⁴⁹.
- (76) With a network spanning more than 220 countries and territories and more than 500 airports globally, DHL employs 275 000 people and runs a fleet of 80 000 vehicles and 250 dedicated DHL aircraft⁵⁰. In 2011 revenue in the Express Division was EUR 11.76 billion⁵¹.
- (77) DHL's European network has its central hub in Leipzig, Germany. The site is becoming increasingly important for its global network: more than 50 aircrafts take off and land in Leipzig each day.

FedEx

- (78) FedEx, based in Memphis, Tennessee, USA, is one of the world's largest freight companies. FedEx's core operations are in the United States overnight domestic express market, however it also provides e-commerce and business services, and has been investing heavily in international freight operations.
- (79) FedEx provides delivery of packages and freight to more than 220 countries and territories through one integrated global network. It offers time-certain delivery within one to three business days, serving markets that generate more than 90% of the world's gross domestic product through door-to-door and customs-cleared service. FedEx

⁴⁶ <http://www.supplychainleaders.com/provider/dhl-express/240/> consulted on 11 January 2013.

⁴⁷ <http://www.dhl.com/en/express.html> consulted on 11 January 2013.

⁴⁸ <http://www.supplychainleaders.com/provider/dhl-express/240/> consulted on 11 January 2013.

⁴⁹ <http://www.supplychainleaders.com/provider/dhl-express/240/> consulted on 11 January 2013.

⁵⁰ <http://www.dhl.com/worldmap/intro.html#/GLOBAL/factsandfiguresglobal> consulted on 02 October 2012.

⁵¹ Transport Intelligence, *International Express Parcels 2012*, p.37.

Express employs approximately 141 000 employees and has approximately 57 000 drop-off locations (including FedEx Office and Print Centres), 684 aircraft and approximately 51 000 vehicles and trailers in its integrated global network. With a fleet of over 2 000 vehicles and 50 aircraft, FedEx Express EMEA serves approximately 123 countries and territories and 45 airports, and has 132 stations⁵². It achieved revenues of EUR 28.23 billion in 2010-2011 (year end is 31 May 2011 for 2010-2011 revenues)⁵³.

- (80) FedEx has a relatively limited network in most EEA countries. Moreover, its intra-EEA air network is also significantly smaller than those of the other integrators. FedEx's European network has its central hub in France at Paris Charles de Gaulle airport.
- (81) Within the EEA, FedEx has a larger domestic presence in the United Kingdom, in France, where it acquired in 2012 the ground network operator Tatex, and in Poland, where it recently acquired the ground network operator Opek.

6.1.5.2. Incumbent postal operators

- (82) National postal operators own extensive domestic ground networks and in some cases also international operations. In particular, Royal Mail (the United Kingdom), La Poste in France (for the sake of this Decision, it will be referred indifferently to La Poste, La Poste/DPD, DPD and GeoPost), PostNL (Netherlands) and Austrian Post (Austria) qualify as international network operators.
- (83) Those operators have taken a strong foothold in the international segment by acquiring small package companies outside their home markets. For instance, La Poste through the acquisition of Deutscher Paket Dienst ("DPD"); Royal Mail, notably through its subsidiary General Logistics System ("GLS"); Austrian Post, through its subsidiary Trans-o-flex; and PostNL, through its recent acquisition of the Dutch and Belgian activities of the Trans-o-flex Group.
- (84) Those operators use their own post office network and assets for pick up. In the delivery country they then either sub-contract to a third party for final delivery or use their own operations. Those operators, in contrast to the integrators, do not have their own air fleet and have to rely on commercial flights (belly space) or on integrators for delivery services based on air transportation, which puts them at a competitive disadvantage vis-à-vis the integrators for intra-EEA express services in particular.

6.1.5.3. National small package delivery companies and partner networks

- (85) National small package operators have a predominantly domestic small package business. Companies such as Bartolini in Italy, Yodl in the United Kingdom, Siodemka in Poland or Speedex in Greece have a rather national footprint and compete with the Parties only at that national level.
- (86) National or local postal operators may form alliances and partner networks to offer European-wide small package services. Cooperative networks like NetExpress Europe, Eurodis and EuroExpress unite several regional companies for the delivery of cross-border packages. However, the market presence of these networks is very limited and their level of integration is far less developed compared to that of firms operating under a unified single control, in particular the integrators.

⁵² <http://www.fedex.com/az/about/company-info/overview-and-facts.html> consulted on 04 January 2013.

⁵³ Transport Intelligence, *International Express Parcels 2012*, p.50.

6.1.5.4. Freight forwarders

(87) Freight forwarders (such as Kuehne+Nagel, DB Schenker, DSV, Geodis) focus on heavy consignments but sometimes also deliver small packages, mostly to customers who send ship cargo shipments through their networks. Freight forwarders also offer intra-EEA express services of small packages, which they however often outsource through the integrators; typically after picking-up the parcel at the clients' premises they will send the package on via the integrators' network.

6.1.5.5. Others

(88) Other competitors active on the market are mostly smaller companies which typically have a domestic ground PUD service in one or more countries (Hermes for instance). These courier companies generally focus on building relationships with local customers and may handle time-sensitive shipments by offering same day delivery services⁵⁴.

6.1.5.6. Resellers

(89) The reselling operating model allows a small package company (often a freight forwarder, a local domestic package company selling international services or a parcel broker) to resell the services purchased from another small package company (often an integrator). Resellers may be seen, from the end-customer perspective, as competing directly with that small package delivery operator. However, resellers do not have control over important parts of the value chain. In terms of pricing, quality of service and other parameters they are therefore dependent on other players, most notably the integrators. Resellers do not cover a significant part of the market, and the vast majority of shipments is contracted by clients directly from the small package delivery companies.

6.1.6. *Customer base and multi-sourcing*

(90) The operators usually define their customer segmentation based on annual revenue spent with the respective service supplier⁵⁵. Small package delivery suppliers have thousands of customers ranging from the occasional purchaser (called "ad hoc" customers by TNT) to large multinational companies shipping daily hundreds of packages on a multitude of lanes. [Details regarding the Parties' customer base]*.

(91) In principle, customers purchase rapid (express⁵⁶) or slower (deferred) delivery services from the small package companies based on their specific needs (e.g. intra-company shipments and/or shipments to customers, either businesses or consumers) and different types of requirements. For instance, customers with special needs for timely deliveries are likely to have strong preferences for express services with time commitments, notably if they ship certain categories of items which are widely perceived as time-sensitive (e.g. spare parts, components used in production processes, medical or life science items such as blood samples, R&D samples or time-critical documents, etc.).

(92) [Details regarding the Parties' customer base]*⁵⁷

⁵⁴ Form CO, paragraphs 434 and 435.

⁵⁵ See the description with regard to the Parties' customer segmentation in Form CO, paragraphs 351 and 361.

⁵⁶ The definition of express and deferred services is explained in detail in the market definition Section 6.2.1.4.

⁵⁷ [...]*

- (93) [Details regarding the Parties' customer base]*
- (94) Depending on their size and preferences, customers may either single-source or multi-source. The evidence collected through the market investigation shows that bundling behaviour is very dependent on the customer though generally it appears that smaller customers with limited needs are more likely to single-source. For large customers, it appears that some customers use the same supplier for all services, some customers use different suppliers for different services and some customers use different suppliers for the same service⁵⁸.
- (95) The evidence collected through the market investigation has shown that bundling cannot be identified as a prominent feature of the industry even though some customers do purchase several services from the same supplier. This fact is illustrated by the Notifying party's own contradictory claims: on the one hand, bundling behaviour is a prominent disciplinary force on pricing (because customers purchase their requirements from one single supplier and can threaten to move the entire bundle or a large part of the bundle purchased from the Parties to competitors) and at the same time, most customers already multi-source, purchasing services from several suppliers (which is supposed to reinforce the threat of multi-sourcing in order to discipline pricing). In Paragraph 3.27 of the Response to the Statement of Objections, the Notifying party indicates that "*The vast majority of customers of the Parties purchase their services in a bundle*" while in Paragraph 3.36, the Notifying party indicates that "*(...) the vast majority of the customers of the Parties multi-source*" referring to the Form CO where the following statement was made: "*Concluding contracts covering different small package services is standard practice in the industry. Since the discount is however generally not dictated by the total volume/amount spend, but rather by the individual volume shipped using a single service, customers can (and do) pick and choose services between different suppliers*"⁵⁹. The Notifying party had also provided evidence that [Many of its largest customers multi-source]*⁶⁰. The Notifying party's arguments are difficult to reconcile: either customers bundle (purchasing their needs from a single supplier) in which case suppliers compete for the bundle, or customers multi-source (purchasing their needs from several suppliers), in which case, suppliers can compete for the whole bundle to attract more volumes but generally price and compete by service.
- (96) In the Statement of Objections, the Commission did not report the details of the market investigation because it was inconclusive in identifying a general trend across customers with the exception that large customers tend to multi-source as recognized by the Notifying party. In response to the market investigation,⁶¹ the majority of large customers indicated that they purchase more than one service (and about a third of customers purchase up to 10 services⁶²). At the same time, the majority of large customers reported using different suppliers for different services as well as having only one supplier for each specific service. Only about a quarter of respondents reported purchasing a bundle of services from the same supplier and very few customers truly

⁵⁸ See responses to Question 9 of the questionnaire to customers aggregated for all Member States (Q2-Q29), Phase I.

⁵⁹ Form CO, paragraph 579. See also paragraphs 377 thereafter discussing how customers multi-source.

⁶⁰ See Form CO, Annex 28.

⁶¹ See responses to question 8 of the questionnaire to small customers R31 - Phase II.

⁶² The services include domestic, intra-EEA and extra-EEA with the various time commitments (deferred, express early morning, express noon, express end-of-day).

dual-source (that is to say, use more than one supplier for the same service). This is consistent with the claim made in the Statement of Objections that large customers mostly pick and choose from various suppliers.

- (97) In the Response to the Statement of Objections, the Notifying party indicates that bundle purchases constrain the combined entity in relation to pricing for individual services. This would have the effect of constraining the price charged by the Parties for specific services (such as intra-EEA express) because customers would threaten to move the entire bundle to another supplier or start multi-sourcing and move their other services to other suppliers. This argument cannot be accepted. First, as indicated in recitals (95) and (96), most large customers already multi-source and therefore, the alleged threat to move the entire bundle or a large part of it is not credible. Second, even for those (generally smaller) customers that might prefer a bundle, there are two outcomes in case of a price increase of one component of the bundle: either customers switch the bundle (but as will be discussed in Section 7 only a very limited number of competitors, including the Parties, can offer the whole bundle of delivery services), or they begin to mix-and-match, moving away the part of the bundle that is more expensive, but even in this case, the number of competitive options will be particularly reduced after the merger, and therefore, the pricing pressure will become even weaker. Indeed, should the merged entity raise prices for long-haul services as a result of the Transaction (and be followed by other companies offering such services, notably DHL), all things being otherwise equal, a customer purchasing such long-haul express services in a bundle would have no incentive to switch non-long-haul express to other suppliers (including non-integrators), even assuming that it attaches no value to bundling. Indeed, such a switch would not spare the customer from the increase in prices of long-haul services due to the effects of the Transaction. When it comes to non-long haul intra-EEA express services, the customer would have no reason to benefit from a price decrease by switching away from the merged entity. Indeed, there is no reason why as a consequence of the Transaction, the merged entity's competitors, in particular non-integrators would undercut the merged entity for such services more than they would absent the Transaction. This conclusion holds even assuming that "*switching is not uncommon*". As regards customers that currently multi-source their intra-EEA expresses delivery services from different integrators and non-integrators, the transaction would nonetheless remove a competitive constraint for lanes that are not served by very few suppliers.

6.1.7. *The price setting process*

- (98) Like most players in the industry, UPS and TNT publish list prices by service type, zone and weight. As acknowledged by the Parties "*This can make pricing in the small package business complex. Especially when the customer uses a large variety of service/lane combinations and shipment characteristics show a large variability*"⁶³. [Details regarding the Parties' pricing strategy]^{*64}, which makes the price structure even more complex. In this context it appears that the Parties employ a complex price setting process, which normally takes into account [Details regarding the Parties' pricing strategy]*. The precise nature of the process and the quality of the underlying

⁶³ Form CO, paragraph 31.

⁶⁴ [Details regarding the Parties' pricing strategy]*

information might differ among customers and bids depending, for instance on the size of the customer, or whether a customer is an existing or new one⁶⁵.

- (99) The complexity of the negotiation process varies among customers of different size. [Details regarding the Parties' business strategy]*.
- (100) [Details regarding the Parties' business strategy]*^{66 67}
- (101) Such large customers often use a structured request for quotation ("RFQ"), which details the company's business, its supply chain, its logistic needs and the main criteria that the small package service providers should meet⁶⁸. In any event, it appears that [Details regarding the Parties' business strategy]*⁶⁹.
- (102) [Information on UPS' sales strategy]*^{70 71}
- (103) [Information on UPS' sales strategy]*⁷²
- (104) [Information on UPS' sales strategy]*^{73 74 75}
- (105) [Information on UPS' sales strategy]*^{76 77 78}
- (106) [Information on TNT's sales strategy]*⁷⁹
- (107) [Information on the Parties' price setting strategy]*⁸⁰
- (108) [Information on the Parties' price setting strategy]*^{81 82}
- (109) [Information on UPS' price setting strategy]*^{83 84}

Figure 4: [Information on UPS' price setting strategy]*⁸⁵

[...]*

Source: [...]*

⁶⁵ [Details regarding the Parties' pricing strategy]*
⁶⁶ [...]*
⁶⁷ [Details regarding the Parties' business strategy]*
⁶⁸ See, for instance, Form CO, paragraph 350.
⁶⁹ [Details regarding the Parties' business strategy]*
⁷⁰ [Information on UPS' sales strategy]*
⁷¹ [Information on UPS' sales strategy]*
⁷² [Information on UPS' sales strategy]*
⁷³ [...]*
⁷⁴ [Information on UPS' sales strategy]*
⁷⁵ [Information on UPS' sales strategy]*
⁷⁶ [...]*
⁷⁷ [...]*
⁷⁸ [...]*
⁷⁹ [...]*
⁸⁰ [...]*
⁸¹ [...]*
⁸² [Information on the Parties' price setting strategy]*
⁸³ [Information on UPS' price setting strategy]*
⁸⁴ [Information on UPS' price setting strategy]*
⁸⁵ [Information on UPS' price setting strategy]*

- (110) [Information on TNT's price setting strategy]*⁸⁶
(111) [Information on TNT's price setting strategy]*

Figure 5: [Information on TNT's price setting strategy]*⁸⁷

[...]*

Source: [...]*

6.1.8. Price discrimination

- (112) Price discrimination is said to exist when similar products are sold at different prices that do not reflect cost differences. Three conditions are required for price discrimination to exist: customers are heterogeneous, i.e. they differ in their demands for a given good or service, a firm is able to set prices above marginal cost (that is, the firm has market power in economic terms) and arbitrage among customers is not feasible⁸⁸. These conditions are clearly met in the case of small package delivery.
- (113) The evidence in the file suggests that UPS and TNT price discriminate against a considerable proportion of their customers. Firstly, for most customers discounts are set in individual negotiations. Secondly, detailed information on the customer shipping profile is normally fed in the price setting process. As a result, offers, in particular to the larger accounts ([...]*), are highly individualised. Finally, the final offer takes into account the sales person's knowledge of the competitive constraints and customers' willingness to pay. Hence, prices are set on the basis of the competitive context and not only on the basis of costs. The Parties own transaction data confirms that price differences across customers for the same service on the same lane do not reflect cost differences.

6.1.8.1. Individual negotiations take place with the majority of customers

- (114) The Parties themselves have on a number of occasions emphasised that most of their business is negotiated bilaterally. [Details regarding negotiations with customers]*. *But the final contract and its associated conditions and rates are always the result of a set of negotiations (which will almost inevitably include the customer seeking comparative bids from competitors)*⁸⁹.
- (115) This is in line with customers' answers in the market investigation – even when looking at small customers only, the vast majority of them indicated that that they pay a price

⁸⁶ [Information on TNT's price setting strategy]*

⁸⁷ [Information on TNT's price setting strategy]*

⁸⁸ Regarding the third condition, it appears highly unlikely that customers would be able to resell to other customers the delivery services they are purchasing from their suppliers. This would require customers negotiating terms for deliveries between addresses that are not relevant to them but to other customers and organizing pick-up, delivery, billing on behalf of other companies. This seems highly implausible. If considering the services sold by integrators to actual resellers (freight forwarders for example), these are ultimately not selling the same product given that these resellers offer to final customers their own services (generally of lower quality as explained later in the competitive assessment). Only a certain part of the delivery would be performed by the integrator.

⁸⁹ Form CO, paragraphs 11 and 31.

which is negotiated or involves a discount to the published price list⁹⁰. This is also the case for large customers⁹¹.

6.1.8.2. The price setting process relies on detailed information on the customer shipping profile and for an important part of the customer base prices are individually tailored

- (116) It appears that during the negotiation and price setting process the Parties make use of, often, detailed information of the expected and/ or past shipping behaviour of customers as well as of the sales person's knowledge of the customers' business, needs and of the competitive context.
- (117) From the Notifying party's own description of its sales process, it becomes clear that the sales force normally has a good understanding of their customers' business and logistic needs. [Information on the Parties' price setting strategy]*^{92 93}
- (118) The extent of the available information and its quality could depend on whether a customer is an existing one or a new one. As the Notifying party explains in paragraph 349 of the Form CO, regarding existing customers, UPS can make use of historic shipping data to gain an understanding of the needs of these customers. This is not always possible as regards new customers for whom information on shipping characteristics, competitors and required price levels is according to the Parties often not available⁹⁴.
- (119) However, evidence gathered in the market investigation from customers indicates that most customers do share a number of key elements of information with their new suppliers, even already during the bidding process or contract negotiation. Indeed, a large majority of the large customers responding in the Commission's investigation indicated that when negotiating a contract with a new small package delivery services supplier, they share the quantities to be shipped, types of items to be shipped, specific requirements and constraints on the day/time by which the packages need to reach their destination; when sharing the information a large majority also shares historical shipment data and estimated future delivery needs⁹⁵. A similar picture also arises from the responses of the small customers – a large majority of the responding small customers also indicate that they share information about quantities, types of items to ship and constraints on the day/time by which the small packages need to reach their destination, and a majority also shares the need for specific requirements⁹⁶.
- (120) Suppliers take this information into account when making an offer to the customers, and if shipments/revenue fall below expectations, this can be a reason for changing the conditions and re-negotiating the contracts in the future.

⁹⁰ See responses to question 4 of questionnaire to small customers R31 – Phase II.

⁹¹ See responses to question 12 of questionnaire to customers, aggregated for all Member States (R1-R29) – Phase II.

⁹² [...]*

⁹³ [...]*

⁹⁴ See Form CO, paragraph 349, as well as TNT's reply of 13 August 2012 to the Commission request for information Q8.

⁹⁵ See responses to questions 10.1, 10.2, 10.3, 10.4, 10.6.1 and 10.6.2 of questionnaire to customers, aggregated for all Member States (R1-R29) – Phase II.

⁹⁶ See responses to question 5 of questionnaire to small customers R31 – Phase II.

- (121) Suppliers strive to gather all the key information they need about their clients, their constraints and the way they need their packages to be delivered – and according to the customers they are quite successful in that. For example, the vast majority of all large customers replying in the market investigation think that on the basis of information their small package delivery companies have about their shipment needs, the suppliers are in a position to understand how important it is for them to use services with a certain committed delivery time⁹⁷.
- (122) Furthermore, a considerable proportion of customers are offered discounts which are personalised to a certain degree. [Information on the Parties' price setting strategy]*^{98 99}
100 101 102
- (123) [Information on the Parties' price setting strategy]*¹⁰³
- 6.1.8.3. Competitive constraints and customers willingness to pay are accounted for in the price offers made to customers
- (124) The information provided by the Parties confirms that price differences across customers for the same service do not fully reflect cost differences but are also a function of customers' willingness to pay as well as the competitive context.
- (125) [Information on the Parties' price setting strategy]*¹⁰⁴
- (126) The fact that considerations other than costs play a role in UPS's pricing decisions is confirmed by the explanations in the Parties' submission related to the expected efficiencies due to the merger: [Information on the Parties' price setting strategy]*¹⁰⁵.
- (127) [Information on the Parties' price setting strategy]*
- (128) [Details regarding negotiations with one customer]*^{106 107}
- (129) Matching competitors' offers for particular service types and countries is also explicitly mentioned [Details regarding negotiations with one customer]*¹⁰⁸. This example illustrates the considerations at play when UPS formulates its final offer to strategic customers¹⁰⁹.
- (130) Another indication that discounts offered to different customers do not reflect fully cost differences is that apparently [Information on TNT's sales strategy]*¹¹⁰.
- (131) [Information on TNT's sales strategy]*

⁹⁷ See responses to question 11 of questionnaire to customers, aggregated for all Member States (R1-R29) – Phase II.

⁹⁸ [...]*

⁹⁹ [Information on the Parties' price setting strategy]*

¹⁰⁰ [Information on the Parties' price setting strategy]*

¹⁰¹ [Information on the Parties' price setting strategy]*

¹⁰² [Information on the Parties' price setting strategy]*

¹⁰³ [...]*

¹⁰⁴ [Information on the Parties' price setting strategy]*

¹⁰⁵ [...]*

¹⁰⁶ [Details regarding negotiations with one customer]*

¹⁰⁷ [Details regarding negotiations with one customer]*

¹⁰⁸ [Details regarding negotiations with one customer]*

¹⁰⁹ [Details regarding negotiations with one customer]*

¹¹⁰ [...]*

Figure 6: [...]*¹¹¹

[...]*

Source: [...]*

6.1.8.4. The Parties transaction data confirms that price differences cannot be fully explained by cost differences

- (132) Using the Parties' own transaction data the Commission investigated whether price differences across customers for similar services can be explained by cost differences. If this were true one would observe similar margins across customers. [Information on UPS' business strategy]* would be indicative of the Parties price discriminating across customers, that is, charging different customers different prices, which are not fully driven by cost differences.
- (133) As regards UPS, the Commission used the dataset provided by UPS on 5 September 2012¹¹² to calculate price-cost margins per kilo per customer, lane and service for intra-EEA express and deferred services¹¹³. Examples are provided in the graphs below, which show the distribution of per kilo margins for early morning, midday, end-of-day (EOD) intra-EEA express services and deferred services on four lanes¹¹⁴. The shadowed rectangle shows the interquartile range, in other words its lower bound indicates the level below which 25% of the margins lie and its upper bound – the level below which 75% of the margins lie. The middle line shows the median margin or in other words the level of the margin such that half of the customers have a margin above that level and the rest - below that level. This observed variation of margins across customers within service type is consistent with UPS price discriminating¹¹⁵.

Figure 7: [...]*

[...]*

Source: [...]*

¹¹¹ [...]*

¹¹² On 5 September 2012 UPS provided cost data for 2011 at a customer, lane, service level, for certain countries and customers. The costs provided are modelled costs, that is, they are obtained by the UPS cost model based on system averages, such as average delivery densities and hypothetical utilisation levels. It is explained that costs are further adjusted to reflect actual P&L costs. Following a request by the Commission to merge the transaction and the cost datasets, on 12 September 2012 UPS provided a dataset, containing quarterly transaction data and yearly cost data for 2011. Because costs in this dataset are annual, the Commission created a dataset where all variables are at an annual level.

¹¹³ The Commission calculated both absolute and percentage margins (mark-up) relying on revenue per service and lane as well as on the adjusted total costs as provided by UPS (as these costs are not split into variable and fixed). Using the modelled costs before adjustment does not change qualitatively the results but shifts the distributions upwards, which indicates that the adjustments increase the costs relative to the unadjusted ones. However, this is not relevant for the purpose of showing that [Information on UPS' business strategy]*.

¹¹⁴ The top two short haul and long haul lanes were chosen (long haul being defined on the basis of 800 km cut-off using the simple distance measure provided by the parties).

¹¹⁵ Similar dispersion is present as regards the mark-ups.

(134) [...] TNT transaction data¹¹⁶.

Figure 8: [...]*

[...]*

Source: [...]*

6.1.8.5. Views of the Parties

- (135) The evidence shows that prices are predominantly set in individual negotiations and that the price setting process involves the processing of often detailed information of the customer's characteristics through sophisticated revenue management tools. [Information on the parties pricing strategy]*. The Notifying party acknowledges this in its response to the Statement of Objections where it states that *"an important feature of the competition in this industry is that prices are set individually per transaction and per customer"*¹¹⁷.
- (136) Though the Notifying party acknowledges that individualised pricing is an important feature of the industry, in its response to the decision opening proceedings, it claimed that *"the information collected during the negotiation with a customer will often not allow the small package company to determine with precision the price sensitivity of the customer to future price changes"* and that the Parties are unable to identify the actual customer demand for a specific service¹¹⁸. First, it is not clear why the Parties refer to future price changes. Moreover, as already explained, while the quality of the information available to the Parties might differ across customers, it appears that, in particular for large customers, the information is sufficiently detailed to allow offering targeted discounts depending on the customer characteristics and the competitive alternatives.
- (137) Furthermore, the Parties claim that they do not discriminate against a particular category of customers and, in particular, that price discrimination does not occur at the level of the customer's willingness to pay but at a higher level, such as product type, weight band, customer size, industry¹¹⁹. The evidence in the file suggests that a wide range of customer characteristics are taken into account in the price setting process, including but not limited to those pointed out by the Parties. It is precisely the fact that customers' shipping needs and characteristics are indicative of their willingness to pay and of the competitive alternatives present, which allows suppliers to customise their offers accordingly.
- (138) Finally, to substantiate that price discrimination does not occur, the Notifying party has submitted two studies relating to price discrimination. These two studies aim at

¹¹⁶ The Commission used the updated TNT transaction data for 2010-2011 provided on 13 August 2012. The data set contains information at a quarterly level on country of origin and destination, customer identity (number, name), service split, volume in kg, net revenue and three types of margins (first margin, direct margin and EBID). The Commission constructed lanes for every pair origin-destination. For plotting the margin dispersion for certain lanes, 2011 data on first margin was used which, according to TNT, was obtained by deducting the variable cost components ([...]*) from the net revenue. Similarly to UPS, both absolute first margin per kg, as well as the mark-up were calculated. The results are qualitatively the same.

¹¹⁷ Notifying party's response to the Statement of Objections, paragraph 4.106.

¹¹⁸ Notifying party's response to the decision opening the proceedings, paragraph 122.

¹¹⁹ Notifying party's response to the decision opening the proceedings, Annex 11 and Annex 12.

identifying whether price discrimination occurs along specific dimensions of lane or customer characteristics.

- (139) The first study on price discrimination (hereafter, the First Price Discrimination Study) was submitted on 4 July 2012¹²⁰ and investigated whether across lanes prices were dependent upon the time-in-transit of deferred products or whether prices were dependent upon a customer's share of express products and/or their share of express products on lanes with long deferred time-in-transit (the study was conducted for strategic customers). The second study on price discrimination (hereafter, the Second Price Discrimination Study) was submitted on 24 August 2012 and 27 August 2012 (these are two parts of a similar analysis undertaken once with UPS data and once with TNT data)¹²¹. In this study, the discounts offered to customers are compared based on their needs for early morning services (this is to identify whether customers with greater needs for early morning services have lower discounts).
- (140) Both studies conclude that no price discrimination can be observed based on the variables considered in these analyses as explanatory factors of prices.
- (141) In particular, the First Study on Price Discrimination concludes that [Details regarding UPS' pricing]*¹²².
- (142) The Second Study on Price Discrimination finds that [Details regarding UPS' pricing]*.
- (143) As follows from Section 6.1.7, pricing in this industry is particularly complex and a number of factors affect prices. For the same service on a given lane, the variation in prices paid by customers is extremely large – well beyond the possible variations of costs to serve a particular customer. As the underlying data for the First Study on Price Discrimination shows, on a lane such as Belgium to Germany for example, customers have paid between [Details regarding UPS' pricing]* for sending their packages with UPS's Express Saver service. Such wide variations in the data imply that simply comparing average prices between groups of customers may either lead to erroneous conclusions (as averages can be affected by extreme values for some customers), or at least, such simple comparisons are insufficient to confidently conclude that a certain characteristic does not affect pricing. This is particularly true given that the analysis does not control for any other factor affecting prices.
- (144) With respect to the First Study on Price Discrimination, the Commission considers that the simple comparison of average price gaps without taking into account other relevant factors (such as customer size or the competitive conditions prevailing on the lane) cannot be meaningfully interpreted. This is even more the case in view of the fact that the analysis focuses on strategic customers for whom bilateral negotiations are particularly prominent and for whom individualized prices will incorporate the features of the overall demand of any given customer (which may explain why such significant variations in price per kg are observed in the data).
- (145) Moreover, the averages calculated yield some unexpected results such as those seen in Table 2 of the First Study on Price Discrimination where the ratio of the price of EOD

¹²⁰ Price discrimination in the small package delivery market, 4 July 2012.

¹²¹ Evidence of price discrimination: results based on UPS discounts, 24 August 2012 and Evidence of price discrimination: results based on TNT discounts, 27 August 2012.

¹²² [Details regarding UPS' pricing]*

over deferred is larger than the ratio of the price of all express products combined over deferred. This is rather surprising given that EOD prices tend to be cheaper than other faster express services¹²³. In fact the Commission noticed that in the underlying data, there are numerous customers for which the price of deferred is in fact *higher* than the price of express services (this is the case for about 20% of the sample) and sometimes even significantly higher. This unexpected result casts further doubts on the meaningfulness of calculating average price ratios and gaps between express and deferred product as these negative gaps obviously capture other determining factors of the price (there must be specific features of certain contracts / products to explain that a customer seemingly pays more for its deferred shipments than for its express shipments). Also the Commission notices that the relationship between price gaps and time-in-transit is in fact not linear (it first decreases and then increases for lanes on which the time-in-transit for deferred is above two days and a half).

- (146) In the Second Study on Price Discrimination, average discounts for groups of customers are calculated and compared (the treatment group includes customers with greater early morning needs and the control group includes other customers). One concern about this study relates to the interpretation of average discounts across products that have different list prices and different price levels (given that prices depend on lanes). If a customer purchasing high volumes of early morning services from Belgium to France obtains a 5% discount off a list price of 100 euros is compared to another customer purchasing small volumes of early morning services from Belgium to Germany with a 10% discount off a list price of 110 euros, the study would conclude that the first customer has a lesser discount even though the price paid is actually lower. Moreover, in view of the significant variations in discounts and prices, the average discounts calculated for the treatment groups which generally have very few observations are likely to be affected by outliers. Indeed, in the two papers submitted as part of the Second Study on Price Discrimination, treatment groups have in several cases fewer than 10 customers.
- (147) Despite these shortcomings and even if these results were taken at face value, the Commission does not ultimately define separate markets along the lines identified in the studies described in recitals 138-146 (such as time-in-transit for deferred services, industry to which the customer belongs, needs for early morning services, etc.).

6.1.8.6. Conclusion

- (148) Generally, the way prices are set in this industry for an important part of customers (mostly large customers but also some medium customers) implies that the price paid by each customer will be the result of that particular customer's characteristics. For the same product (delivery speed and lane), customers pay different prices that are not fully explained by differences in costs to deliver.
- (149) In particular, while the price setting process is rather complex, pricing is primarily influenced by a few factors such as the costs of serving the customer (which depend on a customer's shipment needs such as volumes, time of delivery, lanes covered), the competitive alternatives that the customer faces on that set of services/lanes, as well as

¹²³ The Commission also notes that when cleaning the dataset, by excluding negative prices and the top and bottom one percent price per kilogram for express and deferred, almost 80% of observations are excluded.

any information that the sales person may have on the customer's preferences and price sensitivity.

- (150) Whilst all the qualitative information reviewed by the Commission indicates these factors affect price, the same conclusion arises from the price concentration analysis submitted by the Notifying party on 27 September 2012. In that analysis, it is shown that the price per kg (of EOD products) depends on cost, distance, market size, customer size as well as on the presence of competitors.
- (151) It is thus concluded that the industry is characterised by price discrimination. The existence of price discrimination renders the market definition exercise particularly complex as marginal customers (those who would switch) do not "protect" non-marginal customers by imposing a constraint on the price paid by customers. In this context, it is important to identify the segments for which the merger would lead to more concentration (that is, the services/lanes for which the merger significantly reduces the competitive alternatives) as for those, prices are likely to rise even though there are other services/lanes/customer types for which the merger may have limited effect.

6.2. Market Definition

6.2.1. Relevant product markets

6.2.1.1. Small packages

- (152) Both Parties provide small package delivery services throughout the EEA.
- (153) As indicated above, parcel delivery services are highly differentiated products along a number of dimensions, the most important being speed of delivery (ranging from early morning next day express services to two or more day standard delivery), geography (ranging from domestic to international extra EEA services) and quality of delivery (such as reliability, security, late pick up time, comprehensive track and trace ability). Each customer is likely to have different needs but also to face different competitive conditions depending on these dimensions.
- (154) In the response to the decision opening proceedings, the Notifying party indicates that "*In a phase two case, it will be necessary to conduct a SSNIP test*"¹²⁴ as part of the evidence to justify a given market delineation. However, the characteristics of the industry render a direct empirical implementation of the SSNIP test unsuitable. Moreover, as stated in the Horizontal Merger Guidelines¹²⁵, the main purpose of market definition is to identify in a systematic way the immediate competitive constraints facing the merged entity. The Notice on market definition¹²⁶ further explains that the hypothetical monopolist test represents *one way* of assessing demand substitutability, which can be viewed as a *speculative experiment*. Hence, while it remains a useful conceptual tool to focus the assessment on identifying the primary source of competition faced by two merging parties, it does not constitute a necessary test that the Commission should empirically implement for market definition purposes. This is even more so the case in the industry at

¹²⁴ Notifying party's response to the decision opening proceedings, paragraph 98.

¹²⁵ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraph 10 (OJ C 31, 5.02.2004).

¹²⁶ Commission Notice on the definition of relevant market for the purposes of Community competition law, paragraph 15 (OJ C 372, 9.12.1997).

hand where the "price" that each customer pays is individually negotiated and, thus, for similar transactions, customers may pay different prices. The main consequence of this feature is that the willingness of certain customers "to switch marginal volumes"¹²⁷ will have no implications on the prices paid by customers who would not switch. In this context, attempting an empirical application of the SSNIP test does not appear well suited, while identifying product characteristics for which conditions of competition are homogeneous (that is, identify groups of products for which a given set of suppliers are shown to be competitive alternatives for most customers) appears more appropriate. In the Response to the Statement of Objections, the Notifying party indicates that it will "not focus" on whether a SSNIP test should be performed but still submits that the Commission should have provided a "meaningful quantitative framework for its analysis" (paragraph 3.3).

- (155) Speed of delivery and geographic extent of services seem to be the two most important differentiating characteristics of the small packages delivery industry. [Details regarding econometric study]*¹²⁸ (see the discussion on small packages in Section 6.2.1.1), [Details regarding econometric study]* (see the discussion on the differences between express and deferred in Section 6.2.1.4) [Details regarding econometric study]* (see the discussion on the differences between domestic and international services in Section 6.2.1.2).
- (156) In line with its decisional practice,¹²⁹ the Commission identifies the relevant product markets on the basis of the speed of delivery (that is to say, express delivery services - commonly understood as services with a next day delivery commitment, and standard/deferred delivery services) and geographic extent of services (that is to say, domestic, international intra-EEA and international extra- EEA services). Weight is an important dimension to distinguish small packages from freight. Differentiation along quality features of the services will be analysed in greater detail in the competitive assessment.

UPS's views

- (157) According to UPS, small package services can be differentiated from freight on the basis of weight limits. UPS considers that although there is no clear definition for what constitutes a small package, the upper weight limit is in general terms determined by the weight a single person can handle without specific equipment. UPS mentions that the weight limit of 31.5 kg is commonly used in the industry¹³⁰.
- (158) UPS argues that all palletised volume should be excluded from the small package market as such volume requires specific handling equipment (forklift) and special vans/trucks for PUD. According to UPS, deliveries of such heavier items belong to freight forwarding and not to small package delivery services.

The Commission's assessment

- (159) The market investigation confirmed the views of UPS. A distinction has to be made between freight forwarding and small package delivery services. Freight forwarders and small package delivery services providers have a different business model. Freight and

¹²⁷ As mentioned by the Notifying party in its response to the decision opening proceedings, paragraph 99.

¹²⁸ Notifying party's response to the decision opening the proceedings, Annex 3.

¹²⁹ Case No COMP/M.3971 *Deutsche Post / Exel* paragraphs 8-24.

¹³⁰ Form CO, paragraph 125.

small packages are usually transported via different infrastructures which are designed in a different way¹³¹.

- (160) The handling of freight necessitates special equipment that is not needed for small package delivery, such as forklifts; whereas the sorting of palletised goods is done manually¹³². Freight forwarders usually deliver palletised goods to a more limited number of clients arranging the transport of their goods on a more point-to-point basis. As the number of items is significantly smaller and the items are much heavier, the freight forwarding model does not involve a hub-and-spoke system such as the one used by small package delivery suppliers.
- (161) Small package networks are characterised by a significantly higher level of automation than freight networks, notably at the level of sorting centres, which are based on conveyor belts and scanners. Every day, the (local) sorting centres accumulate a high number of packages which are usually channelled via hubs and again sorted and dispatched to the delivery hubs and sorting centres. Furthermore, in order to deliver small packages efficiently, operators need a dense network. These features allow companies operating small package networks to ship high numbers of units between points of origin and points of destinations spread over wide geographic areas and within relatively limited timeframes compared to those prevailing in the freight forwarding sector.
- (162) Due to the different characteristics of freight and small package networks, it is commonly agreed that there is a weight threshold below which small package delivery companies are more competitive than freight forwarders and above which freight should be considered as a cost effective alternative¹³³.
- (163) The replies to the market investigation confirmed that there is no uniform weight limit across the industry to determine which units are acceptable in a small package network. However, most competitors mentioned weight limits ranging between 25 and 35 kg¹³⁴, specifying sometimes lower limits for certain categories of shipments, for instance international shipments or shipments to individuals. The Express Mail Service cooperative has a weight limit of 30kg for small parcels. Overall, the market investigation confirms that the 31.5 kg limit used by UPS is appropriate to compute market share estimates.

Conclusion

- (164) In view of the foregoing, the Commission concludes for the purpose of this Decision that there is a separate product market for small package delivery services for which 31.5 kg appears as an appropriate threshold to distinguish small packages from freight.

¹³¹ Agreed minutes of a teleconference call of 30 August 2012 with Lacie.

¹³² Agreed minutes of a teleconference call of 30 August 2012 with Lacie.

¹³³ Agreed minutes of a teleconference call of 30 August 2012 with Lacie. Agreed minutes of the meeting of 23 August 2012 with DHL.

¹³⁴ See responses to question 4 of questionnaire to competitors – Phase I.

6.2.1.2. Domestic vs. international intra-EEA services

- (165) In previous decisions, the Commission distinguished between domestic and international small package delivery services. This distinction is relevant for both express¹³⁵ and deferred services¹³⁶.
- (166) Indeed, domestic delivery services can be provided by companies operating a single national pick-up and distribution network. By contrast, international delivery services and notably shipment from an EEA country to another EEA country (hereafter "international intra-EEA services", "intra-EEA deliveries", "intra-EEA shipments") can only be provided by companies which also have access to such a network in the destination country, either operated by themselves or via a partnership with delivery companies in the destination country.
- (167) Several types of networks co-exist, having been mostly configured for different purposes. Generally, domestic networks have been configured to achieve the highest coverage within a given country, which may imply that hubs may be better placed at the centre of a country¹³⁷.

UPS's views

- (168) UPS considers that this distinction is irrelevant notably because there are often no differences in distance and delivery commitments between a domestic and international intra-European delivery. Furthermore, due to the internal market, there are no import and export requirements¹³⁸.
- (169) UPS considers that the mere fact that it can offer both domestic and international delivery services with the same characteristics in a single contract is already a strong indication that the two services are part of the same product market. It also states that most of the important competitors provide both domestic and intra-EEA delivery services.
- (170) UPS acknowledges the fact that there are more competitors present in the domestic markets than in the international market¹³⁹, but according to UPS this is only because there is more domestic than international volume.

The Commission's assessment

- (171) In terms of demand side substitutability, it is clear that if a customer wants to ship a given package to a specific destination abroad, other national/local destinations cannot represent substitutable alternatives. Therefore domestic and international services are not substitutable from the demand side.
- (172) As far as the supply side is concerned, a vast majority of the competitors considered that a company that already has domestic small package delivery operations in a given country of the EEA could not switch to international intra-EEA small package delivery operations from the same country in the short-term without incurring significant

¹³⁵ Case No IV/M.1405 - *TNT Post Group /Jet Services* paragraph 24.

¹³⁶ See for example case n°COMP/M.5152 *Posten AB/ Post Danmark AS* paragraphs 54 to 57 and n°COMP/M.2908 *Deutsche Post / DHL (II)*, paragraph 10.

¹³⁷ Notifying party's response to the decision opening the proceedings, Annex 3.

¹³⁸ Form CO, paragraph 171.

¹³⁹ Notifying party's response to the decision opening the proceedings, paragraph 145.

additional costs or risks, in response to changes in relative prices of the two categories of services¹⁴⁰.

- (173) According to the market investigation, such a switch would require either the costly and lengthy development of an appropriate own international network, or, as pointed out by UPS, the recourse to sub-contractors or partners in other countries.
- (174) Only the four integrators (UPS, TNT, DHL and FedEx) and two ground operators (DPD and GLS) control a dedicated international network in a significant number of countries covering the entire value chain necessary for offering intra-EEA services, from pick-up to delivery, although the latter two are lacking control over airlift capacity and concentrate much more on deferred than express shipments. Setting up such a network often includes the use of subcontractors, which, however, are under the full operational control of those suppliers. The creation of such a pan-European network entails extensive investments.
- (175) The market investigation reveals that a company willing to launch international operations on the basis of sub-contracting or partnerships, that is to say, without having full operational control over those subcontractors and partners, would also face significant hurdles and costs¹⁴¹. Moreover, setting-up of such a pan-European network would require considerable time and investments, and in any case a company relying on partnerships and sub-contracting (without a tight control over the operational processes) would only be able to provide a service of lower quality¹⁴².
- (176) First, as pointed out by several market players, an intra-EEA small package service provider proposes to its clients a commercially attractive offer only if it covers most if not all of the EEA-countries with a sufficient enough level of coverage across countries¹⁴³. It therefore needs to find suitable partners operating a network in most of the countries of the EEA as well as partners for line-hauling¹⁴⁴. It also needs to set up a dedicated commercial workforce to sell intra-EEA parcel delivery services¹⁴⁵. According to most of the respondents, managing such an EEA-wide network is costly¹⁴⁶. The integration of the IT systems also entails important costs¹⁴⁷ and can be envisaged only in the context of a strategic partnership between the operators of the pan-European network.
- (177) The market investigation thus confirms that switching from domestic to intra-EEA international small package delivery services requires substantial investments. A particularly heavy investment concerns airlift capacity, which is also necessary to be

¹⁴⁰ See responses to question 18 of questionnaire to competitors – Phase I.

¹⁴¹ See responses to question 18.1 of questionnaire to competitors –Phase I.

¹⁴² DHL, response to question 18.1 of questionnaire R30 to competitors – Phase II.

¹⁴³ Responses to question 16.1 of questionnaire to competitors.

¹⁴⁴ Transportation of packages between sorting and distributing centres, usually done by truck.

¹⁴⁵ La Poste/Geopost, response to question 63.vi of questionnaire to competitors,

¹⁴⁶ See for example Fast Way, response to question 18.1 of questionnaire to competitors; GO! General Overnight, response to question 18.1 of questionnaire to competitors; Gebrüder Weiss Gesellschaft, response to question 18.1 of questionnaire to competitors.

¹⁴⁷ Royal Mail, response to question 18.1 of questionnaire to competitors; bpost, response to question 18.1 of questionnaire to competitors; Poste Italiane, response to question 18.1 of questionnaire to competitors.

able to offer express, that is to say, overnight services, across the EEA. On the contrary, it is not necessary to rely on air network in order to operate on domestic markets¹⁴⁸.

- (178) In view of these upfront investments, the respondents clearly indicated that significant intra-EEA volumes must be reached to break even¹⁴⁹.
- (179) This is reflected in the differences of the market structure between domestic and international intra-EEA services. For domestic services there are generally more competitors present with a network serving the destinations in a particular country. These competitors most of the time include the postal incumbent which has a strong market position at domestic level. Conversely, offering small package deliveries on a European level is much more demanding and the number of competitors providing this on a larger scale is generally more limited.
- (180) Against this background, UPS's argument according to which there are more competitors in the domestic markets because domestic volumes are higher has to be rejected. Most market players providing intra-EEA services are also active in the domestic markets. However, only a few domestic service providers have been able to expand their operations in the intra-EEA market. In view of the significant investments needed and the associated costs, time and risks to enter or expand into intra-EEA markets, there is no supply-side substitutability between domestic and international services.
- (181) Furthermore, the fact that [Details regarding the Parties' contracts]* does not imply that the services they provide are part of the same product market. It is only the consequence of UPS and TNT being global players who are active in several markets.

Conclusion

- (182) On this basis, for the purpose of this Decision the Commission concludes that domestic and international intra-EEA small package delivery services constitute distinct product markets.

6.2.1.3. International intra-EEA services vs extra-EEA services

- (183) As far as services from EEA countries to non-EEA countries ("extra-EEA services") are concerned, the Parties do not seem to contest that it is a separate product market¹⁵⁰, but claim that barriers to entry for this particular market are low.
- (184) However, a large majority of the competitors that responded to the market investigation took the view that a company that already has international intra-EEA small package delivery operations could not switch to international small package delivery operations from the EEA to non-EEA countries (extra EEA services) and market these international services in the short term without incurring significant additional costs and risks, in response to changes in relative prices of these two categories of international services¹⁵¹.

¹⁴⁸ Responses to question 13.3 of questionnaire to competitors – Phase I.

¹⁴⁹ Hermes, response to question 18.1 of questionnaire to competitors; Kuehne+Nagel, response to question 18.1 of questionnaire to competitors; MRW, response to question 18.1 of questionnaire to competitors.

¹⁵⁰ Notifying party's response to the decision opening the proceedings, paragraph 147.

¹⁵¹ See responses to question 19 of questionnaire to competitors - Phase I.

- (185) Respondents pointed in particular to the different infrastructures needed for the two categories of services, extra EEA services requiring access to an extensive air network¹⁵² involving larger and long-distance airplanes, as well as the necessity to develop know-how and specific infrastructures to handle customs clearance¹⁵³ processes in order to offer extra EEA services. The provision of air capacity is needed since parcels cannot be carried by road and transportation by ship would entail too long a time in transit even for standard services.
- (186) This is reflected in the differences of the market structure between international intra-EEA and extra-EEA services. The four integrators are the main providers of extra-EEA small package delivery services, followed by freight forwarders, whereas ground operators such as GLS or DPD are only marginally active on those services¹⁵⁴.

Conclusion

- (187) For these reasons, the Commission concludes that for the purpose of this Decision domestic, international intra-EEA, and international extra EEA small package delivery services constitute separate product markets.

6.2.1.4. Express versus deferred small package delivery services

- (188) In previous decisions, the Commission distinguished between express (that is to say, committed delivery by next day/end of day at the latest) and deferred services¹⁵⁵. This distinction was based on the fact that the two services were provided with a different infrastructure, that a significant number of customers are depending on express, and that express delivery services are also considerably more expensive.

UPS's views

- (189) UPS considers that this distinction is irrelevant. UPS argues that there has been a clear trend on behalf of customers to shift from express to deferred services in order to achieve cost savings¹⁵⁶.
- (190) UPS argues that the infrastructure to transport express and deferred packages is 'to a certain extent'¹⁵⁷ the same even if, as indicated by UPS, [...] * [10-20]*% of UPS international express service is carried by road¹⁵⁸. The remaining [80-90]*% is carried over the air network which is primarily dedicated to express. Deferred packages are essentially not transported by air network.
- (191) UPS also argues that operators now offer a wide range of services (in terms of delivery timeframes) often via a single contract, and this range of services forms a continuum between the slowest and fastest services. According to UPS, the mere existence of a continuum implies an absence of clear distinction between express and deferred, and is sufficient to conclude to the absence of distinct product markets.

¹⁵² DHL, response to question 19.1 of the questionnaire to competitors; Poste Italiane, response to question 19.1 of the questionnaire to competitors.

¹⁵³ La Poste, response to question 19.1 of the questionnaire to competitors.

¹⁵⁴ UPS's submission of 14 august 2012.

¹⁵⁵ See for example Case n°COMP/M.2908 *Deutsche Post / DHL (II)*, paragraph 10, Case n°COMP/M.5152 *Posten/Post Danmark*.

¹⁵⁶ Notifying party's response to the Statement of Objections, paragraph 3.7.

¹⁵⁷ Form CO, paragraph 136.

¹⁵⁸ Form CO, paragraph 137.

The Commission's assessment

- (192) The Notifying party submitted a number of studies (originating mainly from TNT) which purport to establish that within the express market, segments do not constitute separate markets. These studies are mainly referring to substitution between express products with different time commitments and are therefore not directly relevant for the analysis of substitution between express and deferred services. However, they do offer some useful insights.
- (193) [Details regarding econometric study]*
- (194) [Details regarding econometric study]*
- (195) [Details regarding econometric study]*¹⁵⁹
- (196) The results of a new survey were submitted as part of the Response to the Statement of Objections and these were used to calculate price elasticities¹⁶⁰. [Details regarding econometric study]*¹⁶¹
- (197) [Details regarding econometric study]*. As explained in Section 6.1.8, the industry is characterised by significant price discrimination, in particular for medium to large customers. Therefore, the existence of marginal customers or marginal volumes (that is customers who would switch all or part of their needs to slower services in case of a price increase) does not necessarily imply that deferred and express services are overall in the same market given that price increases can be targeted to specific customers. In the Response to the Statement of Objections, the Notifying party indicates that this conclusion is "*only an assertion*" (paragraph 3.11) and the fact that "*a certain subset of customers does not switch in response to a price increase is irrelevant*". These two points are incorrect. First, the subset of customers that would not switch is significant (as the Notifying party's survey indicates, consistently with the results of the market investigation discussed below in recitals (203) and following). Second, when price discrimination is a prominent feature of pricing in an industry and suppliers gather detailed information on their customers' needs and constraints¹⁶² it is likely that individual customers with high preference for express services can be identified¹⁶³. Therefore, the existence of such a subset of customers is not irrelevant because these are the customers most at risk of a price increase if their limited set of alternatives is further restricted by the merger. This conclusion is consistent with the evidence on average prices for express services discussed in recital (199), which indicates that the Parties are able to charge – on average – significantly higher prices for express services.
- (198) The industry distinguishes between express services which have a next day guaranteed/committed delivery, and deferred (standard) services which have delivery

¹⁵⁹ [Details regarding econometric study]*

¹⁶⁰ Notifying party's response to the Statement of Objections, Annex 2

¹⁶¹ [...]*

¹⁶² See responses to question 10 of questionnaire to large customers - Phase II.

¹⁶³ Indeed, customers believe that on the basis of information their suppliers have about the customers' shipments needs, those suppliers are in a position to understand how important it is for the customer to use services with a certain committed delivery time. See responses to question 11 of questionnaire to large customers - Phase II.

times of two or more days (and for some providers the delivery day is not always guaranteed or committed). [Parties internal analyses regarding the market]*¹⁶⁴.

- (199) The Commission used the 2011 transaction data provided by the Parties to compute the average net revenue (that is to say, after discounts) per kilo, by origin and service type. [Information on the Parties' prices and revenues]*¹⁶⁵. The following Figures 9 and 10 illustrate the differences in average revenues per kilo by country of origin across service types¹⁶⁶.

Figure 9: [Information on the Parties' prices and revenues]*¹⁶⁷

[...]*

Source: [...]*

Figure 10: [Information on the Parties' prices and revenues]*¹⁶⁸

[...]*

Source: [...]*

- (200) In terms of demand side substitutability, a large number of customers attach very great importance to the certainty that a package will be delivered within a specific timeframe. They would be very unlikely to switch to services with a less demanding committed delivery timeframe depending on price developments¹⁶⁹.
- (201) The mere fact that certain customers are willing to pay a price which is significantly (often several times) higher for express services is already a strong indication that express and deferred services are not interchangeable.
- (202) DHL stated that "Users of express parcel services select their level of service based on their specific needs. Should any express parcel provider hike its prices by 5% or 10% [...] only a very small minority of customers will react to a price increase by switching to a standard, less and cheaper service with a later delivery commitment"¹⁷⁰. Similarly, La Poste took the view that "the timed transportation service chosen is required for a particular purpose by our customers and a small change in price would not affect their decision"¹⁷¹. FedEx stated that "Customers purchasing services with a next day delivery commitment are willing to pay significantly more in order for their small package to arrive on the next day"¹⁷².
- (203) This view is also confirmed by the majority of customers. Indeed, the majority of them indicated that they would not switch from express to deferred in response to a 5 to 10 %

¹⁶⁴ [Parties internal analyses regarding the market]*

¹⁶⁵ This is also consistent with the difference in list prices. For example, according to the published UPS price list, a package of 10 kg shipped from Belgium to Austria with an express product (UPS Express Saver – next day end of day delivery) costs 178 Euro, whereas the standard product (UPS Standard – more than 1 day delivery) costs 45 Euro. This is about four times higher. Most of Express Saver is express and most of Standard is deferred, therefore, the significant price difference between the list prices of Express Saver and Standard are indicative of the order of magnitude of the list price differential between express and standard. Some outliers have been omitted.

¹⁶⁶

¹⁶⁷ [...]*

¹⁶⁸ [...]*

¹⁶⁹ See responses to questions 49, 50, 51 of questionnaire to customers - Phase I.

¹⁷⁰ DHL, response to question 24.i of questionnaire to competitors.

¹⁷¹ La Poste, response to question 24.i of questionnaire to competitors.

¹⁷² FedEx, response to question 24.i of questionnaire to competitors.

relative price increase of express services¹⁷³. As a result, for a large number of customers, substitutability between express and deferred is limited. There may be customers for whom there is substitution between these two products. However, the mere existence of such "marginal" customers does not imply that substitution is likely for all customers or that the pricing pressure by marginal customers would keep overall prices down for all customers (including those who cannot switch) leading deferred and express products being part of the same market. On the contrary, for some customers, suppliers of deferred services may be a competitive option while for other customers suppliers of deferred services will not be a competitive option. Based on the market investigation, it appears that deferred services are more often considered as not substitutable to express services. This is mainly due to the way customers have organized their supply chain as explained below.

- (204) Indeed, there are a number of ways in which customers have organized their operations with the need to use express deliveries. According to the market investigation, customers often require express services for the following categories of goods: spare parts¹⁷⁴, critical components¹⁷⁵, surgical instruments and implants¹⁷⁶, pharmaceuticals¹⁷⁷, health care products¹⁷⁸, cosmetics¹⁷⁹, printed circuit boards¹⁸⁰, samples¹⁸¹ and documents¹⁸². Concerning spare parts for instance, customers have organised their supply chain around express delivery in order to avoid the high costs caused by down-times of production lines, or by the desire to limit inventories whilst still having rapid access to necessary supplies or due to a quick time to market-model. Some products require rapid delivery by nature (such as blood samples)¹⁸³. Some other customers may use express shipments on a less systematic basis, in case of an ad hoc situation which requires an urgent shipment (for example urgent shipment to retail outlets when some valuable goods become unexpectedly out of stock)¹⁸⁴.
- (205) [Proposed business approach for TNT]*^{185 186}

¹⁷³ See responses to question 51.iii of questionnaire to customers - Phase I and responses to question 19.1 of questionnaire to customers – Phase II.

¹⁷⁴ [Customer's name]*, response to questions 44.1 and 48.1 of questionnaires Q1 to customers – Austria – Phase I; [Customer's name]*, response to questions 44.1 and 48.1 of questionnaires Q2 to customers – Belgium– Phase I; [Customer's name]*, response to questions 44.1 and 48.1 of questionnaires Q5 to customers - Czech Republic - Phase I.

¹⁷⁵ [Customer's name]*, response to question 44.1 of questionnaire Q7 to customers – Estonia - Phase I.

¹⁷⁶ [Customer's name]*, response to questions 44.1, 46.1.1 and 48.1 of questionnaire Q10 to customers – Germany – Phase I.

¹⁷⁷ [Customer's name]*, response to question 48.1 of questionnaires Q25 to customers – Spain – Phase I.

¹⁷⁸ [Customer's name]*, response to question 44.1 of questionnaire Q9 to customers - France - Phase I.

¹⁷⁹ [Customer's name]*, response to questions 44.1 and 48.1 of questionnaire Q20 to customers – Poland - Phase I.

¹⁸⁰ [Customer's name]*, response to questions 48.1, 49.1.1 and 50.1.1 of questionnaire Q16 to customers – Lithuania – Phase I.

¹⁸¹ [Customer's name]*, response to question 48.1 of questionnaire Q15 to customers – Latvia - Phase I.

¹⁸² [Customer's name]*, response to question 48.1 of questionnaire Q20 to customers – Poland - Phase I; [Customer's name]*, response to question 48.1 of questionnaire Q1 to customers – Austria - Phase I.

¹⁸³ [Customer's name]*, response to questions 44.1 and 48.1 of questionnaire Q27 to customers – United Kingdom - Phase I.

¹⁸⁴ [Customer's name]*, response to questions 44.1, 45.1.1 and 48.1 of questionnaire Q25 to customers – Spain - Phase I.

¹⁸⁵ [Proposed business approach for TNT]*

- (206) Furthermore, the 2004 Simon Kucher and Partner study confirms that for some customers it is very important that their shipments arrive on time¹⁸⁷.
- (207) On this basis, the evidence from the market investigation confirms that many customers do not have the possibility to substitute express services by deferred. Against this background, both the express and deferred markets have been growing over time during the recent years. The fact that the deferred market grew even more (which largely seems to be explained by the growth of e-commerce and B2C deliveries which are predominantly shipped by deferred shipments) does not entail that there is a significant substitution over time from express to deferred and that any such substitution would be expected in the future. Even if some customers may have switched from express to deferred in the past for small packages deliveries with less stringent time constraints, the fact remains that deferred services are not an option for customers who absolutely need to get their shipments delivered by next-day/end-of-day. On the contrary, the growing market of express shipments indicates that more and more goods are shipped with express and that more and more customers are indeed willing to pay a significant express premium for the benefits that a speedy delivery brings to their businesses. In any event, the customers' business operation model, time constrains and hence the necessity of using express services are individualized, and they appear to be known to the suppliers who can factor-in the customers' willingness to pay in the individualized price negotiations (as demonstrated in the Sections 6.1.7 and 6.1.8 above on price setting and price discrimination).
- (208) UPS mentions that, for short distances, many deferred services providers deliver within a timeframe comparable to those of express services providers¹⁸⁸. For certain routes, *'there are often no or no significant differences between express and deferred'*¹⁸⁹.
- (209) This overlap is however limited to a small number of deferred shipments. [Time in transit of the Parties' deferred services]*¹⁹⁰.
- (210) Furthermore, the key point is that express services come with a commitment by the supplier to arrive at a certain time of the following day. Only express services provide customers with the certainty that their shipment will arrive on time¹⁹¹ and customers are ready to pay higher prices for a reliable service. Express suppliers such as UPS emphasise the reliability of their express services and actively market a money-back guarantee in case the committed delivery time is not met¹⁹².
- (211) In terms of supply side substitutability, the evidence collected during the market investigation demonstrates that the express and deferred networks are often organised differently, and some major suppliers such as DHL have a different network for express and deferred deliveries.

¹⁸⁶ [Proposed business approach for TNT]*

¹⁸⁷ Paragraph 25 of the 2004 Simon Kucher and Partner study.

¹⁸⁸ UPS states that many deferred deliveries have a one day committed time in transit'. We consider them as express irrespective of whether the relevant shipments are carried by road or air.

¹⁸⁹ Form CO, paragraph 158.

¹⁹⁰ Form CO, paragraphs 158 and 159.

¹⁹¹ [...] *% of UPS's express shipments arrive on time. See Form CO, paragraph 143.

¹⁹² See FedEx study 'The particular international express needs of groups of suppliers', paragraph 72.

- (212) While it is true that certain assets are used for both deferred and express networks, there is one class of assets which appears to be a precondition for the ability to offer comprehensive international express services: air lift capabilities¹⁹³. Hence, a company operating a deferred network will not be able to provide express services as an immediate response to a relative price increase of express in comparison to deferred¹⁹⁴. This is in particular the case for all shipments over a certain distance.
- (213) The Parties maintain that air capacity can be viably outsourced to third parties and, thus, operators with no current airlift capability might easily outsource and compete for express services¹⁹⁵. However, it should be noted that such arrangements are complex to implement, expose the operators to reliability problems and have also a considerable impact on the profitability of operators.
- (214) The Parties also claim that since more than 50% of the express volume is transported over distances below 880 kilometres, airlift capability is not necessary to operate on the market. [Details regarding UPS' network]*. However, this still implies that certain destinations can only be served by operators with the necessary airlift capacity.
- (215) The integrators have designed an air network dedicated to express shipment which enables them to reach destinations across Europe overnight. Certain ground operators such as La Poste/DPD have access to an air network by engaging into partnerships with air cargo operators or outsourcing air services from integrators, however such arrangements suffer from a structural disadvantage and do not enable ground operators to compete fully (see Section 7.2.1.5.).
- (216) As far as TNT and UPS are concerned, the proportion of express parcels not shipped by air is rather low. It represents [10-20]*% of UPS express shipments in volume and [20-30]*% of TNT's shipments in volume¹⁹⁶. In particular, [Details regarding the Parties' networks]* could not be delivered in time if carried by road and requires air transportation¹⁹⁷.
- (217) Certain ground operators, including GLS and DPD, have also set up a limited express network to provide express services over limited distances. A further reach of those services by road is however impossible. Moreover, as explained in Section 7.2.1.8. the quality of the service they propose in terms of security, reliability and track-and-trace is already lower than the one proposed by integrators.
- (218) Furthermore, the functioning of an express ground network is different from the functioning of a traditional deferred ground network. In particular, it requires the use of vans instead of lorries, which, with an average speed of 70 km/h, are too slow for express services. An express road network also requires different line hauls than a deferred road network and the parcels must be sorted more quickly in hubs or depots.

¹⁹³ [Details regarding UPS' network]*

¹⁹⁴ [80-90]*% of UPS's express shipments are transported by air, which includes not only long-haul shipments, but also short-haul [Details regarding UPS' network]*.

¹⁹⁵ Notifying party's response to the Statement of Objections, paragraph 3.19.

¹⁹⁶ Notifying party's response to the decision opening the proceedings, Annex 26.

¹⁹⁷ Notifying party's response to the decision opening the proceedings, Annex 26.

[Details regarding TNT's business and operational strategy]*¹⁹⁸ [Details regarding TNT's business and operational strategy]*¹⁹⁹.

Conclusion

(219) The Commission thus concludes for the purpose of this Decision that express and deferred small package delivery services constitute separate markets.

6.2.1.5. Time-segments of Express market

(220) The market for express shipments could be further segmented according to the specific time of delivery. All main suppliers offer a morning delivery product (delivery on the next day by a specified time between 8.30 or 10.00 according to the supplier and/or particular destination zone). Further, suppliers offer a mid-day delivery by 12.00, and end-of-day ("EOD") delivery. The offering of these products further differentiates the express market along the speed dimension. Although most express revenues relate to EOD services, the Parties still achieved [10-20]*% of their intra-EEA express revenues with committed pre-noon services, and additional [0-5]*% revenues on the committed pre-10am services in 2011²⁰⁰.

(221) The market investigation confirms that there is indeed a specific demand for committed delivery for extremely urgent items next day before 10.00 or before 12.00. The delivery of products, spare parts and documents for various industries (such as healthcare, medical, life sciences, automotive, technology industries, etc.) will sometimes require this level of service. This is particularly the case if the customer uses the integrator as part of its just-in-time supply chain solution. Customers shipping valuable goods for which the price of transportation is marginal compared to the risk of losing track of the product may also require earliest possible delivery²⁰¹.

(222) This view is also shared by customers. Indeed, many of them indicated that they would not switch to committed delivery before end of day should the relative price of committed delivery next day before 10.00 or before 12.00 increase as compared with committed delivery before end of day²⁰².

(223) However, on the supply side, all the market participants, including the Parties²⁰³ and their main competitors²⁰⁴, indicated that there is a certain degree of substitutability between the different express products. The studies mentioned by the Parties also support this conclusion²⁰⁵.

(224) Indeed, the integrators are the main suppliers of express services. All the express parcels they transport arrive at the same time in the depots. Express parcel providers can offer premium express services by granting a certain degree of priority during the delivery

¹⁹⁸ Notifying party's response to the decision opening the proceedings, paragraphs 218 to 226.

¹⁹⁹ Notifying party's response to the decision opening the proceedings, Annex 26.

²⁰⁰ For UPS this was [10-20]*% of its intra-EEA express revenues with pre-noon services, and [0-5]*% revenues on the pre-10 am services; TNT achieved [5-10]*% for pre-noon and [0-5]*% for pre-10 am services. See Notifying party's response to the decision opening the proceedings, p 48.

²⁰¹ See responses to questions 51.i and 51.ii of questionnaire Q1-Q29 to customers - Phase I.

²⁰² See responses to questions 51.i and 51.ii of questionnaire to customers - Phase I.

²⁰³ Notifying party's response to the decision opening the proceedings, paragraphs 33 and 34.

²⁰⁴ Agreed minutes of the meeting of 23 August 2012 with DHL, paragraph 39. Agreed minutes of meeting of 9 August 2012 with FedEx, paragraph 12.

²⁰⁵ Notifying party's response to the decision opening the proceedings, Annexes 3 and 4.

process to these packages, that is to say, the drivers begin with early morning shipments first.

- (225) As the provision of premium services is performed by 'route optimisation'²⁰⁶, the degree of substitution between the different categories of express services depends on the scale, coverage and density of the providers' operations. Those who have the denser network and higher volumes can optimise their routes in order to provide premium express services with a certain degree of geographical coverage without substantial additional costs. Conversely, smaller express providers may only provide premium express services to a more restraint number of locations.
- (226) On this basis, these services do not constitute a separate product markets but are segments within the broader express market. The distinction between these different categories of express services will be considered in the competitive assessment as a distinguishing factor for evaluating the competitive strengths of the various players.

6.2.1.6. Intra-EEA express market: a segmentation between short-distance and long-distance shipments

- (227) Within the intra-EEA express market, a further refinement could be made concerning the geographical scope of the services offered. As shown above, the provision of express delivery services across the EEA requires not only an express road network but also air lift capacity in order to cover long distances. Consequently, different segments could be defined for short-haul and long-haul service on the basis of whether the delivery destination can be reached by ground transportation.
- (228) According to UPS, non-integrators would be able to compete with integrators on the basis of their ground networks for a significant part of international intra-EEA express deliveries. In particular, on the basis of research conducted by TNT Express as part of its [Details regarding TNT's business and operational strategy]*, UPS argues that road use is feasible – compared to air – for distances up to 1 500 km, is in fact feasible for a significant part of all next day volumes and may be more optimal and cost-effective than air for distances of at least 880 km²⁰⁷.
- (229) The market investigation has not allowed the Commission to determine a precise distance below which operators are able and willing to use road for international express deliveries. Indeed, there appear to be very different approaches among operators to decide whether a package should be carried by road. For example, FedEx [Details on operators' business strategy]* while Royal Mail takes its decisions on the basis of a combination of criteria related to distance, location and available transit time, and Go! General Overnight performs next day deliveries by road for distances of up to 1 000 km²⁰⁸. La Poste, for its part, considers that 550 km is the standard distance that can be covered by road within 24 hour²⁰⁹, and PostNL submitted that road and air can be substitutes for one another for distances up to 600 km²¹⁰.

²⁰⁶ Agreed minutes of the meeting of 23 August 2012 with DHL.

²⁰⁷ Notifying party's response to the decision opening the proceedings, paragraph 220.

²⁰⁸ See responses to questions 13.2 and 13.2.1 of questionnaire to competitors - Phase I.

²⁰⁹ Agreed minutes of a teleconference call of 30 April 2012 with La Poste, paragraph 8.

²¹⁰ PostNL, response to question 51.i of questionnaire to competitors – Phase I.

- (230) It is likely that no maximum distance for next day deliveries can be defined in absolute terms. Indeed, the maximum distance over which a package can be shipped within one day probably depends not merely on the distance between the origin and destination points, but also, to a great extent, on the locations of the points of origin and destination, the road infrastructure that links these two points as well as the configuration of the network of the small package delivery company (location of hubs, proximity with points of origin and departures, number of sorting operations during the delivery process etc.). Furthermore, the maximal distance over which a road-based operator would be ready to deliver a package by road (instead of using air services or not carrying the package at all) is also likely to depend on a number of parameters relating in particular to the cost of the delivery process.
- (231) It is, however, not necessary to define the precise borders between long-haul and short-haul shipments, as this distinction between these two segments will, be considered in the competitive assessment as a distinguishing factor for evaluating the competitive strengths of the various players.

6.2.1.7. Distinction according to the quality of service as a third product market dimension

- (232) In addition to the committed delivery timeframes and geographic reach, customers also consider in their purchasing decisions other criteria, such as security, quality of the track-and-trace system and its possible integration with the customer's own IT system.
- (233) [Details regarding econometric study]*²¹¹ [Details regarding econometric study]*²¹². The "value-added" services include track-and-trace, money back guarantees for delay, proof of delivery, administrative functions (customs), tailor-made services, special handling, and security. Whether or not some of these features become more standard, there remains differentiation across companies with respect to the level of sophistication and the extent to which such add-ons are an integral part of a firms' offering.
- (234) This point has been addressed by many customers, including [Customer's name]* ("*Value-added services are very important to [Customer's name]**"). For instance, there is electronic data interchange (EDI) between [Customer's name]* and the supplier, which provide a very high quality Track & Trace service, electronic billing, cash-on-delivery and high security standards to minimize the risk of theft²¹³.
- (235) The results of the market investigation show that integrators have usually the greatest selection and leading edge technology, in particular concerning the IT system. Other players are usually followers and offer only some of these features, and often of a lesser quality.
- (236) It is however not justified to define separate product markets on the basis of quality criteria. The fact that each customer has its own needs in terms of quality of service demonstrates that the small package delivery markets are differentiated along many different dimensions, including on destination, committed timeframe of delivery and quality of service.

²¹¹ Notifying party's response to the decision opening the proceedings, Annex 3.

²¹² Notifying party's response to the decision opening the proceedings, Annex 3, p 11.

²¹³ Agreed minutes of a teleconference call of 4 May 2012 with [Customer's name]*.

- (237) Finally, under the decisional practice of the Commission, the deferred market is subdivided between B2B and B2C services²¹⁴. The Parties indicated that a distinction between B2B and B2C is not relevant in the context of the present investigation, since very few express parcels are delivered to private consumers²¹⁵. The market investigation supports that view.

Conclusion

- (238) The Commission thus concludes for the purpose of this Decision that there is a separate product market for international intra-EEA express small package delivery services.

6.2.2. Geographic markets

6.2.2.1. UPS's views

- (239) In the Form CO, [Details of UPS' customer base]*. This shows that there is still very significant demand for single country-specific contracts, [Details of UPS' customer base]*. Furthermore, in many Member States there are a number of significant competitors who are predominantly nationally focussed and operate in only one or several Member States on the pick-up side. Accordingly, it is submitted that it is more appropriate to undertake the competition analysis on a Member State by Member State basis.

- (240) Therefore, UPS concludes that in general it agrees with the definition reached in earlier cases and will analyse the competitive effects of the Transaction on national markets for small package, international small package, domestic small package, international express, international deferred, domestic express and domestic deferred.

6.2.2.2. The Commission's assessment

- (241) In previous decisions, the Commission took the view that the markets for small package delivery services appeared to be national in scope²¹⁶. In particular, the Commission considered that the market for the international delivery of small packages had a national dimension²¹⁷.

- (242) The outcome of the market investigation in the present case has confirmed that this market delineation was still relevant. Indeed a vast majority of competitors agreed with the fact that contracts for small package deliveries are mostly negotiated at the national level for both domestic and international deliveries²¹⁸. Indeed, Gebrüder Weiss explains that: "*According to our experience shippers negotiate contracts for small package delivery at a national level*"²¹⁹ as well as Go! General Overnight which states that: "*most of the customers [are] negotiate their contracts in the country where there are located*"²²⁰. In addition, an overwhelming majority of the competitors considers that a small package company needs a significant national presence in a given country (e.g. infrastructure, client contracts, sales force) in order to meaningfully compete in that

²¹⁴ Case n°COMP/M.5152 *Posten/Post Danmark*.

²¹⁵ Form CO, paragraph 180.

²¹⁶ See for example Case n°COMP/M.2908 *Deutsche Post / DHL (II)*, paragraph 20 and Case n°COMP/M.5152- *Posten AB / Post Danmark A/S*, paragraphs 64-74.

²¹⁷ See Case n°COMP/M.5152 – *Posten AB/Post Danmark A/S*, paragraph 74.

²¹⁸ See responses to question 30 of questionnaire to competitors – Phase I.

²¹⁹ Gebrüder Weiss' response to question 30 of questionnaire to competitors – Phase I.

²²⁰ Go! General Overnight's response to question 30 of questionnaire to competitors – Phase I.

country for the provision of small package delivery services²²¹. As posited by Remax: "*significant presence of the provider is always required*"²²².

- (243) In light of the foregoing elements and for the purpose of the present case, it can be concluded that the market for small package delivery services as well as its potential narrower segments can be considered national. However, in view of the focus of the competitive assessment on intra-EEA small package deliveries, the network feature of the industry and the presence of customers with needs that span across multiple countries, an "integrated" EEA-wide competitive assessment will be carried out first in Section 7.5. The overall assessment of the main competitors generally applies to all countries and the specific competitive conditions prevailing in each Member State will therefore be assessed in Section 7.11.

7. OVERALL EFFECTS OF THE TRANSACTION ON THE INTRA-EEA EXPRESS DELIVERY SERVICES MARKETS

7.1. Introduction

- (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 UPS²²³ - 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.

7.2. Non-integrated small package delivery companies exert a weak competitive constraint on the Parties

7.2.1. La Poste and Royal Mail

- (245) According to UPS, several national postal operators have undertaken significant international expansion, notably through acquisitions of domestic small package delivery companies subsequently incorporated into international networks, such that

²²¹ See responses to question 31 of questionnaire to competitors – Phase I.

²²² Remax' response to question 31 of questionnaire to competitors – Phase I.

²²³ See for example Notifying party's response to the Statement of Objections, paragraph 6.68.

they are genuine pan-European operators and also have worldwide reach²²⁴. UPS emphasised in particular the role of La Poste, Royal Mail and their respective subsidiaries DPD and GLS.

- (246) In its response to the Statement of Objections, UPS argued that La Poste and Royal Mail offered competitive deliveries on some long-haul intra-EEA lanes on the basis of outsourcing of air transport²²⁵. Also, in its response to the Decision opening the proceedings, UPS argued that these operators were exerting significant competition on the Parties thanks to their extensive ground networks for deliveries over distances of up to [500-1000]* km. Furthermore, according to UPS, these operators were exerting competition to the extent that such companies would want to supplement their road network with aircraft for shipments over distances that cannot be covered by road and there would be no barriers for them doing so, notably thanks to the availability of air transport services offered by third parties such as airlines and integrators²²⁶.
- (247) UPS also considers that La Poste and Royal Mail currently offer competitive service levels, notably in terms of track-and-trace, reliability and security²²⁷.
- (248) According to UPS, the only customers potentially affected by the Transaction according to the objections set out in the Statement of Objections are larger customers, who have significant bargaining power and are able to threaten to give at least a part of their demand to La Poste and Royal Mail²²⁸.
- (249) UPS also claimed that even if non-integrators such as La Poste and Royal Mail do not have comparable transit times as the integrators, the combined entity would be disciplined by the fact that approximately [...] of its customers' demand (deliveries up to at least [500-1000]* km) could be satisfied by ground-based operators and the threat of losing this business would discipline the competition for all express services²²⁹.
- (250) Furthermore, on the basis of a series of recent investments and other initiatives undertaken by La Poste and Royal Mail outside their home markets, UPS argues that these two companies are expanding rapidly, which according to UPS should be taken into consideration in the assessment of the Transaction²³⁰.
- (251) [Confidential information taken from the Parties' internal databases]*. In addition, UPS also takes the view, on the basis of the outcome of the market investigation that a significant amount of customers (both larger and smaller) consider other small package companies as credible alternatives²³¹.
- (252) On the basis of the outcome of the market investigation, it appears that La Poste and Royal Mail are, among all the non-integrated small package delivery companies, the operators that have the most extensive international intra-EEA networks at their disposal. In addition, whereas the other non-integrators usually market small package delivery services in one or a few EEA countries only (save for a few large freight

²²⁴ Form CO, paragraphs 390-391.

²²⁵ Notifying party's response to the Statement of Objections, paragraph 6.14.

²²⁶ Notifying party's response to the Decision opening the proceedings, paragraphs 217 *et seq.*

²²⁷ Notifying party's response to the Statement of Objections, paragraphs 6.31 *et seq.*

²²⁸ Notifying party's response to the Statement of Objections, paragraph 6.14.

²²⁹ Notifying party's response to the Decision opening the proceedings, paragraph 224.

²³⁰ Notifying party's response to the Decision opening the proceedings, paragraphs 225-226.

²³¹ Notifying party's response to the Statement of Objections, paragraphs 6.14 and 6.15.

forwarders which mainly resell integrators' services), La Poste and Royal Mail do so in a significant number of EEA countries. For these reasons, a specific analysis of the competitive constraint exerted by these two operators on the Parties is warranted, starting with an analysis of the geographic coverage of their international intra-EEA express services.

7.2.1.1. La Poste and Royal Mail's current international intra-EEA express services have a much narrower geographic coverage than the Parties' services

- (253) In all EEA countries except France and Spain, La Poste relies only to a very minor extent on air transport and therefore almost exclusively uses road transport to provide international intra-EEA express services²³². As explained in more detail in Section 7.2.1.4., for most EEA countries, La Poste's international express deliveries performed by road are available only for destinations located in neighbouring countries (and not necessarily in the whole territory of all neighbouring countries). With the exception of France and Spain, La Poste uses air transport to provide international intra-EEA express services only in very specific circumstances, namely when a customer essentially purchasing services that La Poste can deliver by road requests, for very limited volumes, long-distance express deliveries that necessitate air transport. In some countries, in order to be able to deliver these very limited volumes within one day, La Poste's subsidiaries have concluded *ad hoc* agreements with air transport service providers on a local basis²³³.
- (254) If these very limited volumes are not taken into consideration, it appears that La Poste does not offer any international intra-EEA express service in a number of countries: Austria, Bulgaria, Cyprus, Denmark, Finland, Greece, Hungary, Iceland, Italy, Malta, Norway, Poland, Portugal, Romania, Slovenia, Sweden and the United Kingdom. In Belgium, the Czech Republic, Germany, Ireland, Luxembourg and Slovakia, these services are available only for some destinations located in neighbouring countries. In each of the Baltic States (Latvia, Lithuania, Estonia), these services are offered at best only for destinations located in the two other Baltic States, Poland and Finland. In the Netherlands, they are only offered for certain destinations in Belgium, Germany and Poland²³⁴. Therefore, with regard to its international intra-EEA express services, La Poste offers a very significantly narrower geographic coverage in these various countries than the integrators, notably the Parties, as shown in the following recitals.
- (255) It should first be noted that the Parties' geographic coverage of their international express services has a very different structure from the geographic coverage of La Poste and Royal Mail's services, because in the case of the integrators, coverage of a given service in the country of destination is largely independent of the country of origin of the small packages. This is due to the hub-and-spoke nature of the integrators' air networks, which results in geographic coverage in a country of destination depending essentially on how well various locations in that country are connected to the air gateways used by the integrator in that country²³⁵.

²³² Agreed minutes of a teleconference call of 25 September 2012 with La Poste, paragraph 4.

²³³ Agreed minutes of a teleconference call of 25 September 2012 with La Poste, paragraph 4.

²³⁴ La Poste's submissions of 1 October 2012 [ID 7020 and ID 7022] and 2 October 2012.

²³⁵ UPS's reply to question 9 of request for information Q22 of 21 September 2012.

- (256) In each EEA country, UPS's Express Saver is offered with a next day delivery commitment for deliveries in all the other EEA countries except Cyprus. [Parties' coverage in the EEA]*²³⁶. TNT's 'Express' service, for its part, is offered with a next day delivery commitment for deliveries in all the EEA countries [Parties' coverage in the EEA]*²³⁷.
- (257) On that basis, it is therefore clear that, except for services offered in France and Spain, which will be dealt with in recital 260 and following, La Poste offers international intra-EEA express services for far less destination countries than the Parties, who are able to cover almost all EEA countries [Parties' coverage in the EEA]*.
- (258) In countries other than France and Spain, La Poste cannot be seen as an alternative to the Parties by customers that need to ship significant volumes with a next day guarantee over distances that cannot be covered by a road hub-and-spoke network operator like La Poste within one day (hereafter: "long-haul" – or "long distance" shipments). The fact that La Poste has *ad hoc* agreements with air service providers to ship very limited volumes with a next day commitment does not alter this conclusion. As previously stated, La Poste only offer this service for customers who principally purchase its road-based services and request express deliveries necessitating air for very limited volumes. La Poste does not serve customers with significant needs for international intra-EEA express services requiring air transport. As such, La Poste is not a fully-fledged competitor of the Parties in the international intra-EEA express market. [Parties' internal market analysis]*²³⁸.
- (259) In addition, as will be explained in more detail, La Poste does not intend to start competing actively with the integrators for such customers in the near future²³⁹ and irrespective of their geographic coverage, international intra-EEA express services relying on outsourced air transport can only exert a very weak competitive constraint on the Parties' services.
- (260) In France and Spain, La Poste, which offers international services respectively through its subsidiaries Chronopost and SEUR, relies more extensively on air transport than in the other EEA countries. Chronopost and SEUR, due to their historical background, have a "natural" portfolio of domestic express customers, who also request international express services to a non-negligible extent. When La Poste cannot serve these customers with its own road capabilities, it relies on an integrator for air transport: [...] in France and [...] in Spain²⁴⁰. However, even in these two countries, La Poste's international intra-EEA express services have a much narrower geographic coverage than the services of the Parties.
- (261) In France, La Poste's international intra-EEA express services are not available for destinations located in Romania, Cyprus, Malta, Norway and Iceland. In countries where next-day committed deliveries from France are offered, these deliveries are only possible for destinations located in large agglomerations except Belgium, Luxembourg and the Netherlands, where deliveries are available throughout the whole country. For

²³⁶ [...]*

²³⁷ [...]*

²³⁸ [Parties' internal market analysis]*

²³⁹ Agreed minutes of a teleconference call of 25 September 2012 with La Poste, paragraph 9.

²⁴⁰ Agreed minutes of a teleconference call of 25 September 2012 with La Poste, paragraph 3.

example, in Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Estonia, Latvia and Portugal, only the capital city is covered²⁴¹ by international intra-EEA express services. By contrast, as already indicated, [Parties' coverage in the EEA]*²⁴², where La Poste only covers the agglomeration of Warsaw.

(262) [Parties' coverage in the EEA]*²⁴³

(263) [Parties' coverage in the EEA]*

Table 1: [Parties' coverage in the EEA and estimates of competitor coverage]*

[...]*

Source: [...]*

(264) [Parties' coverage in the EEA and estimates of competitor coverage]*^{244 245}

(265) The coverage of La Poste's international intra-EEA express services offered in Spain is broadly similar. In Spain, La Poste's international intra-EEA express services are offered only for destinations located in one or several large agglomerations in each country of destination, except for Belgium, Luxembourg, the Netherlands, France, Portugal, Latvia and Lithuania. For example, in Poland, Slovakia, the Czech Republic, Hungary, Slovakia, Romania, Bulgaria, Estonia and Ireland, only the capital city is covered²⁴⁶. [Parties' coverage in the EEA]*²⁴⁷.

(266) The international intra-EEA express services offered by La Poste in France and Spain are available for destinations located in most EEA countries. However, within most of these countries, they are available for a much narrower range of destinations than the Parties' services.

(267) UPS took the view that the Commission erred in its finding in the Statement of Objections that La Poste offered a significantly weaker geographic coverage (on the destination side) than both Parties in France and Spain. UPS argued that [Details of an agreement between La Poste and one of the integrators]*. On that basis, UPS claimed that "*The answers of La Poste with regard to the coverage offered by SEUR are therefore wrong and should be disregarded*"²⁴⁸. However, this reasoning is flawed, as the Commission did not allege in the Statement of Objections that [...]* would discriminate between La Poste's volumes and its own volumes, and would thereby limit its geographic coverage. It simply recorded the fact that in Spain, La Poste offered an international intra-EEA express service which had a significantly lower coverage than the Parties' service.

²⁴¹ La Poste's submission of 27 September 2012.

²⁴² [...]*

²⁴³ Form CO, paragraph 475.

²⁴⁴ [...]*

²⁴⁵ Form CO, paragraph 475.

²⁴⁶ La Poste's submission of 2 October 2012.

²⁴⁷ [...]*

²⁴⁸ Notifying party's response to the Statement of Objections, paragraphs 6.18 and 6.19.

- (268) UPS also called this finding into question on the basis of phone calls that it made to the call centre of SEUR "to request an indication of the time-in-transit to a number of cities in different countries that are not listed in the reply by SEUR on their coverage". According to UPS, SEUR's call centre confirmed that all these cities could be reached with a next-day commitment²⁴⁹. The Commission is unable to verify the accuracy of this allegation. UPS did not provide any written proof (for example a written confirmation by SEUR of the statements made by its call centre). Written confirmation or evidence would have been necessary for the Commission to establish that the factual information provided by La Poste about its own services was incorrect. La Poste submitted a document setting out precisely the agglomerations covered by its express services from Spain to the other EEA countries. Moreover, it cannot be excluded that there may be discrepancies between the indications provided to potential customers by a call centre and what the company is actually prepared to offer to an actual customer in the framework of a contract covering regular shipment cannot be excluded. In this respect, it should be noted that [Parties internal market analysis]*²⁵⁰. Therefore, the information provided by La Poste to the Commission in this regard must be deemed to be accurate. It should be noted in addition that UPS provided no indication as to the price at which SEUR would be prepared to provide the services concerned. In any event, UPS's request was limited to 5 cities only, and as such cannot question the conclusion that overall La Poste's coverage is more limited than that of the Parties' services.
- (269) As regards the international intra-EEA express services offered by La Poste in France, UPS relied on similar arguments as in the case of Spain to call into question the accuracy of the information provided by La Poste about the geographic coverage of its own services. UPS referred to the agreement that La Poste used to have with [...] and indicated that the Parties "assume that the contract between Chronopost and [...] does not limit the geographic coverage of the packages provided by Chronopost"²⁵¹. As in the case of SEUR in Spain, it should be noted that the Commission did not allege in the Statement of Objections that [...] would limit the coverage of Chronopost's services. In any event, Chronopost's international intra-EEA express volumes are delivered from the arrival air gateways in destination countries to the final consignees either by [...] or by La Poste itself²⁵². Therefore, the geographic coverage that La Poste is technically able to achieve in the various destination countries does not only depend on [...] in these countries, but also on La Poste's own networks. Finally, the doubts cast by UPS on the information provided by La Poste in regard to its geographic coverage is all the more surprising than [Parties' coverage in the EEA]*²⁵³.
- (270) It results from the foregoing that in spite of a more extensive use of air services in France and Spain than in the other EEA countries, La Poste offers a significantly weaker geographic coverage (on the destination side) than both Parties also in these two countries. Even in Spain and France, La Poste does not appear to compete actively against the Parties in the "long-haul" international intra-EEA express business, since it

²⁴⁹ Notifying party's response to the Statement of Objections, paragraph 6.19, footnote 104.

²⁵⁰ UPS's reply to requests for information Q4 and Q5 of 27 July and 8 August 2012, [Parties internal market analysis]*

²⁵¹ Notifying party's response to the Statement of Objections, paragraph 6.20.

²⁵² Agreed minutes of a teleconference call of 25 September 2012 with La Poste, paragraph 6.

²⁵³ Form CO, paragraph 475.

basically offers these services to customers purchasing road-based services, and interested in express services necessitating air transport as part of a bundle. In particular, La Poste appears not to be a credible alternative to the integrators for French or Spanish customers that are ready to have different suppliers for different kinds of services, as illustrated by the following statement: *"According to GeoPost, small and medium-size customers (in terms of shipped volumes) who need to ship within the EEA by the next day are not willing to multi-source. Therefore, according to GeoPost, customers using GeoPost in France and Spain for domestic express or international deferred services are inclined to hand their international express business to GeoPost. GeoPost considers that larger customers, on the contrary, will not hesitate to 'multi-source' (i.e. use different providers for different types of services) and will look to the lowest prices. Against this backdrop, large French and Spanish customers usually see no reason to use GeoPost for international intra-EEA express services (knowing that GeoPost relies on an integrator for line-haul by air) and usually opt for an integrator."*²⁵⁴

- (271) On the basis of this statement, UPS claimed that La Poste had a very strong competitive position with regard to smaller customers who are reluctant to multi-source. According to UPS, intra-EEA express services are generally only a small percentage of the total demand of a customer and La Poste has a stronger market position than the Parties on the French and Spanish international intra-EEA deferred markets. UPS considers that this strong position, combined with the reluctance of smaller customer to multi-source, confers on La Poste a competitive advantage on the French and Spanish international intra-EEA express markets²⁵⁵. In fact, La Poste's above-quoted statement shows that there is a whole category of customers – the larger customers who are ready to multi-source, which it cannot capture and must leave to the integrators and this element of La Poste's statement is not disputed by UPS.
- (272) Furthermore, as will be explained in Section 7.2.1.5., irrespective of their geographic coverage, international intra-EEA express services relying on outsourced air transport exert only limited competitive constraint on the integrators' services. This explains why La Poste does not actively compete against the integrators in the "long-haul" international intra-EEA express business.
- (273) As regards Royal Mail, its international intra-EEA express services also have a much more limited geographic coverage than the Parties' services. In the United Kingdom, Royal Mail offers international intra-EEA express services only for deliveries from London and the south east of England to capital cities and other major cities of half of the other EEA countries²⁵⁶. UPS cast doubts on the accuracy of the information provided by Royal Mail about its own services. UPS claimed that Royal Mail's call centre had confirmed that next-day services were also available from Manchester and Glasgow. However, for the purposes of this Decision, express services are limited to those for which a next-day delivery commitment is given. Services for which only an indicative transit time of one day is communicated to a potential or actual customer (for example by a call centre) fall outside the express market because they do not include a

²⁵⁴ Agreed minutes of a teleconference call of 25 September 2012 with La Poste, paragraph 7.

²⁵⁵ Notifying party's response to the Statement of Objections, paragraph 6.22.

²⁵⁶ Royal Mail's submission of 25 September 2012.

firm commitment to next-day delivery. [Agreement by Royal Mail on difference between indicative and committed delivery times]*²⁵⁷.

- (274) As in the case of SEUR's services in Spain, UPS failed to provide any written proof (such as a written confirmation by Royal Mail of the statements made by its call centre), despite Royal Mail having given a precise list of indicative transit times of its services from the United Kingdom to the various other EEA countries and explained the relationship between indicative transit and committed times, as noted above. UPS therefore failed to provide evidence sufficient for the Commission to establish that the information provided by Royal Mail about its own services was factually incorrect. In addition, as already indicated, it cannot be excluded that there may be discrepancies between the indications provided to potential customers by a call centre and what the company is actually prepared to offer to an actual customer in the framework of a contract covering regular shipments. It should be noted in this respect that UPS provided no indication as to the price at which Royal Mail would be prepared to provide the services concerned. There is no indication either as to whether the call centre, when speaking with UPS, was actually referring to next-day committed services, or simply to services with an indicative transit time of one day. In any event, UPS's allegations only relate to the coverage of Royal Mail's services on the origin side, and not on the destination side.
- (275) As a result, the information provided by Royal Mail must be deemed to be accurate, which leads to the conclusion that the international intra-EEA express services offered by this company in the United Kingdom have a much more limited geographic coverage than the Parties' services.
- (276) Royal Mail views itself as a very small player in the United Kingdom international express market in comparison with the integrators: *"on the international express services from the UK the number of these customers which use RM is considerably smaller than the number of customers of the three integrators (UPS, TNT, and DHL, FedEx being relatively small in GB)"*²⁵⁸.
- (277) Furthermore, in countries outside the United Kingdom, Royal Mail (through GLS) has very limited international intra-EEA express operations where it is only able to offer very restricted geographic coverage and does not compete actively with the Parties in that market.
- (278) GLS carries small packages essentially by road. With regard to its ground network, GLS time-in-transits are longer than one day for international deliveries, except for short-distance cross-border routes, [...] *²⁵⁹.
- (279) According to this statement, even between two neighbouring countries (Germany and Austria), GLS cannot consistently offer next-day deliveries with its ground network.
- (280) Under certain conditions, GLS offers international intra-EEA express services on the basis of air transport services purchased from an integrator. However, similar to La Poste's services in countries other than France and Spain, these conditions are very restrictive: GLS offers such services only to customers predominantly purchasing

²⁵⁷ Royal Mail's submission of 25 September 2012.

²⁵⁸ Agreed minutes of a teleconference call of 11 May 2012 with Royal Mail, page 8.

²⁵⁹ [...]*

deferred services or express services that can be provided by road - the core business of GLS – and which ask GLS to provide express services requiring air transport only "occasionally" and "for a few packages"²⁶⁰. Therefore, GLS does not serve customers that ship significant volumes over distances necessitating air transport and does not actively compete with the Parties for such customers. [Parties internal market analysis]^{*261}. Furthermore, as will be explained below in more detail, international intra-EEA express services relying on outsourced air transport exert only limited competitive constraint on the integrators' services, irrespective of their geographic coverage.

- (281) [Parties' estimates regarding the other integrators' coverage]^{*262}. This is broadly consistent with the finding that GLS does not offer international intra-EEA "long-haul" express services to any significant extent, and in any event, not actively. [Parties' estimates regarding the other integrators' coverage]*. This is a further indication that GLS does not actively market international intra-EEA "long-haul" express services. The same remark applies to DPD as well as to Royal Mail's operations in the United Kingdom, [Parties' estimates regarding the other integrators' coverage]*.
- (282) It should also be noted that [Parties internal market analysis]^{*263}. This is a further indication that DPD and Royal Mail are very far from UPS in terms of geographic coverage of international intra-EEA express services and that (i) this is sufficiently well-known by customers without any in-depth coverage analysis to being necessary to substantiate it, and (ii) [Parties internal market analysis]*. [Parties internal market analysis]^{*264}. This is a further indication that UPS sees DPD and GLS as competing mainly in the international deferred rather than international express markets.
- (283) Contrary to UPS's claims²⁶⁵, the above analysis takes account of differences across the various EEA countries. This Decision together with the Statement of Objections contains a specific analysis of each national market for international intra-EEA express services where the competitive constraint exerted on the Parties by La Poste and Royal Mail is assessed as appropriate and relevant.
- (284) It can thus be concluded that with respect to international intra-EEA express deliveries, both La Poste and Royal Mail offer a much narrower geographic coverage (on the destination side) than the integrators, in particular the Parties. With the exception of La Poste' operations in France and Spain and Royal Mail's operations in the United Kingdom, this is due to the strong limitations imposed by the predominant use of road transport by these two companies. As a result of these limitations, a customer that needs to ship significant volumes with a next day guarantee over long distances is very unlikely to consider either La Poste or Royal Mail as a suitable alternative to the Parties. In France and in Spain, even though La Poste uses air transport to a non-negligible extent, its international intra-EEA express services are available for a much narrower range of destinations than the Parties' services. A UPS or TNT customer located in

²⁶⁰ Agreed minutes of a teleconference call of 15 May 2012 with GLS, page 2.

²⁶¹ [Parties internal market analysis]*

²⁶² Form CO, paragraph 475.

²⁶³ UPS's reply to request for information Q22 of 21 September 2012.

²⁶⁴ UPS's reply to requests for information Q4 and Q5 of 27 July 2012 and 8 August 2012, [Parties internal market analysis]*

²⁶⁵ Notifying party's' response to the Statement of Objections, paragraphs 6.25 and 6.26.

France or Spain that would need to be able to ship packages with a next day guarantee to certain areas of the EEA that are not covered by La Poste would be very unlikely to view La Poste as a suitable alternative to the Parties. The same holds true with respect to the international intra-EEA express services marketed by Royal Mail in the United Kingdom. Therefore, even in France, Spain and the United Kingdom, La Poste and Royal Mail exert a weak constraint on the Parties in the "long-haul" segment of the international intra-EEA express market.

7.2.1.2. Customers generally do not see La Poste and Royal Mail as credible alternatives

- (285) During the second phase of the investigation, the Commission sent a questionnaire targeting customers of the Parties who are small purchasers of small package delivery services (in terms of spending). More than 400 replies were received. Among the respondents purchasing international intra-EEA next-day end-of-day services, the vast majority considered UPS, TNT and DHL as credible suppliers when they last searched for a service provider or renewed their contract. By contrast, the vast majority did not consider La Poste or Royal Mail as a credible potential supplier.
- (286) The vast majority identified the insufficient geographic coverage of non-integrators as one of the reasons that they did not consider non-integrators' services as an alternative to the Parties' international intra-EEA express services²⁶⁶. This further confirms the inability of Royal Mail and La Poste to satisfy the needs of users of international intra-EEA express services shipping small packages over "long distances", owing to their limitations with respect to geographic coverage.
- (287) Replies to questions related to switching contained in the same questionnaire gave a similar conclusion. Among the respondents that switched suppliers of international intra-EEA express services in the past three years, only a very small proportion switched from La Poste or Royal Mail whilst most of them switched from an integrator²⁶⁷. This is consistent with customers viewing integrators as closer competitors relative to non-integrators.
- (288) During the second phase of the investigation, the Commission also sent a second, more extensive questionnaire to the Parties' customers. Addressees that organised a tender or negotiated a new contract for the provision of international intra-EEA express services in the last two years were asked to indicate which companies they invited to submit an offer. For each component of the international intra-EEA express market (pre-10.00 am, pre-noon and end-of-day services), each of UPS, TNT and DHL were invited to submit an offer by a majority of the respondents while the overwhelming majority of the respondents did not invite La Poste or Royal Mail²⁶⁸. This indicates that overall La Poste and Royal Mail exert a weak constraint on the Parties in the international intra-EEA express market. Indeed, when they are not invited to submit an offer, it means that these operators exert no influence on the competitive process whereby the customer selects its supplier, and no influence on the price eventually paid by that customer. However, it does not mean that La Poste and Royal Mail are seen as a weak alternative by all customers.

²⁶⁶ See responses to question 21.2 of questionnaire R31 to customers (B) – Phase II.

²⁶⁷ See responses to question 3 and 3.1 of questionnaire R31 to customers (B) – Phase II.

²⁶⁸ See responses to question 27 of questionnaires R1 to R29 to customers – Phase II.

- (289) In the course of the market investigation, information was collected from customers as regards their recent switching experiences. Respondents reported many more switching events between UPS and TNT or DHL than between UPS and DPD or GLS. Similarly, they reported many more switching events between TNT and UPS or DHL than between TNT and DPD or GLS²⁶⁹. This is a further indication that at least a significant number of customers are likely to choose their suppliers, for certain services, between UPS, TNT and DHL without considering DPD and GLS as possible alternatives.
- (290) A large majority of respondents indicated that neither GLS nor DPD constituted credible alternatives to the Parties for any component of the international intra-EEA express market (pre-10.00 am, pre-noon, end-of-day) as these suppliers have been mentioned far less frequently than DHL and FedEx as a credible alternative²⁷⁰.
- (291) When asked to describe the respective strengths and weaknesses of DPD and GLS with respect to international intra-EEA express services, respondents frequently mentioned price as a strength and as regards weaknesses, they predominantly mentioned geographic coverage, transit times, and lack of a real express network (all these aspects relate to the same weakness, namely, the limited geographic coverage of express services)²⁷¹. On the basis of these replies, it also appears that some customers do not even identify DPD or GLS as providers of international intra-EEA express services, or simply do not know these operators, even if they actually provide such services in countries where these customers are established. For example, [Customer name]*, which is located in Belgium, indicated that DPD and GLS were "*not known as express courier[s]*"²⁷² and [Customer name]*, which is located in France, took the view that each of DPD and GLS had a "*good deferred network*" but "*no express network*"²⁷³,
- (292) Even if the limitations of their express network and the geographic coverage of their international intra-EEA express services were identified as DPD and GLS' main weaknesses, it is worth nothing that a significant proportion of respondents – scattered over a variety of countries - mentioned weaknesses which relate to the quality of the international intra-EEA express services provided by DPD or GLS. Some respondents referred to quality of service in general²⁷⁴ whereas others referred to more specific aspects, such as reliability²⁷⁵, quality of the track-and-trace system²⁷⁶ or the behaviour of drivers²⁷⁷.

²⁶⁹ See responses to question 21 of questionnaires Q1 to Q29 to customers – Phase I.

²⁷⁰ See responses to question 59 of questionnaires Q1 to Q29 to customers – Phase I.

²⁷¹ See responses to question 39 of questionnaires R1 to R29 to customers – Phase II.

²⁷² [Customer name]* response to question 39 of questionnaire R2 to customers – Belgium – Phase II.

²⁷³ [Customer name]* response to question 39 of questionnaire R9 to customers – France – Phase II.

²⁷⁴ See for example [Customer name]* response to question 39 of questionnaire R20 to customers – Poland – Phase II, [Customer name]* response to question 39 of questionnaire R25 to customers – Spain – Phase II, [Customer name]* response to question 39 of questionnaire R27 to customers – United Kingdom – Phase II.

²⁷⁵ See for example [Customer name]* response to question 39 of questionnaire R1 to customers – Austria – Phase II.

²⁷⁶ See for example [Customer name]* response to question 39 of questionnaire R6 to customers – Denmark – Phase II, [Customer name]* response to question 39 of questionnaire R17 to customers – Luxembourg – Phase II, [Customer name]* response to question 39 of questionnaire R29 to customers – Norway – Phase II, [Customer name]* response of questionnaire R29 to customers – Norway – Phase II.

²⁷⁷ [Customer name]* response to question 39 of questionnaire R17 to customers – Luxembourg – Phase II.

- (293) In addition, as acknowledged by UPS²⁷⁸, around half of the respondents indicated that non-integrators (i.e. including Royal Mail and La Poste) were not a good alternative to the integrators (in the sense that they would consider using them) for express deliveries to close countries in the EEA, while a large majority indicated that non-integrators were not a good alternative for deliveries over distances longer than 600-800 km²⁷⁹. This is a further indication that the longer the distance over which packages are shipped by a customer, the less likely it is that this customer will view non-integrators as credible alternatives.
- (294) The existence of customers that need to ship with a next day delivery guarantee to a broad range of destinations scattered over the EEA – or beyond the EEA - is not a mere theoretical possibility. Such customers indeed exist and appear not to consider non-integrators (including La Poste and Royal Mail) as possible substitutes for the Parties for such services. For example, [Customer name]* indicated: *"Key aspect for choosing a supplier for the contact is the ability to support all EU countries as well as other countries in Eastern Europe, Middle East and Africa (...). [Customer name]* uses some local couriers but essentially finds that the integrated couriers are better able to meet their global needs. (...) If the Transaction takes place, DHL would remain as the only significant alternative regional integrator."*²⁸⁰ [Customer name]*, for its part, stated: *"There are several things that [Customer name]* requires from their delivery firms to make the service usable: - Global footprint (ability of shipper to fulfil all of above services for worldwide coverage). - Collect all in one shipment - Only one carrier per location or origin - Handling of hazardous goods (very often batteries in power tools like drills)."*²⁸¹
- (295) All these elements show that La Poste and Royal Mail are generally not seen as credible alternatives to the Parties on the international intra-EEA express market, particularly on the long-haul segment.
- 7.2.1.3. The presence of operators such as La Poste and Royal Mail on certain lanes does not constrain the Parties on long-haul lanes from which they are absent
- (296) On the basis of the outcome of the market investigation, it appears that there is no common approach among customers on the choice between having one supplier for all small package delivery services and areas of destination (or at least as few as possible) and finding the most suitable supplier for each type of services (domestic / short distance international intra-EEA / long distance international intra-EEA / extra EEA, express / deferred etc.) without trying to minimise the overall number of suppliers. In the context of the first phase investigation, customers were asked to indicate which of these two paths they followed. It turned out that both are followed by a significant number of respondents²⁸².
- (297) As regards customers that are keen to minimise the number of suppliers and simultaneously ship to a broad range of destinations, including remote ones within the EEA, they are unlikely to consider La Poste or Royal Mail as suitable suppliers, even on

²⁷⁸ Notifying party's response to the Statement of Objections, paragraph 6.10.

²⁷⁹ See responses to questions 41.5.2 and 41.5.3 of questionnaires R1 to R29 to customers – Phase II.

²⁸⁰ Agreed minutes of a teleconference call of 2 May 2012 with [Customer name]*.

²⁸¹ Agreed minutes of a teleconference call of 7 May 2012 with [Customer name]*.

²⁸² See responses to question 9 of questionnaires Q1 to Q29 to customers – Phase I.

"short-haul" lanes on which these suppliers may offer a competitive service on the basis of their ground networks. Indeed, as indicated in the previous sub-Section, customers like [Customer name]* tend to choose their suppliers among the integrators because other companies lack the necessary international coverage on an international basis. As a further illustration, [Customer name]*, which ships large volumes from a central warehouse in Belgium to a number of retailers and end-consumers in Europe, including with express services, indicated: "*[Customer name]* demands from its suppliers that they can deliver to any given location within Europe and that is one of the reasons why [Customer name]* chose UPS i.e. because UPS is a global player able to provide such service*"²⁸³. [Customer name]*, which ships medical devices and spare parts for such devices from a single European warehouse located in the Netherlands to a variety of destinations in the EEA indicated that: "*Tier2 players such as DPD and GLS are used as a benchmark by [Customer name]* but they do not have strong enough networks to be seen as credible alternatives*"²⁸⁴. Indeed, some customers appear to ask for several quotes in order to increase competitive pressure without considering all bidders as potentially suitable.

- (298) It should be noted that when negotiating a contract, [Details regarding negotiations with customers]*²⁸⁵. Knowing the business models of the "non-integrators", the Parties are likely to be able to accurately identify the lanes or destinations for which these operators – notably large ones such as La Poste or Royal Mail - do not actively offer express services. The Parties can then negotiate prices for these lanes or destinations accordingly, that is to say, without fearing that customers would switch to non-integrators for such lanes should they be dissatisfied with the Parties' offer.
- (299) UPS argued that even if non-integrators such as La Poste and Royal Mail do not have a comparable time in transit as the integrators, the combined entity would be disciplined by the fact that approximately [...] of its customers' demand (deliveries up to at least [500-1000]* km) could be satisfied by ground-based operators and the threat of losing this business would discipline the competition for all express services²⁸⁶. In the same vein, UPS claimed that customers shipping to many destinations are mostly large customers and that "*one should assume that they are willing to multi-source and could therefore switch (part of) their volume to a competitor (both express and deferred volume)*". Moreover, [Details regarding UPS' cost structure and business strategy]*²⁸⁷ [Details regarding UPS' cost structure and business strategy]*²⁸⁸. To summarise, the substance of UPS's arguments in this respect is that, even if operators such as La Poste and Royal Mail offer international intra-EEA express services on a narrower range of lanes than the Parties, customers that are receptive to multi-sourcing could switch a significant part of their volume (notably domestic, international intra-EEA deferred and international intra-EEA express on certain lanes) to these non-integrators²⁸⁹.

²⁸³ Agreed minutes of a teleconference call of 4 May 2012 with [Customer name]*.

²⁸⁴ Agreed minutes of a teleconference call of 2 May 2012 with [Customer name]*.

²⁸⁵ Form CO, paragraphs 1205-1208.

²⁸⁶ Notifying party's response to the Decision opening the proceedings, paragraph 224.

²⁸⁷ Notifying party's response to Statement of Objections, paragraph 6.23.

²⁸⁸ Notifying party's response to Statement of Objections, paragraph 6.50.

²⁸⁹ See also Notifying party's response to Statement of Objections, paragraphs 6.30 and 6.63.

- (300) This reasoning is flawed. As indicated by UPS, [Information on the Parties' pricing and sales strategy]*²⁹⁰ ²⁹¹. In the light of this, assuming that as a result of the Transaction, the merged entity raised prices for long-haul express services on intra-EEA lanes from which non-integrators such as La Poste or Royal Mail are absent, all things being otherwise equal (in particular, prices on lanes where La Poste or Royal Mail operate being unchanged), a customer purchasing such long-haul express services in a bundle would have no incentive to switch non-long-haul express (and long-haul express services on lanes where non-integrators are present) to other suppliers such as La Poste and Royal Mail, even assuming that it attaches no value to bundling. Such a switch would not spare the customer from the increase in prices of long-haul express services caused by the Transaction. When it comes to non-long haul intra-EEA express services (and long-haul express services on lanes where non-integrators such as La Poste or Royal Mail are present), the customer would have no reason to switch away from the merged entity as a result of the Transaction since it is assumed for the purposes of this reasoning that the merged entity would not increase prices for these specific services. In other words, the merged entity cannot be deterred from raising prices on certain long-haul lanes where it faces competition only from the integrators by the risk of losing volumes carried on other lanes to the benefit of operators such as La Poste or Royal Mail operating on these other lanes.
- (301) As regards customers that want to have just one supplier or at least minimise the number of suppliers of small package delivery services, if they purchase long-haul express services on lanes not covered by non-integrators such as La Poste or Royal Mail (and where for instance, only the Parties and DHL are present), they are unlikely to switch any component of their bundle to suppliers other than those present on all lanes where they need long-haul express services. In other words, they are unlikely to switch any part of their bundles to La Poste or Royal Mail.
- (302) UPS considers that "*the Commission has in any event failed to make a proper distinction between the demand of smaller and larger customers and has not assessed the intra-EEA volume of these customers for which La Poste/Royal Mail can compete and the percentage of this volume of the total (intra-EEA) volume.*"²⁹² In fact, it stems from the foregoing, and in particular the weak geographic coverage of La Poste and Royal Mail's services compared to that of the Parties' services, that on a very large number of lanes, particularly – but not limited to countries where La Poste and Royal Mail provide long-haul international intra-EEA express services to a very limited extent, La Poste and Royal Mail are not present. Their presence on certain lanes does not constrain the Parties on lanes where they do not operate.
- (303) It would therefore be pointless to try to quantify the total volumes carried by all operators on each of the lanes where La Poste and / or Royal Mail are present relative to the total intra-EEA express volumes to come to the conclusion that La Poste and Royal Mail do not act as significant constraining forces on the Parties. For instance, even if La Poste and Royal Mail "*could viably compete for slightly less than 50% of the intra-EEA express volume originating in Germany based on their current express offering*"²⁹³, it

²⁹⁰ Form CO, paragraph 31.

²⁹¹ See for example Form CO, paragraph 465 and Statement of Objections, paragraphs 69 and following.

²⁹² Notifying party's response to Statement of Objections, paragraphs 6.24 and 6.27.

²⁹³ Notifying party's response to Statement of Objections, paragraph 6.26.

would not alter the fact that they do not exert any constraint on the Parties on a large number of lanes out of Germany. Indeed, as already indicated, DPD only offers international intra-EEA express services in Germany for destinations located in Germany's neighbouring countries and GLS only offers such services on limited cross-border lanes.

- (304) UPS considers that *"it is (...) not necessary for a market participant to offer services to all long-haul destinations within the EEA. A competitor might be able to effectively compete for a large percentage of customers even if it offers long-haul services on a limited number of lanes."*²⁹⁴ However, as already discussed in this Decision, [Information on the Parties' pricing and sales strategy]*. In these circumstances, the volumes or number of customers that various suppliers can serve on the market is of limited relevance to assess whether a concentration between two of these suppliers is likely to bring about harmful effects. Indeed, the fact that for a significant number of customers, there might be enough residual competition *post* merger does not shield the other customers from negative effects of the concentration in the form of price increases.
- (305) According to UPS, if the Commission believes that FedEx cannot be regarded as a viable competitor of the Parties for international intra-EEA express services in many countries because it does not offer a domestic service and many customers want to bundle their services, then it should consider La Poste and Royal Mail strong competitors in view of their domestic and deferred presence²⁹⁵. As a matter of fact, for customers that are keen to have one supplier for all types of small package delivery services – or as few suppliers as possible –, La Poste and Royal Mail can hardly be regarded as suitable providers, unless the bundle purchased by a customer is essentially made up of domestic and / or international deferred services and / or international express services limited to the lanes served by La Poste and / or Royal Mail. As already indicated, in countries such as the Netherlands, neither DPD nor GLS offers air-based international intra-EEA express services to any significant extent. Nonetheless, they do so by purchasing air capacity for customers that need such services for limited volumes, when the bulk of such customers' needs for small package delivery services in general can be satisfied with DPD or GLS' road-based services. However, neither DPD nor GLS can serve single-sourcing customers that need international intra-EEA express services requiring air transport for significant and regular volumes.
- (306) In other words, the mere fact that La Poste or Royal Mail has a strong position on the domestic and / or international deferred market in a given country is not sufficient to make them suitable for single-sourcing customers that purchase international intra-EEA express to a significant extent on lanes where these operators are not active.
- (307) UPS also argued that the Commission should have assessed whether customers have an incentive to split their demand between lanes where La Poste/Royal Mail offers a service and lanes where only the integrators offer a service²⁹⁶. In fact, it is obvious that customers cannot arbitrage between different lanes, and shift the destination of their shipments in order to benefit from more favourable competitive conditions on certain

²⁹⁴ Notifying party's response to Statement of Objections, paragraphs 6.71.

²⁹⁵ Notifying party's response to Statement of Objections, paragraph 6.29.

²⁹⁶ Notifying party's response to Statement of Objections, paragraph 6.27.

lanes. Indeed, customers ship items to well-defined consignees (finished products to specific end-consumers, wholesalers or retailers, spare parts to other premises of the shipper etc.).

(308) Therefore, it can be concluded that La Poste and Royal Mail's presence on a sub-set of lanes does not allow them to constrain the Parties to a significant extent on the whole of the market.

(309) As will be now analysed in more detail, the distance over which La Poste and Royal Mail ship packages by road within one day within the EEA is limited compared to the dimensions of the EEA and it is expected to remain this way.

7.2.1.4. With their road networks, Royal Mail and La Poste can only deliver within one day over limited distances

(310) As has been outlined in the market definition section, ground networks can deliver express shipments by the next day only up to a certain distance. UPS argues that road use is feasible for a significant part of all next day volumes. UPS further argues that while road use is feasible – compared to air – for distances up to [1 000-2 000]* km based on a TNT research done for "Next day by road" project, shipping may be more optimal and cost-effective than air for distances over [500-1000]* km.²⁹⁷ Other market participants suggested, mostly lower maximum distances. As explained previously, it is likely that no maximum distance for next day deliveries can be defined in absolute terms as the actual feasible distance is likely to depend on a number of parameters relating to road infrastructure, and the network set-up and delivery process of the particular supplier.

(311) However, it is clear that whatever the location of the point of origin of a small package, there is necessarily a significant proportion of the territory of the EEA that cannot be reached by road with a next-day delivery. This is due to the size of the EEA and the limitation imposed by the speed of road vehicles as well as the use of a hub-and-spoke model by small package delivery companies, which involves various sorting, unloading and reloading steps during the delivery process. [Parties' internal business strategy]*²⁹⁸.

(312) [Parties' internal business strategy]*

(313) [Parties' internal business strategy]*²⁹⁹

(314) [Parties' internal business strategy]*³⁰⁰

(315) [Parties' internal business strategy]*

(316) [UPS' revenue information]*³⁰¹

Table 2: [UPS' revenue information]*

[...]*

Source: [...]*

²⁹⁷ Notifying party's response to the decision opening the proceedings, paragraph 220.

²⁹⁸ Notifying party's response to the decision opening the proceedings, Annex 26, page 8.

²⁹⁹ [Parties' internal business strategy]*

³⁰⁰ [...]*

³⁰¹ [...]*

(317) It should also be noted that certain EEA countries such as the United Kingdom, Ireland, Malta, Cyprus, or certain large regions, such as Sicily, Sardinia, and parts of Greece, are insular or made up of islands. Express deliveries to or from these countries or regions on the basis of road and sea transport are possible only for a very limited range of lanes due to the slowness of maritime transport.

(318) It follows from the foregoing that a significant proportion of international intra-EEA express volumes need to be carried by air. Moreover, even taking into considerations plans to increase the number of lanes on which road is used for express services, [Parties' internal business strategy]*, cannot result in a fully pan-European road-based coverage and require time to materialise, it is likely that in the coming years, a significant proportion of international intra-EEA express volumes will still have to be carried by air.

7.2.1.5. International intra-EEA express services relying on outsourcing of air transport suffer from a structural competitive disadvantage vis-à-vis the integrators' services

(319) In reply to the questionnaire addressed to competitors during the first phase investigation, an overwhelming majority of respondents indicated that there were areas of the small package delivery market where they considered that they could not fully compete against the integrators. A majority of those that took such a position identified international services as one of these areas³⁰², and international express services were specifically mentioned in a number of instances. For example, Posten AB mentioned "*Express Parcel deliveries to European and Worldwide destinations*" as an area where it cannot fully compete against the integrators and added: "*Large accounts are not possible to win over from an integrator. We are sometimes competitive towards small and medium accounts that have contracts with us on other services and only have smaller volumes of outbound express deliveries.*"³⁰³ Royal Mail, for its part, indicated: "*through utilising their own air network integrators are able to provide a faster, more reliable international service at a price more competitive to the customer. Integrators therefore dominate the express export market and most other carriers are unable to compete*"³⁰⁴.

(320) This suggests that for a non-integrator, using air transport on the basis of outsourcing is not sufficient to be able to fully compete with the integrators in all segments of the international intra-EEA express market, given that operational control over an air network (as opposed to reliance on outsourcing of air transport) is the main differentiator between integrators and non-integrators.

(321) Furthermore, when asked to specify the advantages of being an integrator, a majority of respondents referred to the control (or ownership) of the whole or a large part of the network or processes used for small package delivery operations. Some respondents highlighted several benefits of enjoying such full control, notably the ability to control the cost and quality of the delivery process and the potential for efficiency stemming from this control³⁰⁵. In particular, bpost stated: "*owning an extensive air and ground transportation network allows for economies of scale and scope and ensure a better ICT*

³⁰² See responses to question 51 (iii) of questionnaire to competitors – Phase I.

³⁰³ Posten AB's response to question 51 (iii) of questionnaire to competitors – Phase I.

³⁰⁴ Royal Mail's response to question 51 (iii) of questionnaire to competitors – Phase I.

³⁰⁵ See responses to question 51 (i) of questionnaire to competitors – Phase I.

integration and same services to all countries"]³⁰⁶. The Hungarian Post listed several advantages of being an integrator including "fix and stable / reliable air and road transport fleet which can be optimized to volumes"³⁰⁷. Posten AB stated: "Having one network for door to door transportation offering with harmonized production set up, IT, track and trace as well as simple service portfolio benefits the company and its customers in form of better control over the package flows (quality), optimal transparency (T&T) and quick lead-times. Guaranteed uplift, independency of airlines, cost control, buying power. Better branding possibilities (one single brand). No risk of partners, networks or alliances splitting up over night caused by mergers or acquisitions"³⁰⁸. Posten Norge stated: "Control of global network for last mile is the main advantage so the operations are more seamless than for other players who have to use subcontractors. The integrators are perceived to a larger degree as one supplier globally."³⁰⁹ PostNL took the view that "advantages of being an integrator are obviously the full control of an international network, including time schedules for Air- and road transport and IT."³¹⁰ Slovenska Posta listed several advantages including "direct controlling"³¹¹. According to La Poste, "the advantages are the interconnection between their own ground and air networks. The centralisation of operations in many respects makes it easier for customer services"³¹². In the same vein, GLS stressed the integrators' "high performance due to own control of processes."³¹³ DB Schenker mentioned the following advantages: "enabling one-stop-shopping covering the whole logistics chain" and "own production set-up enabling a qualitative advantage due to fewer subcontractors involved in the production"³¹⁴. DSV stated: "The integrators are in control of all parts of the process. We have to book our shipments to integrators and cannot offer the complete chain in own network. By booking to the integrators we also have to advice who our customers are."³¹⁵ Kuehne+Nagel indicated: "an integrator can 100% control the quality and operations of its network"³¹⁶. GO! General Overnight submitted that the integrators enjoyed an advantage in terms of "own network and geographical coverage"³¹⁷. Speedex referred to "operational and quality control" as well as "cost control"³¹⁸.

- (322) This suggests that controlling an integrated air and ground network provides a significant advantage over operators outsourcing air transport.
- (323) As will be shown in the following recitals, on the basis of the outcome of the market investigation, it appears that there are two essential reasons why the international intra-EEA express services that ground-based operators such as La Poste or Royal Mail

³⁰⁶ bpost's response to question 51(i) of questionnaire to competitors – Phase I.
³⁰⁷ Hungarian Post's response to question 51(i) of questionnaire to competitors – Phase I.
³⁰⁸ Posten AB's response to question 51 (i) of questionnaire to competitors – Phase I.
³⁰⁹ Posten Norge's response to question 51(i) of questionnaire to competitors – Phase I.
³¹⁰ PostNL's response to question 51(i) of questionnaire to competitors – Phase I (taking account of the corrigendum sent by PostNL on 4 July 2012).
³¹¹ Slovenska Posta's response to question 51(i) of questionnaire to competitors – Phase I.
³¹² La Poste's response to question 51(i) of questionnaire to competitors – Phase I.
³¹³ GLS' response to question 51(i) of questionnaire to competitors – Phase I.
³¹⁴ DB Schenker's response to question 51(i) of questionnaire to competitors – Phase I.
³¹⁵ DSV's response to question 51(i) of questionnaire to competitors – Phase I.
³¹⁶ Kuehne+Nagel's response to question 51(i) of questionnaire to competitors – Phase I.
³¹⁷ GO! General Overnight's response to question 51(i) of questionnaire to competitors – Phase I.
³¹⁸ Speedex' response to question 51(i) of questionnaire to competitors – Phase I.

provide (or could provide) on the basis of outsourced air transport can exert only very limited competitive pressure on the integrators' services. The first reason is that reliance on outsourced air transport prevents non-integrators from being as efficient and competitive as the integrators and achieving the same degree of quality, including in terms of reliability. The second reason, which derives from the first one, is that certain customers are hostile to the use of sub-contracting and as a matter of principle, prefer "integrated services".

- (324) As pointed out by UPS³¹⁹, in reply to the market investigation, a majority of the suppliers of small package delivery services considered that outsourcing could be a viable solution in order to compete effectively against integrators³²⁰. However, the corresponding question was not specific to international intra-EEA express services. Replies to other questions focussing specifically on intra-EEA express and deferred services reveal that many operators do not acknowledge the same merits to outsourcing for these two categories of services. Indeed, an overwhelming majority of the respondents indicated that owning an air network with scheduled flights was not necessary to compete effectively against the integrators for intra-EEA deferred services³²¹ whereas around half of the respondents considered that it was necessary in the area of intra-EEA next-day end-of-day services³²². Moreover, it appears that for some of the respondents that find ownership unnecessary, operational control – for example in the form of chartering arrangements – would be necessary to compete effectively against the integrators in the international intra-EEA express market. For instance, Kuehne+Nagel stated: *"if you want to ensure highest quality standards and a very rigid operating procedure then companies need to investigate options that ensure this. However, "owning" is not necessary, one can do this also via a charter solution or else.*"³²³
- (325) By contrast, international deferred services do not require night flights and a very tight synchronisation of ground and air operations to ensure that the next-day delivery commitment is met. Therefore, providers of international deferred services may use daytime flights, including those operated by commercial airlines. Moreover, for their operations, flight schedules are much less critical than in the case of international express; delayed flights do not in principle give rise to a risk of breaching a commitment vis-à-vis customers, and more generally, most of the operational issues mentioned below are not applicable to air-based international deferred services.
- (326) Furthermore, among the respondents that took the view that outsourcing could be a viable solution, several companies (in particular DB Schenker, DSV and Kuehne+Nagel) are freight forwarders which as will be shown below in the assessment of the competitive constraint exerted by freight forwarders, either hardly have any operations on the international intra-EEA express markets or are active on these market essentially by reselling the integrators' services without acting as significant constraining forces on them.

³¹⁹ Notifying party's response to the Statement of Objections, paragraphs 6.22 and 6.65.

³²⁰ See responses to question 15.7 of questionnaire R30 to competitors – Phase II.

³²¹ See responses to question 15.4 of questionnaire R30 to competitors – Phase II.

³²² See responses to question 15.3 of questionnaire R30 to competitors – Phase II.

³²³ Kuehne+Nagel's responses to questions 15.3 and 15.3.1 of questionnaire R30 to competitors – Phase II.

- (327) By contrast, DHL and FedEx, who focus on express services, control an air network and provide air transport services to small package delivery companies, took the opposite view. Furthermore, the small package delivery companies which appear to rank among the main users of outsourcing of air transport for the provision of international intra-EEA express services have highlighted a number of core problems arising from dependency on outsourcing. In particular, La Poste and Royal Mail both believe that outsourcing is not an option to compete effectively against the integrators³²⁴. La Poste stated: *"this solution is viable for only more than two day deliveries, but subject to constraints of collaboration within the partner networks. Express deliveries require ownership of air network. However, outsourcing does not enable operators such as GeoPost to compete effectively with integrators for international express deliveries (e.g. capacity constraints on planes during peak periods, etc.)"*³²⁵. Royal Mail, for its part, commented in its reply by stating that *"only integrators are able to schedule their air network to meet their delivery aims"*³²⁶.
- (328) The main difficulty faced by non-integrators when providing an express service dependent on outsourcing of air transport is that they have no control over the routings, frequencies, schedules and capacity of the aircraft operated by the air carriers on which they rely, unless they enter into leasing or chartering agreements³²⁷. However, large-scale chartering or leasing of aircraft amounts to controlling an extensive air network and in fact, being an integrator. This is indeed the model applied by UPS in Europe. La Poste and Royal Mail, for their part, are not in the same situation. They cannot prevent their providers of air transport services from modifying key parameters of their operations such as routes, frequencies, schedules and capacity. This is a major disadvantage compared with the integrators, who enjoy full control over the air, ground and sorting assets used for their small package delivery operations, and can thus optimise the functioning of the whole infrastructure on which these operations rely.
- (329) [Information regarding UPS' cost structure and efficiencies expected to arise from the Transaction]*
- (330) [Information regarding UPS' cost structure and efficiencies expected to arise from the Transaction]*³²⁸

Figure 11: [Details regarding UPS' operational strategy and cost structure]*

[...]*

Source: [...]*

- (331) [Details regarding TNT's operational strategy and cost structure]*

Figure 12: [Details regarding TNT's operational strategy and cost structure]*

[...]*

Source: [...]*

³²⁴ La Poste's response to question 15.7 of questionnaire R30 to competitors – Phase II and Royal Mail's response to question 15.7 of questionnaire R30 to competitors – Phase II.

³²⁵ See La Poste's response to question 15.7.1 of questionnaire R30 to competitors – Phase II.

³²⁶ See Royal Mail's response to question 15.7.1 of questionnaire R30 to competitors – Phase II.

³²⁷ UPS's reply to questions 11 and 12 of the request for information of 22 June 2012.

³²⁸ [...]*

- (332) [Details regarding UPS' operational strategy]*³²⁹.
- (333) [Information regarding UPS' cost structure and efficiencies expected to arise from the Transaction]*³³⁰
- (334) These elements brought forward by UPS shows that the integrators can modify the configuration of their air network very quickly and flexibly in terms of routings, schedules and capacity, and actually do it. These elements also show that they do it primarily with a view to optimising the configuration of their air network in the first place in light of "*patterns of demand*", that is to say, their flows of small package on the various lanes.[Details regarding UPS' operational strategy and cost structure]*³³¹
- (335) [Details regarding the Parties' operational strategy and cost structure]*³³²
- (336) [Parties internal market analysis]*^{333 334}
- (337) [Information regarding UPS' cost structure and efficiencies expected to arise from the Transaction]*³³⁵. It shows that full operational control over an air network is a crucial competitive advantage for a small package delivery company in the long-haul segment of the international intra-EEA express business, where air transport is required.
- (338) As already indicated, [Information regarding UPS' cost structure and efficiencies expected to arise from the Transaction]*. If these findings are correct, there is no reason why they would not also apply to partnerships and agreements between a ground-based operator like La Poste or Royal Mail and a third party providing it with air transport services. Indeed, such a partnership would be unlikely to allow a ground-based operator to reach the same level of optimisation of its "long-haul" international intra-EEA express deliveries as if it was controlling an air network. Indeed, the air transport costs incurred by a ground-based operator depend on the price charged by its external providers of air transport services. A ground-based operator cannot minimise these costs by adapting the air network on which it relies in terms of capacity, routings and schedules in relation to its own flows of small packages. It cannot decide to ground aircraft, or substitute a smaller aircraft for a larger one to lower unit costs. Moreover, should its air service provider adapt its network to the volumes of cargo (including small packages) that it carries on various routes, using the above-mentioned routes, the ensuing cost reductions may not necessarily be passed on to the ground-based operator.
- (339) UPS indicated that it was not necessary for a market participant to adjust the air network to its specific needs but that it may adjust its current network to the air transport services purchased and still be able to offer a competitive service. UPS indicated that for example, a market participant could offer relatively early pick-up times in order to be able to use flights departing in the evening³³⁶. However, even if there is demand for

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[...]*

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[...]*

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UPS's Supplementary Submission on Efficiencies of 4 September 2012, paragraphs 5.28 and 5.29.

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[...]*

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UPS's reply to requests for information Q4 and Q5 of 27 July 2012 and 8 August 2012, [Parties internal market analysis]*

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UPS's reply to requests for information Q4 and Q5 of 27 July 2012 and 8 August 2012, [Parties internal market analysis]*

335

UPS's Supplementary Submission on Efficiencies of 4 September 2012, paragraph 2.4.

336

Notifying party's response to the Statement of Objections, paragraph 6.70.

such services, it does not change the fact that the non-integrator in question could not modify the routings, capacity and schedules of the flights used to transport its volumes, and lower the costs of air transport. In addition, by adapting its current network to the air network of its external provider, it may have only limited ability to set certain important parameters such as latest pick-up time.

- (340) Moreover, a change of routings, schedules or capacity – if they are allowed by the agreement between the ground-based operator and its air service provider - may negatively impact the ground-based operator's processes. Indeed, for example, a change of flight schedules may make the connection between the ground network of a non-integrator (in the context of its international express operations) and the air network of its air service provider impossible, for instance because the aircraft departs too early to allow the small packages of the non-integrator to be loaded on time. In order to remedy such situations, significant operational changes may be necessary in the operations of the non-integrator. FedEx also pointed to these kind of risks, arguing that ground-based operators "*remain limited in the reliability of their services, not least because of the limited flexibility in terms of space available and reliance on third party scheduling.*"³³⁷
- (341) These risks also affect the reliability of the non-integrators' services, which depend on a third party's decisions with regards to its air network. On the basis of the replies to the questionnaire addressed to customers during the first phase investigation, it appears that on-time delivery is a very important criterion taken into account by customers when negotiating a contract³³⁸. Against this backdrop, it is clear that the risk of failing to comply with the committed delivery timeframe because of a change of schedule or the grounding of an aircraft constitutes a serious disadvantage for a non-integrated company vis-à-vis the integrators, who manage their air network with a view to meeting their time commitments at minimum costs.
- (342) DHL and FedEx have made comments which tend to confirm that by relying on a third party for air transport (when air transport is necessary), non-integrators suffer from a serious competitive disadvantage vis-à-vis the integrators and are exposed to risks affecting the reliability of their services: These comments are of considerable evidential value given that, in addition to the Parties, DHL and FedEx are the only integrators operating in Europe and both have experience with the provision of air transport services to other small package delivery companies.
- (343) DHL, for example, highlighted the major inconvenience for a small package delivery company of relying on flight schedules tailored to needs other than its own: "*Due to the nature of the operations, nearly all flight needs to be performed during night time and sorting in hubs take place around midnight. Therefore nearly all flights have to be performed according to a flight schedule dictated by aforementioned requirements (dedicated flights) and in most cases cannot be performed by passenger airlines (belly capacity) or 3rd parties with own flight schedules tailored to different needs.*"³³⁹
- (344) FedEx, like UPS, emphasised the flexibility enjoyed by integrators to optimise their air operations on the short-term in order to adapt to changes in their flows of small packages and contingencies: "*the integrators are able to use back-up aircraft and adjust*

³³⁷ FedEx' submission on postal operators and ground-based operators in Europe, 10 July 2012, paragraph 94.

³³⁸ See responses to question 30 of Questionnaires Q1 to Q29 to customers – Phase I.

³³⁹ DHL's response to question 15.3.1. of questionnaire R30 to competitors – Phase II.

their internal schedules according to demand and according to externalities (such as bad weather, etc.). Accordingly non-integrators face significant hurdles in terms of competing with the integrators in the absence of an operational air network."³⁴⁰ Indeed, a non-integrator would be unlikely to be able to force its provider of air transport to use a back-up aircraft on a given lane, or to reroute aircraft and change schedule. For these reasons, non-integrators are exposed to higher risks of delays than integrators thus cannot offer the same degree of reliability to their customers.

- (345) DHL also referred to the short-term adjustments that an integrator can implement at the level of its air network, notably to face contingencies and ensure that small packages are delivered on time: "[...]*. (...) As mentioned in various earlier submissions, the use of non-dedicated air uplift without a doubt affects the quality and reliability of service, making express (TDI) deliveries very challenging. For DPDHL, therefore, non-dedicated air uplift can only ever be supplementary to its dedicated air uplift capacity."³⁴¹
- (346) It is noteworthy that both FedEx and DHL referred to unforeseen events capable of adversely affecting the reliability of their air-based express services. Continuity of air traffic and punctuality of flights are indeed known to be sensitive to events such as adverse weather conditions or other natural events (such as volcano eruptions), technical problems affecting aircraft, strikes etc. Both FedEx and DHL mentioned contingency planning designed to address these risks and involving measures such as use of back-up aircraft or rerouting of small package flows within their networks. Such measures are not available to non-integrators, who fully depend on third parties for air transport. Contractual arrangements with their air service providers may allow them to benefit from contingency measures put in place by these providers – in particular if the latter are integrators and if the contractual arrangements contain non-discrimination clauses between the integrator's and the non-integrator's volumes. However, air service providers are not obliged to accept such clauses in commercial air service contracts. Moreover, if integrators implement contingency measures such as those mentioned in this recital, it is most likely with the intention to ensure the reliability of their own small package delivery services and protect their reputation vis-à-vis their small package delivery service customers. Reliability of the services provided by non-integrators on the basis of their air transport services is unlikely to drive their decisions to implement contingency measures.
- (347) Overall, the reliability of air-based express services offered by non-integrators on the basis of outsourcing thus appears to be exposed to more risks than in the case of services offered by the integrators using their own (or operationally controlled) air network. International intra-EEA express deliveries involving air transport rely on very tight schedules and require a very good coordination between the various steps of the delivery process. In particular, small packages, which may have to be picked up only at the end of the business day (at least, when the service is performed by an integrator) must go through the various sorting and ground transportation steps sufficiently quickly to reach the air gateway on time to be loaded onto the appropriate aircraft. A minor change in the schedule of a flight may thus lead to a situation where a small package company relying on that flight can no longer offer next day deliveries to certain

³⁴⁰ FedEx' response to question 15.1.1 and 15.3.1 of questionnaire R30 to competitors – Phase II.

³⁴¹ DHL's submission of 26 September 2012.

customers for certain destinations, at least not without adjusting its own ground operations or finding another provider of air transport services. In other words, an integrator controls both the air and the ground network in terms of routings, capacity and schedules whereas a non-integrator only controls the ground network part and has to take the air network as a given. This severely limits the ability of a non-integrator to optimise its international intra-EEA express operations and to ensure that these services can be offered at all times. FedEx pointed to this type of issues, referring to *"risk of delay arising from the variability of the third parties' own services (over which the ground based operator has no control)."* and noted that: *"The integrators have their own fleets of aircraft (utilised on a hub-and-spoke basis) in order to ensure that their international express services in the EEA can guarantee delivery. For these reasons, non-integrators cannot offer international express services in the EEA in any way that is competitive operationally and economically with the integrators."*³⁴² As already indicated, La Poste, for its part, emphasised the advantages stemming from the possibility to manage in a coordinated manner a ground and an air network: *"the advantages are the interconnection between their own ground and air networks. The centralisation of operations in many respects makes it easier for customer services"*³⁴³.

- (348) In the same vein, Royal Mail stated: *"As integrators own their air network they are able to schedule flights to ensure they meet their delivery aims"*³⁴⁴. Royal Mail also referred to air network optimisation, and underlined its benefits in terms of transit time: *"Integrators can also adjust their flight and trunking times, allowing them to provide transit times which are difficult to replicate"*³⁴⁵.
- (349) UPS stated: *"The Commission objects that the outsourcing of air transport is not a viable option as companies would have no control over routes, frequencies, schedules and capacity of the aircraft and competitors with limited volumes would not find it profitable to enter into chartering agreements (...). This observation disregards market practice. La Poste for instance has ad hoc agreements on number of lanes, which allow it to offer a reliable next day service on these lanes. Royal Mail is able to provide next day services using a combination of a contract for the provision of (cargo) air capacity and passenger airlines. This clearly demonstrates that third parties can be used to provide reliable next day services."*³⁴⁶ However, the various agreements that La Poste and Royal Mail have with their air services providers for international intra-EEA routes are not akin to chartering arrangements which would confer on them full control over routings, schedules and capacity. Moreover, the mere fact that these agreements exist does not imply that the services offered by La Poste and Royal Mail on that basis are as reliable as those offered by the Parties through their own air networks. La Poste commented on outsourcing by stating: *"this solution is viable for only more than two day deliveries, but subject to constraints of collaboration within the partner networks. Express deliveries require ownership of air network. However, outsourcing does not enable operators such as GeoPost to compete effectively with integrators for international express deliveries (e.g. capacity constraints on planes during peak*

³⁴² FedEx' response to questions 15.3.1 and 15.1.1 of questionnaire R30 to competitors Phase II.

³⁴³ La Poste's response to question 51(i) of questionnaire to competitors – Phase I.

³⁴⁴ Royal Mail's response to question 15.3 of questionnaire R30 to competitors – Phase II.

³⁴⁵ Royal Mail's response to question 51 of questionnaire to competitors – Phase I.

³⁴⁶ Notifying party's response to the Statement of Objections, paragraph 6.65.

periods, etc)"³⁴⁷ and also indicated, with respect to these capacity constraints, which affect the reliability of the service: "*the risk of having international express packages left grounded in peak times is viewed by GeoPost as a very serious one because it could spoil the relationships with a customer*"³⁴⁸. Royal Mail, for its part, took the view that "*only integrators are able to schedule their air network to meet their delivery aims*"³⁴⁹. Moreover, as will be shown in recitals 370 and following, certain customers consider that reliance on outsourcing negatively affects the reliability of the service and may notably induce "*frictions and delays*"³⁵⁰. Finally, the mere existence of such agreements says nothing about the air transport costs incurred by operators such as La Poste or Royal Mail and their ability to compete aggressively.

- (350) Furthermore, it is clear that on a pan-European level, in terms of revenues and geographic coverage, the integrators are far ahead of any non-integrator. [Information on the Parties' coverage and revenues]*. This is an indication that outsourcing is not a suitable model for large-scale deployment of international intra-EEA express services, but rather a route for small package delivery companies who want to provide these services merely as a complement to road-based services.
- (351) Moreover, non-integrators face some risks in relation to the availability of sufficient capacity on board aircraft. Indeed, it appears that, unsurprisingly, integrators adjust their air transport capacity primarily in order to optimise their own small package delivery operations. Mere air transport services are sold to third parties essentially with a view to marketing excess capacity on aircraft. DHL, for example, indicated: "*DHL Aviation is a subsidiary of DHL Express and operates an Intercontinental and Regional Airline cargo network to handle its Express business. In order to maximize the use of space and spread the operating costs, DHL Aviation sells excess cargo space into the freight forwarding community.*"³⁵¹
- (352) FedEx for its part, indicated: "*Importantly, FedEx Express is an "integrator" and not a traditional cargo operator, and as a consequence, the very large majority of its air cargo capacity is used captively. (...) FedEx has very limited capacity in any event, which is dedicated to its own integrated services for its express customers.*"³⁵²
- (353) In order to carry out international intra-EEA deliveries within one day over distances requiring air transport, operators need, in general to have small packages carried on night flights. In reply to the questionnaire addressed to competitors during the first phase investigation, a majority of the respondents indicated that some of the packages that they deliver needed to be carried on night flights. From their explanations, it appears that next day deliveries in particular, may require overnight air transport³⁵³. Moreover, a majority of respondents mentioned only integrators as companies able to provide them with night air transport services to the destinations for which they need these services³⁵⁴.

³⁴⁷ La Poste's response to question 15.7.1 of questionnaire R30 to competitors – Phase II.

³⁴⁸ Agreed minutes of a teleconference call of 25 September 2012 with La Poste, paragraph 11.

³⁴⁹ See Royal Mail's response to question 15.7.1 of questionnaire R30 to competitors – Phase II.

³⁵⁰ Agreed minutes of a teleconference call of 2 May 2012 with [Customer name]*.

³⁵¹ DHL's response to question 2 of questionnaire to air cargo operators – Phase I.

³⁵² FedEx' response to questions 2 and 13 of questionnaire to air cargo operators – Phase I.

³⁵³ See responses to question 66 (i) of questionnaire to competitors - Phase I.

³⁵⁴ See responses to question 66 (ii) of questionnaire to competitors - Phase I.

- (354) As acknowledged by FedEx, the use of night flights for "long-haul" international intra-EEA express deliveries is not an absolute prerequisite, but the use of passenger flights for such deliveries also entails risks: *"in order to provide express delivery services a non-integrator would need to secure capacity on late evening and early morning commercial flights. However these flights already operate at close to full capacity as passengers prefer to take these flights (and passenger luggage reduces the amount of belly space that can be made available to non-integrators)."*³⁵⁵
- (355) Based on its past experience with [...]*, La Poste, who now use [...]* and [...]* as its main providers of air transport services, made comments which further support the view that the integrators are the most suitable providers of air transport services for small package delivery companies: *"The Case team noted that GeoPost has an extensive ground network in Europe and asked whether buying air space capacity from airline companies was an option. GeoPost replied that they had tried, specifically with [...]*, but that it only worked to a certain extent. As [...]* holds a passenger network, flight times were not adequate for express deliveries. Conversely integrator flights occur overnight allowing for early deliveries. In result GeoPost's offer was not competitive."*³⁵⁶
- (356) Overall, it appears that a non-integrated company providing "long-haul" international intra-EEA express services that would need an air carrier to be able to provide international intra-EEA express services would be likely to opt for an integrator. However, since integrators appear to market essentially excess capacity, non-integrators are exposed to the risk of not being able to contract enough capacity with an integrator.
- (357) According to UPS, capacity is not an issue, the example of third party air transport used by La Poste and Royal Mail would demonstrate that capacity is available and that small package delivery companies needing air transport routinely negotiate conditions ensuring that their volumes are taken on board³⁵⁷. However, while a non-integrator may be able to negotiate such conditions with an integrator, it may not necessarily be able to contract for enough capacity on all suitable routes. Indeed, while integrators adjust their air network according to their volumes of small packages, non-integrators that need the integrators' night flights only have access to the capacity that integrators are able and willing to offer them once their own volumes have been taken into account.
- (358) It results from the foregoing that the reliance of non-integrators on outsourced air transport prevents them from being as efficient as the integrators (due to the impossibility to optimise the air network on the basis of their flows of small packages) and reaching the same level of reliability.
- (359) In addition, FedEx referred to a "double-margin issue", which would stem from the fact that: *"Costs involved for [ground-based operators] to obtain access to an integrator's network for EEA or international line-haul for purposes of offering express services are significant and do not allow [ground-based operators] to expand in this space. In fact, [ground-based operators] would obtain discounts based on certain committed volumes. However, because the volumes committed by [ground-based operators] are significantly lower than those of FedEx' largest customers, [ground-based operators]*

³⁵⁵ FedEx' response to question 13.4 of questionnaire to competitors – Phase I.

³⁵⁶ Agreed minutes of a teleconference call of 9 August 2012 with La Poste, paragraph 16.

³⁵⁷ Notifying party's response to the Statement of Objections, paragraph 6.66.

obtain rates and charges which do not allow them to compete on price and earn a margin, particularly by comparison to the prices that FedEx gives to customers who benefit from discounts"³⁵⁸. UPS does not dispute the accuracy of FedEx' description of the current situation of non-integrators. UPS even remarks that "*this statement by FedEx makes clear that other small package companies may only be prevented from competing for certain customers because they lack volume*"³⁵⁹. Since in addition, [Information on the Parties' price setting strategy]*, it means that non-integrators are not able to exert a significant competitive constraint on these customers, because their costs do not allow them to offer attractive prices.

- (360) UPS argued that "*If other small package companies would (...) therefore focus on getting additional intra-EEA volume, they would get higher discounts and be able to obtain even more volumes (even though prices are not directly related to costs)*"³⁶⁰. However, such a strategy would imply capturing a significant number of additional customers and would be likely to take time to produce its effects. In particular, in countries other than France, Spain and the United Kingdom, where La Poste and Royal Mail have very limited air-based international intra-EEA express operations, it would certainly take time to increase volumes to a sufficient extent to increase their discounts significantly.
- (361) The difficulty faced by express services relying on outsourced air transport to compete with integrators on price has been confirmed by GLS, who took the view that its dependence on outsourced air transport in the context of its very limited provision of "long-haul" international intra-EEA express services prevented it from offering competitive prices relative to the integrators: "*For parts of Europe, GLS is hiring one of the four Integrators for air transport, since it has no own aircraft fleet. Because of that it cannot offer competitive prices to customers that need express services necessitating air transport relative to direct offers by the Integrators.*"³⁶¹
- (362) The fact that dependence on outsourcing of air transport translates into higher prices has been identified by certain customers. [Customer name]*, for example, indicated that it did not consider non-integrators as good alternatives to the integrators for express deliveries within the EEA over distances longer than [500-1000]* km because such services "*usually require air network and other companies use one of these 4 integrators with a higher rate for these services*"³⁶².
- (363) According to UPS, "*a possible cost disadvantage (which should only exist in the short run when volumes are limited) can therefore not lead to the conclusion that any market participant using aircraft as part of its offering cannot exercise a competitive constraint without further analysis. In any case, as with almost any expansion in a network industry, there generally is a start-up period during which the services provided are not as profitable as those of established players. This does however not prevent a market participant from effectively competing on the market and expanding volumes.*"³⁶³ Indeed, irrespective of its costs, a company can, in a short to mid-term price

³⁵⁸ FedEx' submission on postal operators and ground-based operators in Europe, 10 July 2012, paragraph 99.

³⁵⁹ Notifying party's response to the Statement of Objections, paragraph 6.73.

³⁶⁰ Notifying party's response to the Statement of Objections, paragraph 6.73.

³⁶¹ Agreed minutes of a teleconference call of 15 May 2012 with GLS, page 2.

³⁶² [Customer name]* response to question 41.5.3. of questionnaire R25 to customers – Spain – Phase II.

³⁶³ Notifying party's response to the Statement of Objections, paragraph 6.68.

aggressively in order to expand volumes and grow, even if it incurs losses. However, as discussed below, there is no indication that La Poste and Royal Mail are currently pursuing an expansion strategy in the long haul international intra-EEA express segment and are competing aggressively in order to increase volumes. In particular, in all EEA countries but France, the United Kingdom and Spain, these two operators only offer these services as a complement to their core road-based services, for limited volumes. Instead of competing aggressively to increase volumes, they compete very passively and do not compete for contracts with a significant proportion of long-haul international intra-EEA express volumes.

- (364) It thus appears that in order to be competitive vis-à-vis the integrators for "long-haul" international intra-EEA express deliveries, a non-integrator would need to offset a series of fundamental disadvantages of its services in terms of reliability, efficiency and costs, with some structural competitive advantages. However, there is no reason to believe that such structural advantages exist. In particular, there is no reason to believe that the ground networks of operators such as La Poste and Royal Mail exhibit any clear strength compared to the integrators' ground networks, which in particular in the case of the Parties and DHL, have a geographic coverage that is comparable to if not better than La Poste and Royal Mail's networks.
- (365) The only situation where La Poste and Royal Mail seem to be able to offer attractive "long-haul" air-based international intra-EEA express services are for example to customers who request these services as part of a bundle comprising road-based services, as some of La Poste's customers do in France and Spain. However, this situation can only occur when road-based services are sufficiently important in the bundle to compensate for the competitive disadvantage on "long-haul" air-based express services faced by the non-integrated company vis-à-vis the integrators.
- (366) [Parties internal market analysis]*^{364 365}
- (367) Overall, the weaknesses of non-integrators' services dependent on outsourcing of air transport can be appropriately summarised by the followings statement by bpost: *"Operators, including bpost, use such solution [(outsourced air transport)] but it does not constitute a viable solution to compete effectively with the integrators, such operators not being able to reserve margins comparable to those of the integrators, not being able to fully control their costs and depending on third party's quality and efficiency."*³⁶⁶.
- (368) As already pointed out concerning GLS and La Poste, these operators do not compete actively against the integrators in the "long-haul" international intra-EEA express segment. Instead, they offer such services only with a view to satisfying customers which essentially buy their road-based services but which, often to a very marginal extent, also request services necessitating air transport and want to keep one single supplier for all services or at least as few as possible. This was confirmed by FedEx on the basis of its own experience as a provider of air service to a ground-based small package delivery company: *"This agreement allowed [CONFIDENTIAL] to add international express delivery services alongside its own domestic express and*

³⁶⁴ [Parties internal market analysis]*

³⁶⁵ [Parties internal market analysis]*

³⁶⁶ bpost' response to question 15.7.1. of questionnaire R30 to competitors – Phase II.

international deferred services. However, it did not allow [CONFIDENTIAL] to compete against FedEx or the other integrators in the market for international express delivery services."³⁶⁷.

- (369) All the constraints inherent to outsourcing of air transport have repercussions on customers' perception of these services. According to Bartolini, *"the level of reliability of service that can be reached through outsourcing of air transport are not sufficient to comply with the standards expected by the express market."*³⁶⁸
- (370) On the basis of the second phase of the market investigation, it indeed appears that reliance on sub-contractors, notably for air transport, is viewed negatively by a significant proportion of the customers. In response to the questionnaire addressed by the Commission to a large number of small purchasers of international intra-EEA express services, the majority of the respondents that do not see non-integrators as credible alternatives to the integrators for international intra-EEA next-day end-of-day services indicated that non-integrators' reliance on sub-contractors (for example for air transport) for the provision of such services was a problem for them³⁶⁹.
- (371) In reply to the request for information sent to the customers during the second phase of the investigation, several customers considered that the fact that the integrators do not outsource air transport was important for them. For example, [Customer name]* stressed the importance of the fact that the integrators have their *"own planes, own pilots, international hubs..."*³⁷⁰ [Customer name]* emphasised the fact that the integrators have their *"own network"* and *"own fleet"*³⁷¹ and [Customer name]* identified as a weakness of DPD the fact that its international intra-EEA express services involve *"many operators in [the] chain"*³⁷², which also suggests that extensive reliance on outsourcing tends to be perceived negatively at least by certain customers.
- (372) In the same vein, [Customer name]*, a company shipping high-value time-critical items indicated: *"It would be hard for firms without air network such as DPD to fulfil the strict requirements of [Customer name]* even if they source airspace from third parties, as delivery of third parties is prone to frictions and delays, which violates the service level qualities requested by [Customer name]*."*³⁷³ [Customer name]* made very similar comments: *"[Customer name]* strives to avoid operators which have to outsource part of the carriage to a third party, since handing over the parcel to one or more other operators during the transport makes the whole supply chain more prone to errors."*³⁷⁴ [Customer name]*, for its part, highlighted the fact that suppliers relying on sub-contracts for part of the process may be de facto excluded by the stringent liability regime put in place because of the high value of the transported goods: *"[Customer name]* contracts with small package companies often foresee a very stringent CMR liability regime which de facto excludes operators that would need to sub-contract part*

³⁶⁷ FedEx' submission on postal operators and ground-based operators in Europe, 10 July 2012, paragraph 98.
³⁶⁸ Bartolini's response to question 15.7.1. of questionnaire R30 to competitors – Phase II, *"I livelli di affidabilità del servizio raggiungibili attraverso l'outsourcing del trasporto aereo non sono sufficienti per rispettare gli standard attesi dal mercato nel settore espresso"*.
³⁶⁹ See responses to question 21.4 of questionnaire R31 to customers (B)- Phase II.
³⁷⁰ [Customer name]* response to question 41.3.1. of questionnaire R10 to customers – Germany – Phase II.
³⁷¹ [Customer name]* response to question 41.3.1. of questionnaire R9 to customers – France – Phase II.
³⁷² [Customer name]* response to question 39 of questionnaire R8 to customers – Finland – Phase II.
³⁷³ Agreed minutes of a teleconference call of 2 May 2012 with [Customer name]*.
³⁷⁴ Agreed minutes of a teleconference call of 2 May 2012 with [Customer name]*.

of the delivery operations. CMR + liability goes far in terms of financial liability. It can be that wholesale value is claimed. Seen the high values of [Customer name] goods not all companies can deal with this liability regime because of the high financial risk involved.*"³⁷⁵.

- (373) In its response to the Statement of Objections, [Information on the Parties' networks and business strategy]*³⁷⁶. However, the types of subcontracting arrangements mentioned by UPS are very different from outsourcing of air transport by non-integrators. In the case of outsourcing of line-haul trucking for example, the integrators task a road carrier to operate trucks on certain routes defined by them. The integrators control the schedules and routings. [Information on the Parties' networks and business strategy]*.
- (374) For all these reasons, it appears that a non-integrator relying on outsourced air transport for the provision of international intra-EEA express services is structurally prevented from operating as efficiently as an integrator and cannot deliver the same level of reliability. A number of customers, including large customers shipping to many destinations, are unlikely to consider such operators as credible alternatives. Therefore non-integrators can only exert, at best, a very weak competitive constraint on the Parties in the "long-haul" international intra-EEA express segment. This explains why neither La Poste nor Royal Mail tries to compete actively against the integrators for such services.
- 7.2.1.6. It is very unlikely that La Poste and Royal Mail would significantly increase the geographic coverage of their international intra-EEA express services and start competing actively with the Parties in that market in the near future
- (375) As already indicated, La Poste (except in France and Spain) and Royal Mail (except in the United Kingdom) do not provide "long-haul" international intra-EEA express services to any meaningful extent. In France and Spain, La Poste provides such services with a much more limited geographic coverage than the Parties and with serious competitive disadvantages resulting from its reliance on outsourcing of air transport. The same is true for Royal Mail in the United Kingdom.
- (376) UPS suggested that this may change in the future. Indeed, as already indicated, UPS argued that where La Poste and Royal Mail would want to supplement their road network with aircraft for shipments over distances that cannot be covered by road there would be no barriers for them doing so, notably thanks to the availability of air transport services offered by third parties such as airlines and integrators³⁷⁷.
- (377) However, the availability or unavailability of air transport services is only part of the relevant question, namely whether the expansion of La Poste and Royal Mail post Transaction into the "long-haul" international intra-EEA express business would be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the Transaction³⁷⁸. The mere fact that air transport services are offered within the EEA by airlines and integrators is by no means sufficient to address this question.

³⁷⁵ Agreed minutes of a teleconference call of 4 May 2012 with [Customer name]*.

³⁷⁶ Notifying party's response to the Statement of Objections, paragraph 6.75.

³⁷⁷ Notifying party's response to the Decision opening the proceedings, paragraphs 217 *et seq.*

³⁷⁸ Horizontal Merger Guidelines, paragraph 68 (OJ C31, 5.2.2004, p. 5).

- (378) For all the reasons set out above, and in light of the analysis set out in recitals 370 and following, if Royal Mail or La Poste managed to expand their international intra-EEA express services to reach a coverage comparable to that of the Parties, they would still be likely to suffer from a competitive disadvantage hampering their ability to exert a significant competitive constraint on the integrators, at least for so long as they were unable to control an air network and would have to rely on agreements with third party air service providers concluded on standard commercial terms. Such an expansion would thus be unlikely to defeat any possible harmful effects of the Transaction, unless La Poste or Royal Mail took control of a significant air network.
- (379) However, as will be explained in the general discussion on entry barriers, the magnitude of the investment costs and risks associated with the acquisition of a significant air network is a very high barrier to entry. This is true whether the air network comprises own air assets (primarily aircraft but also ground handling facilities, sorting and other facilities at air gateways etc.) or air assets controlled through other means, notably chartering and leasing (in the case of aircraft). Indeed, the costs of a chartering or leasing agreement are essentially fixed costs and under this type of arrangements, the utilisation risks (essentially the risks of not covering fixed costs due to insufficient load factor) are the same as those associated with ownership of assets, as indicated by DHL: *"However, outsourcing to 3rd parties, that operate aircrafts [on] behalf [of the small parcel operator] and according to the flight schedule of the small parcel operator is possible. Please note, that in these kind of agreements, the utilization risk remains with the small parcel operator and are based on long term lease agreements. Hence the small parcel operator can be considered as the owner of the aircraft."*³⁷⁹
- (380) According to UPS, in the Statement of Objections, the Commission failed to assess whether it would be possible for La Poste or Royal Mail to expand long-haul international intra-EEA express deliveries should the merged entity increase prices, which would make such activities even more profitable³⁸⁰. In fact, as already explained in the Statement of Objections³⁸¹, the barriers to entry described above are so high that irrespective of the potential consequences of the Transaction on prices in the international intra-EEA express markets, operators such as La Poste and Royal Mail are very unlikely to be able and willing to overcome such barriers for their hypothetical expansion to be sufficiently "timely" to defeat any harmful effects of the Transaction. GLS indicated in this respect *"GLS does not own aircraft and does not consider investing in a fleet. It considers that the market is established with high market entry barriers. The investment in a fully owned European air network is prohibitively high and goes along with a high risk of low utilisation levels since the established players would try to defend their market shares and to drive any new player out of the market again (see example of DHL in the USA)."*³⁸² The prohibitive investment costs mentioned by GLS and confirmed in the assessment of the barriers to entry set out in this Decision imply that in order to make entry or expansion profitable, the merged entity would have to increase prices very significantly. The merged entity could thus safely impose price

³⁷⁹ DHL's response to question 15.3.1. of questionnaire R30 to competitors – Phase II.

³⁸⁰ Notifying party's response to the Statement of Objections, paragraphs 6.17 and 6.62.

³⁸¹ Statement of Objections, paragraph 300.

³⁸² Agreed minutes of a teleconference call of 22 August 2012 with GLS, paragraph 16-17.

increases up to a high level without fearing to trigger a significant entry or expansion by a competitor.

- (381) In view of the high barriers to entry, the only path that La Poste and Royal Mail could follow to improve the geographic coverage of their international intra-EEA express services in the near future to reach a pan-European coverage and start competing "actively" against the Parties in the "long-haul" segment of the international intra-EEA express market would involve more extensive outsourcing of air transport. In such a scenario, however, these non-integrators would suffer from the structural weaknesses attached to a non-integrated service relying on outsourced air transport. Against this backdrop, the prospect of being structurally less efficient than the integrators and largely perceived by customers as not delivering the same quality of service is very likely to deter operators such as La Poste or Royal Mail from engaging in such expansion. This makes this hypothetical expansion very unlikely.
- (382) As already indicated, UPS suggested that non-integrators could offer attractive prices in order to increase volumes to obtain better rates for air transport services, so as to become more competitive vis-à-vis the Parties. However, a significant increase in the long-haul international intra-EEA express volumes of non-integrators, even large operators such as La Poste or Royal Mail would take time. Indeed, these operators have non-negligible long-haul international intra-EEA express operations in only a very limited number of countries, and only for a limited number of lanes. They would need to increase their volumes substantially, which means that they would have to capture a significant number of customers. Such expansion is unlikely to be sufficiently timely to defeat attempts to raise prices on the part of the merged entity. Moreover, there is no ground to believe that any significant non-integrator may be pursuing such an expansion strategy.
- (383) [La Poste's difficulties to expand long-haul express volumes across EEA]*³⁸³
- (384) This statement shows that significant risks would be associated with this type of expansion, notably the difficulty to build up a sufficient customer base. It also shows that even for such an expansion based on outsourced air transport, barriers to entry would not be as low as claimed by UPS. Indeed, as suggested by La Poste, integrators may be reluctant to offer air transport services to another small package company to such an extent that this company could offer "long-haul" international intra-EEA express services and become a significant competitor on a pan-European basis. In any event, it confirms that La Poste is unlikely to be willing to engage in such expansion in a near future post Transaction. [Information on La Poste's business strategy]*³⁸⁴. [Information on La Poste's business strategy]*³⁸⁵. [Information on La Poste's business strategy]*³⁸⁶.
- (385) Neither did GLS express any intention to initiate such a strategic move: *"GLS considers that expanding its express services within Europe would be very difficult, and it cannot provide a European-wide Express solution as it lacks its own air network, and the critical mass of volumes to fill it. (...) Sub-contracting air services from*

³⁸³ Agreed minutes of a teleconference call of 25 September 2012 with La Poste, paragraph 9.

³⁸⁴ Agreed minutes of a teleconference call of 9 August 2012 with La Poste, paragraph 19.

³⁸⁵ Agreed minutes of a teleconference call of 9 August 2012 with La Poste, paragraphs 16 and 19.

³⁸⁶ Agreed minutes of a teleconference call of 9 August 2012 with La Poste, paragraph 20.

passenger/cargo airlines to offer a European-wide Express service is not an option, mainly for reliability and quality / timing reasons, as explained before. If this would be an option, GLS would have done it already. In GLS's view, being able to meaningfully compete with competitors providing a pan-European Express service is only possible with an own-controlled air network based on a hub-and-spoke system."³⁸⁷

- (386) As regards its operations in the United Kingdom, Royal Mail indicated that it had not attempted to quantify the time and investments needed to offer additional fast next-day international services but considered such expansion not likely to be possible in the short term and the required investments likely to be considerable³⁸⁸. Royal Mail is thus very unlikely to take steps in a near future to start competing more actively against the Parties and with a broader geographic coverage in the "long-haul" international intra-EEA express segment.
- (387) [Details on UPS' business strategy]*³⁸⁹. Indeed, it cannot be excluded that operators such as La Poste and Royal Mail could gradually expand their international intra-EEA express operations on the basis of outsourcing and then progressively start leasing or chartering aircraft. However, as indicated above, these operators seem unwilling to do this in the near future and currently provide air-based express services to a meaningful extent only in a very limited number of countries. In addition, even if they expanded their intra-EEA express operations on the basis of outsourcing, this would not alter the magnitude of the investment costs necessary in order to acquire control over an air network. As already indicated, and as developed in more detail in the analysis of barriers to entry (see Section 7.6.3.), these costs are very high and constitute by themselves a very high barrier to entry and expansion.
- (388) As regards UPS's own experience of moving from a model based on outsourcing to the development of an operationally controlled air network, it rather tends to show that it can take many years as illustrated by the following milestones in UPS's history in the United States: "1929: UPS begins world's first air express service", "1953: UPS Air is reborn with two-day service that connects major cities on the East and West Coasts", "1975: UPS becomes the first package delivery company to serve every address in the continental United States and begins its first operation outside the U.S. - in Ontario, Canada", "1982: Next Day Air service is established", "1985: UPS began first intercontinental air service between U.S. and Europe", "1988: UPS launches its own airline"³⁹⁰. According to this information, no less than 6 years lapsed between the launch of UPS's next-day air service and the creation of its own airline, and no less than 35 years between the launch of a two-day air-based service connecting major cities on the East and West Coast and the creation of UPS's airline. This experience therefore cannot serve as an indication that La Poste and Royal Mail may move from air-based express services offered on the basis of outsourcing in a handful of EEA countries to the status of integrators controlling pan-European air networks within the timeframe relevant in the context of the assessment of the Transaction (around two years).

³⁸⁷ Agreed minutes of a teleconference call of 22 August 2012 with GLS, paragraphs 16-17.

³⁸⁸ Royal Mail's response to question 27 of questionnaire R30 to competitors – Phase II.

³⁸⁹ Notifying party's response to the Statement of Objections, paragraph 6.65.

³⁹⁰ See *UPS Timeline*" on UPS's website: <http://pressroom.ups.com/Fact+Sheets/UPS+Timeline> , visited on 9 January 2013 at 5.30 pm).

- (389) It should also be stressed that UPS's growth in the United States took place in an entirely different market context than the one currently faced by La Poste and Royal Mail in Europe. UPS was founded in the United States in 1907. Together with FedEx, it was a pioneer in the development of express deliveries in the United States, which grew in particular as modern means of transport were developing in that country. By contrast, La Poste and Royal Mail are facing a market structure where three large integrators compete on the basis of extensive pan-European integrated air and ground networks, and which is characterised by moderate growth. In this context, La Poste and Royal Mail would be unlikely to be able to expand their air-based express operations to a level justifying the development of their own (or operationally controlled) air network without capturing a significant number of customers from the current integrators. There is obviously a certain degree of uncertainty in their ability to do so. Their incentives to gradually expand their air-based express services through outsourcing and then start developing their owned (or operationally controlled) air networks are thus entirely different from those of UPS at the time when it took steps to become a fully-fledged integrator in the United States.
- (390) In view of the foregoing, it appears that a transition towards full integration would in all likelihood require significant time and costs. Such a transition would thus not be completed in the near future, even if the merged entity increased prices to an extent that non-integrators such as La Poste or Royal Mail grow their own volumes steadily.
- (391) It results from the foregoing that La Poste and Royal Mail are very unlikely to expand significantly into the long-haul segment of the international intra-EEA express segment.
- (392) As already indicated, on the basis of a series of recent investments and acquisitions carried out by La Poste and Royal Mail outside their home markets, UPS claimed that these two companies were expanding rapidly and according to UPS should be taken into consideration for the assessment of the Transaction³⁹¹. However, it is striking that the expansion projects mentioned by UPS at paragraph 225 of the response to the Decision opening the proceedings concern investments in ground infrastructures or partnerships with ground operators. None of them can be interpreted as part of a strategic move on the part of La Poste or Royal Mail towards expansion in the "long-haul" air-based international intra-EEA express business.
- (393) For instance, the partnership between Itella and GLS in the Baltic States, which UPS invoked to support its claims, seems to focus on road-based deferred services rather than anything close to "long-haul" international intra-EEA express services, as illustrated by the following statement by GLS: *"GLS customers can use the new link to the Baltic with Euro Business-Parcel and Euro Business-Small Parcel. Returns and collections with direct delivery are also available via Pick&Return-Service and Pick&Ship-Service. Delivery times to all the Baltic states from Germany, for example, are typically [...] days, even to more remote areas."*³⁹²
- (394) The Commission does not contest that La Poste and Royal Mail may be investing, at least to some extent, to expand their road-based operations, including with a view to expanding their international intra-EEA services. What the Commission considers very

³⁹¹ Notifying party's response to the decision opening the proceeding, paragraphs 225-226.

³⁹² Press release *"Itella Logistics – GLS" new partner in Lithuania and Latvia'*, 21 May 2012, referred to in footnote 60 of the Notifying party's response to the decision opening the proceedings.

unlikely, however, is any significant expansion by any of these two operators into the air-based long-haul segment of the international intra-EEA express markets.

(395) As a consequence, no future expansion of La Poste or Royal Mail's operations in the "long-haul" international intra-EEA express segment could be sufficiently likely, timely and of a sufficient magnitude to defeat the harmful effects of the Transaction on consumers.

7.2.1.7. La Poste and Royal Mail's international intra-EEA express services are perceived as distant substitutes for the Parties' services with respect to various quality criteria

(396) In the framework of the market investigation, UPS, TNT and DHL were each identified by most responding customers as companies satisfying the criteria that respondents consider indispensable with respect to international intra-EEA services, whereas GLS and DPD were mentioned only by a very small minority³⁹³. This is an indication that the international intra-EEA services offered by La Poste and Royal Mail are generally viewed as distant substitutes to the services offered by the Parties and DHL.

(397) Besides, in reply to the questionnaire addressed to customers in the course of the first phase investigation, three key features of international intra-EEA express services were identified by a vast majority of respondents as indispensable criteria taken into account in their decision to select a supplier, namely quality of the track and trace system, security of shipped goods and on-time delivery record (i.e. reliability)³⁹⁴.

(398) La Poste and Royal Mail have been mentioned far less frequently than TNT and DHL as being among the two closest competitors of UPS with respect to track-and-trace, latest pick-up time and on time delivery record. Similarly, they have been mentioned far less frequently than UPS and DHL as being among the two closest competitors of TNT with respect to the three same characteristics³⁹⁵. In addition, according to UPS, in response to the second phase market investigation, only a minority of large customers also included non-integrators when identifying the carriers which satisfied their track-and-trace needs³⁹⁶.

(399) Furthermore, as already indicated, in response to the market investigation a significant proportion of customers – scattered over a variety of countries – identified weaknesses of DPD or GLS' international intra-EEA express services which relate to the quality of these services. Some respondents referred to quality of service in general³⁹⁷ whereas others referred to more specific aspects, such as reliability³⁹⁸ or the quality of the track-and-trace system³⁹⁹.

³⁹³ See responses to question 31 of Questionnaires Q1 to Q29 to customers – Phase I.

³⁹⁴ See responses to question 30 of questionnaires Q1 to Q29 to customers – Phase I.

³⁹⁵ See responses to questions 36 and 37 of questionnaires Q1 to Q29 to customers - Phase I.

³⁹⁶ Notifying party's response to the Statement of Objections, paragraph 6.41.

³⁹⁷ See for example [Customer name]* response to question 39 of questionnaire R20 to customers – Poland – Phase II, [Customer name]* response to question 39 of questionnaire R25 to customers – Spain – Phase II, [Customer name]* response to question 39 of questionnaire R27 to customers – United Kingdom – Phase II.

³⁹⁸ See for example [Customer name]* response to question 39 of questionnaire R1 to customers – Austria–Phase II.

³⁹⁹ See for example [Customer name]* response to question 39 of questionnaire R6 to customers – Denmark – Phase II, [Customer name]* response to question 39 of questionnaire R17 to customers – Luxembourg –

- (400) [Parties internal market analysis]*
- (401) [Parties internal market analysis]*^{400 401 402 403 404}
- (402) [Parties internal market analysis]*⁴⁰⁵. However, consignees' perceptions are likely to be reported to and / or monitored by shippers and thus are likely to have repercussions on shippers' perceptions. It should also be noted that domestic, international intra-EEA express and international intra-EEA deferred volumes go through the same process when it comes to last-mile delivery. Therefore, the above perceptions of consignees must be deemed to apply to international intra-EAA express deliveries among other types of deliveries, all the more so since among all small package delivery services, international intra-EEA express services are "premium services" for which customers' requirements in terms of quality tend to be high.
- (403) UPS contended that in the Statement of Objections, there were no arguments as to why the reliability of La Poste and Royal Mail was less than that of the Parties and that the Commission only referred to statements made by FedEx and internal documents of the Parties⁴⁰⁶. In fact, the foregoing contains clear evidence and arguments showing why La Poste and Royal Mail's services are generally perceived by customers as of lower quality than the Parties' services with respect to characteristics to which they attach great importance, notably reliability. These arguments were already set out in the Statement of Objections⁴⁰⁷. Moreover, as acknowledged by UPS, in the Statement of Objections⁴⁰⁸, [Parties internal market analysis]*.
- (404) [Parties internal market analysis]*⁴⁰⁹
- (405) According to UPS, the fact that customers continue to use the services of La Poste or Royal Mail demonstrates that they must be able to offer these services reliably and without security problems, particularly since these operators have expanded their intra-EEA offering in recent years⁴¹⁰. This line of argument cannot be followed since there are obviously different degrees in the level of reliability or security that various operators achieve, and different degrees in customers' requirements on those aspects. While certain customers may be satisfied with there being a reasonable likelihood that their packages will be delivered on time, others require quasi-certainty and a very high level of physical security and are ready to pay a higher price in exchange. For instance, [Customer name]*, which indicated that the items it shipped in small packages were of high value, stated: "*Value-added services are very important to* [Customer name]*.

Phase II, [Customer name]* response to question 39 of questionnaire R29 to customers – Norway – Phase II, [Customer name]* response of questionnaire R29 to customers – Norway – Phase II.

400 [Parties internal market analysis]*

401 [Parties internal market analysis]*

402 [Parties internal market analysis]*

403 [Parties internal market analysis]*

404 [Parties internal market analysis]*

405 [Parties internal market analysis]*

406 Notifying party's response to Statement of Objections, paragraphs 6.32 and 6.33

407 Statement of Objections, paragraph 313

408 Statement of Objections, paragraphs 310 to 312

409 [...]*

410 Notifying party's response to Statement of Objections, paragraphs 6.34 and 6.35.

*Among these are (...) high security standards to minimize the risk of theft (e.g. trucks park only on guarded parking areas)."*⁴¹¹

- (406) An overwhelming majority of the customers that responded to the market investigation indicated that the quality of the track-and-trace system was indispensable or important. On the basis of the market investigation, it appears that customers need good track-and-trace primarily to fulfil their obligations vis-à-vis their own customers or at least, to deliver a reliable and high-quality service. In particular, with a good track-and-trace system, the customer can react and solve problems quickly when its own customers inform it that a small package has not been delivered on time⁴¹². Against this backdrop, a large majority of the respondents also indicated that the number of times a package is scanned was important⁴¹³. Indeed, the more often a package is scanned, the more precise the tracking of this package and the better one can react to a problem, as illustrated by the following statement by [Customer name]*, for whom on-time delivery is particularly crucial: *"The number of scans ensures that progress towards the destination can be monitored to determine if flight connections and driver routings have been successfully achieved in a timely manner."*⁴¹⁴
- (407) However, in terms of number of scans, La Poste seems to have a much more basic system than the Parties. La Poste indicated that it scanned packages [Number of scans]* in the event of non-delivery [...] ⁴¹⁵. UPS, for its part, can scan a package up to [Number of scans]* times in the context of its intra-EU services and it estimates that for an 'average' delivery scenario, it provides [Number of scans]* scans. TNT, for its part, scans a package on average [Number of scans]* times in the context of its international services but can scan up to [Number of scans]* times⁴¹⁶. GLS, for its part, stated: *"GLS' services are significantly less sophisticated than that of the integrators because GLS's IT system has been designed predominantly for standard services."*⁴¹⁷
- (408) UPS disputed the accuracy of the information provided by La Poste as regards its number of scans on the basis of test shipments organised on six different lanes. According to UPS, of the six test shipments conducted with DPD, the package had been scanned on average [Number of scans]* times and DPD appeared to scan [Information on the number of scans provided by UPS]*. Furthermore, UPS also organised test shipments with GLS on six lanes and indicated that of the six test shipments, GLS had a [Information on the number of scans provided by UPS]*⁴¹⁸.
- (409) However, irrespective of the actual numbers of scans performed by La Poste and Royal Mail, as indicated above, customers generally perceive them as offering a more basic track-and-trace service than the Parties.
- (410) UPS quoted statements found on GLS's website – a webpage called *"Why choose GLS?"* - which advertise in very general terms GLS's security standards and track-and-trace

⁴¹¹ Agreed minutes of a teleconference call of 4 May 2012 with [Customer name]*.

⁴¹² See responses to questions 34 and 34.1 of questionnaires R1 to R30 to customers – Phase II.

⁴¹³ See responses to questions 34.2 and 34.2.1 of questionnaires R1 to R30 to customers – Phase II.

⁴¹⁴ [Customer name]* response to question 34.2.1. of questionnaire R6 to customers – Phase II – Denmark.

⁴¹⁵ La Poste's response to question 35 of questionnaire to competitors – Phase I.

⁴¹⁶ Form CO, paragraphs 1276-1284.

⁴¹⁷ Agreed minutes of a teleconference call of 15 May 2012 with GLS, page 3.

⁴¹⁸ Notifying party's response to the Statement of Objections, paragraphs 6.38 to 6.41.

systems⁴¹⁹. These very general statements do not clearly show that GLS would have similar security standards – and performance – and a similar track-and-trace system as the Parties. Moreover, they clearly seek to convey a favourable picture of GLS's services to potential customers. They are therefore of very limited evidential value in this context. More importantly, in terms of competitive constraint, image and perception by customers matter at least as much as suppliers' actual performance. Yet, as has been shown above, [Parties internal market analysis]*, Royal Mail is generally perceived as delivering a lower level quality than the integrators in terms of track-and-trace and security.

- (411) Therefore, it appears that in terms of quality of service, including quality of track-and-trace, reliability and security, which are of key importance for certain customers; Royal Mail and La Poste's international intra-EEA express services are generally perceived by customers as being of lower quality than the Parties' services. Those of the Parties' customers that require a high standard of quality with respect to these aspects, and are ready to pay for a higher price in order to obtain it, would thus be unlikely to switch to La Poste or Royal Mail should the merged entity increase prices, even for services and lanes where these operators are present. This is an additional reason why La Poste and Royal Mail exert a weak competitive constraint on the Parties on the international intra-EEA express markets.

7.2.1.8. La Poste and Royal Mail' have less capability to offer "premium" time-committed services

- (412) [Royal Mail and GLS' offer of "premium" time-committed services]*⁴²⁰. [Royal Mail and GLS' offer of "premium" time-committed services]*⁴²¹. In any event, as already indicated, GLS offers next day delivery services (which include 'premium' pre-10.00 am and pre-noon services) essentially for destinations which can be reached by road, in most cases in neighbouring countries. The geographic coverage of its early morning services is thus necessarily very limited.
- (413) [La Poste's offer of "premium" time-committed services]*⁴²². [La Poste's offer of "premium" time-committed services]*. La Poste may offer such 'premium' services in other countries, but always with a limited geographic coverage, mostly limited to neighbouring countries (as with the rest of their international intra-EEA express services).
- (414) By contrast, in each EEA country, UPS's Express (which is a next day pre-noon or pre-10.30 am committed service, the committed time of delivery depending on the point of destination) is offered for deliveries in all the other EEA countries except Cyprus and Malta. Moreover, the geographic coverage of this service (in terms of percentage of postal codes covered in each destination country) is [Parties' coverage in the EEA]*⁴²³. TNT's '12.00 Express', for its part, is offered for deliveries in all the EEA countries

⁴¹⁹ Notifying party's response to the Statement of Objections, paragraphs 6.35 and 6.37.

⁴²⁰ Agreed minutes of a teleconference call of 11 May 2012 with Royal Mail, paragraph 4.

⁴²¹ Agreed minutes of a teleconference call of 15 May 2012 with GLS, pages 1-2.

⁴²² Agreed minutes of a teleconference call of 25 September 2012 with La Poste, paragraph 3.

⁴²³ UPS's submission of 7 June 2012.

except Iceland, Malta and Slovenia and its geographic coverage, is [Parties' coverage in the EEA]*⁴²⁴.

- (415) As regards UPS's Express Plus (which is a next day pre-9.00 am service), it is offered for deliveries in [Parties' coverage in the EEA]* EEA countries and its geographic coverage is [Parties' coverage in the EEA]*⁴²⁵. TNT's '9.00 Express', for its part, is offered for deliveries in [Parties' coverage in the EEA]* EEA countries and its geographic coverage is [Parties' coverage in the EEA]*⁴²⁶.
- (416) Therefore, it can be concluded that La Poste and Royal Mail offer these premium services in a very limited manner compared to the Parties, who offer these services for a significant number of countries on the destination side. This finding is undisputed by UPS.
- (417) Nevertheless, UPS argued that a very limited number of customers have a demand for early morning services, which account for limited volumes. According to UPS, "*it is very unlikely that these limited volumes of early morning are competitively significant and could lead to the conclusion that La Poste/Royal Mail cannot compete for a significant part of the customers demanding intra-EEA express services*"⁴²⁷. However, these services happen to be important for certain customers, for some of their uses of international intra-EEA express services. Indeed, in reply to the market investigation, a majority of customers indicated that even in case of a price increase of 5-10%, they would be reluctant to switch from a next day pre-10.00 am to a next day pre-noon service or from a next day pre-noon to a next-day end-of-day service⁴²⁸. For customers needing these premium services for a broad range of destinations, and reluctant to switch to a slower service, La Poste and Royal Mail would thus be very unlikely to be seen as satisfactory alternatives to the Parties. Moreover, as already explained, prices are set by service type among other things, and therefore differentiate between next-day end-of-day services and premium services. Furthermore, the international intra-EEA express market is a market where prices are not heterogeneous, result from discounts which vary amongst customers, and are set in many instances as a result of individual negotiations. Therefore, the fact that the volumes accounted for by premium services in relation to the size of the overall international intra-EEA express market are low is of limited relevance. Indeed, in this context, the fact that many customers might not purchase these services does not protect those who do from a price increase for these particular services, unless they are ready to switch to slower and cheaper services.
- (418) UPS also stated: "*The Commission failed to assess if most demand for early morning services comes from large customers which generally multi-source and are thus able to switch (a large part of) their demand to a competitor (having a very significant adverse effect on the cost of the Parties)*"⁴²⁹. However, as explained in the following recital, the fact that these customers multi-source is of limited relevance to assess the competitive constraint exerted by La Poste and Royal Mail.

⁴²⁴ TNT's submission of 7 June 2012.

⁴²⁵ UPS's submission of 7 June 2012.

⁴²⁶ TNT's submission of 7 June 2012.

⁴²⁷ Notifying party's response to the Statement of Objections, paragraph 6.28.

⁴²⁸ See responses to questions 49 and 50 of questionnaires Q1 to Q29 to customers – Phase I.

⁴²⁹ Notifying party's response to the Statement of Objections, paragraph 6.28.

- (419) Indeed, prices depend on the type of services. For the same reasons as those explained in recital 300, the Parties are able to increase (implicit or explicit) net prices of international express "premium" services through the setting of published prices as well as through [Information on the Parties' pricing strategy]*. In light of this, assuming that as a result of the Transaction, the merged entity raised prices for "premium" international intra-EEA express services, all things being otherwise equal (in particular, prices for other types of services), a customer purchasing such premium express services in a bundle would have no incentive to switch non-premium services to other suppliers such as La Poste and Royal Mail, even assuming that it attaches no value to bundling. Such a switch would not spare the customer from the increase in prices of premium express services caused by the Transaction. When it comes to non-premium intra-EEA express services, the customer would have no reason to switch away from the merged entity as a result of the Transaction since it is assumed for the purposes of this reasoning that the merged entity would not increase prices for non-"premium" services. In other words, the merged entity cannot be deterred from raising prices for international intra-EEA express "premium" services by the risk of losing non-"premium" volumes to the benefit of operators such as La Poste or Royal Mail.
- (420) In conclusion, the very limited offer of "premium services" by La Poste and Royal Mail compared to the Parties is an additional factor contributing to the weakness of the competitive constraint that they exert on the Parties on the international intra-EEA express market.

7.2.1.9. The Parties' customers mostly use DPD and GLS for domestic and standard services

- (421) In reply to the market investigation⁴³⁰, customers indicated which suppliers they are currently using for their various delivery services. The responses indicate that GLS and DPD are mostly mentioned as suppliers for domestic services or intra-EEA deferred services. For example, when GLS is quoted, in more than three-quarter of the cases, it is mentioned as a supplier for domestic and intra-EEA deferred services. For DPD, the corresponding figure is even higher as it is above 80%. In view of their lesser ability to offer high-quality express intra-EEA services, especially on long distance, it is not surprising that both GLS and DPD are quoted most often as suppliers for domestic deferred deliveries.
- (422) When looking at each service categories separately, GLS and DPD are indicated as existing suppliers by less than 2% of customers for intra-EEA express services (early morning, noon and EOD separately⁴³¹).
- (423) A similar view emerges from the Parties' own analysis of multi-sourcing as discussed below.

7.2.1.10. The Parties' own information on multi-sourcing confirms the limited presence of GLS and DPD on express intra-EEA services

- (424) In Annex 28 to the Form CO, the Parties presented data on multi-sourcing. For its top 25 customers in Europe, UPS estimated the share of the customer's needs that was

⁴³⁰ See responses to question 8 of questionnaires R1 to R29 – Phase II.

⁴³¹ Even taking into account of the fact that respondents to the market investigation are existing customers of UPS and TNT, the number of customers that also use the other integrators is much larger than those using GLS or DPD.

sourced from UPS (share of wallet) as well as the share of wallet of other suppliers. The table prepared by UPS indicates the services that competitors are also offering to UPS's top 25 customers. [Confidential information from the Parties' internal databases]*^{432 433}

(425) [Confidential information from the Parties' internal databases]*

(426) [Confidential information from the Parties' internal databases]*

7.2.1.11. Empirical evidence on the presence and activities of GLS and DPD: UPS Data

(427) On 3 September 2012, the Commission received a database from UPS covering contract characteristics for offers made to strategic customers (the so-called [UPS database]*). This data contains detailed volume information for the needs of customers at the lane and service level (that is the volumes that were expected to be shipped on each lane for each service if the contract was won). The data also contains incomplete information on competitor presence during the bidding/negotiation process. Using this database, the Commission compared the characteristics of contracts when a given competitor was mentioned as a bidder and the characteristics of contracts when that same competitor was not mentioned as a bidder. This analysis provides some insights on the types of contracts for which given competitors are more likely to participate.

(428) In the Statement of Objections, the Commission presented the results of its analysis of the participation of DPD and GLS in bids against UPS. [Confidential information taken from UPS' internal database]*⁴³⁴.

(429) [Confidential information taken from UPS' internal database]*

(430) [Confidential information taken from UPS' internal database]*

(431) [Confidential information taken from UPS' internal database]*

Figure 13: [Confidential information taken from UPS' internal database]*

[...]*

Source: [...]*

Figure 14: [Confidential information taken from UPS' internal database]*

[...]*

Source: [...]*

(432) In the Response to the Statement of Objections, the Notifying party concluded that the Commission's assessment is incomplete (paragraph 6.42) and a closer look at the data indicates that La Poste and Royal Mail are in fact "*viable alternatives for at least some customers*". [Confidential information taken from UPS' internal database]*.

⁴³² Note that La Poste/Chronopost also appears as a supplier for [...]* customers (of which [...]* are using both DPD and Chronopost but for different countries). La Poste/Chronopost are only used for delivery services in France. In total, there are therefore [...]* customers using DPD and/or Chronopost/La Poste.

⁴³³ Note that Royal Mail is mentioned as a supplier for [...]* customers (of which [...]* using both GLS and Royal Mail). Royal Mail is only listed for deferred services in the United Kingdom. In total there are therefore [...]* customers using Royal Mail and/or GLS.

⁴³⁴ If we consider La Poste as a group and Royal mail as a group, the figures are respectively [...]* and [...]*. These numbers consider the bids for which the contract information is available and which are used for the analysis. If we consider all bids (with and without contract characteristics), the relative appearance of competitors is as follows: [Confidential information taken from UPS' internal database]*.

- (433) [Confidential information taken from UPS' internal database]*
- (434) The Notifying party argues that "*La Poste and Royal Mail also competed for a significant number of bids with a large share of intra-EEA express services*". [Confidential information taken from UPS' internal database]*

Table 3: [Confidential information taken from UPS' internal database]*

[...]*

Source: [...]*

7.2.1.12. Empirical evidence on the presence and activities of GLS and DPD: TNT Data

- (435) TNT submitted bidding data from its [Confidential information taken from TNT's internal database]*
- (436) [Confidential information taken from TNT's internal database]*
- (437) Furthermore, TNT submitted additional 'bidding data' collected from its [Confidential information taken from TNT's internal database]*
- (438) [Confidential information taken from TNT's internal database]*
- (439) [Confidential information taken from TNT's internal database]*

7.2.1.13. Empirical evidence on the presence and activities of GLS and DPD: FedEx and DHL Data

- (440) [Confidential information taken from FedEx' internal database]*
- (441) [Confidential information taken from FedEx' internal database]*⁴³⁵
- (442) [Confidential information taken from FedEx' internal database]*
- (443) [Confidential information taken from FedEx' internal database]*⁴³⁶
- (444) [Confidential information taken from FedEx' internal database]*⁴³⁷. [Confidential information taken from UPS' internal database]*.
- (445) [Confidential information taken from FedEx' internal database]*
- (446) [Confidential information taken from FedEx' internal database]*
- (447) Hence, the FedEx pricing system database confirms the fact that La Poste and Royal Mail have a special focus on contracts with large volume share of deferred intra-EEA services.
- (448) [Confidential information taken from DHL' internal database]*
- (449) [Confidential information taken from DHL' internal database]*
- (450) [Confidential information taken from DHL' internal database]*

7.2.1.14. Conclusion on the competitive constraint of La Poste and Royal Mail

- (451) It results from the foregoing that in terms of geographic coverage, perceived quality of service and speed in form of "premium" next day morning services, La Poste and Royal

⁴³⁵ [Confidential information taken from FedEx' internal database]*

⁴³⁶ [Confidential information taken from FedEx' internal database]*

⁴³⁷ [Confidential information taken from FedEx' internal database]*

Mail's international intra-EEA express services are distant substitutes for the integrators' – and notably the Parties' – services.

- (452) La Poste and Royal Mail cannot provide "long-haul" international intra-EEA express services on the basis of their road-based operations which are the core of their business model. Relying on outsourced air transport constitutes a major handicap vis-à-vis the integrators, both in terms of efficiency and reliability. Moreover, these operators are unlikely to be willing and able to extend their currently limited geographic coverage on the basis of more extensive reliance on outsourcing of air transport.

7.2.2. *Other postal operators*

- (453) Most, if not all, postal operators in Europe provide small package delivery services. However, only La Poste (DPD) and Royal Mail (GLS) have developed a pan-European footprint which allows them to compete to a limited extent with the integrators on the intra-EEA express markets.

- (454) In its notification, as well as in its response to the Statement of Objections, UPS mentioned other public postal operators which are active in several member states: (i) Austrian Post, (ii) PostNL (iii) PostNord and (iv) Posten Norge. In addition, UPS also outlines that the public postal operators which are active in their home country only also exercise competitive constraints on the Parties as to their respective national intra-EEA express markets.

- (455) As concerns, Austrian Post, UPS claims that it offers intra-EEA express deliveries not only in Austria, its home market, but also in Germany, via its subsidiary Trans-o-flex. Nevertheless, this latter confirmed that it only provides express domestic services in Germany and no intra-EEA express: *'Trans-o-flex only offers domestic services in the b2b segment. Thus, in comparison with the services provided by the four integrators and our services it has to be noted that our services are deemed to be very limited, since we only operate on a domestic level. Furthermore trans-o-flex only operates a Germany wide road network. The services offered by us do not compete directly with those offered by UPS and TNT since we only operate a domestic road network and are only offering b2b services within Germany. Thus, it can be stated that due to our limited network capabilities and because we are only offering b2b services we cannot be deemed as direct competitors of UPS and TNT'*⁴³⁸.

- (456) As concerns PostNL, after the acquisition of the Belgian and Dutch subsidiaries of Trans-o-flex, it offers road-based intra-EEA express services in the Netherlands and Belgium⁴³⁹.

- (457) With its subsidiary Bring Express, Posten Norge provides small package delivery services not only in Norway but also in Finland, Denmark and Sweden⁴⁴⁰ within Scandinavia with its own infrastructure. [Details regarding Posten Norge's services]^{*441}. [Details regarding contractual arrangements]*.

⁴³⁸ Trans-o-flex' response to questionnaire to competitors R32- notably questions 3.2 and 4.

⁴³⁹ PostNL's response to question 1 of the questionnaire to competitors – Phase I.

⁴⁴⁰ Posten Norge's email dated.

⁴⁴¹ See Posten Norge's email dated 8 October 2012.

- (458) PostNord AB is the parent company of the Group formed by the merger between Post Danmark A/S and Posten AB (Swedish Post) in 2009⁴⁴². It operates its own network in Sweden and Denmark. In addition, they offer intra-EEA express deliveries from Finland⁴⁴³ and from Norway⁴⁴⁴ [Details on PostNord's activities]*⁴⁴⁵.
- (459) All public postal operators (except Luxemburg's P&T and Iceland Post) are members of the Express Mail Services ('EMS') cooperative which regroups postal administrations within the meaning of the UPU convention. Although the UPU imposes on its members certain harmonised requirements such as tracking or delivery against signature, the members of the EMS cooperative do not have to invest in a dedicated express infrastructure. Therefore, the quality of the services is limited by the quality of the services that each individual public postal operator is able to provide and remains below those provided by commercial express providers.
- (460) As will be seen in country specific Sections 7.11, the market investigation further revealed that not every postal incumbent offers intra-EEA express services other than the EMS services. Polska posta, Bulgarian post, Czech post, Estonian Post, Hungarian post, Latvian Post and Lithuanian Post belong to this category.
- (461) Those postal operators which offer express services resell the service of one or several integrators. For instance [...] ⁴⁴⁶ and [...] ⁴⁴⁷ subcontract to [...] ^{*} for express deliveries originating from their home countries; [...] ⁴⁴⁸, [...] ⁴⁴⁹, [...] ⁴⁵⁰ and [...] ⁴⁵¹ resell [...] ^{*}'s express products. [Details regarding contractual terms agreed by the Parties with resellers]*⁴⁵².
- (462) The market investigation demonstrated that resellers do not exercise a competitive constraint on integrators. First, as La Poste stated "*resellers account for a very limited proportion of the sales of integrators 'as regards Europe, the resellers only account for a small proportion of the integrator's sales'*"⁴⁵³.
- (463) [Details regarding contractual terms agreed by the Parties with resellers]*^{454 455}
- (464) To summarize, resellers can be seen as a sort of wholesaler which aggregates demand from smaller customers and [Details regarding contractual terms agreed by the Parties with resellers]*^{456 457}. Therefore, [Details regarding contractual terms agreed by the Parties with resellers]* and the prices they can offer to their customers are not as

442 See case n°COMP/M.5152 *Posten AB/ Post Danmark*.

443 See Posten AB and Post Danmark's responses to question 99 of questionnaire to competitors – Phase I.

444 See Posten AB and Post Danmark's responses to question 151 of questionnaire to competitors – Phase I.

445 See Posten AB and Post Danmark's responses to question 2.7.1 of questionnaire to competitors – Phase II.

446 See [...] ^{*} response to question 2.4.1 of questionnaire to competitors R30– Phase II.

447 See [...] ^{*}

448 Submission of [...] ^{*} of 6 August 2012.

449 [...] ^{*} response to question 2.4.1 of questionnaire to competitors R30 – Phase II.

450 Form CO, paragraph 315.

451 [...] ^{*} response to question 2.4.1 of questionnaire to competitors R30 – Phase II.

452 Form CO, paragraph 316.

453 Submission of La Poste/DPD of 17 August 2012.

454 [...] ^{*}

455 [...] ^{*}

456 Form CO, paragraphs 317 and 452.

457 [...] ^{*}

competitive as the ones offered directly by their sub-contracting partners, namely the integrators.

- (465) As a consequence, when asked if they consider that companies acting as a reseller on behalf of an integrator are effectively exerting a competitive constraint on the relevant integrator for the provision of small package delivery services, almost all the competitors replied negatively⁴⁵⁸, including almost all the national postal operators mentioned by UPS as active either on their national market or outside. For instance, PostNL states: "*Resellers are too small to have such a significant impact*"⁴⁵⁹. In addition, a majority of competitors considers that the companies reselling small packages delivery services on behalf of integrators are not freely competing with their co-contractors. This is indeed the opinion of [...]*, [which acts as a reseller in Italy]*⁴⁶⁰: "*they [the resellers] are able to approach only small and medium customers on the international one [arena]*". The same player also puts forward that: "*In principle, resellers are free to set the level of prices they offer to their customers. However, the integrator being a competitor at the retail level, the room for effective price competition is very limited: as a matter of fact, resellers' prices are framed, at the bottom, by the resale price charged to them by the integrator and, at the top, by the retail price offered by the integrator to the final customers.*"⁴⁶¹
- (466) In light of the above, since they have to rely on the integrators for their deliveries outside their home countries, the so-called "*other postal operators*" exert a very limited competitive pressure on them.
- (467) The Parties also mentioned Hermes as a competitor, although this company is not a public postal operator within the meaning of the UPU convention. Hermes which operates in several European Countries including in Germany, Austria, France, Italy and the United Kingdom is however specialised in B2C deferred parcel services. Hermes confirmed that it only delivers consumer goods products as illustrated by the following statement: "*Hermes Logistik Gruppe Deutschland is a logistics service provider for deliveries to private customers*"⁴⁶².
- (468) Consequently, it does not compete with the Parties in the express segment (or in even the B2B deferred segment) as illustrated by the following statement from GLS: "*Indeed Hermes' network is specifically designed for B2C activity, and Hermes is currently not able to effectively compete on the B2B market*"⁴⁶³.

7.2.3. Cooperative networks

- (469) Apart from the EMS cooperative joining several national postal operators, there are other cooperative networks. While it varies to some extent, the degree of cooperation these networks offer between their members is rather loose. Indeed, they do not deal directly with customers and do not invoice them. In practice, should a customer be willing to ship from Spain to Sweden, the member of the cooperative network would pick up the package, organise the transport to Sweden and hand it over its counterpart in

⁴⁵⁸ See replies to question 42 of the questionnaire to competitors R30 - Phase II.

⁴⁵⁹ PostNL's response to question 42.1 of the questionnaire to competitors R30 – Phase II.

⁴⁶⁰ [...]*'s response to question 43 of the questionnaire to competitors R30 – Phase II.

⁴⁶¹ [...]*'s response to question 44 of the questionnaire to competitors R30 – Phase II.

⁴⁶² Submission of Hermes of 30 July 2012.

⁴⁶³ Agreed minutes of the meeting of 22 August 2012 with GLS.

Sweden. The cooperative networks, as indicated by their name, merely facilitate the cooperation between their members by setting up and formalizing such organisation.

- (470) Nevertheless, the extent of cooperation diverges among the partnerships. For instance, NetExpress ensures that a common IT system is in place, which allows among other things track and trace of the cargo. Therefore, a parcel is scanned [Number of scans]* times which allows for a very good tracking, although not as good as integrators like UPS, according to NetExpress own say.⁴⁶⁴ On the other hand, every Eurodis partner uses its own IT-system. Eurodis offers a data hub to allow for the transfer of information between the partners' systems. Customers have access to tracking information on the system of the partner that collected the shipment. In addition, Eurodis offers a tracking system itself, which is however of basic nature⁴⁶⁵.
- (471) As concerns EuroExpress, it seems that it merely works as a loose cooperation delivery agreement, more like a groupage cooperation (i.e. closer to freight than to small packages) according to Eurodis⁴⁶⁶.
- (472) In any event, the main common characteristic of these networks is however that their members are and remain independent from each other.
- (473) As regards, the competitive pressure exerted by the cooperative networks on the intra-EEA express markets, it is rather light. Indeed, it cannot be disputed that some members of these networks are strong on their domestic express markets, such as for instance Bartolini in Italy or Bring Parcel in Norway. [Parties' internal market analysis]*⁴⁶⁷ [Parties' internal market analysis]*⁴⁶⁸. Therefore, it could hardly be considered competitive on the intra-EEA express market.
- (474) First of all, it appears that from the supply-side, there is absolutely no closeness of competition between the cooperative networks and the integrators with respect of the intra-EEA express delivery services. First, when asked, NetExpress considers that the services compete effectively but are clearly behind the ones offered by UPS and TNT on the intra-EEA express markets⁴⁶⁹. Second, Eurodis explained that: "*In the Eurodis system there are no express services offered, only standard (i.e. deferred) ones. Although the delivery times within the Eurodis network might come close to express delivery times there is no guaranty of a delivery time as it is given for express services, as well as no add-on services as the ones which come with typical express services. As a consequence, Eurodis does not compete with the integrators on the intra-EEA express market.*"⁴⁷⁰. Finally, as to EuroExpress, at least two out of three of its members, namely Gebrüder Weiss⁴⁷¹ and Bartolini⁴⁷², do not offer intra-EEA express delivery services and the third member, Azkar, has, according to UPS, [...] % market share on the Spanish intra-EEA express market.

⁴⁶⁴ Agreed minutes of a teleconference call of 31 August 2012 with NetExpress.

⁴⁶⁵ Agreed minutes of a teleconference call of 8 October 2012 with Eurodis.

⁴⁶⁶ Agreed minutes of a teleconference call of 8 October 2012 with Eurodis.

⁴⁶⁷ [Parties internal market analysis]*

⁴⁶⁸ Form CO, paragraph 1361.

⁴⁶⁹ NetExpress' response to questions 49 and 50 of the questionnaire to competitors – Phase I.

⁴⁷⁰ Agreed minutes of a teleconference call of 8 October 2012 with Eurodis.

⁴⁷¹ Gebrüder Weiss' response to question 70 of the questionnaire to competitors – Phase I.

⁴⁷² Bartolini's response to question 127 of the questionnaire to competitors – Phase I.

- (475) Second, almost none of the customers across all the EEA countries mentioned any member of these networks as a close competitor to either UPS or TNT for the intra-EEA express delivery services.⁴⁷³ Similarly, almost none of the customers across all the EEA countries mentioned any of the members of these networks as a credible alternative to either UPS or TNT⁴⁷⁴.
- (476) Moreover, FedEx, as an example, considers that the three networks cumulate severe drawbacks such as the lack of an air network, of a rationalized product portfolio between the members, of an integrated IT system as well as a truly international brand⁴⁷⁵. Finally, an overwhelming majority of competitors does not consider that neither Eurodis, nor NetExpress, nor EuroExpress are credible alternative to UPS or to TNT for intra-EEA express deliveries⁴⁷⁶.
- (477) Consequently, in light of the aforementioned elements, it can be concluded that the partner networks do not exert a competitive constraint on the Parties on the intra-EEA express markets. All general arguments as elaborated in the section about why ground-based operators such as La Poste (DPD) or Royal Mail (GLS) are exercising only a very weak competitive constraint on the Parties in intra-EEA express market, and particularly on long-distance services, applies more so to cooperative networks.

7.2.4. Freight forwarders

7.2.4.1. UPS's views

- (478) In its notification, UPS took the view that freight forwarding and small package delivery services constitute separate product markets, as agreed by the Commission. However, freight forwarders are also active in the small package delivery services market. According to UPS, they exercise a significant competitive pressure on small package delivery companies on the international intra-EEA express market.
- (479) UPS indicated it acquired in 1999 and 2004 two freight forwarders, respectively Fritz and Menlo. [Details regarding UPS freight forwarding business]*.
- (480) UPS furthermore takes the view that freight forwarders may ship small packages on a stand-alone basis and not necessarily as a bundle with freight or palletised goods.
- (481) According to UPS, freight forwarders would offer comparable speed and reliability as integrators as well as comparable other value added services. [Details regarding UPS freight forwarding business and small package service levels]*⁴⁷⁷.
- (482) [Confidential information taken from TNT's internal database]*⁴⁷⁸
- (483) In its response to the Statement of Objections, UPS puts forward two additional arguments. First, it claims that freight forwarders have the capabilities to organise *ad hoc* networks in order to send shipments to the destinations demanded by their customers within the timeframe specified by the customer. UPS goes on by explaining that as such, their networks are much more flexible than the ones of UPS or TNT and

⁴⁷³ See responses to questions 60 and 61 of the questionnaires to customers – Phase I.

⁴⁷⁴ See responses to questions 59 and 62 of the questionnaire to customers – Phase I.

⁴⁷⁵ FedEx' response to question 52 of the questionnaire to competitors – Phase I.

⁴⁷⁶ Questions 32 and 33 of the questionnaire to competitors – Phase II.

⁴⁷⁷ Notifying party response to the Decision opening the proceedings, paragraph 235.

⁴⁷⁸ [...]*

are thus tailored for the customers' needs⁴⁷⁹. Second, UPS suggests that "*freight forwarders can also exercise competitive pressure in a different way by incentivising customers to palletise their volumes*"⁴⁸⁰.

- (484) As a consequence, UPS considers that companies such as DB Schenker, DSV, Panalpina and other freight forwarders exert competitive pressure on the international intra-EEA express market and therefore has attributed them variable market shares up to approximately [10-20]*% (DB Schenker in Norway).

7.2.4.2. The Commission's assessment

- (485) First of all, the Commission does not deny that freight forwarders offer small package delivery services, in addition to their usual activities. Some of them do provide international intra-EEA express deliveries. Nevertheless, the Commission argues that they do not constitute a strong competitive force in that market, as claimed by UPS and this is reflected in this significantly lower market shares attributed to them than UPS. As shown by the outcome of the market investigation, the freight forwarders are actually fringe players that only exert a very remote competitive pressure on the four integrators in the international intra-EEA express market.
- (486) In the course of the market investigation, the Commission contacted those competitors which were presented by UPS as the most important. Since on each of the 29 markets UPS argues that at least one freight forwarder provides international intra-EEA express deliveries, the Commission sent requests for information to a large number of freight forwarders allegedly active on the international intra-EEA express market. The results are to some extent telling since companies presented by UPS as freight forwarders offering intra-EEA express deliveries confirmed to the Commission that they are actually not present on the market such as Rhenus: "*Rhenus is not active on the market of "small package delivery"*"⁴⁸¹ or Masped: "*We confirm once more that our company is not and was never active in the small package delivery business*"⁴⁸²
- (487) Out of those which actually deliver small packages, only DB Schenker and DSV have subsidiaries dedicated to these services. In Norway, Finland, Sweden and Poland, DB Schenker owns a parcel company or has "integrated" parcel delivery operations and provides international services partly relying on sub-contracting [Details on DB Schenker's strategy]*⁴⁸³. As regards DSV, it runs its own small package delivery business in Denmark and Germany⁴⁸⁴. Otherwise, freight forwarders do not provide small package delivery as a stand-alone product but rather as a bundle together with freight forwarding services, on a case-by-case basis in order to satisfy their customers' needs, as explained by Kuehne+Nagel: "[Details on Kuehne+Nagel's strategy]*⁴⁸⁵"
- (488) UPS claims that, irrespective of whether small package services are offered on a stand-alone basis or as part of a bundle, the networks of the freight forwarders are as good as

⁴⁷⁹ Notifying party's response to the Statement of Objections, paragraph 6.54.

⁴⁸⁰ Notifying party's response to the Statement of Objections, paragraph 6.60.

⁴⁸¹ See Rhenus' submission dated 21 June 2012: "*Die Rhenus AG & CO. KG ist (...) nicht im Markt für "small parcel delivery" tätig*".

⁴⁸² Masped's email dated 30 July 2012.

⁴⁸³ Agreed minutes of a teleconference call of 29 August 2012 with DB Schenker.

⁴⁸⁴ Agreed minutes of a teleconference call of 30 August 2012 with DSV.

⁴⁸⁵ Kuehne+Nagel's response to question 3 of questionnaire to competitors – Phase I.

those of the integrators since they are quite flexible and can be organised according to the customers' demand. The outcome of the market investigation is proof to the contrary. Firstly, the customers do not consider the freight forwarders' own network for the shipments of small packages. Indeed, when asked if they consider that transport services provided by freight forwarders via their freight networks offer solutions comparable to the ones offered by small package delivery companies, almost half of the respondents replied negatively and only a minority considered that they actually did so⁴⁸⁶. It stems from the customers' replies that the freight forwarders' networks are more much less sophisticated than the integrators'. One customer claims: "*small packages are frequently lost/damaged in networks adjusted to pallet size shipments. Transit time is not comparable in most cases*"⁴⁸⁷, another also explains that: "*they do not have the knowledge or IT-systems to handle this [small package]*"⁴⁸⁸. When asked to rank the add-on/specific criteria they take into account while negotiating a contract for the provision of international intra-EEA small package delivery services, a vast majority of customers granted the highest grade (5) to "track-and-trace". However, an overwhelming majority of the same respondents does not consider that the freight forwarders are capable of offering the add-on/specific criteria to which they awarded the highest grade (5). This is illustrated by statements of customers such as the followings: "*Our experience shows that small package companies are more reliable and the traceability is much better*"⁴⁸⁹ and "*The freight forwarders usually cannot provide express service (delivery of the parcel in short time, especially for the further destinations. Transit times are longer, less tracking possibilities*"⁴⁹⁰. In addition, it appears that most customers consider that the freight forwarders' networks are more appropriate for packages with specific dimensions or size: "*Freight Forwarders are generally preferred for consignments exceeding 60 Kg's that are destined for non-EU customers*"⁴⁹¹.

- (489) UPS provides in its response to the Statement of Objections a table which purports that freight forwarders are able to deliver small packages with a time-commitment of next day via their own network⁴⁹². However, the Commission has never claimed that freight forwarders did not offer intra-EEA express services or that they were not active on this market. The only point made by the Commission is that freight forwarders are not actually competing effectively let alone on equal footing with the integrators on the intra-EEA express shipments. In other words, when freight forwarders offer intra-EEA express deliveries using their own freight network, they are not as competitive as the integrators for shipments of small packages to intra-EEA destinations by next day. For instance, in the table presented by UPS, no mention is made of the price charged by the companies listed while a reproach generally addressed to the freight forwarders is that

⁴⁸⁶ See replies to question 42 of the questionnaires to customers – Phase II: the other fraction of respondents had no opinion.

⁴⁸⁷ [Customer name]* response to question 42.1 of questionnaire R20 to customers –Poland - Phase II.

⁴⁸⁸ [Customer name]* response to question 42.1 of questionnaire R26 to customers – Sweden – Phase II.

⁴⁸⁹ [Customer name]* response to question 42.1 of questionnaire R20 to customers – Poland – Phase II.

⁴⁹⁰ [Customer name]* response to question 42.1 of questionnaire R16 – Lithuania- Phase II.

⁴⁹¹ [Customer name]* response to question 42.1 of questionnaire R13 – Ireland – Phase II.

⁴⁹² Notifying party's response to the Statement of Objections, paragraph 6.56.

they are more expensive than the integrators: "*less flexibility and more expensive*"⁴⁹³ and "*their prices are not competitive*"⁴⁹⁴.

- (490) By illustration, when asked more precisely if the services offered by the freight forwarders via their freight network would be an alternative for sending their intra-EEA express shipments, the majority of the customers replied that it was not the case⁴⁹⁵. [Customer name]* stated that: "*It would take too long to as their network are not as developed and the cost would increase dramatically*"⁴⁹⁶ and [Customer name]* explained that "*Most of our shipments are none time critical so could be sent through freight forwarders*"⁴⁹⁷, which implies on the contrary that they could not use freight forwarders' networks should their shipments be time-sensitive.
- (491) Finally, when it comes to the customers who actually use the freight forwarders' networks in order to ship small packages to other EEA countries within one day, the notifying party's assertion that freight forwarder exercise a significant competitive constraint cannot be sustained. Indeed, quite a large majority of the respondents to the market investigation does not have any experience of sending express small packages by freight forwarders via their freight network⁴⁹⁸ and those who do, do so for very specific reasons such as "*temperature controlled shipments*"⁴⁹⁹ or "*Requested Pick up time was too late for the integrator. Unfortunately the freight was damaged on road*"⁵⁰⁰.
- (492) Consequently, it seems that contrary to what UPS claims freight forwarders' networks does not allow them to compete effectively with the integrators on the international intra-EEA express market. It is worth mentioning that when asked if, *post* merger, they would enter a given segment of the small package delivery service market following a price increase of 5-10%, none of the freight forwarders questioned replied positively: "*No, not at all. We talk about billions of EUR of investments to setup the same delivery network and infrastructure.*"⁵⁰¹ or "*We are primarily a freight forwarder and not an integrator*"⁵⁰²
- (493) Nevertheless, freight forwarders are active on this market via the network of the integrators themselves, UPS, TNT and DHL. The market investigation confirmed that on their own they perform a limited number of operations along the value chain such as the pick-up and grouping⁵⁰³ or line-hauling⁵⁰⁴ before handing over the small packages to small package service providers⁵⁰⁵. Furthermore, for express services, freight forwarders usually only collect and group the small packages before handing them over to their partner/integrator as early as possible in the process. For instance, "[Company name]* *is*

493 [Customer name]* response to question 42.1 of questionnaire R9 – France – Phase II.

494 [Customer name]* response to question 42.1 of questionnaire to customers R11 – Greece - Phase II.

495 See replies to question 43.1 of questionnaire to customers – Phase II.

496 [Customer name]* response to question 43.1.1 of questionnaire R26 of questionnaire to customers – Sweden – Phase II.

497 [Customer name]* response to question 43.1.1 of questionnaire R27 to customers – UK – Phase II.

498 See replies to question 44 of questionnaire to customers – Phase II.

499 [Customer name]* response to question 44. of questionnaire R8 to customers – Finland – Phase II.

500 [Customer name]* response to question 44.1 of questionnaire R17 to customers – Luxembourg – Phase II.

501 Kuehne+Nagel's response to question 26.1 of questionnaire to competitors – Phase II.

502 Logwin AG's response to question 26.1 of questionnaire to competitors – Phase II.

503 [...]*

504 [...]*

505 Agreed minutes of a teleconference call of 23 August 2012 with DHL.

not able to provide express services on its own. For express, packages are handed over to the sub-contractor quite early in the process"⁵⁰⁶. This is also confirmed by DHL, which states that "*some freight forwarders may offer an "express" service but that usually integrators move the products for them*"⁵⁰⁷.

- (494) Although freight forwarders may pick-up and consolidate express small packages, they are marginally involved in the sorting, transportation and delivery processes for intra-EEA express shipments. They usually bring them to the closest depot of the integrator they use as subcontractor.
- (495) As a consequence, the companies who are presented by UPS in its Form CO as the main freight forwarders active in the EEA consider themselves purely as *re-sellers* when it comes to small package deliveries: "[Company name]* *is entirely dependent on [the integrators']* infrastructures for small packages and only acts on the market as a reseller*"⁵⁰⁸ and "[Company name]* *company acts as a reseller*"⁵⁰⁹ as well as [Company name]* which confirms in its reply to the Commission questionnaire that it behaves as a reseller on behalf of [the integrators]*⁵¹⁰.
- (496) The competitive constraint exercised by freight forwarders on the international intra-EEA express markets thus depends on their ability to propose (i) services and (ii) pricing which are different from those offered by integrators which are both their suppliers and competitors.
- (497) It is rather difficult for the freight forwarders to differentiate themselves on the quality of service they offer since, as described above, they mainly use the integrators' networks to ship small packages to EEA countries within one day. However, it transpires from the results of the market investigation that some customers do appreciate to use the freight forwarders' networks in order to ship specific goods: "*Packages with extra length and sometimes hazardous goods*"⁵¹¹.
- (498) As to competing with the integrators in terms of pricing, it is obviously quite challenging since they have to face double-margins: their own margins and the integrators'. Once again, the views of the main freight forwarders acting as resellers on behalf of the integrators concur. [Company name]* claims: "[Company name]* *is generally a price-follower in the small package market (following the integrators)*"⁵¹². [Company name]* also explains that "*From experience we know that the rates given to a re-seller in comparison to the ones given to a (large) direct customer are non-competitive. (estimated gap 15-30%)*"⁵¹³ and finally [Company name]* states that "*Resellers are usually more expensive*"⁵¹⁴.

506

[...]*

507

Agreed minutes of a teleconference call of 23 August 2012 with DHL, paragraph 12.

508

[...]*

509

[...]*'s response to question 53 (iii) of questionnaire to competitors – Phase I.

510

[...]*'s response to questions 49 and 50 of questionnaire to competitors – Phase I.

511

[Customer name]* response to question 44.1 of questionnaire R29 to customers – Norway – Phase II.

512

[...]*

513

[...]*

514

[...]*'s response to question 53 (iii) of questionnaire to competitors – Phase I.

- (499) Consequently, as summed up by Kuehne+Nagel since they can barely compete on level of service and pricing: "*The competitive pressure is very limited as the re-sellers are dependent on the original parcel provider*"⁵¹⁵.
- (500) From a demand-side perspective, the Commission had the opportunity to analyse the bidding data and exit interviews made available by the four integrators.
- (501) According to DHL's bidding data, freight forwarders were present as first competitors of DHL in only 2.54% of the cases where DHL placed a bid. [Confidential information taken from UPS' internal database]*.
- (502) [Confidential information taken from TNT' internal database]*
- (503) [Confidential information taken from TNT' internal database]*⁵¹⁶
- (504) [Confidential information taken from FedEx' internal database]*⁵¹⁷
- (505) In addition, the customers questioned directly in the course of the market investigation confirmed that they barely view the freight forwarders as credible suppliers of intra-EEA express deliveries: for instance, when they last searched for a provider of international intra-EEA express deliveries, the vast majority of the customers did not consider the freight forwarders as credible suppliers (that is as able to fulfil their express delivery needs)⁵¹⁸. In addition, when asked about the close competitors to either UPS or TNT for the intra-EEA express deliveries, freight forwarders are scarcely mentioned⁵¹⁹. Finally, when asked about the companies from whom they have invited/requested a quotation from in the last two years in the framework of a tender procedure or the negotiation of a contract for the provision of intra-EEA express deliveries, only a few respondents referred to freight forwarders⁵²⁰.
- (506) Finally, UPS puts forward that freight forwarders can incentivise their small package customers to gather together their small packages on pallets ("palletise their volumes") and ship these small packages/pallets via their freight network⁵²¹. However, such argument cannot be accepted. Indeed, there is no indication whatsoever of such a phenomenon in the results of the market investigation. More importantly, such policy could be applied only to large customers [Details regarding UPS' customer base]*⁵²². Lastly, should these customers actually do so, they would put themselves in a dependency situation vis-à-vis the integrators since, above a certain distance, intra-EEA express deliveries have to be flown and freight forwarders do not control an air network and would have then to use the integrators' airlift (See Section 7.6.3.3).
- (507) All the elements above demonstrate that the freight forwarders exert only a very limited constraint on the international intra-EEA express market.

⁵¹⁵ Kuehne+Nagel's response to question 53 (iii) of questionnaire to competitors – Phase I.

⁵¹⁶ [Confidential information taken from TNT' internal database]*

⁵¹⁷ [Confidential information taken from FedEx' internal database]*

⁵¹⁸ See replies to questions 9.8, 14.8 and 20.8 of questionnaire to customers (B) – Phase II.

⁵¹⁹ See replies to questions 60 and 61 of questionnaires to customers – Phase I.

⁵²⁰ See replies to questions 27.1, 27.2 and 27.3 of questionnaire to customers – Phase II.

⁵²¹ Paragraph 6.60, UPS' response to the Statement of Objections.

⁵²² Form CO, paragraph 346.

7.2.5. *Conclusion on ground based operators, postal incumbents, cooperative networks and freight forwarders*

- (508) On the basis of the sections above, ground-based operators, public postal operators, cooperative networks and freight forwarders exert a limited competitive constraint on the integrators in the intra-EEA express markets all across the EEA both from a demand-side and a supply-side perspective.
- (509) Indeed, as illustrated by the figures below and based on the revenues provided by the companies which responded to the market investigation, intra-EEA express revenues can be split by the category of express service provider as illustrated below⁵²³:

Table 4: Intra-EEA express revenues split by category of express service provider

Intra-EEA express	share of revenues
Integrators ⁵²⁴	[90-95]%
DPD+GLS	[0-5]%
national postal operators ⁵²⁵	[0-5]%
others ⁵²⁶	[0-5]%

Source: Commission's market reconstruction using revenue data from integrators

- (510) On the basis of the above, the intra-EEA express market is dominated by the four integrators altogether. However, as will be shown in the following sections, FedEx has by far a much weaker position compared to UPS, TNT and DHL.

7.3. Amongst integrators, FedEx is a weak competitor in Europe

- (511) During the market investigation, the claims made by the Notifying party as well as third parties were evaluated as to the strength of FedEx as a competitor on intra-EEA express routes. Whilst in the Form CO the Notifying party recognized that FedEx is "*somewhat smaller*"⁵²⁷, they portrayed the company as an "*increasingly important competitor*"⁵²⁸, with a significant growth potential. [Confidential information taken from the Parties' internal bid databases]*⁵²⁹. In the response to the Decision opening the proceedings⁵³⁰,

⁵²³ We have considered the revenues indicated by third parties. Certain of them resell the services of the integrators. Not considering these re-sold revenues as being part of the revenues of the integrators decreases their share. This assumption is favourable to the Parties.

⁵²⁴ UPS, TNT, DHL and FedEx.

⁵²⁵ All public postal operators in their respective Member States except La Poste (France) and Royal Mail: Austrian Post, bpost, Bulgarian Post, Cyprus Post, Czech Post, PostNL, PostNord, Posten Norge, Itella, Estonian Post, Elta, Magyar Posta, Iceland Post, An Post, Poste Italiane, Latvian Post, AB Lietuvos paštas, P&T, Poczta Polska, CTT, Posta Romane, Slovak Post, Slovenian Post, Correos.

⁵²⁶ Kuehne+Nagel, Wim Bosman, Econt Express, Transpress (UPS reseller), In time, D&D, ACS Courier, Oy Matkahuolto Ab, Geodis, Ducros (DHL), Hermes, Speedex, Bartolini, Siodemka, Delta Trans Transporte, Econt Express, Nacex.

⁵²⁷ Form CO, Paragraph 31.

⁵²⁸ Form CO, Paragraph 14.

⁵²⁹ "Summary of UPS offers made to strategic customers in 2012Q1", 2 July 2012.

⁵³⁰ Response to the Decision opening the proceedings, paragraphs 241 to 254.

the Notifying party reaffirmed more strongly its claims about FedEx's role. Specifically, the Notifying party argued that FedEx's presence is "*already very strong*", indicating that FedEx has a "*significant*" coverage, that its presence is increasing and that customers of the merging parties already consider FedEx to be strong.

(512) However, the in-depth investigation has confirmed the Commission's preliminary view expressed in the Decision opening the proceedings that FedEx is currently a weaker competitor that can exert only a limited competitive constraint on the merged entity, in particular in relation to the markets for intra-EEA express delivery services.

7.3.1. *FedEx's market position (by revenue) in the intra-EEA express markets*

(513) The Commission has performed an assessment of the four integrators' market position on the basis of a comparison of the integrators revenue figures⁵³¹. On the one hand, it is well understood that the overall real market shares will be lower as non-integrators are not included in the comparison. On the other hand, on long-haul lanes, only the four integrators are in effect credible suppliers.

(514) At EEA-wide level, a comparison of revenue shares of the four integrators provided in Table 5 shows that post-transaction FedEx will be the weakest of the four integrators in intra-EEA express services.

Table 5: EEA-wide Integrators' 2011 revenue share in International intra-EEA small package delivery

UPS	[20-30]%
TNT	[10-20]%
Combined	[40-50]%
DHL	[40-50]%
FedEx	[5-10]%

Source: Commission's reconstruction on first hand revenue data from integrators

(515) At a country level, FedEx is the weakest of the four integrators in most of the EEA-countries (see Table 6). FedEx is particularly weak (for example below 10% market share) in 20 of the 29 EEA-countries, including Austria, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Iceland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia and Sweden.

(516) Nonetheless, it should be noted that post-transaction FedEx will become the smallest integrator (in terms of market share) in all 29 EEA-countries, including those 9 countries where it is currently equally strong or even stronger than one of the Parties (Belgium, Cyprus, France, Hungary, Ireland, Italy, Portugal, Spain, the United Kingdom).

⁵³¹ An exhaustive reconstruction exercise was carried out in the market investigation to collect first-hand revenue data for 2011 from each of the four integrators at a country level.

Table 6: Integrators' 2011 revenue share in International intra-EEA small package delivery by country

Country	International Intra-EEA				
	Express				
	UPS	TNT	Combined entity	DHL	FedEx
Austria	[20-30]%	[10-20]%	[40-50]%	[50-60]%	[5-10]%
Belgium	[20-30]%	[10-20]%	[40-50]%	[40-50]%	[10-20]%
Bulgaria	[5-10]%	[20-30]%	[30-40]%	[50-60]%	[5-10]%
Cyprus	[5-10]%	[10-20]%	[20-30]%	[60-70]%	[10-20]%
Czech Republic	[30-40]%	[10-20]%	[50-60]%	[40-50]%	[5-10]%
Denmark	[30-40]%	[10-20]%	[50-60]%	[40-50]%	[5-10]%
Estonia	[10-20]%	[20-30]%	[40-50]%	[50-60]%	[0-5]%
Finland	[20-30]%	[10-20]%	[30-40]%	[60-70]%	[0-5]%
France	[20-30]%	[10-20]%	[30-40]%	[40-50]%	[10-20]%
Germany	[20-30]%	[10-20]%	[40-50]%	[50-60]%	[5-10]%
Greece	[20-30]%	[10-20]%	[30-40]%	[60-70]%	[0-5]%
Hungary	[20-30]%	[20-30]%	[40-50]%	[30-40]%	[10-20]%
Iceland	[5-10]%	[5-10]%	[5-10]%	[80-90]%	[0-5]%
Ireland	[20-30]%	[5-10]%	[20-30]%	[60-70]%	[10-20]%
Italy	[20-30]%	[10-20]%	[30-40]%	[50-60]%	[10-20]%
Latvia	[10-20]%	[30-40]%	[40-50]%	[40-50]%	[5-10]%
Lithuania	[20-30]%	[20-30]%	[50-60]%	[40-50]%	[0-5]%
Luxembourg	[5-10]%	[10-20]%	[20-30]%	[70-80]%	[0-5]%
Malta	[20-30]%	[20-30]%	[40-50]%	[50-60]%	[0-5]%
Netherlands	[30-40]%	[10-20]%	[50-60]%	[40-50]%	[0-5]%
Norway	[10-20]%	[10-20]%	[20-30]%	[70-80]%	[0-5]%
Poland	[20-30]%	[20-30]%	[40-50]%	[40-50]%	[5-10]%
Portugal	[30-40]%	[10-20]%	[40-50]%	[40-50]%	[10-20]%
Romania	[20-30]%	[20-30]%	[40-50]%	[50-60]%	[0-5]%
Slovakia	[20-30]%	[20-30]%	[40-50]%	[40-50]%	[5-10]%
Slovenia	[20-30]%	[10-20]%	[30-40]%	[60-70]%	[0-5]%
Spain	[20-30]%	[10-20]%	[30-40]%	[40-50]%	[10-20]%
Sweden	[20-30]%	[10-20]%	[40-50]%	[50-60]%	[0-5]%
UK	[20-30]%	[10-20]%	[30-40]%	[40-50]%	[10-20]%

Source: Commission's market reconstruction using revenue data from integrators

- (517) In view of the limited revenue shares achieved by FedEx in the different EEA-countries, it is concluded that overall FedEx is a relatively weaker competitor than the other remaining integrators in intra-EEA express delivery services.

7.3.2. FedEx's coverage in the EEA

- (518) The degree of territorial coverage subject to time commitment is one of the key indicators used to benchmark competitiveness in the small package delivery market.

- (519) In order to constitute a credible option for a large number of potential customers, integrators must offer express coverage of their location from an outbound and inbound perspective. The integrators must be able to collect the package from the customer and transfer it to a local flight point in time to be transported the same day by air to its European hub for overnight sorting and then have the dense ground PUD network in the country of destination.
- (520) As small package delivery companies essentially operate on the basis of a hub-and-spoke system, the geographic coverage for international express services in each country generally does not depend on the origin country of the shipment. This is because international packages from origin countries are routed through a central (air) hub and arrive at the air gateways/hubs or in the destination country in the morning of the committed day⁵³².
- (521) The percentage of the business addresses offered by a market participant in any given country for express services for example destination reached by the end of the following business day is an indicator that captures the relative reach of the network of each of the integrators in that particular country. [Parties' internal market analysis]*⁵³³
- (522) UPS provided this data concerning percentage of postal codes of business addresses covered for express services by destination country in September 2012⁵³⁴. An analysis of the data for EOD coverage provided in Table 7 below shows that FedEx is clearly the weakest of the four integrators. Out of the 28 EEA countries for which comparison data is available⁵³⁵, FedEx has the weakest coverage (figures in bold) in a vast majority that is [...] out of the EEA countries⁵³⁶. Moreover, when comparing competitors who have a significantly inferior coverage than the leading company (lagging behind by [...] percentage points – shadowed cells⁵³⁷), FedEx is also significantly weaker in a large majority that is [...] out of EEA countries. The same would apply even when FedEx' position would be compared to the first two leading companies in terms of coverage ([...] EEA countries).

Table 7: [Parties' coverage data in the EEA and estimates regarding the other integrators]*

[...]*

Source: [...]*

⁵³² See Notifying party's reply of 28 September 2012 to request for information of 21 September 2012 (Q22), page 7.

⁵³³ [Parties' internal market analysis]*

⁵³⁴ UPS reply to request for information of 21 September 2012.

⁵³⁵ Coverage data was not provided for Ireland for TNT or DHL.

⁵³⁶ The Parties put forward that FedEx coverage may increase in the future in France and Poland due to recent acquisitions of Tatex and Opek respectively. Assuming that these acquisitions would provide an additional coverage which would be larger than any competitor, then FedEx would be the weakest integrator in [...] EEA countries.

⁵³⁷ This measure is also used by UPS in a slightly different context to discriminate whether a certain competitor is present in a particular line.

⁵³⁸ Again, if the additional coverage of FedEx' recent acquisitions in Poland and France would match the competitors' coverage, FedEx would still be significantly weaker (by [...] percentage points) in [...] EEA countries.

- (523) An analysis of the coverage data for committed delivery times before 12.00 and before 9.00 reveals that FedEx is also a weak player in these two "premium" segments –of the intra-EEA express market -⁵³⁹.
- (524) As regards intra-EEA express next day committed delivery before 12.00, FedEx is significantly weaker than the other integrators as shown in Table 8. In this respect, FedEx is the weakest player alone or with other integrators in [...] of the 29 analysed countries (those highlighted in bold), while DHL is the weakest only in [...] countries, UPS is the weakest in [...] countries and TNT is the weakest in [...] countries. Moreover, when comparing competitors who have a significantly inferior coverage than the leading company (lagging behind by [...] percentage points – shadowed cells), FedEx is also significantly weaker in a large majority ([...] out of the 29 EEA countries analysed) while DHL has a weaker coverage in [...] countries, UPS in [...] and TNT in [...].

Table 8: [Parties' coverage data in the EEA and estimates regarding the other integrators]*

[...]*

Source: [...]*

- (525) As regards the intra-EEA express before 10.00 segment, as shown in Table 9, FedEx appears more comparable to other integrators; however it is still weaker than UPS and TNT. In this respect FedEx is the weakest player alone or with other integrators in [...] of the 29 analysed countries (those highlighted in bold), while DHL is also weaker in [...] countries, UPS is weaker in [...] countries and TNT is weaker in [...] countries. Moreover, when comparing competitors who have a significantly inferior coverage than the leading company (lagging behind by [...] percentage points – shadowed cells), FedEx performance is relatively better although still weaker than TNT. FedEx is weaker in [...] countries similar to UPS and DHL, while TNT is weaker in only [...] countries.

Table 9: [Parties' coverage data in the EEA and estimates regarding the other integrators]*

[...]*

Source: [...]*

- (526) [Parties' internal market analysis]*^{540 541}

Figure 15: [UPS internal market analysis]*

[...]*

Source: [...]*

7.3.2.1. Conclusion

- (527) Therefore, it is concluded that at this stage FedEx offers a limited territorial coverage in Europe in comparison to the other integrators as regards its intra-EEA express delivery services subject to the different time delivery commitments.

⁵³⁹ UPS reply to request for information Q25 of 9 October 2012.

⁵⁴⁰ [Parties' internal market analysis]*

⁵⁴¹ [Parties' internal market analysis]*

7.3.3. *FedEx's network in the EEA*

- (528) FedEx displays a relatively weaker network in Europe in comparison to the other integrators.
- (529) First, its airline network is the smallest among the integrators by a significant margin. According to FedEx's estimates, its flight points are [...] ⁵⁴². The flight points for the other integrators are [...] ⁵⁴³ for DHL, [...] ⁵⁴⁴ for TNT and [...] ⁵⁴⁵ for UPS. The air network density obviously has an impact on the number of destinations that can be reached and also on the speed (time-in transit) of reaching those destinations. FedEx has fewer flights that stop more frequently than its competitors, which means that FedEx parcels arrive later to their destination. FedEx air network is weaker not only in terms of flight points but also types of aircrafts, as FedEx uses more feeders than the other integrators ⁵⁴⁶ which has an impact on speed and costs. [Details regarding the Parties' cost structure and projected efficiencies] ⁵⁴⁷. Smaller feeder planes also need more time in transit, arriving later at their destination. FedEx uses these smaller aircrafts given the more limited volumes it transports.
- (530) Second, FedEx currently has very limited domestic and international road network. This means that its sorting centres and hubs are generally weakly connected with each other, apart from the main connections to the (air) hubs feeding the international traffic. FedEx has started domestic services relatively recently, but these are still very limited except in the United Kingdom, France and Poland.
- (531) Third, FedEx PUD network is less dense, which is directly evidenced by the significantly lower coverage of the Parties.
- (532) Fourth, in relation to pick-up and deliveries, FedEx relies much more on outsourced services than the Parties and hence has a lower degree of control over the network. [Details regarding the Parties' networks] ⁵⁴⁸.
- (533) This weaker network translates into FedEx's lower geographic coverage for the different express services, relative weakness in providing deferred and domestic services on a larger scale, and into a higher cost base resulting from lower economies of scale and density, which all together makes FedEx significantly less competitive for intra-EEA express deliveries. This in turn translates into a weak market position vis-à-vis the Parties and DHL and is consistent with FedEx focus on extra-EEA deliveries.

7.3.4. *FedEx faces a significant cost disadvantage in the EEA*

- (534) Based on the information reviewed by the Commission, namely FedEx own internal estimates, its European PUD costs are currently several times higher than those of UPS and TNT as result of its significantly smaller scale ⁵⁴⁸. [Details regarding the Parties' cost structure] ⁵⁴⁸. However, in the Response to the Statement of Objections, the Notifying party argues that the Commission applies an "efficiency offense" by benchmarking

⁵⁴² FedEx, reply to the Commission's request for information, 6 October 2012, p.6.

⁵⁴³ Form CO, Annex 41.01.02 – Transport Intelligence Report – International Express Parcels 2012, p. 44.

⁵⁴⁴ Form CO, Annex 30.

⁵⁴⁵ Form CO, Annex 29.

⁵⁴⁶ Agreed minutes of meeting of 9 August 2012 with FedEx.

⁵⁴⁷ See UPS's Supplementary Submissions on Efficiencies, 4 September 2012 and 28 September 2012.

⁵⁴⁸ FedEx, reply of 6 October to question 1 of the request for information, 5 October 2012.

FedEx's market presence with its cost position and "*requiring*" that FedEx should benefit from comparable costs to those of the merging parties in order to compete (paragraph 5.78). This is not correct. The market investigation simply aims at helping to explain why FedEx may have (to date) failed to achieve significant market shares in the international intra-EEA express market. High pick-up and delivery costs ([Details regarding the Parties' cost structure]*) due to the smaller scale of FedEx's operations in Europe contribute to FedEx's weak position [Details regarding the Parties' cost structure]*.

- (535) [Details of FedEx's cost structure]*⁵⁴⁹. [Details of FedEx's cost structure]*.
- (536) [Details on FedEx's databases used by the Commission to assess its market position]*⁵⁵⁰
[Details on FedEx's databases used by the Commission to assess its market position]*:
- [Details on FedEx's databases used by the Commission to assess its market position]*
 - [Details on FedEx's databases used by the Commission to assess its market position]*
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 - [Details on FedEx's databases used by the Commission to assess its market position]*
 - [Details on FedEx's databases used by the Commission to assess its market position]*
- (537) [Details of FedEx's cost position]*.⁵⁵¹ [Details regarding the Parties' cost structure]*⁵⁵².
- (538) [Details regarding the Parties' cost structure and projected efficiencies]*^{553 554 555}
- (539) Therefore, the current scale of FedEx's operation in Europe and its reliance on intra-EEA express services (given that it offers limited domestic and deferred services) implies that it faces higher costs and is therefore less likely to be able to offer competitive prices.

⁵⁴⁹ Databases submitted by FedEx on 10 August 2012 as a reply to the Commission's request for information numbered Q7.

⁵⁵⁰ [Details on FedEx's databases used by the Commission to assess its market position]*

⁵⁵¹ FedEx, reply to the Commission's request for information, 6 October 2012, p.3, 7

⁵⁵² Supplementary Submission on Efficiencies, 28 September 2012.

⁵⁵³ [...]*

⁵⁵⁴ [...]*

⁵⁵⁵ [...]*

- (540) As regards the relative cost position of FedEx, the Notifying Party refers to recital 453 of the Statement of Objections, which supports the conclusion that FedEx faces relatively higher costs with examples from the two FedEx databases discussed in recital (536). The Notifying Party notes that it is not clear to which customers the information refers to and that it is highly likely that these are not customers for which both UPS and TNT could bid for.
- (541) The Notifying party further criticises the Commission for failing to properly assess UPS strategic customer emails and weigh them against the evidence provided by FedEx. According to the Notifying party these emails show that UPS competes against FedEx for intra-EEA express business on all parameters of competition, including price and FedEx cannot be considered a weak competitor. According to the Notifying party, the emails show that FedEx is considered a strong competitor and an effective one "*when it comes to prices*"⁵⁵⁶. Extracts from five emails are provided to support this claim.
- (542) As regards the first criticism of the Notifying party, the Commission notes that the quotes from the FedEx databases provided in recital 453 of the Statement of Objections only represent examples, which illustrate the conclusion drawn by the Commission in recital 452 of the Statement of Objections on the basis of the argument developed in recitals 446 to 451. In these recitals the Commission explains the reasons behind FedEx's cost disadvantage "*vis-à-vis other integrators*"⁵⁵⁷. In fact, it becomes clear from this assessment that at the core of FedEx's cost disadvantage are the very same elements that underlie the Notifying party efficiencies claims, namely [Details regarding the Parties' cost structure and projected efficiencies]*. Secondly, recital 454 of the Statement of Objections explicitly states that "*for virtually all these contracts, the existing or chosen supplier was one of the integrators*".
- (543) As regards the alleged failure of the Commission to take into account the evidence emerging from UPS's strategic customer emails, it should be noted that these emails provide background detail about the bids in which UPS participated and which are recorded in the UPS strategic bidding database submitted to the Commission. [Confidential information taken from UPS' internal bid database]*. If the strategic bidding database is considered relatively complete in terms of the presence and identity of competitors, there is no reason to believe that the emails containing the information with which the database was populated could provide a completely different picture from the one emerging from the database itself. This is indeed highly unlikely since, as explained by the Notifying party, in order to populate the 'competitor' field in the strategic bidding database, as completely as possible, analysts manually extracted information on the presence of competitors from the strategic customers emails⁵⁵⁸.
- (544) Moreover, the Commission does not conclude that FedEx is completely absent from the intra-EEA express market but that it is more likely to bid for contracts that on average have a large share of extra-EEA deliveries. This is supported by the evidence gathered during the market investigation and consistent with FedEx relatively stronger position outside Europe. Such a conclusion does not exclude the possibility that FedEx also bids for or wins pure intra-EEA contracts. However, a few such examples do not prove that

⁵⁵⁶ Notifying party's response to the Statement of Objections, paragraph 5.97.

⁵⁵⁷ Recital 452, Statement of Objections.

⁵⁵⁸ See email from the Notifying party of 20 July 2012, where it is explained that "[Confidential information taken from UPS' internal bid database]*"

FedEx is overall a strong and effective competitor to UPS for intra-EEA express business. More importantly, the analysis of the strategic bidding database does not support such a conclusion.

- (545) In relation to FedEx's cost position, it should be mentioned that following the adoption of an organic expansion plan in 2011, FedEx has been investing in several EEA countries to enhance its network infrastructure, by adding new sorting facilities and increasing the overall nominal capacity, with the aim of achieving a greater geographic coverage and density. With such improved infrastructure, FedEx is trying to accommodate increasing volumes and to grow its operations. If achieved, higher volumes would ultimately help FedEx to bring down its costs. In this regard, it should be noted that FedEx has recently started operation in both domestic and deferred services in several countries (see Section 7.3.5) and this might help to attract further volumes. The extent to which costs could be ultimately reduced will depend on the actual growth of volumes. FedEx for its part expects that even if it were to meet all its targets, on completion of its organic expansion plan in [...] its PUD cost position would still remain significantly higher than the other integrators for the supply of international intra-EEA express services⁵⁵⁹.
- (546) In conclusion, in view of the foregoing, it is reasonable to expect that in the future FedEx's cost disadvantage will gradually be declining with infrastructure expansion and increase of volumes, though the cost gap is not likely to be closed in the medium term and FedEx will still suffer a significant cost disadvantage.

7.3.5. *FedEx's presence in domestic and deferred markets*

- (547) FedEx, which was already active in the domestic markets of France, Poland and the United Kingdom, has recently decided to further expand its domestic operations in [Six EU countries]*. In the respective domestic express markets in those six countries, FedEx aims to achieve less than [...] % market share in the long-term. Finally, FedEx plans to open domestic service in [fewer than ten additional countries]*⁵⁶⁰.
- (548) Their presence in domestic markets could help to some extent to attract higher volumes and reduce costs. In addition, this could help FedEx to be more attractive to customers who prefer to buy domestic service together with international ones. Nonetheless, it should be mentioned that presence in domestic does not seem to represent an absolute requirement for being competitive in the international intra-EEA markets. In fact, it should be considered that DHL, one of the leading integrators in Europe, has recently decided to unwind its domestic operations in a number of countries (for example France, the United Kingdom and Romania)⁵⁶¹.
- (549) As regards deferred markets, FedEx recently started to operate an international deferred network in some EEA countries. Nonetheless, FedEx stresses that its total EEA deferred business accounts for less than € [...] million today. In particular, outbound international deferred services from Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Ireland, Luxemburg, the Netherlands, Norway, Poland, Spain, Sweden and the United Kingdom began in January 2009;

⁵⁵⁹ FedEx, reply to question 4 of the Commission's request for information, 16 November 2012 (Q30).

⁵⁶⁰ FedEx, reply to question 1 of the Commission's request for information, 16 November 2012 (Q31).

⁵⁶¹ Notifying party's response to the Statement of Objections, paragraph 5.85.

outbound international deferred services from the Baltic States began in August 2009; and such services began in Portugal in September 2010⁵⁶².

- (550) FedEx intra-European truck network is extremely limited: *'it currently comprises only [...] truck routes a week (i.e. approximately [...] per day)*⁵⁶³. In comparison, UPS and TNT have a significantly broader European ground network. In fact, UPS European ground network covers more than [...] trips per day⁵⁶⁴ while TNT has an express road network connecting [...] countries and comprising [...] international depots and [...] road hubs⁵⁶⁵.
- (551) Today, this cross-border deferred network utilises primarily the FedEx air network and connects FedEx's Charles de Gaulle (France) and Cologne (Germany) air hubs. Specifically, FedEx indicated that its air hubs are used at idle times (i.e. during the day) to cater for international deferred sorting and distribution requirements. Originally, FedEx commenced international deferred services to "open the bundle" and, thus, attract more volumes. In the absence of a road network, FedEx used the available capacity on its air network to offer these services (by adding incremental deferred volumes to fill up its flights), essentially having optimised the express air network to transport incremental volumes of international deferred parcels. This, however, is changing as currently FedEx is in the process of implementing a long-term project aimed at developing a ground-based intra-EEA cross-border deferred network with the aim of limiting its air network only to express services⁵⁶⁶.
- (552) In view of the foregoing, it is reasonable to expect that in the future FedEx's cost position may improve somewhat with the gradual growth of its domestic and deferred services. FedEx has generally a very limited presence in these markets and it will likely take time to develop a meaningful position. Thus it is not expected that any dramatic change in FedEx cost disadvantage vis-à-vis other integrators due to lack of volumes would materialize in the next 2-3 years.

7.3.6. *FedEx is mainly strong for extra-EEA sales*

- (553) In view of its coverage limitations and higher costs in Europe, FedEx's strongest segment for outbound deliveries from EEA countries relates to extra-EEA deliveries. From the market investigation and bidding databases provided by the Parties and third parties, it has been confirmed that in the EEA, FedEx has a stronger focus for international (extra-EEA) deliveries in the sense that it is more likely to bid for deliveries on extra-EEA lanes and more likely to be competitive and win contracts on such lanes. This is to be expected particularly in view of its strong presence in the United States (as well as Asia).

7.3.6.1. FedEx appears more in extra-EEA deliveries in the market investigation

- (554) In reply to the market investigation⁵⁶⁷, customers indicated which suppliers they are currently using for their various delivery services (in addition to either UPS or TNT). Across the various delivery service categories, FedEx was mainly mentioned as a

⁵⁶² FedEx, reply to question 5 of the Commission's request for information, 16 November 2012 (Q 31).

⁵⁶³ FedEx, reply to question 1 of the Commission's request for information, 16 October 2012.

⁵⁶⁴ Form CO, Annex 19.

⁵⁶⁵ Form CO, Annex 2.

⁵⁶⁶ FedEx, reply to question 5 of the Commission's request for information, 16 November 2012 (Q31).

⁵⁶⁷ See responses to question 8 of questionnaire to customers R1 to R29 - Phase II.

supplier for extra-EEA services. The share of FedEx as a supplier is the highest in extra-EEA express services (14% of respondents using such services indicated FedEx as a supplier). In comparison, in other service categories, its shares are as follows: less than 3% for domestic deliveries, 6% for intra-EEA early morning, 7% for intra-EEA noon and 10% for extra-EEA deferred deliveries as well as intra-EEA EOD.

7.3.6.2. The UPS Strategic Customer Bidding Database

- (555) Referring back to the UPS strategic bidding database, the greater focus of FedEx on extra-EEA deliveries can be illustrated as well as its overall weaker presence. [Confidential information taken from UPS' internal bid database]*⁵⁶⁸. It is worth reminding that in this database, competitors are named at the bid level (and not at the service/lane level).
- (556) FedEx appears as a bidder for contracts that on average have a large share of extra-EEA deliveries. [Confidential information taken from UPS' internal bid database]*.

Figure 16: [Confidential information taken from UPS' internal bid database]*

[...]*

Source: [...]*

- (557) [Confidential information taken from UPS' internal bid database]*

Table 10: [Confidential information taken from UPS' internal bid database]*

[...]*

Source: [...]*

7.3.6.3. The FedEx Sales Database

- (558) In response to the Commission request for information Q7, on 10 August 2012, FedEx submitted a Sales database [Confidential information taken from FedEx's internal Sales database]*⁵⁶⁹. [Confidential information taken from FedEx's internal Sales database]*⁵⁷⁰. [Confidential information taken from FedEx's internal Sales database]*.
- (559) [Confidential information taken from FedEx's internal Sales database]*⁵⁷¹). [Confidential information taken from FedEx's internal Sales database]*. [Confidential information taken from UPS' internal bid database]*. [Confidential information taken from FedEx's internal Sales database]*.⁵⁷² [Confidential information taken from FedEx's internal Sales database]*⁵⁷³, [Confidential information taken from FedEx's internal Sales database]*.
- (560) [Confidential information taken from FedEx's internal Sales database]*⁵⁷⁴. All this evidence is consistent with FedEx being a stronger competitor for extra-EEA

⁵⁶⁸ These are the bids for which the Parties supplied detailed contract information. When considering all bids (with and without contract information), FedEx appears [...]* times compared with [...]* times for TNT and [...]* times for DHL.

⁵⁶⁹ There are mostly so-called opportunities but also risks, where FedEx may lose business. Risks represent a minority of the database.

⁵⁷⁰ Some opportunities refer to several services, but for most, opportunities are recorded for one service / lane.

⁵⁷¹ And most of the rest relates to [...]* domestic deliveries.

⁵⁷² 16 countries out of 28, including all large volume countries.

⁵⁷³ Notifying party's response to the Statement of Objections, Paragraph 5.107.

⁵⁷⁴ [Confidential information from FedEx's Pricing Database]*

opportunities as it bids for a large number of opportunities relating to extra-EEA opportunities and such opportunities are more likely to be won.

7.3.6.4. The FedEx pricing system Database

- (561) FedEx also submitted a database containing further information on pricing offers [Confidential information from FedEx's Pricing Database]*.
- (562) The database contains information on deferred and express services for both freight and small packages⁵⁷⁵. For the analysis the Commission has kept only data for which it is known whether the discount request was accepted or rejected. Volumes in the database are individual packages. The Commission analysed the pricing requests referring to bids for which the origin country was in the EEA. The database also contained information on the country zone associated with the destination of shipments. Hence, intra-EEA and extra-EEA shipments could be identified, and then the average share of each type of service/destination across contracts was calculated.
- (563) Where freight services are also taken into account, the average share of intra-EEA express small packages is [...]%, the average share of express extra-EEA small packages is [...]%, the average share of intra-EEA deferred small packages is [...]%, and the average share of extra-EEA deferred small packages is [...]%. For comparability with the average shares of services calculated in the UPS strategic customer bidding database, the Commission looked at bids without freight services. In that case, the average share of extra-EEA services in the FedEx database is [...]%, compared with [Confidential information taken from UPS' internal bid database]* in the UPS database. [Confidential information from FedEx's Pricing Database]* [Confidential information taken from UPS' internal bid database]*. This point is not disputed by the Notifying party. Rather the Notifying party argues that the variation in the share of extra-EEA volumes across bids is significant and therefore "*there is no systematic tendency for FedEx to compete for bids where the extra-EEA services are particularly important*" (See the Response to the Statement of Objections, paragraph 5.111).
- (564) [Confidential information from FedEx's Pricing Database]*⁵⁷⁶. [Confidential information from FedEx's Pricing Database]*⁵⁷⁷. This suggests that FedEx is less likely to grant discounts for bids with larger intra-EEA deliveries for which its costs are higher. This is consistent with FedEx being a stronger competitor for customers with significant extra-EEA needs.

7.3.7. *Customers' perception of FedEx*

- (565) The market investigation clearly confirmed that customers consider FedEx as a weaker player than the other integrators in intra-EEA express small package services.
- (566) When large customers were asked to indicate the perceived positioning of intra-EEA express small package suppliers (in terms of being perceived from the strongest to the weakest on the market), the responding customers clearly considered FedEx as a weaker

⁵⁷⁵ Freight is identified as product services in which the term "freight" or "heavy weight" appears in the service type variable.

⁵⁷⁶ Note that for deferred small packages, the opposite is true.

⁵⁷⁷ UPS/TNT: Assessment of the ability of FedEx to compete for stand-alone intra-European customers, RBB Economics, 5 October 2012.

player than DHL, TNT and UPS⁵⁷⁸. In fact, comparing the number of respondents that awarded the highest mark for ‘the strongest’ supplier in their view, DHL, TNT and UPS were each indicated by roughly about one third of the customers, whereas FedEx was almost never marked as the strongest.

- (567) As to the perceived strengths and weaknesses of FedEx in intra-EEA-express services, the replies of large customers to the questionnaires sent out in the in-depth market investigation reveal that many customers signal coverage as the largest weakness of FedEx⁵⁷⁹.
- (568) As to the customers perception of credible alternatives to the Parties in International intra-EEA express, the replies to questionnaires in the market investigation show that FedEx is considered much less frequently as a credible competitor to the Parties irrespective of the express segment considered (re 10am, pre noon and EOD)⁵⁸⁰.
- (569) As to the perception of whether all the integrators are equally good, the customers' replies to the questionnaires in the market investigation revealed that about half of the customers consider that the four integrators are not equally capable of providing an equivalent good alternative for domestic/intra-EEA and extra-EEA express services and in many occasions they singled out FedEx as the weakest one within the group⁵⁸¹.
- (570) Furthermore, customers in the market investigation were requested to specify which criteria/service features they regard as indispensable when negotiating a contract for intra-EEA small package delivery services⁵⁸². When looking at the three time-segments of express market, the majority of customers indicated, for each of those segments, the following features as indispensable: quality of the track and trace information, security for shipped goods, extensive geographic coverage in the receiving country, and on-time delivery record, while almost half of customers further indicated coverage of all destination countries as indispensable. Customers were then asked to indicate which of the suppliers satisfy the criteria considered as indispensable⁵⁸³. From all the responding customers, a vast majority indicated each of UPS, TNT and DHL as satisfying those criteria, while only a relatively small minority considered FedEx. A very similar picture arises when customers were asked which further add-on features they consider as indispensable and which suppliers satisfy these criteria⁵⁸⁴.
- (571) The weak perception of FedEx as a competitive alternative to the Parties is also evident from the customers' answers indicating the closest competitor to UPS and to TNT (notably in terms of pricing, quality and characteristics of the services)⁵⁸⁵. Only a negligible number of customers mentioned FedEx as the closest competitor to UPS and

⁵⁷⁸ See responses to question 39 of the questionnaire to customers R1 to R29 – phase II.

⁵⁷⁹ See responses to question 39 of the questionnaire to customers R1 to R29– phase II.

⁵⁸⁰ See responses to question 59 of questionnaires Q1 to Q29 to customers, phase I, and responses to questions 9, 14 and 21 of Phase II questionnaire to small customers (R31).

⁵⁸¹ See responses to question 41 of questionnaire to R1 to R29 to customers – Phase II.

⁵⁸² See responses to question 30 of Phase I questionnaire to customers, aggregated for all Member States (Q2-Q29).

⁵⁸³ See responses to question 31 of Phase I questionnaire to customers, aggregated for all Member States (Q2-Q29).

⁵⁸⁴ See responses to questions 32 and 33 of Phase I questionnaire to customers, aggregated for all Member States (Q2-Q29).

⁵⁸⁵ See responses to question 60 and 61 of Phase I questionnaire to customers, aggregated for all Member States (Q2-Q29).

to TNT, while an overwhelming majority named either UPS or DHL, for each of the three express segments (pre-10am, pre-noon, and EOD).

- (572) Also the replies to the questionnaires of small customers revealed that FedEx is considered as having a limited geographic coverage (FedEx mentioned by a majority of respondents as having a limited coverage, while TNT UPS and DHL by a small minority), and as having a limited offer of express services (almost half mentioned FedEx, while TNT, DHL and UPS were mentioned by a small minority), by the largest share of respondents. FedEx was also mentioned the most for lacking add-on services⁵⁸⁶.
- (573) The overall picture gathered in the investigation from customers is consistently pointing to the weak position of FedEx in Europe, as customers themselves explain.
- (574) For example, according to [Customer name]* *"FedEx offers shipment solution in the US but is not a credible alternative for shipments within the EEA. Despite being very good in the US, FedEx in Europe does not have satisfactory performance and in addition, the level of services they offer is not high enough to satisfy [Customer name]*' requirements. [Customer name]* considers that the cost ratio performance of UPS and TNT Express is much better than that of FedEx"*⁵⁸⁷.
- (575) Another large customer [Customer name]* indicates *"The reason for not using FedEx in Europe is due to the network of FedEx not achieving the necessary density for the needs of [Customer name]*"*⁵⁸⁸.
- (576) Furthermore, a significant number of customers' replies to the market investigation revealed that many customers in the Member States in which FedEx is present do not consider that FedEx capable of offering a similar service to that of the other remaining integrators, customers explicitly referring notably to FedEx's weak network, coverage or presence in Europe, the fact of working with many sub-contracting companies, absence of a road network, or an earlier pick-up time compared to other integrators⁵⁸⁹.

7.3.7.1. Conclusion

- (577) Therefore, it is concluded that customers, small and large alike, perceive FedEx as a weak competitor exerting only limited competitive constraint in the markets for intra-EEA express delivery services.

7.3.8. *Competitors' perception of FedEx*

- (578) The perception of customers as reported in the Section 7.3.7 coincides with the perception of competitors. In fact, *all* of the most significant competitors in the industry consider FedEx as a weak player in Europe, and explain why they consider FedEx as a weak competitive constraint in the intra-EEA express market.
- (579) DHL considers that *"FedEx's is still a marginal player in all European countries. DHL believes that the purpose of the FedEx market presence in Europe is to fill their planes when they head back to the US. For this reason FedEx has only small operations within the EEA and their customers in Europe are mainly US based firms. Growing by*

⁵⁸⁶ See responses to question 6 of questionnaire R31 to small customers (B), Phase II.

⁵⁸⁷ Agreed minutes of teleconference call of 2 May 2012 with [Customer name]*

⁵⁸⁸ Agreed minutes of teleconference call of 2 May 2012 with [Customer name]*

⁵⁸⁹ See responses to question 41.1 of questionnaires R1 to R29 to customers – Phase II.

acquisition is the only viable growth strategy for them and there is no other potential target as the ground network players are difficult to integrate. Growing organically is very difficult as a high set-up cost has to be incurred before the services can be offered at full scope."⁵⁹⁰.

- (580) La Poste identifies FedEx's main weaknesses for intra-EEA small package delivery services in the *"lack of presence (operations and sales), a weak road network, weak domestic offering and a lack of an economy service in Europe, as well as inability to deliver shipments to many major cities of Europe pre 10 or pre 12"*⁵⁹¹. La Poste also does not consider *"FedEx as a strong competitor in the intra-European small package business, notably because it has no significant domestic presence except in the UK, whereas such a presence is a pre-requisite to offer a broad range of pick-up and delivery points for intra-European international services. GeoPost believes that as regards international delivery to or from Europe, FedEx focuses on overseas shipment (e.g. to and from the US)"*⁵⁹².
- (581) GLS indicates that *"FedEx is in Europe the weakest of the four Integrators. Most important, they do not have a strong domestic network and only deliver themselves in some perimeter around major cities. FedEx has its own domestic networks in 7-8 domestic markets (by acquisitions), whereas UPS operates on the domestic market in around 50 countries. [...]"*⁵⁹³.
- (582) Kuehne+Nagel notes that *"A small package company needs a significant national presence in given country (e.g. infrastructure, client contacts, sales personnel) in order to meaningfully compete in that country for the provision of small package delivery services [...] If a company cannot provide good coverage or only with a very high degree of network partners, then it is unlikely that it can compete with the other players. The best example for this is FedEx which have nearly no national network in any of the large European countries and thus cannot compete."*⁵⁹⁴. It further notes that *"FedEx has no network in Europe. Only focus is international (ex EEA) express business. Not regarded as competition within EEA"*⁵⁹⁵.
- (583) Moreover, most of the competitors considered that in order to compete effectively in intra-EEA package delivery services, and in particular in express services, it is important to be able to offer a wide range of services including domestic delivery⁵⁹⁶. bpost highlighted that *"Customers nowadays more and more value (and require) their providers to be able to provide them with a "one-stop-shop" solution including all types of services (one single contract, one single contact person, one single global ICT system, etc.). Providers which are not in a position to offer such a range of services are unlikely to be short-listed with integrators"*⁵⁹⁷.

⁵⁹⁰ Agreed minutes of meeting of 8 May 2012 with DHL.

⁵⁹¹ See, for example responses of La Poste to questions 128.1, 135.1 or 268.1 of questionnaire R30 Competitors Phase II.

⁵⁹² Agreed minutes of teleconference call of 30 April 2012 with La Poste.

⁵⁹³ Agreed minutes of teleconference call of 15 May 2012 with GLS.

⁵⁹⁴ Kuehne+Nagel's response to question 31 of questionnaire to competitors - Phase I.

⁵⁹⁵ Kuehne+Nagel's response to question 52 of questionnaire to competitors - Phase I.

⁵⁹⁶ See responses to question 19 of questionnaire R30 to competitors phase II.

⁵⁹⁷ bpost's response to question 19.1 of questionnaire R30 to competitors phase II.

- (584) [Parties' internal market analysis]*^{598 599}
- (585) [Parties' internal market analysis]*^{600 601 602}
- (586) [Parties' internal market analysis]*^{603 604}
- (587) At present, despite efforts to expand its presence in various Member States, it appears that FedEx activity is still very much focused on intercontinental instead of intra-EEA services. This is highlighted in a study from the market consultancy Transport Intelligence which points out that "*FedEx hub in CDG still very much focused on intercontinental ([...]*% to North America), and has a very small intra-EEA traffic ([...]*%)*"⁶⁰⁵.
- (588) As explained Section 7.3.5, FedEx has recently started offering domestic services in a number of countries and is planning to further expand its domestic operations in the next few years. It is not yet known whether the entry into domestic services will be successful, but it might help FedEx to attract customers who have preferences for one-stop solutions. Therefore, the lack of domestic offering currently perceived by customers as a weakness might be addressed to a certain extent in the near future.
- (589) Therefore, in view of all these elements, it is concluded that all major competitors (including integrators and non-integrators alike) perceive FedEx as a relatively weaker competitor in the markets for intra-EEA express delivery services.

7.3.9. *FedEx is weaker on intra-EEA express service markets*

- (590) Customers participating in the market investigation were asked which companies they invited and short-listed as potential suppliers in their recent tender processes for small packages⁶⁰⁶. Looking at all customer replies involving tenders for express intra-EEA services (that is to say, where customers mentioned that both express services and intra-EEA destinations were included in the tender⁶⁰⁷), it appears that FedEx was shortlisted only in a small minority of cases, while all of UPS, TNT and DHL were amongst the ones being shortlisted in a majority of the tenders. The replies also indicate that FedEx has been relatively unsuccessful in being shortlisted and winning tenders. Of all the customers who replied to the questionnaire⁶⁰⁸, only about half of those who invited FedEx to submit a quotation, retained FedEx in the tender shortlist and only about one quarter finally awarded the contract to FedEx.

⁵⁹⁸ [...]*

⁵⁹⁹ [Parties' internal market analysis]*

⁶⁰⁰ [Parties' internal market analysis]*

⁶⁰¹ [Parties' internal market analysis]*

⁶⁰² [Parties' internal market analysis]*

⁶⁰³ [...]*

⁶⁰⁴ [Parties' internal market analysis]*

⁶⁰⁵ Transport Intelligence - Global Express Parcels 2011, p.142.

⁶⁰⁶ See responses to question 39 of questionnaire to customers (Q2-Q29) - Phase I, aggregated for all Member States.

⁶⁰⁷ In many instances the tenders involved also other services such as domestic and deferred. It is not specified whether the customers awarded one contract or split the tenders in various lots and awarded different contracts e.g. for different services.

⁶⁰⁸ It should be noted that the market investigation was carried out relying on the contact details provided by the Parties in the notification and therefore refer essentially to TNT and UPS customers.

- (591) In the in-depth investigation, large customers were asked specifically about the companies from which they requested a quotation or which they invited to tender for intra-EEA express services in the last two years⁶⁰⁹. For each of the three time-segments within the intra-EEA express market (pre-10 am, pre-noon, and EOD), FedEx was invited by significantly less (almost half) number of customers than each of UPS, TNT and DHL. Whilst this participation does not yet take into account the competitive interaction within the tender process, it already provides an indication about companies which mostly tend to be invited by large customers to bid specifically for intra-EEA express services.
- (592) During the in-depth investigation, the Commission also verified specifically with smaller customers (who less frequently organise a tender process), which companies they had considered as a credible supplier for intra-EEA express services when they were last searching for a provider (or renewing their contract)⁶¹⁰. Out of all responding customers, FedEx was again mentioned by significantly less customers than the three other integrators for end of day services, the gap getting even wider for noon and morning deliveries.
- (593) In the TNT [...] bidding database⁶¹¹, FedEx is hardly ever mentioned as a major constraint. [Confidential information taken from TNT's internal bid database]*
- (594) In the TNT [...] database⁶¹², FedEx appears as a much weaker competitive constraint to TNT than either DHL or UPS. [Confidential information taken from TNT's internal bid database]*
- (595) Similarly, in the DHL bidding database submitted on 21 August 2012, FedEx is mentioned as first competitor in [...] % of bids overall, much far behind the Parties, [Confidential information taken from DHL's internal bid database]*
- (596) Finally, in the course of the market investigation, customers' switching decisions were analysed and they revealed that customers switched less frequently to FedEx than to the Parties or DHL⁶¹³.
- (597) [Confidential information taken from TNT's internal bid database]*
- (598) In conclusion, the analysis of data from recent tenders indicates that in comparison with the other integrators FedEx is relatively underperforming in the intra-EEA express markets.

7.3.10. Expansion of FedEx in the EEA

- (599) Since FedEx re-entered the European markets in the 1990s, it has been steadily expanding its operations, via acquisitions of smaller companies and gradually investing in the organic development of its network. FedEx established its main European hub at Paris Charles de Gaulle airport and has relatively recently set up a second European air hub in Cologne to focus on Central and Eastern Europe (the latter project took about

⁶⁰⁹ See responses to questions 27.1 27.2 and 27.3 of questionnaire to customers, aggregated for all Member States (R1-R29) – Phase II.

⁶¹⁰ See responses to question 9 of questionnaire R31 to small customers.

⁶¹¹ [Confidential information taken from TNT's internal bid database]*

⁶¹² [Confidential information taken from TNT's internal bid database]*

⁶¹³ See responses to question 20.2 of questionnaire Q1 to Q29 to Customers, Phase I.

[...]* years to build according to FedEx⁶¹⁴). FedEx has managed to set up an air network with flights connecting its main hub(s) to a number of destinations, and has set up numerous sorting centres across Europe. Recently FedEx has also built a number of new sorting centres and reconfigured its air network from its Paris Charles de Gaulle hub to cover flight points in Northern Europe by introducing [...]* Boeing 757 aircraft. Through an acquisition in the United Kingdom some years ago it has established domestic presence in that country and is able to offer domestic express services in the United Kingdom.

- (600) Through gradual expansions and significant investments over the last two decades, FedEx has been able to effectively re-enter the European intra-EEA express markets. However, as discussed in the previous sections, compared to the other three integrators FedEx is still significantly lagging behind.
- (601) In order to further strengthen its network, FedEx has recently purchased two local domestic providers in France and Poland, respectively Tatex and Opek. Moreover, FedEx has recently publically announced an 'improvement plan', which among others is expected to further '*expand infrastructure and capabilities within Europe*'⁶¹⁵. This plan encompasses investments both in intra-European ground service and air network⁶¹⁶. More specifically, FedEx submitted that it is currently implementing an organic expansion plan aimed at further improving its market position on intra-EEA express markets and at the same time it has been running in parallel a global domestic expansion project, to expand its operations in domestic express services in a number of countries.
- (602) In the next Section 7.3.10.1, FedEx's recent expansion by acquisitions in France and Poland, as well as its expansion plan will be analysed.

7.3.10.1. Recent Acquisitions

- (603) The purchase of Tatex and Opek will allow FedEx to achieve some additional density and volumes in the French and Polish markets.
- (604) According to the Parties' own market share estimates, Tatex market share in the French domestic express market is only [0-5%]*%, while it is not present at all on the domestic deferred market. On the intra-EEA deferred market Tatex added only [0-5]* percentage points of market share. According to Parties' estimates, in the international intra-EEA express market itself, Tatex only added a market share of [0-5]* percentage points to FedEx. In comparison, the Parties' estimate that their combined market share in France for intra-EEA express services is [20-30%]*. Even though Tatex will allow FedEx to increase its presence in France, the added volume will still represent a tiny fraction of the Parties' combined market share in intra-EEA-express services in France. Furthermore, it is noted by FedEx that Tatex's total activities of [...]* million shipments per annum represent the equivalent of [Confidential information regarding TNT's activities in France]*⁶¹⁷.

⁶¹⁴ FedEx, reply to the Commission's request for information, 6 October 2012, p.5.

⁶¹⁵ FedEx, Michael Ducker - Executive Vice President and COO of FedEx, Presentation at the FedEx Investor Day, October 2012.

⁶¹⁶ FedEx, Michael Ducker - Executive Vice President and COO of FedEx, Presentation at the FedEx Investor Day, October 2012.

⁶¹⁷ FedEx', reply to the Commission's request for information, 6 October 2012, p.5.

- (605) As regards Opek in Poland, according to the Parties' market share figures, Opek's market share on the Polish domestic express market is only [0-5%]*, and [5-10%]* on the domestic deferred market. According to the Parties' figures, Opex has no presence in the international intra-EEA express and in the intra-EEA deferred markets. By comparison, according to the Parties' estimates, their combined market share in Poland for intra-EEA express services is [20-30%]* and [20-30%]* in domestic express services. This illustrates that even though Opek would allow FedEx to increase its domestic presence in Poland, it will not add volume in terms of intra-EEA express services and domestic express services, [Confidential information regarding TNT's activities in Poland]*. Furthermore, it is noted by FedEx that Opek's total activities of [...] million shipments per annum represent in volume the equivalent of [Confidential information regarding TNT's activities in Poland]*⁶¹⁸.
- (606) Therefore, whereas FedEx's recent acquisitions in France and Poland will increase the domestic presence in the respective countries, they will still represent a gradual improvement for FedEx as, in view of their limited size, they are not likely to substantially increase FedEx's volumes, scope and density in the short term.

7.3.10.2. Organic growth expansion plan

- (607) As part of the expansion plan in Europe, FedEx is investing in ground networks and new stations, adding new jet routes and feeders into its network⁶¹⁹. FedEx has opened [...] stations in 2012 and plans to open [...] new stations in 2013 in Europe and a number of additional ones in the coming years⁶²⁰.
- (608) Whereas objectives beyond 2014 have not yet been translated into concrete opening plans, FedEx has currently defined specific actions in order to meet the objectives set for the end of financial year (hereinafter "FY") 2014 (that is to say, 31 May 2014) and provided detailed information about the planned openings, notably information on the number of local sorting centres and nominal sorting capacity⁶²¹.
- (609) With this additional infrastructure put into place, FedEx's organic expansion plan aims at improving FedEx's service coverage position in the EEA⁶²². In its organic expansion plan, FedEx sets target objectives for service coverage on a year-by-year basis (from FY 2011 to FY [...]*) for the expansion plan across 26 EEA countries (four very small EEA countries were not included in the plan).
- (610) Based on an improved infrastructure and coverage, FedEx is planning to gain more customer volumes. FedEx's plan sets out target objectives as regards revenues, volumes and market shares to be achieved on a year-by-year basis. [Confidential FedEx Business plan data]*⁶²³.
- (611) FedEx indicated that, as a result of several factors, the plan has been "slipping" and therefore FedEx expects that its overall expansion objectives will only be met beyond

⁶¹⁸ FedEx' reply to the Commission's request for information, 6 October 2012, p.5.

⁶¹⁹ Michael Ducker, Executive Vice President and COO of FedEx, presentation at the FedEx Investor Day, October 2012.

⁶²⁰ FedEx' reply to the Commission's request for information, 16 October 2012.

⁶²¹ FedEx' reply to the Commission's request for information, 16 November 2012 (Q30).

⁶²² FedEx, reply to the Commission's request for information, 16 November 2012 (Q30).

⁶²³ [...]*

[...]*⁶²⁴. Specifically, it appears that the slippage mostly relates to a downwards revision of the revenue and market share forecasts⁶²⁵. However, the concrete opening plans for local sorting centres (as planned for FY 2014) appear not to have been impacted.

- (612) Despite the ambitious expansion plan aiming at a mid-term growth, it is unlikely that FedEx will be, from an overall network perspective of the intra-EEA express markets, able to actually bridge the gap to the leading integrators in the next two to three years. FedEx's organic expansion plan is a multiannual plan, where different objectives are set gradually, and for different countries in different time periods. Consequently, FedEx's competitive presence within the next two to three years is likely to vary from country to country.
- (613) It appears that it has been a strategic choice of FedEx not to focus on certain EEA countries in the first phase of its expansion plan. Therefore, the investments into local infrastructure which could help FedEx to improve its pick-up and last mile capabilities in such countries (such as [...]*) are less certain to be made and in any event less timely than in some countries where the expansion has already started or is planned in the very near future (such as [...]*). It is only after the infrastructure has been improved that FedEx would be able to significantly improve its coverage and try to grow its volumes and consequently market shares. Therefore, for certain countries where no significant infrastructure improvements are planned shortly, it can be expected that the organic plan will not have a significant impact in the short-term.
- (614) In the countries where FedEx has already started to implement or projected infrastructure investments, the projected improvements in terms of coverage appear more likely. On the other hand, FedEx's projected growth in actual volumes, and thus growth in market shares, has to be taken with care, as it is difficult to predict with certainty how successful the growth strategy will be with customers. However, it is likely that after having invested significantly in assets and capacity, FedEx will actively solicit new customer volumes, devote marketing and sales activities in order to fill its network and, in this way, try to reach the main objective which is to significantly increase its scale and market presence. This will likely create a certain degree of competitive pressure on the other main integrators, which has to be taken into account in the specific countries.
- (615) It should be considered that already today there are differences among the EEA countries as regards FedEx's presence, competitive position and coverage level. As a result, FedEx's ability to represent an increased competitive constraint on the Parties will differ from country to country. Additional information about FedEx's specific country-by-country expansion plans will be provided in Section 7.11 presenting the country-by-country analysis.
- (616) The Parties argue that the Commission should not be relying on FedEx existing expansion plans, but on the expansion of FedEx which would come as a reaction on the

⁶²⁴ FedEx, reply to the Commission's request for information, 16 November 2012 (Q30).

⁶²⁵ FedEx indicates that as a result of various factors, the targets for intra-EEA express market share set out in the original expansion plan have been slipping and will not be met in [...]*, as was originally foreseen. See FedEx, reply to the request for information dated 16 November 2012 (Q30).

possible anti-competitive effects resulting from the Transaction, and notably on possible price increases.

- (617) It is questionable whether FedEx would be able to accelerate its expansion post-merger, as a reaction on possible anti-competitive effects in the form of increased prices. It is true that an increased price level post-merger may to some extent have a positive influence on FedEx' incentives to expand. However, price is not the only factor of customers' choice and FedEx is still significantly lagging behind the Parties and DHL in several aspects, and notably the network and coverage in both origin and EEA destination countries. As coverage is one of the key competitive parameters on which customers put a great emphasis, it will likely be still difficult for FedEx to attract new customers even in the presence of price increases. Developing a strong network across the EEA does take considerable time and FedEx will be able to do this only gradually. Moreover, it is worth noting that FedEx's incentives to expand should be driven by the conditions, such as price levels, which FedEx expects to prevail following its expansion. Therefore, an argument that FedEx' incentives will change and it will accelerate its expansion in view of post-merger price increase, could be valid only if FedEx expects higher price levels to be sustained in the market after its expansion. It can be thus concluded that it is very uncertain whether the merger and its effects could accelerate FedEx's expansion as the Parties claim. This applies to all countries analysed in Section 7.11 of this Decision.

7.3.10.3. FedEx's Global Domestic Expansion project

- (618) FedEx indicated that besides the organic expansion plan, it has also been running on parallel a global domestic expansion project, which is not linked to the FedEx organic expansion plan⁶²⁶.
- (619) In September 2012, FedEx started domestic operations in seven countries, namely Belgium, Denmark, France, Germany, Italy, Luxembourg and the Netherlands, on a "priority overnight" basis. Two main features of such services are (i) next-day or two-day delivery, with delivery time as per International Priority services (that is to say, by EOD); (ii) cut-off time for pick-up as per International Priority services⁶²⁷.
- (620) FedEx will not offer "purely" domestic services, but domestic services will only be offered if the customer has international volumes. In fact, FedEx maintains that it aims at serving the select domestic needs of its international customers⁶²⁸. FedEx however recognises that its position in the United Kingdom, France and Poland is different from that in the other countries, as there a standard domestic product will be offered⁶²⁹.
- (621) [Confidential FedEx Business Plan regarding expansion of domestic services]*⁶³⁰.
- (622) FedEx claims that the domestic project is not expected to contribute in any way to the density and scale of FedEx's international express operations. However, as already discussed in Section 7.3.4, as a matter of fact an increase in shipment volumes will contribute to the overall network efficiency.

⁶²⁶ FedEx, reply to question 1 of reply to the Commission's request for information, 16 November 2012 (Q31).
⁶²⁷ FedEx, reply to question 1 of reply to the Commission's request for information, 16 November 2012 (Q31).
⁶²⁸ FedEx, reply to question 1 of reply to the Commission's request for information, 16 November 2012 (Q31).
⁶²⁹ FedEx, reply to question 1 of reply to the Commission's request for information, 16 November 2012 (Q31).
⁶³⁰ FedEx, reply to question 1 of reply to the Commission's request for information, 16 November 2012 (Q31).

7.3.11. Conclusion

- (623) Today FedEx is lagging behind in the intra-EEA express market in comparison with the other integrators. The intra-EEA express package delivery business constitutes a network industry requiring operators to engage in large infrastructure investments all along the value chain (from pick-up, sorting, line-hauls, hubs, air network and planes, to delivery). In order to benefit from network effects in intra-EEA express market these operators have to ensure their extensive presence and coverage in all the EEA countries. Therefore, in order to compete effectively with the merged entity and DHL, and to achieve a density and scale allowing for a competitive offering, a company like FedEx needs to engage in significant investments over many years.
- (624) In the last few years and more specifically since very recently with its organic expansion plan, FedEx has been working in this direction, in order to enhance its competitiveness in Europe. Its on-going organic expansion plan aims at strengthening the network infrastructure and increasing its density and coverage, and eventually capturing more customer volumes.
- (625) Nonetheless, it cannot be expected that the benefits of the on-going expansion plans are going to materialize within a sufficiently short time period, that is to say, within the next two to three years, throughout the EEA countries so as to close FedEx's gap with the other integrators in its intra-EEA express network. It should be considered that it took FedEx a significant long time (about 20 years) to gradually expand and reach its current and still rather limited market position in the intra-EEA express markets. Moreover, as outlined in Sections 7.3.1 - 7.3.3, there are different starting points in the different EEA countries which, together with the country-specific planned actions and relative timing, will also determine where FedEx will stand within the next two to three years. Whereas the gap is likely to be gradually reduced in the next years further to the completion of the expansion plan (beyond [...]*), the Commission considers that it is unlikely that FedEx will be able to actually bridge the gap to the leading integrators across the EEA countries in the near foreseeable future. As there are differences in the timing, scope and breath of the expansion plan, a country by country assessment is carried out in Section 7.11 so as to determine the degree of the competitive constraint that FedEx is likely to exert in individual countries within the next two to three years. The analysis shows that despite a continuing expansion and the fact that it may exert an increased competitive pressure compared to the current situation, FedEx is unlikely to expand to such an extent such as to defeat the likely anti-competitive effects arising from the Transaction on the intra-EEA express markets identified in section 7.11.

7.4. DHL

- (626) The Parties state that DHL is the most important competitor on the market. This is not contested. Overall, DHL is today the leading integrator in the intra-EEA express market. DHL offers express services. In all but one of the 29 national markets, it has a market share of above [...]*% based on the integrators' revenues' shares⁶³¹. *Post* merger, DHL would be broadly similar to the merged entity in terms of size and weight, as both companies would hold a [...]* share of integrators' revenues on the EEA-wide level⁶³².

⁶³¹ See Table 6 above.

⁶³² See Table 5 above.

- (627) DHL' geographic coverage is also among the highest in the industry. According to the figures as presented in Tables 7, 8 and 9, DHL has the best coverage of business addresses for both the EOD and the noon commitments amongst the four integrators. Only in the segment of before 10.00 am deliveries does DHL have a comparatively weaker coverage.
- (628) The current strong position of DHL in terms of market shares and coverage is due to its well developed and dense network spreading across the EEA. In addition to intra-EEA express services, DHL offers extra-EEA services, and to some extent domestic services (notably in Germany) and deferred services. Recently, however, DHL has divested its domestic operations in several countries including the United Kingdom and France, suggesting that DHL is committed to primarily focus on the international business.
- (629) DHL, as all other main integrators, has been investing in the past into improving its network. UPS in its Response to the Statement of Objections referred to DHL's group strategy to grow in small packages⁶³³. DHL has made its strategy of growth in EBIT known in a public presentation of its company representatives. However, from the presentation it transpires that DHL's intention was to "*invest in growth*" in 2011, in 2012 the aim was a "*market share growth*", whereas in 2013 the goal is "*margin acceleration*"⁶³⁴. This suggests that after DHL has been investing in its network and improving its service, and after a growth in volumes, its current aim is to capitalise on its improved position in the market. Indeed, a DHL representative commented at the Oral Hearing that DHL Express currently considers that its "*margins have been under pressure over the last couple of years, but it hopes to change that going forward.*"⁶³⁵
- (630) The market investigation shows that DHL is indeed regarded as a credible and strong player, and – as will be analysed in detailed in the Section 7.5.1 on closeness of competition - it is a close competitor to both UPS and TNT. *Post* merger, customers would thus face two very strong integrators.

7.5. The merger is likely to lead to anti-competitive effects on intra-EEA express market

7.5.1. UPS and TNT are close competitors in a differentiated market

- (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 market⁶³⁶. The analysis shows that DHL is also a close competitor to

⁶³³ See Parties' response to the Statement of Objections, paragraph 4.102 and footnote 54 referring to a DHL investor presentation. The Parties' reference to the slides suggesting that DHL's strategy is to "compensate revenue decrease in the letter business by growing small package sales" actually refer to another service than the intra-EEA express business, namely the German domestic business of DHL. The Parties also erroneously refer to an "increase of capacity by 40%" of DHL as a result of a network upgrade called "Paket 2012". Upon clarification, DHL confirmed that this has no relation to international express business, but to German domestic (deferred) parcel platform produced and sold by DP's MAIL divisions. The infrastructures used are different from the ones used for intra-EEA express market. See email of DHL's legal representatives of 19 December 2012.

⁶³⁴ Slide 8 of the Presentation "Capital Markets Day 2012" made on 24 May 2012 by Ken Allen, CEO of DHL Express. Annex of the submission of DHL of 19 December 2012.

⁶³⁵ DHL's submission of 19 November 2012 "DPDHL Input and Clarifications following the Oral Hearing", page 6.

⁶³⁶ See paragraph 28 of the Horizontal Merger Guidelines.

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.

7.5.1.1. Customers evaluation from the market investigation

- (636) In its market investigation, the Commission asked customers of small package delivery services who they perceive as the closest competitors to the Parties, and gathered other elements from the customers' replies which together present one consistent picture: the Parties, together with DHL, are considered to be close competitors on the intra-EEA express market, while all other companies are offering products which are much more distant substitutes than the ones offered by UPS, TNT and DHL.
- (637) First, when customers in the first phase investigation were asked to name the company they consider, for intra-EEA small package express deliveries, as the main and closest competitor to UPS (notably in terms of pricing, quality and characteristics of the services)⁶³⁷, almost all responding customers across the EEA named either TNT or DHL. For each of the three time-segments within the intra-EEA express market (pre-10.00 a.m., pre-noon, and EOD), DHL was mentioned by a small majority, and TNT by a relatively large minority of all the responding customers as the closest competitor to

⁶³⁷ See responses to question 60 of Phase I questionnaire to customers, aggregated for all Member States (Q2-Q29).

UPS. FedEx was mentioned only by a very small minority of customers (several times smaller than TNT) and all other competitors (including DPD and GLS) by a negligible proportion of all responding customers for each of the three time-segments of the intra-EEA express market.

- (638) In the same way, customers were also asked to name who they consider the closest competitor to TNT for each of the three time-segments within the intra-EEA express market⁶³⁸. Again, almost all responding customers across the EEA named either UPS or DHL. DHL was named by a small majority, and UPS by a relatively large minority of all responding customers as the closest competitor to TNT for each of the three express segments. FedEx, and all other companies (including DPD and GLS) were mentioned by a negligible proportion of all responding customers as the closest competitor to UPS for each of the three express segments.
- (639) Second, customers participating in the first phase market investigation were asked which companies they invited and short-listed as potential suppliers in their recent tender processes for small packages⁶³⁹. Short-listing is a second step in a tender process when the customer makes a pre-selection from all the suppliers that were invited to participate in the tender, and eliminates all other companies. It gives an indication that for the customer the shortlisted companies present closer alternatives than other non-short listed companies. Looking at all customer replies involving tenders for express intra-EEA services (that is to say, where customers mentioned that both express services and intra-EEA destinations were included in the tender⁶⁴⁰), it appears that in the majority of all such tenders, each of UPS, TNT and DHL were amongst the ones being shortlisted. By comparison, FedEx was shortlisted only in a small minority of these tenders, while GLS and DPD/Chronopost/La Poste were each shortlisted only in a negligible proportion of these tenders.
- (640) When looking at only those tenders where UPS was shortlisted, one observes that TNT was also shortlisted within the same tender in a large majority of cases, while DHL was also shortlisted in a large majority of cases, albeit slightly less than TNT. FedEx was shortlisted in the same tenders as UPS only in a small minority of cases (several times less than TNT or DHL), and DPD/La Poste and GLS respectively in only a negligible proportion of the cases. When looking at the tenders where TNT was short-listed, UPS was also short-listed within the same tender in a large minority of cases, DHL in the majority of cases. FedEx was shortlisted in the same tenders as TNT only in a small minority of cases (several times less than UPS or DHL), and DPD/La Poste and GLS respectively in a negligible proportion of the cases. It is also observed that some customers only short-listed UPS and TNT, which indicates that the two Parties were the closest competitors for these particular customers. In sum, the analysis indicates that both Parties compete with each other and with DHL much more closely than with any other company when it comes to the tenders reported by customers participating in the market investigation.

⁶³⁸ See responses to question 60 of Phase I questionnaire to customers, aggregated for all Member States (Q2-Q29).

⁶³⁹ See responses to question 39 of Phase I questionnaire to customers, aggregated for all Member States (Q2-Q29).

⁶⁴⁰ In many instances the tenders involved also other services such as domestic and deferred. It is not specified whether the customers awarded one contract or split the tenders in various lots and awarded different contracts eg. for different services.

- (641) Third, customers in the first phase market investigation were requested to specify which criteria/service features they regard as indispensable when negotiating a contract for intra-EEA small package delivery services⁶⁴¹. When looking at the three time-segments of express market, the majority of customers indicated, for each of those segments, the following features as indispensable: quality of the track and trace information, security for shipped goods, extensive geographic coverage in the receiving country, and on-time delivery record, while almost half of customers further indicated coverage of all destination countries as indispensable. Customers were then asked to indicate which of the suppliers satisfy the criteria considered as indispensable⁶⁴². From all the responding customers, a vast majority indicated each of UPS, TNT and DHL as satisfying those criteria. Only a relatively small minority of responding customers (more than two times smaller number of respondents) considered FedEx as satisfying those criteria. All other companies including DPD and GLS were mentioned by even less customers (several times less than the three leading companies) as satisfying those criteria.
- (642) A very similar picture arises when customer were asked which further add-on features they consider as indispensable and which suppliers satisfy these criteria⁶⁴³. The add-on features regarded as indispensable by a majority of customers for all three time segments of express deliveries were pre-specified time of delivery, track and trace, and proof of delivery, and for morning and noon segments the a late pick-up from the clients. Again, UPS, TNT and DHL were each considered as satisfying these criteria by a vast majority of clients, while only a relatively small minority considered FedEx (less than half as many respondents), and all other companies including DPD and GLS were mentioned by even less customers (several times less).
- (643) This further indicates that the three strongest integrators UPS, TNT and DHL are regarded by customers as close in terms of the service features they offer, with a significant gap between them and FedEx or any other company on the market.
- (644) The Commission has also analysed other evidence from the customers' answers relating to their selection process of intra-EEA express services. This evidence is consistent with the findings that UPS, TNT and DHL are close competitors on the intra-EEA express market.
- (645) In the in-depth investigation large customers were asked specifically about the companies from which they requested a quotation or invited to tender for intra-EEA express services in the last two years⁶⁴⁴. For each of the three time-segments within the intra-EEA express market (pre-10.00 a.m., pre-noon, and EOD), UPS, TNT and DHL were each indicated by a majority of all responding customers, in comparable proportions. FedEx was invited by a relatively small minority of customers (just over half as many as the three leading companies) for any of the intra-EEA express services, DPD or GLS by even smaller minority (several times less than the three leading

⁶⁴¹ See responses to question 30 of Phase I questionnaire to customers, aggregated for all Member States (Q2-Q29).

⁶⁴² See responses to question 31 of Phase I questionnaire to customers, aggregated for all Member States (Q2-Q29).

⁶⁴³ See responses to questions 32 and 33 of Phase I questionnaire to customers, aggregated for all Member States (Q2-Q29).

⁶⁴⁴ See responses to questions 27.1 27.2 and 27.3 of Phase II questionnaire to large customers, aggregated for all Member States (R1-R29).

companies). None of the other companies were invited by more than a negligible proportion of customers.

- (646) This participation does not take into account the competitive interaction within the tender process and does not provide further indications about which companies were competing more closely (for example by being shortlisted). It is therefore less indicative of the closeness of competition than the replies analysed as regards shortlisted companies. Nevertheless such participation is consistent with the other findings and provides an indication about companies which mostly tend to be invited by large customers to bid specifically for intra-EEA express services.
- (647) In their Response to the Statement of Objections, the Parties argue that the participation in the bids shows that UPS and TNT "*cannot be close competitors*"⁶⁴⁵ as in most cases it is not only UPS, TNT (and DHL) that is invited to tender, but a bid is in most cases also sought from one or more other competitors (such as FedEx, DPS or GLS). This argument cannot be upheld. The fact that customers mostly also invite other companies to tenders is perfectly consistent with a finding that UPS, TNT and DHL are close competitors. The participation analysis clearly indicates that customers are inviting each of these three suppliers significantly more frequently than any other company.
- (648) The Commission also verified specifically with smaller customers (who less frequently organise a tender process), which companies they were considering as a credible supplier for intra-EEA express services when they were last searching for a provider (or renewing their contract)⁶⁴⁶. Out of all responding customers, a vast majority indicated UPS, TNT, and DHL for intra-EEA services with EOD commitment (in relatively comparable proportions). FedEx was mentioned by a small majority (and significantly less than the three leading companies), and the majority of customers did not consider DPD, GLS nor any other competitor as a credible supplier. The gap between the three leading integrators and FedEx is even larger when looking at earlier delivery times – for pre-noon services and for pre-10.00 a.m. services. Again, the majority of customers did not consider any other competitor as a credible supplier for these earlier delivery services.
- (649) Again, these answers may not give a specific answer about which companies are considered to be close substitutes to UPS or TNT, and are thus somewhat similar to the ones given by large customers about companies which participate in their tenders. Here smaller customers were essentially indicating which suppliers they regard as "credible" when they engage in negotiations.
- (650) In their Response to the Statement of Objections, the Parties emphasise customers' answers to another similar question from the first phase questionnaire, when customers were asked to name those companies which they considered as "credible competitive alternatives" to UPS and TNT for intra-EEA express business. From all responding customers answering for EOD services, DHL was mentioned by an overwhelming majority, FedEx by about half of respondents, and DPD and GLS by a small minority of respondents. The Parties put the answers to this question at the forefront of their defence, arguing that when all alternative providers to the Parties and DHL are taken

⁶⁴⁵ Notifying Party's response to the Statement of Objections, p.58.

⁶⁴⁶ See responses to questions 9, 14 and 12 of Phase II questionnaire to small customers (R31). Responses from customers from all Member States.

together (FedEx, GLS, DPD and all other companies including local ones) over three quarters of respondents also consider other companies than DHL as a viable alternative to TNT and UPS. The Parties imply that this piece of evidence weakens and invalidates the analysis of closeness of competition.

- (651) The interpretation of the answers to this question has to be put into perspective. First, it is clear from the answers to that question that when the respondents were indicating the individual companies they see as alternatives to the Parties, customers mentioned FedEx, DPD, GLS and others significantly less in comparison to DHL. This is fully consistent with the finding that DHL is a close competitor to UPS and TNT, whereas FedEx, DPD and GLS are more distant substitutes. The aggregation of all responses which mentioned *any* company apart from DHL has little meaning for the analysis of which companies are close competitors to the Parties.
- (652) Second, in this question the respondents indicated all companies which they considered as credible alternatives, without differentiating which of the companies they mentioned was a closer substitute. Obviously, in a differentiated market customers may have more suppliers which may in general be seen as credible competitive alternatives, but not all of them may be equally good substitutes. This becomes evident when taking into account, that essentially the very same customers who replied on this question also responded in the same questionnaire on the question about which company they regard as the closest competitor to UPS and to TNT (notably in terms of pricing, quality and characteristics of the services). The results of these answers were analysed in recitals 637 and 638 and clearly show that FedEx and other companies were only mentioned by a negligible proportion of customers, and several times less than the other party and DHL as the closest competitor. This demonstrates that customers do invite other companies to tender and they may even see them as "credible competitive alternative", but that those suppliers are at the same time likely to be viewed as more distant substitutes to UPS and TNT compared to the other party and to DHL. The latter transpires also from all other available evidence presented in this section.

7.5.1.2. Comparison of destinations served and delivery coverage for different express services

- (653) One of the most important differentiating factors between small package delivery companies offering intra-EEA express services is the coverage of origin and destination countries. This determines the ability of the customer to ship small packages with a supplier with a given express service (early morning, noon or EOD) from a particular origin to another given destination.
- (654) When looking at the integrators⁶⁴⁷, the coverage of the destination territories for EOD services is overall broadly comparable between UPS, TNT and DHL, whilst FedEx is clearly lagging behind. On the basis of the coverage figures of the four integrators presented and analysed in section 7.3.2, it can be concluded that the Parties' (and DHL's) EOD coverage are broadly similar both on the basis of business addresses

⁶⁴⁷ It has been discussed in section 7.2 relating to non-integrators, that they do not generally deliver express packages over a certain distance, hence not providing any significant coverage for these long-haul destinations within the EEA. Save some few exceptions which were discussed in that section, these competitors mostly provide express services only to neighbouring countries are thus very distant substitutes to the Parties with regards to this important attribute. This is valid for EOD and all the more so early morning or pre-noon deliveries. For La Poste and Royal Mail see specifically section 7.2.1.1 analysing the much narrower geographic coverage of these suppliers compared to the Parties.

covered (see Table 7). Indeed, FedEx has the weakest coverage in [...] EEA countries, while TNT is the weakest in [...] EEA countries, UPS and DHL are never the weakest according to this data. When comparing competitors who have a coverage which is significantly inferior to that of the leading company (lagging behind by [...] percentage points), FedEx is significantly weaker in [...] EEA countries, while the other three integrators are broadly comparable (UPS significantly weaker in [...]*, TNT in [...]* and DHL in [...]* EEA countries).

- (655) A similar conclusion can also be reached for the pre-noon coverage figures based on business addresses, as presented in Table 8. The Parties' coverage is, overall, broadly comparable with each other, DHL also has a comparable coverage and FedEx is significantly weaker than the three largest integrators. FedEx is the weakest player alone or with other integrators in [...] of the 29 analysed countries while DHL in [...] countries, UPS in [...] countries and TNT in [...] countries. When comparing competitors whose coverage is significantly inferior to the leading company (lagging behind by [...] percentage points – shadowed cells), FedEx is significantly weaker in a large majority of the EEA countries analysed ([...] out of the 29 EEA countries analysed) while DHL has a weaker coverage in [...] countries, UPS in [...] and TNT in [...]*.
- (656) As regards intra-EEA express services before 10.00 a.m., as shown in Table 9, the coverage of the Parties also overall broadly comparable. UPS has the weakest coverage alone or with other integrators in [...] countries and TNT in [...] countries, DHL is weaker in [...] countries and FedEx in [...] countries. When comparing competitors who have a coverage which is significantly inferior to that of the leading company (lagging behind by [...] percentage points), FedEx is weaker in [...] countries, as are UPS and DHL, while TNT is weaker in only [...] countries.
- (657) The geographic coverage of non-integrated companies, such as La Poste/DPD and Royal Mail/GLS has been extensively analysed in Section 7.2.1.1. Even these two leading non-integrated companies offer a significantly narrower geographic coverage for intra-EEA express services than the Parties - essentially only for some neighbouring countries (with the exception of services offered in France and Spain for La Poste/DPD and the United Kingdom for Royal Mail/GLS; even in those origin countries the services are available for a narrower range of destinations). From the perspective of geographic coverage, La Poste/DPD, Royal Mail/GLS and all other non-integrated companies are very distant substitutes to the Parties.
- (658) The majority of customers regard the extensive geographic coverage in the receiving country as indispensable when negotiating a contract for intra-EEA small package delivery services, while almost half of customers further indicated that coverage of all destination countries as indispensable for them⁶⁴⁸.
- (659) For those customers who require a broad geographic coverage for intra-EEA express services, the Parties and DHL will likely be the closest substitutes.

⁶⁴⁸ See responses to question 30 of Phase I questionnaire to customers, aggregated for all Member States (Q2-Q29).

7.5.1.3. Offering of early morning and noon services

- (660) One of the other differentiating factors which determines how closely small package companies compete on the intra-EEA express market is the offering of earlier delivery services. As has been explained in the market definition section (section 6.2.1.5), the express market can be segmented into pre-10.00 a.m. deliveries, pre-noon deliveries and EOD.
- (661) Earlier delivery services are often used for certain categories of items such as spare parts (for instance in the automotive, electronics or IT industry), components used in production processes, medical or life science items (such as blood samples), R&D samples or time-critical documents (notably in the banking and insurance sector). Some customers use these services more occasionally, when facing imperative requirements as regards the timeframe within which these items have to reach their point of destination.
- (662) When comparing the small package delivery companies' offering of express services, and their relative strength in the two more premium segments (pre-10.00 a.m. and pre-noon), it is particularly evident that the Parties compete very closely against each other.
- (663) Among the companies active on the international intra-EEA express market, the non-integrators such as DPD, GLS or national postal operators, have only a very limited offering of premium earlier services. In case that they provide some, their coverage in terms of destinations is very limited (see section 7.2.1.8).
- (664) When looking at the integrators' geographic coverage of destination countries for earlier services in general, one finds that the Parties are also relatively close to each other (see section 7.5.1.2. and 7.3.2).
- (665) The Parties' strong presence in the earlier segments indicates that for these services they indeed present the main competitors to each other (together with DHL for noon coverage), and that they are amongst the very few companies on the market which have an extensive presence in the full range of express services. The closeness of the Parties on these particular segments is further evidenced by the replies of customers specifically for these segments (as presented in section 7.5.1.1).

7.5.1.4. Qualitative features of the services offered

- (666) 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).

7.5.1.5. Bidding analysis

- (667) The analysis of the bidding data also confirms that UPS and TNT compete closely. The Commission has analysed information from bidding data submitted by the Parties and third parties. For the analysis of closeness of competition, the Parties' databases are the most relevant sources of information as they directly show how often the merging parties compete against each other in bids. For this reason, in the Response to the Statement of Objections, the Notifying party argues that third party bidding databases should be given "*no or very little weight*" (paragraph 4.30). While it is true that

competitive interaction between the merging parties can only be directly assessed through their own bidding databases, data from third parties can also be informative as to the presence of other competitors. All bidding databases reviewed confirm that there is a significant competitive interaction between UPS and TNT. Whilst DHL is the most frequently quoted competitor, both UPS and TNT also frequently compete with each other. Smaller rivals (such as FedEx or non-integrators) have significantly less frequent competitive interaction with the merging parties.

7.5.1.6. UPS Bidding Data

- (668) [Confidential information taken from the Parties' internal bid databases]*^{649 650 651}
- (669) In the Decision opening the proceedings, a number of concerns were expressed about the [...] (see recitals 81 to 90 of the Decision opening the proceedings). In particular, the characteristics of contracts for which UPS and TNT competed could not be properly identified. The Decision also noted that it was not necessary for TNT to be the closest competitor to UPS in order to lead to price effects. If TNT imposes a significant enough constraint on UPS pricing, the merger will remove this constraint and competitive constraints on UPS will be relaxed. In the response to the Decision opening the proceedings, the Notifying party argued that the Commission's concerns about the UPS offers database were "*overstated*" and that the results from the analysis were "*in fact interesting and informative*"⁶⁵².
- (670) In the Statement of Objections, the Commission noted that in view of the results of the market investigation, analysing bidding data without taking into account the characteristics of contracts can be misleading. This is in some ways the point made by the Notifying party in the response to the Decision opening the proceedings when commenting on the bidding analysis presented by FedEx⁶⁵³: "*It is of course hard to interpret these results without knowing which countries were covered by the study: we know that DPD does not compete as strongly in all European countries [...] Simply averaging out its effects across a number of countries where it does not focus its efforts in order to depress its apparent share does not give useful insights into a competitive process [...]*". Geography of origin is one aspect of differentiation in this industry but there are also further segmentations (such as between express and deferred or amongst express products) and destination also matters (as the stronger presence of FedEx for extra-EEA deliveries shows). Ignoring such segmentations when analysing bidding data has the same impact as the one described by the Notifying party itself which is to "*average out*" competitive effects and either "*depress*" or exaggerate them when pooling together all types of bids. This is precisely what the Notifying party does when reporting bidding participation for non-integrators and FedEx whilst taking little account of the content of the contracts for which these companies bid.
- (671) The Commission's concerns were mostly ignored in the Response to the Statement of Objections and the Notifying party simply reported again the results presented during

⁶⁴⁹ [Confidential information taken from the Parties' internal bid databases]*

⁶⁵⁰ [Confidential information taken from the Parties' internal bid databases]*

⁶⁵¹ [Confidential information taken from the Parties' internal bid databases]*

⁶⁵² Notifying party' response to the Decision opening the proceedings, Annex 32.

⁶⁵³ Ibid.

the first phase investigation (paragraphs 4.53 to 4.61). The Notifying party claims that the [Confidential information taken from the Parties' internal bid databases]*^{654 655}

- (672) [Confidential information taken from the Parties' internal bid databases]*⁶⁵⁶
- (673) In the Response to the Statement of Objections (paragraphs 4.32 to 4.40), the Notifying party downplays the inferences that can be drawn from the [Confidential information taken from the Parties' internal bid databases]*.
- (674) The Commission does not consider that these arguments diminish TNT's position as a close competitor to UPS. [Confidential information taken from the Parties' internal bid databases]*. Second, this observation does not invalidate the fact that TNT competes frequently against UPS for a wide range of contracts and is a close competitor in the eyes of numerous customers. Third, using poor proxies of diversion ratios to infer the type of concentration implied in a symmetric merger setting is neither informative nor appropriate (see a discussion of the diversion ratios submitted by the Notifying party in recital (707)). The industry at hand involves differentiation and very asymmetric firms. The asymmetry is particularly pronounced in terms of the presence and competitiveness of rivals in the international intra-EEA express market. Most of the competitors considered by the Notifying party to be effective rivals are actually mostly suppliers of other services than intra-EEA express services that offer intra-EEA express services simply as an add-on to their core products. For contracts with significant intra-EEA express volumes, the Commission's investigation has clearly shown that DHL and TNT are the two main constraints on UPS (FedEx and DPD/GLS are overall weaker constraints).

7.5.1.7. TNT Bidding Data

- (675) TNT provided two databases, [...] *⁶⁵⁷ and [...] *⁶⁵⁸. The bidding data sets of TNT provide some indications about which companies were perceived by TNT as competitors in the bids where TNT was present.
- (676) In the response to the Decision opening the proceedings, the Notifying party provide an analysis of a previous version of the [Confidential information taken from the Parties' internal bid databases]* (with fewer observations than the one analysed by the Commission)⁶⁵⁹. [Confidential information taken from the Parties' internal bid databases]*.
- (677) [Confidential information taken from the Parties' internal bid databases]*
- (678) [Confidential information taken from the Parties' internal bid databases]*
- (679) [Confidential information taken from the Parties' internal bid databases]*
- (680) [Confidential information taken from the Parties' internal bid databases]*
- (681) [Confidential information taken from the Parties' internal bid databases]*

⁶⁵⁴ [Confidential information taken from the Parties' internal bid databases]*

⁶⁵⁵ [Confidential information taken from the Parties' internal bid databases]*

⁶⁵⁶ [Confidential information taken from the Parties' internal bid databases]*

⁶⁵⁷ [...]*

⁶⁵⁸ [...]*

⁶⁵⁹ Notifying party's response to the decision opening the proceedings, Annex 32.

7.5.1.8. DHL Bidding Data

- (682) DHL provided three databases corresponding to various groups of big customers which contain more than 3 500 opportunities in total (from 410 customers), originating mainly in Europe and covering the whole range of DHL products. In most cases, it is possible to identify which competitors were perceived by DHL as the first and second competitors in individual bids it participated.
- (683) More than half of the bids in DHL database cover international express products. The analysis of these bids shows that amongst the DHL opportunities where the name of the first competitor was recorded, UPS and TNT are present in the highest number of bids (UPS in 42% of bids and TNT in 30%), followed by FedEx only in 14%, DPD, GLS and Schenker each less than 1%. This indicates that also from DHL's perspective, the Parties are the main source of competition (in 72% of cases), whereas FedEx and all other companies are significantly lagging behind.
- (684) The opportunities where a second competitor was recorded allow getting a picture of the frequency with which the Parties met. Amongst the bids for international express services where UPS was perceived as the first competitor to DHL, TNT was mentioned second in 58% of cases, whereas amongst the opportunities where TNT was perceived as the first competitor to DHL, UPS was the second in 76% of these bids. This shows that the Parties were competing for the same contracts in the majority of cases where a second competitor was mentioned - a further indication of how close competitors the Parties are.

7.5.1.9. Customer switching on the basis of exit interviews

- (685) [Confidential information taken from TNT's internal churn database]*^{660 661 662}
- (686) In the Statement of Objections the Commission made a number of observations related to limitations of the survey analysis, which are relevant for the inferences and conclusions that can be drawn from it. [Confidential information regarding TNT's internal churn database]*
- (687) [Confidential information regarding TNT's internal churn database]*⁶⁶³
- (688) Notwithstanding the limitations mentioned in recitals 685, 686 and 687, the Commission calculated⁶⁶⁴ and presented in the Statement of Objections the proportion of switching customers to each competitor, as well as the proportion weighted by revenue, separately for the group of customers who had shipped express intra-EEA with TNT⁶⁶⁵ and for the group of customers who had shipped intra-EEA parcels and documents⁶⁶⁶, [Confidential information regarding TNT's internal churn database]*⁶⁶⁷.

⁶⁶⁰ Notifying party's response to the decision opening the proceedings, paragraph 208.

⁶⁶¹ Notifying party's response to the decision opening the proceedings, paragraphs 209-215.

⁶⁶² [Confidential information taken from TNT's internal churn database]*

⁶⁶³ Notifying party's response to the decision opening the proceedings, footnote 57.

⁶⁶⁴ The Commission used the raw data provided by TNT in its reply of 6 September 2012 to the Commission request for information Q18.

⁶⁶⁵ [Confidential information regarding TNT's internal churn database]*

⁶⁶⁶ [Confidential information regarding TNT's internal churn database]*

⁶⁶⁷ This was deemed more appropriate than using the data for the first quarter of 2011 since a full year revenue data would capture possible seasonality.

(689) [Confidential information taken from TNT's internal churn database]*⁶⁶⁸

Table 11: [Confidential information taken from TNT's internal churn database]*

[...]*

Source: [...]*

(690) [Confidential information taken from TNT's internal churn database]*

(691) [Confidential information taken from TNT's internal churn database]*. However, the Commission noted in the Statement of Objections that there are a number of issues which call for caution when relying on the exit interviews results to draw general conclusions about the strength of the competitive constraint exercised by the companies mentioned in the survey across the EEA countries.

(692) [Confidential information regarding TNT's internal churn database]*⁶⁶⁹

(693) [Confidential information taken from TNT's internal churn database]*⁶⁷⁰

(694) The Commission concluded in the Statement of Objections that the above concerns (recitals 692, 693) together with the data limitations mentioned in recitals 685, 686 and 687 affect the weight which the Commission can attach to the results of the exit interviews for the purpose of assessing the competitive constraint that competitors exercise on TNT as regards small and ad hoc customers.

The Notifying party's response to the Statement of Objections regarding customer switching and exit interviews

(695) In its response to the Statement of Objections the Notifying party refers to some of the concerns raised by the Commission arguing that for most part the Commission's observations are unwarranted.

(696) [Confidential information regarding TNT's internal database]*⁶⁷¹

(697) Furthermore, the Notifying party refers to the response rate of the survey, arguing that by industry standards a response rate of approximately [Confidential information regarding TNT's internal churn database]*% is quite high. A research agency asked by TNT to comment on the response rate confirmed that the response level is reasonable. While the response of the Notifying party and the supporting evidence it presented suggest that, given the nature of the survey, a response rate of [Confidential information regarding TNT's internal churn database]*% is to be expected and can be considered reasonable, there is no explanation regarding the possible presence or lack of biases and whether the representativeness of the sample can be safely assumed, which is the point made by the Commission in the Statement of Objections.

(698) Indeed, in its email to the research agency TNS-Nipo, TNT asked the research agency to confirm TNT arguments demonstrating that the non-response rate of the TNT internal survey cannot be considered high but rather that, given the circumstances of the survey, the response rate is actually very high.⁶⁷² However, TNT did not seek the advice of the

⁶⁶⁸ The percentages do not add up to 100 since some customers have mentioned a number of competitors.

⁶⁶⁹ [Confidential information regarding TNT's internal churn database]*

⁶⁷⁰ [Confidential information taken from TNT's internal churn database]*

⁶⁷¹ [Confidential information regarding TNT's internal churn database]*

⁶⁷² Notifying party's response to the Statement of Objections, Annex 7.

research agency and does not itself explain why there could not be a bias or that such a bias is expected to be insignificant. In other words, in order for the conclusions from the survey to apply to the whole population of customers who have switched away from TNT, the group of customers who responded must not be systematically different from the group of customers who did not respond. It is not clear whether this has been explored by TNT and whether it is true in the present survey.⁶⁷³

(699) [Confidential information regarding TNT's internal churn database]*

(700) [Confidential information taken from TNT's internal churn database]*⁶⁷⁴

(701) Based on the above, the Commission maintains its view that the results from the TNT exit interviews have to be interpreted with caution, accounting for the different limitations discussed in the present section. The Commission, however, does not ignore the evidence from the TNT interviews, as claimed by the Notifying party in the response to the Statement of Objections⁶⁷⁵. The Commission takes account of the relative ranking of competitors, which is consistent with the rest of the evidence from the market investigation.

7.5.1.10. Conclusion on closeness of competition

(702) The body of evidence presented in this section all leads to a conclusion that UPS and TNT are close competitors in the intra-EEA express market.

(703) The analysis also shows that DHL is a close competitor to the Parties.

(704) The question of which of TNT, UPS and DHL are *the* closest competitors is less relevant since all three companies offer a comparable service in terms of geographic reach and coverage, premium services offerings, services and quality features and, in any event are all three considered as close competitors by their customers, standing out from all other rivals. In such a narrow group of three companies with similar characteristics compared to all others, each of TNT and UPS are indeed considered as close competitors.

(705) In the response to the Statement of Objections (paragraphs 4.5 to 4.18), the Notifying party raises a number of concerns about the Commission's analysis of closeness of competition. First, the Commission failed "*to demonstrate and quantify how [the] perceived differentiation affects the representativeness of market shares as a tool for competitive assessment*" (paragraph 4.9). Second, the Commission not only failed "*to investigate and capture the diversion ratios between the market players on the relevant national markets*" but it also chose "*to ignore the estimated diversion ratios that the Parties have provided on the basis of their bidding data*" (paragraph 4.10). Finally, the Commission should have quantified the number of customers regarding UPS and TNT as their first choices, who would not see DHL as a viable alternative and who are locked-in (paragraph 4.15). According to the Notifying party, this is the only group of customers that may be affected by the merger as all other customers would switch to

⁶⁷³ The Commission does not contest that, given the circumstances of the survey, the response rate might be reasonable, albeit low. However, given that non-response might not be random, it is expected that the possible presence of non-response bias is explored and, if necessary and feasible, tackled (through appropriate weighting, for instance).

⁶⁷⁴ [Confidential information taken from TNT's internal churn database]*

⁶⁷⁵ See Notifying party's response to the Statement of Objections, for instance paragraph 1.23.

DHL and "there is no reason to believe that post merger the Parties' current customers would accept higher prices" (paragraph 4.18).

- (706) Regarding market shares and differentiation, the Notifying party's arguments are incorrect. First, most of the Commission's analysis is in fact precisely directed at the issue of differentiation. As has been extensively explained, participation in bids (as well as winning probability regarding FedEx) is dependent on the bid's characteristics and the types of services the customer mostly needs. The market shares presented by the Notifying party include competitors that are barely active in the express intra-EEA market and treat all competitors as equally strong. The bidding datasets reviewed by the Commission have clearly shown that a number of these suppliers are only a valid competitive alternative for specific types of contracts ([Confidential information taken from the Parties' internal bid and churn database]*). In addition, the Commission has analysed and presented a set of consistent qualitative evidence in this section demonstrating that the Parties and DHL are offering products which are close substitutes and that customers also see these three companies as the closest substitutes, to a much greater extent than FedEx and non-integrated companies. Hence, contrary to the Notifying party's claim, the Commission has shown why the market shares presented in the Form CO do not adequately reflect the competitive constraint exerted by the various rivals.
- (707) Second, the Notifying party's claim that the Commission failed to investigate diversion ratios and ignores those estimated by the Notifying party is misplaced. It is worth noting that the Notifying party has in fact not calculated diversion ratios but rather a weak proxy which relies on the assumption that the frequency of participation in bids by competitors measures the share of express volumes that would switch from UPS to competitors in case of a price increase.⁶⁷⁶ [Confidential information taken from the Parties' internal bid and churn databases]*⁶⁷⁷. Indeed, it is true that DPD has a presence in international intra-EEA express services from France (although only limited to pick-up from large agglomerations). However, as explained in recitals 270 and 271, its focus is mostly on small and medium customers (in terms of shipped volumes) who use its domestic express or international deferred services and, due to their reluctance to multi-source, are also inclined to use its international express services⁶⁷⁸.
- (708) In their response to the Statement of Objections, the Notifying party puts forward some additional criticism of the analysis of closeness of competition. The Commission considers that these points are misplaced for the following reasons.
- (709) First, the Notifying party suggests that UPS and TNT may not be close competitors as they have a "fundamentally different profile" (paragraph 4.25). The Notifying party stresses that TNT is in addition to small packages active in freight business, actively markets this combined service offering, and is said to be competing with freight

⁶⁷⁶ Diversion ratios are a measure of the percentage loss of volumes from product A to product B in response to a price increase of A (all else being equal). The measure presented by the Notifying party as a diversion ratio in Paragraph 4.54 of the response to the Statement of Objections is the (unweighted) frequency of participation in bids of the various competitors. Counting the number of bids in which DHL participated against UPS is not equivalent to measuring the share of UPS's volumes that would effectively be lost by UPS to DHL in case UPS raised its prices by 5%.

⁶⁷⁷ [Confidential information taken from the Parties' internal bid and churn databases]*

⁶⁷⁸ [Confidential information taken from the Parties' internal bid and churn databases]*

forwarders to a larger extent. [Details regarding the Parties' market position]*. The "fundamentally different profile" argument ought to be dismissed. Both UPS and TNT are integrators which, in the intra-EEA express market, are offering similar services. The fact that TNT offers additional freight services in addition to small package delivery, that it is [...] in other small package services (such as domestic), or [...] in extra-EEA services, does not invalidate the fact that *within* the intra-EEA express small package market, TNT and UPS closely compete, as demonstrated throughout by various pieces of evidence in this section.

- (710) Second, the Notifying party alleges that the Commission is employing a "*binary approach*" to the closeness of competition analysis, in order to label a particular competitor to be either "in" or "out" from the competitive equation (paragraph 1.14). This is obviously not correct, as the analysis takes into account the available pieces of evidence in view of assessing how close substitutes the Parties and other particular companies are to UPS and to TNT.
- (711) Third, the Notifying party wrongly alleges that the Statement of Objections is "*seeking to assess alleged closeness of competition solely in the context of long-haul intra-EEA express deliveries*" (paragraph 1.20). This is again incorrect. As is done in this Decision, the Statement of Objections did assess closeness of competition on the basis of the market of intra-EEA express deliveries, not only the long-haul segment.

7.5.2. *The merger will remove a significant constraining force on the market in a highly concentrated market*

7.5.2.1. The impact of the UPS and TNT merger

Integrators vs. non-integrators: the merger reduces the choice from "4 to 3"

- (712) The analysis presented above has established that integrators face limited competition from non-integrators in the intra-EEA market. First, integrators have an air network that allows them to supply intra-EEA express services with a high speed of delivery between distant points (defined as above [500-1000]*). For those services, non-integrators are not competitive because they can only rely on third-party air capacity which is a very imperfect substitute to the integrators' offering. Hence, for services involving long-haul intra-EEA express delivery, the merger will reduce the choice of suppliers from "4 to 3".
- (713) Second, for intra-EEA express services as a whole (for both long and short distances), integrators offer a high quality service (reliability, track and trace, late pick-up, security, special handling...). Customers value these features highly and for some customers, such service features are even a necessity in view of the nature of the shipped product (such as high value products, products that are important in a production chain or dangerous products). Hence, for customers with intra-EEA express delivery needs that also value high quality services (whatever the lane), non-integrators constitute a weak competitive alternative and therefore, the merger will reduce their choice of suppliers from "4 to 3".
- (714) Moreover, integrators generally have a superior geographic coverage or offering of lanes/countries covered from a certain origin. Generally, this applies both for long-haul destinations and also for short-haul destinations where in theory such services could be reached by road within next day. Even leading non-integrators such as La Poste/DPD and Royal Mail/GLS often offer intra-EEA express services only to *some* nearby countries, depending on their networks. Furthermore, non-integrators have generally

less capability to offer premium noon or morning services. This all means that non-integrators are not a credible option for customers needing intra-EEA express services to those destinations or committed earlier times which are not offered by those non-integrators. In any event, for all the reasons mentioned, they are only a weak constraint to the integrators in the intra-EEA express market.

The weaker constraint from FedEx: the merger reduces the choice from "3 to 2"

- (715) As has been extensively discussed, the fourth integrator, FedEx suffers in fact from a number of weaknesses that limit its ability to constrain significantly the merged entity and DHL. FedEx has a limited deferred and domestic offering in the EEA (except in the United Kingdom and more recently, it made acquisitions in France and Poland, and is only starting to develop it in more countries). Its overall smaller size also implies that FedEx has an air network consisting of fewer flight points (lesser density) and smaller planes than its competitors [Details on FedEx's operations and cost structure]* FedEx is also unable to offer express deliveries in certain areas due to its weaker coverage, having a significantly weaker geographic across the EEA. This all the more applies to services with earlier committed delivery times.
- (716) As the market investigation has also shown, FedEx is a stronger competitor for customers with extra-EEA deliveries needs. Whilst FedEx participates in bids for both extra-EEA and intra-EEA services, it competes more frequently for contracts with a greater content of extra-EEA deliveries and it is more likely to win contracts with a greater content of extra-EEA deliveries. Its weaker coverage and less competitive pricing are the cause of FedEx losing bids in the EEA (or parts of bids).
- (717) The implications of the analysis of FedEx's role and position are that for some customers, it does not constitute a competitive alternative to other integrators (such as customers who require a certain geographic coverage for their shipments, or customers that need earlier intra-EEA deliveries on certain lanes where FedEx is not present, or customers who wish to extensively purchase domestic or deferred services the same supplier as for intra-EEA express services). Moreover, FedEx is often unable to offer prices that are competitive enough for intra-EEA express services. Hence, even when FedEx competes, it constitutes a weaker constraint due to its very high marginal costs.
- (718) There are therefore customers for whom the merger will reduce the number of alternatives from "3 to 2" given that FedEx is either not able to fulfil the customer's requirements or, even if it is able to supply the customer needs, it may not be competitive enough by the many internal quotes from FedEx. In any event, FedEx can be characterised as a much more distant substitute to the other remaining integrators than those are to each other, and as a weaker competitive constraint on them.
- (719) These conclusions essentially apply to customers located in any EEA country. While markets have been defined as national and FedEx's presence can be greater in certain countries, customers shipping from any given country may wish to send their packages to a multitude of destinations. Hence, it is not only the pick-up ability in a given country that matters in order to be competitive but also the ability to deliver in other countries. For example, if FedEx has a dense coverage in the United Kingdom but a very weak coverage in, say, Scandinavia, customers in the United Kingdom that need to ship express parcels to Scandinavia will not view FedEx as an alternative despite its ability to pick-up the parcel anywhere in the United Kingdom. In other words, on any given lane, it is the presence and scale at both ends that will determine the competitiveness of

an integrator. More generally, it is the ability to offer a wide scope of services across countries through a wide and dense network.

- (720) Reducing the number of competitors from 4 to 3 (with a weaker third player) or reducing the number of competitors from 3 to 2 will lead to a significant impediment of competition – unless counterweighed by strong efficiencies or other countervailing factors. Before the merger, UPS's prices on express intra-EEA services are constrained by DHL, TNT and to a lesser extent by FedEx. By removing a close competitor (even if not the largest one), the merger will relax one of the important pricing constraints that prevailed before the merger. The expected consequences of such concentration are discussed below, both in theory and in the particular circumstances of this industry.

Likely impact of the merger on prices

- (721) In assessing whether the loss of direct competition as a result of the merger would significantly impede effective competition in the market and lead to consumer harm, the Commission takes into account, on the one hand, the likelihood that the merger will produce anticompetitive effects in the absence of efficiencies and other countervailing factors and, on the other hand, the likelihood that the anticompetitive effects would be offset by such countervailing factors (such as buyer power or entry). The net effect of a merger on competition and consumer welfare will depend on the characteristics of the particular market and the dynamics of competition.
- (722) As regards the likelihood that the merger would lead to higher prices in the absence of offsetting efficiency gains, static economic models of oligopolistic competition predict that in mergers between companies producing imperfect substitutes the merged firm would have an incentive to increase prices *post* merger⁶⁷⁹. This incentive arises from the ability of the merged firm to recapture, through the sales of the merger partner's product, some of the sales that would otherwise be lost as a result of such price increase. This effect is stronger if the merger brings together close competitors and/or if the concentration on the market is already high (that is if there will be few remaining rivals)⁶⁸⁰. This reasoning extends to markets where prices are determined through bilateral negotiations/bidding-like processes. In a context where the merging firms are the first and second choices for some customers, and suppliers are aware of that fact, price effects will be targeted to such customers. However, when there is some uncertainty about the precise rankings of the merging firms, merger effects are likely to spread across a wider group of customers⁶⁸¹. The incentive of the merging parties to increase prices also limits the competitive pressure on the other firms in the market. In general, these models predict that the equilibrium effect on the market involves higher

⁶⁷⁹ It is often useful to think of the full effect of the merger on competition as the result of the effect on the incentives of the merging parties keeping the behaviour of the remaining competitors unchanged and the effect on the actions of these competitors.

⁶⁸⁰ This conclusion does not hold in the very specific context of so-called Bertrand models which predict perfectly competitive outcomes (prices at marginal cost) even with only two firms operating in the market. This outcome depends on rather extreme assumptions, such as the firms being identical, selling homogeneous products at identical marginal cost and facing no capacity constraints. Relaxing any of these extreme assumptions changes the prediction that perfectly competitive prices can arise with just two competitors. Even in markets where prices are set through bidding-like processes, it is only under very specific conditions that significant further concentration through a merger may have limited impact on prices (such as "winner-takes-all" bids, lumpy contracts, easy entry,...).

⁶⁸¹ [Confidential information taken from the Parties' internal bid databases]*

prices and lower output, though the magnitude of the effect would depend on the nature of competition.

- (723) Indeed, the Horizontal Merger Guidelines specify that "*mergers in oligopolistic markets involving the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of the oligopoly, also result in a significant impediment to competition. The Merger Regulation clarifies that all mergers giving rise to such non-coordinated effects shall also be declared incompatible with the common market*⁶⁸². Paragraph 25 of the Merger Regulation No 139/2004 further clarifies that: "*The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned*". Indeed, the Transaction would eliminate an important competitive force on the market, and would relax competition which existed before between TNT and UPS. In addition, as stated in the Horizontal Merger Guidelines, non-merging firms, in particular DHL, can also benefit from the reduction of competitive pressure that results from the merger, since the merged firms' price increase may switch some demand to the rival firms, which in turn may find it profitable to increase their prices, leading to higher overall prices for intra-EEA express deliveries after the takeover of TNT by UPS⁶⁸³.
- (724) In the Response to the Statement of Objections and at the Oral Hearing, the Notifying party strongly argued against the presumption that prices would rise *post* merger (absent any countervailing factors), in particular due to the presence of DHL. Any price increases would be "*disciplined*" by DHL (paragraph 4.97 of the Response to the Statement of Objections) as the company has both the "*ability and incentive to heavily undermine a potential price increase by the Parties*" (paragraph 4.103 of the Response to the Statement of Objections). Yet, the Notifying party recognizes that – absent any countervailing factors – [Results of the price concentration analysis undertaken by the Parties]*.
- (725) In the Statement of Objections, the Commission simply states the presumption that in a highly concentrated market such as the intra-EEA express market, significant price effects should be expected by the removal of a significant and close competitor unless there are countervailing factors or any other evidence pointing to the contrary. [Results of the price concentration analysis undertaken by the Parties]*. The price concentration study discussed in Section 7.5.2.2 below quantifies the extent to which prices of intra-EEA express services (end-of-day) vary depending on the number of competitors across lanes and confirms the presumption (in this industry) that a reduction in the number of rivals leads to higher prices. Contrary to the claim that the Commission has not examined the magnitude of the price effect (paragraph 4.105 of the Response to the Statement of Objections), the Commission has in fact carefully assessed and reviewed the empirical evidence linking prices with the degree of concentration in this market.

⁶⁸² Paragraph 25 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (The Horizontal Merger Guidelines) OJ C 031, 05/02/2004.

⁶⁸³ See paragraph 24 of the Horizontal Merger Guidelines.

The empirical evidence based on real historical pricing data of the Parties (more than a million pricing points) analysed in a price-concentration analysis is clear: reducing the number of competitors, increases prices and it is also important to note that the analysis does take into account the presence of DHL and the pricing pressure it exerts on the Parties pricing behaviour. Indeed, the observed prices used for the analysis are the result of the competitive interaction between the Parties and their rivals – in particular DHL. The conclusion that prices are higher on lanes where fewer competitors operate is empirically validated, even where DHL has a strong coverage. On lanes where only two integrators operate (DHL and UPS for example), prices will be higher on average compared with lanes where three integrators operate (DHL, UPS and TNT for example).

- (726) In the Response to the Statement of Objections (paragraphs 4.111 to 4.113), the Notifying party contests on two main grounds the fact that the price-concentration analysis supports the Commission's presumption: first, the Commission's own results are based on a flawed methodology which biases upwards the potential price rises; Second, [Results of the price concentration analysis undertaken by the Parties]*. The first point will be discussed in the next section focusing on the price-concentration analysis. As regards the second point, it is worth noting that it implicitly acknowledges that the empirical evidence put forward by the notifying party confirms that prices are higher on more concentrated lanes, even though a strong DHL is present. Also, the Notifying party suggested that DHL has incentives to grow on the market, referring to DHL's publically made growth strategy. However, as discussed in section 7.4, such growth prospectively refers to "*margin acceleration*". But in any case, the Commission's assessment of the merger is based on a wide range of quantitative (price-concentration, bidding, market shares) and qualitative (internal documents, market investigation) evidence. All these elements taken together and discussed more specifically in this Decision indicate that, leaving aside any efficiency gains, the elimination of competition between TNT and UPS is likely to result in higher prices even in the presence of DHL and other fringe competitors⁶⁸⁴. Further the Commission has analysed the presence of countervailing factors such as buyer power or ease of entry that could counterweigh the expected price rise. The extent of efficiencies and likelihood of pass-through is also evaluated in section 7.10.3.

7.5.2.2. The Notifying party's price concentration study

Description of the methodology

- (727) During the proceedings, the Notifying party submitted five econometric studies assessing the impact of the number of competitors on prices across lanes with the aim to evaluate potential merger effect on lanes where the merger will reduce the number of suppliers.⁶⁸⁵ [Confidential information regarding the price concentration analysis undertaken by the Parties]*^{686 687 688}

⁶⁸⁴ See Paragraph 37 of the Horizontal Merger Guidelines.

⁶⁸⁵ "Price concentration analysis for UPS and TNT end of day services" (27 September 2012), "Analysis of the likely effects of the Transaction" (4 October 2012), "Further price concentration analysis" (26 October 2012), "Price concentration analysis" (Annex 27 to the response to the Statement of Objections) and "Additional price concentration results for UPS and TNT, end of day services" (16 November 2012).

⁶⁸⁶ [Confidential information regarding the price concentration analysis undertaken by the Parties]*

⁶⁸⁷ [Confidential information regarding the price concentration analysis undertaken by the Parties]*

⁶⁸⁸ [Confidential information regarding the price concentration analysis undertaken by the Parties]*

- (728) [Confidential information regarding the price concentration analysis undertaken by the Parties]*
- (729) It is worth noting that the degree of concentration and the presence of competitors in the price-concentration studies solely rely on coverage data. As discussed above, coverage is defined as the percentage of business addresses that are covered by a supplier for the express, EOD delivery of a small package in a given country. This measure of coverage is therefore an "inbound" coverage measure, independent of where the package originates from. Coverage is an important measure of presence as it measures a supplier's ability to reach customers effectively (as revealed by the market investigation, companies monitor and evaluate the coverage of their competitors). It however only informs on one aspect of the network, in this case, delivery – irrespective of the country of origin. As the market investigation has revealed, coverage data and market share data sometimes depict very different pictures in the sense that a company may have a dense delivery coverage but achieve a relatively limited market position. This may be due to customers in that particular country wishing to send small packages to areas that are not covered (or not significantly) by the company. Hence, the ability to deliver *to* customers in a country (as measured by coverage) and the ability to compete for customers wishing to send packages *from* that country (as measured by market shares) are not necessarily highly correlated. In this respect, when interpreting the results of the price concentration studies, it should always be kept in mind that the measure of concentration used in the analysis may not appropriately reflect the extent of competitive constraints exercised in a given country, and may in fact overestimate companies with a very weak market position.
- (730) In the Statement of Objections, the Commission discussed a series of methodological and implementation problems associated with the studies submitted by the Parties and presented some alternative results which aim at addressing the issues. [Confidential information regarding the price concentration analysis undertaken by the Parties]*^{689 690 691}
- (731) [Confidential information regarding the price concentration analysis undertaken by the Parties]*. The results of each of the Notifying party's studies are discussed in greater detail hereafter.
- (732) The first study submitted by the Notifying party on 27 September 2012 concluded that [Results of the price concentration analysis undertaken by the Parties]*^{692 693}
- (733) [Confidential information regarding the price concentration analysis undertaken by the Parties]*
- (734) [Confidential information regarding the price concentration analysis undertaken by the Parties]*⁶⁹⁴

⁶⁸⁹ [...]*

⁶⁹⁰ [Confidential information regarding the price concentration analysis undertaken by the Parties]*

⁶⁹¹ [Confidential information regarding the price concentration analysis undertaken by the Parties]*

⁶⁹² [Results of the price concentration analysis undertaken by the Parties]*

⁶⁹³ [Results of the price concentration analysis undertaken by the Parties]*

⁶⁹⁴ [Confidential information regarding the price concentration analysis undertaken by the Parties]*

- (735) The third econometric study submitted by the Notifying party on 26 October 2012⁶⁹⁵ argued that the Commission's model suffered from a "*technical problem*". [Confidential information regarding the price concentration analysis undertaken by the Parties]*^{696 697}
- (736) The fourth econometric study was submitted as part of the Response to the Statement of Objections.⁶⁹⁸ [Confidential information regarding the price concentration analysis undertaken by the Parties and respective results]*^{699 700}
- (737) The fifth econometric study was submitted by the Notifying party on 16 November 2012.⁷⁰¹ [Confidential information regarding the price concentration analysis undertaken by the Parties and respective results]*
- (738) [Confidential information regarding the price concentration analysis undertaken by the Parties]*. In short of this richer data structure, it cannot be excluded that the true price effects are larger than those estimated by the submissions of the Notifying party, and are indeed closer to those presented in the Statement of Objections.
- (739) [Confidential information regarding the price concentration analysis undertaken by the Parties and respective results]*.⁷⁰² Confidential information regarding the price concentration analysis undertaken by the Parties and respective results]*⁷⁰³. The table below summarizes the Commission's results and the latest results presented by the Notifying party. As can be seen, in most countries (though not all), the price effects estimated by the Commission exceed (sometimes significantly) those presented by the Notifying party. The Commission's estimated price increases vary between [0-5]*% in Luxembourg up to [10-20]*% in Malta. In general, it can be observed that price rises are higher in Eastern Europe including the Baltic States (Slovenia, Lithuania, Bulgaria, Romania, Estonia, Latvia, Poland, Slovakia) as well as Scandinavia (Finland and Sweden).

⁶⁹⁵ See reference in footnote 685.

⁶⁹⁶ [Confidential information regarding the price concentration analysis undertaken by the Parties]*

⁶⁹⁷ [Confidential information regarding the price concentration analysis undertaken by the Parties]*

⁶⁹⁸ Notifying party's response to the Statement of Objections, Annex 27.

⁶⁹⁹ [Confidential information regarding the price concentration analysis undertaken by the Parties and respective results]*

⁷⁰⁰ [Confidential information regarding the price concentration analysis undertaken by the Parties and respective results]*

⁷⁰¹ See reference in footnote 685.

⁷⁰² [Confidential information regarding the price concentration analysis undertaken by the Parties and respective results]*

⁷⁰³ More technical details and explanations can be found in the Annex.

Table 12: Implied weighted average price impacts by origin (%) – Commission Results and Notifying party's results

origin	UPS (Commission estimates)	TNT (Commission estimates)	Weighted average Price increase (Commission estimates)	Price Increase estimated by the Notifying Party (16 November 2012)
MT	[10-20]*%	[5-10]*%	[10-20]*%	[...]*%
SI	[10-20]*%	[5-10]*%	[5-10]*%	[...]*%
LT	[10-20]*%	[5-10]*%	[5-10]*%	[...]*%
BG	[10-20]*%	[5-10]*%	[5-10]*%	[...]*%
RO	[10-20]*%	[0-5]*%	[5-10]*%	[...]*%
FI	[5-10]*%	[0-5]*%	[5-10]*%	[...]*%
SE	[5-10]*%	[0-5]*%	[5-10]*%	[...]*%
EE	[5-10]*%	[0-5]*%	[5-10]*%	[...]*%
GR	[5-10]*%	[0-5]*%	[5-10]*%	[...]*%
LV	[10-20]*%	[0-5]*%	[5-10]*%	[...]*%
SK	[5-10]*%	[0-5]*%	[5-10]*%	[...]*%
PL	[5-10]*%	[0-5]*%	[5-10]*%	[...]*%
IT	[5-10]*%	[0-5]*%	[0-5]*%	[...]*%
GB	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%
AT	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%
FR	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%
HU	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%
PT	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%
DK	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%
ES	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%
DE	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%
CZ	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%
NL	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%
BE	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%
LU	[0-5]*%	[0-5]*%	[0-5]*%	[...]*%

Note: [Results of the price concentration analysis undertaken by the Parties]*

(740) Overall, the results from the price-concentration analysis indicate that the merger will most likely lead to price increases that could be particularly significant. Given the nature of competition in this industry it is likely that rival firms and, in particular, DHL would have the ability and incentive to accommodate price increases of the merging parties⁷⁰⁴. This is supported by the results of the price concentration analysis, which indicate that *post* merger price increases would not be defeated by more intense competition by the remaining competitors. Therefore, overall prices for intra-EEA express deliveries are expected to be higher after the takeover of TNT by UPS.

7.6. Barriers to entry and to expansion are high on the international intra-EEA express markets

(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

⁷⁰⁴ See also paragraphs 24-25 of the Horizontal Merger Guidelines.

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 outsourcing⁷⁰⁵.

7.6.1. *No entry of a major player occurred over the last 20 years*

- (742) Since 1992, when FedEx re-entered the intra-EEA express market for small packages there has been no new entrant or an expansion of an existing player into this network market. Despite being one of the major players on the US market and having the financial capabilities to make the indispensable upfront investments, after two decades, FedEx has not yet reached the competitive level of the three incumbent integrators UPS, TNT and DHL, as explained in Section 7.3. Indeed, as stated by Kuehne+Nagel: "*Any new network requires a critical mass in order to cover its cost. This will take years and absorb billions of EUR of investment.*"⁷⁰⁶
- (743) The vast majority of competitors observe that there has been no recent entry or expansion in any country, as explained by La Poste/DPD: "*Whilst there have been no pan Intra-EEA or Extra-EEA entries or expansions there have been a number of domestic acquisitions*"⁷⁰⁷. Such acquisitions, as opposed to UPS's claims in its response to the decision opening proceedings, cannot be considered as entries or expansions as such within the meaning of the Horizontal Merger Guidelines. Indeed external growth differs from organic growth as it is based on the availability of companies or assets to be bought while the latter depends solely on the will and means of the potential entrant. In addition, buying existing assets does not create new competition on the market, i.e. does not inject additional capacity into the market, but rather consists of acquiring and enjoying the market position built up by the assets' previous owner. An actual new entrant on the market has to establish its own market position by investing, innovating and canvassing new customers. A true new entrant will run financial risks which the acquirer of an existing organization will typically not face.
- (744) All the examples of entries mentioned by UPS and most of the ones referred to by the respondents to the market investigation are acquisitions of existing assets or conclusions of partnerships between small package companies. As already explained in the previous paragraph, behaviour that does not lead to the creation of a new competitive force on the market cannot be seen as entry on the market within the meaning of paragraphs 68 *et seq.* of the Horizontal Merger Guidelines. Moreover, according to the majority of the respondents to the market investigation, these entries/expansions, which were in reality acquisitions, on the intra-EEA market were not successful⁷⁰⁸ and did not challenge the four integrators' dominance on the intra-EEA market. This is a first indication that, contrary to UPS's claims, barriers to entry are rather high.
- (745) As to the creation of partnerships, the few examples of such a cooperation prove that it does not succeed. Indeed, for instance, FedEx cooperated with [...] but had to cease

⁷⁰⁵ See Paragraph 68 and following of the Horizontal Merger Guidelines.

⁷⁰⁶ Kuehne+Nagel's response to question 60 of the questionnaire to competitors - Phase I.

⁷⁰⁷ La Poste's response to question 20 of the questionnaire to competitors R30 – Phase II.

⁷⁰⁸ See responses to question 21 of the questionnaire to competitors R30 – Phase II.

shortly thereafter and as explained in Section 7.2.3, [Confidential information regarding efficiencies expected to arise from the Transaction]*⁷⁰⁹.

(746) Consequently, the absence of any large-scale entry/expansion on the intra-EEA express market since 1992 leading to the emergence of a pan-European provider capable of representing a real alternative to the main players indicates that barriers to entry on this market are very high.

7.6.2. *Barriers to entry/expansion on the intra-EEA express markets have to be considered both under a product and a geographic dimension*

(747) UPS claims: "*Thus it can be seen that for existing operators the barriers to entry onto neighbouring markets are far from insurmountable.*"⁷¹⁰ This statement is to a large extent contradicted by the outcome of the market investigation, whatever the dimension of the entry or expansion. In the present case, entry or expansion has to occur along two dimensions in order to build a credible intra-European express network:

- product offering, i.e. entry/expansion into the express small package market and
- geographic scope, i.e. entry/expansion into a vast number of Member States to be able to provide intra-EEA small package deliveries
- a newcomer has to simultaneously invest into upgrading speed and geographic coverage.

(748) As concerns the product offering, when asked if a supplier offering time-committed delivery services could switch to a more demanding category of delivery and market these speedier services in the short term without incurring significant additional costs or risks, the vast majority of competitors replied negatively⁷¹¹. As explained by La Poste/DPD, starting to offer more demanding delivery services will mean significant costs: "*If a supplier wishes to switch from deferred to express, the adjustment to the network is likely to incur additional cost and risks. The costs and risks are higher for international transportation. For example international road or air hubs are likely to be required [if] it is not already available.*"⁷¹² Also FedEx considers that: "*The provision of next day delivery services with time certain commitments in the EEA requires much more intensive logistic and transportation capacity than is required for domestic express deliveries. In order to provide an earlier time delivery commitment in the intra-EEA markets a service provider must invest in a highly efficient integrated distribution network.*"⁷¹³

(749) From a geographic entry/expansion perspective, the intra-EEA express services are necessarily cross-border in nature, so an entry/expansion would necessarily entail vast investments not only in the origin countries but into multiple destination countries, and need to ensure an efficient air and road connection between those countries. Indeed, the vast majority of competitors considers that a company which has already domestic small package delivery operations in a given country of the EEA could not switch to international intra-EEA small package delivery operations from the same country and

⁷⁰⁹ UPS's submission dated 4 May 2012.

⁷¹⁰ Notifying party's response to the decision opening the proceedings, paragraph 276.

⁷¹¹ See replies to question 25 of the questionnaire to competitors – Phase I.

⁷¹² La Poste's response to question 25 of the questionnaire to competitors – Phase I.

⁷¹³ FedEx' response to question 25 of the questionnaire to competitors – Phase I.

market these international services in the short term without incurring significant additional costs or risks⁷¹⁴. Indeed D&D express states: "A lot of investments are necessary to extend a domestic network to international."⁷¹⁵ La Poste explains that: "In order for domestic operators to effectively enter the intra-EEA cross border market, in the short term, it would require substantial investment in the development of an international infrastructure (finding air transport solutions, ground solutions, setting up a dedicated commercial force, finding subcontractors and/or partners for collection & deliveries and line hauls across EEA)"⁷¹⁶.

(750) Barriers to entry are extremely high not only for companies wishing to establish a pan-European express network, they are also high for firms which are already active on the small package market and wish to move towards a neighbouring segment. The outcome of the market investigation contradicts UPS's claims since a large part of the respondents qualifies the barriers to entry on the intra-EEA market as high or very high,⁷¹⁷ requiring in particular a sophisticated and costly infrastructure.

7.6.3. *A new entrant on the intra-EEA express market would have to build up a sophisticated infrastructure all across the EEA*

(751) A majority of the market players identified numerous assets that need to be invested in, in order to compete effectively with the integrators on the intra-EEA express market. Owning them will require time and resources and therefore constitute a barrier to entry on the intra-EEA express market.

(752) To set up a network in order to compete with the integrators on the intra-EEA express market, a new entrant would have to establish a widespread infrastructure present in almost all the EEA countries. Its setting-up cost would thus make the entry on the intra-EEA express market almost impossible.

7.6.3.1. Need to have a proprietary IT system

(753) UPS acknowledges that a sophisticated IT system is now a pre-requisite to enter into the small package industry⁷¹⁸. Nevertheless, it considers that it can be easily acquired from IT companies.

(754) In the course of the market investigation, it has been confirmed that an efficient IT system is nowadays indispensable in order to be a major player in the small package sector. Customers, like [Customer name]* for instance, view them as very important⁷¹⁹. Track-and-trace has developed to the extreme and some companies now offer to their customers the possibility to follow their shipments in real time which implies an extensive IT infrastructure. Moreover, it is important for small package suppliers to offer the possibility to integrate their IT systems with the IT systems of the more sophisticated customers in order to smooth the delivery process. Finally, widespread IT coverage lowers the risks of delays and losses which for the suppliers of time-committed deliveries is of the outmost importance. Delays and losses can lead to both damages and, even worse, a tarnished reputation.

⁷¹⁴ See responses to question 18 of questionnaire to competitors – Phase I.

⁷¹⁵ D&D Express' response to question 18.1 of the questionnaire to competitors – Phase I.

⁷¹⁶ La Poste's response to question 18.1 of the questionnaire to competitors – Phase I.

⁷¹⁷ See responses to question 62 of questionnaire to competitors – Phase I.

⁷¹⁸ UPS's response to the decision opening proceeding – Paragraph 277.

⁷¹⁹ Agreed minutes of a teleconference call of 7 May 2012.

- (755) It therefore comes as no surprise that an overwhelming majority of the competitors considers that owning a sophisticated proprietary IT system constitutes a significant barrier to entry in the small package delivery sector⁷²⁰ since as GLS states: "*Sophisticated IT system is standard in the small parcel delivery market, so necessary pre-condition in order to be competitive, which causes significant cost. Furthermore, the IT system needs to be not only maintained but also constantly further developed in order to stay close to technological developments and customer needs.*"⁷²¹ Kuehne+Nagel also puts forward that: "*A single consistent IT system is required by the customer. To build it from scratch or buy it involves huge investments.*"⁷²² Customers also value the fact that their small package supplier offers a reliable and efficient IT system: "*Indeed, the advantage of an integrated network is that one knows that the track and trace system of that company works with the same standard for all countries (seamless network).*"⁷²³
- (756) Contrary to what UPS claims, having an IT system is not only indispensable to penetrate the overall small package market but also to compete effectively with the integrators on the most time-committed markets. In their overwhelming majority, the respondents to the market investigation see a proprietary IT system as an indispensable requirement to compete effectively with the integrators on the intra-EEA express market. As Post Danmark puts it: "*Sophisticated IT system supporting a supply chain is a must*"⁷²⁴. Indeed, when it comes to intra-EEA express deliveries, the vast majority of customers highly values the quality of the track and trace information provided by their future small package supplier as well as the integration between their own IT system and the one run by their small package supplier⁷²⁵.
- (757) As concerns UPS's claim that postal operators can outsource the supply of these IT services, it seems that the other market players do not share this opinion. A majority of competitors who replied to the market investigation considers that for an operator who does not own a proprietary IT network, outsourcing could not be a viable solution in order to compete effectively against integrators. As an example, Posten Danmark states that: "*A proprietary IT network is part of the core business and must be owned by the operator in order to compete effectively against integrators.*"⁷²⁶ Correos explains: "*Information technology is part of the core-business. Outsourcing this part of the service can lead to a leak of information in the different steps, which would end up in a general decrease in the quality of the service provided to the customer. Actually it would place the company in a non-competitive position against integrators*".⁷²⁷ This is even more stressed by the importance that customers attach to security of the shipped goods: an overwhelming majority of them considers it as indispensable to be satisfied

⁷²⁰ See responses to question 63 (iii) of questionnaire to competitors – Phase I.

⁷²¹ GLS' response to question 63 (iii) of the questionnaire to competitors – Phase I.

⁷²² Kuehne+Nagel's response to question 63 (iii) of questionnaire to competitors – Phase I.

⁷²³ Agreed minutes of a teleconference call of 11 May 2012 with [Customer name]*, paragraph 8.

⁷²⁴ Post Danmark's response to question 17.5 of questionnaire to competitors R30 – Phase II.

⁷²⁵ See responses to question 30 of questionnaire to customers – Phase I: Customers who ranked 4 or 5 the integration with the IT system as a criteria they take into account while negotiating a contract for the provision of intra-EEA small package delivery services.

⁷²⁶ Post Danmark's response to question 18 of questionnaire to competitors R30 – Phase II.

⁷²⁷ Correos' response to question 18 of questionnaire to competitors R30 – Phase II.

while negotiating a contract for the provision of small package delivery services⁷²⁸. As explained by [Customer name]*: "[Customer name]*'s contracts with small package companies often foresee a very stringent CMR⁷²⁹ liability regime which de facto excludes operators that would need to sub-contract part of the delivery operations."⁷³⁰

- (758) In addition, it is worth mentioning that the costs of an IT network not only result from its setting up but also from its maintenance. The failure to keep the IT system up-to-date on a regular basis risks significantly affecting its usefulness. Such updates imply heavy costs that have to be incurred repeatedly.
- (759) Consequently, in light of all the aforementioned elements, the need to have a proprietary IT system constitutes a barrier to entry on the intra-EEA express market.

7.6.3.2. Need to have a sorting infrastructure spread all across the EEA

- (760) In the Form CO, the Notifying party remains silent as to the extent to which the need to have a sorting infrastructure could constitute a barrier to entry. It merely mentions that it does not consider that the construction of a hub could be seen as an entry barrier. [Details regarding UPS' business strategy]*. Such a statement has to be put into perspective with the fact that earlier in the Form CO, it is mentioned that FedEx spent around EUR [...] million to open its new sorting hub in Cologne for Eastern and Central Europe.
- (761) As shown in Section 6.1.1, the business model of the small package sector is geared around the indispensability of a sorting infrastructure composed of a single or multiple hubs as well as sorting facilities which can vary in size. Being a network industry, the entry on the intra-EEA small package market implies that the new entrant will have to set up sorting facilities not only in the country of origin but also in all the possible countries of destination. In addition, in the majority of the countries one sorting facility does obviously not suffice and the number will have to be multiplied according to the size, the geography and the population of each country. On average, UPS has [10-20]* sorting facilities per country and [250-300]* sorting facilities in total within the EEA: following its business model based on multiple hubs, it has opened [30-40]* hubs all across Europe (included [5-10]* automated) as well as [250-300]* centres in the countries where it is active. UPS has invested between EUR [0-5]* and [5-10]* million to set up a centre and EUR between [0-5]* and [60-70]* million for a hub. As regards TNT, it operates on average [0-5]* hubs and [20-30]* depots per country. TNT has invested between EUR [0-5]* and [0-5]* million to set up a depot and between EUR [0-5]* and [20-30]* million for a hub. In addition, its Liège air hub cost EUR [150-200]* million. As regards DHL, it has established [400-450]* local distribution centres, [50-100]* country gateways and sorting centres as well as [0-50]* regional hubs all across the EEA. DHL has invested EUR [0.5-10] million to set up a local distribution centre,

⁷²⁸ See responses to question 30 of questionnaire to customers – Phase I: Customers who ranked 4 or 5 the security of shipped goods as a criteria they take into account while negotiating a contract for the provision of intra-EEA small package delivery services.

⁷²⁹ "CMR" stands for Convention Relative au Contrat de Transport International de Marchandise par Route. In standard CMR liability, the partner is responsible for the actual value of the goods. [Customer name]* wants its partners to sign a CMR and a liability regime, where the responsibility goes to wholesale value, which is much higher (Email from [Customer name]*' representative dated of 3 October 2012).

⁷³⁰ Agreed minutes of a teleconference call of 4 May 2012 with [Customer name]*.

EUR [2-50] million to set up a country gateway and sorting centre and EUR [20-70] million for a hub⁷³¹.

- (762) These figures evidence that to be a major player on the intra-EEA small package market it is indispensable to have a widespread network of sorting facilities in each and every EEA country. Without such a network a supplier would not be a credible alternative to the integrators for intra-EEA deliveries. As an example, GLS has only [0-50]* hubs in 17 EEA countries⁷³² and La Poste/DPD [0-50]* hubs⁷³³. Indeed, the extensive geographic coverage in the origination country together with the coverage of all destination countries are considered as essential criteria by a vast majority of customers while negotiating for the supply of express intra-EEA small package deliveries⁷³⁴. As [Customer name]* explains: *"In Europe, [Customer name]* needs to deliver its products quickly, so [Customer name]* would look more favourably on operators who have both air and ground networks, providing next day service as broadly as possible across EMEA."*⁷³⁵
- (763) In addition, in view of the costs incurred by the incumbent integrators to establish their EEA network, should a company decide to set up such a network across the entire EEA, it would have to incur massive sunk costs that would not be recouped before a rather long period of time as stated by FedEx: *"These structures require significant upfront investments and sunk operational costs. Initially, due to low volumes, the hub operations would not be optimized, increasing significantly the cost per pack. In addition, to FedEx's knowledge there are currently no providers of outsourcing capability for hub and sorting services."*⁷³⁶ This view is confirmed *inter alia* by GLS which states: *"Good and reliable infrastructure necessary and causing significant cost"*⁷³⁷. DHL estimates the total investment in the sorting infrastructure throughout the EEA that a new entrant ought to make to be in the order of EUR [0-5]* billion⁷³⁸.
- (764) These major investments constitute a very high barrier to entry on the intra-EEA small package market which is confirmed by the overwhelming majority of the respondents to the market investigation such as FedEx for example *"Accordingly, the need to have a sorting infrastructure constitutes a significant barrier to entry in the small package delivery sector"*⁷³⁹.
- (765) Consequently, in light of all the aforementioned elements, the need for a sorting infrastructure set up across the EEA constitutes a barrier to entry on the intra-EEA express market.

7.6.3.3. Need to operate its own air network

⁷³¹ DHL's reply of 21 September 2012 to the request for information, 19 September 2012.

⁷³² GLS website.

⁷³³ Table with the number of La Poste's hub-depots per country.

⁷³⁴ See responses to question 30 of questionnaire to customers – Phase I: Customers who ranked 4 and 5 the extensive geographic coverage in the receiving country as a criteria they take into account while negotiating a contract for the provision of small package delivery services.

⁷³⁵ Agreed minutes of a teleconference call of 11 May 2012 with [Customer name]*.

⁷³⁶ FedEx' response to question 63 of questionnaire to competitors – Phase I.

⁷³⁷ GLS' response to question 63 of questionnaire to competitors – Phase I.

⁷³⁸ DHL's reply of 21 September 2012 to the request for information, 19 September 2012.

⁷³⁹ FedEx' response to question 63 of the questionnaire to competitors – Phase I.

Air network is indispensable to compete with integrators on the intra-EEA express markets

- (766) Within the EEA, the four integrators are the only small package delivery suppliers who operate their own air network (see Section 6.1.5.1.). According to the outcome of the market investigation, this feature singles them out from their competitors: the majority of the competitors considers that it is necessary to own or to have operational control over an air network with scheduled flights in order to provide intra-EEA express services and compete effectively against integrators⁷⁴⁰. Nacex explains that: "*It is essential to own an air network to meet the deadlines*"⁷⁴¹ as well as Royal Mail which claims: "*Without ownership of an air network it is logistically very complicated to provide a next morning delivery.*"⁷⁴² Another player explained that: "*In GLS's view, being able to meaningfully compete with providing a pan-European express service is only possible with an own-controlled air network based on a hub-and-spoke system.*"⁷⁴³ Customers also value the fact that a shipper operates an air network: "[Customer name]* would look to operators such as GLS and other ground players as being viable alternatives but the disadvantage is that these operators do not have air networks."⁷⁴⁴
- (767) Moreover, the large majority of competitors identified the need to have its own capillary transport network, including air transport, as a significant barrier to entry in the small package delivery sector⁷⁴⁵. As explained by Opek: "*While creating a ground based network with a few trucks to provide a domestic small parcel delivery services at domestic level would be feasible, providing international express delivery services requires a European wide air network that is operating during night hours allowing for late pick-ups in origin markets and early deliveries in the destination markets.*"⁷⁴⁶ and by Rangel Expressso: "*For express international transport, I consider it almost impossible to set up now an airline transport network.*"⁷⁴⁷. Royal Mail also explained that: "*Indeed, in order to be able to deliver by the next morning, a shipping company necessarily needs to operate its own air fleet; otherwise, to organize a next morning delivery is a very complicated logistical operation, which is possible only for a small number of destinations.*"⁷⁴⁸.
- (768) Consequently, in the light of the aforementioned elements, the need to operate one's own air network constitutes a significant barrier to entry on the intra-EEA express market.

The outsourcing of the airlift is not a solution to overcome the entry barrier due to higher costs and lower service quality

- (769) It transpires from the results of the market investigation that outsourcing is not as easy as UPS claims. The two main reasons are the cost disadvantage resulting from double

⁷⁴⁰ See responses to question 15 of questionnaire to competitors R30 – Phase II.
⁷⁴¹ Nacex' response question 15.1. of questionnaire to competitors R30 – Phase II: "*Es imprescindible tener unas rutas aéreas para cumplir horarios.*"
⁷⁴² Royal Mail's response to question 15.1. of questionnaire to competitors R30 – Phase II.
⁷⁴³ Agreed minutes of a teleconference call of 22 August 2012 with GLS, paragraph 17.
⁷⁴⁴ Agreed minutes of a teleconference call of 11 May 2012 with [Customer name]*.
⁷⁴⁵ See responses to question 63 (ii) of questionnaire to competitors – Phase I.
⁷⁴⁶ Opek's response to question 63 (ii) of questionnaire to competitors – Phase I.
⁷⁴⁷ Rangel Expressso's response to question 63 (ii) of questionnaire to competitors – Phase I: "*Para o transporte expresso internacional, considero quase impossivel montar agora uma rede aérea...*".
⁷⁴⁸ Agreed minutes of a teleconference call of 11 May 2012 with Royal Mail, paragraph 4.

marginalisation and the generally lower service quality of a network which is not seamless. As outlined by [Company name]*: *"The level of service reliability achievable by outsourcing air transport is not sufficient to fulfil the standards expected within the express sector."*⁷⁴⁹ Indeed, for security reasons, customers prefer their packages to be handled by only one company rather than by a multitude of sub-contractors. Indeed as explained by [Customer name]*, a medical device supplier also explains: *"It would be hard for firms without air network such as DPD to fulfil the strict requirements of [Customer name]* even if they source airspace from third parties, as delivery of third parties is prone to frictions and delays, which violates the service level qualities requested by [Customer name]*."*⁷⁵⁰ [Customer name]* also claims that: *"In particular, [Customer name]* strives to avoid operators which have to outsource part of the carriage to a third party, since handing over the parcel to one or more other operators during the transport makes the whole supply chain more prone to errors."*⁷⁵¹.

- (770) In addition, using a third party air network implies higher costs due to double marginalisation which the integrators do not bear. In other words, small parcel operators outsourcing their air lift needs to a third party will be faced with an access price to that third party air network which already includes a profit margin for that third party since the price is not at cost. The third party margin leads to a higher cost base for the non-integrator which can either try to pass its higher costs on to the customers, or, in order to avoid becoming non-competitive, internalise those costs at the expense of its own margin and overall profits for a certain delivery service. This is confirmed by [Company name]*: *"For parts of Europe, [Company name]* is hiring one of the four Integrators for air transport, since it has no own aircraft fleet. Because of that it cannot offer competitive prices to customers that need express services necessitating air transport relative to direct offers by the Integrators."*⁷⁵² A similar comment was made by [Company name]*⁷⁵³. [Company name]* also outlines that: *"Operators, including [Company name]*, use such solution but it does not constitute a viable solution to compete effectively with the integrators, such operators not being able to reserve margins comparable to those of the integrators, not being able to fully control their costs and depending on third party's quality and efficiency."*⁷⁵⁴
- (771) As a consequence, outsourcing is a rather precarious strategy to deploy which does not enable non-integrators to fully compete with integrators on the intra-EEA express markets.

Outsourcing of air capacity for intra-EEA express deliveries can be done efficiently only through integrators, thus the merger may reduce the competition on this market

- (772) According to the Form CO, there is a wide variety of solutions to obtain airlift and a wholly-owned air network is not indispensable.
- (773) [Details regarding UPS' network]*^{755 756 757}. Therefore, despite what is claimed by UPS this can hardly be assimilated to true outsourcing where the contracting company is

⁷⁴⁹ [Company name]*response to question 15.7 of questionnaire to the competitors R30 – Phase II [...]*.

⁷⁵⁰ Agreed minutes of a teleconference call of [...]* 2012 with [Customer name]*.

⁷⁵¹ Agreed minutes of a teleconference call of [...]* 2012 with [Customer name]*.

⁷⁵² [...]*

⁷⁵³ [Company name]* reply response to question 15.7.1 of the questionnaire to the competitors R30 – Phase II.

⁷⁵⁴ [Company name]* response to question 15.7 of questionnaire to the competitors R30 – Phase II.

⁷⁵⁵ Reg. 1008/2008.

dependent on operational decisions made by its sub-contractor does not have any control over airlift scheduling and capacity decisions, and may even run the risk of its packages being left behind or not delivered on time.

- (774) Likewise, according to the replies to the market investigation, in the context of their small package delivery operations, the majority of the competitors purchase air transport services from third parties⁷⁵⁸.
- (775) The results of the market investigation show that the need to outsource to an air provider is based on the speed of the delivery as well as on the destination. The vast majority of the competitors which procures air services does so only for services with certain types of commitments in terms of speed/time of delivery and/or geographic destinations⁷⁵⁹, most notably for international intra-EEA express deliveries, as stated e.g. by [Company name]*: "*Air transportation is used for cross border air express services*"⁷⁶⁰ and by [Company name]*: "*We purchase air transport services for certain geographical destinations (e.g. outside Europe) as well as for certain volumes with committed next day delivery (e.g. Express, courier)*"⁷⁶¹.
- (776) The respondents to the market investigation explained that they purchase air transport services from various sources including (i) "common carriers" such as the major scheduled passenger airlines which provide cargo space on their aircraft (known as "belly space") and (ii) cargo airlines offering space on dedicated freighters. Nevertheless, most of the competitors mentioned that they purchase air services from integrators such as *inter alia* D&D Express ([...])*⁷⁶², Fan Courier ([...])*⁷⁶³, GLS,⁷⁶⁴ La Poste ([...])*⁷⁶⁵, Nacex ([...])*⁷⁶⁶, NetExpress Europe ([...])*⁷⁶⁷ and Rangel ([...])*⁷⁶⁸.
- (777) The reason why such a significant number of respondents uses the integrators' air services is because carrying small packages overnight is indispensable to compete with integrators. Notably, La Poste explains this as follows: "*To offer Express Services and premium services (before 08h _ 10h am) in Europe, we need night air transport if we want to be competitive in terms of transit time and delivery to customer, on the European market. For Express services, most customers would like a late pick up and an early delivery on next day in other European countries. If we are not able to cover the expectation by road (due to distance), we need to use airlines and intra-Europe, it's quite difficult to have Passenger or Cargo airlines solutions available; it means we have no real choice and we will use integrators*"⁷⁶⁹. Indeed, since most of the European

⁷⁵⁶ Form CO, paragraph 307.

⁷⁵⁷ Reply of 28 June 2012 to the Commission's request for information, 22 June 2012.

⁷⁵⁸ See responses to question 14 of questionnaire to competitors – Phase I.

⁷⁵⁹ See responses to question 15 of questionnaire to competitors – Phase I.

⁷⁶⁰ [Company name]*response to question 15 of questionnaire to competitors – Phase I.

⁷⁶¹ [Company name]* response to question 15 of questionnaire to competitors – Phase I.

⁷⁶² D&D Express' response to question 64 of questionnaire to competitors – Phase I.

⁷⁶³ Fan courier's response to question 64 of questionnaire to competitors – Phase I.

⁷⁶⁴ GLS' response to question 64 of questionnaire to competitors – Phase I.

⁷⁶⁵ Agreed minutes of a teleconference call of 30 May 2012 with La Poste, paragraph 14.

⁷⁶⁶ Nacex' response to question 66 of questionnaire to competitors – Phase I.

⁷⁶⁷ NetExpress' response to question 66 of questionnaire to competitors – Phase I.

⁷⁶⁸ Rangel's response to question 66 of questionnaire to competitors – Phase I.

⁷⁶⁹ La Poste's response to question 66 of questionnaire to competitors – Phase I.

airports are closed during the nights and for short-haul travels, such as the ones done within the EEA, passengers are not willing to travel overnight, passenger and cargo airlines are not in a position to offer in-night transportation, contrary to the integrators' airways.

- (778) Furthermore, as argued by FedEx⁷⁷⁰, in order to offer express delivery services across the EEA, a non-integrator would need to secure capacity on late evening and early morning flights. However, these flights already operate at close to full capacity as passengers prefer to take these flights (and passengers' luggage reduces the amount of belly space that can be made available to non-integrators). In addition, an overwhelming majority of competitors sees the airlift supplied by the four integrators as by far superior to the one supplied by (i) the cargo airlines using dedicated freighter planes, (ii) passenger airlines with only belly space cargo capacity and (iii) combination airlines with dedicated freighter planes and belly space cargo capacity. In fact, according to the outcome of the market investigation⁷⁷¹, these three possibilities suffer drawbacks such as lack of geographic coverage of air network, unsuitable frequencies, lack of sorting facilities to handle small packages at the airport, IT issues and operational difficulties as opposed to the aircraft services provided by the integrators.
- (779) As a consequence, small package suppliers which do not operate their own air network and who wish to enter/expand on the intra-EEA express small package delivery market have no other choice than to use the air network of an integrator.
- (780) *Post* merger, the non-integrators' choice for the outsourcing of airlift for intra-EEA express small package deliveries would be reduced to only three integrators instead of four. This may further increase the barriers to entry and expansion on the intra-EEA express markets.

7.6.4. *Conclusions on barriers to entry and expansion*

- (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 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, on 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.

⁷⁷⁰ FedEx' response to question 66 of questionnaire to competitors – Phase I.

⁷⁷¹ See responses to question 53 of questionnaire to competitors R30 – Phase II.

7.7. No entry or expansion is likely, timely and sufficient to deter potential anti-competitive effects

7.7.1. Expansion of FedEx

(783) The expansion of FedEx has been analysed in section 7.3.10, and it will be also addressed specifically country-by-country in section 7.11. The analysis shows that despite a continuing expansion and the fact that it may exert an increased competitive pressure compared to the current situation, FedEx is unlikely to expand to such an extent such as to defeat the likely anti-competitive effects arising from the Transaction on the intra-EEA express markets identified in Section 7.11 and following.

7.7.2. Expansion of others

(784) It has been extensively discussed in section 7.2.1.6. on La Poste and Royal Mail why even the major ground-based operators such La Poste and Royal Mail are very unlikely to increase significantly the geographic coverage of their intra-EEA express services and start competing actively with the Parties in the market in a near future.

(785) In its response to the Decision opening proceedings,⁷⁷² UPS quotes [Company name]* which points to expected expansion in Scandinavia and which reads as follows: "*Small package delivery services targeted towards the B2C segments is expected to expand all over the EEA area. Hermes is expected to extend their services to also cover the Nordic area. DB Schenker is also expected to establish its own small packages network in Denmark to cover all Nordic. We foresee UPS entering the Nordic standard parcel scene starting with either Denmark or Sweden. Bring started establishing its own parcel delivery network in Denmark in 2011 and will continue to expand this in 2012*"⁷⁷³. First of all, the accuracy of this statement should be put into question since it states as regards UPS: "*We foresee UPS entering the Nordic standard parcel scene starting with either Denmark or Sweden*". However, according to the data it provided to the Commission, UPS is already active in Denmark and Sweden since at least 2010. Therefore, in view of this rather inaccurate market intelligence, the entry predictions [Company name]* makes as to the other competitors should be treated cautiously. Second, except for UPS and Bring, which is the subsidiary of the Norwegian incumbent postal operator, the other two companies mentioned by [Company name]* are freight forwarders: Hermes and DB Schenker. As explained at length in Section 7.2.4., on the national markets where they are already active, freight forwarders do not offer competitive solutions on the intra-EEA express market. Therefore, this would hold even truer on markets where they have just started their activity.

(786) The large majority of the respondents to the market investigation does not expect any significant entry in a near future in the small package express delivery sector in any country of the EEA⁷⁷⁴. As to the companies which replied positively, their reply has to be nuanced. As an example bpost explains its positive reply as follows: "*On the one hand, local competitors enter every day at very local levels. On the other hand, we do not expect the entry of major new globally active competitors/integrators. Moreover, we expect more consolidation of existing major players in the international arena.*"⁷⁷⁵ The

⁷⁷² Notifying party's response to the decision opening the proceedings, paragraph 273.

⁷⁷³ [Company name]*response to question 61 of questionnaire to competitors – Phase I.

⁷⁷⁴ See responses to question 60 of questionnaire to competitors - Phase I.

⁷⁷⁵ Bpost's response to question 60 of questionnaire to competitors - Phase I.

fact that new local operators enter the market for domestic delivery services cannot jeopardize any anti-competitive strategy carried out by the merged entity on a distinct market, namely the intra-EEA express markets. A market on which, on the other hand, bpost does not foresee any significant entry. D&D Express' reply to the Yes/No question is also to be read in light of the explanation it provides afterwards since it further considers that the expected significant entries will come from ground-based operators⁷⁷⁶. As explained in Section 7.2., ground-based operators are only to a limited extent a credible alternative to the integrators on the intra-EEA express market. Consequently, the potential entry of such operator would have no or only very limited impact on the intra-EEA express markets.

- (787) Should the merged entity unilaterally increase the prices on the express intra-EEA segment by 5 or 10%, such an increase would not create an incentive sufficient to overcome the barriers to entry/expansion: competitors not yet active on the express intra-EEA markets would not have further inducement to penetrate them as confirmed by a large majority of competitors⁷⁷⁷. Indeed, as stated by La Poste/DPD: "*A mere price increase would not automatically enable GeoPost to enter or extend into a given segment. For example, in international express deliveries, given that GeoPost does not possess its own air transport, even in the case of a significant price increase (by 5% or 10%) GeoPost would still have to rely on its competitors (e.g. integrators) or third party providers*",⁷⁷⁸ as well as by GLS "*The services that we do not offer so far (i.e. international express services), can also not be offered after such a price increase.*"⁷⁷⁹ or also by Kuehne+Nagel *inter alia*: "*No, not at all. We talk about billions of EUR of investments to setup the same delivery network and infrastructure.*"⁷⁸⁰
- (788) Consequently, in light of the aforementioned elements, it appears that neither FedEx nor any other competitor could expand to such extent that it could deter any anti-competitive strategy set in place by the merged entity.

7.8. Absence of countervailing purchasing power

- (789) Countervailing buyer power is defined in the horizontal merger guidelines⁷⁸¹ 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 suppliers⁷⁸².
- (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.

⁷⁷⁶ D&D Express' response to question 60 of questionnaire to competitors – Phase I.

⁷⁷⁷ See responses to question 26 of questionnaire to competitors R30 – Phase II.

⁷⁷⁸ La Poste's responses to question 26.1 of questionnaire to competitors R30 – Phase II.

⁷⁷⁹ GLS' response to question 26.1 of questionnaire to competitors R30 – Phase II.

⁷⁸⁰ Kuehne+Nagel's response to question 26.1 of questionnaire to competitors R30 – Phase II.

⁷⁸¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03).

⁷⁸² See Paragraphs 64 and following of the Horizontal Merger Guidelines.

7.8.1. *UPS's views*

(791) UPS claims that certain customers could exercise buyer power either by downtrading or by switching to other existing suppliers, either by selecting other suppliers for express, or by shifting non-express volumes to other suppliers (multisourcing).

7.8.2. *The Commission's assessment*

(792) The market investigation confirms that the small package market is fragmented on the customers' perspective. Table 13 represents the revenues arising from UPS's most important customers as a percentage of UPS's total revenues (EEA, 2011, all destinations).

Table 13: [Confidential information on UPS' revenues and customer base]*

[...]*

Source: [...]*

(793) [Confidential information on UPS' revenues and customer base]*⁷⁸³

(794) In order to sponsor new entrants or the expansion of existing competitors, a customer would need to have a certain size which would allow him to credibly underwrite such entry, for instance through guaranteed volumes. [Confidential information on UPS' revenues and customer base]*. Furthermore, as demonstrated in section 7.6., the cost of entry and expansion is particularly high for international intra-EEA express services. Therefore, it is unlikely that customers would be able to defeat a price increase of the merging parties by sponsoring entry or expansion

(795) The second strategy of exercising buyer power that customers can employ is to switch at least part of their volumes to other existing suppliers. However, following the acquisition of TNT by UPS there would be only a very limited number of close substitutes left, essentially one major alternative player to the Parties, namely DHL. It is true that customers could in principle decide to switch to DHL after the merger. However, as shown in Section 7.5, in the new equilibrium following TNT's removal there would be higher prices on the market, even in the presence of DHL.

(796) Thirdly, UPS argues that the customers who single source different services from one supplier might consider multi-sourcing in response to an increase of price for intra-EEA services, or specifically for long-haul intra-EEA services. However, customers needing to buy intra-EEA express services (in particular long-haul services) would have no more choice of suppliers for these services, irrespectively of whether they would choose to multisource or not. The presence of suppliers offering a different service (such as short-haul) presents no viable switching alternative for customers. As was explained in section 7.2.1.3., the presence of operators such as La Poste and Royal Mail on certain lanes does not constrain the Parties on long-haul lanes from which those operators are absent. A similar reasoning as advanced in that section would equally apply to other operators (such as FedEx) who are absent from certain lanes or destinations (or are at least very weak substitutes for such lanes/destinations).

⁷⁸³

[...]*

- (797) Consequently, if the merged entity increased prices on the intra-EEA express market, or specifically on the long-haul segment of the market, customers would lack alternatives to bring down prices.
- (798) As regards downtrading, it has been demonstrated in section 6.1.8. that customers purchase small package delivery services depending on their needs and will not downtrade significantly so as to defeat price increases for express delivery services.
- (799) In light of these arguments, 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.

7.9. Framework of analysis: TNT's market position in the absence of the merger

- (800) The Parties submit in their Response to the Statement of Objections that the correct counterfactual to the merger should be taking into account [Details regarding TNT's business strategy]*. The Parties claim that in the absence of the merger, [Details regarding TNT's business strategy]*.⁷⁸⁴
- (801) [Details regarding TNT's business strategy]*⁷⁸⁵
- (802) [Details regarding TNT's business strategy]*
- (803) [Details regarding TNT's business strategy]*
- (804) [Details regarding TNT's business strategy]*⁷⁸⁶
- (805) [Details regarding TNT's business strategy]*. TNT's 2011 Annual Report itself states that TNT's plan within Europe was to reconfigure its air network by shifting volumes from air to its dense road network with an eye to reducing exposure to fixed air capacity, while "*ensuring current customer service levels*".⁷⁸⁷ [Details regarding TNT's business strategy]*.
- (806) Therefore, the correct counterfactual of the merger has to take into account TNT's current coverage and competitiveness, [Details regarding TNT's business strategy]*.

7.10. Efficiencies

7.10.1. Introduction

- (807) The Notifying party submits that the Transaction is expected to give rise to significant efficiencies through the combination of the UPS and TNT Express businesses. While the Form CO included a section on claimed efficiencies deriving from the notified operation, providing some high-level estimates of those efficiencies, the Notifying party complemented this initial submission on 4 September 2012⁷⁸⁸ and 28 September 2012⁷⁸⁹. Those submissions provided some further underlying economic reasoning and data and elaborated on the claimed efficiencies. The Notifying party has since further supplemented the efficiencies claims in order to address the Commission's concerns

784 [...]*

785 [...]*

786 [...]*

787 Form CO, Annex 10, page 19, TNT Annual Report 2011.

788 "Supplementary Submission on Efficiencies".

789 "Supplementary Submission on Efficiencies: How Synergies Feed through to Customers".

raised in the Statement of Objections. Those submissions were made on 6 November 2012⁷⁹⁰ and 22 November 2012⁷⁹¹.

- (808) According to recital 29 of the Merger Regulation "*in order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertaking concerned*". Moreover, it is "*possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition*".
- (809) Therefore, the Commission takes into account, in its analysis, substantiated efficiencies brought forward by the Notifying party and may, in line with the Horizontal Merger Guidelines, decide on this basis "*that there are no grounds for declaring the merger incompatible with the common market pursuant to Article 2(3) of the Merger Regulation. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.*"⁷⁹²
- (810) The Horizontal Merger Guidelines establish a cumulative set of requirements to take efficiencies into consideration. Efficiencies have to benefit consumers, be merger-specific and be verifiable.⁷⁹³
- (811) First, the "relevant benchmark" in the assessment of efficiency claims is that consumers should be no worse off as a result of the merger. For that purpose, efficiencies have to be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur⁷⁹⁴.
- (812) In general, efficiencies that lead to reductions in variable or marginal costs are more likely to be relevant for the assessment of efficiencies than reductions in fixed costs as they are more likely to result in lower prices for consumers. Cost reductions, which merely result from anti-competitive reductions in output, cannot be considered as efficiencies benefiting consumers⁷⁹⁵.
- (813) Any efficiency should be passed on to consumers. The scope for pass-on is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry. The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realized, and to be passed on, to a sufficient degree, to the consumer⁷⁹⁶.

⁷⁹⁰ Notifying party's response to the statement of objections, Annex 4 ("Further Materials Supporting the Verifiability of the Expected Synergies") and Annex 5 ("Analysis of total customer synergy effects", CRA – amended on 14 November).

⁷⁹¹ Memorandum "Efficiencies: country level savings for Benelux countries", CRA.

⁷⁹² Horizontal Merger Guidelines, paragraph 77.

⁷⁹³ Horizontal Merger Guidelines, paragraph 78.

⁷⁹⁴ Horizontal Merger Guidelines, paragraph 79.

⁷⁹⁵ Horizontal Merger Guidelines, paragraph 80.

⁷⁹⁶ Horizontal Merger Guidelines, paragraph 84.

- (814) Second, efficiencies should be merger specific and it should not be possible for them to be achieved to a similar extent by less anticompetitive alternatives⁷⁹⁷.
- (815) Finally, the efficiencies should be verifiable so that the Commission can be reasonably certain that the efficiencies are likely to materialize, and be substantial enough to counteract a merger's potential harm to consumers⁷⁹⁸.
- (816) It is incumbent upon the Notifying party to provide the Commission in due time with all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised and that the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and that the claimed efficiencies therefore benefit consumers⁷⁹⁹.

7.10.2. *The efficiency claims made by the Notifying party*

7.10.2.1. Introduction

- (817) The Notifying party claims that the Transaction is expected to give rise to significant efficiencies through the combination of the UPS and TNT businesses.⁸⁰⁰ The merger is expected to (i) generate very significant economies of density and of scope, (ii) improve service quality, and (iii) produce transactional efficiencies by combining complementary networks. Furthermore, the Notifying party claims that the efficiencies benefit consumers, as the majority of the cost synergies are variable (and therefore of a type that is, according to the Horizontal Merger Guidelines, more likely to be passed on to consumers). Efficiencies are also claimed merger specific since [Confidential information regarding efficiencies expected to arise from the Transaction]* could not be achieved without full integration. Finally, efficiencies are deemed verifiable, as shown in various internal documents that were prepared for the Board of Directors and used to decide on the merger.
- (818) The synergies were estimated without full access to TNT's data and were calculated on a number of different bases, resulting in a range of possible levels. UPS communicated to the investing public a range between EUR 400-550 million. [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸⁰¹.
- (819) These efficiencies are divided into three main areas: (i) operational (covering ground transportation costs) – [...]*, (ii) air network – [...]* and (iii) management and administrative overheads – [...]*. [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸⁰². [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸⁰³. [Confidential information regarding efficiencies expected to arise from the Transaction]*. This approach casts some doubts on the reliability of the figures, proving the considerable uncertainty⁸⁰⁴ involved in the efficiencies estimation process and making verification difficult.

⁷⁹⁷ Horizontal Merger Guidelines, paragraph 85.

⁷⁹⁸ Horizontal Merger Guidelines, paragraph 86.

⁷⁹⁹ Horizontal Merger Guidelines, paragraph 87.

⁸⁰⁰ Form CO, paragraphs 1337-1367.

⁸⁰¹ "Supplementary Submission on Efficiencies", paragraph (2.11), 4 September 2012

⁸⁰² "Supplementary Submission on Efficiencies", (paragraph 2.12), 4 September 2012

⁸⁰³ See for example Form CO, Annex 70.

⁸⁰⁴ An additional indication of the expected uncertainties [Confidential information regarding efficiencies expected to arise from the Transaction]*

- (820) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (821) [Confidential information regarding efficiencies expected to arise from the Transaction]*

7.10.2.2. Description of expected cost savings

Operational synergies (EUR [...]*)

- (822) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (823) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (824) [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸⁰⁵
- (825) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (826) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (827) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (828) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (829) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (830) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (831) [Confidential information regarding efficiencies expected to arise from the Transaction]*

Air network synergies (EUR [...]*)

- (832) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (833) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (834) [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸⁰⁶
- (835) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (836) [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸⁰⁵ [...]*

⁸⁰⁶ [...]*

(837) [Confidential information regarding efficiencies expected to arise from the Transaction]*

Management and administrative costs synergies ((EUR [...]*))

(838) [Confidential information regarding efficiencies expected to arise from the Transaction]*

Verifiability, merger-specificity and benefit to consumers

(839) The Notifying party claims that these synergies are verifiable, supported by consistent evidence. [Confidential information regarding efficiencies expected to arise from the Transaction]*.

(840) Furthermore, it is claimed that [Confidential information regarding efficiencies expected to arise from the Transaction]*

(841) [Confidential information regarding efficiencies expected to arise from the Transaction]*

7.10.2.3. Allocation of cost savings to specific countries

(842) On 28 September 2012, the Notifying party provided a supplementary submission on efficiencies⁸⁰⁷, including further details on how the synergies would in practice flow to customers and in particular to which countries these synergies would most strongly apply to. The methodology discussed in this paper regarding the allocation of various costs to services and countries was updated in the Response to the Statement of Objections⁸⁰⁸ (hereinafter the "Efficiencies report"). Adjustments made in the recent version of the report are aimed at addressing some of the Commissions' concerns in the intra-EEA international express markets. The Commission will assess in this Decision the most recent version of the calculations.

(843) [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸⁰⁹

(844) [Confidential information regarding efficiencies expected to arise from the Transaction]*

(845) The following table gives an overview of the allocation of the different categories of cost savings ([Confidential information regarding efficiencies expected to arise from the Transaction]*⁸¹⁰) to different categories of services.

Table 14: [Confidential information regarding efficiencies expected to arise from the Transaction]*

[...]*

Source: [...]*

⁸⁰⁷ "Supplementary Submission on Efficiencies: How Synergies Feed through to Customers".

⁸⁰⁸ Notifying party's response to the Statement of Objections, Annex 5, (CRA, "Analysis of total customer synergy effects", – amended on 14 November).

⁸⁰⁹ [...]*

⁸¹⁰ [Confidential information regarding efficiencies expected to arise from the Transaction]*

As shown in the table 14, the cost savings that are relevant for the estimated efficiencies in the intra-EEA express market are those related to [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸¹¹.

(846) The results obtained with this allocation are summarized in the table below⁸¹².

Table 15: [Confidential information regarding efficiencies expected to arise from the Transaction]*

[...]*

(847) [Confidential information regarding efficiencies expected to arise from the Transaction]*

(848) [Confidential information regarding efficiencies expected to arise from the Transaction]*

7.10.3. *Assessment of efficiencies*

(849) This section assesses the extent to which the claimed efficiencies can be deemed verifiable, merger-specific and to benefit of consumers and also quantifies the level of cost savings.

7.10.3.1. Verifiability

(850) The market investigation has confirmed that this industry is characterised by significant economies of scale and density. Unit costs are highly dependent on volumes and coverage.

PUD Savings (EUR [...])*

(851) The Commission acknowledges that PUD efficiencies may be achieved by the merger in light of a larger customer base due to the network nature of the industry and the importance of economies of scale and density for PUD.

(852) [Confidential information regarding efficiencies expected to arise from the Transaction]*

(853) However, the Commission cannot use the calculations of the [...]* as an acceptable standard for efficiency verifiability due to at least two main issues. First, they were only calculated with any degree of detail for [...]*. For all the other countries, only a broad estimate has been calculated at an aggregate level, [...]*. For these two groups an average reduction [...]* is assumed, but no underlying explanation is provided. [...]*, the data should be collected in a bottom-up approach starting at the country levels, and it is not correct to derive them from allocating an aggregated figure to individual countries. This means that for the individual countries belonging to the two groups, PUD synergies are clearly not verifiable.

(854) Second, [Confidential information regarding efficiencies expected to arise from the Transaction]*. The current estimates for 2011 simply constitute downwards revisions [Confidential information regarding efficiencies expected to arise from the Transaction]*. [Confidential information regarding efficiencies expected to arise from the Transaction]*. These reductions are not explained but are considered "conservative"

⁸¹¹ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸¹² Table 1, CRA paper of 14 November 2012, "Analysis of total customer synergy effects".

simply because they review downwards previous estimates. Yet, the reduced figures may not necessarily be seen as conservative. [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸¹³, [Confidential information regarding efficiencies expected to arise from the Transaction]*. In fact, UPS has not provided any supporting document to explain on which grounds these reductions were decided.⁸¹⁴ This is insufficient to meet the acceptable standard for verifiability of efficiencies.

- (855) Therefore, whilst the Notifying party argued convincingly on the scope for efficiencies in theory and the 2007 calculations have some merit, the submissions and calculations underlying the EUR [...] of PUD cost savings estimated for the current Transaction do not constitute a sufficient basis for recognizing such efficiencies as verifiable, [Confidential information regarding efficiencies expected to arise from the Transaction]*.⁸¹⁵

OSP Savings (EUR [...])*

- (856) It appears that in most countries, TNT subcontracts a significant share of its PUD ([...]*% in the United Kingdom, [...]*% in Germany and France and [...]*% in Italy).
- (857) The calculations for PUD savings arising from sub-contractors are even more uncertain than the own PUD efficiencies, as they are based on extremely simplified assumptions and have been shown by the Notifying party's economics consultant to rely on incorrect assumptions regarding TNT's volumes⁸¹⁶.
- (858) [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸¹⁷. Given the country-specific features of [...]*, this is insufficient to meet the acceptable standard for verifiability of efficiencies, even more so than in the case of [...]*.
- (859) [Confidential information regarding efficiencies expected to arise from the Transaction]*. No attempt has been made to use actual country average costs per piece and to allocate these to the actual volumes of the combined entity in order to provide a more appropriate measure of efficiencies.
- (860) Whilst the current estimate may be biased downwards⁸¹⁸, there is no possible way in which the Commission can verify the order of magnitude of [...]* at the country level (when comparing the consultant and the UPS estimates of [...]*, the orders of magnitude vary from half to more than double; for example, in the United Kingdom/Ireland, UPS estimates EUR [...] savings while the consultant estimates EUR [...] and in Germany, UPS estimates EUR [...] while the consultant estimates EUR [...]*).
- (861) In view of these significant discrepancies between the initial calculations and the estimates of the Notifying party's economic consultants as well as the lack of country

⁸¹³ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸¹⁴ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸¹⁵ The Commission notes also that the EUR [...] is a downwards ("conservative") revision of the total EUR [...] [Confidential information regarding efficiencies expected to arise from the Transaction]*.

⁸¹⁶ Section 6.3, CRA paper of 14 November 2012, "Analysis of total customer synergy effects".

⁸¹⁷ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸¹⁸ [Confidential information regarding efficiencies expected to arise from the Transaction]*

level figures, the Commission lacks a reliable and reasonable order of magnitude for the claimed OSP cost savings. Therefore, they are deemed to be unverifiable.

Facilities savings (EUR [...]*)

- (862) [UPS' method to calculate efficiencies]*
- (863) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (864) In view of the impossibility to estimate cost savings per country as well as of the omission from the calculation of the operating costs corresponding to the [...]*, the Commission cannot verify the claimed synergies in this category.

Line-haul savings (EUR [...]*)

- (865) Calculations regarding these savings appear to derive from [UPS' method to calculate efficiencies]*.
- (866) [UPS method to calculate efficiencies]*. Yet the outcome of the exercise is a single number applicable to all countries: a [...] % reduction in the cost per piece for line-haul without any particular justification as to why the order of magnitude of this figure is valid in general and for each country in particular.⁸¹⁹
- (867) [UPS method to calculate efficiencies]*⁸²⁰. Again, the discrepancies between the initial calculations of the Notifying party and the subsequent verifications performed by the consultants show a high range of uncertainty regarding the quantification of this category of cost savings.
- (868) In view of the above (lack of country specific information, significant difference between the estimated and actual TNT volumes), the Commission cannot consider the efficiencies associated to the line-haul costs as sufficiently substantiated to reach the verifiability standard.

European air network cost savings (EUR [...]*)

- (869) The estimated cost savings in European air network appear to offer greater verifiability and reliability. Conceptually, these savings are convincing as they derive from economies of scale and re-optimized routes across a combined network. Participants in the market investigation also confirmed this view⁸²¹.
- (870) In practice, for estimating these cost savings, UPS used [UPS method to calculate efficiencies]*.
- (871) Furthermore, the steps which UPS undertook for the calculations are better documented and the applied methodology appears convincing as it follows UPS's normal optimisation process, although due to the complexity of the modelling exercise it is difficult to fully assess the reliability of the air network re-optimization.
- (872) In response to the Commission's concerns regarding the verifiability of the claimed efficiencies, the Notifying party provided more detailed description of the methodology

⁸¹⁹ [UPS method to calculate efficiencies]*

⁸²⁰ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸²¹ This is also consistent with FedEx's argument as to why their network is less competitive due to lower volumes and the use of more expensive, smaller feeder planes.

and its role in assessing and developing the air network plan⁸²². The potential *post-merger* network configuration and the associated costs derive from UPS network planning model and internal expertise. The different steps of their optimization process are described in detail, as well as its application for the TNT diligence process. The Commission considers that the use of standard procedures as well as the involvement of "TNT diligence"⁸²³, provide higher credibility in terms of verifiability.

- (873) [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸²⁴. The estimated cost savings were subsequently reduced in view of the uncertainty associated with the cost estimates.
- (874) The Commission acknowledges the complexity of network planning process and that the estimated cost savings were obtained by employing the network modelling approaches which UPS uses in the normal course of business and its internal network planning expertise. [UPS method to calculate efficiencies]*. The cost saving estimates are, therefore, inherently uncertain and hence a reduction is fully justified.
- (875) Moreover, given that the nature of air-savings is of a pan-European nature and does not rely on significant country-specific factors ([Confidential information regarding efficiencies expected to arise from the Transaction]*), the Commission has accepted an aggregate figure. Furthermore, the Commission has allocated these cost savings on a country by country level based on UPS costs at the lane level ([Confidential information regarding efficiencies expected to arise from the Transaction]*).⁸²⁵
- (876) Hence, in light of the elements described above, the Commission recognizes these efficiencies and allocates them to every EEA country.

Ground handling savings (EUR [...])*

- (877) There are also ground handling savings stemming from the expected reduction of daily cycles and gateway operations consolidation. This directly depends from the re-configuration of the air network, and takes into account the reduced number of combined flights.
- (878) [UPS' method to calculate efficiencies]*
- (879) [UPS' method to calculate efficiencies]*
- (880) These costs are incurred in addition to the European air network costs. Their current estimation seems to be linked with the re-optimization of the air network, subject to similar processes and therefore verifiable. As was the case with European air network savings, the overall synergies of EUR [...]* concerning ground handling will be allocated by lane and then by country of origin proportional to UPS air costs per lane.

Transatlantic air cost savings (EUR [...])*

- (881) [UPS' method to calculate efficiencies]*
- (882) [UPS' method to calculate efficiencies]*⁸²⁶

⁸²² Notifying party's response to the Statement of Objections, Annex 4.10.

⁸²³ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸²⁴ Notifying party's response to the Statement of Objections, Annex 4.10. and 4.11.

⁸²⁵ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸²⁶ [UPS' method to calculate efficiencies]*

(883) While one can see how cost savings can be achieved in principle, the level of these cost savings is hard to verify. [Confidential information regarding efficiencies expected to arise from the Transaction]*

Common carriage savings (EUR [...])*

(884) [UPS' method to calculate efficiencies]*

(885) [UPS' method to calculate efficiencies]*

(886) [Confidential information regarding efficiencies expected to arise from the Transaction]*

(887) [Confidential information regarding efficiencies expected to arise from the Transaction]*

(888) [Confidential information regarding efficiencies expected to arise from the Transaction]*

(889) Although the principle behind this category of synergies is straightforward, the Commission lacks sufficient information to evaluate UPS's claims that the opportunity cost of [...]* is indeed negligible. If these costs are positive, they would drive down the projected amount of cost savings. In fact, [Confidential information regarding efficiencies expected to arise from the Transaction]*. However, UPS has not demonstrated sufficiently that this is the case.

(890) Consequently, neither transatlantic air cost savings nor common carriage cost savings reach the Commission's verifiability standard in order to be taken into account into the calculation of efficiency gains.

Administrative cost savings (EUR [...])*

(891) These costs are generally fixed to a large extent as these relate to management and administration positions⁸²⁷. [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸²⁸ However, what matters for pricing ([...])* are the costs effectively generated by serving any given additional contract⁸²⁹.

(892) In view of the above, the Commission considers that this category of cost savings does not satisfy the verifiability condition for the purpose of assessing the likely cost savings expected in the relevant product markets. However, as discussed in the next section, even if those cost savings had been deemed verifiable, it is unlikely that they would benefit consumers.

7.10.3.2. Consumers benefits

Variable nature of costs and pass-through to consumers

(893) As indicated above in recital (812), the Commission is more likely to consider as relevant efficiencies that lead to reductions in variable or marginal costs as opposed to reductions in fixed costs given that variable or marginal cost reductions are more likely to result in lower prices for consumers. The Commission's analysis should therefore identify which costs are variable in nature and the extent to which such costs would be

⁸²⁷ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸²⁸ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸²⁹ [Confidential information regarding efficiencies expected to arise from the Transaction]*

passed-on. It is extremely rare to have precise estimates of the variable proportion of certain categories of costs or of the actual pass-through of such costs. In this case, such estimates were however available. [Confidential information regarding efficiencies expected to arise from the Transaction]*. Hence, the Commission could either use the estimates of variable costs and determine which share of such costs would be passed-through or use the direct estimate of the pass-through of total average costs. The Commission ultimately chose the second option and the reasoning for this choice is explained below.

- (894) Both UPS and TNT have internal estimates of the share of costs that they consider as variable.⁸³⁰[Confidential information regarding efficiencies expected to arise from the Transaction]*⁸³¹
- (895) However, the reliability of the figures submitted by the Notifying party in order to undertake a pass-through exercise was put into question during exchanges between the Commission and the Parties and their consultants. [Confidential information regarding efficiencies expected to arise from the Transaction]*. This casts serious doubts on the actual reliability and significance of the measure for PUD costs given that the Parties' own consultants would not rely on the disaggregated figures and rather use an average. Moreover, individual values of marginal cost factor were not available for a number of countries.
- (896) Marginal cost factors applied by UPS to its air network costs are calculated at lane and service level. [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸³².
- (897) In view of the verifiability issue discussed above, it is only the marginal cost factor for air network that might be relevant for the calculation of the variable component of costs. However, as the Commission does not possess reliable estimates for the pass-through rate of changes in variable costs to consumers, it considers more appropriate to adopt a more direct approach.
- (898) Indeed, in this case, a quantification of the pass-through of total average cost was in fact available. In the price concentration analysis, the impact of variations in average total costs on prices was directly estimated. The price concentration analysis quantifies the relationship between prices set at the lane level for each customer and a number of explanatory factors, including the average total cost. [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸³³. [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸³⁴. The models estimated both by the Notifying party and the Commission indicate that the pass-through rate of total average cost is about [...]*%. [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸³⁵. [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸³⁶.

⁸³⁰ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸³¹ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸³² Notifying party's response to the Statement of Objections, Annex 4.14, Annex 4.15.

⁸³³ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸³⁴ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸³⁵ See Table 7 in "Analysis of total customer synergy effects", 6 November 2012.

⁸³⁶ And this is favourable to the Notifying party.

- (899) Hence, for the calculation of efficiencies, the Commission takes the total average cost pass-through coefficient estimated in the price-concentration studies ([...]*%) and applies it to the recognized efficiencies⁸³⁷.
- (900) With respect to administrative cost savings, the Commission notes again that these are largely fixed in nature and in accordance with the Horizontal Merger Guidelines (paragraph 80), these costs are considered to be less likely to be passed-through to consumers. Indeed, when pricing is determined for individual contracts, it is primarily incremental costs that are relevant for pricing purposes (that is, costs that are directly generated by the additional volumes of any potential new business). This is also consistent with the calculated pass-through of total average cost around [...]*% given that this average incorporates different pass-through rates for fixed and variable elements. Indeed, "other" costs only represent about [...]*% of direct costs of international services⁸³⁸ and could be associated with a [...]* pass-through whilst other variable costs are passed-through to a significant extent.

Time horizon

- (901) According to the timeline envisaged by the Notifying party, the bulk of the efficiencies are likely to take at least [Confidential information regarding efficiencies expected to arise from the Transaction]* to materialize. [Confidential information regarding efficiencies expected to arise from the Transaction]*. Whilst it may be true that over the long time horizon the Notifying party may envisage for integration benefits to materialize, such distant efficiencies should have less weight and may not be sufficient to offset anti-competitive effects expected in the short run. According to the Horizontal Merger Guidelines, "*the later the efficiencies are expected in the future, the less weight the Commission can assign to them. This implies that, in order to be considered as a counteracting factor, the efficiencies must be timely*"⁸³⁹.
- (902) [Confidential information regarding the integration post merger]*
- (903) [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸⁴⁰
- (904) [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸⁴¹
- (905) The timeliness of efficiencies constitutes an important condition for two reasons: first, efficiencies expected to materialize in a more distant future are less likely to outweigh anti-competitive effects which are expected to arise in the short-term and second, more distant efficiencies carry more uncertainty as to their realizations as market circumstances are more difficult to predict in the longer run and could substantially affect their quantification. For these reasons, the Commission tends to give more weight to estimates of efficiencies expected to arise in the short to medium term. However, it should also be recognized that in some industries, the process of integration may take

⁸³⁷ In comparison, for the calculation of its net price effects, the Notifying party used a total cost pass-through of [...]*% (see Annex 27 of the response to the Statement of Objections).

⁸³⁸ See Figure 3 of the "Supplementary submission on efficiencies", 4 September 2012. These other costs relate to non-operational activities (such as administrative activities).

⁸³⁹ Horizontal Merger Guidelines, paragraph 83.

⁸⁴⁰ [...]*

⁸⁴¹ [Confidential information regarding efficiencies expected to arise from the Transaction]*

longer. The great uncertainty associated with synergies calculations (especially when the full scope of such synergies is expected in a distant future) is well illustrated by the broad range that was communicated to the markets by UPS (EUR 400 Million to 550 Million).

- (906) In view of the above, the Commission has decided in this case to consider as its baseline case efficiencies arising after three years. The focus on efficiencies expected to materialize in year three in this case satisfies the timeliness condition in that the analysis takes into account the necessary time to integrate in a complex setting but also the need to attribute less weight to efficiencies that are more distant in the future⁸⁴². In its overall assessment, the Commission will however also consider efficiencies expected after [Confidential information regarding efficiencies expected to arise from the Transaction]* – though assigning less weight to the full scope of efficiencies achievable [Confidential information regarding efficiencies expected to arise from the Transaction]* (in accordance with paragraph 83 of the Horizontal Merger Guidelines quoted in Recital 901 above).

7.10.3.3. Merger specificity

- (907) In their response to the Statement of Objections, the Notifying party claims that there are no realistic alternatives to achieve efficiencies. [Confidential information regarding efficiencies expected to arise from the Transaction]*.
- (908) [Confidential information regarding efficiencies expected to arise from the Transaction]*⁸⁴³
- (909) [Confidential information regarding efficiencies expected to arise from the Transaction]*
- (910) The Commission recognizes the Notifying party's arguments regarding the complexity of such network integration. Indeed, it seems that no agreements of this scale exist currently in the market. The Commission acknowledges that such arrangements could bring significant additional costs, less flexibility and more risk as compared with the merged entity.

7.10.3.4. Synergies calculation

Intra-EEA express cost savings

- (911) Cost savings that affect intra-EEA international express services include PUD/OSP, facilities, intra-Europe air network and associated ground handling costs. However, given the lack of verifiability for operational cost savings, the Commission will quantify efficiency gains only as regards the two latter categories, namely intra-Europe air network and ground handling costs.
- (912) The table below shows the timeline for the realization of the total amount of cost savings related to the two categories of synergies that are acknowledged as verifiable by the Commission.

⁸⁴² Assigning full weight to efficiencies expected to arise in [...] after the implementation of the merger would not have satisfied the timeliness condition in view of the greater uncertainties associated with cost savings expected to arise in a more distant future. Also note that in Paragraph 74 of the Horizontal Merger Guidelines, it is normally considered that entry is timely only if it occurs within two years.

⁸⁴³ [...]*

Table 16: [Confidential information regarding efficiencies expected to arise from the Transaction]*

[...]*

Source: [...]*

- (913) As explained above, the Commission takes into account cost savings achieved by the end of year 3. [Confidential information regarding efficiencies expected to arise from the Transaction]* In its decision to accept such a relatively long time horizon, the Commission acknowledged both the complexity of the industry and the fact that achieving a significant amount of air network synergies earlier than the rest (and that could be verified to a certain extent) seemed plausible.
- (914) Within the three year time horizon, the intra-Europe air network synergy savings are **EUR [...]*** and that for ground handling, **EUR [...]***.
- (915) A country-by-country allocation of these savings was not available from the Notifying party. However, the present case deals with national markets and the price effects are presented at country level. Therefore, in order to undertake a systematic balancing exercise, the Commission computed cost savings at country level.
- (916) UPS provided the Commission with data on its European air transport costs at lane level. The Commission has allocated the overall cost savings to individual lanes with origin and destination within EEA proportional to each lane's share of total UPS European air transport costs. Furthermore, the Commission has calculated an average cost per piece for each country of origin within EEA across all lanes originating in a given country.
- (917) Additionally, cost savings are also expressed as percentages of the average price of intra-EEA international express services in each country, based on UPS's weighted average price for customers as recorded in UPS transaction data.
- (918) Finally, the pass-through rate of [60-70]*% as recognized by the Commission is applied to the relative cost savings to obtain the final estimates for efficiencies in the intra-EEA international express market.
- (919) The table below summarizes the calculations explained above and presents the total cost savings per piece, the total relative cost savings as percentage of UPS average price and the proportion of savings the Commission believes that could be passed-on to customers.

Table 17: Cost savings in the intra-EEA express services after year 3

Origin country	Per piece	% of average price	% of average price (with [60-70]*% pass-through)
AT	[0-5]*	[0-5]*	[0-5]*
BE	[0-5]*	[0-5]*	[0-5]*
BG	[0-5]*	[0-5]*	[0-5]*
CY	[0-5]*	[0-5]*	[0-5]*
CZ	[0-5]*	[0-5]*	[0-5]*
DE	[0-5]*	[5-10]*	[0-5]*
DK	[0-5]*	[5-10]*	[0-5]*
EE	[0-5]*	[0-5]*	[0-5]*
ES	[0-5]*	[5-10]*	[0-5]*
FI	[0-5]*	[5-10]*	[5-10]*
FR	[0-5]*	[5-10]*	[0-5]*
GB	[0-5]*	[5-10]*	[0-5]*
GR	[0-5]*	[10-20]*	[5-10]*
HU	[0-5]*	[0-5]*	[0-5]*
IE	[0-5]*	[10-20]*	[5-10]*
IS	[5-10]*	[5-10]*	[0-5]*
IT	[0-5]*	[5-10]*	[0-5]*
LT	[0-5]*	[0-5]*	[0-5]*
LU	[0-5]*	[0-5]*	[0-5]*
LV	[0-5]*	[0-5]*	[0-5]*
MT	[0-5]*	[0-5]*	[0-5]*
NL	[0-5]*	[5-10]*	[0-5]*
NO	[0-5]*	[0-5]*	[0-5]*
PL	[0-5]*	[0-5]*	[0-5]*
PT	[0-5]*	[5-10]*	[5-10]*
RO	[0-5]*	[0-5]*	[0-5]*
SE	[0-5]*	[5-10]*	[0-5]*
SI	[5-10]*	[5-10]*	[5-10]*
SK	[0-5]*	[0-5]*	[0-5]*

Source: Commission calculations

Out-of-market efficiencies

(920) The Notifying party has submitted a paper⁸⁴⁴ showing the number of customers purchasing bundles and the number of packages that are purchased from the Parties in combination with other services. According to their calculations, [Details regarding the Parties' customer base]*. Given that there are no competition concerns on other services

⁸⁴⁴ Notifying party's response to the Statement of Objections, Annex 5 (CRA, "Analysis of total customer synergy effects", – amended on 14 November).

but efficiencies are expected, customers purchasing bundles of services should benefit from efficiencies arising in these other services and be overall better off, even if prices increase on the intra-EEA part of their bundle.

- (921) However, in the present case, there is no need to consider out-of-market efficiencies as in any event those efficiencies that are relevant for other services ([Confidential information regarding efficiencies expected to arise from the Transaction]*⁸⁴⁵ ⁸⁴⁶) are not verifiable to the required standard.

7.10.3.5. Overall effect of the Transaction

- (922) In each country-specific Section, the Commission will balance the efficiencies estimated above against the effects obtained in the price concentration analysis.

7.11. Country-by-Country analysis

7.11.1. Introduction

- (923) The Commission's assessment of the effects of the Transaction on the international intra-EEA express markets of the various EEA countries is presented in more detail in Sections 7.11.3 to 7.11.17.
- (924) The express delivery of small packages within the EEA is a network industry, which requires a presence in both the origin and the destination country. In order to offer a pan European express service, a seamless pan-European network is necessary, which is offered by the integrators only.
- (925) In assessing the competitive strengths of the various categories of competitors of the Parties in the international intra-EEA express markets, the Commission found that non-integrated small package delivery companies were weak competitors, notably with respect to geographic coverage, quality of service and ability to offer "premium" next day morning services.
- (926) In particular, this category of market participants generally does not offer "long-haul" international intra-EEA express services necessitating air transport. Some non-integrated companies offer such services relying on outsourcing of air transport, but generally to a limited extent and with a view to serving customers that essentially purchase road-based services and request deliveries necessitating air transport as a limited part of the bundle of services purchased from the non-integrated companies. Therefore, non-integrated small package delivery companies generally do not compete actively against integrators for "long-haul" international intra-EEA express services. In any event, relying on outsourcing of air transport imposes limitations which prevent a non-integrated company from operating as efficiently as an integrator and from offering an equally reliable service. This leads many customers to consider only integrators as possible suppliers of "long-haul" international intra-EEA express services. As a result, there is no prospect that post Transaction, any non-integrated small package delivery company – even among large international operators such as La Poste or Royal Mail, which control extensive ground networks in several EEA countries, may be willing or able to exert a significant competitive constraint on the Parties in the "long-haul" segment of the international intra-EEA express markets.

⁸⁴⁵ [Confidential information regarding efficiencies expected to arise from the Transaction]*

⁸⁴⁶ [Confidential information regarding efficiencies expected to arise from the Transaction]*

- (927) These findings apply to national postal operators as well as local small package delivery companies, even those that offer international intra-EEA services through international cooperative networks. Such cooperative networks play a very limited role in the international intra-EEA express markets and in any event, cooperation of independent local operators do not allow them to reach a comparable level of efficiency and reliability as single companies.
- (928) Freight forwarders do not exert a significant competitive constraint on the Parties in the international intra-EEA express markets either. Indeed, these market participants have limited operations in the small package delivery area and generally offer small package delivery services as part of a bundle of services requested by customers essentially purchasing their core freight forwarding services. Therefore, they generally do not actively compete against the integrators in the small package delivery markets. Moreover, their freight-oriented infrastructures do not allow them to efficiently provide small package delivery services. As a result, when marketing small package delivery services, freight forwarders usually outsource the whole or at least a significant part of the delivery process to small package delivery companies, in particular integrators, on which they are heavily dependent and in relation to which they essentially act as resellers.
- (929) Moreover, among integrators, FedEx is a weak competitor of the Parties in many international intra-EEA express markets and is generally perceived as such by customers. FedEx' operations in Europe are in fact mainly geared towards intercontinental shipments, where FedEx appears to enjoy a relatively strong position. By contrast, its international intra-EEA express operations generate limited revenues compared to the three other integrators. FedEx suffers from a significantly more limited geographic coverage than the one achieved by the other integrators and from a significant cost disadvantage in relation to them in particular because of the relatively low volumes transiting through FedEx's intra-European network. Although FedEx has an organic expansion plan which it started implementing in some EEA countries, and it may exert an increased competitive pressure compared to the current situation, FedEx is unlikely to expand to such an extent such as to defeat the likely anti-competitive effects arising from the Transaction on the intra-EEA express markets where such effects were identified.
- (930) While FedEx is a distant competitor of the other integrators, the Parties and DHL, by contrast, are close competitors on several key aspects. Customers generally perceive the Parties and DHL as close competitors.
- (931) As a result, the Transaction will remove a significant constraining force from the market and significantly limit possibilities for customers to switch to alternative suppliers, which will be prone to price increases. Given the magnitude of the barriers to entry in the international intra-EEA express markets, it is very unlikely that post Transaction, any entry or expansion could be sufficient in scope and sufficiently timely to defeat the harmful effects of the Transaction on consumers. In addition, no countervailing purchasing power can allow customers to combat these effects.
- (932) Initially, on the basis of the Parties' submissions and the findings of the market investigation, the Commission had, by way of a preliminary conclusion in the Statement of Objections, concluded that the Transaction would lead to a significant impediment to effective competition in the market for intra-EEA express delivery services in 29 EEA countries.

- (933) In the Statement of Objections, efficiency claims had been deemed unverifiable. As mentioned in Section 7.10.1, on 6 November 2012⁸⁴⁷ and 22 November 2012⁸⁴⁸, the Notifying party supplemented its submission about the efficiencies claims in order to address the Commission's concerns. The Commission reviewed and assessed in great detail the background material and explanations regarding the efficiency figures. As explained in Section 7.10, the Commission ultimately recognized part of these efficiencies as being verifiable, timely, merger specific and likely to benefit consumers. The Commission also used the Notifying party's figures to allocate efficiency gains at the country level ([Confidential information regarding efficiencies expected to arise from the Transaction]*).
- (934) In parallel, the Commission undertook an updated price-concentration analysis following exchanges with the Notifying party's economists and further submissions by the Notifying party after the issuance of the Statement of Objections and the Oral Hearing. [Results of the price concentration analysis]*⁸⁴⁹.
- (935) In view of the updated price concentration analysis and the assessment of efficiencies, the Commission found that in some countries, the orders of magnitude of price effects based on the refined economic models and cost savings based on efficiencies were such that net price decreases might be expected in a number of EEA countries, while in others prices would increase net of efficiencies. The Commission has taken this into account in its assessment in combination with other qualitative evidence in the file.
- (936) Moreover, following the Statement of Objections and the Oral Hearing, FedEx submitted additional information concerning its expansion plan for the period 2011-[...]* in 26 EEA countries and illustrating FedEx's targets for the evolution of key parameters, such as number of sorting centres, nominal sorting capacity, EOD service coverage and market share, over the period 2011-[...]*⁸⁵⁰.
- (937) As explained in the Letter of Facts, these additional facts confirm the general finding that it is unlikely that FedEx's position will change in the foreseeable future to such an extent as to counter-act any negative effects of the Transaction on competition.
- (938) This additional information also shows that there are differences among the EEA countries in the expansion, timing and targets of FedEx. Moreover, already today there are differences among the EEA countries as regards FedEx's presence, competitive position, coverage level and other country-specific circumstances. Therefore, in light of the current expansion plan, the degree to which FedEx is able to represent an increased competitive constraint on the Parties will vary from country to country.
- (939) In conclusion, on the basis of the specific market structure and the country-specific evidence collected in the course of the market investigation, and by taking into account the additional elements collected after the Statement of Objections, in this Decision the Commission does not identify competition concerns in the intra-EEA express market in

⁸⁴⁷ Annex 4 ("Further Materials Supporting the Verifiability of the Expected Synergies") and Annex 5 ("Analysis of total customer synergy effects", CRA – amended on 14 November) to the Response to the Statement of Objections

⁸⁴⁸ Memorandum "Efficiencies: country level savings for Benelux countries", CRA

⁸⁴⁹ In order to check for the robustness of the results, the Commission has run various scenarios of this model by varying different parameters and assumptions.

⁸⁵⁰ FedEx, response to the request for information dated 16 November 2012 (Q30).

EEA countries other than the ones mentioned in this section 7.11. The Commission concludes that, on balance, and taking into account all available evidence together, the Transaction would lead to a significant impediment to effective competition in the fifteen countries mentioned in the following Section 7.11.3 to 7.11.17.

7.11.2. *UPS's market shares are unreliable*

- (940) In the Form CO, UPS has provided market share estimates for the Parties and their main competitors in each EEA country (except Liechtenstein) for the following segments: all small package delivery services, international services, international express, international deferred, domestic, domestic express and domestic deferred, on the basis of specific criteria which do not correspond to the distinction of express and deferred services retained in the present statement.
- (941) On 6 July 2012, the Commission sent a request for information pursuant to Article 11(2) of the Merger Regulation asking UPS to provide its own estimated market shares for 2011 as well as TNT's and all the companies it considers to be its competitors according to the market definitions followed in the Statement of Objections, that is to say domestic/intra-EEA/extra-EEA and express/deferred. After various extensions of deadlines, UPS replied on 20 July 2012, that is to say, on the day when the Commission formally opened proceedings and thus too late to be taken into account in the decision opening proceedings.
- (942) Meanwhile in the course of the first phase investigation, the Commission took steps to collect revenue data directly from the Parties and the main other market participants. The collected revenues have been used to calculate percentages which represent an upper bound of each market participants' presence in the relevant segments, since at least in certain cases, data could not be obtained from all relevant market participants.
- (943) As stated by the Commission in the decision opening proceedings and as suggested by the Parties in their response to that decision, the Commission has pursued its investigation in view of gathering further data for the market reconstruction in its in-depth investigation.
- (944) On 7 August 2012, UPS provided updated market shares for 2010⁸⁵¹ in line with the market definition adopted in the Statement of Objection. UPS stated that, despite all its reasonable efforts, it was not able to submit more recent data. Despite the fact that these market shares refer to 2010, UPS argues that, in any event, they are more reliable than an incomplete market reconstruction exercise where the competitors would have a tendency to under-estimate their market presence.
- (945) Indeed, the Commission did not succeed in reconstructing the market as presented by the Parties, despite undertaking several investigatory measures⁸⁵² in order to collect the revenue data from those players listed by the Parties as being active on the intra-EEA express small package market. UPS had listed such a large number of companies as competing with them and TNT in each of the EEA countries, such as freight forwarders,

⁸⁵¹ Eventually by an email of 10 September 2012, UPS confirmed that the market shares stand for 2010 and not for 2011 as requested by the Commission.

⁸⁵² The Commission sent Article 11(3) Decisions to four third parties and sent a specific Article 11(2) request for information to 61 competitors in order to gather their revenue data, in addition to the first-phase request for information sent to 144 addressees.

contract logistics providers, courier companies, that it was not feasible under the very tight deadlines of a merger investigation to accomplish an exhaustive market reconstruction exercise.

- (946) However, a large part of those companies allegedly active in intra-EEA express delivery services for small packages have, according to UPS, individually market shares below [0-5]*%. In the Netherlands, for instance, UPS mentioned [20-30]* competitors with a market share of less than [0-5]*%. A market share of less than [0-5]*% is already an indication that such a competitor does not exert any competitive constraint on the Parties and the other integrators. Moreover, most of these competitors are freight forwarders, which as has been shown in Section 7.2.4., do not offer express services on their own. Not surprisingly, these competitors have not been mentioned by any client in the course of the investigation.
- (947) Furthermore, UPS clearly overestimated the market share of the Royal Mail Group (including GLS) and La Poste Group (including DPD). In all the 29 countries except Latvia, Lithuania, Romania and Slovenia, UPS's estimates of GLS and DPD's market shares are higher, and often significantly higher, than the revenue figures obtained during the market investigation⁸⁵³. For instance, in Germany, the Parties indicated that the estimated revenues of DPD and GLS in the intra-EEA express market are respectively EUR [...] million corresponding to a share of respectively [5-10]*% and [5-10]*% of the German market. Based on the data obtained from DPD, DPD's revenues were [...] of UPS's estimates, corresponding to a [0-5]*% market share. GLS indicated that it was unable to provide intra-EEA express services in Germany except to Luxembourg and therefore had very marginal revenues and market shares.
- (948) Similarly, in all the 29 countries covered by the investigation, with the exception of Luxembourg, Malta and Sweden, the result of the market investigation demonstrated that the market share of the Public Postal Operator ('PPO') is lower and often significantly lower than the estimate provided by the Parties. For instance, in Poland, the market investigation confirmed that Posta Polska is not active in the intra-EEA express market at all and therefore does not have a [5-10]*% market share as claimed by the Parties.
- (949) As a result, the market shares submitted by UPS are clearly underestimating the market presence of the integrators. The market reconstruction of the Commission is not perfect either, although it is based on data submitted by third parties concerning their own operation and not estimates. It nevertheless omits players and therefore results in market shares for UPS and the other integrators which are slightly overstated and would constitute an upper bound.
- (950) Therefore, for the sake of fairness, in its country-by-country analysis, the Commission decided to use the market shares submitted by UPS as a starting point for its assessment of the overall competitive landscape.
- (951) Given that competitors other than the integrators exert only a limited or no competitive constraint on the integrators in the market for intra-EEA express services and especially on the long-distance services, and the integrators are the main sources of competition in

⁸⁵³ UPS's estimates are based on the year 2010 while market reconstruction data are available for 2011. However, even if revenues vary from one year to another, the market shares from one year to another normally vary less.

that market, the Commission will present for each country a comparison of the integrators revenues in order to compare their relative strength. The Commission has obtained all the necessary revenue data from the four integrators in the course of its in-depth investigation, notably from DHL and FedEx, as well as from the Parties which provided revenue data for 2011 in response to the Article 11(3) decision issued by the Commission on 10 August 2012.

7.11.3. Bulgaria

7.11.3.1. UPS's views

- (952) [Details on UPS' operations in Bulgaria]*⁸⁵⁴. TNT, for its part, operates in Bulgaria with its own assets. The two other integrators also operate in Bulgaria. DHL operates with its own assets and FedEx is represented in that country by [...] *⁸⁵⁵. La Poste and Royal Mail also have small package delivery operations in Bulgaria. They operate through partnerships with local operators, respectively [...] * and [...] *⁸⁵⁶.
- (953) UPS argued that the Bulgarian international intra-EEA express market was very dynamic. UPS put particular emphasis on the role of DHL, which would be, also post Transaction, the largest player in international express in Bulgaria. UPS also referred to the role of FedEx as well as to the existence of a "*diffuse competitive fringe*"⁸⁵⁷.
- (954) UPS considers in particular that non-integrated small package delivery companies and freight forwarders are important and credible alternatives within the Bulgarian international intra-EEA express market⁸⁵⁸. UPS took the view that the conclusions reached in the Statement of Objections with regard to non-integrators were based on too few responses from customers to the market investigation⁸⁵⁹. Concerning specifically DPD, UPS cast doubts on the fact that this company offers no international intra-EEA express services in Bulgaria, save for very limited volumes in very specific circumstances⁸⁶⁰.
- (955) Also, UPS emphasises the role of Econt Express, which would have "*a particularly strong presence in Bulgaria*"⁸⁶¹, as well as the role of freight forwarders, which would be "*providing a credible alternative to some customers in Bulgaria*"⁸⁶².
- (956) As regards FedEx, UPS contests the conclusion that it would be a weak competitor on the Bulgarian international intra-EEA express market because of the weakness of its European network⁸⁶³. Referring to the Bulgarian customers' responses to the market investigation, UPS argues that FedEx should not be disregarded as a competitive constraint in Bulgaria⁸⁶⁴.

854 Form CO, paragraph 641.

855 Form CO, paragraphs 643-644.

856 Form CO, paragraphs 645-646.

857 Form CO, paragraph 655, Notifying party's response to the Statement of Objections, paragraph 9.30.

858 Notifying party's response to the Statement of Objections, paragraph 9.31.

859 Notifying party's response to the Statement of Objections, paragraph 9.40.

860 Notifying party's response to the Statement of Objections, paragraph 9.41.

861 Notifying party's response to the Statement of Objections, paragraph 9.42.

862 Notifying party's response to the Statement of Objections, paragraph 9.44.

863 Notifying party's response to the Statement of Objections, paragraphs 9.46-9.48.

864 Notifying party's response to the Statement of Objections, paragraph 9.49.

- (957) On that basis, UPS expressed disagreement with respect to the conclusions reached in the Statement of Objections in regard to the closeness of competition between the Parties⁸⁶⁵.
- (958) In addition, UPS criticised the Commission for having allegedly adopted a "*completely static view*" when assessing the effects of the Transaction on the Bulgarian market. According to UPS, the Commission would have failed to properly assess the likely reaction of competitors to a hypothetical price increase post Transaction⁸⁶⁶.
- (959) Besides, UPS claims that the outcome of the market investigation would reveal that for the sub-set of customers that according to the Statement of Objections would be affected by the Transaction, namely, customers that source all their small package delivery services from one single supplier and could not threaten to multi-source, other competitors than DHL are relevant⁸⁶⁷.
- (960) [Details on UPS' operations in Bulgaria]*
- (961) UPS's estimates of market shares for the Bulgarian international intra-EEA express market in 2010 are the following:

Table 18: International intra-EEA express deliveries in Bulgaria (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[5-10]*%
TNT Express	[20-30]*%
Combined	[30-40]*%
DHL Express	[40-50]*%
Fedex	[5-10]*%
Royal Mail (GLS)	
La Poste (DPD)	[0-5]*%
BG Post	
In Time (Domestic)	
Interlogistica (Excluding GLS)	[0-5]*%
Speedy (Excluding DPD)	[0-5]*%
Econt Express	[5-10]*%
Aramex	[0-5]*%
Eurosped	
Transpress Courier	
Gebruder Weiss	[0-5]*%
DB Schenker	[0-5]*%
D&D Express	[0-5]*%
Tip-Top Courier	[0-5]*%
Di Eych Express Bulgaria Eood	[0-5]*%
Polipost	[0-5]*%
Sema Express	[0-5]*%
Meridian Express	
	100.0%

⁸⁶⁵ Notifying party's response to the Statement of Objections, paragraph 9.50.

⁸⁶⁶ Notifying party's response to the Statement of Objections, paragraph 9.33.

⁸⁶⁷ Notifying party's response to the Statement of Objections, paragraphs 3.47, 9.36 and 9.37.

Source: UPS's response of 7 August 2012 to the request for information of 31 July 2012.

7.11.3.2. The Commission's assessment

(962) According to UPS's data, apart from the four integrators, only the following operators would have a market share of more than [0-5]*%: Econt Express, Aramex, Gebrüder Weiss, DB Schenker, Di Eych Express Bulgaria Eood and Sema Express. None of these operators would have a market share higher than [0-5]*%, except Econt Express ([5-10]*%). According to these data, DHL and the merged entity would be the largest operators intra-EEA, far ahead of all the other competitors.

Preliminary remark on single-sourcing customers

(963) It must be noted from the outset that contrary to the allegations made by UPS, the Commission has not limited the competition concerns raised in the Statement of Objections to single-sourcing customers. Wherever the Commission maintains concerns in this Decision, they are not limited to single-sourcing customers either. The assessment in this section will show that it is the case in particular for the Bulgarian market. Therefore, UPS's restrictive analysis of the responses of the sole single-sourcing customers⁸⁶⁸ to the market investigation cannot lead to any meaningful conclusion. Moreover, it is noteworthy that UPS drew far-reaching conclusions on the basis of the responses of the two customers that it considers to be the only true single-sourcing customers among Bulgarian respondents, while at the same time, criticising the Commission for having also drawn conclusions on the basis of two responses only⁸⁶⁹.

Non-integrators

(964) In this section, the Commission will examine the role of non-integrators on the Bulgarian international intra-EEA express market and the extent to which they exert competitive pressure on the Parties on this market.

DPD and GLS

(965) According to UPS's market share estimates, GLS is not present at all on the Bulgarian international intra-EEA express market.

(966) Moreover, according to UPS, DPD has a very modest market share (only [0-5]*%). This is already a strong indication of the negligible competitive constraint exerted on the Parties by DPD.

(967) According to La Poste, in fact, with the possible exception of very limited volumes shipped by air for customers essentially purchasing road-based services, DPD offers no international intra-EEA express services in Bulgaria⁸⁷⁰.

(968) UPS called this fact into question, claiming that according to DPD's Bulgarian website and price list, DPD offers deliveries to more than 220 countries from Bulgaria, promising to deliver documents and packages within one to two days from Sofia to at least 17 EEA countries (Austria, Belgium, Cyprus, the Czech Republic, Denmark, Germany, France, Finland, Greece, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Slovakia, Spain and Sweden). UPS also referred to the following statement

⁸⁶⁸ Notifying party's response to the Statement of Objections, paragraphs 9.37 and 9.38.

⁸⁶⁹ Notifying party's response to the Statement of Objections, paragraph 9.40.

⁸⁷⁰ La Poste's submission of 27 September 2012.

found on DPD's website concerning the DPD Express service: "*in many European countries, delivery is on the following day*"⁸⁷¹.

- (969) However, contrary to what UPS suggests, no clear confirmation of DPD's presence on the Bulgarian international intra-EEA express market can be found on DPD's website. In fact, it can be inferred from the information disclosed on DPD's website that the DPD Express service is not offered in Bulgaria. As regards shipments from Bulgaria, the relevant webpages only refer to the DPD Classic service, for which the standard delivery time is at least two days (three to five days for France, Germany and Italy) and can go up to six to eight days (for Finland)⁸⁷². Therefore, La Poste's abovementioned submission is correct.
- (970) Moreover, even if UPS's affirmations were true and even if DPD promised to deliver small packages from Sofia within one to two days to other EEA countries, this would still not prove that DPD is active in the international intra-EEA express market, which only includes services with a next-day delivery commitment. Likewise, even if the DPD Express service was offered in Bulgaria, the mere indication given to customers that small packages are usually delivered on the following day would not make it an international intra-EEA express service within the meaning of this Decision.
- (971) Besides, as explained in the general assessment of the competitive constraint exerted by DPD and GLS on the Parties in Section 7.2, none of these two operators is likely to expand significantly into the long haul express segment of the market in the near future, even if the merged entity would increase prices. Indeed, this would require a more extensive use of outsourcing of air transport and neither DPD nor GLS would be likely to be willing to follow such a path and be able to exert a significant constraint on the integrators on that basis.
- (972) For these reasons, La Poste and Royal Mail, which have no significant presence on the Bulgarian market, are unlikely to expand in a near future such that they would become significant competitive forces vis-à-vis the merged entity.

Other non-integrated small package delivery companies

- (973) The Bulgarian Post does not offer international express services. The minimum transit time of its international services is three days⁸⁷³.
- (974) As regards Econt Express, it is a local small package delivery company [Results of UPS' market analysis]^{*874}.
- (975) In addition, Econt Express does not see itself as a significant competitor of the integrators with respect to customers shipping significant volumes outside Bulgaria. [Details on Econt Express' strategy]^{*875}. [Details on Econt Express' strategy]^{*876}. Furthermore, Econt Express indicated that if post Transaction, prices on a given segment of the small package delivery market were to go up, it would not be sufficient

⁸⁷¹ Notifying party's response to the Statement of Objections, paragraph 9.41.

⁸⁷² See DPD's website: http://www.dpd.com/bg_en/Home/Shipping/Shipping-International/Delivery-Time, visited on 2 December 2012 at 9.00 pm.

⁸⁷³ Bulgarian Post's response to question 78 of questionnaire to competitors – Phase I.

⁸⁷⁴ Form CO, paragraph 648.

⁸⁷⁵ Econt Express' response to questions 11, and 11.1 of questionnaire R30 to competitors – Phase II.

⁸⁷⁶ Econt Express' response to questions 54.1 and 27 of questionnaire R30 to competitors – Phase II.

for it to enter that segment because its "*strength and goals are not connected with massive international parcel deliveries*"⁸⁷⁷. This means that Econt Express would not be prepared to enter the international intra-EEA express segment with significant volumes, since significant international operations are not part of its strategy.

- (976) This points to a limited presence of Econt Express on the international intra-EEA express market, which appears to fall outside the strategic focus of the company. This further suggests a weak likelihood that it may expand significantly into this area in a near future. Besides, Bulgarian customers appear not to view Econt Express as a significant competitor of the Parties on the international intra-EEA express market. In the framework of the market investigation, an overwhelming majority of the respondents did not mention local small package delivery companies (a category to which Econt Express belongs) as satisfying the criteria that they consider indispensable when negotiating a contract for international intra-EEA services⁸⁷⁸. It is also worth noting that [Customer's name]*, which purchases domestic services from Econt Express and thus presumably knows that operator well, does not use it for international services (including international intra-EEA express services) [...]*. Moreover, [Customer's name]* indicated that non-integrators would not be a good alternative to integrators for international intra-EEA express deliveries⁸⁷⁹. [Customer's name]*, for its part, indicated that it used "*for domestic shipments local companies and for all other shipments – integrator*"⁸⁸⁰.
- (977) In view of these elements as well as the modest market share of Econt Express, it is concluded that Econt Express does not exert any significant competitive constraint on the Parties on the Bulgarian international intra-EEA express market and will not do so in a near future.

Freight forwarders and resellers

- (978) Several companies identified by UPS as operating in the Bulgarian international intra-EEA express market are freight forwarders. This is the case in particular for Aramex, Gebrüder Weiss and DB Schenker. According to UPS, the market shares of these operators would be very modest, not exceeding [0-5]*%.
- (979) DB Schenker stated that it had "*no significant parcel business*" in Bulgaria but that "*on request, standard and express services*" can be provided in that country⁸⁸¹. This indicates that DB Schenker is unlikely to constitute a significant competitive force on the Bulgarian international intra-EEA express market. It further shows that DB Schenker does not actively compete for small package delivery contracts, but instead, offers these "*on request*".
- (980) DB Schenker, whose core business is made up of freight forwarding services, explained that the rationale behind its small package delivery operations in Europe was to provide a comprehensive range of logistics services to its customers⁸⁸². [Details on DB Schenker

⁸⁷⁷ Econt Express' response to questions 26 and 26.1 of questionnaire R30 to competitors – Phase II.

⁸⁷⁸ See responses to question 31 of questionnaire Q3 to customers – Bulgaria – Phase I.

⁸⁷⁹ [Customer's name]* response to questions 8, 41.5.2 and 41.5.3 of questionnaire R3 to customers – Bulgaria – Phase II.

⁸⁸⁰ [Customer's name]* response to question 41.5.5.1 of questionnaire R3 to customers – Bulgaria – Phase II.

⁸⁸¹ DB Schenker's response to question 79 of questionnaire to competitors – Phase I.

⁸⁸² Agreed minutes of a teleconference call of 29 August 2012 with DB Schenker, paragraphs 3 and 20.

operations in Bulgaria]*⁸⁸³. When it comes to express services, most of the process is contracted out to third parties⁸⁸⁴. [Relationship between DB Schenker and UPS in Bulgaria]*⁸⁸⁵. For all the reasons already put forward in the general assessment of the competitive constraint exerted by freight forwarders and resellers in Section 7.2, DB Schenker cannot be seen as a significant competitive force vis-à-vis UPS [Relationship between DB Schenker and UPS in Bulgaria]*. Indeed, in such a context, a price increase following the Transaction would harm DB Schenker [Relationship between DB Schenker and UPS in Bulgaria]* and would be likely to be passed on to its own customers.

- (981) As regards Gebrüder Weiss, aside from Austria, it does not offer express small package delivery services to any meaningful extent. Indeed, it offers "Express Services" via its brand EuroExpress but those services usually concern packages weighing more than 31.5 kg, thereby falling outside the scope of the definition of "small packages"⁸⁸⁶.
- (982) As regards Aramex's "International Express" service, [Information from the Parties' internal market analysis]*⁸⁸⁷.
- (983) In addition, in the framework of the market investigation, an overwhelming majority of the Bulgarian customers has not identified freight forwarders as a category of operators satisfying the criteria that they consider indispensable when negotiating a contract for international intra-EEA services⁸⁸⁸.
- (984) In view of all these elements, freight forwarders appear to exert a very limited competitive constraint on the Parties on the Bulgarian international intra-EEA express market.
- (985) UPS referred to a questionnaire sent by the Commission to a large number of small customers during the second phase investigation, and remarked that of the 11 responding small customers of the Parties located in Bulgaria, two currently used freight forwarders while one noted that it switched to freight forwarders in the last three years⁸⁸⁹. This shows that only a small minority of respondents uses freight forwarders, which does not contradict the finding that whilst being present on the market, freight forwarders do not constrain the Parties to any significant extent. In addition, UPS has erred in reading the questionnaire. It referred to a question whereby respondents were invited to specify the suppliers *from* which they switched and not *to* which they switched, which means that the customer to which it referred switched away from a freight forwarder, and not to a freight forwarder⁸⁹⁰. Moreover, TNT and DHL were each identified by a majority of Bulgarian customers that reported switching events as companies from which they switched. UPS was identified by half of them. By contrast, freight forwarders were only mentioned by a small minority - in fact, one single customer. In addition, that single customer indicated with respect to international intra-EEA next-day end-of-day services that non-integrators do not offer the service

⁸⁸³ Agreed minutes of a teleconference call of 29 August 2012 with DB Schenker, paragraphs 4-5.

⁸⁸⁴ Agreed minutes of a teleconference call of 29 August 2012 with DB Schenker, paragraph 6.

⁸⁸⁵ Form CO, paragraph 314.

⁸⁸⁶ Gebrüder Weiss' response to question 3 of questionnaire to competitors – Phase I.

⁸⁸⁷ [Information from the Parties' internal market analysis]*

⁸⁸⁸ See responses to question 31 of questionnaire Q3 to customers – Phase I.

⁸⁸⁹ Notifying party's response to the Statement of Objections, paragraph 9.44.

⁸⁹⁰ See responses to question 3.1 of questionnaire to customers (B) – Phase II.

characteristics and / or the quality that it needs, do not cover all the destinations to which it needs to ship small packages and are unable to ship all its volume requirements⁸⁹¹. This suggests that it is very unlikely that that customer would be ready to switch back to a freight forwarder.

- (986) Consequently, UPS's arguments cannot call into question the conclusions that freight forwarders exert a very limited competitive constraint on the Parties on the Bulgarian international intra-EEA express market.

Customers' behaviour vis-à-vis non-integrators

- (987) In reply to the market investigation no Bulgarian customer has identified any non-integrator among the two or three closest competitors of UPS or TNT⁸⁹². Moreover, when asked which suppliers satisfy the criteria that they consider indispensable when negotiating a contract for the provision of international intra-EEA small package delivery services, a vast majority of the respondents did not mention freight forwarders. The same holds true for local companies. By contrast, UPS and TNT were each mentioned by at least half of the respondents⁸⁹³.

- (988) Therefore, it can be concluded that non-integrators, including Econt Express and freight forwarders exert at best a very weak competitive constraint on the Parties on the Bulgarian international intra-EEA express market. Moreover, in view of the general assessment of barriers to entry set out in Section 7.6, non-integrators appear unlikely to expand significantly into the Bulgarian international intra-EEA express market in a near future, even following a price increase due to the Transaction.

- (989) Furthermore, Bulgarian customers have taken the view that non-integrators would not constitute a good alternative to the integrators for international intra-EEA express services⁸⁹⁴. Moreover, these respondents invited only integrators to submit an offer for international intra-EEA next-day end-of-day services in the last two years⁸⁹⁵. Admittedly and as pointed out by UPS⁸⁹⁶, there has been only a very small number of respondents, which therefore does not allow these responses to be regarded as decisive evidence. It is thus simply noted that these responses do not conflict with the conclusion that non-integrators only have a modest role on the Bulgarian international intra-EEA express market.

Integrators

- (990) According to data directly obtained from each integrator during the investigation, the total revenues obtained by the four integrators in 2011 on the Bulgarian international intra-EEA express market would be split as follows:

⁸⁹¹ [Customer's name]* response to questions 21.1, 21.2 and 21.3 of questionnaire to customers (B)- Phase II.

⁸⁹² See responses to questions 60 and 61 of questionnaire Q3 to customers – Bulgaria – Phase I and questions 35 to 37 of questionnaire R3 to customers – Bulgaria – Phase II.

⁸⁹³ See responses to question 31 of questionnaire to customers – Bulgaria – Phase I.

⁸⁹⁴ See responses to questions 41.5.2 and 41.5.3 of questionnaire R3 to customers – Bulgaria – Phase II.

⁸⁹⁵ See responses to question 27.3 to questionnaire R3 to customers – Bulgaria – Phase II.

⁸⁹⁶ Notifying party's response to the Statement of Objections, paragraph 9.40.

Table 19: International intra-EEA express deliveries in Bulgaria (2011) – Integrators' revenues only

	International intra EEA
Company	Express
UPS	[5-10]%
TNT Express	[20-30]%
UPS + TNT Express	[30-40]%
DHL	[50-60]%
FedEx	[5-10]%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL⁸⁹⁷ and FedEx⁸⁹⁸ replies to the Questionnaire to competitors-Phase I.

- (991) The outcome of the Commission's market reconstruction therefore indicates that post Transaction, DHL would be the largest market participant, followed by the merged entity, which would have a lower market share, and FedEx, the latter having a very significantly lower market share than the merged entity.

DHL

- (992) Referring to the figures in Table 19, UPS argues that post Transaction, DHL would "remain much larger than the merged entity with a high market share of 50-60% in relation to the intra-EEA express market (integrators only)"⁸⁹⁹. However, those figures rather indicate that while DHL would remain the strongest market player post-Transaction in terms of revenues, the merged entity would also have a very significant weight on the market, ranking second well ahead of FedEx and non-integrators, which as demonstrated do not constitute significant competitive forces.
- (993) These figures also illustrate the fact that the Parties are currently the second and third operators by some margin and that in view of the shares of the integrators' total revenues accounted for by UPS, the Transaction would eliminate a significant independent competitive force.
- (994) Furthermore, as it will be shown in this section, the available price concentration analysis provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.

FedEx

- (995) FedEx generates very limited revenues on the Bulgarian international intra-EEA express market compared with each of the other integrators, and *a fortiori*, compared to the merged entity and DHL. This, combined with the factors identified in the general assessment of the competitive constraint exerted by FedEx in Section 7.3, notably its cost disadvantage, is a first and strong indication that FedEx only exerts a weak

⁸⁹⁷ DHL's response to question 98 of the questionnaire to competitors – Phase I.

⁸⁹⁸ FedEx's response to question 98 of the questionnaire to competitors – Phase I.

⁸⁹⁹ Notifying party's response to the Statement of Objections, paragraph 9.30.

constraint on the Parties, and would *a fortiori* exert a weak constraint on the merged entity.

- (996) [Parties' coverage data and estimates regarding the other integrators' coverage]*. Even though geographic coverage relates in the first place to inbound deliveries, it is also a reliable parameter to assess the strength of a network in terms of pick-up of outbound international volumes and ground transportation of these volumes within the origin country. Indeed, in a given country, the same network is used for the pick-up of outbound consignments and the delivery of inbound consignments.
- (997) The network used by FedEx in Bulgaria (via its agent [...]*) thus appears very weak compared to that of the other integrators, which strongly limits FedEx' ability to offer international intra-EEA express to a large number of customers scattered over the whole territory. Indeed, in order to be able to pick-up small packages in late afternoon and carry them to the closest satellite air gateway so that they can be transported by air during the night and reach the consignees in the destination country by the next day, one needs a dense network in the origin country.
- (998) In addition, as already indicated in Section 7.3.3., FedEx has less dense a network than the Parties in a number of EEA countries, which overall translates into a weak geographic coverage (on the destination side) for outbound international intra-EEA express volumes from Bulgaria.
- (999) Data [...] * concerning the time-in-transit of the integrators' services illustrate FedEx's weaknesses vis-à-vis TNT as far as coverage is concerned⁹⁰⁰. [Parties' coverage data and estimates regarding the other integrators' coverage]*.
- (1000) During the market investigation, Bulgarian customers were invited to rank 13 service characteristics on a scale from 1 to 5 (1 corresponding to the least important characteristics and 5 to the indispensable ones), per category of service. For international intra-EEA next-day end-of-day services, which constitute the bulk of the international intra-EEA express market, the Bulgarian customers attributed an average ranking of more than 4.5 to the criterion "extensive geographic coverage in the receiving country"⁹⁰¹. This reveals that they attach great importance to this characteristic. Yet, FedEx appears weaker than the three other integrators in respect to this category, due to the generally weak density of its intra-European network. This is thus a further indication of the weak constraint exerted by FedEx on the Parties.
- (1001) UPS argues that the limited geographic coverage of FedEx is a weak basis to limit the competitive pressure exercised by FedEx notably because the relevant market is not defined on a lane-by-lane basis but encompasses all destination countries in the EEA, which implies that a company is active in the Bulgarian international intra-EEA express market as soon as it serves only one lane⁹⁰². This argument ought to be dismissed. The fact that FedEx is active on at least one lane out of Bulgaria can only lead to the conclusion that FedEx is active on the relevant market. However, it cannot provide any indication as to the intensity of the competitive constraint exerted by FedEx. The fact that FedEx has a weak coverage both in Bulgaria and in a number of other EEA countries implies that it is severely limited both in its ability to supply potential

⁹⁰⁰ UPS's reply to request for information Q20, 31 August 2012.

⁹⁰¹ See responses to question 30 of questionnaire Q3 to customers – Bulgaria – Phase I.

⁹⁰² Notifying party's response to the Statement of Objections, paragraph 9.46-9.47.

customers in Bulgaria and in its ability to offer a service comparable with competing services with respect to an important characteristic, namely geographic coverage. Therefore, this fact, combined with FedEx' very modest market share, is indicative of a low degree of constraint exerted by FedEx on the Parties.

- (1002) According to UPS, many customers multi-source, which means that they mix and match providers and that the lack of geographic coverage on a certain destination does not have to affect the competitive pressure exercised by that supplier on another destination⁹⁰³. However, as demonstrated in Section 7.3, the latter has, overall, a weaker intra-European network than the Parties, and therefore, overall, a lower geographic coverage on the destination side. Moreover, FedEx has a weak network on the origin side. Therefore even though FedEx may offer a competitive service on certain lanes from Bulgaria, overall on the market, it is weaker than the Parties.
- (1003) UPS referred to the responses to the second phase market investigation questionnaire to Bulgarian customers to support the conclusion that FedEx should not be disregarded as a competitive constraint⁹⁰⁴. This is surprising, in view of the criticism aimed at the Commission for having used the small number of responses to this same questionnaire in the reasoning set out in the Statement of Objections (see recital 954 above)⁹⁰⁵. UPS also noted⁹⁰⁶ that in reply to the second phase market investigation questionnaire, Bulgarian customers indicated either that the four integrators were capable of providing an equally good alternative for domestic, intra-EEA and extra-EEA services or that they did not know if it was the case⁹⁰⁷. However, in view of FedEx' low market shares and weak network in Bulgaria, it cannot affect the conclusion that FedEx currently exerts only a weak constraint on the Parties.
- (1004) According to its European expansion plan⁹⁰⁸, [Details on FedEx's expansion plan across the EEA]*⁹⁰⁹. [Details on FedEx's expansion plan across the EEA]*⁹¹⁰. [Details on FedEx's expansion plan across the EEA]*⁹¹¹.
- (1005) [Details on FedEx's expansion plan across the EEA]*
- (1006) Given that FedEx activities are operated by a third party, UPS argues in its reply to the Letter of Facts⁹¹², that FedEx can presumably increase its coverage without additional investments. However, the achievement of FedEx's general target for coverage is dependent on this third party and cannot be taken as a firm commitment of FedEx's investments. It is only after the infrastructure has been improved that FedEx (or its local partner) would be able to significantly improve its coverage and try to grow more volumes and consequently market shares. According to the Parties' EOD coverage estimations, FedEx reached only [5-10]*% coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx's coverage would translate into a coverage of

⁹⁰³ Notifying party's response to the Statement of Objections, paragraph 9.48.
⁹⁰⁴ Notifying party's responses to the Statement of Objections, paragraph 9.49.
⁹⁰⁵ Notifying party's responses to the Statement of Objections, paragraph 9.40.
⁹⁰⁶ Notifying party's response to the Statement of Objections, paragraph 9.49.
⁹⁰⁷ See responses to question 41 to questionnaire to customers – Bulgaria – Phase II.
⁹⁰⁸ See Section 7.3.10 of this Decision.
⁹⁰⁹ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.
⁹¹⁰ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.
⁹¹¹ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 3.
⁹¹² The Notifying party's Response to the Letter of Facts, page 7.

[...]*% in FY 2015.⁹¹³ This means that FedEx would still lag significantly behind the Parties who both have a coverage close or above [90-100]*%.

- (1007) [Details on FedEx's expansion plan across the EEA]*⁹¹⁴. [Details on FedEx's expansion plan across the EEA]*. Even though it is likely that FedEx's market share may increase, the Commission is thus unable to predict what level of market share FedEx is likely to be able to achieve in the near future.
- (1008) The expansion of FedEx needs to be put into perspective of its current market position, where the starting point for expansion is still quite modest. In Bulgaria, FedEx achieved a revenue share of [5-10]% based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL given FedEx's low coverage on the destination side.
- (1009) Therefore, even if the competitive pressure of FedEx would likely increase compared to its current position, FedEx is not expected to represent a significant competitive constraint on the main integrators in the near future, such as to counter-act negative effects of the transaction on competition in Bulgaria.

Closeness of competition

- (1010) The general conclusions already drawn with respect to the closeness of competition between the Parties on the international intra-EEA express market apply to Bulgaria. The Parties and DHL appear to face only limited competitive pressure on the part of FedEx and even less from non-integrators on the Bulgarian market. FedEx, notably in view of its limited market share and geographic coverage, appears to be a distant competitor. UPS, TNT and DHL are the only integrators that at the same time use an extensive network in Bulgaria and offer an extensive geographic coverage across the EEA on the destination side.
- (1011) Therefore, UPS, TNT and DHL can be seen as close competitors in the Bulgarian international intra-EEA express market, whilst FedEx and non-integrators are significantly more distant competitors.

Use of an Authorised Service Contractor by UPS

- (1012) [Details on UPS' operations in Bulgaria]*^{915 916 917}

Customers' assessment

- (1013) Relying on a comment made by one single customer ([Customer's name]*), UPS claims that the market investigation reveals support for the Transaction among Bulgarian customers⁹¹⁸. However, the alleged supportive views of the Bulgarian customers is far from unanimous, as exemplified by the following two comments made by [Customer's name]*, respectively on the expected impact of the Transaction on its own business and

⁹¹³ FedEx's current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

⁹¹⁴ FedEx, response to the request for information dated 16 November 2012 (Q30).

⁹¹⁵ [Details on UPS' operations in Bulgaria]*

⁹¹⁶ [Details on UPS' operations in Bulgaria]*

⁹¹⁷ [Details on UPS' operations in Bulgaria]*

⁹¹⁸ Notifying party's response to the Statement of Objections, paragraph 9.29.

on the small package industry as a whole: "*price increase, level of service change*", "*price increase*"⁹¹⁹.

Price concentration analysis and efficiencies

- (1014) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Bulgaria would range between [5-10]*% and [5-10]*% depending on the model specification.⁹²⁰ The scope of estimated price increases derives from the fact that FedEx's coverage in Bulgaria is extremely limited ([5-10]*%) and non-integrators also have [...]*. The merger would therefore amount to a "3 to 2". The Commission also notes that in Bulgaria FedEx's market share is low ([5-10]%), consistent with its limited coverage.
- (1015) Regarding efficiencies, the Commission has calculated that in Bulgaria, cost savings would represent between [0-5]*% of net prices in Year [...]* (after the Transaction) and up to [5-10]*% of net prices in Year [...]*. Assuming a pass-through rate of [60-70]*% and taking Year [...]* efficiencies as the base line case (as explained in Section 7.10.3), the net price effects in Bulgaria would be positive, ranging between [0-5]*% and [5-10]*%.⁹²¹ Even in Year [...]*, when full efficiencies would be achieved – and even irrespective of the fact that this is a remote time horizon in the context of merger control – net price effects in Bulgaria remain positive. Overall in Bulgaria, the orders of magnitude of price increases and efficiencies are such that a significant impediment to effective competition on the market for international intra-EEA express services is to be expected.

7.11.3.3. The Commission's conclusion

- (1016) Therefore, UPS, TNT and DHL can be seen as close competitors on the Bulgarian international intra-EEA express market while FedEx and non-integrators are distant competitors exerting a weak constraint on the Parties.
- (1017) In addition, also in view of the general assessment already conducted as regards barriers to entry in Section 7.6, countervailing buyer power and efficiencies, the Commission considers that the Transaction is likely to eliminate an important competitive force from the Bulgarian international intra-EEA express market and to limit the possibilities of switching supplier, as there is no sufficient countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects. Furthermore, the available price concentration analysis provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.
- (1018) Therefore, the Transaction would be likely to lead to a significant impediment to effective competition on the Bulgarian market for international intra-EEA express deliveries of small packages.

⁹¹⁹ [Customer's name]* response to questions 66.1 and 66.2 of questionnaire Q3 to customers – Bulgaria – Phase I.

⁹²⁰ Note that these specifications include both models with and without non-integrators coverage data.

⁹²¹ [Confidential information regarding efficiencies expected to arise from the Transaction]*

7.11.4. The Czech Republic

7.11.4.1. UPS's views

(1019) According to UPS's estimates, based on the products market definition followed by the Commission, *post* merger UPS considers that the market shares would be spread as follows:

Table 20: International intra-EEA express deliveries in the Czech Republic (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[20-30]*%
TNT Express	[10-20]*%
Combined	[30-40]*%
DHL Express	[40-50]*%
Fedex	[5-10]*%
Royal Mail (GLS)	[0-5]*%
La Poste (DPD)	[0-5]*%
Czech Post	[0-5]*%
TopTrans	[0-5]*%
DB Schenker	[0-5]*%
Geis	[0-5]*%
Raben	[0-5]*%
Transexpress International, S.R.O	[0-5]*%
Cargo Partner	[0-5]*%
Deugro	[0-5]*%
CN Cargo S.R.O	[0-5]*%
Kühne + Nagel	[0-5]*%
Go Express & Logistic	[0-5]*%
	100.0%

Source: UPS's reply of 7 August 2012 to Commission's Request for information of 31 July 2012.

- (1020) Both UPS and TNT are directly active on the Czech small package delivery service market.
- (1021) [Results of UPS' market analysis]*
- (1022) In its response to the Statement of Objections, UPS raised the following supplementary arguments: (i) the Commission should have taken into account only the replies to the market investigation coming from the customers that single-source long-haul intra-EEA express services, (ii) FedEx is not a more distant and weaker competitor among the integrators in the Czech Republic and (iii) that switching for customers in the Czech Republic is feasible *post-* merger due the presence of alternative players other than the Parties.
- (1023) Based on these arguments, UPS submits that the Transaction will not lead to competition concerns on the international express market in the Czech Republic.

7.11.4.2. The Commission's assessment

- (1024) First of all, this Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the Czech intra-EEA express delivery market as such, even though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is no justification for basing this assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections.
- (1025) Moreover, as demonstrated in Section 6.1.6, contrary to what the Parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices.
- (1026) UPS's market reconstruction includes a large number of companies, such as non-integrated companies, national postal operators and freight forwarders. However, as mentioned in Section 7.2., contrary to UPS's contention these companies do not offer a viable alternative to the customers, in particular when it comes to intra-EEA express deliveries for non-neighbouring countries
- (1027) [Results of UPS' market analysis]*

The non-integrators on the Czech intra-EEA express small package delivery market

- (1028) Upon examination of the role of the non-integrators on the Czech intra-EEA express market and the extent to which they exert competitive pressure on the four integrators on this market, the Commission disagrees with UPS for the reasons set out in this section.

La Poste/DPD

- (1029) With respect to international services within Europe, La Poste carries most packages by road and can deliver them within [...]*. Indeed, La Poste/DPD indicated that it only offers international intra-EEA express services from the Czech Republic to Slovakia⁹²².
- (1030) [Parties' coverage in the EEA and estimates regarding other players]*,⁹²³ according to which, with the exception of Slovakia, La Poste/DPD is not able to deliver from Prague and Brno to any of the two major cities in all EEA countries with a firm one day time commitment. In particular, it needs at least [...]* in order to deliver to any of the two major cities in Bulgaria, Cyprus, Denmark, Estonia, Spain, Finland, France, the United Kingdom, Greece, Ireland, Iceland, Lithuania, Latvia, Malta, Norway, Portugal, Sweden, as opposed to the Parties which - with very few exceptions - can reach all cities mentioned in [...]* within one day.
- (1031) In view of the limited scope of the destinations offered by La Post/DPD, it is rather unlikely that it would be a suitable alternative for customers as opposed to the Parties who are able to deliver to all the EEA countries. [Parties' coverage in the EEA and estimates regarding other players]*. They would not be able to do so from La Post/DPD, at least as concerns intra-EEA express services in view of its extremely limited portfolio. Conversely, a customer could source from either UPS or TNT the full

⁹²² La Poste/DPD's response to questions 86 and 87 of questionnaire to competitors – Phase I.

⁹²³ [Parties' coverage in the EEA and estimates regarding other players]*

range of intra-EEA express it desires, as both serve the whole EEA territory from the Czech Republic, at least the capital cities.

- (1032) From a qualitative point of view, it appears that only a small minority of the customers recently organising a tender procedure or starting negotiations for the provision of express intra-EEA small package deliveries invited or requested a quotation from La Poste/DPD⁹²⁴.
- (1033) Consequently, La Poste/DPD is unlikely to exert a significant competitive constraint on the Parties on the Czech market of express intra-EEA small package deliveries.

Česká Pošta

- (1034) Concerning Česká Pošta, which is the incumbent in the Czech postal sector, [...] it is unable to deliver from Prague and Brno to addressees in any of the two major cities in all EEA countries with a firm one day time commitment⁹²⁵. This has been confirmed by Česká Pošta itself in the course of the market investigation⁹²⁶.
- (1035) More specifically, Česká Pošta needs at least [...] in order to deliver to the two major cities in [Parties' coverage in the EEA and estimates regarding other players]*.
- (1036) In view of the limited scope of the destinations offered by Česká Pošta, it is rather unlikely that Česká Pošta would be a suitable alternative for customers as opposed to the Parties who are able to deliver to all the EEA countries. [Parties' coverage in the EEA and estimates regarding other players]*. They would not be able to do so from Česká Pošta, at least as concerns intra-EEA express services in view of its extremely limited portfolio. Conversely, a customer could source from either UPS or TNT the full range of intra-EEA express it desires, as both serve the whole EEA territory from the Czech Republic, at least the capital cities.
- (1037) In addition, despite being the national incumbent, Česká Pošta has been mentioned by a minority of the Czech customers among the companies taken into consideration when recently organising tender procedures or starting negotiations concerning intra-EEA express delivery services⁹²⁷. Moreover, as opposed to the Parties, only a small minority of Czech customers considered that national postal operators (a category to which Česká Pošta belongs) meet the criteria deemed as indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services and offer the add-on service(s)/specific features they consider as indispensable for intra-EEA deliveries⁹²⁸.
- (1038) Consequently, it is unlikely that Česká Pošta represents a competitive constraint on the Parties on the Czech market of express intra-EEA small package deliveries.

Geis

- (1039) Regarding Geis, the Commission has ascertained⁹²⁹ that its Czech parcel division offers road based international parcel distribution within the EEA, but is unable to deliver

⁹²⁴ Questions 27.1, 27.2 and 27.3 of the questionnaire R5 to customers-Czech Republic-Phase II.

⁹²⁵ [Parties' coverage in the EEA and estimates regarding other players]*

⁹²⁶ See e-mail from Česká Pošta on 28 September 2012.

⁹²⁷ Questions 27.1, 27.2 and 27.3 of the questionnaire R5 to customers-Czech Republic-Phase II.

⁹²⁸ Questions 31 and 33 of the questionnaire Q5 to customers-Czech Republic-Phase I.

⁹²⁹ See email received from Geis on 19.09.2012.

from the Czech Republic to addressees in any EEA country with a firm one day time commitment.

- (1040) Furthermore, with the exception of deliveries to Slovakia (which are transported on Geis' own network), Geis' international parcels are fed into the network of [...]*. Geis furthermore clarified that it considers delivery services with a firm one day commitment as "a classic courier service" provided by companies like UPS, TNT, FedEx. Geis does not consider itself as a "courier" service provider. Indeed, Geis declared that in the rare event that it has to provide any such services to its customers, it offers them through [name of an integrator]*.
- (1041) For these reasons, it is unlikely that Geis represents a competitive constraint in the Czech market for intra-EEA express deliveries.

Freight forwarders (Kuehne+Nagel, DB Schenker, etc.)

- (1042) UPS also indicated that freight forwarders like Kuehne+Nagel, DB Schenker, etc. are significant competitive forces in the Czech intra-EEA express deliveries segment. However, in line with the arguments set out in Section 7.2.4., it appears that freight forwarders are not a good alternative to the integrators for Czech customers.
- (1043) The Czech customers do not see the freight forwarders in general as a good alternative to either UPS or TNT⁹³⁰. Moreover, they do not consider DB Schenker or Kuehne+Nagel as close competitors to UPS or to TNT, whatever the service or the characteristic at stake⁹³¹. Indeed, in the course of the Phase-II market investigation, freight forwarders have been mentioned by a small minority of the Czech customers among the companies satisfying the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services (as opposed to the Parties)⁹³². The result was not different when considering the add-on services/specific features considered as must-have for small package companies providing express intra-EEA delivery services. In fact, also in such case, freight forwarders have been referred to only by a small minority of Slovak customers⁹³³.
- (1044) Indeed, as [Customer's name]* confirmed with specific regard to the situation prevailing in the Czech Republic, freight forwarders are an alternative insofar as they are able to offer a one-stop-shop-solution by offering small package service in cooperation with a small package delivery company. However, for the very reason that they are unable to offer a distinct small package service of their own, and thus to exert competitive pressure on the integrators, freight forwarders cannot be considered as a credible competitive force also as regards intra-EEA express deliveries from the Czech Republic⁹³⁴.

Concluding remarks on non-integrated companies

- (1045) Generally, in the course of the market investigation, when asked to mention what they perceive as the strengths and the weaknesses of the market players active in the Czech

⁹³⁰ See responses to question 59 of questionnaire Q23 to customers – Czech Republic – Phase I.

⁹³¹ See responses to questions 36 and 37 of questionnaire R23 to customers –Czech Republic – Phase II.

⁹³² Question 31 of the questionnaire Q5 to customers-Czech Republic-Phase I.

⁹³³ Question 33 of the questionnaire Q5 to customers-Czech Republic-Phase I.

⁹³⁴ [Customer's name]* response to question 42.1 of questionnaire customers R5 to the Czech Republic – Phase II

Republic (that is to say, the four integrators, La Poste/DPD, GLS and any other company they would have liked to refer to) and to indicate how they perceived their position on the market, none of the Czech customers did name a non-integrator in the first or second position⁹³⁵.

- (1046) Non-integrators are indeed distant competitors of the integrators, notably for Czech customers shipping express packages over long distances, first and foremost because they have a far weaker geographic coverage than the integrators.
- (1047) Therefore, it can be concluded that non-integrators exert a very limited competitive pressure on the four integrators, with respect to the shipments of small package across the EEA with a committed time of delivery of next day/end-of-day. It is thus appropriate to look at the respective positions and strengths of the four integrators on the Czech intra-EEA express small package delivery market

The four integrators in the Czech intra-EEA express small package delivery market

- (1048) Following the market reconstruction launched by the Commission, the revenues achieved by the integrators are spread as follows:

Table 21: International intra-EEA express deliveries in the Czech Republic (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[30-40]%
TNT Express	[10-20]%
Combined	[50-60]%
Deutsche Post DHL	[40-50]%
FedEx	[5-10]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL⁹³⁶ and FedEx⁹³⁷ replies to the questionnaire to competitors-Phase I.

- (1049) As explained in Section 6.1.4., the industry also uses coverage data in order to measure the strength of a competitor on a certain market.

Table 22: International intra-EEA express deliveries in the Czech Republic – coverage by the four integrators in terms of business addresses (the Czech Republic as destination point)

[...]*

Source: [...]*

FedEx

- (1050) As explained in Section 7.3.9., FedEx is the weakest integrator among the four with a market share of [5-10]%. The competitive constraint exerted by FedEx is even lower than can be inferred from the figures obtained by the Commission's market reconstruction. Indeed, FedEx does not have the same geographic footprint as the Parties and DHL as regards intra-EEA express deliveries from the Czech Republic, in

⁹³⁵ Question 39 of the questionnaire R5 to customers-Czech Republic-Phase II.

⁹³⁶ DHL's response to question 98 of questionnaire to competitors – Phase I.

⁹³⁷ FedEx' response to question 98 of questionnaire to competitors – Phase I.

particular to most of its neighbouring countries, and is therefore much weaker than can be inferred from its revenue data.

- (1051) Moreover, [Parties' coverage data and estimates regarding the other integrators' coverage]*⁹³⁸, FedEx's fastest international intra-EEA express services from Prague have a time-in-transit of at least [...] for deliveries to Kosice and Bucharest and the most important cities in Cyprus, Iceland, Latvia, Lithuania, Estonia and Malta. By contrast, with very few exceptions⁹³⁹, the Parties have a time-in-transit of one day from Prague to all the cities considered in [...] or otherwise shorter than FedEx's time-in-transit.
- (1052) The same also applies to express intra-EEA deliveries from Brno, although it appears that both the coverage of the Parties and FedEx's coverage allow for [...]. [Parties' coverage data and estimates regarding the other integrators' coverage]*.
- (1053) From a qualitative point of view, the Czech customers indicated that they view very favourably suppliers that offer intra-EEA express services covering many destination countries. Indeed, when asked to rank the criteria they take into account while they negotiate supply agreements for intra-EEA express deliveries, the majority of respondents gave the highest grade to coverage of all destination countries⁹⁴⁰. As already explained in detail in Section 7.3.2, FedEx does not offer all destination within the EEA.
- (1054) The outcome of the market investigation confirms that customers view FedEx as the weakest integrator. Indeed, as opposed to the Parties, only a small minority of the responding companies which recently organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from FedEx⁹⁴¹.
- (1055) According to its European expansion plan⁹⁴², [Details on FedEx's expansion plan across the EEA]*⁹⁴³. [Details on FedEx's expansion plan across the EEA]*⁹⁴⁴. [Details on FedEx's expansion plan across the EEA]*⁹⁴⁵.
- (1056) [Details on FedEx's expansion plan across the EEA]*
- (1057) According to the Parties' EOD coverage estimations, FedEx reached [80-90]*% coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx coverage would translate into [full coverage]* in FY 2015⁹⁴⁶. This would be similar to the current coverage of both UPS and TNT⁹⁴⁷.

⁹³⁸ [Parties' coverage data and estimates regarding the other integrators' coverage]*

⁹³⁹ [Parties' coverage data and estimates regarding the other integrators' coverage]*

⁹⁴⁰ Question 30 of questionnaire Q5 to customers – Czech Republic – Phase I.

⁹⁴¹ Question 27 of the questionnaire R5 to customers-Czech Republic-Phase II.

⁹⁴² See Section 7.3.10 of this Decision.

⁹⁴³ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

⁹⁴⁴ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.

⁹⁴⁵ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 3.

⁹⁴⁶ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

⁹⁴⁷ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

- (1058) [Details on FedEx's expansion plan across the EEA]*.⁹⁴⁸ Even though it is likely that FedEx's market share may increase, The Commission is thus unable to predict what market share FedEx is likely to achieve in the near future.
- (1059) The expansion of FedEx needs to be put into perspective of its current market position, where the starting point for expansion is still quite modest. In the Czech Republic, FedEx achieved a revenue share of [5-10]% based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL given FedEx's low coverage on the destination side.
- (1060) Therefore, even if the competitive pressure from FedEx would be likely to increase compared to its current position, FedEx is not expected to represent a significant competitive constraint on the main integrators in the near future, such as to counter-act negative effects of the transaction on competition in the Czech Republic.

The merger will be a "3 to 2" merger

- (1061) The Parties and DHL appear to offer the fullest possible range of small package express delivery services in the Czech Republic. [Parties' coverage data and estimates regarding the other integrators' coverage]*. This is not the case for FedEx and non-integrators operating in the Czech international intra-EEA express market.
- (1062) [Parties' coverage data and estimates regarding the other integrators' coverage]*. Therefore, with respect to geographic coverage of their international intra-EEA express services, UPS, TNT and DHL appear as close competitors, and closer to one another than to any other competitor.
- (1063) Furthermore, based on the outcome of the phase II market investigation, it appears that the majority of Czech customers recently organising a tender procedure or starting negotiations concerning express intra-EEA small package deliveries invited or requested a quotation from UPS, TNT and DHL, with FedEx lagging behind⁹⁴⁹.
- (1064) In this respect, within the group of integrators, FedEx is a significantly more distant and weaker competitor of UPS as opposed to both DHL and TNT for customers that need to ship packages to a broad range of destinations. Indeed, as already indicated, UPS's coverage and time-in-transit data indicate that the geographic coverage of FedEx's international intra-EEA express services (in terms of destinations reached from the Czech Republic within one day) is more limited than those of both UPS and TNT.
- (1065) Therefore, the Commission considers that the Transaction is likely to eliminate an important competitive force and to limit the possibilities of switching supplier, as there is no countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects in the Czech Republic.

Price concentration analysis and efficiencies

- (1066) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from the Czech Republic

⁹⁴⁸ FedEx, response to the request for information dated 16 November 2012 (Q30).

⁹⁴⁹ Question 27 of the questionnaire R23 to customers-Slovakia-Phase II.

would range between [0-5]*% and [0-5]*% depending on the model specification.⁹⁵⁰ The scope of estimated price increases derives from the fact that despite being the lowest, FedEx's coverage in the Czech Republic is still high relative to the other three integrators.

- (1067) Regarding efficiencies, the Commission has calculated that in the Czech Republic, cost savings would represent between [0-5]*% of net prices in Year [...] and up to [0-5]*% of net prices in Year [...]. Assuming a pass-through rate of [60-70]*% and taking Year [...] efficiencies as the base line case, the net price effects in the Czech Republic would be positive and range between [0-5]*% and [0-5]*%.⁹⁵¹ Even after Year [...], when the full efficiencies would materialize - and even irrespective of the fact that this is a remote time horizon in the context of merger control - net price effects would still be slightly positive.

7.11.4.3. The Commission's conclusion

- (1068) Therefore, UPS, TNT and DHL can be seen as close competitors on the Czech international intra-EEA express market while FedEx is exerting only a weak constraint on the Parties.
- (1069) In addition, also in view of the general assessment already conducted in Sections 7.6, 7.7 and 7.8, the Commission considers that the Transaction is likely to eliminate an important competitive force from the Czech international intra-EEA express market and to limit the possibilities of switching supplier, as there is no sufficient countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects. Moreover, the Commission's quantitative analysis confirms that the Transaction is expected to cause price increases on the Czech market, even if the effects of efficiencies is taken in to account. Furthermore, the available price concentration analysis provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.
- (1070) On the basis of all these qualitative and quantitative elements, the concentration is likely to lead to a significant impediment to effective competition on the Czech market for international intra-EEA express deliveries of small packages.

7.11.5. *Denmark*

7.11.5.1. UPS's views

- (1071) According to UPS's estimates based on the product market definition followed by the Commission, *post* merger UPS considers that the market shares would be spread as follows:

⁹⁵⁰ Note that these specifications include both models with and without non-integrators coverage data.
⁹⁵¹ [Confidential information regarding efficiencies expected to arise from the Transaction]*

Table 23: International intra-EEA express deliveries in Denmark (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[20-30]*%
TNT Express	[5-10]*%
Combined	[30-40]*%
DHL Express	[30-40]*%
Fedex	[5-10]*%
Royal Mail (GLS)	[5-10]*%
POST NORD GROUP	
POSTEN NORGE GROUP	[0-5]*%
Itella	[0-5]*%
DB Schenker	[5-10]*%
Link Logistics	[0-5]*%
Kühne + Nagel	[0-5]*%
Star Air	[0-5]*%
Dachser	[0-5]*%
Scam logistics	[0-5]*%
Freja	[0-5]*%
DSV	[0-5]*%
World Courier	[0-5]*%
Kurergruppen Danmark APS	[0-5]*%
Zap Distribution	
	100.0%

Source: UPS's reply of 7 August 2012 to Commission's Request for information of 31 July 2012.

- (1072) Both UPS and TNT are directly active on the Danish small package delivery services market.
- (1073) UPS contends that the Danish international intra-EEA market is very dynamic. UPS puts particular emphasis on the role of DHL, which would remain the strongest competitor on the market *post* merger. UPS also referred to the role of FedEx as well as of other strong competitors present on this market such as [...]*. [Results of UPS' market analysis]*.
- (1074) In its response to the Decision opening the proceedings, UPS further alleges that the Commission overstated the Parties' market shares and understated those of DHL and FedEx. Furthermore, UPS notes that additional competitors, other than the integrators, would be present on the market, including a handful of originally postal incumbents that changed their business models and successfully compete in the Danish intra-EEA express market.
- (1075) In its response to the Statement of Objection, UPS further argues that (i) the Commission should have taken into account only the replies to the market investigation coming from the customers that single-source long-haul intra-EEA express services, (ii) FedEx is not a more distant and weaker competitor among the integrators in Denmark and (iii) freight forwarders such as [...]* exert a competitive constraint on the integrators on the intra-EEA express market.
- (1076) In a further submission of 23 November, UPS also emphasises that competition is not limited to integrators only, but that other small package providers, such as Bring Parcel

and DSV, also exert a significant competitive constraint. According to UPS, [...] *% of total UPS/TNT combined intra-EEA express volume are exported from Denmark to neighbouring countries, confirming that such small competitors, offering next day intra-EEA express services to limited number of destinations, can effectively compete for a significant amount of the total intra-EEA volume.

- (1077) Based on these arguments, UPS submits that the Transaction will not lead to competition concerns on the international intra-EEA express delivery market in Denmark.

7.11.5.2. The Commission's assessment

- (1078) First of all, this Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the Danish intra-EEA express delivery market as such, even though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is no justification for basing this assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections.
- (1079) Moreover, as demonstrated in Section 6.1.6, contrary to what the Parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices.
- (1080) UPS's market reconstruction includes a large number of companies, such as non-integrated companies, national postal operators and freight forwarders. However, as mentioned in Section 7.2., contrary to UPS's contention these companies do not offer a viable alternative to the customers when it comes to intra-EEA express deliveries, in particular for non-neighbouring countries: only the four integrators are capable to deliver small packages within a day also to distant or remote destinations. Therefore, switching possibilities for customers in Denmark appear to be rather limited.
- (1081) In this respect, apart from the four integrators, UPS sees only [Competitors' names] * as exerting effectively a competitive constraint on the intra-EEA express market in Denmark. All other players on the market are credited by the Notifying party of individual market share of [0-5] *% at most, which as such would not enable them to exert any competitive pressure whatsoever.
- (1082) Finally, non-integrators are not directly active in the Danish intra-EEA express delivery market, rather they use the integrators' network for outbound express deliveries from Denmark or act as resellers/through cooperation agreements, as is the case for Post Nord and Posten Norge/Bring Parcel.

The non-integrators on the Danish intra-EEA express small package delivery market

- (1083) Upon examination of the role of the non-integrators on the Danish intra-EEA express market and the extent to which they exert a competitive pressure on the four integrators on this market, the Commission disagrees with UPS's assessment and conclusions for the reason set out in this section.

Royal Mail/GLS

- (1084) [Parties' coverage data in the EEA and estimates regarding other players]*,⁹⁵² Royal Mail/GLS is unable to deliver from Copenhagen and Aarhus to any of the two major cities of all EEA countries with a firm one day time commitment, but rather needs [...] to ship to any of the two major cities in the EEA countries. As a general rule, the farther the country of destination is from Denmark, the more time is usually needed. For example, [...] are needed for shipments to Germany, whereas [...] are needed to deliver to Estonia and [...] to deliver to Greece or Spain. By contrast, the Parties are generally able to deliver with a firm one day commitment to all cities mentioned in [...]*.
- (1085) In view of the limited scope of destinations offered by Royal Mail/GLS, it is rather unlikely that it would be a suitable alternative for customers as opposed to the Parties who are able to deliver to all the EEA countries. [Parties' coverage in the EEA and estimates regarding other players]*. They would not be able to do so from GLS, at least as concerns intra-EEA express services in view of its extremely limited portfolio. Conversely, a customer could source from either UPS or TNT the full range of intra-EEA express it desires, sine both serve the whole EEA territory from Denmark, at least the capital cities.
- (1086) Moreover, UPS appears to have very significantly overstated the role of Royal Mail/GLS on the Danish international intra-EEA express market. Revenue data obtained directly from this operator for 2011 indicate that it does not offer international intra-EEA express in Denmark.
- (1087) From a qualitative point of view, it appears that none of the customers recently organising a tender procedure or starting negotiations for the provision of express intra-EEA small package deliveries (committed timeframe EOD) invited or requested a quotation from GLS⁹⁵³. GLS was also mentioned only by a minority of the Danish customers among the companies satisfying the criteria they consider indispensable in order to start negotiating a contract for the provision of express intra-EEA services (as opposed to the Parties)⁹⁵⁴. Similarly, as concerns the add-on services/specific features they view as must-have for small package companies providing express intra-EEA delivery services, GLS/Royal Mail was referred to only by a small minority of Danish customers⁹⁵⁵.
- (1088) Consequently, GLS/Royal Mail is unlikely to exert a competitive constraint in the Danish market of express intra-EEA small package deliveries.

PostNord

- (1089) PostNord AB is the parent company of the Group resulting from the merger between Post Danmark A/S and Posten AB (Swedish Post) in 2009. The Group offers communications and logistics solutions to, from and within the Nordic region.
- (1090) The small package delivery services provided by the PostNord Group are supplied by its Logistics business area. The services offered vary from country to country and cover

⁹⁵² [Parties' coverage data in the EEA and estimates regarding other players]*

⁹⁵³ Question 27 of the questionnaire R6 to customers-Denmark-Phase II.

⁹⁵⁴ Question 31 of the questionnaire Q6 to customers-Denmark-Phase I.

⁹⁵⁵ Question 33 of the questionnaire Q6 to customers-Denmark-Phase I.

both small packages sent via express as well as deferred deliveries. [Details on PostNord's activities]*⁹⁵⁶.

- (1091) In the course of the Phase I investigation, PostNord supplied turnover figures highlighting a non-negligible presence in the Danish intra-EEA express segment. However, these figures appear to be due to PostNord's cooperation agreements with other operators rather than to its own network.
- (1092) Indeed, as Post Danmark explicitly clarified, it uses [...]*, [...]*, [...] networks for outbound express deliveries from Denmark and the [...] network for deferred delivery services. Post Danmark further explained that for some intra-EEA areas express services are not available due to distance⁹⁵⁷.
- (1093) The identified integrators are used by Post Danmark as subcontractors⁹⁵⁸. In this respect, Post Danmark noted that: *"Having one network for door-to-door transportation offering a harmonized production set up, IT and track & trace benefits the integrator in form of better control over the package flows (quality), optimal transparency (track & trace) and quick leadtimes. The integrators always have guaranteed uplift, independency of airlines, cost control and buying power. A sub-contractor risks partners, networks or alliances to split up caused by mergers and/or acquisitions"*⁹⁵⁹.
- (1094) Therefore, PostNord is unlikely to exert a competitive constraint in the Danish intra-EEA express market.

Posten Norge (Norwegian Post)

- (1095) Posten Norge, the incumbent in the postal sector in Norway, is active in the mail and logistics industry for the B2B and B2C markets through its brand "Bring", which consist of nine specialist areas. Among these, "Bring Parcels" offers small package delivery services.
- (1096) Bring Parcels is active at the domestic level in Norway, Sweden and Denmark. Cross-border deliveries are offered from Norway, Sweden, Denmark and Finland. Bring Parcels ships to 193 countries worldwide through its partners' networks⁹⁶⁰.
- (1097) [Details regarding Posten Norge/Bring's service offering in Denmark]*⁹⁶¹
- (1098) Furthermore, it appears [Parties' coverage in the EEA and estimates regarding other players]*⁹⁶² that Posten Norge/Bring is unable to deliver from Copenhagen and Aarhus to any of the two major cities of all EEA countries with a firm one day commitment. Indeed it needs [...] to deliver to any of these cities. By contrast, with very few exceptions, the Parties are able to deliver within one day from Copenhagen and Aarhus to all cities mentioned in [...]*.

⁹⁵⁶ Post Danmark's response to questions 1-3 of questionnaire to competitors – Phase I.

⁹⁵⁷ Post Danmark's response to question 91 of questionnaire to competitors – Phase I.

⁹⁵⁸ Post Danmark's response to question 106.2 of questionnaire R30 to competitors – Phase II.

⁹⁵⁹ Post Danmark's response to question 52.1 of questionnaire R30 to competitors – Phase II.

⁹⁶⁰ Posten Norge's response to questions 1-3 of questionnaire to competitors – Phase I.

⁹⁶¹ [...]*

⁹⁶² [Parties' coverage in the EEA and estimates regarding other players]*

- (1099) In addition, Posten Norge/Bring has never been mentioned by Danish customers recently organizing a tender procedure for the award of a contract concerning intra-EEA express delivery services or starting negotiations for the same purpose⁹⁶³.
- (1100) As a consequence, Posten Norge/Bring is unlikely to exert a competitive constraint in the Danish intra-EEA express market.

Freight Forwarders (DSV and DB Schenker)

- (1101) UPS indicated that freight forwarders like [...]*, etc. are significant competitive forces in the Danish intra-EEA express deliveries segment. However, in line with the arguments provided in Section 7.2.4, it appears that freight forwarders are not a good alternative to the integrators for Danish customers. In particular, the Danish customers do not see the freight forwarders in general as a good alternative to either UPS or TNT⁹⁶⁴. Moreover, they do not consider [...]* as close competitor to UPS nor to TNT whatever the service or the characteristic at stake⁹⁶⁵.
- (1102) In addition, freight forwarders have been mentioned only by a small minority of the Danish customers among the companies satisfying the criteria they consider indispensable in order to start negotiating a contract for the provision of express intra-EEA delivery services (as opposed to the Parties)⁹⁶⁶. Similarly, as concerns the add-on services/specific features they view as must-have for small package companies providing express intra-EEA delivery services, freight forwarders have been referred to only by a small minority of Danish customers⁹⁶⁷.

DSV

- (1103) DSV is a freight forwarding and logistics company active internationally. As it is often the case for freight forwarders, in the event that it is requested to offer small package services, DSV provides them via its freight forwarding or the integrators' networks.
- (1104) As far as Denmark is concerned, however, it appears that DSV markets small package services through a dedicated company having its own employees and IT systems⁹⁶⁸. [Details regards DSV's services]*⁹⁶⁹.
- (1105) DSV further explained that the activities it performed in 2011 [...]* of [...]* amount to [...]">% of DSV's total revenues for the express intra-EEA small package deliveries originating from Denmark⁹⁷⁰.
- (1106) In light of the arguments set out in Section 7.2.4., on the weakness of the constraint exerted by resellers of the integrators' services also apply to the intra-EEA express services offered by DSV from Denmark.

⁹⁶³ Question 27 of the questionnaire R6 to customers-Denmark-Phase II.

⁹⁶⁴ See responses to question 59 of questionnaire Q6 to customers – Denmark – Phase I.

⁹⁶⁵ See responses to questions 36 and 37 of questionnaire R6 to customers –Denmark – Phase II.

⁹⁶⁶ Question 31 of the questionnaire Q6 to customers-Denmark-Phase I.

⁹⁶⁷ Question 33 of the questionnaire Q6 to customers-Denmark-Phase I.

⁹⁶⁸ See e-mail from DSV on 24 September 2012 at 13:35.

⁹⁶⁹ Agreed minutes of a teleconference call of 30 August 2012 with DSV.

⁹⁷⁰ DSV's response to question 104.2.2 of questionnaire R30 to competitors – Phase II.

(1107) To conclude, DSV is unlikely to exert a significant competitive constraint in the Danish intra-EEA express market.

DB Schenker

(1108) UPS considers DB Schenker as an important player in the Danish intra-EEA express market, attributing a [5-10]*% share of the market to that company. [Parties' coverage in the EEA and estimates regarding other players]*⁹⁷¹.

(1109) DB Schenker, declared that it has "*No significant parcel business, thus no specific monitoring of parcel providers*" in Denmark.

(1110) More specifically, DB Schenker explained that it owns a parcel company or has "integrated" parcel delivery operations only in Norway, Sweden, Finland and Poland. In the other countries like Denmark DB Schenker offers a small package delivery service which it contracts out, at least in part, to small package companies. [Details DB Schenker subcontracting]*⁹⁷².

(1111) Therefore, the arguments set out in Section 7.2.4 on the weakness of the constraint exerted by resellers of the integrators' services also apply to the intra-EEA express services offered by DB Schenker from Denmark.

(1112) DB Schenker's limited product offer is reflected in the tender data of customers collected in the course of the Phase-II market investigation: DB Schenker has never been mentioned by Danish customers recently organizing a tender procedure for the award of a contract concerning intra-EEA express delivery services or starting negotiations for the same purpose⁹⁷³.

(1113) In sum, DB Schenker is unlikely to exert a competitive constraint in the Danish intra-EEA express market.

Other Freight Forwarders ([...], etc.)*

(1114) UPS also indicates other freight forwarders, such as [...]* as significant competitive forces in the Danish intra-EEA express deliveries segment. As already indicated in Section 7.2.4., freight forwarders exert only very weak competitive constraint on the integrators in the international intra-EEA express market, in particular when they act as mere resellers of the services of the integrators. This has been confirmed by Danish customers⁹⁷⁴.

Concluding remarks on non-integrated companies

(1115) In reply to the market investigation questionnaire, no Danish customer has identified any non-integrator among the two or three closest competitors of UPS or TNT⁹⁷⁵. Moreover, when asked which suppliers satisfy the criteria that they consider indispensable when negotiating a contract for the provision of international intra-EEA small package delivery services, a majority of the respondents did not mention freight

⁹⁷¹ UPS's reply of 7 September 2012 to the Commission's request for information Q20.

⁹⁷² Agreed minutes of a teleconference call of 29 August 2012 with DB Schenker.

⁹⁷³ Question 27 of the questionnaire R6 to customers-Denmark-Phase II.

⁹⁷⁴ See responses to questions 42 and 42.1 of the questionnaire R6 to customers-Denmark-Phase II.

⁹⁷⁵ See responses to questions 60 and 61 of questionnaire Q6 to customers – Denmark – Phase I and questions 35 to 37 of questionnaire R6 to customers – Denmark – Phase II.

forwarders. The same holds true for local companies. By contrast, UPS and TNT were each mentioned by a large majority of the respondents⁹⁷⁶.

- (1116) In view of all that, it can be concluded that non-integrators, including freight forwarders, do not effectively compete with the Parties on the Danish international intra-EEA express market. Moreover, in view of the general assessment of barriers to entry set out in this Decision, non-integrators appear unlikely to expand significantly into the Danish international intra-EEA express market in a near future, even following a price increase due to the Transaction.
- (1117) Furthermore, the Danish customers have taken the view that non-integrators would not constitute a good alternative to the integrators for international intra-EEA express services⁹⁷⁷. Moreover, these respondents have generally invited integrators to submit an offer for international intra-EEA next-day end-of-day services in the last two years⁹⁷⁸. Admittedly and as pointed out by UPS, only a very small number of respondents stated that they invited non-integrators to submit offers for international intra-EEA express services. Therefore these few responses cannot be regarded as decisive evidence and they do not conflict with the conclusion that non-integrators only have a modest role on the Danish international intra-EEA express market.
- (1118) Therefore, it can be concluded that the non-integrators exert a very limited competitive pressure on the four integrators, with respect to the shipments of small package across the EEA with a commitment time of delivery of next day/end-of-day. It is thus appropriate to look at the respective positions and the strengths of the four integrators on the Danish intra-EEA express small package delivery market.

The four integrators on the Danish intra-EEA express small package delivery market

- (1119) Following the market reconstruction launched by the Commission, the revenues achieved by the integrators are spread as follows:

Table 24: International intra-EEA express deliveries in Denmark (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[30-40]%
TNT Express	[10-20]%
Combined	[50-60]%
Deutsche Post DHL	[40-50]%
FedEx	[5-10]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL⁹⁷⁹ and FedEx⁹⁸⁰ replies to the questionnaire to competitors-Phase I.

⁹⁷⁶ See responses to question 31 of questionnaire Q6 to customers – Denmark – Phase I.

⁹⁷⁷ See responses to questions 41.5.2 and 41.5.3 of questionnaire R6 to customers – Denmark – Phase II.

⁹⁷⁸ See responses to question 27.3 to questionnaire R6 to customers – Denmark – Phase II.

⁹⁷⁹ DHL's response to question 98 of questionnaire to competitors – Phase I.

⁹⁸⁰ FedEx' response to question 98 of questionnaire to competitors – Phase I.

- (1120) As explained in Section 6.1.4., the industry also uses coverage data in order to measure the strength of a competitor on a certain market:

Table 25: International intra-EEA express deliveries in Denmark – coverage by the four integrators in terms of business addresses (Denmark as destination point)

[...]*

Source: [...]*

DHL

- (1121) Referring to the above figures, UPS argues that post Transaction, DHL will remain a strong competitor with a high market share of 40-50% in relation to the intra-EEA express market (integrators only). However, these figures rather indicate that while DHL would remain a strong market player post-Transaction in terms of revenues, the merged entity would become the market leader with a market share of 50-60% well ahead of FedEx and the other non-integrators, which as demonstrated in Section 7.2 do not constitute significant competitive forces.
- (1122) These figures also show that the Parties are currently the second and third operators by some margin and that in view of the shares of the integrators' total revenues accounted for by TNT, the Transaction would eliminate a significant independent competitive force.
- (1123) Furthermore, as will be shown in this section, the available price concentration analysis provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.

FedEx

- (1124) As explained in Section 7.3.9, FedEx is the weakest integrator among the four. The competitive constraint exerted by FedEx' is even lower than can be inferred from the figures presented in Table 25. Indeed, FedEx does not have the same geographic footprint as the Parties and DHL as regards intra-EEA deliveries from Denmark and is therefore much weaker than can be inferred from its revenue data.
- (1125) From a qualitative point of view, Danish customers indicated that they view very favourably suppliers that offer intra-EEA express services covering many destination countries, with extensive geographic coverage in each of them. Indeed, when asked to rank the criteria that they take into account when they negotiate supply agreements for intra-EEA express deliveries, almost all respondents gave the highest grade to (i) the coverage of all destination countries and (ii) the extensive geographic coverage in the country of destination⁹⁸¹. Indeed, international express deliveries require the use of extensive networks not only in the origin country, but also in the destination countries.

⁹⁸¹ Question 30 of the questionnaire Q6 to customers – Denmark – Phase I.

- (1126) In this respect, [Parties' coverage data and estimates regarding the other integrators' coverage]⁹⁸² show that FedEx does not offer all destinations within the EEA and in particular, it is not able to deliver within one day from Copenhagen and Aarhus to Varna, Tampere, Athens, Bergen, Bucharest, Kosice and it requires at least [...] to the two major cities in Malta, Latvia, Lithuania, Estonia, Cyprus, Iceland and Slovenia. By contrast, the Parties appear to have a time-in-transit of one day from Denmark to all the cities considered in [...] or otherwise shorter than (or at least equal to) the one of FedEx.
- (1127) In the course of the market investigation, when asked to mention what they perceive as the strengths and the weaknesses of the four integrators, La Poste/DPD and GLS and to indicate how they perceive their positioning on the market for intra-EEA express deliveries, the majority of Danish customers ranked FedEx after the Parties and DHL for reasons including expensiveness, bad service in Denmark, inability to offer a full range of services within Europe and a longer transit time⁹⁸³. When asked about FedEx's weaknesses, two of the respondents stated: "[...]" or "[...]" and ranked it as the fourth integrator behind DHL, UPS and TNT⁹⁸⁴. Similarly, when asked if all the four integrators are capable of providing an equally good alternative for domestic/intra/extra-EEA express services, [Customer's name]* replied: "*We don't feel that FedEx is established in the EEA countries and are missing some networks*" and [Customer's name]* confirmed that "*FedEx is weak in intra-EEA*"⁹⁸⁵.
- (1128) According to its European expansion plan⁹⁸⁶, [Details on FedEx's expansion plan across the EEA]⁹⁸⁷. [Details on FedEx's expansion plan across the EEA]⁹⁸⁸. [Details on FedEx's expansion plan across the EEA]⁹⁸⁹.
- (1129) The Commission considers that [Details on FedEx's expansion plan across the EEA]⁹⁹⁰.
- (1130) According to the Parties' EOD coverage estimations, FedEx reached [90-100]*% coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx coverage would translate into coverage in the range of [90-100]*% - [90-100]*% [...] in FY 2015⁹⁹¹. This would be slightly below but close to the Parties' current coverage of over [90-100]*% each⁹⁹².

⁹⁸² [Parties' coverage data and estimates regarding the other integrators' coverage]*

⁹⁸³ Question 39 of the questionnaire R6 to customers-Denmark-Phase II.

⁹⁸⁴ [Customer's name]* and [Customer's name]* response to question 39 of the questionnaire R6 to customers-Denmark-Phase II.

⁹⁸⁵ [Customer's name]* and [Customer's name]* response to question 41 of questionnaire R6 to customers – Denmark – Phase II.

⁹⁸⁶ Discussed in section 7.3.10 of this Decision.

⁹⁸⁷ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

⁹⁸⁸ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.

⁹⁸⁹ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 3.

⁹⁹⁰ FedEx, response to the request for information dated 16 November 2012 (Q30).

⁹⁹¹ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

⁹⁹² [Parties' coverage data and estimates regarding the other integrators' coverage]*

- (1131) [Details on FedEx's expansion plan across the EEA]*⁹⁹³. Even though it is likely that FedEx market share will increase, the Commission is unable to predict what market share FedEx is likely to achieve in the near future.
- (1132) [Details on FedEx's expansion plan across the EEA]*. This will likely create a degree of competitive pressure on the other main integrators.
- (1133) The expansion of FedEx needs to be put into perspective of its current market position, where the starting point for expansion is still quite modest. In Denmark, FedEx achieved a revenue share of [5-10]% based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL given FedEx's low coverage on the destination side.
- (1134) Therefore, it can be expected that FedEx will exercise an increasing degree of competitive pressure on the main integrators in Denmark in the near future. However, in combination with all other evidence, the countervailing effect of FedEx's expansion will likely not be sufficient to outweigh the negative effects of the Transaction on competition in Denmark.

The merger will be a "3 to 2" merger

- (1135) [Confidential information taken from the Parties' internal databases]*. However, for the reasons set out in this section, the Commission is of the view that UPS and TNT are close competitors (for a general discussion on closeness of competition see the results of the bidding data analysis carried out by the Notifying party are assessed in detail in Section 7.5.1.6.).
- (1136) The Parties and DHL appear to offer the fullest possible range of small package delivery services in Denmark. [Parties' coverage data and estimates regarding the other integrator's coverage]*. Therefore, with respect to geographic coverage of their intra-EEA express services, UPS, TNT and DHL appear as close competitors, and closer to one another than to any other competitor.
- (1137) On the basis of the market investigation, it appears that Danish customers indicated that UPS, TNT and DHL are by far each other's closest competitors with respect to the range of service offered⁹⁹⁴. Moreover, an overwhelming majority of customers mentioned UPS, DHL and TNT as fulfilling the criteria they view as "must-haves" while negotiating an agreement relating the supply of small package delivery services⁹⁹⁵.
- (1138) Within the group of integrators, FedEx is a significantly more distant and weaker competitor of UPS as opposed to both DHL and TNT for customers that need to ship packages to a broad range of destinations. Indeed, as already indicated, UPS's coverage and time-in-transit data indicate that the geographic coverage of FedEx' international intra-EEA express services (in terms of destinations reached from Denmark within one day) is more limited than those of both UPS and TNT.
- (1139) Furthermore, based on the outcome of the phase I market investigation, it appears that FedEx was mentioned only by a minority of Danish customers among the companies

⁹⁹³ FedEx, response to the request for information dated 16 November 2012 (Q30).

⁹⁹⁴ Question 35, 35.1 and 35.2 of the questionnaire R6 to customers – Denmark – Phase II.

⁹⁹⁵ See responses to question 31 of questionnaire Q6 to customers – Denmark – Phase I.

satisfying the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA services (as opposed to the Parties and DHL)⁹⁹⁶. Similarly, as concerns the add-on services/specific features they view as must-have for small package companies providing express intra-EEA delivery services, FedEx was referred to only by a small minority of Danish customers⁹⁹⁷.

- (1140) In line with the results of the market investigation, the Commission considers that the Transaction is likely to eliminate an important competitive force and to limit the possibilities of switching supplier, as there is no countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects in Denmark.
- (1141) It follows that TNT is a significant competitor of UPS in the intra-EEA express market in Denmark, in particular in terms of overall revenues and geographic coverage. In fact, TNT - and to an even higher extent DHL - appear as the strongest sources of competitive constraint on UPS in the international intra-EEA express market for customers that need to ship packages to a broad range of countries of destinations.

Price concentration analysis and efficiencies

- (1142) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Denmark would range between [0-5]*% and [0-5]*% depending on the model specification.⁹⁹⁸ The scope of estimated price increases reflects the fact that in the model, FedEx has a relatively high coverage in Denmark. Hence, according to the model, on the Danish market, the integrators are almost all equally effective competitors. However, the Commission notes that in Denmark, coverage data and market share are rather inconsistent. FedEx has an almost complete coverage but achieves very limited revenues.
- (1143) Regarding efficiencies, the Commission has calculated that in Denmark, cost savings would represent between [0-5]*% of net prices in Year [...] and up to [10-20]*% of net prices in Year [...]*. Assuming a pass-through rate of [60-70]*% and taking Year [...] efficiencies as the base line case, the net price effects in Denmark would be negative and range between -[0-5]*% and -[0-5]*%⁹⁹⁹.
- (1144) Overall in Denmark, the orders of magnitude of price increases and efficiencies are such that efficiencies would be expected to outweigh any price rise. However, the estimated anti-competitive effects are likely to be underestimated because in the case of Denmark, the coverage data does not fully capture the true competitive constraint exerted by the parties' rivals as illustrated by the lack of consistency between coverage and market shares, as well as the qualitative elements of the market investigation reported at recitals (1137) to (1141).
- (1145) Hence, in the case of Denmark, the quantification of net merger effects should be given less weight because the model does not appropriately capture the relative competitive strengths of integrators on the Danish market.

⁹⁹⁶ Question 31 of the questionnaire Q6 to customers-Denmark-Phase I.

⁹⁹⁷ Question 33 of the questionnaire Q6 to customers-Denmark-Phase I.

⁹⁹⁸ Note that these specifications include both models with and without non-integrators coverage data.

⁹⁹⁹ [Confidential information regarding efficiencies expected to arise from the Transaction]*

7.11.5.3. The Commission's conclusion

- (1146) Therefore, UPS, TNT and DHL can be seen as close competitors on the Danish international intra-EEA express market while FedEx and non-integrators are distant competitors exerting at best a weak constraint on the Parties.
- (1147) In addition, also in view of the general assessment already conducted as regards barriers to entry and countervailing buyer power, the Commission considers that the Transaction is likely to eliminate an important competitive force from the Danish international intra-EEA express market and to limit the possibilities of switching supplier, as there is no sufficient countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects. Moreover, the Commission's quantitative analysis has indicated that the Transaction is expected to cause price increases on the Danish international intra-EEA express market (efficiencies being disregarded), and that these are likely to be underestimated as explained in recital 1135. Although the efficiencies appear to outweigh the (likely underestimated) price increases resulting from the price-concentration analysis, the overall review of the evidence relating to Denmark indicates that on balance, the removal of a strong competitive constraint would lead to a significant impediment to effective competition in this market and that neither efficiencies nor the expected FedEx's expected expansion are sufficient to outweigh the overall negative effect of the Transaction.
- (1148) Therefore, the Commission concludes that the Transaction would lead to a significant impediment to effective competition in the market for intra-EEA express delivery services in Denmark.

7.11.6. *Estonia*

7.11.6.1. UPS's views

- (1149) According to UPS's estimates, based on the products market definition followed by the Commission, *post* merger UPS considers that the market shares would be spread as follows:

Table 26: International intra-EEA express deliveries in Estonia (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[10-20]*%
TNT Express	[10-20]*%
Combined	[30-40]*%
DHL Express	[30-40]*%
Fedex	[0-5]*%
La Poste (DPD)	[5-10]*%
Eesti Post	[0-5]*%
Itella	[0-5]*%
DB Schenker	[0-5]*%
Cargobus	[0-5]*%
Lex System	
CISIS	
Transport International	[0-5]*%
Kaubaeexpress	
Globex Service	[0-5]*%
DSV	[0-5]*%
Navaka	[0-5]*%
SmartPost	[0-5]*%
HRX	[0-5]*%
D2D	[0-5]*%
Auto Post	[0-5]*%
NBI	[0-5]*%
Saadetis	[0-5]*%
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

- (1150) [Details on UPS' operations in Estonia]*. [Details on TNT's operations in Estonia]*.
- (1151) As regards international express services from the Estonia, UPS submits that the market is characterised by the presence of several strong competitors. The largest player active on the market would be [...]*. [...]* would also have a significant presence. The other players include [...]*.
- (1152) In its response to the Statement of Objection, UPS further argues that (i) the Commission should have taken into account only the replies to the market investigation coming from the customers that single-source long-haul intra-EEA express services, (ii) FedEx is not a more distant and weaker competitor among the integrators in Estonia and (iii) the Commission entirely ignores other more relevant data in the form of the UPS and TNT bidding databases which provided much more accurate information about the closeness of competition between competitors.
- (1153) Based on these arguments, UPS submits that the Transaction will not lead to competition concerns on the international express market in Estonia.

7.11.6.2. The Commission's assessment

- (1154) First of all, this Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the Estonian intra-EEA express delivery market as such, even

though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is no justification for basing this assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections.

- (1155) Second as concerns the bidding data analysis carried out by the Notifying party, they are assessed in detail in Section 7.5.1.6.
- (1156) Moreover, as demonstrated in Section 6.1.6, contrary to what the Parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices.
- (1157) UPS's market reconstruction includes a large number of companies, such as non-integrated companies, national postal operators and freight forwarders. However, as mentioned in Section 7.2.4., contrary to UPS's contention these companies do not offer a viable alternative to the customers when it comes to intra-EEA express deliveries, in particular for non-neighbouring countries: only the four integrators are capable to deliver small packages within a day also to distant or remote destinations.
- (1158) [Results of UPS' market analysis]*

Non-integrators on the Estonian intra-EEA small package delivery market

- (1159) Upon examination of the role of the non-integrators on the Estonian intra-EEA express market and the extent to which they exert a competitive pressure on the four integrators on this market, the Commission disagrees with UPS for the reasons set out in this section.

La Poste/DPD

- (1160) UPS attributes a [5-10]*% market share to La Poste/DPD. However, the real market share is only [0-5]%. Moreover, as corroborated by information provided by La Poste, they offer intra-EEA express service only for certain neighbouring destinations in Lithuania, Latvia and Finland¹⁰⁰⁰.
- (1161) As it appears from [Parties' coverage in the EEA and estimates regarding other players]*,¹⁰⁰¹ La Poste/DPD is not able to deliver from Tallinn and Tartu to any of the two most important cities of all EEA countries with a firm one day time commitment with the exception of the cities of Liepaja and Riga in the neighbouring country of Latvia. Furthermore, it needs at least [...] to deliver to the two most important cities in Austria, Bulgaria, Denmark, the United Kingdom, Iceland, Malta, Norway, Portugal, Romania, Slovenia, as opposed to the Parties which can reach the two cities in these countries in one day.
- (1162) In view of the limited scope of the destinations offered by La Post/DPD, it is rather unlikely that it would be a suitable alternative for customers as opposed to the Parties who are able to deliver to all the EEA countries. In particular, UPS explains in its response to the Statement of Objections that most of the customers "bundle" that is to say that buy multiple services. They would not be able to do so from La Post/DPD, at least as concerns intra-EEA express services in view of its extremely limited portfolio. Conversely, a customer could source from either UPS or TNT the full range of intra-

¹⁰⁰⁰ La Poste's submission of 27 September 2012.

¹⁰⁰¹ [Parties' coverage in the EEA and estimates regarding other players]*

EEA express it desires, as both serve the whole EEA territory from Estonia, at least the capital cities.

- (1163) From a qualitative point of view, it appears that only one customer recently organising a tender procedure or starting negotiations for the provision of express intra-EEA small package deliveries invited or requested a quotation from La Poste/DPD¹⁰⁰².
- (1164) For these reasons as well as all the reasons already mentioned in the general assessment of the competitive constraint exerted by La Poste in Section 7.2, this operator exerts only a weak constraint on the Parties with respect to international intra-EEA express delivery services, and no constraint at all with respect to the 'long-distance' segment of that market.

Other non-integrated small package delivery companies

- (1165) As regards Eesti Post (ELS), it appears that all the revenues achieved by Eesti Post in intra-EEA international small package deliveries correspond to deferred (two days or more) and that Eesti Post does not offer currently intra-EEA express services¹⁰⁰³.
- (1166) As regards Itella, it appears from [...] * that Itella is only capable to reach the capital Vilnius of its neighbouring country Lithuania with a firm one day time commitment but would require [...] * to deliver to the second most important city, Klaipeda. On the contrary, the Parties can reach of the two cities in Lithuania within one day with one of their express services products. Moreover none of the respondents which organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from Itella¹⁰⁰⁴.
- (1167) As regards Cargobus, from a qualitative point of view, only a single respondent which organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from Cargobus¹⁰⁰⁵.

Freight Forwarders and resellers

- (1168) A number of companies identified by UPS as operating in the Estonian international intra-EEA express market are freight forwarders. This is the case in particular for DB Schenker, DSV and Kuehne+Nagel. [Details regarding freight forwarders' service offerings in Estonia] *¹⁰⁰⁶. The general conclusions already drawn with respect to freight forwarders and resellers apply to these various companies, which thus, at best, exert only very weak constraint on the Parties.
- (1169) The Estonian customers do not see the freight forwarders in general as a good alternative to either UPS or TNT¹⁰⁰⁷. Moreover, they do not consider DB Schenker or Kuehne+Nagel as close competitor to UPS nor to TNT whatever the service or the characteristic at stake¹⁰⁰⁸. Indeed, in the course of the Phase-II market investigation, freight forwarders have been mentioned by a small minority of the Estonian customers among the companies satisfying the criteria they consider indispensable in order to start

¹⁰⁰² Questions 27.1, 27.2 and 27.3 of the questionnaire R7 to customers-Estonia - Phase II.

¹⁰⁰³ Eesti Post's response to question 94 of questionnaire to competitors – phase I.

¹⁰⁰⁴ Question 27 of the questionnaire R7 to customers-Estonia-Phase II.

¹⁰⁰⁵ Question 27 of the questionnaire R7 to customers-Estonia-Phase II.

¹⁰⁰⁶ Form CO, p.118 -122.

¹⁰⁰⁷ See responses to question 59 of questionnaire Q7 to customers – Estonia – Phase I.

¹⁰⁰⁸ See responses to questions 36 and 37 of questionnaire R7 to customers –Estonia – Phase II.

negotiating a contract for the provision of intra-EEA delivery services (as opposed to the Parties)¹⁰⁰⁹. The result was not different when considering the add-on services/specific features considered as must-have for small package companies providing express intra-EEA delivery services, freight forwarders have been referred to only by a small minority of Estonian customers¹⁰¹⁰.

Concluding remarks on non-integrated companies

- (1170) In the reply to the market investigation, the majority of the Estonian customers indicated that no company other than the integrators could constitute a good alternative to the latter with respect to international intra-EEA express deliveries¹⁰¹¹. They further confirmed that non-integrators exert only limited constraint on the Parties on the Estonian international intra-EEA express market. During the second phase of the investigation, asked to indicate which companies they had invited to submit an offer for international intra-EEA express services in the last two years, the majority of Estonian customers mentioned only integrators¹⁰¹².
- (1171) In view of all that, it can be concluded that non-integrators and freight forwarders exert at best a very weak competitive constraint on the Parties on the Estonian international intra-EEA express market. Moreover, in view of the general assessment of barriers to entry set out in this Decision, non-integrators appear unlikely to expand significantly into the Estonian international intra-EEA express market in a near future, even following a price increase due to the Transaction.

The four integrators on the Estonian intra-EEA express small package delivery market

- (1172) Following the market reconstruction launched by the Commission, the revenues achieved by the integrators are spread as follows:

Table 27: International intra-EEA express deliveries in Estonia (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[10-20]%
TNT Express	[20-30]%
Combined	[40-50]%
Deutsche Post DHL	[50-60]%
FedEx	[0-5]%
	100%

¹⁰⁰⁹ Question 31 of the questionnaire Q7 to customers-Estonia-Phase I.

¹⁰¹⁰ Question 33 of the questionnaire Q7 to customers-Estonia-Phase I.

¹⁰¹¹ Questions 41.5.2 and 41.5.3 of questionnaire R7 to customers – Estonia – Phase II

¹⁰¹² Question 27 of questionnaire R7 to customers – Estonia – Phase II.

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹⁰¹³ and FedEx¹⁰¹⁴ replies to the questionnaire to competitors-Phase I.

- (1173) As explained in Section 6.1.4., the industry also uses coverage data in order to measure the strength of a competitor on a certain market:

Table 28: International intra-EEA express deliveries in Estonia – coverage by the four integrators in terms of business addresses (Estonia as destination point)

[...]*

Source: [...]*

FedEx

- (1174) For all the reasons already developed in the general assessment of the role of FedEx, the latter exerts only weak constraint on the Parties in the Estonian international intra-EEA express market. This is due in particular to the fact that FedEx's network is far less developed than those of each of the two Parties, which results in a significantly weaker geographic coverage. As already explained, due to the hub-and-spoke structure of the networks of the integrators, the geographic coverage of their international services in each country of destination is largely independent on the country of origin of the packages. Therefore, what has been mentioned in Section 7.3.2 about the weak geographic coverage of FedEx' international intra-EEA express services (on the destination side) applies to outbound deliveries from Estonia as well as from any other EEA country to Estonia (inbound) [...]*.
- (1175) FedEx' weakness in international intra-EEA express deliveries from Estonia has been confirmed by the Estonian customers' replies to the market investigation. When asked which of the small package delivery companies satisfy the criteria that they consider indispensable in order to start negotiating a contract for the provision of international intra-EEA small package delivery services, only one respondent mentioned FedEx, whereas, DHL, UPS and TNT Express were each mentioned by a large majority of respondents¹⁰¹⁵.
- (1176) In addition, only a respondent of those who organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from FedEx¹⁰¹⁶.
- (1177) Moreover, UPS, TNT Express and DHL were each mentioned by a majority of respondents that recently organised a tender procedure or negotiated a contract for international intra-EEA end-of-day express services as companies that they invited to submit an offer, whereas none of them mentioned FedEx¹⁰¹⁷. The respondents also mentioned UPS, TNT and DHL as companies that satisfy the criteria as well as the add-on services they consider indispensable for small package delivery services while none indicated FedEx¹⁰¹⁸.

¹⁰¹³ DHL's response to question 98 of questionnaire to competitors – Phase I.

¹⁰¹⁴ FedEx' response to question 98 of questionnaire to competitors – Phase I.

¹⁰¹⁵ Question 31 of questionnaire Q7 to customers - Estonia – Phase I

¹⁰¹⁶ Question 27.1, 27.2 and 27.3 of the questionnaire R7 to customers-Estonia-Phase II.

¹⁰¹⁷ Question 27.3 and 27.3.1 of questionnaire R7 to customers-Estonia-Phase II.

¹⁰¹⁸ Question 25 and 28 of questionnaire Q7 to customers – Estonia – Phase I.

- (1178) According to its European expansion plan¹⁰¹⁹, [Details on FedEx's expansion plan across the EEA]*¹⁰²⁰. [Details on FedEx's expansion plan across the EEA]*¹⁰²¹. [Details on FedEx's expansion plan across the EEA]*¹⁰²².
- (1179) [Details on FedEx's expansion plan across the EEA]*.
- (1180) Given that FedEx's activities are operated by a third party, UPS argues in its reply to the Letter of Facts¹⁰²³, that FedEx can increase its coverage presumably without additional investments. However, the achievement of FedEx's general target for coverage is dependent on this third party and cannot be taken as a firm commitment of FedEx's investments. It is only after the infrastructure has been improved that FedEx (or its local partner) would be able to significantly improve its coverage and try to grow more volumes and consequently market shares. The Parties attribute [...] % EOD coverage to FedEx in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx coverage would translate into a coverage of [...] % in FY 2015¹⁰²⁴. FedEx's coverage would therefore still be significantly lower than UPS and lower than TNT.
- (1181) [Details on FedEx's expansion plan across the EEA]*.¹⁰²⁵ Even though it is likely that FedEx's market share may increase, the Commission is unable to predict what market share FedEx is likely to achieve in the near future.
- (1182) The expansion of FedEx needs to be put into perspective of its current market position, where the starting point for expansion is still quite modest. In Estonia, FedEx achieved a revenue share of [0-5] % based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL given FedEx's low coverage on the destination side.
- (1183) Therefore, even if the competitive pressure of FedEx would likely increase compared to its current position, FedEx is not expected to represent a significant competitive constraint on the main integrators in the near future, such as to counter-act negative effects of the transaction on competition in Estonia.

The merger is a "3 to 2" merger in Estonia

- (1184) On the basis of the market investigation non-integrators are largely unable to offer a valid alternative to the integrators international intra-EEA express services in Estonia.
- (1185) Moreover, among the integrators, FedEx has a significantly weaker position than both Parties in terms of geographic coverage, which is an essential parameter for international intra-EEA express services. UPS, TNT and DHL can be seen as close competitors in the Estonian international intra-EEA express market whilst FedEx and non-integrators are significantly more distant.

¹⁰¹⁹ See Section 7.3.10 of this Decision.

¹⁰²⁰ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

¹⁰²¹ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.

¹⁰²² FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 3.

¹⁰²³ The Notifying party's Response to the Letter of Facts, page 8 and 9.

¹⁰²⁴ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

¹⁰²⁵ FedEx, response to the request for information dated 16 November 2012 (Q30).

- (1186) Therefore, it appears that within the group of the integrators, UPS, TNT and DHL are close competitors while FedEx is lagging behind.
- (1187) As to the tender procedures the Estonian customers organised or contracts they negotiated over the last two years for the provision of international intra-EEA express delivery services, UPS, TNT and DHL were invited to make a bid in the overwhelming majority of cases¹⁰²⁶.

Price concentration analysis and efficiencies

- (1188) Furthermore, the price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Estonia would range between [5-10]*% and [5-10]*% depending on the model specification.¹⁰²⁷ The scope of estimated price increases reflects the fact that in the model, FedEx's destination coverage in Estonia is inexistent, which is consistent with its very limited market share.
- (1189) Regarding efficiencies, the Commission has calculated that in Estonia, cost savings would represent between [0-5]*% of net prices in Year [...] and up to [5-10]*% of net prices in Year [...]*. Assuming a pass-through rate of [60-70]*% and taking Year [...] efficiencies as the base line case, the net price effects in Estonia would be positive (meaning a net price rise despite efficiencies) and range between [0-5]*% and [0-5]*%¹⁰²⁸. Even after Year [...]*, when the full efficiencies would materialize - and even irrespective of the fact that this is a remote time horizon in the context of merger control - net price effects would still be slightly positive.

7.11.6.3. The Commission's conclusion

- (1190) It follows that TNT Express is a significant competitor of UPS in the Estonian international intra-EEA express market, where TNT is the second player in terms of revenues, DHL being the market leader. [Details on UPS' operations in Estonia]*¹⁰²⁹
¹⁰³⁰.
- (1191) Besides, even if DHL's market share is higher than the combined market shares of the Parties, the Transaction will lead to a market structure with two market participants of a comparable size facing limited constraint from all the other competitors.
- (1192) In addition, the orders of magnitude of price increases and efficiencies in Estonia are such that a price increase is to be expected. Furthermore, the available price concentration analysis provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.
- (1193) For all these reasons, the Commission concludes that the Transaction would lead to a significant impediment to effective competition in the market for intra-EEA express delivery services in Estonia.

¹⁰²⁶ Question 27 of the questionnaire R7 to customers – Estonia – Phase II.

¹⁰²⁷ Note that these specifications include both models with and without non-integrators coverage data.

¹⁰²⁸ [Confidential information regarding efficiencies expected to arise from the Transaction]*

¹⁰²⁹ Form CO, paragraphs 272 to 278.

¹⁰³⁰ Form CO, paragraph 272.

7.11.7. Finland

7.11.7.1. UPS's views

(1194) According to UPS's estimates provided in the course of the investigation and based on the product market definition followed by the Commission, *post* merger the market shares would be spread as follows:

Table 29: International intra-EEA express deliveries in Finland (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[10-20]*%
TNT Express	[10-20]*%
Combined	[20-30]*%
DHL Express	[20-30]*%
Fedex	[5-10]*%
POST NORD GROUP	[0-5]*%
Itella	[30-40]*%
Posten Norge - Bring Parcels	[0-5]*%
Posten Norge - Bring Express	[0-5]*%
Air Express	[0-5]*%
Kühne + Nagel	[0-5]*%
DB Schenker	[0-5]*%
Panalpina	[0-5]*%
DSV	[0-5]*%
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

- (1195) Both UPS and TNT operate directly on the Finnish small package delivery service market.
- (1196) According to the data provided by the UPS, post Transaction Itella, the Finnish incumbent postal operator, will remain the dominant player ([30-40]*%) before the merged entity ([20-30]*%) and DHL ([20-30]*%).
- (1197) [Confidential information taken from the Parties' internal databases]*. UPS therefore concludes that UPS and TNT Express are not particular close competitors.
- (1198) In its response to the Statement of Objections, UPS also raises supplementary arguments. First, the Commission should have taken into account only the replies to the market investigation coming from the customers that single-source long-haul intra-EEA express services. Second, Itella and DB Schenker actually exert a non-negligible competitive constraint on the integrators on the intra-EEA express market. Third, FedEx is not as weak as claimed in the Statement of Objections.
- (1199) Based on these arguments, the Notifying party submits that the Transaction will not lead to competition concerns in the international express market in Finland. The Parties will continue to face competition from strong players such as DHL, Itella and FedEx.

7.11.7.2. The Commission's assessment

The non-integrators on the Finnish intra-EEA express small package delivery market

- (1200) First of all, this Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the Finnish intra-EEA express delivery market as such, even though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is no point in basing this assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections. Moreover, as demonstrated in section 6.1.6, contrary to what the parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices. Therefore, this argument will not be considered in the following assessment.
- (1201) Second, as concerns the results of the bidding data analysis carried out by the Notifying party, they do not support the conclusion drawn by UPS, as demonstrated in detail in Sections 7.5.1.5 and following.
- (1202) Apart from the four integrators, UPS sees mainly DB Schenker and Itella as exerting effectively a competitive constraint on the intra-EEA express market in Finland. All other players on the market are credited by the Notifying party of individual market shares below [0-5]*%, which as such would not enable them to exert any competitive pressure whatsoever.
- (1203) However, as it will be demonstrated in this section, even these two players do not exert any meaningful competitive constraint on the four integrators on the Finnish intra-EEA express market.

Itella

- (1204) Itella is the Finnish postal incumbent postal operator. By crediting it with a market share of [30-40]*%, UPS appears to have heavily overestimated its actual market position. Indeed, revenue data directly obtained from Itella indicates that it has a much lower weight on the market.
- (1205) [Results of UPS' market analysis]*¹⁰³¹, Itella has confirmed that it offers intra-EEA express deliveries only to Sweden and the Baltics¹⁰³². Therefore, Itella competes with the integrators only on four destination countries.
- (1206) For all the deliveries outside Finland, including those four countries to which it offers express deliveries. Itella relies on a sub-contractor, the national incumbent or a local service provider¹⁰³³. This means that Itella does not benefit from controlling its own network and thus does not manage two-thirds of the process, which puts it in a disadvantageous position vis-à-vis the integrators. As explained in the Section 7.6 relating to barriers to entry, the sub-contracting entails double-margins for Itella which has to face its own margins as well as its sub-contractor's, which prevent it from being cost-efficient as opposed to the integrators which enjoy a seamless delivery process.

¹⁰³¹ See Notifying party's response to the Statement of Objections, paragraph 9.152.

¹⁰³² Itella's response to question 99 of questionnaire to competitors – Phase I and email dated of 29 November 2012.

¹⁰³³ Itella's response to question 17 of questionnaire to competitors – Phase I.

(1207) Therefore, even though Itella offers intra-EEA express deliveries to the same extent as the ones offered by the Parties from Finland to Sweden and the Baltics, it can hardly compete with the UPS and TNT since it has to sub-contract part of the delivery process.

DB Schenker

(1208) In spite of being a freight forwarder, DB Schenker runs, in Finland, a subsidiary dedicated to the handling of small packages and through it offers both intra-EEA express deliveries. [Results of UPS' market analysis]*.

(1209) DB Schenker's limited presence on the Finnish market for express is not only mirrored by its very small market share), but also corresponds to the perception of customers. Only a limited majority of customers sees the services offered by DB Schenker and other freight forwarders via their network as an alternative for sending their intra-EEA express shipments¹⁰³⁴. Contrary to what UPS claimed in its response to the Statement of Objections, what matters is not to consider contracting with a company by for instance inviting it to a tender procedure, but to actually do it and according to their responses, in practice, a large majority has never used a freight forwarder for sending small packages from Finland to another EEA country via their network with a next-day time-commitment¹⁰³⁵. One of the respondents explains that: "*it is more difficult to arrange door-door and more expensive and complicated*"¹⁰³⁶. All the more, in most cases DB Schenker uses the integrators' network even when they run a dedicated subsidiary, as shown in Section 7.2.4. relating to freight forwarders, which in any event puts them at a competitive disadvantage.

(1210) More generally, only an extremely limited number of customers sees either Itella or DB Schenker as capable of offering the add-on services¹⁰³⁷ or of satisfying the criteria¹⁰³⁸ they view as indispensable, as opposed to the integrators. Even more striking, neither DB Schenker, nor Itella are mentioned as credible alternatives to the Parties on this market by the Finnish customers of the Parties¹⁰³⁹. In addition, none of the two is mentioned as a close competitor to either UPS or TNT¹⁰⁴⁰.

(1211) Finally, only a minority of Finnish customers who have organized a tender procedure or started negotiating a contract for the provision of intra-EEA express small package delivery services from Finland in the last two years invited or requested a quotation from alternatively Itella or DB Schenker¹⁰⁴¹.

Conclusion on non-integrators

¹⁰³⁴ See responses to question 43.1 of questionnaire to customers Q8 – Finland – Phase I.

¹⁰³⁵ See responses to question 44 of questionnaire to customers Q8 – Finland – Phase I.

¹⁰³⁶ [Customer's name]* response to question 44.1 of questionnaire to customers – Finland – Phase I.

¹⁰³⁷ See responses to question 33 of the questionnaire to customers Q8 – Finland – Phase I.

¹⁰³⁸ See responses to question 31 of the questionnaire to customers Q8 – Finland – Phase I.

¹⁰³⁹ See responses to question 59 of the questionnaire to customers Q8- Finland – Phase I. In paragraph 9.156 of its response to the Statement of Objections, UPS claims that the customers had no possibility to respond specifically Itella or DB Schenker. This is an incorrect reading of the multiple possible replies offered to the respondents. Indeed they had the choice between: *DHL, FedEx, GLS, DPD, Hermes, Other (including freight forwarders)*. And they had enough space to actually specify what they meant by "*other*" should they have chosen this reply.

¹⁰⁴⁰ See responses to question 60 and 61 of the questionnaire to customers Q8 – Finland – Phase I.

¹⁰⁴¹ See responses to question 27 of the questionnaire R8 to customers – Finland – Phase II.

- (1212) Consequently, DB Schenker and Itella are unlikely to exert a significant competitive constraint on the Parties on the intra-EEA express small package delivery market in Sweden.
- (1213) Overall, an overwhelming majority of the Finnish customers confirmed that there were no other companies than the integrators that would be such a good alternative to the latter that they could imagine to use them instead of the integrators for deliveries to EEA countries which are over 600-800 km from the location of the pick-up¹⁰⁴². Similarly, a majority of customers confirmed that the situation was identical for deliveries to neighbouring countries¹⁰⁴³.
- (1214) Therefore, it can be concluded that the non-integrators exert a very limited competitive pressure on the four integrators, with respect to the shipments of small package across the EEA with a committed time of delivery of next day/end-of-day. It is thus appropriate to look at the respective positions and strengths of the four integrators on the Finnish intra-EEA express small package delivery market.

The four integrators on the Finnish intra-EEA express small package delivery market

- (1215) Following the market reconstruction launched by the Commission, the revenues achieved by the integrators are spread as follows:

Table 30: International intra-EEA express deliveries in Finland (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[20-30]%
TNT Express	[10-20]%
Combined	[30-40]%
Deutsche Post DHL	[60-70]%
FedEx	[0-5]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹⁰⁴⁴ and FedEx¹⁰⁴⁵ replies to the questionnaire to competitors-Phase I.

- (1216) As explained in Section 6.1.4, the industry also uses coverage data in order to measure the strength of a competitor on a certain market:

Table 31: International intra-EEA express deliveries in Finland – coverage by the four integrators in terms of business addresses (Finland as destination point)

[...]*

*Source: [...]**

¹⁰⁴² See responses to question 41.5.3 of the questionnaire R.8 to customers – Finland – Phase II.

¹⁰⁴³ See responses to question 41.5.2 of the questionnaire R.8 to customers – Finland – Phase II.

¹⁰⁴⁴ DHL's response to question 98 of questionnaire to competitors – Phase I.

¹⁰⁴⁵ FedEx' response to question 98 of questionnaire to competitors – Phase I.

FedEx

- (1217) As explained in Section 7.3.9., FedEx is the weakest integrator among the four. This is rather obvious from Table 31. With a share of the total revenues of the four integrators on the Finnish intra-EEA express market ranging between 0 and 5, FedEx will exert a very weak competitive pressure on the Parties *post* merger.
- (1218) From a qualitative point of view, Finnish customers indicated that they view very favourably suppliers that offer intra-EEA express services covering many destination countries, with an extensive geographic coverage in each of them. Indeed, when asked to rank the criterion they take into account while they negotiate supply agreements for intra-EEA express deliveries, almost all the respondents gave the highest grades¹⁰⁴⁶ to (i) the coverage of all destination countries and (ii) the extensive geographic coverage in the country of destination¹⁰⁴⁷. As already explained in Section 7.3.2, FedEx does not offer all destinations within the EEA [Parties' coverage data and estimates regarding the other integrators' coverage]*¹⁰⁴⁸: [Details on FedEx operations in Denmark]*.¹⁰⁴⁹ This clearly is a competitive handicap for FedEx, in particular since these services are the most costly.
- (1219) The outcome of the market investigation confirms that the customers view FedEx as the weakest integrator: "*In some areas FedEx network has not met our requirements*"¹⁰⁵⁰ as stated by [Customer's name]*. Another customer, when asked if the all the four integrators are capable of providing an equally good alternative for domestic/intra/extra-EEA express services replied: "*FedEx not in Finland*"¹⁰⁵¹. In addition, only a minority of Finnish customers sees FedEx as a close competitor to UPS and an even smaller minority as a close competitor to TNT with respect to deliveries that have to be shipped within one day to other EEA countries¹⁰⁵². Finally, only a minority of Finnish customers who have organized a tender procedure or started negotiating a contract for the provision of intra-EEA express small package delivery services from Finland in the last two years invited or requested a quotation from FedEx¹⁰⁵³. UPS puts forward this piece of evidence to show that FedEx is a valid alternative to the Parties¹⁰⁵⁴. Nevertheless, what matters in the end is not only to be invited but to eventually be awarded the contract. The facts speak for themselves: eventually, none of the respondents contracted with FedEx¹⁰⁵⁵.
- (1220) According to its European expansion plan¹⁰⁵⁶, [Details on FedEx's expansion plan across EEA]*¹⁰⁵⁷. [Details on FedEx's expansion plan across EEA]*¹⁰⁵⁸. [Details on FedEx's expansion plan across EEA]*¹⁰⁵⁹.

¹⁰⁴⁶ On a scale ranging from 1 to 5, they awarded a 4 or a 5.

¹⁰⁴⁷ See responses to question 30 of the questionnaire Q8 to customers – Finland – Phase I.

¹⁰⁴⁸ [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹⁰⁴⁹ FedEx does not also offer morning deliveries to the following destinations: Bucharest (Romania), Portugal, Innsbruck (Austria), Sofia (Bulgaria), Czech Republic, Luxemburg and Poland.

¹⁰⁵⁰ [Customer's name]* response to question 41.1 of questionnaire R8 to customers – Finland – Phase II.

¹⁰⁵¹ [Customer's name]* response to question 41 of questionnaire R8 to customers – Finland – Phase II.

¹⁰⁵² See responses to questions 60 and 61 of questionnaire Q8 to customers – Finland – Phase I.

¹⁰⁵³ See responses to question 27 of questionnaire R26 to customers – Finland – Phase II.

¹⁰⁵⁴ Notifying party's response to the Statement of Objections, paragraph 9.163.

¹⁰⁵⁵ See responses to question 39 of questionnaire Q8 to customers – Finland – Phase I.

¹⁰⁵⁶ See Section 7.3.10 of this Decision.

¹⁰⁵⁷ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

- (1221) [Details on FedEx's expansion plan across EEA]*
- (1222) According to the Parties' EOD coverage estimates, FedEx reached only [...] % coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx coverage would translate into a coverage between [...] % in FY 2015¹⁰⁶⁰. This would be close to the Parties' current coverage of over [...] % each.
- (1223) [Details on FedEx's expansion plan across EEA]*.¹⁰⁶¹ Even though it is likely that FedEx market share may increase, the Commission is unable to predict what market share FedEx is likely to achieve in the near future.
- (1224) The expansion of FedEx needs to be put into the perspective of its current market position, where the starting point for expansion is still quite modest. In Finland, FedEx achieved a revenue share of [0-5] % based on integrators' revenues according to the market reconstruction. However, even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL given FedEx' low coverage on the destination side.
- (1225) Therefore, even if the competitive pressure from FedEx would be likely to increase compared to its current position, FedEx is not expected to represent a significant competitive constraint on the main integrators in the near future, such as to counter-act negative effects of the transaction on competition in Finland.

The merger will be a "3 to 2 merger" in Finland

- (1226) UPS, TNT and DHL are the three small package companies which offer the fastest delivery services from Finland [Parties' coverage data and estimates regarding the other integrators' coverage]*¹⁰⁶². They have equivalent times-in-transit for almost all the destinations¹⁰⁶³. Therefore, with respect to geographic coverage of their intra-EEA express services, UPS, TNT and DHL appear as close competitors, and closer to one another than to any other competitor.
- (1227) Similarly, while an overwhelming majority of the customers mention both UPS and DHL as TNT's closest competitors and conversely both TNT and DHL as UPS's closest competitors, only a minority referred to FedEx¹⁰⁶⁴. Moreover, an overwhelming majority of customers mentioned UPS, DHL and TNT as fulfilling the criteria they view as "must-haves" while negotiating an agreement relating the supply of small package delivery services, while only a minority share this opinion in respect of FedEx¹⁰⁶⁵. Likewise as to the specific features they consider indispensable, an even bigger gap stands between the proportion of customers who confide in the Parties and DHL to offer such services and the ones who rely on FedEx to do so¹⁰⁶⁶.

¹⁰⁵⁸ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.

¹⁰⁵⁹ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 3.

¹⁰⁶⁰ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

¹⁰⁶¹ FedEx, response to the request for information dated 16 November 2012 (Q30).

¹⁰⁶² [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹⁰⁶³ As opposed to at least one of the Parties, DHL does not offer morning deliveries to Czech Republic, Denmark, Estonia, Spain and Portugal.

¹⁰⁶⁴ See responses to questions 60 and 61 of questionnaire Q8 to customers – Finland – Phase I.

¹⁰⁶⁵ See responses to question 31 of questionnaire Q8 to customers – Finland – Phase I.

¹⁰⁶⁶ See responses to question 33 of questionnaire Q8 to customers – Finland – Phase I.

- (1228) Furthermore, as to the tender procedures the Finnish customers organised over the last two years: each of UPS, TNT and DHL was invited to make a bid in the overwhelming majority of cases¹⁰⁶⁷.
- (1229) Therefore, it appears that within the group of the integrators, UPS, TNT and DHL are close competitors while FedEx is lagging behind.
- (1230) It worth stressing that neither in its response to the Statement of Objections or in its submission dated 23 November 2012, UPS contests the outcome of the market investigation and the conclusion the Commission draws from it: UPS, TNT and DHL are close competitors.
- (1231) With a market position of [10-20]% in terms of revenues, TNT is one of the three main integrators active on the intra-EEA express market in Finland. As stressed by one customer, the Transaction will mean "*one major provider less in the market*"¹⁰⁶⁸
- (1232) As indicated previously, the elimination of one of the three competitors very often invited to participate in tender procedures is likely to have a negative effect on prices due to the reduction of competition it induces (see Section 7.5.2.).
- (1233) Finally, the Commission considers that the Transaction is likely to eliminate an important competitive force and to limit the possibilities of switching supplier, as there is no countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects in Finland.

Price concentration and efficiencies

- (1234) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Finland range between [5-10]*% and [5-10]*% depending on the model specification.¹⁰⁶⁹ The magnitude of the estimated price increases reflects the fact that in the model, FedEx's coverage in Finland is limited relative to the other integrators. The Commission also notes that in Finland FedEx's market share is particularly low, consistent with its limited coverage.
- (1235) Regarding efficiencies, the Commission has calculated that in Finland, cost savings would represent between [0-5]*% of net prices in Year [...] and up to [10-20]*% of net prices in Year [...]*. Assuming a pass-through rate of [60-70]*% and taking Year [...] efficiencies as the base line case, the net price effects in Finland would remain positive ranging between [0-5]*% and [0-5]*%, despite the expected cost savings¹⁰⁷⁰. Only in Year [...] would price decreases be expected but this is a remote time horizon in the context of merger control.
- (1236) Overall in Finland, the orders of magnitude of price increases and efficiencies are such that a significant impediment to effective competition on the market for international intra-EEA express services is to be expected.
- (1237) Moreover, some customers confirm that they fear that *post merger* prices might increase, such as for instance [Customer's name]* which claims: "*We probably will lose*

¹⁰⁶⁷ See responses to question 27 of questionnaire R8 to customers – Finland – Phase II.

¹⁰⁶⁸ [Customer's name]* response to question 67.1 of questionnaire Q8 – Finland – Phase I.

¹⁰⁶⁹ Note that these specifications include both models with and without non-integrators coverage data.

¹⁰⁷⁰ [Confidential information regarding efficiencies expected to arise from the Transaction]*

the current working set-up with TNT. We also expect prices to increase and must find a working alternative to TNT."¹⁰⁷¹. Another customer considers that: "*There is a possibility that the prices of certain services will increase*"¹⁰⁷² and another one states: "*I [am] afraid that the prices will be higher as today*"¹⁰⁷³.

7.11.7.3. The Commission's conclusion

- (1238) Therefore, UPS, TNT and DHL can be seen as close competitors on the Finnish international intra-EEA express market while FedEx is exerting only a weak constraint on the Parties.
- (1239) In addition, also in view of the general assessment already conducted as regards barriers to entry, countervailing buyer power and efficiencies in Sections 7.6 to 7.10, the Commission considers that the Transaction is likely to eliminate an important competitive force from the Finnish international intra-EEA express market and to limit the possibilities of switching supplier while there is no sufficient countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects. Moreover, the Commission's quantitative analysis confirms that the Transaction is expected to cause price increases on the Finnish market, even if the effects of efficiencies is taken in to account. The available price concentration analysis also provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.
- (1240) On the basis of all these qualitative and quantitative elements, the concentration is likely to lead to a significant impediment to effective competition on the Finnish market for international intra-EEA express deliveries of small packages.

7.11.8. *Hungary*

7.11.8.1. UPS's views

- (1241) UPS and TNT both operate in Hungary with their own assets¹⁰⁷⁴. UPS argued that the Hungarian international intra-EEA express market was very dynamic and put particular emphasis on the role of several competitors: DHL, FedEx, Royal Mail and Sprinter¹⁰⁷⁵. UPS also referred to the role of freight forwarders¹⁰⁷⁶.
- (1242) UPS considered that the Commission failed to analyse potential expansion by competitors and the likely response of competitors to a hypothetical price increase post-Transaction, thereby presenting a "*completely static analysis*"¹⁰⁷⁷.
- (1243) UPS further took the view that in the Statement of Objections, the Commission was wrong not to focus its analysis on customers purchasing long-haul international intra-

¹⁰⁷¹ [Customer's name]* response to question 66.1 of questionnaire Q8 to customers – Finland – Phase I.

¹⁰⁷² [Customer's name]* response to question 70 of questionnaire Q8 to customers – Finland – Phase I.

¹⁰⁷³ [Customer's name]* response to question 66.1 of questionnaire Q8 – Finland – Phase I.

¹⁰⁷⁴ Form CO, paragraphs 840-841.

¹⁰⁷⁵ Form CO, paragraphs 852 and 853, Notifying party's response to the Statement of Objections, paragraphs 9.305 to 9.309.

¹⁰⁷⁶ Notifying party's response to the Statement of Objections, paragraph 9.314.

¹⁰⁷⁷ Notifying party's response to the Statement of Objections, paragraph 9.295.

EEA express services, that is to say, the only segment which, according to UPS, would have been found exposed to harmful effects in that same Statement of Objections¹⁰⁷⁸.

- (1244) In addition, UPS claimed that the Commission should have investigated to what extent the long-haul international intra-EEA customers purchase services in a bundle or threaten to multi-source. According to UPS, many customers "*multi-source and thus use and mix and match different suppliers depending on the origin-destinations combinations*", such that the overall geographic coverage of potential suppliers in all EEA countries would not be important when it comes to selecting one of them¹⁰⁷⁹.
- (1245) According to UPS, the outcome of the market investigation demonstrates that a significant amount of customers multi-sources and that switching is not uncommon. UPS stated that "*switching of non-long-haul intra-EEA express services (for customers that purchase a bundle of services; an important aspect that is not investigated or analyzed in the SO) may also be used by customers as leverage against a hypothetical price increase for long-haul express delivery.*"¹⁰⁸⁰.
- (1246) UPS referred to the transit time data provided to the Commission as well as the outcome of the market investigation and on that basis, disputed the findings reached in the Statement of Objections as to the weakness of the competitive constraint exerted by FedEx¹⁰⁸¹.
- (1247) Besides, UPS took the view that DHL's role was not properly taken into consideration in the reasoning set out in the Statement of Objections¹⁰⁸².
- (1248) Also, UPS claimed that the outcome of the market investigation would reveal a more nuanced picture than that described in the Statement of Objections as regards the closeness of competition between the Parties¹⁰⁸³.
- (1249) UPS referred to the views put across by Hungarian customers in response to the market investigation, suggesting that there were overall positive and that customers generally did not expect negative effects, in particular in the form of price increases¹⁰⁸⁴.
- (1250) UPS's estimates of market shares for the Hungarian international intra-EEA express market in 2010 are the following.

¹⁰⁷⁸ Notifying party's response to the Statement of Objections, paragraph 9.296.

¹⁰⁷⁹ Notifying party's response to the Statement of Objections, paragraph 9.297 to 9.299.

¹⁰⁸⁰ Notifying party's response to the Statement of Objections, paragraph 9.300 to 9.304.

¹⁰⁸¹ Notifying party's response to the Statement of Objections, paragraphs 9.315 to 9.318.

¹⁰⁸² Notifying party's response to the Statement of Objections, paragraphs 9.319 to 9.320.

¹⁰⁸³ Notifying party's response to the Statement of Objections, paragraphs 9.322 to 9.325.

¹⁰⁸⁴ Notifying party's response to the Statement of Objections, paragraphs 9.326 to 9.328.

Table 32: International intra-EEA express deliveries in Hungary (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[10-20]*%
TNT Express	[10-20]*%
Combined	[20-30]*%
DHL Express	[20-30]*%
Fedex	[5-10]*%
Royal Mail (GLS)	[5-10]*%
La Poste (DPD)	[0-5]*%
Hungarian post	[0-5]*%
Sprinter	[5-10]*%
Austrian Post - Transoflex	[0-5]*%
Raben	[0-5]*%
World Courier	[0-5]*%
Simon Trans	[0-5]*%
Gartner	[5-10]*%
Yusen Logistics	[0-5]*%
Delta Trans	[0-5]*%
Waberer's	[5-10]*%
Masped	[0-5]*%
Lagermax	[0-5]*%
Gebruder Weiss	[0-5]*%
Panalpina	[0-5]*%
DB Schenker	[0-5]*%
Cargo Partner	[0-5]*%
CEVA	[0-5]*%
Royal Sprint	[0-5]*%
Kíséro Kft	[0-5]*%
Ipó-Trans	[0-5]*%
Town to Town	[0-5]*%
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

7.11.8.2. The Commission's assessment

(1251) According to UPS's above data, apart from the four integrators, the following operators would have a market share of more than [0-5]*%: [Competitor's names]*. According to these data, the merged entity would rank first in terms of revenues on the Hungarian international intra-EEA express market, and would be followed by [Competitor's name]*, the other competitors having much lower market shares.

Non-integrators

(1252) The Commission will now examine the role of non-integrators on the Hungarian international intra-EEA express market and the extent to which they exert competitive pressure on the Parties in this market.

[Competitor's name]* and GLS

(1253) UPS attributes a negligible market share to [Competitor's name]* ([0-5]*%), which indicates that [Competitor's name]* is almost absent from the Hungarian international

intra-EEA express market. This point has been corroborated by information provided by [Competitor's name]*, according to which [Competitor's name]* offers no international intra-EEA express services in Hungary¹⁰⁸⁵ except in very specific circumstances, that is to say, when a customer essentially purchasing road-based services requests air-based express services for very limited volumes¹⁰⁸⁶.

- (1254) As regards GLS, it only offers international intra-EEA express services on short-distance cross-border lanes via its ground network, with the exception of limited volumes shipped by air for customers requesting express services necessitating air transport occasionally and for a few packages. This is confirmed by [...] according to which the transit time of GLS' Euro Business Parcel is at minimum [...] for deliveries from Budapest or Debrecen to all the other 56 large cities considered in [...] except for Bratislava, where it would be [...]. For deliveries to Germany, the United Kingdom and Spain, the transit times would be respectively [...], and it could reach up to [...] for certain destinations in the Baltic States¹⁰⁸⁷. By contrast, as already indicated, the Parties' international intra-EEA express services are available for almost all EEA countries (in terms of destination), and for most of them, a significant proportion of the national territory is covered. Given GLS's very limited intra-EEA express operations, the market share estimated by UPS ([5-10]%) overstates its real competitive significance on the international intra-EEA express market.
- (1255) Moreover, as it will be demonstrated in this section, it can be concluded from the outcome of the market investigation that customers would be unlikely to switch from one of the Parties to a non-integrator such as GLS for international intra-EEA express services as a result of a price increase.
- (1256) For these reasons as well as all the reasons already mentioned in the general assessment of the competitive constraint exerted by La Poste and Royal Mail in Section 7.2, these two operators only exert a weak constraint on the Parties with respect to international intra-EEA express delivery services, and no constraint at all with respect to the "long-haul" segment of that market.

Hungarian Post

- (1257) UPS attributes a negligible market share to the Hungarian Post. This turns out to be justified, in light of information provided by the Hungarian Post itself, which indicated that it was not operating in the international intra-EEA express market¹⁰⁸⁸.

Austrian Post (Trans-o-flex)

- (1258) UPS indicated that through its subsidiary Trans-o-flex, Austrian Post would be operating in the Hungarian international intra-EEA small package delivery market, where it would achieve a market share of [0-5]%. In fact, Trans-o-flex appears not to offer any international intra-EEA express service in Hungary, but only deferred services with a minimum transit time of [...] ¹⁰⁸⁹.

1085 [...]*

1086 [...]*

1087 [...]*

1088 Hungarian Post's response to questions 114-117 of questionnaire to competitors – Phase I.

1089 Austrian Post's submission of 10 October 2012.

Sprinter

- (1259) Sprinter is a local Hungarian company which was founded in 1997 initially as a logistics supplier for the publishing industry, and subsequently, according to UPS, would have evolved into a strong competitor in the Hungarian small package sector. Sprinter offers small package delivery services using air transport, (through the SkyNet World Express network) as well as road transport¹⁰⁹⁰.
- (1260) According to [...] ¹⁰⁹¹, Sprinter offers international intra-EEA express services, but with a much narrower geographic coverage than the Parties. [...] ^{*} Sprinter would offer road-based next-day morning services, but only for destinations in Austria and Germany. Sprinter's other road-based services would be available with a next-day commitment for deliveries in Austria but for no other country, even other neighbouring countries such as Romania and Slovakia. As regards the air-based services, they would be available with a transit time of one day for deliveries in Sweden, [...] ^{*} for Austria, Germany, Denmark, Spain, Finland, France, Greece, Portugal, Malta, the Netherlands and Norway, [...] ^{*} for Italy and Poland and at least [...] ^{*} for the other destinations considered in [...] ^{*}. According to Sprinter, these services are available on a door-to-door basis with a transit time of one day for "*several cities of Europe*" only [...] ^{*}¹⁰⁹².
- (1261) Sprinter's international intra-EEA express services have thus a much narrower geographic coverage than those of the Parties, which cover all EEA countries (except Cyprus, in the case of UPS) with a next-day committed service, and for a majority of them, most of the national territory. Moreover, Sprinter's next-day delivery services appear to be much more restrictive than those of the Parties, notably with respect to the location of the pick-up point. Finally, even though it uses air transport for some of its international deliveries, Sprinter does not itself control an air network, which as discussed in detail in the general assessment of the competitive constraint exerted by La Poste and Royal Mail, prevents it from reaching a comparable level of efficiency and reliability as the integrators.
- (1262) Therefore, also in view of the factors already identified in the general assessment of the competitive constraint exerted by local operators in Section 7.2, Sprinter's international intra-EEA express services are a distant substitute for the Parties' services and Sprinter exerts at best a weak constraint on the Parties in the Hungarian international intra-EEA express market.
- (1263) UPS disputes these findings, arguing that "*many customers multi-source and thus use and mix-and-match different suppliers depending on the origin-destinations combinations*" which would mean that "*a supplier cannot be ignored altogether only if it is present on only a number of lanes*"¹⁰⁹³. In fact, neither in the Statement of Objections nor in this Decision is Sprinter "*ignored altogether*". The Commission does not deny that Sprinter is present on the Hungarian international intra-EEA express market. It does not contest either that customers can and do "multi-source" and may use Sprinter on certain lanes and other suppliers on other lanes. However, these elements

¹⁰⁹⁰ Form CO, paragraph 846.

¹⁰⁹¹ [...] ^{*}

¹⁰⁹² See Sprinter's website visited on 7 October 2012 at 6.30 pm:
<http://www.sprinter.hu/en/szolgalatasok/nemzetkozi-legi-csomag-expressz/>.

¹⁰⁹³ Notifying party's response to the Statement of Objections, paragraph 9.309.

cannot alter the conclusion that Sprinter is a weak constraint, both because it is absent from many lanes where the Parties are both present – and where, by definition, Sprinter cannot exert any pressure on the Parties – and because of general factors which make it weaker even on lanes where it competes against the Parties - notably the competitive disadvantages stemming from reliance on outsourcing of air transport.

- (1264) In any event, the outcome of the market investigation clearly shows that Sprinter is generally not viewed as a credible alternative to the Parties for international intra-EEA express services.

Freight forwarders and resellers

- (1265) Apart from GLS, Sprinter and Trans-o-flex, the companies which according to UPS would achieve a market share of at least [0-5]*% on the Hungarian international intra-EEA express market are freight forwarders. Some of them appear not to offer small package delivery services at all in Hungary, or to a very marginal extent and without any intention to actively compete against small package delivery companies such as the Parties. For example, Waberer's, a road freight forwarder which UPS credited with a market share of [5-10]*% indicated: *"we are not really active in the small package deliveries, only in special cases"* and *"we are not interested in the small package business and we concentrate basically on road, mostly FTL [(full truckload)] transportation"*¹⁰⁹⁴.
- (1266) Mased, which according to UPS would have a market share of [0-5]*%, indicated that it was not at all active in the Hungarian small package delivery market¹⁰⁹⁵. When asked to describe its small package delivery services, Delta Trans (which in any event would according to UPS have a very modest market share), only mentioned deferred services from Poland to Germany¹⁰⁹⁶.
- (1267) Panalpina, for its part, stated the following: *"Panalpina is not engaged in small parcel delivery services, neither in the EU nor elsewhere. Occasionally customers request Panalpina to handle small parcels as part of dedicated logistics solutions, as a value added services in connection with containerized /palletized cargo consignments. In such cases Panalpina subcontracts these services to parcel service providers [Details regarding Panalpina's services]* for pre- or on-carriage to/from air- and seaports"*¹⁰⁹⁷. This shows that Panalpina, as many other freight forwarders, does not actively compete against the Parties for small package delivery contracts and customers. Instead, Panalpina – again, as many other freight forwarders - offers small package delivery services through sub-contracting / reselling as a complement to their core freight forwarding services to customers requesting small package delivery services *"occasionally"*.
- (1268) Furthermore, the outcome of the market investigation confirms that the Parties' customers would be unlikely to switch to freight forwarders or resellers as a result of a price increase following the implementation of the Transaction.

¹⁰⁹⁴ Waberer's response to questions 3 and 188 of questionnaire to competitors – Phase I.

¹⁰⁹⁵ Mased's submission of 30 July 2012.

¹⁰⁹⁶ Delta Trans' response to question 1 of questionnaire R32 to competitors – Phase II.

¹⁰⁹⁷ Panalpina's submission of 9 August 2012.

(1269) In any event, the general conclusions already drawn with respect to freight forwarders and resellers in Section 7.2 apply to these various companies, which thus, at best, exert only very weak constraint on the Parties on the Hungarian international intra-EEA express market.

Customers' behaviour vis-à-vis non-integrators

(1270) On the basis of the outcome of the market investigation, it appears that in general, Hungarian customers may in principle be open to choose a non-integrator as a provider of international intra-EEA express services. Indeed, the majority of the respondents indicated that there was no type of small package delivery services for which they would not choose other companies than integrators¹⁰⁹⁸. Moreover, a majority of the respondents indicated that there were no features of the services offered by the integrators that were important for them and distinguished the integrators from other companies offering international intra-EEA express services¹⁰⁹⁹.

(1271) It can be concluded that in abstract terms, a majority of the respondents does not consider the fact that a company is a "non-integrator" as a sufficient reason to exclude that it could be a suitable supplier, even for international intra-EEA express services. However, the replies by Hungarian customers to more detailed questions reveal that faced with a concrete choice, Hungarian customers are generally likely to consider that non-integrators do not constitute credible alternatives.

(1272) During the first phase investigation, Hungarian customers were invited to provide information on individual bids. The information received shows that for the majority of the bids that had an express and an international intra-EEA component and for which sufficient information is available, GLS and DPD were each invited in around half of the cases, and apart from the Hungarian Post, no other operator, including freight forwarders, Sprinter and Trans-o-flex, was invited.

(1273) This is a further confirmation that freight forwarders, Sprinter and Trans-o-flex exert a very weak competitive constraint on the Parties, if any. Indeed, operators that are not invited to make an offer for a particular contract cannot constrain those who are. As regards DPD and GLS, they appear to be invited more frequently than the other non-integrators. However, the characteristics of their services (and in particular the restrictive circumstances under which they provide such services and / or the limited number of lanes on which they do so), as described above, leads to the conclusion that do not act as significant competitive constraints on the Parties.

(1274) During the first phase investigation, Hungarian customers were also invited to describe a recent example of switching. The types of small package delivery services for which they switched supplier were not always precisely specified. However, it is worth noting that the majority of the reported switching events involved a switch between two integrators. GLS, DPD, Sprinter, Trans-o-flex were not mentioned as operators to or from which customers switched, save for GLS in one case¹¹⁰⁰. However, in that case, the information provided by this customer ([Customer's name]*) was not sufficiently clear to identify the operators from and to which this customer switched¹¹⁰¹. This is also an

¹⁰⁹⁸ See responses to question 41.5.5 of questionnaire R12 to customers – Hungary – Phase II.

¹⁰⁹⁹ See responses to question 41.3 of questionnaire R12 to customers – Hungary – Phase II.

¹¹⁰⁰ See responses to question 20 to questionnaire Q12 to customers – Hungary – Phase I.

¹¹⁰¹ [Customer's name]* reply to question 20.2 of questionnaire Q12 to customers – Hungary – Phase I.

illustration of the fact that non-integrators are distant competitors to the Parties compared to the integrators on the Hungarian international intra-EEA express market.

- (1275) Quoting three responses of Hungarian customers concerning these switching events. UPS claimed that "*switching by Hungarian customers is not limited to the integrators.*"¹¹⁰² However, one of these three examples relates to a switch between FedEx and TNT and therefore does not bear out UPS's conclusion. Another one stems from [Customer's name]* response, which, as already indicated, was not sufficiently clear to identify the operators from / to which this customer switched.
- (1276) Moreover, when asked to indicate which companies are credible competitive alternatives to the Parties for international intra-EEA next-day end-of-day services, Hungarian customers did not mention Sprinter, Trans-o-flex or freight forwarders. DPD was mentioned by half of the respondents. DHL, FedEx and GLS were each mentioned by a majority of respondents¹¹⁰³.
- (1277) Hungarian customers were also asked to specify which companies satisfy the criteria that they consider indispensable when negotiating a contract for international intra-EEA services. UPS and TNT were each mentioned by an overwhelming majority of respondents. DHL, FedEx and GLS were each mentioned by around half of the respondents. Freight forwarders were mentioned by a very small minority only. Local small package delivery companies possibly partnering in cooperation networks - a category which Trans-o-flex and Sprinter belong to - were not mentioned at all. DPD was not mentioned at all either¹¹⁰⁴.
- (1278) All this evidence shows that should the merged entity raise prices post-Transaction, Hungarian customers would be very unlikely to switch to Sprinter, Trans-o-flex, DPD or freight forwarders. GLS seems to be seen overall as a more credible alternative to the Parties than the other non-integrators. However, in view of the nature of the international intra-EEA express services offered by GLS (with a limited number of lanes covered), GLS appears to be a distant competitor of the Parties, exerting a limited constraint on them.
- (1279) This is also shored up by the value attached by Hungarian customers to various important service characteristics. Indeed, when asked to rank 13 characteristics of international intra-EEA express services on a scale from 1 to 5 (1 corresponding to the less important criteria and 5 to the indispensable ones), respondents ranked between 4 and 5 the following criteria (for international intra-EEA next-day end-of-day services, which account for the bulk of the international intra-EEA express market): (i) quality of the track-and-trace system, (ii) security for the shipped goods, (iii) extensive geographic coverage in receiving countries, (iv) coverage of all destination countries, (v) on-time delivery record¹¹⁰⁵. For most of these criteria (with the possible exception of security), it has been established that the international intra-EEA express services offered by non-integrators, including GLS, are perceived as being overall of a lower quality than the integrators' services. Moreover, as already indicated, GLS has a much more limited geographic coverage than the integrators. This implies that customers are unlikely to

¹¹⁰² Notifying party's response to the Statement of Objections, paragraph 9.302.

¹¹⁰³ See responses to question 59 of questionnaire Q12 to customers – Hungary – Phase I.

¹¹⁰⁴ See responses to question 31 of questionnaire Q12 to customers – Hungary – Phase I.

¹¹⁰⁵ See responses to question 30 of questionnaire Q12 to customers – Hungary – Phase I.

switch to non-integrators, including GLS, following a price increase, in view of the importance that they attach to certain criteria for which GLS and other non-integrators are clearly weaker than the integrators.

- (1280) Besides, in the context of the first phase investigation, no non-integrator was named as one of the three closest competitors of either UPS or TNT, apart from GLS and DPD. Trans-o-flex, Sprinter and freight forwarders were not mentioned. GLS and DPD were each mentioned by a very small minority of respondents only¹¹⁰⁶.
- (1281) UPS criticised the way in which the Commission analysed the competitive constraint exerted by non-integrators in the Statement of Objections, claiming that it had made an "*an artificial distinction between what allegedly is the 'abstract' opinion of customers (...) and what is the 'concrete' opinion of customers*"¹¹⁰⁷. This criticism ought to be dismissed. Indeed, it stems from the foregoing that in principle, Hungarian customers do not appear to consider the fact that a company is a non-integrator as a sufficient reason to exclude that it could be a suitable supplier, even for international intra-EEA express services. However, information on service characteristics (notably in terms of geographic coverage), customers' behaviour (in terms of switching, companies invited to make offers), the way in which customers value the various service characteristics indicate that they would in fact be unlikely to switch from the Parties to non-integrators as a result of a price increase. This type of information should be given more weight than the fact that customers do not in principle exclude non-integrators, because it gives a more reliable indication as to what customers would concretely do should the merged entity raise prices post Transaction.
- (1282) According to UPS, the Commission presented a "*completely static analysis*" in the Statement of Objections, failing to analyse all potential expansion by other market participants and to address the response from other market participants to a hypothetical price increase of 5-10% in the long-haul intra-EEA express segment, in particular in the case of Sprinter¹¹⁰⁸. However, in view of the assessment of barriers to entry and expansion prevailing on the international intra-EEA express market, in particular its long-haul segment, Sprinter and other non-integrators would be unlikely to expand significantly into this segment to serve more lanes and more customers following a price increase. This is the case in particular for GLS and DPD, as analysed in the general assessment of the competitive constraint exerted by these two companies.
- (1283) UPS also argued that the Commission was wrong not to focus its investigation on the customers that purchase long-haul intra-EEA express services. UPS claims that it would be the only category of customers that would be potentially exposed to a price increase as a result of the Transaction according to the Commission's own analysis in the Statement of Objections¹¹⁰⁹. However, as shown by the above analysis, non-integrators do not appear to be regarded by Hungarian customers as credible alternatives to the Parties on the international intra-EEA express segment in general, and not only on the long-haul segment. Furthermore, as already indicated, Hungarian customers appear to attach significant importance to characteristics such as (i) quality of the track-and-trace system, (ii) extensive geographic coverage in receiving countries, (iii) coverage of all

¹¹⁰⁶ See responses to questions 60 and 61 of questionnaire Q12 to customers – Hungary – Phase I.

¹¹⁰⁷ Notifying party's response to the Statement of Objections, paragraphs 9.311 and 9.312.

¹¹⁰⁸ Notifying party's response to the Statement of Objections, paragraphs 9.295 and 9.310.

¹¹⁰⁹ Notifying party's response to the Statement of Objections, paragraph 9.296.

destination countries, (iv) on-time delivery record. On these aspects, non-integrators, including DPD and GLS, are generally perceived as weaker than the integrators. This applies to the lanes on which they are present.

- (1284) UPS also stressed the importance of bundling and multi-sourcing and claimed that the outcome of the market investigation would demonstrate that "*a significant amount of customers multi-source and switching is not uncommon*"¹¹¹⁰. According to UPS, multi-sourcing would allow customers purchasing long-haul international intra-EEA express services in a bundle to threaten to switch part of their services, including services other than long-haul international intra-EEA express, to other suppliers in response to a hypothetical price increase for long-haul delivery services¹¹¹¹. This argument ought to be dismissed. Moreover, as demonstrated in section 6.1.6, contrary to what the parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices.

Conclusion on non-integrated companies

- (1285) In light of the above, non-integrators exert a weak competitive constraint on the Parties on the international intra-EEA express market, in particular, but not only, on the long-haul segment on that market.

Integrators

- (1286) According to data directly obtained from each integrator during the investigation, the total revenues obtained by the four integrators in 2011 in the Hungarian international intra-EEA express market would be split as follows:

Table 33: International intra-EEA express deliveries in Hungary (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[20-30]%
TNT Express	[20-30]%
Combined	[40-50]%
Deutsche Post DHL	[30-40]%
FedEx	[10-20]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹¹¹² and FedEx¹¹¹³ replies to the questionnaire to competitors-Phase I.

FedEx

- (1287) FedEx has a significantly lower market share than each of the other three integrators. Moreover, for all the reasons already developed in the general assessment of the role of

¹¹¹⁰ Notifying party's response to the Statement of Objections, paragraph 9.304.

¹¹¹¹ Notifying party's response to the Statement of Objections, paragraphs 9.297, 9.304 and 9.310.

¹¹¹² DHL's response to question 98 of questionnaire to competitors – Phase I.

¹¹¹³ FedEx' response to question 98 of questionnaire to competitors – Phase I.

FedEx in section 7.3, the latter exerts only a weak constraint on the Parties in the Hungarian international intra-EEA express market. This is due in particular to the fact that FedEx's European network is far less developed than those of each of the two Parties, which results in a significantly weaker geographic coverage.

- (1288) [...] * concerning the transit time of the integrators' services would tend to indicate that FedEx' international intra-EEA express services offered in Hungary have a similar coverage as those of the Parties¹¹¹⁴. According to these data, FedEx' International Priority service would be available with a next day delivery commitment for deliveries from Budapest to 53 of the 56 major cities considered in [...] * whereas UPS's Express Saver and TNT's Express services would be available with a next day delivery commitment for respectively 52 and 51 of the mentioned cities of destination.
- (1289) However, by taking into account only two major cities per EEA country, these data are unable to provide a reliable representation of the respective coverage of UPS, TNT and FedEx' services in the whole territory of each EEA country. Moreover, in view of the hub-and-spoke nature of the air networks of the integrators, the geographic coverage of their international intra-EEA air-based express services is largely independent of the origin country. This means for example that the geographic coverage of the integrators' express delivery services from Hungary to Italy as a percentage of business addresses or postal codes covered in Italy, is in principle the same for express delivery services from the United Kingdom to Italy. [Parties' coverage data and estimates regarding the other integrators' coverage] *¹¹¹⁵. Therefore, the coverage data (on the destination side) provided in Table 7 apply to international intra-EEA express deliveries from Hungary as well as from the other EEA countries. As already remarked, these data show that FedEx has overall, a weaker coverage than the Parties on the destination side.
- (1290) [Parties' coverage data and estimates regarding the other integrators' coverage] *. Even though this geographic coverage relates in the first place to inbound deliveries, it is also a reliable parameter to assess the strength of a network in terms of pick-up of outbound international volumes and ground transportation of these volumes within the origin country. Indeed, in a given country, the same network is used for the pick-up of outbound consignments and the delivery of inbound consignments.
- (1291) It can thus be concluded that the international intra-EEA express services that FedEx offers in Hungary have a weaker coverage than the Parties' services.
- (1292) UPS argued that "*many customers multi-source and use different suppliers for different origin and destination combinations*" which would imply that "*the competitive strength of FedEx depends on its origin and destination presence on a particular lane, not on its entire coverage in all EEA countries*"¹¹¹⁶. This statement ignores the fact that since the geographic coverage of FedEx is overall weaker than that of the Parties, it is present on a significantly lower number of post code-to-post code or business address – to – business address lanes. This implies that overall, it is present on a significantly smaller part of the market than the Parties. Secondly, the customers' willingness to multi-source should not be overstated. Indeed, as already indicated, Hungarian customers attach significant value to the following service characteristics: "extensive geographic

¹¹¹⁴ [...] *

¹¹¹⁵ [...] *

¹¹¹⁶ Notifying party's response to the Statement of Objections, paragraphs 9.298, 9.299 and 9.317.

coverage in receiving countries" and "coverage of all destination countries". This tends to indicate that customers, even if they might not exclude multi-sourcing, tend to prefer suppliers that can serve many lanes over those that have a restricted coverage, unless their needs are strictly limited to a well-defined and stable set of lanes.

- (1293) In addition, as argued in the general assessment of the constraint exerted by FedEx in Section 7.3, the limited density and scale of the latter's intra-European network has implications, notably in terms of costs, which prevent FedEx from acting as a strong competitive force on the Parties. These elements apply across the EEA, and therefore also in Hungary. FedEx' difficulties to compete on price with the other integrators is illustrated by the following statement by a Hungarian customer, who took the view that the four integrators were not capable for providing an equally good alternative express service and remarked: "*FedEx: [...]**"¹¹¹⁷
- (1294) As noted by UPS, "*in response to the question which suppliers are invited for tenders by Hungarian customers, FedEx is mentioned by half (four) of the respondents, while UPS is only mentioned twice*". On the basis of that finding, UPS stated: "*This suggests that FedEx is in fact a stronger competitor for Hungarian customers than UPS*"¹¹¹⁸. Moreover, UPS referred to customers' responses to the first phase questionnaire addressed to Hungarian customers, claiming that the majority of the respondents identified FedEx as the main competitor to both UPS and TNT¹¹¹⁹. However, UPS appears to have made mistakes in the counting of the replies. Indeed, in the context of the first phase investigation, TNT was identified as UPS's closest competitor by a majority of respondents and vice-versa¹¹²⁰.
- (1295) Furthermore, in the framework of the second phase investigation, the Commission asked customers more detailed questions than during the first phase investigation concerning their views on closeness of competition. Hungarian customers were asked to identify UPS and TNT's two closest competitors with respect to a range of various service characteristics. TNT and DHL were the most frequently identified closest competitors of UPS with respect to the following criteria: (i) price, (ii) geographic coverage for pick-up, (iii) on-time delivery record, (iv) ability to serve customers of all sizes¹¹²¹. UPS, for its part, was the most frequently identified closest competitor of TNT with respect to the following criteria: (i) geographic coverage for pick-up, (ii) track-and-trace system, (iii) latest pick-up time, (iv) on-time delivery record. In particular in view of the importance attached by Hungarian customers to track-and-trace and on-time delivery record, UPS and TNT are thus to be considered close competitors, FedEx being a more distant competitor.
- (1296) In view of these elements, combined with the overall weakness of FedEx' network across the EEA relative to the other integrators, including in Hungary, as well as the elements discussed in the general assessment of the competitive constraint exerted by FedEx in Section 7.3, it appears that FedEx is a more distant competitor to UPS than TNT and vice-versa.

¹¹¹⁷ [Customer's name]* response to questions 41 and 41.1 of questionnaire R12 to customers – Hungary – Phase II.

¹¹¹⁸ Notifying party's response to the Statement of Objections, paragraph 9.318.

¹¹¹⁹ Notifying party's response to the Statement of Objections, paragraph 9.318.

¹¹²⁰ See responses to questions 60 and 61 of questionnaire Q12 to customers – Hungary – Phase I.

¹¹²¹ See responses to questions 35.1 and 36 of questionnaire R12 to customers – Hungary – Phase II.

- (1297) As argued by UPS¹¹²², FedEx has been identified as a credible alternative to the Parties for international intra-EEA next-day end-of-day deliveries¹¹²³. However, whereas UPS and TNT were each mentioned by a vast majority of respondents as satisfying the criteria considered indispensably by respondents when these negotiate a contract for international intra-EEA express delivery services, FedEx was mentioned only by around half of the respondents¹¹²⁴.
- (1298) As regards FedEx's organic expansion plans¹¹²⁵, [Details on FedEx's expansion plan across EEA]*¹¹²⁶. [Details on FedEx's expansion plan across EEA]*¹¹²⁷. [Details on FedEx's expansion plan across EEA]*¹¹²⁸.
- (1299) [Details on FedEx's expansion plan across EEA]*
- (1300) Given that Fedex's activities are operated [...] by a third party, UPS argues in its reply to the Letter of Facts¹¹²⁹ that FedEx probably expects to use more third party centre locations in addition to the FedEx centres. However, the achievement of FedEx's general target for coverage is dependent also on third party and cannot be taken as a firm commitment of FedEx's investments. It is only after the infrastructure has been improved that FedEx (or its local partner) would be able to significantly improve its coverage and try to grow more volumes and consequently market shares. According to the Parties' EOD coverage estimates, FedEx reached [...] coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx coverage would translate into coverage of at most [...] in FY 2015.¹¹³⁰ FedEx's coverage would still be significantly behind TNT and less than UPS.
- (1301) [Details on FedEx's expansion plan across EEA]*.¹¹³¹ Even though it is likely that FedEx market share may increase, The Commission is thus unable to predict what market share FedEx is likely to achieve in the near future.
- (1302) The expansion of FedEx needs to be put into perspective of its current market position, where the starting point for expansion is still quite modest. In Hungary, FedEx achieved a revenue share of [10-20]% based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL, given especially FedEx's low coverage on the destination side.
- (1303) Therefore, even if the competitive pressure from FedEx would be likely to increase compared to its current position, FedEx is not expected to represent a significant competitive constraint on the main integrators in the near future, such as to counter-act negative effects of the transaction on competition in Hungary.

¹¹²² Notifying party's response to the Statement of Objections, paragraph 9.318.

¹¹²³ See responses to question 59 to questionnaire Q12 to customers – Hungary – Phase I.

¹¹²⁴ See responses to question 31 to questionnaire Q12 to customers – Hungary – Phase I.

¹¹²⁵ See Section 7.3.10 of this Decision.

¹¹²⁶ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

¹¹²⁷ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.

¹¹²⁸ Letter of Facts of 21 December 2012, paragraph 10.

¹¹²⁹ The Notifying party's Response to the Letter of Facts, page 10.

¹¹³⁰ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

¹¹³¹ FedEx, response to the request for information dated 16 November 2012 (Q30).

DHL

- (1304) UPS emphasised the role of DHL on the market, noting that according to the Statement of Objections, DHL has a market share of [30-40]%¹¹³². UPS also referred to the information and views provided by Hungarian customers on DHL in the framework of the market investigation¹¹³³.
- (1305) These elements indeed show that DHL is a strong player on the Hungarian international intra-EEA express market, which in addition is close to each of the Parties. However, according to the Parties' market share estimates and the Commission's market reconstruction, the merged entity would be the clear market leader following the Transaction, DHL ranking second.
- (1306) Furthermore, the available price concentration analysis provides an empirical confirmation that the weight of DHL on the market would not prevent a price increase as a result of the Transaction (at least without the mitigating effect of the efficiencies being taken into account).
- (1307) Finally, even if DHL is a close competitor to both UPS and TNT, and even if it was found to be the closest competitor to each of them, this would not affect the findings the Transaction would remove existing competition between two operators belonging to a group of three very strong players close to one another, with all the other competitors being significantly more distant. Moreover, the Commission's below quantitative analysis confirms that the Transaction is expected to cause price increases on the Hungarian international intra-EEA express market (efficiencies being disregarded), and that there is a risk that efficiencies brought about by the Transaction are insufficient to outweigh this effect. For that reason, the Transaction is likely to have anti-competitive effects.

Closeness of competition

- (1308) The general conclusions already drawn in Section 7.5 with respect to the closeness of competition between the Parties on the international intra-EEA express market apply to Hungary. However, in view of the specific comments made by UPS in its Response to the Statement of Objections as regards the closeness of competition between the Parties and FedEx on the Hungarian international intra-EEA express market, it is appropriate to analyse closeness of competition in more detail.
- (1309) UPS claimed that FedEx was identified as UPS's main competitor by Hungarian customers responding to the first phase questionnaire¹¹³⁴. However, this is factually incorrect. Indeed, an overwhelming majority of the Hungarian customers identified TNT as UPS's closest competitor with respect to international intra-EEA next-day end-of-day services, whilst FedEx was identified only by a very small minority¹¹³⁵.
- (1310) According to UPS's counting, the majority of respondents identified FedEx as "*one of the main competitors of TNT*" for next-day end-of-day deliveries¹¹³⁶. However, UPS

¹¹³² Notifying party's response to the Statement of Objections, paragraph 9.319.

¹¹³³ Notifying party's response to the Statement of Objections, paragraphs 9.320 and 9.32.

¹¹³⁴ Notifying party's response to the Statement of Objections, paragraph 9.324.

¹¹³⁵ See responses to questions 60 of questionnaire Q12 to customers-Hungary -Phase I.

¹¹³⁶ Notifying party's response to the Statement of Objections, paragraph 9.324.

was identified by a majority of respondents as TNT's closest competitor whereas FedEx was only mentioned by a small minority as being TNT's closest competitor¹¹³⁷.

- (1311) Moreover, when asked to identify UPS and TNT's two closest competitors with respect to a range of various service characteristics, respondents predominantly mentioned TNT and DHL as UPS's closest competitor of UPS with respect to the following criteria: (i) price, (ii) geographic coverage for pick-up, (iii) on-time delivery record, (iv) ability to serve customers of all sizes. UPS, for its part, was the most frequently identified closest competitor of TNT with respect to the following criteria: (i) geographic coverage for pick-up, (ii) track-and-trace system, (iii) latest pick-up time, (iv) on-time delivery record. In view of the importance attached by Hungarian customers to track-and-trace and on-time delivery record, UPS and TNT are thus to be considered close competitors.
- (1312) Therefore, it is concluded that the Parties are close competitors on the Hungarian international intra-EEA express market.

Price concentration and efficiencies

- (1313) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Hungary would range between [0-5]*% and [0-5]*% depending on the model specification.¹¹³⁸ The scope of estimated price increases reflects the fact that in the model, FedEx's coverage in Hungary is quite high. The Commission also notes that in Hungary, FedEx's market share is relatively high, consistent with its coverage.
- (1314) Regarding efficiencies, the Commission has calculated that in Hungary, cost savings would represent between [0-5]*% of net prices in Year [...] and up to [5-10]*% of net prices in Year [...]*. Assuming a pass-through rate of [60-70]*% and taking Year [...] efficiencies as the base line case, the net price effects in Hungary would therefore range between -[0-5]*% and [0-5]*%.¹¹³⁹ The quantitative analysis produces an ambiguous result in Hungary given that the net effect is predicted as a slight price decrease or a slight price increase.

7.11.8.3. The Commission's conclusion

- (1315) UPS, TNT and DHL can be seen as close competitors on the Hungarian international intra-EEA express market while FedEx and non-integrators are distant competitors exerting at best a weak constraint on the Parties.
- (1316) In addition, also in view of the general assessment already conducted as regards barriers to entry, countervailing buyer power and efficiencies in Section 7.6, 7.7, 7.8, and 7.10 respectively, the Commission considers that the Transaction is likely to eliminate an important competitive force from the Hungarian international intra-EEA express market and to limit the possibilities of switching supplier as there is no sufficient countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects in Hungary. Moreover, the Commission's quantitative analysis confirms that the Transaction is expected to cause price increases on the Hungarian international intra-EEA express market (efficiencies being disregarded), and that there is a risk that efficiencies brought about by the Transaction are insufficient to outweigh

¹¹³⁷ See responses to questions 61 of questionnaire Q12 to customers-Hungary -Phase I.

¹¹³⁸ Note that these specifications include both models with and without non-integrators coverage data.

¹¹³⁹ [Confidential information regarding efficiencies expected to arise from the Transaction]*

this effect. It should be noted in this respect that this analysis takes into consideration the relatively strong presence of DHL on the market.

- (1317) Therefore, the Transaction would be likely to lead to a significant impediment to effective competition on the Hungarian market for international intra-EEA express deliveries of small packages.

7.11.9. Latvia

7.11.9.1. UPS's views

- (1318) According to UPS's estimates, based on the product market definition followed by the Commission, *post merger* UPS considers that the market shares would be spread as follows:

Table 34: International intra-EEA express deliveries in Latvia (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[5-10]*%
TNT Express	[20-30]*%
Combined	[20-30]*%
DHL Express	[30-40]*%
Fedex	[0-5]*%
La Poste (DPD)	[5-10]*%
Latvijas Pasts	[0-5]*%
DB Schenker	[5-10]*%
Itella	[5-10]*%
Lex System	[0-5]*%
SIA Cargo Services	
DSV	
Kühne + Nagel	[0-5]*%
Velokurjers SIA	
Autopasts Termināls	[0-5]*%
Pasta Un Kurjeru Serviss SIA	[0-5]*%
VIP Kurjers SIA	
City Express	[0-5]*%
DKK	
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

- (1319) In its response to the Decision opening the proceedings, UPS claims that UPS and TNT are both active in the international small package delivery services market in Latvia. [Details on UPS's operations in Latvia]*. Therefore it contends that its market share does not accurately reflect its competitive position on this market.
- (1320) UPS considers that the international small package market in Latvia is very fragmented, leading to the conclusion that the market is very dynamic. UPS claims that post-Transaction DHL will remain the largest player on this market and that other strong competitors are present, including [...]*.
- (1321) In its response to the Statement of Objection, UPS further argues that (i) the Commission should have taken into account only the replies to the market investigation coming from the customers that single-source long-haul intra-EEA express services, (ii)

FedEx is not a more distant and weaker competitor among the integrators in Latvia and (iii) the Commission entirely ignores other more relevant data in the form of the UPS and TNT bidding databases which provided much more accurate information about the closeness of competition between competitors.

- (1322) Based on these arguments, UPS submits that the Transaction will not lead to competition concerns on the international express market in Latvia.

7.11.9.2. The Commission's assessment

- (1323) First of all, this Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the intra-EEA express delivery market in Latvia as such, even though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is no justification for basing the present assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections.
- (1324) Second as concerns the bidding data analysis carried out by the Notifying party, they are assessed in detail in Section 7.5.1.6.
- (1325) Moreover, as demonstrated in Section 6.1.6, contrary to what the Parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices.
- (1326) UPS's market reconstruction includes a large number of companies, such as non-integrated companies, national postal operators and freight forwarders. However, as mentioned in Section 7.2., contrary to UPS's contention these companies do not offer a viable alternative to the customers when it comes to intra-EEA express deliveries, in particular for non-neighbouring countries: only the four integrators are capable to deliver small packages within a day also to distant or remote destinations.
- (1327) On the basis of the revenue data provided by the Parties, DHL will be the market leader followed closely by the merged entity while other competitors including FedEx would have considerably lower market shares. According to UPS data, apart from the four integrators, only the following operators would have a market share above [0-5]*%: [...]*.

Non-integrators on the Latvian intra-EEA small package delivery market

- (1328) Upon examination of the role of the non-integrators on the intra-EEA express market in Latvia and the extent to which they exert a competitive pressure on the four integrators on this market, the Commission disagrees with UPS for the reason set out in this section.

La Poste/DPD

- (1329) UPS attributes a [5-10]*% market share to DPD. However, the real market share is only [0-5]%. Moreover, as corroborated by information provided by La Poste, they offer intra-EEA express service only for certain neighbouring destinations in Lithuania and Estonia¹¹⁴⁰.

¹¹⁴⁰ La Poste's submission of 27 September 2012.

- (1330) In view of the limited scope of the destinations offered by La Poste/DPD, it is rather unlikely that it would be a suitable alternative for customers as opposed to the Parties who are able to deliver to all the EEA countries. In particular, UPS explains in its response to the Statement of Objection that most of the customers "bundle" that is to say that they buy multiple services. They would not be able to do so from La Poste/DPD, at least as concerns intra-EEA express services in view of its extremely limited portfolio. Conversely, a customer could source from either UPS or TNT the full range of intra-EEA express it desires, as both serve the whole EEA territory from Latvia, at least the capital cities.
- (1331) From a qualitative point of view, only a small minority of the respondents which organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from La Poste/DPD¹¹⁴¹.
- (1332) For these reasons as well as all the reasons already mentioned in the general assessment of the competitive constraint exerted by La Poste in Section 7.2, this operator exerts only a weak constraint on the Parties with respect to international intra-EEA express delivery services, and no constraint at all with respect to the 'long-distance' segment of that market.

Other non-integrated small package delivery companies

- (1333) As regards Latvijas Pasts, as it appears from [Parties' coverage data and estimates regarding the other integrators' coverage]*¹¹⁴², Latvijas Pasts in the case of neighbouring countries such as Estonia is only able to deliver with a firm one day time commitment to the capital Tallinn and not to Tartu where it requires [...]*. The same applies to deliveries to the neighbouring country of Lithuania where it is only able to deliver with a firm one day time commitment to the capital Vilnius and not to Klaipeda where it requires [...]*. On the contrary, the Parties can reach the two cities in these two countries within one day with one of their express services products. Latvijas Pasts only exerts a weak constraint on the Parties with respect to international intra-EEA express delivery services, and no constraint at all with respect to the 'long-distance' segment of that market.
- (1334) As regards Itella, which offers an express service for packages to be delivered in Lithuania, Estonia, Latvia and Finland (delivery within 24 hours) - for shipments to other countries, Itella works with partner networks - none of the respondents which organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from Itella¹¹⁴³.

Freight forwarders and resellers

- (1335) A number of companies identified by UPS as operating in the Latvian international intra-EEA express market are freight forwarders. This is the case in particular for DB Schenker, DSV and Kuehne+Nagel. [Details regarding freight forwarders' service offerings in Latvia]*¹¹⁴⁴.

¹¹⁴¹ Question 27 of the questionnaire R15 to customers-Latvia-Phase II.

¹¹⁴² [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹¹⁴³ Question 27 of the questionnaire R15 to customers-Latvia-Phase II.

¹¹⁴⁴ Form CO, page 118 -122.

- (1336) The Latvian customers do not see the freight forwarders in general as a good alternative to either UPS or TNT¹¹⁴⁵. Moreover, they do not consider DB Schenker or Kuehne+Nagel as close competitor to UPS or to TNT whatever the service or the characteristic at stake¹¹⁴⁶. Indeed, in the course of the Phase-II market investigation, freight forwarders have not been mentioned by the Latvian customers among the companies satisfying the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services (as opposed to the Parties)¹¹⁴⁷. The result was not different when considering the add-on services/specific features considered as must-have for small package companies providing express intra-EEA delivery services, freight forwarders have been referred to only by a small minority of Latvian customers¹¹⁴⁸.
- (1337) The market investigation revealed that none of the respondents which organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from Kuehne+Nagel or DB Schenker¹¹⁴⁹.
- (1338) The general conclusions, already drawn with respect to freight forwarders and resellers in Section 7.2, apply to these various companies, which thus, exert only a very weak constraint on the Parties.

Concluding remarks on non-integrated companies

- (1339) In their reply to the market investigation, half of the Latvian customers indicated that no company other than the integrators could constitute a good alternative to the latter with respect to international intra-EEA express deliveries to EEA countries which are over 600-800 km away from the location of pick-up¹¹⁵⁰.
- (1340) Feedback received by customers during the market investigation further confirms that non-integrators exert only limited constraint on the Parties on the Latvian international intra-EEA express market. During the second phase of the investigation, when asked to indicate which companies they had invited to submit an offer for international intra-EEA express services in the last two years, the majority of Latvian customers mentioned only integrators¹¹⁵¹.
- (1341) It results that non-integrators exert a weak competitive constraint on the Parties, notably for Latvian customers shipping express packages over long distances, the needs of which they are simply unable to satisfy.

The four Integrators on the Latvian intra-EEA express small package delivery market

- (1342) Following the market reconstruction launched by the Commission, the revenues achieved by the integrators are spread as follows:

¹¹⁴⁵ See responses to question 59 of questionnaire Q15 to customers – Latvia – Phase I.
¹¹⁴⁶ See responses to questions 36 and 37 of questionnaire R15 to customers –Latvia – Phase II.
¹¹⁴⁷ Question 31 of the questionnaire Q15 to customers-Latvia-Phase I.
¹¹⁴⁸ Question 33 of the questionnaire Q15 to customers-Latvia-Phase I.
¹¹⁴⁹ Question 27 of the questionnaire R15 to customers-Latvia-Phase II.
¹¹⁵⁰ Question 41.5.3 of the questionnaire R15 to customers – Latvia – Phase II.
¹¹⁵¹ Question 27 of the questionnaire R15 to customers – Latvia – Phase II.

Table 35: International intra-EEA express deliveries in Latvia (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[10-20]%
TNT Express	[30-40]%
Combined	[40-50]%
Deutsche Post DHL	[40-50]%
FedEx	[5-10]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹¹⁵² and FedEx¹¹⁵³ replies to the questionnaire to competitors-Phase I.

- (1343) As explained in Section 6.1.4, the industry also uses coverage data in order to measure the strength of a competitor on a certain market.

Table 36: International intra-EEA express deliveries in Latvia – coverage by the four integrators in terms of business addresses (Latvia as destination point)

[...]*

Source: [...]*

FedEx

- (1344) UPS appears to have also overestimated the revenue share of FedEx. For all the reasons already developed in the general assessment of the role of FedEx, the latter exerts only a weak constraint on the Parties in the Latvian international intra-EEA express market. This is due in particular to the fact that its European network is far less developed than those of each of the two Parties, which results in a significantly weaker geographic coverage.
- (1345) [Parties' coverage data and estimates regarding the other integrators' coverage]* concerning time-in-transit illustrate FedEx's weaknesses vis-à-vis UPS and TNT as far as coverage is concerned.¹¹⁵⁴ According to these data, FedEx's fastest international intra-EEA express services from Riga have a time-in-transit of at least [...]* for deliveries to the two most important cities in Cyprus, Estonia, Iceland, Lithuania, Malta and to the cities of Bucharest and Kosice. From Liepaja the only information made available relates to international economy service offered which has a time in transit to all the of the EEA countries of at least [...]*. By contrast, the Parties have a time-in-transit of one day from Riga and also from Liepaja to all the cities considered in [...]* save for Cyprus and Kosice or otherwise shorter than the one of FedEx.
- (1346) A competitor signals that FedEx in Latvia offers express (Priority) and deferred (Economy) deliveries to the EEA, express being next working day deliveries, and

¹¹⁵² DHL's response to question 98 of questionnaire to competitors – Phase I.

¹¹⁵³ FedEx' response to question 98 of questionnaire to competitors – Phase I.

¹¹⁵⁴ [Parties' coverage data and estimates regarding the other integrators' coverage]*

deferred - within two or more days. However, FedEx is not capable of offering [...]***¹¹⁵⁵.

- (1347) FedEx's weakness in international intra-EEA express deliveries from Latvia has been confirmed by the Latvian customers' replies to the market investigation. When asked which of the small package delivery companies satisfy the criteria that they consider indispensable in order to start negotiating a contract for the provision of international intra-EEA small package delivery services, none of respondents mentioned FedEx, whereas, DHL, UPS and TNT were each mentioned by a large majority of respondents¹¹⁵⁶.
- (1348) In addition, none of respondents who organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from FedEx¹¹⁵⁷. Similarly, the respondents mentioned DHL, UPS and TNT as companies that satisfy the add-on services they consider indispensable for small package delivery services while none indicated FedEx¹¹⁵⁸.
- (1349) Moreover, UPS, TNT Express and DHL were each mentioned by a majority of respondents that recently organised a tender procedure or negotiated a contract for international intra-EEA end-of-day express services as companies that they invited to submit an offer, whereas none of them mentioned FedEx¹¹⁵⁹.
- (1350) According to its European expansion plan [...]***¹¹⁶⁰, [Details on FedEx's expansion plan across EEA]***¹¹⁶¹. [Details on FedEx's expansion plan across EEA]***¹¹⁶². [Details on FedEx's expansion plan across EEA]***¹¹⁶³.
- (1351) [Details on FedEx's expansion plan across EEA]***
- (1352) Given that FedEx's activities are operated by a third party, UPS argues in its reply to the Letter of Facts¹¹⁶⁴, that FedEx can increase its coverage presumably without additional investments. However, the achievement of FedEx's general target for coverage is dependent on this third party and cannot be taken as a firm commitment of FedEx's investments. It is only after the infrastructure has been improved that FedEx (or its local partner) would be able to significantly improve its coverage and try to grow more volumes and consequently market shares. According to the Parties' EOD coverage estimates, FedEx reached only [...]***% coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx coverage would translate into a coverage between [...]***% in FY 2015.¹¹⁶⁵ FedEx's coverage would therefore still be lower than UPS and TNT who have coverage of [...]***% and [...]***% respectively.

¹¹⁵⁵ Question 177.1 of the questionnaire R30 to competitors-Phase II.

¹¹⁵⁶ Question 31 of the questionnaire Q15 to customers – Latvia – Phase I.

¹¹⁵⁷ Question 27.1, 27.2 and 27.3 of the questionnaire R15 to customers-Latvia-Phase II.

¹¹⁵⁸ Question 28 of the questionnaire Q15 to customers – Latvia – Phase I.

¹¹⁵⁹ Question 27.3 and 27.3.1 of the questionnaire R15 to customers – Latvia - Phase II.

¹¹⁶⁰ See Section 7.3.10 of this Decision.

¹¹⁶¹ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

¹¹⁶² FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.

¹¹⁶³ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 3.

¹¹⁶⁴ The Notifying party's Response to the Letter of Facts, page 10 and 11.

¹¹⁶⁵ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

- (1353) [Details on FedEx's expansion plan across EEA]*.¹¹⁶⁶ Even though it is likely that FedEx market share may increase, The Commission is thus unable to predict what market share FedEx is likely to achieve in the near future.
- (1354) The expansion of FedEx needs to be put into the perspective of its current market position, where the starting point for expansion is still quite modest. In Latvia, FedEx achieved a revenue share of [5-10]% based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL given especially FedEx's low coverage on the destination side.
- (1355) Therefore, even if the competitive pressure from FedEx would be likely to increase compared to its current position, FedEx is not expected to represent a significant competitive constraint on the main integrators in the near future, such as to counter-act negative effects of the Transaction on competition in Latvia.

The merger is a "3 to 2" merger in Latvia

- (1356) As already indicated, it can be concluded on the basis of the market investigation that non-integrators are largely unable to offer a valid alternative to the integrators international intra-EEA express services in Latvia.
- (1357) Moreover, among the integrators, FedEx is significantly weaker than both Parties in terms of geographic coverage, which is an essential parameter for international intra-EEA express services. Therefore, UPS, TNT and DHL can be seen as close competitors in the Latvian international intra-EEA express market whilst FedEx and non-integrators are significantly more distant competitors.
- (1358) Therefore, it appears that among the integrators, UPS, TNT and DHL are close competitors while FedEx is lagging behind.
- (1359) Furthermore, the price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Latvia would range between [5-10]*% and [5-10]*% depending on the model specification.¹¹⁶⁷ The scope of the estimated price increases reflect the fact that in the model, FedEx's coverage in Latvia is extremely limited ([0-5]*%) and non-integrators also have [...]*. The merger would therefore amount to a "3 to 2", which is expected to yield high price increases. The Commission also notes that in Latvia FedEx's market share is low, consistent with its limited coverage.
- (1360) Regarding efficiencies, the Commission has calculated that in Latvia, cost savings would represent between [0-5]*% of net prices in Year [...]* and up to [0-5]*% of net prices in Year [...]*. Assuming a pass-through rate of [60-70]*% and taking Year [...]* efficiencies as the base line case, the net price effects in Latvia would be positive and significant, ranging between [0-5]*% and [5-10]*%.¹¹⁶⁸ Even in Year [...]*, when full efficiencies will be achieved - and even irrespective of the fact that this is a remote time horizon in the context of merger control - net price effects in Latvia remain positive.

¹¹⁶⁶ FedEx, response to the request for information dated 16 November 2012 (Q30).

¹¹⁶⁷ Note that these specifications include both models with and without non-integrators coverage data.

¹¹⁶⁸ [Confidential information regarding efficiencies expected to arise from the Transaction]*

- (1361) Overall in Latvia, the orders of magnitude of price increases and efficiencies are such that a significant impediment to effective competition on the market for international intra-EEA express services is to be expected.
- (1362) Finally, the Commission considers that the Transaction is likely to eliminate an important competitive force and to limit the possibilities of switching supplier as there is no countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects in Latvia.

7.11.9.3. The Commission's conclusion

- (1363) TNT Express is a significant competitor of UPS in the Latvian international intra-EEA express market, where TNT is the second player in terms of revenues, DHL being the market leader. [Details on UPS' operations in Latvia]*^{1169 1170}.
- (1364) Besides, even if DHL's market share is higher than the combined market shares of the Parties, the Transaction will lead to a market structure with two market participants of a comparable size facing limited constraint from all the other competitors. The available price concentration analysis also provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.
- (1365) Therefore, the Commission concludes that the Transaction would lead to a significant impediment to effective competition in the market for intra-EEA express delivery services in Latvia.

7.11.10. *Lithuania*

7.11.10.1. UPS's views

- (1366) According to UPS's estimates of market shares for the Lithuanian international intra-EEA express market shares in 2010 are the following:

¹¹⁶⁹ Form CO, paragraphs 272-278.
¹¹⁷⁰ Form CO, paragraph 272.

Table 37: International intra-EEA express deliveries in Lithuania (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[10-20]*%
TNT Express	[10-20]*%
Combined	[20-30]*%
DHL Express	[20-30]*%
Fedex	[0-5]*%
La Poste (DPD)	[5-10]*%
Itella	[5-10]*%
Ab Lietuvos Pastas	[0-5]*%
DB Schenker	[0-5]*%
Uab Kautra	[0-5]*%
Uab Bijusta	
Uab Transimeksa	[0-5]*%
Venipack	[5-10]**%
Express Courier	
Uab Finejas	[0-5]*%
Uab Aviavilisa	
Uab Transeurinos Grupe	[0-5]*%
DSV	[0-5]*%
Kühne + Nagel	[0-5]*%
ACE Logistics	
AD REM	[0-5]*%
Nordekspresas	[0-5]*%
Lex System	[0-5]*%
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

- (1367) Both UPS and TNT are active in the small package delivery services market in Lithuania. [Details on UPS's operations in Lithuania]*. Therefore, it contends that its market share does not accurately reflect its competitive position on this market¹¹⁷¹.
- (1368) UPS submits that the international small package market in Lithuania is highly competitive with several strong competitors active in this market, the most important being DHL, La Poste, Itella, Trasimeksa and Venipack¹¹⁷². Moreover, UPS indicates that also FedEx is present on the market through local operator.
- (1369) In its response to the Statement of Objection, UPS further argues that (i) the Commission should have taken into account only the replies to the market investigation coming from the customers that single-source long-haul intra-EEA express services, (ii) FedEx is a not a more distant and weaker competitor among the integrators in Latvia and (iii) La Poste/DPD, freight forwarders and other small package companies are integral components and competitive players in the market.

¹¹⁷¹ Form CO, paragraph 949.

¹¹⁷² Form CO, paragraphs 941-945.

(1370) Based on these arguments, UPS submits that the Transaction will not lead to competition concerns on the international express market in Lithuania.

7.11.10.2. The Commission's assessment

(1371) First of all, this Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the intra-EEA express delivery market in Lithuania as such, even though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is no justification for basing the present assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections¹¹⁷³.

(1372) Second, as concerns the bidding data analysis carried out by the Notifying party, they are assessed in detail in Section 7.5.1.6.

(1373) Moreover, as demonstrated in Section 6.1.6, contrary to what the Parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices.

(1374) UPS's market reconstruction includes a large number of companies, such as non-integrated companies, national postal operators and freight forwarders. However, as mentioned in Section 7.2., contrary to UPS's contention these companies do not offer a viable alternative to the customers when it comes to intra-EEA express deliveries, in particular for non-neighbouring countries: only the four integrators are capable to deliver small packages within a day also to distant or remote destinations.

(1375) According to UPS data, apart from the four integrators, only the following operators would have a market share above [0-5]*%: [...]*. [...]*, the merged entity would be the market leader followed closely by DHL while other competitors including FedEx will have relatively lower market shares.

The non-integrators on the Lithuanian intra-EEA express small package delivery market

(1376) Upon examination of the role of the non-integrators on the Lithuanian intra-EEA express market and the extent to which they exert a competitive pressure on the four integrators on this market, the Commission disagrees with UPS for the reasons set out in this section.

La Poste/ DPD

(1377) UPS attributes a [5-10]*% market share to DPD. However, as corroborated by information provided by La Poste, DPD offers express services only for certain destinations in the two neighbouring countries Latvia and Estonia¹¹⁷⁴.

(1378) Only a small minority of the respondents to the market investigation consider that GLS and DPD meet the criteria and offer the add-on service(s)/specific features that are considered indispensable by customers in the intra-EEA market¹¹⁷⁵.

¹¹⁷³ Notifying party's response to the Statement of Objections, paragraphs 9.444 - 9.446.

¹¹⁷⁴ La Poste's submission of 27 September 2012.

¹¹⁷⁵ Responses to questions 31 and 33 of questionnaire Q22 to customers –Lithuania – Phase I.

- (1379) In the course of the market investigation, half of the respondents identified DPD as a credible alternative to the Parties¹¹⁷⁶, and as one of the companies they had invited to submit a quotation for tender procedures or contract negotiations organized in the last two years for the provision of express intra-EEA small package deliveries¹¹⁷⁷.
- (1380) As a result, DPD seems to be perceived as a credible player on the Lithuanian market. Nonetheless, in view of its service coverage limited to neighbouring countries, it can be concluded that it will only exert a limited constraint on the Parties with respect to international intra-EEA express delivery services.

Other non-integrated small package delivery companies

- (1381) As regards Ab Lietuvos Pastas it appears [Parties' coverage data and estimates regarding the other integrators' coverage]*¹¹⁷⁸ that Ab Lietuvos Pastas is not able to deliver from Vilnius and Klaipeda to any of the two most important cities of all EEA countries with a firm one day time commitment and in many cases it requires up to [...]*. By contrast, the Parties can reach the two major cities in every country within one day.
- (1382) Itella offers an express service for packages to be delivered in Lithuania, Estonia, Latvia and Finland (delivery within 24 hours). For shipments to other countries, Itella works with partner networks¹¹⁷⁹ and has no committed next day delivery on offer.
- (1383) Venipack is a Lithuanian logistics service provider that operates from the Baltic region, which also offers domestic and international small package services in Lithuania¹¹⁸⁰.
- (1384) The market investigation revealed that a small minority of the respondents which organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from Venipack, whereas nobody invited Itella or Ab Lietuvos Pastas¹¹⁸¹.
- (1385) As a result, it is concluded that other non-integrated small package delivery companies do not exert a significant competitive constraint on the Parties on the Lithuanian international intra-EEA express market and will not likely do so in a near future.

Freight forwarders and resellers

- (1386) A number of companies identified by UPS as operating in the Lithuanian international intra-EEA express market are freight forwarders. This is the case in particular for DB Schenker, DSV and Kuehne+Nagel. [Details regarding freight forwarders' service offerings in Lithuania]*¹¹⁸².
- (1387) The market investigation revealed that only a small minority of the respondents which organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from DB Schenker

¹¹⁷⁶ Responses to question 59 of the questionnaire Q16 to customers-Lithuania-Phase I.
¹¹⁷⁷ Responses to question 27 of the questionnaire R16 to customers-Lithuania-Phase II.
¹¹⁷⁸ [Parties' coverage data and estimates regarding the other integrators' coverage]*
¹¹⁷⁹ Form CO, paragraph 943.
¹¹⁸⁰ Form CO, paragraph 944.
¹¹⁸¹ Question 27 of the questionnaire R16 to customers-Lithuania-Phase II.
¹¹⁸² Form CO, p.118 -122.

Lithuania¹¹⁸³. None of them invited or requested a quotation from Kuehne+Nagel, DSV or AD Rem¹¹⁸⁴.

- (1388) Moreover, the overwhelming majority of the respondents does not consider that freight forwarders can offer solutions comparable to the ones offered by small package delivery companies¹¹⁸⁵ and would not consider services offered by freight forwarders as an alternative for intra-EEA services normally offered by integrators¹¹⁸⁶.
- (1389) In view of all these elements, freight forwarders appear to exert a limited competitive constraint on the Parties on the Lithuanian international intra-EEA express market.

Concluding remarks on non-integrated companies

- (1390) Responses received from customers during the market investigation further confirms that non-integrators exert only a limited constraint on the Parties on the Lithuanian international intra-EEA express market. During the second phase of the investigation, asked to indicate which companies they had invited to submit an offer for international intra-EEA express services in the last two years, the majority of Lithuanian customers mentioned only integrators¹¹⁸⁷.
- (1391) More generally, in reply to the market investigation, most of the Lithuanian customers indicated that no company other than the integrators could constitute a good alternative to the latter with respect to international intra-EEA express deliveries over 600-800 km¹¹⁸⁸.
- (1392) As a result non-integrators exert a weak competitive constraint on the Parties, notably for Lithuanian customers shipping express packages over long distances, the needs of which they are simply unable to satisfy.

The four integrators on the Lithuanian intra-EEA express small package delivery market

- (1393) According to data directly obtained from each integrator during the investigation, the total revenues obtained by the four integrators in 2011 on the Lithuanian international intra-EEA express market would be split as follows:

¹¹⁸³ Question 27 of the questionnaire R16 to customers-Lithuania-Phase II.

¹¹⁸⁴ Question 27 of the questionnaire R16 to customers-Lithuania-Phase II.

¹¹⁸⁵ Responses to question 42 of questionnaire R16 to customers – Lithuania- Phase II.

¹¹⁸⁶ Responses to question 43.1 of questionnaire R16 to customers – Lithuania-Phase II.

¹¹⁸⁷ Question 27 of the questionnaire R16 to customers – Lithuania – Phase II.

¹¹⁸⁸ Question 41.5.3 of the questionnaire R16 to customers – Lithuania – Phase II.

Table 38: International intra-EEA express deliveries in Lithuania (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[20-30]%
TNT Express	[20-30]%
Combined	[50-60]%
Deutsche Post DHL	[40-50]%
FedEx	[0-5]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹¹⁸⁹ and FedEx¹¹⁹⁰ replies to the questionnaire to competitors-Phase I.

- (1394) The Commission's reconstruction therefore revealed that post-Transaction, the merged entity will be the market leader followed closely by the DHL, whereas FedEx will have a much smaller market share.
- (1395) As explained in Section 6.1.4, the industry also uses coverage data in order to measure the strength of a competitor on a certain market.

Table 39: Geographic coverage of international intra-EEA express services in Lithuania
[...]*

Source: [...]*

FedEx

- (1396) FedEx generates very limited revenues on the Lithuanian international intra-EEA express market compared with each of the other integrators. This, combined with the factors identified in the general assessment of the competitive constraint exerted by FedEx, is a first and strong indication that FedEx only exerts a weak constraint on the Parties.
- (1397) This is also confirmed by coverage data, which show FedEx net inferiority to the other integrators.
- (1398) [Parties' coverage data and estimates regarding the other integrators' coverage]* illustrate FedEx's weaknesses vis-à-vis TNT Express as far as coverage is concerned¹¹⁹¹. According to these data, FedEx's fastest international intra-EEA express services from Vilnius have a time-in-transit of at least [...]* for deliveries to the two most important cities in Cyprus, Estonia, Iceland, Latvia, Malta and the cities of Kosice and Bucharest. By contrast, the Parties have a time-in-transit of one day from Vilnius and also from Klaipeda to all the cities considered in [...]* save for Cyprus or otherwise shorter than the one of FedEx.
- (1399) FedEx' relative weakness in the Lithuanian international intra-EEA express market seem to be confirmed by the findings of the market investigation.

¹¹⁸⁹ DHL's response to question 98 of questionnaire to competitors – Phase I.

¹¹⁹⁰ FedEx' response to question 98 of questionnaire to competitors – Phase I.

¹¹⁹¹ [Parties' coverage data and estimates regarding the other integrators' coverage]*

- (1400) Almost half of the respondents identified FedEx as credible alternative to the parties on the Lithuanian market¹¹⁹². However, only a minority of the respondents which organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from FedEx¹¹⁹³.
- (1401) Asked which of the small package delivery companies satisfy the criteria that they consider indispensable in order to start negotiating a contract for the provision of international intra-EEA small package delivery services, none of respondents mentioned FedEx, whereas, DHL, UPS and TNT Express were each mentioned by a large majority of respondents¹¹⁹⁴. Additionally, the majority of the respondents mentioned UPS, TNT and DHL as companies that satisfy the criteria as well as the add-on services they consider indispensable for small package delivery services while none of them indicated FedEx¹¹⁹⁵.
- (1402) Moreover, UPS, TNT and DHL were each mentioned by a majority of respondents that recently organised a tender or negotiated a contract for international intra-EEA end-of-day express services as companies that they invited to submit an offer, whereas none of them mentioned FedEx¹¹⁹⁶.
- (1403) Moreover, a vast majority of respondents indicated that the four integrators were not capable of providing an equally good express service. In particular, FedEx, unlike the three other integrators was mentioned by a majority of respondents as a company that would not be a good alternative. In relation to FedEx, respondents mentioned notably weaknesses in terms of presence, price and geographic coverage¹¹⁹⁷.
- (1404) According to its European expansion plan [...] ¹¹⁹⁸, [Details on FedEx's expansion plan across EEA] ¹¹⁹⁹. [Details on FedEx's expansion plan across EEA] ¹²⁰⁰. [Details on FedEx's expansion plan across EEA] ¹²⁰¹.
- (1405) [Details on FedEx's expansion plan across EEA] ^{*}
- (1406) Given that FedEx activities are operated by a third party, UPS argues in its reply to the Letter of Facts¹²⁰², that FedEx can increase its coverage presumably without additional investments. However, the achievement of FedEx' general target for coverage is dependent on this third party and cannot be taken as a firm commitment of FedEx's investments. It is only after the infrastructure has been improved that FedEx (or its local partner) would be able to significantly improve its coverage and try to grow more volumes and consequently market shares. According to the Parties' EOD coverage estimations, FedEx reached [0-5] ^{*}% coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx coverage would translate into a coverage of

1192 Responses to question 59 of questionnaire R16 to customers- Lithuania -Phase II.
 1193 Question 27 of the questionnaire R16 to customers- Lithuania -Phase II.
 1194 Question 31 of the questionnaire Q16 to customers - Lithuania – Phase I.
 1195 Questions 25 and 28 of the questionnaire Q16 to customers – Lithuania – Phase I.
 1196 Question 27.3 and 27.3.1 of the questionnaire R16 to customers-Lithuania-Phase II.
 1197 Questions 41 and 41.1 of the questionnaire R16 to customers – Lithuania – Phase II.
 1198 See Section 7.3.10 of this Decision.
 1199 FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.
 1200 FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.
 1201 FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 3.
 1202 The Notifying party's Response to the Letter of Facts, page 11-12.

[...]*% in FY 2015.¹²⁰³ This means that FedEx would still lag significantly behind the Parties who both have a coverage above [70-80]*%.

- (1407) [Details on FedEx's expansion plan across EEA]*¹²⁰⁴. Even though it is likely that FedEx market share may increase, The Commission is thus unable to predict what market share FedEx is likely to achieve in the near future.
- (1408) The expansion of FedEx needs to be put into the perspective of its current market position, where the starting point for expansion is still quite modest. In Lithuania, FedEx achieved a revenue share of [0-5]*% based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL given FedEx's low coverage on the destination side.
- (1409) Therefore, even if the competitive pressure from FedEx would be likely to increase compared to its current position, FedEx is not expected to represent a significant competitive constraint on the main integrators in the near future, such as to counter-act negative effects of the transaction on competition in Lithuania.

The merger is a '3 to 2' merger in Lithuania

- (1410) In view of their size and current service coverage, UPS, TNT and DHL appear to be close competitors, closer to each other than to FedEx. This closeness of competition emerged also from the market investigation.
- (1411) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Lithuania would range between [5-10]*% and [5-10]*% depending on the model specification.¹²⁰⁵ The scope of the estimated price increases reflects the fact that in the model, FedEx's (destination) coverage in Lithuania is [...]* and non-integrators also have [...]*. The merger would therefore amount to a "3 to 2", which is expected to yield high price increases.
- (1412) Regarding efficiencies, the Commission has calculated that in Lithuania, cost savings would represent between [0-5]*% of net prices in Year [...]* and up to [5-10]*% of net prices in Year [...]*. Assuming a pass-through rate of [60-70]*% and taking Year [...]* efficiencies as the base line case, the net price effects in Lithuania would be positive and significant, ranging between [0-5]*% and [5-10]*%.¹²⁰⁶ Even in Year [...]*, when full efficiencies will be achieved - and even irrespective of the fact that this is a remote time horizon in the context of merger control - net price effects in Lithuania would remain positive.

7.11.10.3. The Commission's conclusion

- (1413) UPS, TNT and DHL can be seen as close competitors on the Lithuanian international intra-EEA express market, while FedEx and non-integrators are distant competitors exerting at best a weak constraint on the Parties.

¹²⁰³ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

¹²⁰⁴ FedEx, response to the request for information dated 16 November 2012 (Q30).

¹²⁰⁵ Note that these specifications include both models with and without non-integrators coverage data.

¹²⁰⁶ [Confidential information regarding efficiencies expected to arise from the Transaction]*

- (1414) In addition, also in view of the general assessment already conducted as regards barriers to entry, countervailing buyer power and efficiencies in Section 7.6 to Section 7.10, the Commission considers that the Transaction is likely to eliminate an important competitive force from the Lithuanian international intra-EEA express market and to limit the possibilities of switching supplier as there is no sufficient countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects in Lithuania. Moreover, the Commission's quantitative analysis confirms that the Transaction is expected to cause price increases on the Lithuanian market, even if the effects of efficiencies is taken in to account. The available price concentration analysis also provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.
- (1415) Therefore, the Transaction would be likely to lead to a significant impediment to effective competition on the Lithuanian market for international intra-EEA express deliveries of small packages.

7.11.11. Malta

7.11.11.1. UPS's views

Table 40: International intra-EEA express deliveries in Malta (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[10-20]*%
TNT Express	[10-20]*%
Combined	[30-40]*%
DHL Express	[40-50]*%
Fedex	[5-10]*%
Royal Mail (GLS)	[0-5]*%
Malta Post	[0-5]*%
Aramex	[0-5]*%
Arrow Express	[0-5]*%
Tubeline	[0-5]*%
Xpress Logisitics	[0-5]*%
Miles Express Cargo	[0-5]*%
Gazelle Couriers Ltd	[0-5]*%
Pony Express	[0-5]*%
Aerospeed Courier Express	[0-5]*%
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

- (1416) [Details on UPS's operations in Malta]* TNT which is active via [...]*. Also, FedEx is represented by a local operator, [...]*. DHL acts directly on the Maltese market.
- (1417) The Notifying party considers that the Transaction will not lead to competition concerns on the intra-EEA express market in Malta. DHL will remain the largest player active on the market. In addition, the Parties will continue to face competition from FedEx and some domestic players. UPS reiterates these arguments in its response to the Statement of Objections.

7.11.11.2. The Commission's assessment

The non-integrators on the Maltese intra-EEA express small package delivery market

- (1418) First of all, this Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the Maltese intra-EEA express delivery market as such, even though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is justification for basing the present assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections. Moreover, as demonstrated in section 6.1.6, contrary to what the parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices. Therefore, this argument will not be considered in the following assessment.
- (1419) None of the non-integrators mentioned by UPS that would be allegedly active on the Maltese intra-EEA express market would have individual market shares above approximately [5-10]*%, be it the incumbent, domestic providers or freight forwarders. More precisely out of the [5-10]* domestic companies presented by UPS as active on the Maltese intra-EEA express market, [5-10]* would have individual market shares below [0-5]*%. This is already quite a strong indication of their reduced market power. One has also to keep in mind that barriers to expansion on the intra-EEA express market are quite high and consequently they will not be able to gain market shares in timely manner. In addition, due its peculiar geographic situation, airlift is even more of essence to deliver small package outside Malta, notably under very extreme time-constraint. Therefore, any operator which does not operate its own aircrafts and has to outsource its airlift is further put in a disadvantageous position.
- (1420) Moreover, only a limited number of customers mentioned either national postal operators or local small package delivery companies as fulfilling the criteria they view as "must-haves" while negotiating an agreement relating to the supply of small package delivery services¹²⁰⁷. Likewise as to the specific features they consider indispensable, a minority of customers mentioned local small package delivery companies (and none of them the national postal operator) as capable of offering them¹²⁰⁸.
- (1421) Finally, none of the Maltese customers who organised a tender procedure or started negotiating a contract for the provision of intra-EEA express shipment of small packages invited tenders from any of the companies listed by UPS as active on the Maltese intra-EEA express market, apart from the integrators, over the last two years¹²⁰⁹. In its response to the SO, UPS mentions that Aramex was actually invited to tenders for intra- and extra-EEA deferred delivery services in order to prove that Aramex is actually a viable competitor on the intra-EEA express market¹²¹⁰. Nevertheless, these are three distinct markets therefore it does not prove UPS's point, in

¹²⁰⁷ See responses to question 31 of questionnaire Q18 to customers – Malta – Phase I.

¹²⁰⁸ See responses to question 33 of questionnaire Q18 to customers – Malta – Phase I.

¹²⁰⁹ See responses to question 27 of questionnaire R18 to customers – Malta – Phase II.

¹²¹⁰ See Notifying party's response to the Statement of Objections, paragraph 9.510.

particular in view of the very limited number of respondents who actually invited the company to bid.

- (1422) As concerns the freight forwarders listed in the table above, UPS states in its response to the Statement of Objections that on the basis of the outcome of the market investigation: "*it is clear that at least a significant minority of customers do regard freight forwarders as valid alternatives*"¹²¹¹. First, UPS acknowledges that actually the majority does not regard freight forwarders as valid alternatives to integrators, which is the true result of the market investigation. Second, what matters is not only to consider contracting with a company but to actually do it and according to their responses, the overwhelming majority of the customers has no experience of using freight forwarders in order to ship small packages to other EEA countries by next day/end-of-day¹²¹².
- (1423) It is also worth mentioning that almost the entirety of respondents to the market investigation considers that no non-integrator company is a good alternative to the integrators, for express deliveries (i) to neighbouring countries in the EEA¹²¹³ or (ii) to EEA countries which are over 600-800 km away from the location of pick-up¹²¹⁴.
- (1424) As a result, non-integrators exert a very limited competitive pressure on the four integrators, with respect to the shipments of small package across the EEA with a committed time of delivery of next day/end-of-day. It is thus appropriate to look at the respective positions and strengths of the four integrators on the Maltese intra-EEA express small package delivery market.

The four integrators on the Maltese intra-EEA express small package delivery market

- (1425) Following the market reconstruction launched by the Commission, the revenues achieved by the integrators are spread as follows:

Table 41: International intra-EEA express deliveries in Malta (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEA
Company	Express
UPS	[20-30]%
TNT Express	[20-30]%
Combined	[40-50]%
Deutsche Post DHL	[50-60]%
FedEx	[0-5]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹²¹⁵ and FedEx¹²¹⁶ replies to the questionnaire to competitors-Phase I.

¹²¹¹ See Notifying party's response to the Statement of Objections, paragraph 9.509.
¹²¹² See responses to question 44 of the questionnaire R18 to customers – Malta – Phase II.
¹²¹³ See responses to question 41.5.2 of questionnaire R18 to customers – Malta – Phase II.
¹²¹⁴ See responses to question 41.5.3 of questionnaire R18 to customers – Malta – Phase II.
¹²¹⁵ DHL's response to question 98 of questionnaire to competitors – Phase I.
¹²¹⁶ FedEx' response to question 98 of questionnaire to competitors – Phase I.

FedEx

- (1426) As explained in Section 7.3.9, FedEx is the weakest integrator among the four. With a share of the revenues ranging between 0 and 5, FedEx will barely be able to exert any competitive pressure on the Parties *post* merger. [Details on FedEx's expansion plan across EEA]*.¹²¹⁷
- (1427) The outcome of the market investigation confirms that the customers view FedEx as the weakest integrator as regards the intra-EEA express deliveries. As compared to DHL, a smaller number of customers sees FedEx as a credible alternative to the Parties on the intra-EEA express deliveries originating from Malta¹²¹⁸. In addition, only a minority of them views FedEx as a close competitor to either UPS or TNT with respect of deliveries reaching the other EEA countries within one day¹²¹⁹. More significantly, none of the respondents to the market investigation located in Malta mentioned FedEx when asked who they see as a close competitor to either UPS or TNT with respect to geographic coverage for pick-up, prices, track-and-trace system, latest pick-up time, on-time delivery record, add-on services, B2C deliveries and ability to serve customers of all sizes¹²²⁰.
- (1428) Finally, only a limited minority of Maltese customers who have organized a tender procedure or started negotiating a contract for the provision of intra-EEA express small package delivery services from Malta in the last two years invited or requested a quotation from FedEx¹²²¹.
- (1429) Consequently, FedEx exerts and is likely to continue to exert in the near future a limited competitive constraint on the Parties in Malta intra-EEA express small package delivery market.

The merger is a "3 to 2" merger in Malta

- (1430) UPS, TNT and DHL are the three small package companies which offer the fastest delivery services from Malta [Parties' coverage data and estimates regarding the other integrators' coverage]*¹²²². They have equivalent times-in-transit for almost all the destinations. Therefore, with respect to geographic coverage of their intra-EEA express services, UPS, TNT and DHL appear as close competitors, and closer to one another than to any other competitor.
- (1431) From a demand-side perspective, a majority of the customers mentions both UPS and DHL as TNT's closest competitors and conversely both TNT and DHL as UPS's closest competitors in terms of pricing, as opposed to a minority who mentioned FedEx¹²²³. More precisely, when asked who they see as a close competitor to UPS with respect to geographic coverage for pick-up, prices, track-and-trace system, latest pick-up time, on-time delivery record, add-on services, B2C deliveries and ability to serve customers of

¹²¹⁷ FedEx' submission of 27 November 2012, *Country-by-country summaries of FedEx' expansion plans*, footnote 1.

¹²¹⁸ See responses to question 59 of questionnaire Q18 to customers – Malta – Phase I.

¹²¹⁹ See responses to questions 60 and 61 of questionnaire Q18 to customers – Malta – Phase I.

¹²²⁰ See responses to question 36 and 37 of questionnaire R18 to customers – Malta – Phase II.

¹²²¹ See responses to question 27 of questionnaire R18 to customers – Malta – Phase II.

¹²²² [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹²²³ See responses to questions 60 and 61 of questionnaire Q18 to customers – Malta – Phase I.

all sizes, TNT and DHL were mentioned the same number of times¹²²⁴. Almost identical result is observed when it comes to TNT¹²²⁵.

- (1432) Furthermore, as to the tenders organised recently for the conclusion of supply agreements of small package delivery services from Malta to other EEA countries within one day, it appears that the majority of customers mentioned UPS, TNT and DHL¹²²⁶. As indicated previously, the elimination of one of the three competitors very often invited to participate in tenders is likely to have a negative effect on prices due to the reduction of competition it induces (see Section 7.5.2). Indeed, one respondent to the market investigation indirectly points towards such effect of the Transaction: "*Should the proposed acquisition [sic] of TNT by UPS go through this might reduce the competition locally and we will have less purchasing power to get best rates for our EOD couriers.*"¹²²⁷

Price concentration and efficiencies

- (1433) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Malta would range between [5-10]*% and [10-20]*% depending on the model specification.¹²²⁸ These large price increases derive from the fact that neither DHL nor FedEx have any (destination) coverage in Malta. Hence, in the model, the merger amounts to a "merger to monopoly" situation. In Malta, FedEx's market share is consistent with its limited coverage.
- (1434) Regarding efficiencies, the Commission has calculated that in Malta, cost savings would be modest and represent between [0-5]*% of net prices in Year [...] and up to [0-5]*% of net prices in Year [...]. Assuming a pass-through rate of [60-70]*% and taking Year [...] efficiencies as the base line case, the net price effects in Malta would be positive, ranging between [5-10]*% and [5-10]*%.¹²²⁹ Note that even in Year [...], when full efficiencies will be achieved - and even irrespective of the fact that this is a remote time horizon in the context of merger control - net price effects in Malta would remain positive.

7.11.11.3. The Commission's conclusion

- (1435) In light of the qualitative and quantitative evidence, in particular the fact that the Transaction is likely to eliminate an important competitive force and to limit the possibilities of switching supplier as there is no countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects the Commission concludes that the proposed concentration will lead to a significant impediment to effective competition in the market for intra-EEA express delivery services in Malta.

¹²²⁴ See responses to question 36 of questionnaire R18 to customers – Malta – Phase II.

¹²²⁵ See responses to question 37 of questionnaire R18 to customers – Malta – Phase II.

¹²²⁶ See responses to question 39 of questionnaire Q18 – customers – Malta – Phase I and responses to question 27 of questionnaire R18 to customers – Malta – Phase II.

¹²²⁷ [Customer's name]* response to question 48 of questionnaire R18 to customers – Malta – Phase II.

¹²²⁸ Note that these specifications include both models with and without non-integrators coverage data.

¹²²⁹ [Confidential information regarding efficiencies expected to arise from the Transaction]*

7.11.12. *The Netherlands*

7.11.12.1. UPS's views

- (1436) UPS and TNT both operate in the Netherlands with their own assets. UPS argued that the Parties were not particularly close competitors. [Confidential information taken from the Parties' internal databases and from a market research conducted on behalf of the Parties]*¹²³⁰.
- (1437) UPS also argued that the Transaction would not significantly reduce the competitive pressure UPS currently faces, due to the constraint which would continue to be exerted by DHL, as well as other competitors such as FedEx¹²³¹. UPS also emphasised the role of other competitors such as GLS, PostNL, Wim Bosman, La Poste, VOS Logistics, Rhenus, DSV and Raben. Noting that [...] *% of all cross-border volume originating in the Netherlands went to Belgium, Germany or Luxembourg, which could be reached by road within one day, UPS claimed that the Parties would be exposed to potential competitive pressure from market participants offering deferred services. According to UPS an increase in the price of express services would quickly induce these companies to enter the international intra-EEA express market¹²³².
- (1438) Moreover, according to UPS, the outcome of the market investigation would reveal that for the sub-set of customers that according to the Statement of Objections would be affected by the Transaction, namely, the customers that source all their small package delivery services from one single supplier and could not threaten to multi-source, (i) DPD and GLS would clearly be relevant competitors and indeed stronger than TNT or UPS, (ii) FedEx would not be any weaker either¹²³³. UPS also claimed that many Dutch customers multi-sourced, suggesting that the sub-set of affected customers would be small¹²³⁴.
- (1439) [Confidential information regarding the Parties' customer base]*. According to UPS, large customers mostly purchase small package delivery services from the Netherlands to other EEA countries in order to ship packages produced outside the EEA, thereby using the Netherlands as a mere transit hub. According to UPS, such large customers have considerable buyer power and multi-source, so that they could readily switch volumes to competitors should the Parties raise prices post-Transaction, or alternatively change the location of their in-transit warehouse / European distribution centre to another country. UPS suggested that the threat of such large customers switching away from the Dutch market to other markets such as the German or Belgian ones would deter the merged entity from raising prices charged to such customers¹²³⁵.

¹²³⁰ Form CO, paragraph 1010.

¹²³¹ Form CO, paragraph 1011.

¹²³² Notifying party's response to the Decision opening the proceedings, paragraph 423-424; Form CO, paragraph 1008-1009; UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraphs 2.15-2.16.

¹²³³ Notifying party's response to the Statement of Objections, paragraphs 3.47, 9.523 and 9.529.

¹²³⁴ UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.1.

¹²³⁵ UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.3 to 2.6.

- (1440) Furthermore, UPS took the view that in their responses to the market investigation, its competitors in the Netherlands grossly underestimated the range of their services, notably in terms of number of destination countries covered by their international intra-EEA express services¹²³⁶.
- (1441) UPS also took from the outcome of the market investigation that resellers and local small package delivery companies providing domestic and short-distance delivery services would be credible competitors for some customers¹²³⁷. In addition, UPS argued that freight forwarders should not be disregarded¹²³⁸.
- (1442) Furthermore, UPS contended that competitors that currently do not offer long-haul express services outbound from the Netherlands could easily do so if they wanted to, thanks to the presence of Schiphol airport which provides suitable air connections to most EEA countries. Moreover, according to UPS, competitors currently present in neighbouring countries could easily pick-up volumes in the Netherlands given the size and geographic location of the country and the presence of many large customers¹²³⁹.
- (1443) As regards FedEx, UPS contests the conclusion that it is a weak competitor on the Dutch international intra-EEA express market because of the weakness of its intra-European network¹²⁴⁰. Besides, on the basis of its review of the Dutch customers' responses to the market investigation, UPS suggested that FedEx was a closer competitor of UPS than found by the Commission in the Statement of Objections, and that it was seen as a credible alternative to the Parties by the Dutch customers¹²⁴¹. Furthermore, UPS indicated that FedEx was now providing domestic services in the Netherlands and claimed that [Details on TNT's operations in The Netherlands]*¹²⁴². UPS also referred to FedEx' expansion plans in the Netherlands, suggesting that FedEx would become a stronger competitor in the coming years¹²⁴³.
- (1444) Besides, disputing the conclusions reached by the Commission in the Statement of Objections as regards the closeness of competition between the Parties on the Dutch market, [Confidential information taken from the Parties' internal databases]*¹²⁴⁴.
- (1445) [Confidential information taken from the Parties' internal databases]*^{1245 1246}

¹²³⁶ Notifying party's response to the Statement of Objections, paragraphs 9.518, 9.532 and 9.535.

¹²³⁷ Notifying party's response to the Statement of Objections, paragraph 9.537.

¹²³⁸ UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.9.

¹²³⁹ UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.2.

¹²⁴⁰ Notifying party's response to the Statement of Objections, paragraph 9.538.

¹²⁴¹ Notifying party's response to the Statement of Objections, paragraph 9.539 and 9.540.

¹²⁴² Notifying party's response to the Statement of Objections, paragraph 9.542.

¹²⁴³ Notifying party's response to the Statement of Objections, paragraph 9.521.

¹²⁴⁴ Notifying party's response to the Statement of Objections, paragraph 9.543, UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.7 and 2.8.

¹²⁴⁵ [...]*

¹²⁴⁶ [...]*

- (1446) UPS also referred to TNT's Exit Interviews, which, UPS suggests, confirmed that DHL was a stronger competitive force on TNT than UPS, and that smaller international express customers in the Netherlands find DPD, GLS and FedEx as viable competitors and would actually switch from TNT to these competitors. According to UPS, this was confirmed by the TNT [...] database, which allegedly reveals that DHL was by far the closest and strongest competitor to TNT and by a considerable margin, and that a significant number of other small package providers were viable competitors¹²⁴⁷.
- (1447) [Confidential information regarding the results of the price concentration analysis and the efficiencies expected to arise from the Transaction]*¹²⁴⁸.
- (1448) UPS's estimates of market shares for the Dutch international intra-EEA express market in 2010 are the following.

¹²⁴⁷ UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.12-2.13.

¹²⁴⁸ [...]*

Table 42: International intra-EEA express deliveries in the Netherlands (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[20-30]*%
TNT Express	[10-20]*%
Combined	[30-40]*%
Fedex	[10-20]*%
DHL Express	[20-30]*%
Royal Mail (GLS)	[0-5]*%
La Poste (DPD)	[0-5]*%
PostNL	[0-5]*%
Austrian Post - Transoflex	[0-5]*%
GEODIS group	[0-5]*%
Aramex	[0-5]*%
Rhenus	[0-5]*%
Raben	[0-5]*%
KDZ	[0-5]*%
Eurospan Holland	[0-5]*%
DB Schenker	[0-5]*%
DSV	[0-5]*%
Versteijnen's Internationaal	[0-5]*%
VOS Logistics	[0-5]*%
Wim Bosman	[5-10]*%
Kühne + Nagel	[0-5]*%
Ceva Logistics	[0-5]*%
Nippon Express	[0-5]*%
Jan De Rijk	[0-5]*%
Menlo	[0-5]*%
Gefco	[0-5]*%
Koopman Logisics	[0-5]*%
Agility	[0-5]*%
Hessers	[0-5]*%
DGO express	[0-5]*%
Speedlink express	[0-5]*%
Skynet	[0-5]*%
Parcel.nl	[0-5]*%
Expressworld Couriers	[0-5]*%
Valid Express	[0-5]*%
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

7.11.12.2. The Commission's assessment

(1449) According to UPS's above data, apart from the four integrators, only the following operators have a market share of more than [0-5]*%: [Competitors' names]*. According to these data, the merged entity would be by far the leading operator on the Dutch international intra-EEA express market post-Transaction, with a market share of [30-40]*%.

Preliminary remark on single-sourcing customers

(1450) It must be noted from the outset that contrary to the allegations made by UPS, the Commission has not limited the competition concerns raised in the Statement of Objections to the sole single-sourcing customers. Wherever the Commission maintained concerns in this Decision, they are not limited to single-sourcing customers either. The below assessment will show that this is the case in particular for the Dutch market. Therefore, UPS's restrictive analysis of the responses of the sole single-sourcing customers¹²⁴⁹ to the market investigation cannot lead to any meaningful conclusion. Moreover, UPS appears to have wrongly identified the sub-set of "single-sourcing" customers in the Netherlands. For example, it named [Customer's name]* as one of them even though this company has at least two suppliers of small package delivery services¹²⁵⁰.

The non-integrators on the Dutch intra-EEA express small package delivery market

(1451) The Commission will now examine the role of non-integrators on the Dutch international intra-EEA express market and the extent to which they exert a competitive pressure on the Parties in this market.

DPD and GLS

(1452) As regards GLS, as already indicated, it only offers international intra-EEA express services on short-distance cross-border lanes via its ground network, with the exception of limited volumes shipped by air for customers requesting express services necessitating air transport occasionally and for a few packages. [Results of UPS' market analysis and estimates of the coverage of other players]*¹²⁵¹. Moreover, UPS attributes a very low market share to GLS ([0-5]*%).

(1453) As regards DPD, according to UPS, it also has a very low market share ([0-5]*%) on the Dutch international intra-EEA express market. Moreover, UPS appears to have heavily overestimated the revenues generated by DPD on this market. Indeed, data directly obtained from La Poste indicate that DPD has a much lower weight on the market (compared to the Parties) than suggested by UPS's estimates.

(1454) Furthermore, with the exception of very limited volumes shipped by air for customers essentially purchasing road-based services, DPD offers international intra-EEA express services in the Netherlands only for some destinations in Belgium, Germany and Poland¹²⁵².

(1455) On the basis of information retrieved on DPD's website, UPS claimed that DPD was also offering next day services to the United Kingdom and Luxembourg. The Commission could not find a confirmation of this allegation on DPD's website. In particular, this website indicates that when it comes to shipments from the Netherlands

¹²⁴⁹ Notifying party's response to the Statement of Objections, paragraph 9.523 to 9.529.

¹²⁵⁰ [Customer's name]* response to question 8 of questionnaire R19 to customers – The Netherlands – Phase II.

¹²⁵¹ [Results of UPS' market analysis and estimates of the coverage of other players]*

¹²⁵² La Poste's submission of 27 September 2012.

to the United Kingdom, only the DPD Classic service with a delivery time of [...] is available¹²⁵³.

- (1456) In any event, even if UPS's allegations were correct, they would not call into question the conclusion that DPD's international intra-EEA express services offered in the Netherlands are available for a much narrower range of destination countries than the Parties' services. Indeed, the Parties offer international intra-EEA express deliveries services from the Netherlands to almost all the other EEA countries, and within most of them, to destinations scattered over a large part of the national territory.
- (1457) This shows that there exist a number of destination countries for which DPD, unlike the Parties, cannot be an option for customers shipping to these countries from the Netherlands. DPD therefore cannot exert any competitive constraint on the Parties to the benefit of customers having such needs. This holds true whether such customers multi-source or single-source.
- (1458) Moreover, as will be shown in this section, DPD and GLS exert no significant competitive constraint on the Parties even for customers that only need short haul express services on lanes where those operators are present.
- (1459) As acknowledged by UPS¹²⁵⁴, GLS has been identified as a credible alternative to the Parties for international intra-EEA next day end-of-day services only by a minority of customers¹²⁵⁵. By contrast, as noted by UPS¹²⁵⁶, DPD was identified by a majority of respondents as a credible alternative to the Parties for this type of services¹²⁵⁷.
- (1460) However, customers' responses to more detailed questions tend to reveal that neither DPD nor GLS are in fact regarded as credible alternatives to the Parties for international intra-EEA express services to any significant extent.
- (1461) As indicated by UPS¹²⁵⁸, DPD was mentioned as one of the companies that satisfy the criteria that customers consider indispensable when negotiating a contract for the provision of international intra-EEA small package delivery services. However, it was mentioned by a very small minority of respondents – which shows that respondents may react differently to abstract and to more concrete questions – , and GLS was not mentioned at all¹²⁵⁹.
- (1462) In addition, in reply to the first phase market investigation questionnaire, only a small minority of customers mentioned either DPD or GLS as being among the three closest competitors of either UPS or TNT for international intra-EEA express services¹²⁶⁰.
- (1463) A further indication of the weakness of the constraint exerted on the Parties by DPD and GLS is the fact that contrary to what UPS seems to suggest¹²⁶¹, no respondent identified DPD or GLS as UPS's closest competitor with respect to the range of services offered

¹²⁵³ See DPD's website visited on 25 November 2012 at 6.00 pm:
www.dpd.com/nl_en/Home/Shipping/Shipping-International2/Delivery-Time-Calculator.

¹²⁵⁴ Notifying party's response to the Statement of Objections, paragraph 9.534.

¹²⁵⁵ See responses to question 59 of questionnaire Q19 to customers – Netherlands – Phase I.

¹²⁵⁶ Notifying party's response to the Statement of Objections, paragraph 9.531.

¹²⁵⁷ See responses to question 59 of questionnaire Q19 to customers – Netherlands – Phase I.

¹²⁵⁸ Notifying party's response to the Statement of Objections, paragraph 9.533.

¹²⁵⁹ See responses to question 31 of questionnaire Q19 to customers – Netherlands – Phase I.

¹²⁶⁰ See responses to questions 60 and 61 of questionnaire Q19 to customers – Netherlands – Phase I.

¹²⁶¹ Notifying party's response to the Statement of Objections, paragraph 9.533.

and only a very small minority identified DPD or GLS as the second closest competitor in this respect. By contrast, TNT was classified either as the closest or the second closest competitor to UPS, with respect to the range of services offered, by around half of the respondents¹²⁶². Moreover, neither DPD nor GLS was identified as TNT's closest or second closest competitor with respect to the range of services offered¹²⁶³.

- (1464) Furthermore, on the basis of the outcome of the market investigation, it can be concluded that DPD and GLS tend to be seen as remote competitors to the Parties with respect to the service characteristics that are regarded as the most important by the Parties' customers. During the first phase investigation, customers were asked to rank 13 service characteristics on a scale from 1 to 5. The characteristics that emerged as the most important in the eyes of customers (those to which customers attributed an average ranking above 4) were the following: (i) "extensive geographic coverage in the receiving country", (ii) "coverage of all destination countries", (iii) "quality of the track-and-trace information", (iv) "on-time delivery record", (v) "integration with IT system"¹²⁶⁴. This reveals that Dutch customers tend to attach significant importance to geographic coverage on the destination side, track-and-trace, IT integration and service reliability.
- (1465) Yet, as already indicated DPD and GLS have a much more limited geographic coverage than the Parties. Moreover, as already concluded in the general assessment of the competitive constraint exerted by GLS and DPD, those operators' services tend to be perceived as having a lower level of quality than the Parties' services in terms of track-and-trace and reliability. This point has been confirmed by the views expressed by Dutch customers. Indeed, concerning international intra-EEA express services, neither DPD nor GLS has been mentioned as being either the closest or second closest competitor to UPS or TNT with respect to the quality of their track-and-trace systems or their on-time delivery record. In fact, only integrators have been identified as being among the two closest competitors of UPS or TNT with respect to these two criteria¹²⁶⁵.
- (1466) DPD's and GLS's weaknesses vis-à-vis the Parties in the Netherlands in terms of reliability is further corroborated by an internal document in which TNT [Parties internal market analysis]*¹²⁶⁶.
- (1467) Moreover, the overwhelming majority of the Dutch customers indicated that there were features of the integrators' services which were important for them and distinguished the integrators from other providers of intra-EEA express services¹²⁶⁷. The main distinctive features identified by customers relate to IT (including track-and-trace) systems, speed, geographic coverage, flexibility and price¹²⁶⁸. This is a further confirmation that service characteristics such as coverage and the quality of IT systems are very important in the eyes of the Parties' customers. This also tends to indicate that the Parties' customers

¹²⁶² See responses to question 35.1 of questionnaire R19 to customers – Netherlands – Phase II.

¹²⁶³ See responses to question 35.2 of questionnaire R19 to customers – Netherlands – Phase II.

¹²⁶⁴ See responses to question 30 of questionnaire Q19 to customers – Netherlands – Phase I.

¹²⁶⁵ See responses to questions 36 and 37 of questionnaire R19 to customers – Netherlands – Phase II.

¹²⁶⁶ Notifying party's reply to the Commission's requests for information Q4 and Q5 of 27 July 2012, [Parties internal market analysis]*.

¹²⁶⁷ See responses to question 41.3 of questionnaire R19 to customers – Netherlands – Phase II.

¹²⁶⁸ See responses to question 41.3.1 of questionnaire R19 to customers – Netherlands – Phase II.

would be unlikely to switch to non-integrators should the merged entity raise prices post-Transaction, given the importance attached to these aspects.

- (1468) An overwhelming majority of the respondents also took the view that companies other than the integrators would not be a good alternative to the integrators for international intra-EEA express deliveries, both for distances above 800 km and distance below 800 km¹²⁶⁹. Replies were slightly more nuanced with respect to deliveries over distances of less than 600-800 km than with respect to longer distances.
- (1469) Relying on the replies to the second phase market investigation questionnaire to Dutch customers, UPS claimed that DPD and GLS had been constantly invited to participate in the intra-EEA tender procedures organised by the respondents¹²⁷⁰. However, a review of the sample of bids for which Dutch customers provided information in the course of the market investigation shows that for the vast majority of the tenders having an international intra-EEA and an express component, neither DPD nor GLS had been invited to submit an offer. By contrast, UPS and TNT were each invited in the majority of the cases¹²⁷¹. Moreover, the fact that a supplier is not invited shows that it exerts no constraint on the invited suppliers for the particular contract, the fact that it is invited does not necessarily mean that it is considered as a credible potential supplier. This is illustrated by the following statement by [Customer's name]*, which uses both UPS and TNT to ship medical devices within Europe from one single warehouse located in the Netherlands: "*Tier2 players such as DPD and GLS are used as a benchmark by [Customer's name]* but they do not have strong enough networks to be seen as credible alternatives. [Customer's name]* always use local players for benchmark purpose in a tender*"¹²⁷². Other European customers also invite non-integrators such as DPD to tender without having the certainty that such operators would be able to satisfy their needs. For example, [Customer's name]* stated: "*The bidders are among the Integrators but also smaller firms such as DPD, however, [Customer's name]* is not sure whether they could deliver at the requested service level.*"¹²⁷³
- (1470) UPS claimed that one customer out of four who replied to question 45.5 of the first phase questionnaire to Dutch customers clearly identified DPD as an alternative that can be used instead of the integrators in Europe¹²⁷⁴. This would rather tend to confirm that DPD exerts very limited competitive pressure on the integrators, since only a small minority of respondents would have identified it as a possible alternative.
- (1471) UPS pointed out that according to the first phase market investigation questionnaire to Dutch customers, DPD "*ranked twice*" among the providers of next-day end-of-day services¹²⁷⁵. However, this only refers to the identity of the current service providers used by the respondents. From these elements, no conclusion can be drawn with respect to the willingness of customers to switch from the merged entity to DPD should the merged entity raise prices post Transaction. Indeed, DPD is active on the Dutch international intra-EEA express market on a limited number of lanes and therefore, it is

¹²⁶⁹ See responses to questions 41.5.2 and 41.5.3 of questionnaire R19 to customers – Netherlands – Phase II.

¹²⁷⁰ Notifying party's response to the Statement of Objections, paragraphs 9.531 and 9.533.

¹²⁷¹ See responses to question 39 of questionnaire Q19 to customers – Netherlands – Phase I.

¹²⁷² Agreed minutes of a teleconference call of 2 May 2012 with [Customer's name]*.

¹²⁷³ Agreed minutes of a teleconference call of 2 May 2012 with [Customer's name]*.

¹²⁷⁴ Notifying party's response to the Statement of Objections, paragraph 9.533.

¹²⁷⁵ Notifying party's response to the Statement of Objections, paragraph 9.534.

by definition able to satisfy certain needs on that market. However, this does not mean that for other needs (in particular deliveries on long-haul lanes or deliveries for which reliability and the quality of track-and-trace and IT integration are particularly important), customers would be ready to switch from the merged entity to DPD as a result of a price increase.

- (1472) As a result, it is concluded that DPD and GLS are absent from the long-haul segment of the international intra-EEA express market and, on balance, exert a weak competitive constraint on the Parties on the rest of this market.
- (1473) As explained in the general assessment of the competitive constraint exerted by DPD and GLS on the Parties in Section 7.2, none of these two operators is likely to expand significantly into the long haul express segment of the market in the near future, even if the merged entity were to increase prices. Indeed, this would require a more extensive use of outsourcing of air transport and neither DPD nor GLS would be likely to be willing to follow such a path and be able to exert a significant constraint on the integrators on that basis. The fact that a major airport providing a wide range of intra-EEA connections is located in the Netherlands¹²⁷⁶ cannot alter this conclusion. Indeed, this has no bearing on DPD and GLS' incentives.
- (1474) For all these reasons, neither DPD nor GLS exerts a significant competitive constraint on the Parties on the Dutch international intra-EEA express market and none of them is likely to do so in the near future post Transaction.

PostNL / Trans-o-flex

- (1475) PostNL is a Dutch company which resulted from the splitting-up of TNT Post Group in 2011. PostNL recently purchased the Dutch and Belgian businesses of Trans-o-flex from Austrian Post, and through them, participates in the Eurodis cooperative network. Taking account of Trans-o-flex' operations, with its own network, PostNL only offers international intra-EEA express services in the Netherlands for destinations located in Belgium and part of Germany. In order to provide these services, PostNL solely relies on road transport¹²⁷⁷.
- (1476) Trans-o-flex' participation in the Eurodis partner network does not allow PostNL to have a broader geographic coverage for its international express services. Indeed, through Eurodis, only international deferred services are offered¹²⁷⁸. [Confidential information regarding the Parties' customer base]*¹²⁷⁹. This shows that PostNL is only present on a small part of the market (in terms of revenues) with its own infrastructure.
- (1477) Therefore, PostNL's international intra-EEA express services have a much more restricted geographic coverage than those of the Parties. As a consequence, PostNL exerts no competitive constraint on the Parties with respect to long-haul international intra-EEA express services. The overall constraint that PostNL may exert on the merged

¹²⁷⁶ UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.2.

¹²⁷⁷ PostNL's response to questions 15.1.3.1 and 75 of questionnaire to competitors – Phase I (taking account of the corrigendum sent by PostNL on 4 July 2012), Austrian Post's submission of 28 September 2012.

¹²⁷⁸ Agreed minutes of a teleconference call of 8 October 2012 with Eurodis, paragraph 8.

¹²⁷⁹ UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.15.

entity post-Transaction is further reduced by the close ties linking the two companies. [Details regarding Post NL's service offering in the Netherlands]*¹²⁸⁰.

- (1478) On the basis of a document retrieved on PostNL's website, UPS claimed that PostNL offers next-day services to 23 EEA countries¹²⁸¹. However, this claim cannot be substantiated by the content of this document. Indeed, according to this document, the *Spoedservice* referred to by UPS would have a transit time of one working day only for deliveries into Belgium, Germany and Luxembourg¹²⁸². [Details regarding Post NL's service offering in the Netherlands]*.
- (1479) In addition, in response to the market investigation, no customer indicated that it had invited PostNL or Trans-of-flex to submit an offer for international intra-EEA next-day end-of-day services in the last two years¹²⁸³. Moreover, national postal operators and their subsidiaries (a category which includes PostNL and its Trans-o-flex subsidiaries) have been mentioned by no customer as a category of operators satisfying the criteria regarded as indispensable in the context of the negotiation of a contract¹²⁸⁴. Furthermore, PostNL and Trans-o-flex have been EOD mentioned by no customer as being among the two closest competitors of UPS or TNT for international intra-EEA express services except with respect to price and only by a very small minority of respondents¹²⁸⁵.
- (1480) Besides, a review of the sample of bids for which Dutch customers provided information in the course of the market investigation shows that for none of the bids having an international intra-EEA and an express component, has PostNL or Trans-o-flex been invited to submit an offer¹²⁸⁶.
- (1481) Finally, as already indicated, an overwhelming majority of the respondents took the view that companies other than the integrators would not be a good alternative to the integrators for international intra-EEA express deliveries, both for distances above 800 km and distance below 800 km¹²⁸⁷.
- (1482) Therefore, PostNL does not exert a significant competitive constraint on the Parties.

Wim Bosman

- (1483) UPS appears to have heavily overstated Wim Bosman's international intra-EEA express revenues. Indeed, whereas according to UPS, these revenues correspond to around [20-30]*% of its own revenues, data directly obtained from both UPS and Wim Bosman show that this ratio is actually far lower.
- (1484) Moreover, Wim Bosman's international intra-EEA express services offered in the Netherlands are available only for deliveries into Belgium, Luxembourg, Germany, a very limited area in France (Northern Alsace) and a limited area around Prague in the Czech Republic¹²⁸⁸. The geographic coverage of Wim Bosman's international intra-EEA

¹²⁸⁰ Form CO, paragraph 314.

¹²⁸¹ Notifying party's response to the Statement of Objections, paragraph 9.535.

¹²⁸² <http://www.tnteasyexpress.nl/pdf/OverkomstduurSS2010.pdf> visited on 27 November 2011 at 9.00 pm.

¹²⁸³ See responses to question 27.3 of questionnaire R19 to customers – Netherlands – Phase II.

¹²⁸⁴ See responses to question 31 of questionnaire Q19 to customers – Netherlands – Phase I.

¹²⁸⁵ See responses to questions 35 to 37 of questionnaire R19 to customers – Netherlands – Phase II.

¹²⁸⁶ See responses to question 39 of questionnaire Q19 to customers – Netherlands – Phase I.

¹²⁸⁷ See responses to questions 41.5.2 and 41.5.3 of questionnaire R19 to customers – Netherlands – Phase II.

¹²⁸⁸ See Wim Bosman's website:

express services is thus much narrower than that of the Parties' services. For this reason as well as all the reasons already identified in the general assessment of the competitive constraint exerted by non-integrated small package delivery companies, and in view of the very limited revenues generated by Wim Bosman in the Dutch international intra-EEA express market, Wim Bosman's international intra-EEA express services appear to exert, at best, a very weak constraint on the Parties' own services, and no constraint at all on 'long-haul' international intra-EEA express services.

- (1485) In addition, in response to the market investigation, no customer indicated that it had invited Wim Bosman to submit an offer for international intra-EEA next-day end-of-day services in the last two years¹²⁸⁹. Moreover, local small package delivery companies possibly partnering in cooperative networks (a category which includes Wim Bosman) have been mentioned by a small minority of respondents as a category of operators satisfying the criteria regarded as indispensable in the context of the negotiation of a contract¹²⁹⁰. In addition, Wim Bosman has been mentioned by no customer as being among the two closest competitors of UPS or TNT in any respect¹²⁹¹.
- (1486) A review of the sample of bids for which Dutch customers provided information in the course of the market investigation shows that for none of the bids having an international intra-EEA and an express component, has Wim Bosman been invited to submit an offer¹²⁹².
- (1487) Finally, as already indicated, an overwhelming majority of the respondents took the view that companies other than the integrators would not be a good alternative to the integrators for international intra-EEA express deliveries, both for distances above 800 km and distance below 800 km¹²⁹³.
- (1488) Therefore, Wim Bosman does not exert any significant competitive constraint on the Parties.

Freight forwarders, resellers and other small package delivery companies

- (1489) A number of companies identified by UPS as operating in the Dutch international intra-EEA express market are freight forwarders. This is the case in particular for Rhenus, VOS Logistics, DSV and Raben. According to UPS's estimates, all these market participants would have very modest market shares, which is already an indication of the limited constraint that they exert on the Parties.
- (1490) Rhenus has no own small package delivery operations¹²⁹⁴ and [Details regarding Rhenus' service offering in the Netherlands]*¹²⁹⁵. Vos Logistics has no own small package delivery operations in Europe either and resells the services of the integrators, [Details regarding Vos Logistics' service offering in the Netherlands]*¹²⁹⁶

http://www.wimbosman.nl/en/transport/european_express_distribution/transit_times.aspx visited on 2 December 2012 at 5.00 pm.

¹²⁸⁹ See responses to question 27.3 of questionnaire R19 to customers – Netherlands – Phase II.

¹²⁹⁰ See responses to question 31 of questionnaire Q19 to customers – Netherlands – Phase I.

¹²⁹¹ See responses to questions 35 to 37 of questionnaire R19 to customers – Netherlands – Phase II.

¹²⁹² See responses to question 39 of questionnaire Q19 to customers – Netherlands – Phase I.

¹²⁹³ See responses to questions 41.5.2 and 41.5.3 of questionnaire R19 to customers – Netherlands – Phase II.

¹²⁹⁴ Rhenus' submission of 21 June 2012.

¹²⁹⁵ Form CO, paragraph 314.

¹²⁹⁶ Vos Logistics' response to the questionnaire to competitors – Phase I, questions 3 and 187.

- (1491) Similarly, DSV is present on the small package delivery markets [Details regarding DSV's service offering in the Netherlands]*. In addition, DSV offers no express services to any significant extent in the Netherlands¹²⁹⁷.
- (1492) For all the reasons already adduced in the general assessment of the competitive constraint exerted by freight forwarders and resellers in Section 7.2, those operators are largely dependent on the integrators' networks, the "wholesale prices" charged to them by the integrators makes up for most of the costs of delivering the resold services and the constraint that they exert on the integrators is very limited. This is corroborated by the outcome of the market investigation, for instance by the fact that no Dutch customer viewed freight forwarders as satisfying the criteria that they consider indispensable when negotiating a contract for international intra-EEA services¹²⁹⁸.
- (1493) UPS's test shipments with two freight forwarders¹²⁹⁹ (to which UPS attributed no market share on the Dutch international intra-EEA express market) cannot call this conclusion into question. Indeed, as stated by UPS¹³⁰⁰, freight forwarders are able to organise "ad hoc networks" by combining various providers of transport services (possibly in addition to their own transport capabilities) to arrange for the transport of a given item. However, it does not mean that with this kind of arrangements, it is possible to compete against the integrators on price, especially when it comes to large and recurring volumes of small packages. The fact that a number of companies invest in their own stable small package network suggests that this is not the case. Therefore, UPS's punctual test shipments cannot lead to any conclusion as regards the intensity of the competitive constraint exerted on the Parties by freight forwarders. It should further be noted that UPS provided no information on the price it paid for these "test shipments".
- (1494) As regards Geodis, it is a French logistics company which, in the small package delivery sector, is essentially active in the French domestic market¹³⁰¹. UPS stressed that it featured among the invitees to tenders for intra-EEA services mentioned in the responses to the market investigation¹³⁰². In fact, it was only mentioned very marginally¹³⁰³.
- (1495) In the context of the second phase investigation, the only companies mentioned as invitees to tender for international intra-EEA express services were the four integrators, DPD, GLS, Geodis, Syncreon, Jabil, Flextonics and DB Schenker¹³⁰⁴. However, Geodis, Syncreon, Jabil, Flextonics and and DB Schenker were all mentioned as having been invited to tender only by one single customer – [Customer's name]*- , that is to say, a very small minority, and this company indicated that it did not consider non-integrators as suitable alternatives to the integrators for international intra-EEA express

¹²⁹⁷ Agreed minutes of a teleconference call of 30 August 2012 with DSV, paragraphs 4 and 8.

¹²⁹⁸ See responses to question 31 of questionnaire Q19 to customers – Netherlands – Phase I.

¹²⁹⁹ UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.9.

¹³⁰⁰ Notifying party's response to the Statement of Objections, paragraph 6.54.

¹³⁰¹ Geodis' submission of 26 July 2012.

¹³⁰² Notifying party's response to the Statement of Objections, paragraph 9.537.

¹³⁰³ See responses to question 39 of questionnaire Q19 to customers – Netherlands – Phase I and responses to question 27.3 of questionnaire R19 to customers – Netherlands – Phase II.

¹³⁰⁴ See responses to question 27.3 of questionnaire R19 to customers – Netherlands – Phase II.

services and in fact only used UPS for all small package delivery services¹³⁰⁵. It can probably be explained by the fact that as already remarked concerning [Customer's name]*, certain customers invite local companies to submit offers mainly for benchmarking purposes without a real intention that they might eventually select such companies. Inviting a large number of companies to tender can indeed increase the competitive pressure on credible bidders and drive offered prices down.

- (1496) Moreover, as already indicated, local small package delivery companies possibly partnering in cooperative networks have been mentioned by a small minority of respondents as a category of operators satisfying the criteria regarded as indispensable in the context of the negotiation of a contract¹³⁰⁶ and more generally, an overwhelming majority of respondents took the view that non-integrators are not suitable alternatives to the integrators.
- (1497) As indicated by UPS¹³⁰⁷, Go!, Nacex and Stok are local companies which were mentioned as invitees to tenders in response to the first phase investigation, and as being among the three closest competitors of the Parties. However, all these companies were mentioned only by one single customer – [Customer's name]*¹³⁰⁸, that is, a very small minority. Moreover, UPS has not even attributed any market share to any of these three operators. Therefore, these are unlikely to exert any significant constraint on the Parties.
- (1498) As a result, freight forwarders, resellers and local small package delivery companies operating in the Netherlands cannot be regarded as exerting a significant constraint on the Parties.
- (1499) As regards competitors located in neighbouring countries, which according to UPS could easily pick-up volumes in the Netherlands¹³⁰⁹, they would be unlikely to expand quickly and significantly into the Dutch market, even as a result of a price increase resulting from the Transaction. Indeed, with road capabilities, they would only achieve a limited geographic coverage. Moreover, no non-integrator uses air transport to any significant extent in countries sharing a border with the Netherlands, even on the basis of outsourcing. Therefore, no non-integrator seems to be in a position to pick-up volumes in the Netherlands, transport them by road to a neighbouring country and then ship them by air so that the packages are delivered within one day.
- (1500) Likewise, it follows from the general assessment of barriers to entry already conducted in this Decision that no ground-based operator is likely to expand significantly into the international intra-EEA express market as a result of a price increase. In addition, in view of the general perception of local operators by Dutch customers, as revealed by the outcome of the market investigation, it is unlikely that such company could quickly grow its operations.

Conclusion on non-integrators

¹³⁰⁵ [Customer's name]* response to questions 8, 41.5.2 and 41.5.3 of questionnaire R19 to customers – Netherlands – Phase II.

¹³⁰⁶ See responses to question 31 of questionnaire Q19 to customers – Netherlands – Phase I.

¹³⁰⁷ Notifying party's response to the Statement of Objections, paragraph 9.537.

¹³⁰⁸ [Customer's name]* response to questions 39, 60 and 61 of questionnaire Q19 to customers – Netherlands – Phase I.

¹³⁰⁹ UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.2.

(1501) In light of the above, non-integrators exert a weak competitive constraint on the Parties, notably for Dutch customers shipping significant volumes of express packages over long distances, the needs of which they are simply unable to satisfy.

Integrators

(1502) According to data directly obtained from each integrator during the investigation, the total revenues obtained by the four integrators in 2011 in the Dutch international intra-EEA express market would be split as follows:

Table 43: International intra-EEA express deliveries in the Netherlands (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[30-40]%
TNT Express	[10-20]%
Combined	[50-60]%
Deutsche Post DHL	[40-50]%
FedEx	[5-10]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹³¹⁰ and FedEx¹³¹¹ replies to the questionnaire to competitors-Phase I.

(1503) The outcome of the Commission's reconstruction therefore indicates that post Transaction, the merged entity would be the largest market participant, followed by DHL, and that FedEx would have a very limited weight. In this respect, UPS appears to have heavily overestimated the revenues of FedEx. Indeed, UPS estimated that FedEx's revenues accounted for around [...] % of its own revenues, whereas in reality, they account for a very significantly smaller portion.

FedEx

(1504) FedEx's modest market share in the Netherlands in relation to the other integrators, combined with all the factors already identified in the general assessment of the competitive constraint exerted by FedEx – notably FedEx's cost disadvantage, and the fact that its intra-European network is significantly less dense than the networks of the other integrators - already constitutes a strong indication of FedEx's modest weight on the Dutch international intra-EEA express market. As regards FedEx's intra-European network, it is far less developed than those of each of the two Parties, which results in a significantly weaker geographic coverage.

(1505) UPS disputes this finding, based on FedEx's capabilities to connect the Netherlands to international destinations via its air network¹³¹². This argument must be dismissed. Indeed, geographic coverage depends not only on international air connections but also on the density of ground networks. The geographic coverage of an integrator like FedEx depends to a crucial extent on the ability of its network to transport small packages

¹³¹⁰ DHL's response to question 98 of questionnaire to competitors – Phase I.
¹³¹¹ FedEx' response to question 98 of questionnaire to competitors – Phase I.
¹³¹² Notifying party's response to the Statement of Objections, paragraph 9.538.

quickly from its satellite air gateways in a given country to final consignees scattered over the territory of that country.

- (1506) [Parties' coverage data and estimates regarding the other integrators' coverage]* the weak geographic coverage of FedEx's international intra-EEA express services. [Parties' coverage data and estimates regarding the other integrators' coverage]*, UPS's Express Saver and TNT's Express services would be available with a one day transit time from the Netherlands to all the 56 destination cities covered by the dataset save for 4 cities in the case of UPS and 5 in the case of TNT. Moreover, for both companies, the transit time never exceeds two days. By contrast, [Parties' coverage data and estimates regarding the other integrators' coverage], the transit time of FedEx's International Priority service from the Netherlands would be [...] for three destination cities, [...] for eight cities and [...] for five cities¹³¹³.
- (1507) Besides, FedEx's weakness in international intra-EEA express deliveries from the Netherlands has been confirmed by the Dutch customers' replies to the market investigation.
- (1508) As indicated by UPS, in response to the market investigation, the majority of the Dutch customers took the view that FedEx was a credible competitive alternative to the Parties with respect to international intra-EEA next-day end-of-day services¹³¹⁴. However, as in the case of DPD, a review of the responses to more concrete or detailed questions reveals that FedEx indeed exerts a weak constraint on the Parties.
- (1509) UPS, TNT and DHL were each mentioned by a majority of the respondents that recently organised a tender procedure or negotiated a contract for international intra-EEA end-of-day express services as companies that they invited to submit an offer, whereas the vast majority did not mention FedEx¹³¹⁵.
- (1510) Also, a review of the sample of bids for which sufficient information was submitted by customers during the first phase investigation reveals that FedEx was invited to submit an offer for tenders with an express and an international intra-EEA component in a very small minority of cases only¹³¹⁶.
- (1511) Moreover, a vast majority of respondents indicated that not all four integrators were capable of providing an equally good express service. In particular FedEx, unlike the three other integrators was mentioned by a majority of respondents as a company that would not be a good alternative. In relation to FedEx, respondents mentioned weaknesses notably in terms of price and geographic coverage¹³¹⁷.
- (1512) UPS also stressed the importance of large and sophisticated customers in the Netherlands¹³¹⁸. UPS pointed out that some of these customers had central warehouses or regional distribution centres in the Netherlands from which they ship to a variety of destinations across the EEA. This type of customer usually needs suppliers with a good

¹³¹³ [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹³¹⁴ Notifying party's response to the Statement of Objections, paragraph 9.539, see responses to question 59 of questionnaire Q19 to customers – the Netherlands – Phase I.

¹³¹⁵ See responses to question 27.3 and 27.3.1 of questionnaire R19 to customers-Netherlands-Phase II.

¹³¹⁶ See responses to question 39 of questionnaire Q19 to customers – Netherlands – Phase I.

¹³¹⁷ See responses to questions 41 and 41.1 of questionnaire R19 to customers – Netherlands – Phase II

¹³¹⁸ UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.3 and 2.4.

geographic coverage across the EEA, which FedEx lacks in comparison to the other integrators. For example, [Customer's name]*, which ships high-value time-critical medical devices from the Netherlands to hospitals and patients in a number of other EEA countries¹³¹⁹ stated: *"The reason for not using FedEx in Europe is due to the network of FedEx not achieving the necessary density for the needs of [Customer's name]*."*¹³²⁰ [Customer's name]*, for its part, took the view that not all four integrators were able to provide an equally good express service and added: *"FedEx have a small geographic footprint and are currently unable to support IT/track and trace integration"*¹³²¹. In fact, in the last two years, [Customer's name]* invited no company apart from the Parties and DHL to submit an offer for international intra-EEA next-day end-of-day services¹³²². [Customer's name]*, which ships medical devices within Europe from one single warehouse located in the Netherlands, made the following, more general comment on FedEx: *"Despite being very good in the US, FedEx in Europe does not have satisfactory performance and in addition, the level of services they offer is not high enough to satisfy [Customer's name]* requirements. [Customer's name]* considers that the cost ratio performance of UPS and TNT Express is much better"*¹³²³.

- (1513) According to UPS, a majority of respondents considered FedEx as a close competitor to UPS¹³²⁴. However, this statement is based on replies exclusively relating to closeness of competition with respect to the range of services offered. As to this point, it should be noted that, as claimed by UPS¹³²⁵, FedEx has recently started *"offering existing international express customers limited domestic service"*¹³²⁶. In UPS's view this means that FedEx is now able to offer a comparable range of small package delivery services as the Parties to customers requiring international intra-EEA express services. It is therefore no longer clear that FedEx would not be an option for Dutch customers willing to buy international intra-EEA express services as part of a bundle with domestic services, even assuming that they would never be prepared to split such a bundle and use several suppliers.
- (1514) Nevertheless, with respect to other service characteristics, and notably services characteristics to which Dutch customers attach the greatest importance (notably geographic coverage, on-time delivery and track and trace, which as already mentioned concerning DPD and GLS are crucial for Dutch customers), the situation is different. Indeed, FedEx has been identified only by a very small minority of respondents as being among the two closest competitors of UPS or TNT, and only with respect to track-and-trace and on-time delivery record¹³²⁷. By contrast, TNT was identified as UPS's closest competitor by a majority of the respondents with respect to each criterion except "B2C

¹³¹⁹ [Customer's name]* response to questions 2, 39.1.3.1 and 39.3.3.1 of questionnaire to customers – Netherlands – Phase I and agreed minutes of a teleconference call of [...] 2012 with [Customer's name]*.

¹³²⁰ Agreed minutes of a teleconference call of [...] 2012 with [Customer's name]*.

¹³²¹ [Customer's name]* response to questions 41 and 41.1 of questionnaire to customers – Netherlands – Phase II.

¹³²² [Customer's name]* response to question 27.3 of questionnaire to customers – Netherlands – Phase II.

¹³²³ Agreed minutes of a teleconference call of [...] 2012 with [Customer's name]*.

¹³²⁴ Notifying party's response to the Statement of Objections, paragraph 9.539.

¹³²⁵ Notifying party's response to the Statement of Objections, paragraph 9.542.

¹³²⁶ FedEx' submission of 27 November 2012 *Country-by-country summaries of FedEx' expansion plans*, paragraph 17.

¹³²⁷ See responses to questions 36 and 37 of questionnaire R19 to customers – Netherlands – Phase II.

deliveries" and "ability to serve customers of all sizes"¹³²⁸. Moreover, even if FedEx started offering a "limited domestic service", this does not compensate for its lack of coverage on the destination side.

- (1515) On the basis of this body of evidence, it is concluded that FedEx currently exerts a weak constraint on the Parties in the Dutch international intra-EEA express market.
- (1516) As part of its European expansion plan¹³²⁹, [Details on FedEx's expansion plan across EEA]*¹³³⁰. [Details on FedEx's expansion plan across EEA]*¹³³¹. [Details on FedEx's expansion plan across EEA]*¹³³².
- (1517) [Details on FedEx's expansion plan across EEA]*
- (1518) [Details on FedEx's expansion plan across EEA]*¹³³³. Even though it is likely that FedEx's market share will increase, the Commission is unable to predict what market share FedEx is likely to achieve in the near future.
- (1519) [Details on FedEx's expansion plan across EEA]* This will likely create a degree of competitive pressure on the other main integrators.
- (1520) However, the expansion of FedEx needs to be put into the perspective of its current market position, where the starting point for expansion is still quite modest. In the Netherlands, FedEx achieved a revenue share of [0-5]% based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, FedEx's growing position would still be far behind the combined entity and DHL.
- (1521) The low market share of FedEx is an important element because FedEx is already now able to cover 100% of the Dutch territory with its inbound international intra-EEA express services. Therefore, if FedEx has so far managed to generate very limited revenues on the Dutch market compared with the other integrators, it is not due to a lack of geographic coverage which could be solved by the setting-up of new local centres. FedEx's weakness on the Dutch market is likely to be due, among other factors, to one of the specificities of the Dutch market which UPS stresses, that is to say, the particularly strong presence of large and sophisticated customers, which will be discussed in more detail in recitals 1547 and following¹³³⁴. Some of these large customers need suppliers with a good geographic coverage across Europe (see for example recitals 294 and following), which FedEx currently lacks in comparison to the other integrators and will only gradually improve. Therefore, it is less clear to what extent FedEx will manage to grow sufficiently in the short term on the Dutch market.
- (1522) Therefore, it can be expected that FedEx will exercise an increasing degree of competitive pressure on the main integrators in the Netherlands in the near future. However, in combination with all other evidence, the counter-veiling effect of FedEx

¹³²⁸ See responses to question 36 of questionnaire R19 to customers – Netherlands – Phase II.

¹³²⁹ See Section 7.3.10 of this Decision.

¹³³⁰ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

¹³³¹ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.

¹³³² FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 3.

¹³³³ FedEx, response to the request for information dated 16 November 2012 (Q30).

¹³³⁴ UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.3 and 2.4.

expansion will likely not be sufficient to counter-act negative effects of the Transaction on competition in the Netherlands.

Closeness of competition

- (1523) The general conclusions already drawn in Section 7.5 with respect to the closeness of competition between the Parties on the international intra-EEA express market apply to the Netherlands. The Parties' international intra-EEA express services appear to have a very comparable geographic coverage, [...]*, which have been already commented upon in the assessment of FedEx' role in the Dutch market.
- (1524) Moreover, in reply to the market investigation, around half of the respondents that recently organised a tender procedure or started negotiations concerning international intra-EEA next-day end-of-day services invited or requested a quotation from both UPS and TNT¹³³⁵. This is an indication that both companies are perceived by a significant proportion of customers as sufficiently close to be potentially able to satisfy their needs at an acceptable price, and compete for the same contracts to a significant extent.
- (1525) A similar outcome results from the review of the information provided by Dutch customers during the first phase investigation on the recent bids that they have organised. Indeed, it appears that UPS and TNT were simultaneously invited in around half of the cases, whereas as already indicated, FedEx was invited in a very small number of cases. For certain bids, UPS and TNT were the only suppliers invited to submit a quote. These are indications that the Parties compete intensely for international intra-EEA express contracts in the Netherlands. Moreover, for most of these bids, DHL was often invited alongside UPS and / or TNT, which suggests that DHL is also a close competitor to each of the Parties¹³³⁶.
- (1526) Furthermore, in the course of the first phase investigation, around half of the respondents mentioned TNT as UPS's main competitor in the Dutch international intra-EEA express market whereas a similar proportion of respondents mentioned DHL. Other operators (including FedEx) have been at best marginally mentioned as being UPS's closest competitor or the second closest one¹³³⁷.
- (1527) This outcome corresponds to the more detailed feedback received from Dutch customers during the second phase investigation. Indeed, when asked to name the two closest competitors of UPS in the international intra-EEA express market with respect to 8 criteria, respondents only named integrators, save in a very limited number of cases where DPD or PostNL were named (only with respect to "geographic coverage for pick-up", "price", "latest pick-up time", "B2C deliveries" and "ability to serve customers of all sizes"). FedEx, for its part, was mentioned only by a very small minority of respondents. By contrast, TNT was identified as UPS's closest competitor by a majority of the respondents with respect to each criterion except "B2C deliveries" and "ability to serve customers of all sizes". It thus turns out that TNT was identified as UPS's closest competitor with respect to criteria which as already mentioned are of particular

¹³³⁵ See responses to question 27.3 of questionnaire R19 to customers-Netherlands-Phase II.

¹³³⁶ See responses to question 39 of questionnaire Q19 to customers – Netherlands – Phase I.

¹³³⁷ See responses to question 60 of questionnaire Q19 to customers – Netherlands – Phase I.

importance in the eyes of Dutch customers, notably track-and-trace and on-time delivery record¹³³⁸.

- (1528) *Mutatis mutandis*, a very similar picture arises from the Dutch customers' responses relating to TNT's two closest competitors, with FedEx and non-integrators being only marginally mentioned and UPS being identified as TNT's closest competitor with respect to each criterion except "ability to serve customers of all sizes", "prices" (for which UPS was identified as the second closest competitor) "add-on services" and "ability to serve customers of all sizes"¹³³⁹.
- (1529) It can be concluded from all these elements that TNT is a very close (if not the closest) competitor to UPS and vice-versa, whilst DHL is also a close competitor to both Parties and all the other operators are much more distant competitors.
- (1530) [Customer's name]*, a large customer which is well-placed to compare the Parties, since it uses both UPS and TNT to ship small packages containing medical devices and spare parts for such devices via express services, remarked: "*The level of quality offered by the big players like UPS, TNT and DHL is roughly similar*"¹³⁴⁰. This statement illustrates the closeness of competition between the Parties, DHL also emerging as a close competitor to both Parties.
- (1531) [Confidential information taken from the Parties' internal databases]*^{1341 1342 1343 1344}

Table 44: [Confidential information taken from the Parties' internal databases]*

[...]*

Source: [...]*

- (1532) These figures should be used with caution since they involve a significant degree of subjectivity. Indeed, they reflect the identity of the operator that UPS perceives as its main competitor for a particular bid, which is not necessarily in line with the perception - and choices – of the customer requesting quotes. This caveat being made, these figures, if used to assess the closeness of competition between the Parties, would rather indicate that [Confidential information taken from the Parties' internal databases]*. These data would also suggest that a [Confidential information taken from the Parties' internal databases]*. Indeed, there is a difference of [...]* [5-10]* percentage points between DHL and TNT. By contrast, there is a difference of [20-30]* percentage points between TNT and FedEx, which in addition is likely to underestimate the actual distance between TNT and FedEx in the international intra-EEA express market. Indeed, the above diversion ratios relate to international express in general, which includes extra EEA where FedEx appears to be significantly stronger than on the intra-EEA markets.
- (1533) In addition, these data tend to shore up the findings already reached as regards the weakness of the competitive constraint exerted on UPS by La Poste / DPD and Royal

¹³³⁸ See responses to question 36 of questionnaire R19 to customers – Netherlands – Phase II.

¹³³⁹ See responses to question 37 of questionnaire R19 to customers – Netherlands – Phase II.

¹³⁴⁰ Agreed minutes of a teleconference call of 2 May 2012 with [Customer's name]*.

¹³⁴¹ [...]*

¹³⁴² [...]*

¹³⁴³ [...]*

¹³⁴⁴ [...]*

Mail / GLS. They also tend to indicate that apart from La Poste / DPD and Royal Mail / GLS, non-integrators seem to exert a negligible constraint, if any, on UPS.

- (1534) These data thus appear as a true reflection of the conclusions already reached in this Decision concerning the Dutch international intra-EEA express market, according to which TNT and DHL are both very close competitors to UPS while all the other market participants are significantly more distant.
- (1535) As regards the alleged similarities between the Dutch and the Belgian markets, they cannot be supported by the available figures. Indeed, when it comes to "diversion ratios in Belgium", there is a difference of [10-20]* percentage points between TNT and DHL (instead of [5-10]* for the Netherlands) and a difference of [10-20]* percentage points between TNT and FedEx (instead of [20-30]* for the Netherlands). Moreover, contrary to what UPS claims, FedEx's market shares are not similar in Belgium and the Netherlands. As already indicated, FedEx accounts for [10-20]% of the total revenues of the integrators on the Belgian international intra-EEA express market but only for [0-5]% on the Dutch market.
- (1536) [Confidential information taken from an market study carried out on behalf of the Parties]*^{1345 1346}
- (1537) [Confidential information taken from the Parties' internal databases]*^{1347 1348 1349}
- (1538) It is difficult to comment on these analyses which have been described in very general and somewhat unclear terms in the Notifying party's response to the Statement of Objections, without any reference to any other document apart from a map of TNT's intra-European air network, which seems only remotely linked to the analyses at issue. It seems that in UPS's view, [Confidential information taken from the Parties' internal databases]*. In view of the way in which these analyses have been described, it is impossible to verify how UPS arrived at this conclusion. In any event, [Confidential information taken from the Parties' internal databases]* does not necessarily provide an indication on the degree of competitive constraint exerted by FedEx on TNT on these lanes.
- (1539) In addition to referring to its own bidding data, UPS submitted figures retrieved from TNT's [...] database. It concluded from these figures that DHL was by far the closest and strongest competitor to TNT and by a considerable margin, while a significant number of other small package providers were viable competitors¹³⁵⁰. UPS indicated that DHL was identified as the closest competitor for [40-50]*% of the bids while UPS was identified in [20-30]*% of the cases and other competitors in [20-30]*% of the cases. On the basis of TNT's [...] data, the Commission made more precise calculations and in particular, identified the percentages reached by FedEx, DPD and GLS. It found that DHL was identified by TNT as the closest competitor for [40-50]*% of the bids, UPS for [20-30]*% (which is consistent with UPS's analysis), FedEx for [5-

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[...]*

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UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.13.

10]*%, DPD for [0-5]*%, GLS for [0-5]*% and all the smaller competitors for [20-30]*% altogether. Even though these data tend to indicate that UPS may not be as close to TNT as DHL, they also reveal that there is a considerable distance between UPS and all the other competitors, including FedEx. Therefore, these data cannot cast doubts on the conclusion that among all TNT's competitors, DHL and UPS are significantly closer, and individually exert far more competitive pressure than all the other competitors, and that the Parties are, against this backdrop, to be considered close competitors.

(1540) [Confidential information taken from the Parties' internal databases]*¹³⁵¹

(1541) However, these figures take into account all European bids submitted during the course of one year and are thus not specific to the Netherlands. Therefore, no conclusion can be drawn from these figures as regards the closeness of competition between the Parties on the Dutch market. [Confidential information taken from the Parties' internal databases]*.

(1542) According to UPS, the outcome of TNT's Exit Interviews indicates that DHL is TNT's closest competitor of UPS with respect to international express services in the Netherlands (and for the smaller customers of TNT, which were the ones targeted by the Exit Interviews). In the first three quarters of 2012, [20-30]*% of respondents using international express services allegedly indicated that they had switched to DHL while [20-30]*% indicated they had switched to UPS, [10-20]*% to DPD, [10-20]*% to FedEx and [5-10]*% to GLS. Other competitors mentioned by these former customers of TNT were Seabourne, Skynet, DB Schenker and DSV¹³⁵². In fact, these data rather tend to reveal that UPS and DHL are close competitors to TNT, and that their degree of closeness of competition is similar. These data also tend to confirm the existence of a wide gap between on the one hand, UPS and DHL, and on the other hand, all the other competitors. Moreover, several operators presented as significant competitors by UPS in its market shares estimates, such as [...] and [...]*, do not appear at all in TNT's Exit Interviews. This suggests that their market shares, as computed by UPS, are likely to overstate their actual market position.

Price concentration analysis and efficiencies

(1543) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from the Netherlands would range between [0-5]*% and [0-5]*% depending on the model specification.¹³⁵³ The scope of these estimated price increases reflects the fact that FedEx's coverage in the Netherlands is complete (in fact, all four integrators have [90-100]*% coverage). The Commission also notes that in the Netherlands, a non-integrator (DPD) has a [90-100]*% end-of-day coverage from the Netherlands to neighbouring countries. Hence, according to the model, the Dutch market has a large number of effective competitors and the merger would lead to a "5 to 4" on several lanes (where DPD offers next day intra-EEA express) or "4 to 3" overall. The Commission notes however that in the Netherlands, coverage data and market share are particularly inconsistent. FedEx has a

¹³⁵¹ [...]*

¹³⁵² UPS's submission of 23 November 2012 on competition in the Netherlands, Denmark, Finland and Sweden, paragraph 2.12.

¹³⁵³ Note that these specifications include both models with and without non-integrators coverage data.

[90-100]*% coverage but achieves very limited revenues. The same occurs for DPD whose complete coverage on some short-haul lanes to/from the Netherlands translate in extremely limited revenues, therefore achieving a market share much below the [0-5]*% estimated by the Notifying party.

- (1544) In the Netherlands, the Commission has calculated that efficiencies would represent between [0-5]*% of net prices in Year [...] and up to [5-10]*% of net prices in Year [...]. Assuming a pass-through rate of [60-70]*% and taking Year [...] efficiencies as the base line case, the net price effects in the Netherlands would be negative and range between -[0-5]* to -[0-5]*%.¹³⁵⁴
- (1545) Overall in the Netherlands, the orders of magnitude of price increases and efficiencies are such that efficiencies would be expected to outweigh any price rise. However, the estimated price effects are likely to be underestimated because in the Netherlands, the coverage data does not fully capture the true competitive constraint exerted by the rivals as illustrated by the lack of consistency between coverage and market shares. This may be due to the specific characteristics of customers in the Netherlands that imply a stronger preference for integrators with the most complete intra-EEA express network (which neither FedEx nor DPD offer). Moreover, the model does not either capture the fact that in the Netherlands, the merging parties seem to be particularly close competitors, [...], but also as confirmed by the market investigation.
- (1546) Hence, in the case of the Netherlands, the quantification of net merger effects should be given less weight because the model does not allow to capture the specificities of the Dutch market.

The significance of large customers

- (1547) [Confidential information regarding the Parties' customer base]*¹³⁵⁵

Figure 17: [Confidential information regarding the Parties' customer base]*

[...]*

Source: [...]*

- (1548) [Confidential information regarding the Parties' customer base]*^{1356 1357}
- (1549) [Confidential information regarding the Parties' customer base]*
- (1550) It should be first noted that the conclusions already reached in Sections 7.2, 7.3 and Section 7.5 as regards the weakness of the constraint exerted on the Parties by FedEx and non-integrators and the closeness of competition between the Parties are independent of the size of the customers and their willingness to multi-source. In addition, as already indicated in the assessment of the constraint exerted by FedEx on the Dutch international intra-EEA express market, input received from large customers such as [Customer's name]* or [Customer's name]* tends to indicate that these customers in particular would be unlikely to regard companies other than the merged entity or DHL as suitable providers of international intra-EEA express services. Even assuming that as a result of a price increase, they would switch short haul express

¹³⁵⁴ [Confidential information regarding efficiencies expected to arise from the Transaction]*
¹³⁵⁵ [...]*
¹³⁵⁶ [Confidential information regarding the Parties' customer base]*
¹³⁵⁷ [Confidential information regarding the Parties' customer base]*

services from the merged entity to non-integrators, they would still have to use an integrator for the long-haul express services and FedEx would appear unlikely to be seen as a fully satisfactory alternative due to the insufficient density of its network. Indeed, as already indicated, the limited geographic coverage of FedEx is one of the main reasons why such large customers often do not view FedEx as a suitable alternative. Moreover, as already explained in the assessment of the customers' buyer power in Section 7.8, customers in the international intra-EEA express markets do not have sufficient countervailing buyer power to defeat the negative effects of the Transaction.

- (1551) [Confidential information regarding the Parties' customer base]*¹³⁵⁸
- (1552) Since FedEx and non-integrators have overall a more limited geographic coverage than the Parties in the EEA (on the destinations side), they are less likely than the Parties to be able to satisfy the needs of large customers shipping to many destinations. As argued by UPS, large customers can multi-source and use FedEx or non-integrators for certain lanes and the Parties for others. However, due to the lack of geographic coverage of those operators, they are likely to be dependent on UPS, TNT or DHL for part of their needs.
- (1553) Moreover, the willingness to multi-source should not be overstated. As already indicated, comments made by [Customer's name]* and [Customer's name]* – the largest customer of UPS in the EEA – with respect to FedEx show that customers of this type attach importance to overall geographic coverage (or "*geographic footprint*" as mentioned by [Customer's name]*), suggesting that the readiness of such customers to use various suppliers for various lanes is not unlimited. Indeed, having several suppliers gives rise to operational complexity. For example, a multi-sourcing customer has to integrate its IT system with the IT systems of several suppliers if IT integration is important for this customer. Moreover, splitting needs among various suppliers reduces the volume per supplier and thus, the ability to obtain a high discount. From a customer perspective, the disadvantages of multi-sourcing international intra-EEA express services must be compensated by some benefits. Comments made by [Customer's name]* and [Customer's name]* on the quality of FedEx' services (for example in terms of track-and-trace) suggest that these large customers are unlikely to find FedEx' services on individual lanes sufficiently attractive to offset the disadvantages of multi-sourcing.
- (1554) Therefore, FedEx is less likely to be seen as a suitable alternative by large customers shipping to many destinations than by smaller customers shipping to fewer destinations.
- (1555) Besides, as regards the risk that these large customers would move their warehouses or regional distribution centre away from the Netherlands (and therefore, expose the merged entity to competition from operators established in other EEA countries), such a geographic transfer is highly likely to involve a very significant operational reorganisation as well as very significant investments. Therefore, even assuming that such a transfer would in fact be triggered by a price increase on the Dutch market following the completion of the Transaction, this price increase would have to be very substantial. Moreover, the customers in question would be likely to need significant time before moving their logistical hub to another country, since it would entail

¹³⁵⁸ [Confidential information regarding the Parties' customer base]*

considerable changes in their operations. These customers would thus be likely to be harmed by the price increase imposed by the merged entity (and followed by DHL) during a non-negligible period.

- (1556) It should also be noted that UPS mentioned one single example to support this theory. Notwithstanding the fact that the switching event in question occurred four years ago, UPS has not explained why this customer moved its warehouse from the Netherlands to Germany. It cannot be ascertained that this decision was triggered by the customer's desire to switch its small package carrier from TNT to DB Schenker on the basis of price considerations. In the absence of any evidence, this seems highly implausible.
- (1557) In any event, even if large customers have a significant weight on the Dutch international intra-EEA express market (possibly greater than in many other countries), this does not mean that these are the only customers present on the Dutch market. Even if UPS's allegations on large customers were right, they would hold only for part of the market.

Customers' assessment

- (1558) Relying on a comment made by one single customer ([Customer's name]*), UPS claims that Dutch customers that responded to the market investigation "*recognise the synergies created by the Transaction and the benefits they will bring*"¹³⁵⁹. However, the statement of [Customer's name]* by no means reflects the views of the majority of the respondents. Indeed, asked to describe the expected impact of the Transaction on their own businesses in particular in terms of price, quality of service, choice, or geographic coverage, a large majority of respondents voiced concerns¹³⁶⁰.
- (1559) [Customer's name]* clearly expects a negative outcome: "*We will have to redesign our European distribution set up. We don't expect that the combined UPS/TNT will in the end give the same service as we are now getting from TNT*"¹³⁶¹. [Customer's name]* remarked: "*Number of carriers eligible for the [...] business is decreasing. Cost will go up, service capabilities as specific tailor made solutions will be lost.*"¹³⁶² [Customer's name]* fears that "*this will increase prices*"¹³⁶³. [Customer's name]* stated: "*After the takeover of TNT Express by UPS two large providers will remain: UPS and DHL. After an initial period of settling down it is very likely that both companies will realize that a comfortable market balance will be more in their benefit than sharp competition. This will lead to: less than competitive behaviour in price setting; a stifling effect on the service innovation that the clients of these companies badly need; higher entry barriers: the difference in scale compared to the next largest companies is so large that new or growing entrants will not be able to compete*"¹³⁶⁴.
- (1560) These statements about the expected effects of the Transaction do not constitute evidence that the Transaction is likely to harm consumers. Nevertheless, they indicate that Dutch customers generally view the current competition between the Parties as

¹³⁵⁹ Notifying party's response to the Statement of Objections, paragraph 9.517.

¹³⁶⁰ See responses to question 66.1 of questionnaire Q19 to customers – Netherlands – Phase I.

¹³⁶¹ [Customer's name]* response to question 66.1 of questionnaire Q19 to customers – Netherlands – Phase I.

¹³⁶² [Customer's name]* response to question 66.1 of questionnaire Q19 to customers – Netherlands – Phase I.

¹³⁶³ [Customer's name]* response to question 66.1 of questionnaire Q19 to customers – Netherlands – Phase I.

¹³⁶⁴ [Customer's name]* response to question 66.1 of questionnaire Q19 to customers – Netherlands – Phase I.

beneficial to them, hence the worries that the Transaction will translate into higher prices and / or a lower quality of service.

7.11.12.3. The Commission's conclusion

- (1561) As a result, UPS, TNT and DHL can be seen as close competitors on the Dutch international intra-EEA express market while FedEx and non-integrators are distant competitors exerting at best a weak constraint on the Parties which would become the clear market leader in the Netherlands.
- (1562) In addition, also in view of the general assessment already conducted as regards barriers to entry and countervailing buyer power, the Commission considers that the Transaction is likely to eliminate an important competitive force from the Dutch international intra-EEA express market and to limit the possibilities of switching supplier since there is no sufficient countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects. Moreover, the Commission's quantitative analysis has indicated that the Transaction is expected to cause price increases on the Dutch international intra-EEA express market (efficiencies being disregarded), and that these are likely to be underestimated as explained in recital 1545. Although the efficiencies appear to outweigh these (likely underestimated) price increases, the overall review of the evidence relating to the Netherlands indicates that on balance, the removal of a strong competitive constraint would lead to a significant impediment to effective competition in this market and that neither efficiencies nor the expected FedEx expansion are sufficient to outweigh the overall negative effect of the Transaction.
- (1563) Therefore, the Transaction would be likely to lead to a significant impediment to effective competition on the Dutch market for international intra-EEA express deliveries of small packages.

7.11.13. *Poland*

7.11.13.1. UPS's views

- (1564) According to UPS's estimates based on the product market definition followed by the Commission, *post* merger, UPS considers that the market shares would be spread as follows:

Table 45: International intra-EEA express deliveries in Poland (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[10-20]*%
TNT Express	[10-20]*%
Combined	[20-30]*%
Fedex	[10-20]*%
DHL Express	[30-40]*%
Royal Mail (GLS)	[0-5]*%
La Poste (DPD)	[0-5]*%
Poczta Polska (and Pocztex)	[5-10]*%
OCS	[0-5]*%
Raben	[5-10]*%
Rhenus	[0-5]*%
Pz Polamer	[0-5]*%
Roberts Europe	[0-5]*%
Gefco	[0-5]*%
DB Schenker	[0-5]*%
DSV	[5-10]*%
Sprinter Logistyka SP Zoo	[0-5]*%
Delta Trans	[0-5]*%
Kurier	[0-5]*%
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

- (1565) Both UPS and TNT are active directly on the Polish market for small package delivery services.
- (1566) UPS submits that the market is already characterised by the presence of several strong competitors such as DHL and FedEx, which have been continually expanding in the recent years as well as non-integrators, national postal operators and freight forwarders. Furthermore, [...]*, the Parties would not be each other's closest competitors. The Transaction would therefore not significantly reduce the competitive pressure UPS currently faces.
- (1567) In its response to the Decision opening the proceedings, UPS contends that the Polish intra-EEA express market is experiencing rapid growth as it is in the early phase of its development, therefore the importance of market shares should not be overestimated.
- (1568) In its response to the Statement of Objections, UPS further claims, *inter alia* that (i) the Commission should have taken into account only the replies to the market investigation coming from the customers that single-source long-haul intra-EEA express services, (ii) the Commission entirely ignored other, more relevant, data in the form of the UPS and TNT bidding databases, which provide much more accurate information about the closeness of competition between competitors and (iii) the Commission completely neglected FedEx's expansion in Poland.
- (1569) Based on these arguments, UPS submits that the Transaction will not lead to competition concerns on the international express market in Poland.

7.11.13.2. The Commission's assessment

- (1570) First of all, this Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the Polish intra-EEA express delivery market as such, even though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is no justification for basing the present assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections.
- (1571) Second, as concerns the results of the bidding data analysis carried out by the Notifying party, they are assessed in detail in Section 7.5.1.6.
- (1572) Moreover, as demonstrated in Section 6.1.6, contrary to what the Parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices.
- (1573) UPS's market reconstruction includes a large number of companies, such as non-integrated companies, national postal operators and freight forwarders. However, as mentioned in Section 7.2., contrary to UPS's contention these companies do not offer a viable alternative to the customers when it comes to intra-EEA express deliveries, in particular for non-neighbouring countries: only the four integrators are capable to deliver small packages within a day also to distant or remote destinations.

The non-integrators on the Polish intra-EEA express small package delivery market

- (1574) Having examined the role of the non-integrators on the Polish intra-EEA express market and the extent to which they exert competitive pressure on the four integrators on this market, the Commission disagrees with UPS for the reasons set out in this section.

La Poste/DPD

- (1575) With respect to international services within Europe, La Poste carries most packages by road and can deliver them within 72 hours. La Poste also offers express services within Europe but it accounts for a small share of its business¹³⁶⁵. In general, La Poste does not see itself as a credible alternative to UPS and TNT Express for international intra-EEA express services. Whilst La Poste indicated that in certain EEA countries, it offers international intra-EEA express services, mostly limited to destinations in neighbouring countries, it reported no such services at all for Poland¹³⁶⁶.
- (1576) [Parties' coverage data in EEA and estimates regarding other players]*,¹³⁶⁷ La Poste/DPD is not able to deliver from Warsaw and Krakow to any of the two most important cities of all EEA countries with a firm one day time commitment. Furthermore, it needs at least [...]* to deliver to the two most important cities in Bulgaria, Denmark, Estonia, the United Kingdom, Iceland, Lithuania, Latvia, Malta, Norway, Portugal, Romania, Slovenia, by contrast with the Parties which - with very few exceptions¹³⁶⁸ - can reach these two cities in one day.

¹³⁶⁵ La Poste/DPD's response to question 3 of questionnaire to competitors – Phase I.

¹³⁶⁶ La Poste/DPD's response to questions 154 and 155 of questionnaire to competitors – Phase I.

¹³⁶⁷ [Parties' coverage data in EEA and estimates regarding other players]*

¹³⁶⁸ [Parties' coverage data in EEA and estimates regarding other players]*

- (1577) In this respect, Polish customers view very favourably suppliers that offer intra-EEA express services covering many destination countries. When asked to rank the criteria they take into account when they negotiate supply agreements for intra-EEA express deliveries, the majority of the respondents considered the coverage of all destination countries as an important criterion¹³⁶⁹. In view of the limited scope of the destinations offered by La Post/DPD, it is rather unlikely that La Post/DPD would be a suitable alternative for customers as opposed to the Parties who are able to deliver to all the EEA countries. In this respect, UPS explains in its response to the Statement of Objections that most of the customers "bundle" that is to say that buy multiple services. They would not be able to do so from La Post/DPD, at least as concerns intra-EEA express services in view of its extremely limited portfolio. Conversely, a customer could source from either UPS or TNT the full range of intra-EEA express it desires, as both serve the whole EEA territory from Poland, at least the capital cities.
- (1578) Furthermore, it appears that only one customer recently organising a tender procedure or starting negotiations for the provision of express intra-EEA express deliveries invited or requested a quotation from La Poste/DPD¹³⁷⁰.
- (1579) In addition, when asked in the course of the Phase-II market investigation which of the small package delivery companies do satisfy the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services, La Poste/DPD was mentioned only by a minority of customers (as opposed to the Parties)¹³⁷¹. Similarly, as concerns the add-on services/specific features they view as must-have for small package companies providing intra-EEA delivery services, La Poste/DPD was referred to by a minority of customers (as opposed to the Parties)¹³⁷².
- (1580) Consequently, it is unlikely that La Poste/DPD represents a competitive constraint in the Polish market of express intra-EEA small package deliveries.

GLS/Royal Mail

- (1581) [Parties' coverage data in the EEA and estimates regarding other players]¹³⁷³, GLS/Royal Mail is unable to deliver from Krakow and Warsaw to any EEA country with a firm one day time commitment, but rather needs [...] to ship to any of the two most important cities in the EEA countries. The farther the country of destination is from Poland, the longer is the time usually needed. For example, [...] are needed for shipments to Brno and Prague or Berlin and Frankfurt whereas [...] are needed to deliver in Lyon or Copenhagen, [...] are needed for shipments to Helsinki and [...] for those to Tampere. By contrast, with a few exceptions, the Parties are able to reach all cities mentioned in [...] within one day.
- (1582) Similar conclusions to the ones drawn in this section for La Poste/DPD, with respect to customers' view on suppliers that offer intra-EEA express services covering many destinations, can be formulated for GLS/Royal Mail.

¹³⁶⁹ See responses to question 30 of questionnaire Q20 to customers – Poland – Phase I.
¹³⁷⁰ Questions 27.1, 27.2 and 27.3 of the questionnaire R20 to customers-Poland-Phase II.
¹³⁷¹ Question 31 of the questionnaire Q20 to customers-Poland-Phase I.
¹³⁷² Question 33 of the questionnaire Q20 to customers-Poland-Phase I.
¹³⁷³ [Parties' coverage data in the EEA and estimates regarding other players]*

- (1583) In addition, only a small minority of the customers recently organising a tender procedure or starting negotiations for the provision of express intra-EEA small package deliveries invited or requested a quotation from GLS/Royal Mail¹³⁷⁴.
- (1584) Furthermore, when asked which of the small package delivery companies do satisfy the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services, GLS/Royal Mail was mentioned only by a minority of the respondents (as opposed to the Parties)¹³⁷⁵. Similarly, as concerns the add-on services/specific features they view as must-have for small package companies providing intra-EEA delivery services, GLS/Royal Mail was referred in a small minority of cases, while the Parties were mentioned by the vast majority of Polish customers¹³⁷⁶.
- (1585) Consequently, it is unlikely that GLS/Royal Mail represents a competitive constraint in the Polish market of express intra-EEA small package deliveries.

Poczta Polska/Pocztex

- (1586) Poczta Polska is the incumbent in the postal sector in Poland. It also provides small package delivery services through the brand "Pocztex" and the EMS network.
- (1587) According to [Parties' coverage data in the EEA and estimates regarding other players]*¹³⁷⁷, Poczta Polska is unable to deliver from Warsaw and Krakow to any of the two most important cities of all EEA countries with a firm one day time commitment. Along the same line, Poczta Polska indicated that: *"there is no such international service rendered by Poczta Polska with a firm one day time commitment"*¹³⁷⁸.
- (1588) For example, Poczta Polska needs at least [...] in order to deliver to the two most important cities in Cyprus, Spain, Estonia, Iceland, Malta and Norway. By contrast, with a few exceptions, the Parties are able to reach all cities mentioned in [...] within one day.
- (1589) Moreover, UPS appears to have very significantly overstated the role of Poczta Polska on the Polish international intra-EEA express market. Revenue data obtained directly from that operator for 2011 indicate that it has a much lower weight on the Polish international intra-EEA express market than suggested by UPS's market share estimates.
- (1590) In addition, despite being the national incumbent, Poczta Polska/Pocztex has been mentioned only by a small minority of Polish customers among the companies taken into consideration when recently organizing a tender procedure or starting negotiations concerning intra-EEA express delivery services.
- (1591) Furthermore, Poczta Polska/Pocztex made clear in its reply to the market investigation questionnaire that: *"it does not render a distinct small package delivery services"*, but rather ships packages in the context of its universal service remit¹³⁷⁹.

¹³⁷⁴ Questions 27.1, 27.2 and 27.3 of the questionnaire R20 to customers-Poland-Phase II.

¹³⁷⁵ Question 31 of the questionnaire Q20 to customers-Poland-Phase I.

¹³⁷⁶ Question 33 of the questionnaire Q20 to customers-Poland-Phase I.

¹³⁷⁷ [Parties' coverage data in the EEA and estimates regarding other players]*

¹³⁷⁸ E-mail from Poczta Polska of 20.09.2012.

¹³⁷⁹ Poczta Polska's response to question 3 of questionnaire to competitors – Phase I.

(1592) Consequently, it is unlikely that Poczta Polska/Pocztex represents a competitive constraint in the Polish market of express intra-EEA small package deliveries.

DB Schenker

(1593) DB Schenker explained that it owns a parcel company or has "integrated" parcel delivery operations in Poland as well as in Norway, Sweden and Finland. Packages are handled within DB Schenker's own Polish set-up, [Details on DB Schenker set-up]*. In the countries other than Finland, Norway, Poland or Sweden, DB Schenker also offers small package delivery services, which it contracts out, at least in part, to small package companies. [Details on DB Schenker set-up]*¹³⁸⁰.

(1594) [Parties' coverage data in the EEA and estimates regarding other players]*¹³⁸¹, with the exception of the two major cities in Belgium, the Netherlands, Luxembourg, Germany, as well as Oslo, DB Schenker is unable to deliver with a firm one day commitment from Poland to any of the two major cities of all EEA countries. By contrast, with a few exceptions, the Parties are able to deliver with a firm one day commitment to all cities mentioned in [...]*.

(1595) In addition, Polish customers do not see the freight forwarders in general and DB Schenker in particular as a good alternative to either UPS or TNT¹³⁸². Moreover, they do not consider DB Schenker as a close competitor to UPS nor to TNT whatever the service or the characteristic at stake¹³⁸³. Finally, over the last two years, DB Schenker has been invited to submit an offer or a quotation for the supply of intra-EEA express shipments by only a limited minority of respondents to the market investigation¹³⁸⁴.

(1596) Consequently, DB Schenker is unlikely to exert a significant competitive constraint on the Parties on the intra-EEA express small package delivery market in Poland.

Other Freight Forwarders (Kuehne+Nagel, DSV, etc.)

(1597) UPS also indicates that other freight forwarders like Kuehne+Nagel and DSV¹³⁸⁵ as significant competitive forces in the Polish intra-EEA express deliveries segment. As already indicated in Section 7.2.4., freight forwarders exert only very weak competitive constraint on the integrators in the international intra-EEA express market, in particular when they act as mere resellers of the services of the integrators.

(1598) The majority of Polish customers confirmed that freight forwarders are not a good alternative to the integrators, so that they could imagine using them instead of the latter for intra-EEA express services.

(1599) For example, [Customer's name]* mentioned that: "*Our experience shows that small package companies are more reliable and the traceability is much better*"¹³⁸⁶.

¹³⁸⁰ Agreed minutes of a teleconference call of 29 August 2012 with DB Schenker.

¹³⁸¹ [Parties' coverage data in the EEA and estimates regarding other players]*

¹³⁸² See responses to question 59 of questionnaire Q20 to customers – Poland – Phase I.

¹³⁸³ See responses to questions 36 and 37 of questionnaire R20 to customers – Poland – Phase II.

¹³⁸⁴ See responses to question 27 of questionnaire R26 to customers – Sweden – Phase II.

¹³⁸⁵ Raben is also mentioned as a significant player by UPS. However, Raben's management clarified that the company's small packages business is *de minimis*, since Raben is specialized in palletized freight handling/transporting only (see e-mail exchange with Raben Management Services).

¹³⁸⁶ [Customer's name]* response to question 42.1 of questionnaire R20 to Customers Poland.

- (1600) [Customer's name]* indicated that: "*small packs are frequently lost/damaged in networks adjusted to pallet size shipments. Transit time is not comparable in most cases.*"¹³⁸⁷.
- (1601) [Customer's name]* stated that: "*Smaller companies than the integrator may not have as good time delivery options*"¹³⁸⁸.

Concluding remarks on non-integrated companies

- (1602) Generally, in the course of the Phase-II market investigation, the majority of customers stated that there are some features of the integrators' services which are important for them and which distinguish the integrators from other companies who also offer intra-EEA express shipments. These characteristics include technical and network capabilities, ease of shipment tracking, and delivery information end to end, late pick-up times, the ability to deliver at a specific hour, and the possibility to reach easily the customer service in the event of a problem¹³⁸⁹.
- (1603) Only a minority of Polish customers indicated that non-integrated companies are UPS's or TNT's closest or second closest competitor taking into account geographic coverage, prices, track and trace system, latest pick-up time, on-time delivery record, B2C deliveries, add-on services offered, ability to serve customers of all sizes¹³⁹⁰.
- (1604) In the same vein, when asked to mention what they perceive as the strengths and the weaknesses of the market players active at the domestic level in Poland (that is to say, the four integrators, La Poste/DPD, GLS or any other company they would have liked to refer to) and to indicate how they perceived their position on the market, the vast majority of Polish clients did not name a non-integrator in the first or second position, essentially due to the less extensive geographic coverage, lower quality of service, problems with the integration of the IT system, absence of a proprietary air network. Attractive prices appear to be by far the main factor driving some customers to choose a non-integrated company¹³⁹¹.
- (1605) Therefore, the non-integrators exert a very limited competitive pressure on the four integrators with respect to the shipments of small package across the EEA with a committed time of delivery of next day/end-of-day. It is thus appropriate to look at the respective positions and strengths of the four integrators on the Polish intra-EEA express small package delivery market.

The four integrators on the Polish intra-EEA express small package delivery market

- (1606) Following the market reconstruction launched by the Commission, the revenues achieved by the integrators are spread as follows:

¹³⁸⁷ [Customer's name]* response to question 42.1 of questionnaire R20 to Customers Poland.

¹³⁸⁸ [Customer's name]* response to question 41.5.1.1 of questionnaire R20 to Customers Poland.

¹³⁸⁹ Questions 41.3 and 41.3.1 of the questionnaire R20 to customers-Poland-Phase II.

¹³⁹⁰ Questions 35-37 of the questionnaire R20 to customers-Poland-Phase II.

¹³⁹¹ Question 39 of the questionnaire R20 to customers-Poland-Phase II.

Table 46: International intra-EEA express deliveries in Poland (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[20-30]%
TNT Express	[20-30]%
Combined	[40-50]%
Deutsche Post DHL	[40-50]%
FedEx	[5-10]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹³⁹² and FedEx¹³⁹³ replies to the Questionnaire to competitors-Phase I.

(1607) As explained in Section 6.1.4, the industry also uses coverage data in order to measure the strength of a competitor on a certain market

Table 47: International intra-EEA express deliveries in Poland – coverage by the four integrators in terms of business addresses (Poland as destination point)

[...]*

Source: [...]*

FedEx

(1608) As explained in Section 7.3.9., FedEx is the weakest integrator among the four with a market share of [5-10]*%. The competitive constraint exerted by FedEx' is even lower as FedEx does not have the same geographic footprint as the Parties and DHL as regards intra-EEA express deliveries from Poland and is therefore much weaker than can be inferred from its revenue data.

(1609) In particular, the analysis of the data for EOD coverage provided in Table 47, shows that FedEx has the weakest coverage in Poland among the four integrators with a share of approximately [40-50]*% lagging behind UPS by more than [20-30]* percentage points and TNT and DHL by almost [10-20]* percentage points.

(1610) The inferiority of FedEx geographic coverage by EOD is even more evident when comparing the percentage of all postal codes covered in Poland.

(1611) On the basis of postal code coverage data, FedEx intra-EEA express EOD¹³⁹⁴ postal code coverage is approximately [60-70]*% lagging behind approximately [20-30]* and [30-40]* percentage points from the Parties and DHL respectively¹³⁹⁵.

(1612) Regarding the destination side, [Parties' coverage data in the EEA and estimates regarding the other integrators' estimate]*¹³⁹⁶, FedEx's fastest international intra-EEA express services from Warsaw have a time-in-transit of at least [...]* for deliveries two

¹³⁹² DHL's response to question 98 of questionnaire to competitors – Phase I.

¹³⁹³ FedEx' response to question 98 of questionnaire to competitors – Phase I.

¹³⁹⁴ This FedEx service is called International priority.

¹³⁹⁵ FedEx' submission of 16 May 2012, "Overview Products_Small Packages Delivery – FedEx".

¹³⁹⁶ [Parties' coverage data in the EEA and estimates regarding the other integrators' estimate]*

the two most important cities in Malta, Cyprus, Slovenia, Iceland, Latvia, Lithuania, Estonia, as well as to Tampere, Thessaloniki, Milan, Bergen, Bucharest, Kosice. By contrast, with very few exceptions, the Parties have a time-in-transit of one day from Warsaw to all the cities considered in [...] or otherwise shorter than the one of FedEx.

- (1613) The same applies to express intra-EEA deliveries from Krakow, although it appears that the coverage of the Parties, as well as the coverage of FedEx, allows for slightly less rapid deliveries. In any event, the Parties appear to have a better coverage than FedEx also from Krakow.
- (1614) FedEx's weakness in intra-EEA express deliveries from Poland is also confirmed by the replies to the market investigation. Only a minority of respondents consider that FedEx satisfies the criteria considered as indispensable while negotiating a contract for the provision of intra-EEA delivery services¹³⁹⁷ or offers the add-on service(s)/specific features they consider indispensable for their intra-EEA deliveries¹³⁹⁸. In addition, only a small minority of the respondents which organised a procedure or started negotiating a contract for the provision of express intra-EEA small package deliveries invited or requested a quotation from FedEx¹³⁹⁹.

Opek's acquisition

- (1615) FedEx has recently completed the acquisition of Opek, a domestic ground transport service provider in Poland. Previously, FedEx only had [...] stations and [...] satellite stations across Poland.
- (1616) According to the data submitted by the Parties, Opek's market share on the Polish domestic express market is only [0-5]*%, and [5-10]*% on the domestic deferred market. According to the Parties' figures, Opek has no presence in international intra-EEA express nor in intra-EEA deferred. By comparison, the Parties' combined market share in Poland is [20-30]*% for intra-EEA express and [20-30]*% for domestic express.
- (1617) As a result, even though Opek would allow FedEx to increase its domestic presence in Poland, it will not add volume in terms of intra-EEA express and in domestic express, and the added volume will still represent only a tiny fraction of the Parties' combined market share in domestic express in Poland. Furthermore, it is noted by FedEx that Opek's total activities of [...] shipments per annum represent in volume the equivalent of only one out of [...] days of TNT's daily operations¹⁴⁰⁰. The additional domestic volumes would thus not help FedEx improve its position in terms of economies of density and scale.
- (1618) Taking the Opek acquisition into account in FedEx's expansion plan¹⁴⁰¹, FedEx will operate a much higher number of local sorting centres compared to 2011. [Details on FedEx's expansion plan across EEA]*¹⁴⁰². [Details on FedEx's expansion plan across

¹³⁹⁷ Question 31 of the questionnaire Q20 to customers-Poland-Phase I.

¹³⁹⁸ Question 33 of the questionnaire Q20 to customers-Poland-Phase I.

¹³⁹⁹ Question 27 of the questionnaire R20 to customers-Poland-Phase II.

¹⁴⁰⁰ FedEx' reply to the Commission's request for information, 6 October 2012, p.5.

¹⁴⁰¹ Discussed in Section 7.3.10 of this Decision.

¹⁴⁰² FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

EEA]*¹⁴⁰³. [Details on FedEx's expansion plan across EEA]*¹⁴⁰⁴. [Details on FedEx's expansion plan across EEA]*¹⁴⁰⁵.

- (1619) [Details on FedEx's expansion plan across EEA]*
- (1620) According to the Parties' EOD coverage estimates, FedEx reached [40-50]*% coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx's coverage would translate into coverage in [...] in FY 2015¹⁴⁰⁶. This coverage would be almost aligned to TNT's current coverage ([...]*%) but still behind UPS's current coverage ([...]*%)¹⁴⁰⁷.
- (1621) As to the projected growth in actual volumes and market shares, FedEx's precise targets are less certain to be achieved and have to be viewed with cautions, as they have been set in a relatively general manner, and it is difficult to predict with certainty how successful the expansion strategy in the intra-EEA market will be with customers, particularly in view of the fact that Opek does not have international activities and thus the different profile of Opek's operations and customer base. FedEx also indicated that this original plan has already been slipping¹⁴⁰⁸. Even though it is likely that after Opek's integration FedEx's market share will increase, the Commission is unable to predict what market share FedEx is likely to achieve in the near future.
- (1622) It is likely that after having invested significantly in assets and capacity, FedEx will actively solicit new customer volumes, devote marketing and sales activities in order to fill its network and, in this way, try to reach the main objective, which is to significantly increase its scale and market presence. This will likely create a degree of competitive pressure on the other main integrators.
- (1623) However, the expansion of FedEx needs to be put into the perspective of its current market position, where the starting point for expansion is still quite modest. In Poland, FedEx achieved a revenue share of [5-10]% based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its growing position would still be far behind the combined entity and DHL given FedEx's low coverage on the destination side.
- (1624) Therefore, it can be expected that FedEx will exercise an increasing degree of competitive pressure on the main integrators in Poland in the near future. However, in combination with all other evidence, the counter-veiling effect of FedEx expansion will likely not be sufficient to counter-act negative effects of the Transaction on competition in Poland.

The merger is a "3 to 2" merger

- (1625) UPS, TNT and DHL are the three small package companies which offer the fastest delivery services from Poland according to [Parties' coverage data in the EEA and

¹⁴⁰³ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

¹⁴⁰⁴ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.

¹⁴⁰⁵ FedEx, reply to the request for information dated 16 November 2012 (Q30), Annex 3-OPEK.

¹⁴⁰⁶ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

¹⁴⁰⁷ [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹⁴⁰⁸ FedEx, response to the request for information dated 16 November 2012 (Q30).

estimates regarding the other integrators' estimate]*. They have equivalent times-in-transit for almost all the destinations¹⁴⁰⁹. Therefore with respect to geographic coverage of their intra-EEA express services UPS, TNT and DHL appear as close competitors, and closer to one another than to any other competitor.

- (1626) On the basis of the market investigation, it appears the vast majority of Polish customers indicated that UPS, TNT and DHL are by far each other's closest competitors according to several parameters¹⁴¹⁰. Moreover, an overwhelming majority of the customers recently organising a tender procedure or starting negotiations concerning express intra-EEA small package deliveries invited or requested a quotation from UPS, TNT and DHL.
- (1627) Therefore, it appears that within the group of integrators, UPS, TNT and DHL are close competitors while FedEx is lagging behind.
- (1628) Finally, the Commission considers that the Transaction is likely to eliminate an important competitive force and to limit the possibilities of switching supplier, as there is no countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects in Poland.

Price concentration and efficiencies

- (1629) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Poland would range between [0-5]*% and [5-10]*% depending on the model specification.¹⁴¹¹ The scope of estimated price increases reflects the fact that FedEx's coverage in Poland is relatively limited compared with the other integrators and non-integrators also have [...]*. The merger would therefore amount to a "3 to 2", which is expected to yield high price increases. The Commission also notes that in Poland, FedEx's market share is low, consistent with its limited coverage.
- (1630) Regarding efficiencies, the Commission has calculated that in Poland, cost savings would represent between [0-5]*% of net prices in Year [...]* and up to [5-10]*% of net prices in Year [...]*. Assuming a pass-through rate of [60-70]*% and taking Year [...]* efficiencies as the base line case, the net price effects in Poland would be positive, ranging between [0-5]*% and [0-5]*%.¹⁴¹² Note that even in Year [...]*- and even irrespective of the fact that this is a remote time horizon in the context of merger control - when full efficiencies will be achieved, net price effects in Poland would remain positive.

7.11.13.3. The Commission's conclusion

- (1631) In view of the arguments set out in Section 7.11.13.2, UPS, TNT and DHL can be seen as close competitors on the Polish international intra-EEA express market while FedEx is exerting only a weak constraint on the Parties.

¹⁴⁰⁹ [Parties' coverage data in the EEA and estimates regarding the other integrators' estimate]*

¹⁴¹⁰ Including the range of services offered geographic coverage, prices, track and trace system, latest pick-up time, on-time delivery record, B2C deliveries, add-on services offered, ability to serve customers of all sizes.

¹⁴¹¹ Note that these specifications include both models with and without non-integrators coverage data.

¹⁴¹² [Confidential information regarding efficiencies expected to arise from the Transaction]*

- (1632) In addition, also in view of the general assessment already conducted as regards barriers to entry in Section 7.6, countervailing buyer power and efficiencies, the Commission considers that the Transaction is likely to eliminate an important competitive force from the Polish international intra-EEA express market and to limit the possibilities of switching supplier as there is no sufficient countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects. Moreover, the Commission's quantitative analysis confirms that the Transaction is expected to cause price increases on the Polish market, even if the effects of efficiencies is taken in to account. The available price concentration analysis also provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.
- (1633) On the basis of all these qualitative and quantitative elements, the concentration is likely to lead to a significant impediment to effective competition on the Polish market for international intra-EEA express deliveries of small packages.

7.11.14. Romania

7.11.14.1. UPS's views

- (1634) Both UPS and TNT operate directly on the Romanian market for small package delivery services.
- (1635) UPS claims that the intra-EEA express services market will remain competitive *post* merger and that integrators face a competitive constraint from non-integrated companies for the international express category of services¹⁴¹³. In particular, they claim that GLS Romania is currently active in the 'next day end of day', 'maximum one day' and 'delivery within two or more days or no time commitment' segment and that it is possible for a competitor to introduce additional time-definite services. FedEx is represented in Romania by an ASC, International Romexpress Service. Posta Romano is the incumbent postal operator¹⁴¹⁴.
- (1636) UPS considers that FedEx, freight-forwarders, GLS and DPD are significant competitors of the Parties on the Romanian market and thus, the market will remain competitive post-Transaction¹⁴¹⁵.
- (1637) According to UPS's estimates of market shares for the Romanian international intra-EEA express market shares in 2010 are the following:

¹⁴¹³ Notifying party's response to the decision opening the proceedings, paragraphs 445-449.

¹⁴¹⁴ Form CO, paragraph 1092.

¹⁴¹⁵ Notifying party's response to the Statement of Objections, paragraph 9.625.

Table 48: International intra-EEA express deliveries in Romania (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[10-20]*%
TNT Express	[10-20]*%
Combined	[30-40]*%
DHL Express	[40-50]*%
Fedex	[5-10]*%
Royal Mail (GLS)	[0-5]*%
La Poste (DPD)	[0-5]*%
Posta Romano	[0-5]*%
Fan Courier	[0-5]*%
Cargus	
TCE Transexpress/TCE Logistica	[0-5]*%
Urgent Curier	[0-5]*%
Nemo	[0-5]*%
Rhenus	[0-5]*%
Express Interfracht România	[0-5]*%
World Courier	[0-5]*%
Gefco	[0-5]*%
Panalpina	[0-5]*%
Trans Express	[0-5]*%
Partner Express SRL	[0-5]*%
Craiss Logistik	[0-5]*%
CRX Curier RomExpress	[0-5]*%
Posta Atlassib Curier Rapid	[0-5]*%
Andreea Express	[0-5]*%
Best Letter Courier	
Chronos Curier	[0-5]*%
Aktif Ileti Service	[0-5]*%
Fastius	[0-5]*%
Mailman	[0-5]*%
Alo Curier Services	[0-5]*%
Mobius Express	
Curiero	
Colet Express	
Roexpres Service	
Sprint Curier	[0-5]*%
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

7.11.14.2. The Commission's assessment

(1638) First of all, this Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the intra-EEA express delivery market in Romania as such, even though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is no justification for basing the present assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections.

(1639) Second, as concerns the bidding data analysis carried out by the Notifying party, they are assessed in detail in Section 7.5.1.6.

- (1640) Moreover, as demonstrated in Section 6.1.6, contrary to what the Parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices.
- (1641) According to UPS data, apart from the four integrators, only the following operators would have a market share above [0-5]*%: [...]*. None of those operators would have a market share higher than [0-5]*%. On the basis of the revenue data provided by the Parties, DHL is the market leader and the merged entity would rank second, while other competitors including FedEx will have significantly lower market shares.

Non-integrators

- (1642) In this section, the Commission will examine the role of non-integrators on the Romanian international intra-EEA express market and the extent to which they exert competitive pressure on the Parties on this market.

DPD and GLS

- (1643) UPS attributes a negligible market share to DPD, which is corroborated by information provided by La Poste, according to which, with the possible exception of very limited volumes shipped by air for customers essentially purchasing road-based services, DPD does not offer international intra-EEA express services in Romania¹⁴¹⁶.
- (1644) As regards GLS, it only offers international intra-EEA express services on short-distance cross-border lanes via its ground network, with the exception of limited volumes shipped by air for customers requesting express services necessitating air transport occasionally and for a few packages. In Romania, it does not offer express intra-EEA services¹⁴¹⁷.
- (1645) Only a small minority of the respondents to the market investigation consider that GLS and DPD meet the criteria and offer the add-on service(s)/specific features that are considered indispensable by customers in the intra-EEA market¹⁴¹⁸.
- (1646) Besides, as explained in the general assessment of the competitive constraint exerted by DPD and GLS on the Parties in Section 7.2, none of these two operators is likely to expand significantly into the long haul express segment of the market in the near future, even if the merged entity would increase prices. Indeed, this would require a more extensive use of outsourcing of air transport and neither DPD nor GLS would be likely to be willing to follow such a path and be able to exert a significant constraint on the integrators on that basis.
- (1647) For these reasons, La Poste and Royal Mail, which have no significant presence on the Romanian market, are unlikely to expand in a near future such that they would become significant competitive forces vis-à-vis the merged entity.

Other non-integrated small package delivery companies

- (1648) As regards Nemo, Urgent Courier and Chronos, none of the respondents pointed to any of them when asked to identify credible competitive alternative to the Parties in Romania¹⁴¹⁹.

¹⁴¹⁶ La Poste, Question 162.ii of the questionnaire to competitors-Phase I.

¹⁴¹⁷ GLS, Question 162.ii of the questionnaire to competitors-Phase I.

¹⁴¹⁸ Responses to questions 31 and 33 of questionnaire Q22 to customers – Romania – Phase I.

(1649) Therefore, considering also the modest market share of these companies, it is concluded that Nemo, Urgent Courier and Chronos do not exert any significant competitive constraint on the Parties on the Romanian international intra-EEA express market and will not do so in a near future.

Freight forwarders and resellers

(1650) Panalpina one of the companies identified by UPS as operating in the Romanian international intra-EEA express market is a freight forwarder. [Details regarding Panalpina's service offering in Romania]*¹⁴²⁰.

(1651) Fan Courier is part of NetExpress Europe network for road transportation and it delivers by air through partnerships with [...] * and [...] *¹⁴²¹. Fan Courier is only present in domestic express services¹⁴²².

(1652) The majority of the respondents does not consider that freight forwarders can offer solutions comparable to the ones offered by small package delivery companies¹⁴²³ and would not consider services offered by freight forwarders as an alternative for intra-EEA services normally offered by integrators¹⁴²⁴.

(1653) Consequently, freight forwarders appear to exert a very limited competitive constraint on the Parties on the Romanian international intra-EEA express market.

Concluding remarks on non-integrated companies

(1654) Therefore, the non-integrators exert a weak competitive constraint on the Parties, notably for Romanian customers shipping express packages over long distances, the needs of which they are simply unable to satisfy.

Integrators

(1655) According to data directly obtained from each integrator during the investigation, the total revenues obtained by the four integrators in 2011 on the Romanian international intra-EEA express market would be split as follows:

¹⁴¹⁹ Responses to question 59 of questionnaire Q22 to customers – Romania – Phase I.
¹⁴²⁰ Form CO, p.118 -122.
¹⁴²¹ Fan Courier, response to question 17.2 of questionnaire to competitors – Phase I.
¹⁴²² Fan Courier, response to question 163 of questionnaire to competitors – Phase I.
¹⁴²³ Responses to question 42 of questionnaire R22 to customers – Phase II.
¹⁴²⁴ Responses to question 43.1 of questionnaire R22 to customers – Phase II.

Table 49: International intra-EEA express deliveries in Romania (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[20-30]%
TNT Express	[20-30]%
Combined	[40-50]%
Deutsche Post DHL	[50-60]%
FedEx	[0-5]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹⁴²⁵ and FedEx¹⁴²⁶ replies to the questionnaire to competitors-Phase I.

- (1656) The outcome of the Commission's reconstruction indicates that post Transaction, DHL would be the largest market participant, followed by the merged entity and FedEx, the latter having a very significantly lower weight.

DHL

- (1657) Referring to the figures in table 49, UPS argues that post Transaction, DHL would remain larger than the merged entity with a high market share of 50-60% in relation to the intra-EEA express market (integrators only)¹⁴²⁷. However, these figures rather indicate that while DHL would remain the strongest market player post-Transaction in terms of revenues, the merged entity would also have a very significant weight on the market, ranking second well ahead of FedEx and other non-integrators, which do not constitute significant competitive forces.
- (1658) These figures also show that the Parties are currently the second and third operators by some margin and that in view of the shares of the integrators' total revenues accounted for by UPS, the Transaction would eliminate a significant independent competitive force.
- (1659) Furthermore, as will be shown further in this section, the available price concentration analysis provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.

FedEx

- (1660) FedEx generates very limited revenues on the Romanian international intra-EEA express market compared with each of the other integrators. This, combined with the factors identified in the general assessment of the competitive constraint exerted by FedEx in Section 7.3, is a first and strong indication that FedEx only exerts a weak constraint on the Parties.

¹⁴²⁵ DHL's reply to question 98 of the questionnaire to competitors – Phase I.

¹⁴²⁶ FedEx's reply to question 98 of the questionnaire to competitors – Phase I.

¹⁴²⁷ Notifying party's response to the Statement of Objections, paragraph 9.610.

(1661) Moreover, FedEx' geographic coverage (on the destination side) is very weak in Romania compared to that achieved by the other integrators. Indeed, according to table 50; UPS, TNT, DHL and FedEx cover respectively [...]%, [...]%, [...]%, and [...]%, of the business addresses in Romania with their inbound international intra-EEA next-day end-of-day deliveries. Even though geographic coverage relates in the first place to inbound deliveries, it is also a reliable parameter to assess the strength of a network in terms of pick-up of outbound international volumes and ground transportation of these volumes within the origin country. Indeed, in a given country, the same network is used for the pick-up of outbound consignments and the delivery of inbound consignments.

Table 50: Geographic coverage of international intra-EEA express services in Romania

[...]*

Source: [...]*

- (1662) The network used by FedEx in Romania (via its ASC International Romexpress Service) thus appears very weak compared to that of the other integrators, which strongly limits FedEx' ability to offer international intra-EEA express to a large number of customers scattered over the whole territory. Indeed, in order to be able to pick-up small packages in late afternoon and carry them to the closest satellite air gateway so that they can be transported by air during the night and reach the consignees in the destination country by the next day, one needs a dense network in the origin country.
- (1663) In addition, as already indicated in Section 7.3, FedEx has less dense a network than the Parties in a number of EEA countries, which overall translates into a weak geographic coverage (on the destination side) for outbound international intra-EEA express volumes from Romania.
- (1664) [Parties' coverage data in the EEA and estimates regarding the other integrators' estimate]* illustrate FedEx's weaknesses vis-à-vis TNT Express as far as coverage is concerned.¹⁴²⁸ According to these data, FedEx's fastest international intra-EEA express services from Bucharest have a time-in-transit of at least [...] for deliveries to the two most important cities in Bulgaria, Cyprus, Estonia, the United Kingdom, Greece, Ireland, Iceland, Italy, Lithuania, Latvia, Malta, Slovenia and Slovakia as well as the cities of [...] and [...]. By contrast, the Parties have a time-in-transit of one day from Bucharest and also from Timisoara to all the cities considered in [...] save for Cyprus or otherwise shorter than the one of FedEx.
- (1665) Contrary to UPS's argument in the reply to the Statement of Objections¹⁴²⁹, FedEx's weakness in international intra-EEA express deliveries from Romania has been confirmed by the Romanian customers' replies to the market investigation. The majority of the Romanian respondents mentioned TNT and UPS as companies that satisfy the criteria as well as the add-on services they consider indispensable for small package delivery services, while a minority indicated DHL and FedEx¹⁴³⁰.

¹⁴²⁸ [Parties' coverage data in the EEA and estimates regarding the other integrators' estimate]*
¹⁴²⁹ Notifying party's response to the Statement of Objections, paragraph 9.623.
¹⁴³⁰ Responses to questions 25 and 28 of questionnaire Q22 to customers – Romania – Phase I.

- (1666) According to its European expansion plan¹⁴³¹, [Details on FedEx's expansion plan across EEA]*¹⁴³². [Details on FedEx's expansion plan across EEA]*¹⁴³³. [Details on FedEx's expansion plan across EEA]*¹⁴³⁴.
- (1667) [Details on FedEx's expansion plan across EEA]*
- (1668) Given that FedEx's activities are operated by a third party, UPS argues in its reply to the Letter of Facts¹⁴³⁵, that FedEx can increase its coverage presumably without additional investments. However, the achievement of FedEx' general target for coverage is dependent on this third party and cannot be taken as a firm commitment of FedEx's investments. It is only after the infrastructure has been improved that FedEx (or its local partner) would be able to significantly improve its coverage and try to grow more volumes and consequently market shares. According to the Parties' EOD coverage estimations, FedEx reached only [...] *% coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx coverage would translate into a coverage of [...] *% in FY 2015.¹⁴³⁶
- (1669) [Details on FedEx's expansion plan across EEA]*.¹⁴³⁷ Even though it is likely that FedEx market share may increase, The Commission is thus unable to predict what market share FedEx is likely to achieve in the near future.
- (1670) The expansion of FedEx needs to be put into perspective of its current market position, where the starting point for expansion is still quite modest. In Romania, FedEx achieved a revenue share of [0-5]% based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL given FedEx's low coverage on the destination side.
- (1671) Therefore, even if the competitive pressure of FedEx would likely increase compared to its current position, FedEx is not expected to represent a significant competitive constraint on the main integrators in the near future, such as to counter-act negative effects of the transaction on competition in Romania.

Closeness of competition

- (1672) The general conclusions already drawn with respect to the closeness of competition between the Parties on the international intra-EEA express market apply to Romania as well. Therefore, it can be concluded on the basis of the market investigation that non-integrators are largely unable to offer a valid alternative to the integrators international intra-EEA express services in Romania. Moreover, FedEx is significantly weaker than both Parties in terms of geographic coverage, which is an essential parameter for international intra-EEA express services.

¹⁴³¹ See Section 7.3.10 of this Decision.

¹⁴³² FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

¹⁴³³ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.

¹⁴³⁴ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 3.

¹⁴³⁵ The Notifying party's Response to the Letter of Facts, page 14.

¹⁴³⁶ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

¹⁴³⁷ FedEx, response to the request for information dated 16 November 2012 (Q30).

- (1673) On the basis of the market investigation, it appears that UPS, TNT and DHL are by far each other's closest competitors with respect to the range of service offered¹⁴³⁸. Moreover, an overwhelming majority of customers mentioned UPS, DHL and TNT as fulfilling the criteria they view as "must-haves" while negotiating an agreement relating the supply of small package delivery services, while only a minority share this opinion in respect of FedEx¹⁴³⁹.
- (1674) Consequently, UPS, TNT and DHL can be seen as close competitors in the Romanian international intra-EEA express market, whilst FedEx and non-integrators are significantly more distant competitors.

Price concentration and efficiencies

- (1675) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Romania would range between [5-10]*% and [5-10]*% depending on the model specification.¹⁴⁴⁰ The scope of these estimated price increases reflect the fact that in the model, FedEx's coverage in Romania is almost [...] and this is also consistent with its insignificant market share. The merger would therefore amount to a "3 to 2", which is expected to yield high price increases.
- (1676) Regarding efficiencies, the Commission has calculated that in Romania, cost savings would not be particularly large and represent between [0-5]*% of net prices in Year [...] and up to [5-10]*% of net prices in Year [...]*. These limited efficiencies are due to Romania's limited share of total air costs. Assuming a pass-through rate of [60-70]*% and taking Year [...] efficiencies as the base line case, the net price effects in Romania would be positive, ranging between [0-5]*% and [5-10]*%.¹⁴⁴¹ Note that even in Year [...] - and even irrespective of the fact that this is a remote time horizon in the context of merger control - when full efficiencies will be achieved, net price effects in Romania remain positive.

7.11.14.3. The Commission's conclusion

- (1677) In view of the arguments set out in Section 7.11.14.2, UPS, TNT and DHL can be seen as close competitors on the Romanian international intra-EEA express market, while FedEx and non-integrators are distant competitors exerting at best a weak constraint on the Parties.
- (1678) In addition, also in view of the general assessment already conducted as regards barriers to entry in Section 7.6, countervailing buyer power and efficiencies, the Commission considers that the Transaction is likely to eliminate an important competitive force from the Romanian international intra-EEA express market and to limit the possibilities of switching supplier as there is no sufficient countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects. Moreover, the Commission's quantitative analysis confirms that the Transaction is expected to cause price increases on the Romanian market, even if the effects of efficiencies is taken in to account. The available price concentration analysis also

¹⁴³⁸ Question 35, 35.1 and 35.2 of the questionnaire R22 to customers – Romania – Phase II.

¹⁴³⁹ See responses to question 31 of questionnaire Q22 to customers – Romania – Phase I.

¹⁴⁴⁰ Note that these specifications include both models with and without non-integrators coverage data.

¹⁴⁴¹ [Confidential information regarding efficiencies expected to arise from the Transaction]*

provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.

- (1679) Therefore, the Transaction would be likely to lead to a significant impediment to effective competition on the Romanian market for international intra-EEA express deliveries of small packages.

7.11.15. Slovakia

7.11.15.1. UPS's views

- (1680) According to UPS's estimates based on the product market definition followed by the Commission, *post* merger UPS considers that the market shares would be spread as follows:

Table 51: International intra-EEA express deliveries in Slovakia (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[10-20] *%
TNT Express	[10-20] *%
Combined	[30-40] *%
DHL Express	[30-40] *%
Fedex	[0-5] **%
Royal Mail (GLS)	[0-5] **%
La Poste (DPD)	[0-5] **%
Slovenska Posta, A.S.	[0-5] **%
Remax (excl. FedEx Service)	[0-5] **%
Ten Express	[0-5] **%
TopTrans	[0-5] **%
Chedos, A.S.	[0-5] **%
Hudos, S.R.O.	[0-5] **%
Dachser	[0-5] **%
CEVA Logistics	[0-5] **%
Express Slovakia	[0-5] **%
Kühne + Nagel	[5-10] **%
DB Schenker	[0-5] **%
GO4	[0-5] **%
Der Kurier	[0-5] **%
KEG	[0-5] **%
SEL	[0-5] **%
Aramex	[0-5] **%
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

- (1681) [Details on UPS's operations in Slovakia]*. Conversely, TNT is directly active in Slovakia.
- (1682) Concerning the Slovak international express segment, UPS argues that DHL is, and will remain, the largest player followed by the Parties. Other competitors on the market would include FedEx, La Poste/DPD, Austrian Post, Kurier Express Grell, De Kurier and TopTrans.

- (1683) UPS also claims that the market share of UPS overstates its competitive significance [Details on UPS's operations in Slovakia]*.
- (1684) In particular, in its response to the Decision opening the proceedings, UPS considers that the Commission overstated the Parties' market shares in several of the segments in which it sub-divided the express intra-EEA market and understated the importance of competitors such as DHL and FedEx.
- (1685) In its response to the Statement of Objections, UPS further claims that (i) the Commission should have taken into account only the replies to the market investigation coming from the customers that single-source long-haul intra-EEA express services, (ii) the Commission entirely ignored other, more relevant data in the form of the UPS and TNT bidding databases, which provide much more accurate information about the closeness of competition between competitors and (iii) FedEx is not a more distant and weaker competitor among the integrators in Slovakia.
- (1686) Based on these arguments, UPS submits that the Transaction will not lead to competition concerns on the international express market in Slovakia.

7.11.15.2. The Commission's assessment

- (1687) First of all, this Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the Slovak intra-EEA express delivery market as such, even though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is no justification for basing the present assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections.
- (1688) Second, as concerns the results of the bidding data analysis carried out by the Notifying party, they are assessed in detail in Section 7.5.1.6.
- (1689) Moreover, as demonstrated in Section 6.1.6, contrary to what the Parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices.
- (1690) UPS's market reconstruction includes a large number of companies, such as non-integrated companies, national postal operators and freight forwarders. However, as mentioned in Section 7.2., contrary to UPS's contention these companies do not offer a viable alternative to the customers when it comes to intra-EEA express deliveries, in particular for non-neighbouring countries: only the four integrators are capable to deliver small packages within a day also to distant or remote destinations.

The non-integrators on the Slovak intra-EEA express small package delivery market

- (1691) Having examined the role of the non-integrators on the Slovak intra-EEA express market and the extent to which they exert competitive pressure on the four integrators on this market, the Commission disagrees with UPS for the reasons set out in this section.

GLS/Royal Mail

- (1692) [Parties' coverage in the EEA and estimates regarding other players]*,¹⁴⁴² GLS/Royal Mail is unable to deliver from Bratislava and Kosice to any of the two major cities of all EEA countries with a firm one day time commitment (with the only exception of Budapest, Hungary), but rather needs [...] to ship to any of these two major cities. As a general rule, the farther the country of destination is from Slovakia, the longer is usually the time needed to complete the shipment. For example, [...] are needed for shipments to Austria whereas [...] are needed to deliver to Cyprus or Estonia.
- (1693) In view of the limited scope of the destinations offered by GLS/Royal Mail, it is rather unlikely that GLS/Royal Mail would be a suitable alternative for customers as opposed to the Parties who are able to deliver to all the EEA countries. In particular, UPS explains in its response to the Statement of Objections that most of the customers "bundle" that is to say that buy multiple services. They would not be able to do so from GLS/Royal Mail, at least as concerns intra-EEA express services in view of its extremely limited portfolio. Conversely, a customer could source from either UPS or TNT the full range of intra-EEA express it desires, as both serve the whole EEA territory from Slovakia, at least the capital cities.
- (1694) Moreover, as opposed to the Parties, during the Phase-II market investigation, GLS/Royal Mail has been mentioned by only a minority of the customers recently organizing a tender for the award of a contract concerning intra-EEA express delivery services or otherwise starting negotiations for the same purpose¹⁴⁴³.
- (1695) Furthermore, GLS/Royal Mail was mentioned by a small minority of the Slovak customers among the companies satisfying the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services (as opposed to the Parties)¹⁴⁴⁴. Similarly, as concerns the add-on services/specific features they view as must-have for small package companies providing intra-EEA deliveries, GLS/Royal Mail was referred to only by a minority of Slovak customers¹⁴⁴⁵.
- (1696) Consequently, GLS/Royal Mail is unlikely to exert a significant competitive constraint in the Slovak market of express intra-EEA small package deliveries.

La Poste/DPD

- (1697) As regards La Poste/DPD, UPS's own market share estimates of [0-5]*% show that it is hardly active in the Slovak intra-EEA express segment. Likewise, La Poste/DPD confirmed in the course of the Phase-II market investigation that it is able to deliver with a firm one day commitment from Slovakia to the Czech Republic only¹⁴⁴⁶.
- (1698) Furthermore, La Poste/DPD was mentioned only by a minority of the Slovak customers among the companies satisfying the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services (as opposed to the Parties)¹⁴⁴⁷. Similarly, as concerns the add-on services/specific features they view as

¹⁴⁴² [Parties' coverage in the EEA and estimates regarding other players]*

¹⁴⁴³ Question 27 of the questionnaire R23 to customers-Slovakia-Phase II.

¹⁴⁴⁴ Question 31 of the questionnaire Q23 to customers-Slovakia-Phase I.

¹⁴⁴⁵ Question 33 of the questionnaire Q23 to customers-Slovakia-Phase I.

¹⁴⁴⁶ La Poste/DPD's response to question 167 of questionnaire to competitors – Phase I.

¹⁴⁴⁷ Question 31 of the questionnaire Q23 to customers-Slovakia-Phase I.

must-have for small package companies providing intra-EEA deliveries, La Poste/DPD was referred to only by a minority of Slovak customers¹⁴⁴⁸.

- (1699) As a result, La Poste/DPD is unlikely to exert a significant competitive constraint in the Slovak market of express intra-EEA small package deliveries.

Slovenská Pošta

- (1700) Slovenská Pošta is the incumbent in the Slovak postal sector and is entrusted with the universal service throughout the Slovak Republic. It provides small package delivery services within the scope of the universal service with a weight limit of 10 kg domestically and up to 20 kg internationally.
- (1701) According to UPS's own market share estimates, Slovenská Pošta is hardly active in the intra-EEA express segment in Slovakia. Along the same line, Slovenská Pošta indicated during the market investigation that it does not provide intra-EEA delivery services with a firm one day commitment from Slovakia¹⁴⁴⁹.
- (1702) Consequently, it is unlikely that Slovenská Pošta exerts a competitive constraint in the Slovak intra-EEA express market.

Österreichische Post (Austrian Post)

- (1703) Österreichische Post (the "Austrian Post") has [...] operating subsidiaries in ten European countries. The company's business outside of Austria focuses on the parcel, logistics and unaddressed direct mail item segments. The Austrian Post is active on the Bosnian, Croatian, German, Hungarian, Montenegrin, Serbian and Slovakian markets, offering integrated logistics services.
- (1704) [Details regarding the Austrian Post's service offering in Slovakia]*¹⁴⁵⁰
- (1705) As already indicated in Section 7.2, companies acting as agents of the integrators exert only a very weak competitive constraint on the latter in the intra-EEA express market.
- (1706) Consequently, Austrian Post is unlikely to exert a significant competitive constraint in the Slovak intra-EEA express market.

Remax

- (1707) Remax it is a provider of domestic express services, which can exceptionally deliver only to [...] and [...] in the Czech Republic¹⁴⁵¹.
- (1708) Therefore, Remax is unlikely to exert a significant competitive constraint in the Slovak intra-EEA express market.

KEG, Der Kurier, TopTrans

- (1709) UPS indicated that KEG (Kurier Express Grell), Der Kurier and TopTrans would also be important competitors in the intra-EEA Slovak express market.

¹⁴⁴⁸ Question 33 of the questionnaire Q23 to customers-Slovakia-Phase I.

¹⁴⁴⁹ See Slovenská Pošta's reply to the Phase I questionnaire to competitors, question 167. Slovenská Pošta further indicated that it has a D + 2 time-in-transit for deliveries to BE, CY, CZ, DE, EE, FI, FR, GR, HU, NL, LV, LU, MC, ES, SE, IT, and UK (see e-mail received Slovenská Pošta on 25 September 2012).

¹⁴⁵⁰ [...]*

¹⁴⁵¹ Remax' response to question 167 of the questionnaire to competitors Phase I.

- (1710) In light of their relatively low market shares (according to UPS's own estimates) and of the considerations on non-integrated companies put forward in Section 7.1.2., the companies at issue do not represent a credible competitor in the Slovak intra-EEA express segment.
- (1711) As regards KEG, the Commission ascertained that it provides courier services [in Bratislava and] in Slovakia, and rather occasionally ships express parcels to abroad destinations. Express shipments (with next day delivery) sent to other countries are in a great majority of cases outsourced and delivered by integrators. KEG offers that service with its own vehicles only to the Czech Republic, Austria and Hungary and this only very exceptionally, on average it ships [...] * per month¹⁴⁵².
- (1712) Concerning Der Kurier, in Slovakia it is a part of the network of the German Der Kurier Group. The Commission established that it is able to deliver express (that is to say with a firm one day commitment) from Slovakia to some European countries via its own network, whereas for all other countries it outsources the service to integrators, so that it effectively re-sells the integrators service and only provides the pick-up.
- (1713) In particular, Der Kurier has a network which is able to deliver on its own express services from Slovakia to Austria, Hungary, the Czech Republic, Poland, Belgium, the Netherlands, Luxembourg, Germany, the United Kingdom. However, the pick-up coverage for these express services only encompasses the western parts of Slovakia which are close to Bratislava, where Der Kurier has its Slovak hub. For further areas within Slovakia, international deliveries would require [...] *. Der Kurier also stated that it has a negligible market position on the Slovak intra-EEA express market compared to large international companies like UPS¹⁴⁵³.
- (1714) Moreover, local small package delivery companies have been mentioned by a minority of the Slovak customers among the companies satisfying the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services (as opposed to the Parties)¹⁴⁵⁴. Similarly, as concerns the add-on services/specific features they view as must-have for small package companies providing intra-EEA services, local small package delivery companies have been referred to only by a minority of Slovak customers¹⁴⁵⁵.
- (1715) Consequently, KEG (Kurier Express Grell), Der Kurier and TopTrans are unlikely to exert a significant competitive constraints in the Slovak intra-EEA express market.

Freight Forwarders (Kuehne+Nagel, DB Schenker, etc.)

- (1716) UPS also indicates freight forwarders such as Kuehne+Nagel, DB Schenker as significant competitive forces in the Slovak intra-EEA express deliveries segment. As already indicated in Section 7.2. freight forwarders exert only a very weak competitive constraint on the integrators in the international intra-EEA express market, in particular when they act as mere resellers of the services of the integrators. The same has been confirmed by Slovak customers in the course of the Phase-II market investigation¹⁴⁵⁶.

¹⁴⁵² Agreed minutes of a teleconference call of 27 September 2012 with Der Kurier.

¹⁴⁵³ Agreed minutes of a teleconference call of 27 September 2012 with Der Kurier.

¹⁴⁵⁴ Question 31 of the questionnaire Q23 to customers-Slovakia-Phase I.

¹⁴⁵⁵ Question 33 of the questionnaire Q23 to customers-Slovakia-Phase I.

¹⁴⁵⁶ See responses to questions 42 and 42.1 of the questionnaire R23 to customers-Slovakia-Phase II.

- (1717) As argued by UPS in its response to the Statement of Objections, the Slovak customers seem to consider the services offered by the freight forwarders as an alternative for sending their intra-EEA express shipments¹⁴⁵⁷. Nevertheless, it is also true that they seem to suffer from a "reputation" issue. Indeed, in the course of the Phase-II market investigation, freight forwarders have been mentioned by a small minority of the Slovak customers among the companies satisfying the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services (as opposed to the Parties)¹⁴⁵⁸. Similarly, as concerns the add-on services/specific features they view as must-have for small package companies providing express intra-EEA delivery services, freight forwarders have been referred to only by a small minority of Slovak customers¹⁴⁵⁹.
- (1718) In addition, the Slovak customers do not see the freight forwarders in general as a good alternative to either UPS or TNT¹⁴⁶⁰. Moreover, they do not consider DB Schenker or Kuehne+Nagel as close competitor to UPS nor to TNT whatever the service or the characteristic at stake¹⁴⁶¹. Indeed, in the course of the Phase-II market investigation, freight forwarders have been mentioned by a small minority of the Slovak customers among the companies satisfying the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services (as opposed to the Parties)¹⁴⁶². The result was not different when considering the add-on services/specific features considered as must-have for small package companies providing express intra-EEA delivery services, freight forwarders have been referred to only by a small minority of Slovak customers¹⁴⁶³.

Concluding remarks on non-integrated companies

- (1719) Consequently, the non-integrators exert a very limited competitive pressure on the four integrators with respect to the shipments of small package across the EEA with a committed time of delivery of next day/end-of-day. It is thus appropriate to look at the respective positions and strengths of the four integrators on the Slovak intra-EEA express small package delivery market.

The four integrators on the Slovak intra-EEA express small package delivery market

- (1720) Following the market reconstruction launched by the Commission, the revenues achieved by the integrators are spread as follows:

¹⁴⁵⁷ See responses to question 43.1 of the questionnaire R23 to customers – Slovakia – Phase I.
¹⁴⁵⁸ Question 31 of the questionnaire Q23 to customers-Slovakia-Phase I.
¹⁴⁵⁹ Question 33 of the questionnaire Q23 to customers-Slovakia-Phase I.
¹⁴⁶⁰ See responses to question 59 of questionnaire Q23 to customers – Slovakia – Phase I.
¹⁴⁶¹ See responses to questions 36 and 37 of questionnaire R23 to customers –Slovakia – Phase II.
¹⁴⁶² Question 31 of the questionnaire Q23 to customers-Slovakia-Phase I.
¹⁴⁶³ Question 33 of the questionnaire Q23 to customers-Slovakia-Phase I.

Table 52: International intra-EEA express deliveries in Slovakia (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[20-30]%
TNT Express	[20-30]%
Combined	[40-50]%
Deutsche Post DHL	[40-50]%
FedEx	[5-10]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹⁴⁶⁴ and FedEx¹⁴⁶⁵ replies to the questionnaire to competitors-Phase I.

(1721) As explained in Section 6.1.4, the industry also uses coverage data in order to measure the strength of a competitor on a certain market:

Table 53: International intra-EEA express deliveries in Slovakia – coverage by the four integrators in terms of business addresses (Slovakia as destination point)

[...]*

Source: [...]*

DHL

(1722) Based on the figures provided in table 52, *post* merger, DHL and the merged entity would have a similar position in terms of market shares with respect to the intra-EEA express market well ahead of FedEx and other non-integrators, which do not constitute significant competitive forces.

(1723) These figures also show that the Parties are currently the second and third operators in terms of revenues and that the Transaction would eliminate a significant independent competitive force.

(1724) Furthermore, as will be shown further in this section, the available price concentration analysis provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.

FedEx

(1725) As explained in Section 7.3.9., FedEx is the weakest integrator among the four. With a share of the revenues ranging between 5 and 10, FedEx will barely exert any competitive pressure on the Parties *post* merger. The competitive constraint exerted by FedEx is even lower than can be inferred from the revenue figures provided in table 52. Indeed, FedEx does not have the same geographic footprint as the Parties and DHL as regards intra-EEA express deliveries from Slovakia.

¹⁴⁶⁴ DHL's response to question 98 of questionnaire to competitors – Phase I.

¹⁴⁶⁵ FedEx' response to question 98 of questionnaire to competitors – Phase I.

- (1726) International express deliveries require the use of extensive networks not only in the origin country, but also in the destination countries. In this respect, [Parties' coverage data and estimates regarding the other integrators' coverage]¹⁴⁶⁶, show that FedEx's fastest international intra-EEA express services from Bratislava and Kosice to the two major cities in Latvia, Lithuania, Estonia, Malta, Cyprus, Iceland as well as Bucharest require at least [...]*. By contrast, with the exception of Cyprus for TNT, the Parties appear to have a time-in-transit of one day from Slovakia to all the cities considered in [...]* (or otherwise shorter than the one of FedEx).
- (1727) From a qualitative point of view, Slovak customers indicated that they view very favourably suppliers that offer intra-EEA express services covering many destination countries. Indeed, when asked to rank the criteria they take into account while they negotiate supply agreements for intra-EEA express deliveries, the majority of respondents gave the highest grade to coverage of all destination countries. As already explained in detail in Section 7.3.2, FedEx does not offer all destination within the EEA.
- (1728) In addition, according to its European expansion plan¹⁴⁶⁷, [Details on FedEx's expansion plan across EEA]¹⁴⁶⁸. [Details on FedEx's expansion plan across EEA]*.
- (1729) [Details on FedEx's expansion plan across EEA]*. Therefore, it appears from FedEx' expansion plans that it is unlikely that such infrastructural gap will be filled in the near future, at least soon enough in order to adversely affect any anti-competitive strategy set up by the merged entity.
- (1730) Given that FedEx activities are operated by a third party, UPS argues in its reply to the Letter of Facts¹⁴⁶⁹, that FedEx can increase its coverage presumably without additional investments. However, the achievement of FedEx' general target for coverage is dependent on this third party and cannot be taken as a firm commitment of FedEx's investments. It is only after the infrastructure has been improved that FedEx (or its local partner) would be able to significantly improve its coverage and try to grow more volumes and consequently market shares. According to the Parties' EOD coverage estimations, FedEx reached only [...]**% coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx's coverage would translate into coverage in the range between [...]**% - [...]**% in FY 2015¹⁴⁷⁰. With this coverage, FedEx would overcome TNT ([...]**% coverage) but still lag behind UPS ([...]**%) coverage.
- (1731) [Details on FedEx's expansion plan across EEA]¹⁴⁷¹. Even though it is likely that FedEx market share may increase, the Commission is thus unable to predict what market share FedEx is likely to achieve in the near future.
- (1732) The expansion of FedEx needs to be put into the perspective of its current market position, where the starting point for expansion is still quite modest. In Slovakia, FedEx achieved a revenue share of [5-10]% based on integrators' revenues according to the

¹⁴⁶⁶ [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹⁴⁶⁷ See Section 7.3.10 of this Decision.

¹⁴⁶⁸ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

¹⁴⁶⁹ The Notifying party's Response to the Letter of Facts, page 15.

¹⁴⁷⁰ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

¹⁴⁷¹ FedEx, response to the request for information dated 16 November 2012 (Q30).

market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL given FedEx' low coverage on the destination side.

- (1733) Therefore, even if the competitive pressure of FedEx would likely increase compared to its current position, FedEx is not expected to represent a significant competitive constraint on the main integrators in the near future, such as to counter-act negative effects of the Transaction on competition in Slovakia.

The merger will be a "3 to 2 merger"

- (1734) The Parties and DHL offer the fullest possible range of small package delivery services in Slovakia. First of all, the Parties and DHL do not only offer international end-of-next-day services, but all three companies also offer premium services with a next day before 9.00 am or a next day before noon delivery commitment to a large number of countries. This is not the case for all non-integrators operating in Slovakia.
- (1735) Secondly, the vast majority of customers mentioned UPS, DHL and TNT as fulfilling the criteria they view as "must-haves" while negotiating an agreement relating the supply of small package delivery services whereas only a minority mentioned FedEx¹⁴⁷².
- (1736) Furthermore, based on the outcome of the phase I market investigation, it appears that while an overwhelming majority of the customers mentions both UPS and DHL as TNT's closest competitors and conversely both TNT and DHL as UPS's closest competitors, none of them mentions FedEx¹⁴⁷³.
- (1737) Within the group of integrators, FedEx is a significantly more distant and weaker competitor of UPS as opposed to both DHL and TNT for customers that need to ship packages to a broad range of destinations. Indeed, [Parties' coverage data and estimates regarding the other integrators' coverage]* indicate that the geographic coverage of FedEx' international intra-EEA express services (in terms of destinations reached from Slovakia within one day) is more limited than those of both UPS and TNT.

Price concentration and efficiencies

- (1738) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Slovakia would range between [0-5]*% and [5-10]% depending on the model specification.¹⁴⁷⁴ The scope of estimated price increases reflects the fact that FedEx's coverage in Slovakia is relatively limited compared with other integrators and non-integrators also have [...]*. The merger would therefore amount to a "3 to 2", which is expected to yield high price increases.
- (1739) Regarding efficiencies, the Commission has calculated that in Slovakia, cost savings would be very modest and represent between [0-5]*% of net prices in Year [...]* and up to [0-5]*% of net prices in Year [...]*. The scope of these efficiencies is due to Slovakia's limited share of total air costs. Assuming a pass-through rate of [60-70]*% and taking Year [...]* efficiencies as the base line case, the net price effects in Slovakia

¹⁴⁷² See responses to question 31 of questionnaire Q23 to customers – Slovakia – Phase I.

¹⁴⁷³ See responses to questions 60 and 61 of questionnaire Q23 to customers – Slovakia – Phase I.

¹⁴⁷⁴ Note that these specifications include both models with and without non-integrators coverage data.

would be positive, ranging between [0-5]*% and [0-5]*%.¹⁴⁷⁵ Note that even in Year [...]*- and even irrespective of the fact that this is a remote time horizon in the context of merger control - when full efficiencies will be achieved, net price effects in Slovakia remain positive.

7.11.15.3. The Commission's conclusion

- (1740) The Commission considers that the Transaction is likely to eliminate an important competitive force and to limit the possibilities of switching supplier, as there is no countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects in Slovakia.
- (1741) It follows from the arguments developed in Section 7.11.15.2 that TNT is a significant competitor of UPS in the Slovak intra-EEA express market, in particular in terms of overall revenues and geographic coverage. In fact, TNT - and to an even higher extent DHL - appear as the strongest sources of competitive constraint on UPS in the international intra-EEA express market for customers that need to ship packages to a broad range of countries of destinations.
- (1742) In addition, the orders of magnitude of price increases and efficiencies are such that a significant impediment to effective competition on the market for international intra-EEA express services is to be expected. The available price concentration analysis also provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.
- (1743) Therefore, the Commission concludes that the Transaction would lead to a significant impediment to effective competition in the market for intra-EEA express delivery services in Slovakia.

7.11.16. *Slovenia*

7.11.16.1. UPS's views

- (1744) According to UPS's estimates based on the product market definition followed by the Commission, *post* merger UPS considers that the market shares would be spread as follows:

¹⁴⁷⁵ [Confidential information regarding efficiencies expected to arise from the Transaction]*

Table 54: International intra-EEA express deliveries in Slovenia (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[20-30]*%
TNT Express	[10-20]*%
Combined	[30-40]*%
DHL Express	[40-50]*%
Fedex	[10-20]*%
Royal Mail (GLS)	[0-5]*%
La Poste (DPD)	[0-5]*%
Posta Slovenije D.O.O.	[0-5]*%
Intereuropa	[0-5]*%
Slovenske Zeleznice	[0-5]*%
City Express	[0-5]*%
Global Express	[0-5]*%
Business Express	[0-5]*%
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

- (1745) Both UPS and TNT operated directly on the Slovenian market for small package delivery services.
- (1746) In addition, concerning the Slovenian international express market, UPS argues that DHL and FedEx are very significant competitors. Other competitors include City Express and La Poste. Moreover UPS notes that the Parties do not appear to be the closest competitor.
- (1747) In its response to the Statement of Objections, UPS further claims that (i) the Commission should have taken into account only the replies to the market investigation coming from the customers that single-source long-haul intra-EEA express services, (ii) in addition to the non-integrators, freight forwarders are also important alternatives within the Slovenian intra-EEA express market.
- (1748) According to UPS, the Transaction will therefore not lead to competition concerns on the international express market in Slovenia.

7.11.16.2. The Commission's assessment

- (1749) This Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the Slovak intra-EEA express delivery market as such, even though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is no justification for basing the present assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections.
- (1750) Moreover, as demonstrated in Section 6.1.6, contrary to what the Parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices.

(1751) UPS's market reconstruction includes a large number of companies, such as non-integrated companies, national postal operators and freight forwarders. However, as mentioned in Section 7.2., contrary to UPS's contention these companies do not offer a viable alternative to the customers when it comes to intra-EEA express deliveries, in particular for non-neighbouring countries: only the four integrators are capable to deliver small packages within a day also to distant or remote destinations.

The non-integrators on the Slovenian intra-EEA express small package delivery market

(1752) Having examined the role of the non-integrators on the Slovenian intra-EEA express market and the extent to which they exert competitive pressure on the four integrators on this market, the Commission disagrees with UPS for the reasons set out in this section.

GLS/Royal Mail

(1753) As regards GLS/Royal Mail, it appears from UPS's own market share estimates of [0-5]*% that it is hardly active in the intra-EEA express segment from Slovenia. Moreover, [Parties' coverage in the EEA and estimates regarding other players]*,¹⁴⁷⁶ with the exception of Austria, GLS/Royal Mail is unable to deliver from Ljubljana or Maribor to any of the two major cities of all EEA countries with a firm one day time commitment. Indeed, it needs [...]* to ship to any of the two most important cities in the EEA countries.

(1754) In view of the limited scope of the destinations offered by GLS/Royal Mail, it is rather unlikely that it would be a suitable alternative for customers as opposed to the Parties who are able to deliver to all the EEA countries. In particular, UPS explains in its response to the Statement of Objections that most of the customers "bundle" that is to say that they buy multiple services at the same time. They would not be able to do so from GLS/Royal Mail, at least as concerns intra-EEA express services in view of its extremely limited portfolio. Conversely, a customer could source from either UPS or TNT the full range of intra-EEA express it desires, as both serve the whole EEA territory from Slovenia, at least the capital cities.

(1755) In addition, only a minority of the customers recently organising a tender procedure or starting negotiations for the provision of express intra-EEA small package deliveries invited or requested a quotation from GLS/Royal Mail¹⁴⁷⁷.

(1756) Furthermore, in the course of the Phase-I market investigation, when asked which of the small package delivery companies does satisfy the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services, GLS/Royal Mail was mentioned by a minority of the Slovenian customers¹⁴⁷⁸. In the same vein, as concerns the add-on services/specific features they view as must-have for small package companies providing intra-EEA services, GLS/Royal Mail was referred to by a minority of Slovenian customers¹⁴⁷⁹.

(1757) Consequently, GLS/Royal Mail is unlikely to exert a significant competitive constraint in the Slovenian market of express intra-EEA small package deliveries.

¹⁴⁷⁶ [Parties' coverage in the EEA and estimates regarding other players]*

¹⁴⁷⁷ Questions 27.1, 27.2 and 27.3 of the questionnaire R24 to customers-Slovenia-Phase II.

¹⁴⁷⁸ Question 31 of the questionnaire Q24 to customers-Slovenia-Phase I.

¹⁴⁷⁹ Question 33 of the questionnaire Q24 to customers-Slovenia-Phase I.

La Poste/DPD

- (1758) Similarly, as far as La Poste/DPD is concerned, it appears from UPS's own market share estimates of [0-5]*% that its presence in the Slovenian intra-EEA express segment is very limited.
- (1759) [Parties' coverage in the EEA and estimates regarding other players]*¹⁴⁸⁰ and by La Poste/DPD itself, according to which it is unable to deliver intra-EEA small packages with a firm one day commitment from Slovenia¹⁴⁸¹.
- (1760) Likewise, in the course of the Phase-I market investigation, when asked which of the small package delivery companies does satisfy the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services, La Poste/DPD was mentioned by a minority of the customers¹⁴⁸². In the same vein, as concerns the add-on services/specific features they view as must-have for small package companies providing intra-EEA services, La Poste/DPD was referred to by a minority of Slovenian customers¹⁴⁸³.
- (1761) Consequently, it is unlikely that La Poste/DPD represents a competitive constraint in the Slovenian market of express intra-EEA small package deliveries.

Posta Slovenije

- (1762) Posta Slovenije is the incumbent in the national postal sector in Slovenia. According to UPS's market share data, which have been confirmed to the Commission's during its market investigation, it is active only to a very limited extent in the intra-EEA express small package delivery segment from Slovenia.
- (1763) Not surprisingly, therefore, Posta Slovenije has been mentioned only by a very small minority of Slovenian customers among the companies taken into consideration when recently organizing a tender procedure or starting negotiations concerning intra-EEA express delivery services¹⁴⁸⁴.
- (1764) Consequently, Posta Slovenije is unlikely to exert a significant constraint in the express intra-EEA segment in Slovenia.

City Express

- (1765) UPS indicates that City Express would also be an important competitor in the intra-EEA expresses Slovenian market. The Commission has repeatedly tried to contact City Express during the market investigation but never managed to obtain a reply. In any event, the Commission considers that – in light of its relatively low market share (according to UPS's estimates) and of the considerations on non-integrated companies put forward in Section 7.1.2. – the company at issue does not represent a significant competitive constraint in the Slovenian intra-EEA express market.

¹⁴⁸⁰ [Parties' coverage in the EEA and estimates regarding other players]*

¹⁴⁸¹ See table attached to the e-mail sent by La Poste on 27 September 2012.

¹⁴⁸² Question 31 of the questionnaire Q24 to customers-Slovenia-Phase I.

¹⁴⁸³ Question 33 of the questionnaire Q24 to customers-Slovenia-Phase I.

¹⁴⁸⁴ Questions 27.1, 27.2 and 27.3 of the questionnaire R24 to customers-Czech Republic-Phase II.

- (1766) Furthermore, it appears from City Express' website that the company at issue delivers mainly, if not only, in the Slovenian territory. International deliveries are only available upon request¹⁴⁸⁵.
- (1767) Consequently, it is unlikely that City Express represents a competitive constraint in the intra-EEA express Slovenian segment.

Freight Forwarders

- (1768) UPS also indicates certain freight forwarders as competitive forces in the Slovenian intra-EEA express deliveries segment. However, as already indicated in Section 7.2. freight forwarders exert only very weak competitive constraint on the integrators in the international intra-EEA express market, in particular when they act as mere resellers of the services of the integrators.
- (1769) In addition, Slovenian customers do not see the freight forwarders in general as a good alternative to either UPS or TNT¹⁴⁸⁶. Indeed, in the course of the Phase-II market investigation, freight forwarders were mentioned only by a small minority of the Slovak customers as among the companies satisfying the criteria they consider indispensable in order to start negotiating a contract for the provision of intra-EEA delivery services (as opposed to the Parties)¹⁴⁸⁷. The result was not different when considering the add-on services/specific features considered as must-have for small package companies providing express intra-EEA delivery services, freight forwarders have been referred to only by a small minority of Slovak customers¹⁴⁸⁸.
- (1770) Therefore, it is likely that customers use freight forwarders on a case-by-case basis rather than systematically as they do with integrators.
- (1771) Consequently the non-integrators exert a very limited competitive pressure on the four integrators, with respect to the shipments of the small package across the EEA with a committed time of delivery of next day/end-of-day. It is thus appropriate to look at the respective positions and strengths of the four integrators on the Slovenian intra-EEA express small package delivery market.

The four integrators on the Slovenian intra-EEA express small package delivery market

- (1772) Following the market reconstruction launched by the Commission, the revenues achieved by the integrators are spread as follows:

¹⁴⁸⁵ <http://www.cityexpress.si/en/courier-service.html>.

¹⁴⁸⁶ See responses to question 59 of questionnaire Q24 to customers – Slovenia – Phase I.

¹⁴⁸⁷ Question 31 of the questionnaire Q24 to customers-Slovenia-Phase I.

¹⁴⁸⁸ Question 33 of the questionnaire Q24 to customers-Slovenia-Phase I.

Table 55: International intra-EEA express deliveries in Slovenia (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[20-30]%
TNT Express	[10-20]%
Combined	[30-40]%
Deutsche Post DHL	[60-70]%
FedEx	[0-5]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹⁴⁸⁹ and FedEx¹⁴⁹⁰ replies to the questionnaire to competitors-Phase I.

(1773) As explained in Section 6.1.4, the industry also uses coverage data in order to measure the strength of a competitor on a certain market.

Table 56: International intra-EEA express deliveries in Slovenian – coverage by the four integrators in terms of business addresses (Slovenia as destination point)

[...]*

Source: [...]*

DHL

(1774) Referring to the figures in Table 55, UPS argues that post Transaction, DHL would remain larger than the merged entity with a high market share of 60-70% in relation to the intra-EEA express market (integrators only). However, these figures rather indicate that while DHL would remain the strongest market player post-Transaction in terms of revenues, the merged entity would also have a very significant weight on the market, ranking second well ahead of FedEx and other non-integrators, which as demonstrated in Section 7.2 do not constitute significant competitive forces.

(1775) These figures also show that the Parties are currently the second and third operators by some margin and that in view of the shares of the integrators' total revenues accounted for by TNT, the Transaction would eliminate a significant independent competitive force.

(1776) Furthermore, as will be shown in this section, the available price concentration analysis provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.

FedEx

(1777) As explained in Section 7.3.9., FedEx is the weakest integrator among the four. With a share of the revenues ranging between 0 and 5, FedEx will barely exert any competitive

¹⁴⁸⁹ DHL's response to question 98 of questionnaire to competitors – Phase I.

¹⁴⁹⁰ FedEx' response to question 98 of questionnaire to competitors – Phase I.

pressure on the Parties *post* merger. The competitive constraint exerted by FedEx is even lower than can be inferred from the figures provided in table 55. Indeed, FedEx does not have the same geographic footprint as the Parties and DHL as regards intra-EEA express deliveries from Slovenia and is therefore much weaker than can be inferred from its revenue data.

- (1778) [Parties' coverage data and estimates regarding the other integrators' coverage]*,¹⁴⁹¹ FedEx is unable to deliver from Slovenia with a firm one day commitment to the two major cities in all EEA countries with the exception of the Czech Republic, Germany, France, the United Kingdom, Hungary, Ireland, Poland as well as Vienna (Austria) and Timisoara (Romania).
- (1779) From a qualitative point of view, Slovenian customers indicated that they view very favourably suppliers that offer intra-EEA express services covering many destination countries, with an extensive geographic coverage in each of them. Indeed, when asked to rank the criteria they take into account when they negotiate supply agreements for intra-EEA express deliveries, almost all the respondents gave the highest grade to (i) the coverage of all destination countries and (ii) the extensive geographic coverage in the country of destination¹⁴⁹².
- (1780) In addition, according to its European expansion plan¹⁴⁹³, [Details on FedEx's expansion plan across EEA]*¹⁴⁹⁴. [Details on FedEx's expansion plan across EEA]*¹⁴⁹⁵. [Details on FedEx's expansion plan across EEA]*¹⁴⁹⁶.
- (1781) [Details on FedEx's expansion plan across EEA]*. Therefore, it appears from FedEx' expansion plans that it is unlikely that such infrastructural gap will be filled in the near future, at least soon enough in order to adversely affect any anti-competitive strategy set up by the merged entity.
- (1782) Given that FedEx's activities are operated by a third party, UPS argues in its reply to the Letter of Facts¹⁴⁹⁷, that FedEx can increase its coverage presumably without additional investments. However, the achievement of FedEx' general target for coverage is dependent on this third party and cannot be taken as a firm commitment of FedEx's investments. It is only after the infrastructure has been improved that FedEx (or its local partner) would be able to significantly improve its coverage and try to grow more volumes and consequently market shares. According to the Parties' EOD coverage estimations, FedEx had [...] *% coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx's coverage would translate into coverage in the range of [...] *% - [...] *% in FY 2015¹⁴⁹⁸. With this coverage, FedEx would still be far behind UPS and TNT ([...] *% coverage).

¹⁴⁹¹ [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹⁴⁹² Question 30 of questionnaire Q24 to customers – Slovenia – Phase I.

¹⁴⁹³ See Section 7.3.10 of this Decision.

¹⁴⁹⁴ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

¹⁴⁹⁵ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.

¹⁴⁹⁶ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 3.

¹⁴⁹⁷ The Notifying party's Response to the Letter of Facts, page 15.

¹⁴⁹⁸ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

- (1783) [Details on FedEx's expansion plan across EEA]*¹⁴⁹⁹. Even though it is likely that FedEx market share may increase, the Commission is thus unable to predict what market share FedEx is likely to achieve in the near future.
- (1784) The expansion of FedEx needs to be put into perspective of its current market position, where the starting point for expansion is still quite modest. In Slovenia, FedEx achieved a revenue share of [0-5]% based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL given FedEx' low coverage on the destination side.
- (1785) Therefore, even if the competitive pressure of FedEx would likely increase compared to its current position, FedEx is not expected to represent a significant competitive constraint on the main integrators in the near future, such as to counter-act negative effects of the Transaction on competition in Slovenia.

The merger is a "3 to 2" merger

- (1786) UPS, TNT and DHL are the three small package companies which offer the fastest delivery services from Slovenia according to time-in-transit data provided by UPS.
- (1787) First of all, the Parties and DHL not only offer international end-of-next-day services, but all three companies also offer premium services with a next day before 9.00 am or a next day before noon delivery commitment to a very large number of countries of destination. This is not the case for all non-integrators operating in the Slovenian international intra-EEA express market, most notably [...] and [...].
- (1788) Therefore, with respect to geographic coverage of their intra-EEA express services, UPS, TNT and DHL appear as close competitors, and closer to one another than to any other competitor.
- (1789) Within the group of integrators, FedEx appears as a significantly more distant and weaker competitor of UPS than both DHL and TNT for customers that need to ship express packages to a broad range of destinations. Indeed, [Parties' coverage data and estimates regarding the other integrators' coverage]* indicate that the geographic coverage of FedEx' international intra-EEA express services (in terms of destinations reached from Slovenia within one day) is significantly more limited than those of both UPS and TNT.
- (1790) Moreover, in the course of the Phase I market investigation, an overwhelming majority of customers mentioned UPS, DHL and TNT as fulfilling the criteria they view as "must-haves" while negotiating an agreement relating the supply of small package delivery services, while only a minority share this opinion in respect of FedEx¹⁵⁰⁰. Likewise as to the specific features they consider indispensable, an even bigger gap stands between the proportion of customers who rely on the Parties and DHL to offer such services and the ones who rely on FedEx to do so¹⁵⁰¹.

¹⁴⁹⁹ FedEx, response to the request for information dated 16 November 2012 (Q30).

¹⁵⁰⁰ See responses to question 31 of questionnaire Q24 to customers – Slovenia – Phase I.

¹⁵⁰¹ See responses to question 33 of questionnaire Q8 to customers – Slovenia – Phase I.

- (1791) FedEx weakness has been noted also by Slovenian customers in the course of the Phase-II market investigation, the vast majority of which ranked it well behind TNT, and UPS and DHL¹⁵⁰².
- (1792) As a result, TNT is a significant competitor of UPS in the Slovenian intra-EEA express market, in particular in terms of overall revenues and geographic coverage. TNT – and to an even larger extent DHL - appear as the strongest sources of competitive constraint on UPS in the international intra-EEA express market for customers that need to ship packages to a broad range of countries of destinations.
- (1793) Therefore, it appears that within the group of the integrators, UPS, TNT and DHL are close competitors while FedEx is lagging behind.

Price concentration and efficiencies

- (1794) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Slovenia would range between [5-10]*% and [5-10]*% depending on the model specification.¹⁵⁰³ The scope of estimated price increases reflects the fact that in the model, FedEx's has [...] in Slovenia and this is consistent with its insignificant market share. The merger would therefore amount to a "3 to 2", which is expected to yield high price increases.
- (1795) Regarding efficiencies, the Commission has calculated that in Slovenia, cost savings could be significant and represent between [0-5]*% of net prices in Year [...] and up to [10-20]*% of net prices in Year [...]*. Assuming a pass-through rate of [60-70]*% and taking Year [...] efficiencies as the base line case, the net price effects in Slovenia would be positive despite the possibly large cost savings. These net price effects range from [0-5]*% to [0-5]*%.¹⁵⁰⁴ Only in Year [...] would net price effects become slightly negative but this is a remote time horizon in the context of merger control.

7.11.16.3. The Commission's conclusion

- (1796) The Commission considers that the Transaction is likely to eliminate an important competitive force and to limit the possibilities of switching supplier, as there is no countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects in Slovenia.
- (1797) Overall in Slovenia, the orders of magnitude of price increases and efficiencies are such that a significant impediment of effective competition on the market for international intra-EEA express services is to be expected. The available price concentration analysis also provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.
- (1798) Therefore, the Commission concludes that the Transaction would lead to a significant impediment to effective competition in the market for intra-EEA express delivery services in Slovenia.

¹⁵⁰² Question 39 of the questionnaire R24 to customers-Slovenia-Phase II.

¹⁵⁰³ Note that these specifications include both models with and without non-integrators coverage data.

¹⁵⁰⁴ [Confidential information regarding efficiencies expected to arise from the Transaction]*

7.11.17. Sweden

7.11.17.1. UPS's views

(1799) According to UPS's estimates based on the product market definition followed by the Commission, *post* merger UPS considers that the market shares would be spread as follows:

Table 57: International intra-EEA express deliveries in Sweden (2010) – UPS's estimates

	INTERNATIONAL INTRA EEA
Company	Maximum one day
UPS	[20-30]*%
TNT Express	[10-20]*%
Combined	[30-40]*%
DHL Express	[30-40]*%
Fedex	[5-10]*%
POST NORD GROUP	[5-10]*%
Posten Norge - Bring Parcels	[5-10]*%
DB Schenker	[5-10]*%
World Courier	[0-5]*%
Panalpina	[0-5]*%
Kühne + Nagel	[0-5]*%
DSV	[0-5]*%
Ceva Logistics	[0-5]*%
Courier X AB	[0-5]*%
	100.0%

Source: UPS's response of 7 August 2012 to Commission's Request for information of 31 July 2012.

- (1800) First of all, it is worth mentioning that both UPS and TNT are directly active on the Swedish market for small package delivery services.
- (1801) In addition, in its notification, UPS mentions that, according to its bid data, UPS and TNT are not particularly close competitors. [Confidential information taken from the Parties' internal databases]*.
- (1802) The Notifying party therefore submits that UPS and TNT are not each other's closest competitors. It furthermore notes that in [...] *% of all case "others" are identified as the primary competitor, which most likely includes PostNord and Posten Norge. UPS reiterates this claim in its response to the Statement of Objections.
- (1803) In its response to the Statement of Objections, UPS also raises supplementary arguments. First, the Commission should have taken into account only the replies to the market investigation coming from the customers that single-source long-haul intra-EEA express services. Second, freight forwarders, such as DB Schenker, exert a competitive constraint on the integrators on the intra-EEA express market. Third, FedEx is not as weak as claimed in the Statement of Objections.
- (1804) Based on these arguments, it submits that the Transaction will not lead to competition concerns on the international express market in Sweden. DHL will remain a significant player on the market as will other players such as FedEx, PostNord, DB Schenker and Posten Norge.

7.11.17.2. The Commission's assessment

- (1805) First of all, this Decision does not seek to address solely the competition concerns faced by the customers that single-source long-haul delivery services. Indeed, the Commission considers that the Transaction will lead to a significant impediment to effective competition on the Swedish intra-EEA express delivery market as such, even though the competitive constraint exerted by some competitors could be even weaker for the long-haul destinations. Consequently, there is justification for basing the present assessment only on the replies from the single-sourcing customers as suggested by UPS in its response to the Statement of Objections. Moreover, as demonstrated in section 6.1.6, contrary to what the parties maintain in the response to the Statement of Objections, the fact that customers multi-source/bundle does not affect the Parties' ability to increase prices. Therefore, this argument will not be considered in the following assessment.
- (1806) Second, as concerns the results of the bidding data analysis carried out by the Notifying party, they are assessed in detail in Sections 7.5.1.5 and following.
- (1807) Apart from the four integrators, UPS mainly sees PostNord, Posten Norge/Bring Parcel and DB Schenker as exerting effectively a competitive constraint on the intra-EEA express market in Sweden. All other players on the market are credited by the Notifying party of individual market shares below [0-5]*%¹⁵⁰⁵, which as such would not enable them to exert any competitive pressure whatsoever.

The non-integrators on the Swedish intra-EEA express small package delivery market

- (1808) Having examined the role of the non-integrators on the Swedish intra-EEA express market and the extent to which they exert competitive pressure on the four integrators on this market, the Commission disagrees with UPS for the reasons set out in this section.

Post Nord

- (1809) Post Nord is the parent company of the group formed by the merger between Posten AB, the Swedish postal incumbent operator, and Post Danmark A/S, the Danish postal incumbent operator
- (1810) [Parties' coverage in the EEA and estimates regarding other players]*¹⁵⁰⁶, Post Nord is only capable to deliver with a time-commitment of next day to Denmark and Norway¹⁵⁰⁷. This is explained by the fact that, for its international deliveries, it uses the [...] network: "[...]"*¹⁵⁰⁸. As explained previously, [...] is a ground-based operator which does not fully compete with the four integrators. For shipments to Finland, the situation is even worse since it is able to deliver only in [...]*. In the remaining EEA countries, Post Nord cannot either offer express services at all.¹⁵⁰⁹ By contrast, both UPS and TNT offer deliveries by next day/end-of-day to all the EEA countries, at least to their capitals, the second main city being served in maximum two days.

¹⁵⁰⁵ [DSV's service offering in Sweden]*

¹⁵⁰⁶ [Parties' coverage in the EEA and estimates regarding other players]*

¹⁵⁰⁷ Post Nord does not offer delivery services to Cyprus and Malta.

¹⁵⁰⁸ Post AB and Post Danmark responses to question 2.7.1 of questionnaire to competitors R30 –Phase II.

¹⁵⁰⁹ It can ship packages in [...] in four EEA countries and in at least [...] in eighteen countries.

- (1811) In this respect, Swedish customers indicated that they view very favourably suppliers that offer intra-EEA express services covering many destination countries. When asked to rank the criteria they take into account when they negotiate supply agreements for intra-EEA express deliveries, almost all the respondents gave the highest grade to *inter alia* the coverage of all destination countries¹⁵¹⁰. In view of the limited scope of the destinations offered by Post Nord, it is rather unlikely that Post Nord would be a suitable alternative for customers as opposed to the Parties who are able to deliver to all the EEA countries. In particular, UPS explains in its response to the Statement of Objections that most of the customers "bundle" that is to say that buy multiple services. They would not be able to do so from Post Nord, at least as concerns intra-EEA express services in view of its portfolio which covers only 2 destination countries for shipments with a time-commitment of one day. Conversely, a customer could source from either UPS or TNT the full range of intra-EEA express it desires, as both serve the whole EEA territory from Sweden, at least the capital cities within one day.
- (1812) This is confirmed by the fact that a vast majority of the respondents does not consider Post Nord as a credible alternative to the Parties for intra-EEA express deliveries¹⁵¹¹, as UPS underlines in its response to the Statement of Objections: "*one out of four customers who answered to Question 59 included Post Nord as a credible alternative*"¹⁵¹², which implies conversely that three quarters do not see it as such. In addition and as a consequence of the previous elements, only a fringe minority of the Swedish customers who organised a tender procedure or started negotiating a contract for the provision of intra-EEA express shipment of small packages invited Post Nord to submit an offer or requested a quotation from them over the last two years¹⁵¹³.
- (1813) Consequently, Post Nord is unlikely to exert any meaningful competitive constraint on the Parties on the Swedish intra-EEA express market, apart for packages to be shipped to Denmark and Norway. In such cases, Post Nord could be seen as a very remote competitor to the integrators.

DB Schenker

- (1814) By crediting it with a market share of [5-10]*%, UPS appears to have heavily overestimated DB Schenker's actual market position. Indeed, data directly obtained from DB Schenker indicates that it has a much lower weight on the market.
- (1815) As put forward by UPS in its response to the Statement of Objections, the Swedish customers seem to consider the services offered by the freight forwarders via their network as an alternative for sending their intra-EEA express shipments to a limited extent¹⁵¹⁴. However, as explained by DB Schenker they barely use their own network to ship small packages but rather rely on the integrators, even in markets where they have dedicated subsidiaries¹⁵¹⁵. Therefore, as explained in the section relating to freight forwarders, these latter exert only a remote competitive constraint on the integrators in

¹⁵¹⁰ See responses to question 30 of questionnaire Q26 to customers – Sweden – Phase I.

¹⁵¹¹ See responses to question 59 of questionnaire Q26 to customers – Sweden – Phase I.

¹⁵¹² Notifying party's response to the Statement of Objections, paragraph 9.713.

¹⁵¹³ See responses to question 27 of questionnaire R26 to customers – Sweden – Phase I.

¹⁵¹⁴ See responses to question 43.1 of the questionnaire R26 to customers – Sweden – Phase I.

¹⁵¹⁵ See agreed minutes of the teleconference call with DB Schenker on 29 August 2012.

the intra-EEA express market since they cannot actively compete with the integrators from which they use the network.

- (1816) This is confirmed by the outcome of the market investigation in Sweden. Indeed, it appears that freight forwarders suffer from a "reputation" issue. Only a minority of the Swedish customers considers that freight forwarders offer the add-on services¹⁵¹⁶ or satisfy the criteria¹⁵¹⁷ they consider indispensable while negotiating a contract for the supply of small package deliveries. In addition, the Swedish customers do not see the freight forwarders in general and DB Schenker in particular as a good alternative to either UPS or TNT¹⁵¹⁸. Moreover, they do not consider DB Schenker as a close competitor to UPS nor to TNT whatever the service or the characteristic at stake¹⁵¹⁹. Finally, over the last two years, DB Schenker has been invited to submit an offer or a quotation for the supply of intra-EEA express shipments by only a limited minority of respondents to the market investigation¹⁵²⁰. Therefore, one can conclude that it is likely that customers use freight forwarders on a case-by-case basis rather than systematically as they do with integrators since as underlined by a respondent: "*it is of course very costly*"¹⁵²¹.
- (1817) Consequently, DB Schenker is unlikely to exert a significant competitive constraint on the Parties on the intra-EEA express small package delivery market in Sweden.
- (1818) In its response to the Statement of Objections¹⁵²², UPS uses the willingness of the customers to switch to deferred services in case of a price increase of 5-10% of the intra-EEA express deliveries to demonstrate that Post Nord and DB Schenker exert a "*substantial competitive constraint on the Parties' pricing behaviour on the intra-EEA express market*". Nevertheless, UPS has no evidence whatsoever that the customers would switch to these companies and would not actually switch to deferred services offered by UPS or TNT. Indeed, as stated by UPS in its presentation during the Oral Hearing: "[Confidential information regarding the Parties' customer base]"¹⁵²³. Therefore, should a customer decide to switch from express to deferred services, according to UPS's data, it is likely that it would still stay a UPS customer, being already accustomed to buy deferred services from it.

Posten Norge/Bring Parcel

- (1819) Posten Norge is the Norwegian incumbent postal operator and Bring Parcel is its subsidiary dedicated to the handling of small packages in the Nordics.
- (1820) Posten Norge/Bring Parcel claims that it offers committed next day deliveries only to Nordic countries, namely Norway, Finland Sweden and Denmark¹⁵²⁴. [Parties' coverage in the EEA and estimates regarding other players]"¹⁵²⁵. Otherwise, for the remaining

¹⁵¹⁶ See responses to question 33 of questionnaire Q26 to customers – Sweden – Phase I.

¹⁵¹⁷ See responses to question 31 of questionnaire Q26 to customers – Sweden – Phase I.

¹⁵¹⁸ See responses to question 59 of questionnaire Q26 to customers – Sweden – Phase I.

¹⁵¹⁹ See responses to questions 36 and 37 of questionnaire R26 to customers – Sweden – Phase II.

¹⁵²⁰ See responses to question 27 of questionnaire R26 to customers – Sweden – Phase II.

¹⁵²¹ See [Customer's name]* response to question 44.1 of questionnaire R26 to customers – Sweden – Phase II.

¹⁵²² Notifying party's response to the Statement of Objections, paragraphs 9.715 and 9.720.

¹⁵²³ [Confidential information regarding the Parties' customer base]*

¹⁵²⁴ Posten Norge's response to question 3 of questionnaire to competitors – Phase I.

¹⁵²⁵ [Parties' coverage in the EEA and estimates regarding other players]*

EEA countries, Posten Norge/Bring Parcel delivers in at least [...] ¹⁵²⁶. Indeed, Bring parcel is a member of the cooperative network NetExpress, which even through set up cooperation with other domestic small package suppliers, cannot offer intra-EEA express deliveries.

- (1821) Furthermore, Posten Norge/Bring Parcel is not mentioned by the customers as a good alternative to the Parties for intra-EEA express deliveries ¹⁵²⁷. Even for deliveries to neighbouring countries, only a limited minority considers Bring Parcels to be at the level of the integrators ¹⁵²⁸. Finally, none of the customers, who have been part of the market investigation and who have organised a tender procedure or started negotiating a contract for the provision of intra-EEA express shipment of small packages, invited Posten Norge/Bring Parcel to submit an offer or requested a quotation from them over the last two years ¹⁵²⁹.
- (1822) It is worth stressing that, in its response to the Statement of Objections, UPS did not dispute the Commission's assessment of Posten Norge's competitive position on the Swedish intra-EEA express delivery market.
- (1823) Consequently, Posten Norge/Bring Parcel is unlikely to exert a significant competitive constraint on the Parties on the intra-EEA express small package delivery market in Sweden.

Conclusion on the non-integrators

- (1824) Consequently the non-integrators exert a very limited competitive pressure on the four integrators, with respect to the shipments of small package across the EEA with a committed time of delivery of next day/end-of-day. It is thus appropriate to look at the respective positions and strengths of the four integrators on the Swedish intra-EEA express small package delivery market.

The four integrators on the Swedish intra-EEA express small package delivery market

- (1825) Following the market reconstruction launched by the Commission, the revenues achieved by the integrators are spread as follows:

¹⁵²⁶ [Parties' coverage in the EEA and estimates regarding other players]*

¹⁵²⁷ See responses to question 59 of questionnaire Q26 to customers – Sweden – Phase I.

¹⁵²⁸ See responses to question 41.5.2 of questionnaire R26 to customers – Sweden – Phase II.

¹⁵²⁹ See responses to question 27 of questionnaire R26 to customers – Sweden – Phase II.

Table 58: International intra-EEA express deliveries in Sweden (2011) – Integrators' revenues only

	INTERNATIONAL INTRA EEEA
Company	Express
UPS	[20-30]%
TNT Express	[10-20]%
Combined	[40-50]%
Deutsche Post DHL	[50-60]%
FedEx	[0-5]%
	100%

Source: UPS's response of 14 August 2011 to Commission's Article 11(3) Decision and DHL¹⁵³⁰ and FedEx¹⁵³¹ replies to the questionnaire to competitors-Phase I.

(1826) As explained in Section 6.1.4., the industry also uses coverage data in order to measure the strength of a competitor on a certain market:

Table 59: International intra-EEA express deliveries in Sweden – coverage by the four integrators in terms of business addresses (Sweden as destination point)

[...]*

Source: [...]*

FedEx

(1827) As explained in Section 7.3.9., FedEx is the weakest integrator among the four. With a share of the revenues ranging between 0 and 5%, FedEx will barely exert any competitive pressure on the Parties *post* merger.

(1828) From a qualitative point of view, Swedish customers indicated that they view very favourably suppliers that offer intra-EEA express services covering many destination countries, with an extensive geographic coverage in each of them. Indeed, when asked to rank the criteria they take into account while they negotiate supply agreements for intra-EEA express deliveries, almost all the respondents gave the highest grade to (i) the coverage of all destination countries and (ii) the extensive geographic coverage in the country of destination¹⁵³². As already explained in detail, in Section 7.3.2, FedEx does not offer all destinations within the EEA: for instance, it has a weak presence in the Baltics and is not able to offer express deliveries from Sweden to those countries while the Swedish businesses have strong economic links with this area. In addition to the Baltics, FedEx does not offer deliveries within one day from Sweden to Greece, Iceland, Malta, Cyprus and Slovenia, as opposed to the Parties¹⁵³³. Consequently, when asked about its weaknesses, one of the respondents stated: "*small network and presence in Europe currently*" and ranked it as the fourth integrator behind DHL, UPS and TNT¹⁵³⁴.

¹⁵³⁰ DHL's response to question 98 of questionnaire to competitors – Phase I.

¹⁵³¹ FedEx' response to question 98 of questionnaire to competitors – Phase I.

¹⁵³² Question 30 of questionnaire Q26 to customers – Sweden – Phase I.

¹⁵³³ [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹⁵³⁴ [Customer's name]* response to question 39 of questionnaire R26 to customers – Phase II.

- (1829) The outcome of the market investigation confirms that the customers view FedEx as the weakest integrator: "*FedEx has very limited network in SE*"¹⁵³⁵ as stated by [Customer's name]*. Only a minority of customers sees it as a credible alternative to the Parties on the intra-EEA express deliveries originating from Sweden¹⁵³⁶.
- (1830) Finally, only a limited minority of Swedish customers who have organized a tender procedure or started negotiating a contract for the provision of intra-EEA express small package delivery services from Sweden in the last 2 years invited or requested a quotation from FedEx¹⁵³⁷.
- (1831) [Details on FedEx's expansion plan across EEA]*¹⁵³⁸. [Details on FedEx's expansion plan across EEA]*¹⁵³⁹, [Details on FedEx's expansion plan across EEA]*¹⁵⁴⁰. [Details on FedEx's expansion plan across EEA]*¹⁵⁴¹. [Details on FedEx's expansion plan across EEA]*¹⁵⁴². [Details on FedEx's expansion plan across EEA]*¹⁵⁴³.
- (1832) [Details on FedEx's expansion plan across EEA]*¹⁵⁴⁴.
- (1833) According to the Parties' EOD coverage estimates, FedEx reached [...] *% coverage in 2011. If this estimate is taken as a base-line, the targeted increase of FedEx's coverage would translate into [...] * in FY 2015¹⁵⁴⁵. This projection would allow FedEx to exceed both UPS and TNT's current coverage, which is respectively [...] *% and [...] *%¹⁵⁴⁶.
- (1834) [Details on FedEx's expansion plan across EEA]*¹⁵⁴⁷. Even though it is likely that FedEx market share will increase, the Commission is unable to predict what market share FedEx is likely to achieve in the near future.
- (1835) [Details on FedEx's expansion plan across EEA]*. This will likely create a degree of competitive pressure on the other main integrators.
- (1836) The expansion of FedEx needs to be put into perspective of its current market position, where the starting point for expansion is still quite modest. In Sweden, FedEx achieved a revenue share of [0-5]% based on integrators' revenues according to the market reconstruction. Even though the ambition to grow volumes may create a certain increased degree of competitive pressure, its position would still be far behind the combined entity and DHL given FedEx's low coverage on the destination side.
- (1837) Therefore, it can be expected that FedEx will exercise an increasing degree of competitive pressure on the main integrators in Sweden in the near future. However, in combination with all other evidence, the counter-veiling effect of FedEx expansion will

¹⁵³⁵ [Customer's name]* response to question 41 of questionnaire R26 to customers – Sweden – Phase II.

¹⁵³⁶ See responses to question 59 of questionnaire Q26 to customers – Sweden – Phase I.

¹⁵³⁷ See responses to question 27 of questionnaire R26 to customers – Sweden – Phase II.

¹⁵³⁸ FedEx' submission of 27 November 2012 *Country-by-country summaries of FedEx' expansion plans*, paragraph 17.

¹⁵³⁹ See Section 7.3.10 of this Decision.

¹⁵⁴⁰ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

¹⁵⁴¹ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 4.

¹⁵⁴² FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 1.

¹⁵⁴³ FedEx's response to the request for information dated 16 November 2012 (Q30), Annex 3.

¹⁵⁴⁴ FedEx, response to the request for information dated 16 November 2012 (Q30).

¹⁵⁴⁵ FedEx current coverage figures are confidential and therefore the targeted increase is projected on the basis of estimates provided by the Parties, as a proxy.

¹⁵⁴⁶ [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹⁵⁴⁷ FedEx, response to the request for information dated 16 November 2012 (Q30).

likely not be sufficient to counter-act negative effects of the Transaction on competition in Sweden.

The merger is a "3 to 2" merger in Sweden

- (1838) UPS, TNT and DHL are the three small package companies which offer the fastest delivery services from Sweden [Parties' coverage data and estimates regarding the other integrators' coverage]*¹⁵⁴⁸. They have equivalent times-in-transit for almost all the destinations¹⁵⁴⁹. Therefore, with respect to geographic coverage of their intra-EEA express services, UPS, TNT and DHL appear as close competitors, and closer to one another than to any other competitor.
- (1839) Similarly, while an overwhelming majority of the customers mentions both UPS and DHL as TNT's closest competitors and conversely both TNT and DHL as UPS's closest competitors, none of them mentions FedEx¹⁵⁵⁰.
- (1840) Furthermore, a majority of customers sees UPS as TNT's one of the two closest competitors in terms of the geographic range of services they offer (domestic, intra-EEA, extra-EEA/express, deferred)¹⁵⁵¹.
- (1841) Therefore, it appears that within the group of the integrators, UPS, TNT and DHL are close competitors while FedEx is lagging behind.
- (1842) Furthermore, as to the tender procedures the Swedish customers organised over the last two years: each of UPS, TNT and DHL was invited to make a bid in the overwhelming majority of cases¹⁵⁵².
- (1843) Finally, the Commission considers that the Transaction is likely to eliminate an important competitive force and to limit the possibilities of switching supplier, as there is no countervailing buyer power and no entry or expansion is likely, timely and sufficient to defeat possible anticompetitive effects in Sweden.

Price concentration and efficiencies

- (1844) The price concentration analysis undertaken by the Commission predicts that the weighted average (gross) price increase on lanes originating from Sweden would range between [5-10]*% and [5-10]*% depending on the model specification.¹⁵⁵³ In Sweden, FedEx has a weaker coverage relative to other integrators and this is consistent with its limited market presence.
- (1845) Indeed some customers fear that the prices of the express deliveries to other EEA countries might increase once the Transaction completed. For example, [Customer's name]* explains that: "*There are not so many companies in this area so it will be easier to have higher prices for one company with no competition.*"¹⁵⁵⁴ and [Customer's name]* claims that: "*We feel that competition is good for the market and that the more players we have, the better it is. With FedEx's currently weak position in the European*

¹⁵⁴⁸ [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹⁵⁴⁹ [Parties' coverage data and estimates regarding the other integrators' coverage]*

¹⁵⁵⁰ See responses to questions 60 and 61 of questionnaire Q26 to customers – Sweden – Phase I.

¹⁵⁵¹ See responses to question 35.1 and 35.2 of questionnaire R26 to customers – Sweden – Phase II.

¹⁵⁵² Question 27 of the questionnaire R26 to customers – Sweden – Phase II.

¹⁵⁵³ Note that these specifications include both models with and without non-integrators coverage data.

¹⁵⁵⁴ [Customer's name]* response to question 46.1 of questionnaire R26 to customers – Sweden – Phase II.

market, we only have DHL, UPS & TNT. Remove one of these and we lose an important player."¹⁵⁵⁵

(1846) Regarding efficiencies, the Commission has calculated that in Sweden, cost savings would represent between [0-5]*% of net prices in Year [...] and up to [5-10]*% of net prices in Year [...]. Assuming a pass-through rate of [60-70]*% and taking Year [...] efficiencies as the base line case, the net price effects in Sweden would be positive ranging between [0-5]*% and [0-5]*%.¹⁵⁵⁶ Even in Year [...], net price effects would remain ambiguous, ranging from slightly negative to slightly positive but this is a remote time horizon in the context of merger control.

7.11.17.3. The Commission's conclusion

(1847) It follows from the arguments developed in Section 7.11.17.2 that TNT is a significant competitor of UPS in the Swedish intra-EEA express market, in particular in terms of overall revenues and geographic coverage. In fact, TNT - and to an even greater extent DHL - appear as the strongest sources of competitive constraint on UPS in the international intra-EEA express market for customers that need to ship packages to a broad range of countries of destinations.

(1848) Moreover, the Commission's quantitative analysis confirms that the Transaction is expected to cause price increases on the Swedish market, even if the effects of efficiencies is taken in to account. The available price concentration analysis also provides an empirical confirmation that the weight of DHL on the market would not affect the ability and incentives of the merged entity to increase prices as a result of the Transaction.

(1849) Therefore, the Commission concludes that the Transaction will lead to a significant impediment to effective competition in the market for intra-EEA express delivery services in Sweden.

8. GENERAL CONCLUSION ON THE EFFECTS OF THE TRANSACTION

(1850) The Commission considers that the proposed concentration leads to a significant impediment to effective competition in the markets for intra-EEA express small package delivery services in:

- Bulgaria;
- The Czech Republic;
- Denmark;
- Estonia;
- Finland;
- Hungary;
- Latvia;
- Lithuania;

¹⁵⁵⁵ [Customer's name]* response to question 46.1 of questionnaire R26 to customers – Sweden – Phase II and [Customer's name]* email dated of 10 October 2012.

¹⁵⁵⁶ [Confidential information regarding efficiencies expected to arise from the Transaction]*

- Malta;
- The Netherlands;
- Poland;
- Romania;
- Slovakia;
- Slovenia;
- Sweden;

9. COMMITMENTS

- (1851) In a state of play meeting of 20 November 2012, the Commission informed the Parties about the outcome of its substantive analysis, indicating that the transaction would lead to a significant impediment of effective competition in the intra-EEA express markets of the 15 Member States
- (1852) On 29 November 2012, the legal deadline for submitting commitments, UPS submitted a set of commitments (hereafter "the Commitments of 29 November 2012"). The Commitments of 29 November 2012 were market tested. They turned out to be insufficient. UPS submitted a second set of commitments on 16 December 2012 (hereafter "the Commitments of 16 December 2012"). On the basis of a second market test, the Commission informed UPS that those commitments were still not sufficient. UPS submitted a further improved package on 3 January 2013 (hereafter "the Commitments of 3 January 2013"). As will be shown in this section, the successive commitments could not remedy the competition concerns identified by the Commission, both on substance as well as certainty, given the lack of a fix-it-first or upfront buyer solution in a situation where there are considerable doubts whether any of the extremely limited number of potentially suitable purchaser candidates would actually buy the commitments package and operate it viably so as to create a sufficient competitive force on the intra-EEA express markets.
- (1853) The inherent short-comings of all three remedy packages proposed by UPS lies in the fact that UPS proposed a structural solution essentially for only one part of the small package delivery chain, namely operations in origin countries. For a key middle-part of the delivery chain – the air transport - UPS proposed a temporary access remedy, while no substantial operations were proposed for divestiture in destination countries (other than those included in the origin countries). Given the network character of the markets in question, such a remedy package would, on its own, not be capable of ensuring a seamless delivery network for intra-EEA express service. Instead, the viability of the business crucially depends on the combination of the divested business with the network of a suitable purchaser.

9.1. Description of the proposed Commitments and the results of the ensuing market tests

9.1.1. *The Commitments of 29 November 2012 and the results of the ensuing market test*

9.1.1.1. Description of the Commitments of 29 November 2012

(1854) The Commitments of 29 November 2012 rested on two main pillars:

- a divestment remedy, whereby UPS would sell TNT's subsidiaries in [5-15]* Member States: [Confidential information regarding the commitments offered by UPS]*;
- an access remedy whereby UPS would have provided access to its intra-European air network from / to the [5-15]* Member States listed in the first indent for [...] years, unless the purchaser already controlled an air network.

(1855) [Commitments offered by UPS regarding Denmark and the Netherlands]*

(1856) As a consequence, hereafter in this Section 9.1.1, [Confidential information regarding the commitments offered by UPS]* will be designated as "the Remedy Countries". All the other EEA countries will be qualified as "the non-Remedy Countries".

The divested businesses

(1857) The businesses to be divested would have included assets located in the [5-15]* national markets in which the Transaction would lead to a significant impediment to effective competition [Confidential information regarding the Commitments offered by UPS]*.

(1858) [Confidential details on divested business]*

(1859) [Confidential information regarding the commitments offered by UPS]*

(1860) Finally, the package was designed as a "menu" with opt-out clauses for the purchaser. Indeed, the purchaser could have decided to buy either all or only some of the [Confidential details on divested business]*.

The access remedy

(1861) UPS offered to enter into an Air Transportation Services Agreement (ATSA) with the purchaser for [...]*. Under this agreement, [Confidential details on access remedy]*.

(1862) A [Confidential details on divested business]* would be charged by UPS and UPS committed to accommodate all the purchaser's intra-EEA inbound and outbound volumes from / to the Remedy Countries. [Confidential details on divested business]*.

(1863) [Confidential details on divested business]*

9.1.1.2. Results of the market test of the Commitments of 29 November 2012

The competitors

(1864) A majority of competitors¹⁵⁵⁷, including [Competitor's name]*¹⁵⁵⁸, [Competitor's name]* and [Competitor's name]*¹⁵⁵⁹, viewed the proposed divestments of assets in the Netherlands and Denmark as insufficient to strengthen the purchaser's presence on these markets. As stated by [Competitor's name]*: "*The Commission estimates that the combined UPS/TNT intra-EEA express market shares are in the range of [Confidential details on divested business]*. The potential purchaser will gain no presence whatsoever in these countries from the Divestment Business. The proposed remedy*

¹⁵⁵⁷ Replies to question 3 of the market test on commitments – competitors 1.

¹⁵⁵⁸ [Competitor's name]*'s response to question 3 of the market test on commitments – competitors 1.

¹⁵⁵⁹ [Competitor's name]*'s response to question 3 of the market test on commitments – competitors 1.

appears to be geared solely to accommodate UPS's integration plan rather than strengthening competition in either market."¹⁵⁶⁰

- (1865) As regards the air access remedy, even though several more local competitors or freight forwarders considered it as sufficient to efficiently provide intra-EEA express services and allay competition concerns in the affected markets¹⁵⁶¹, [Competitor's names]* raised strong concerns on this point. For instance, [Competitor's name]* stated that: *"To enable the Purchaser to compete effectively with UPS would mean to give access to the full range of air and ground services currently offered to the clients of the Purchased Units. An access to a limited part of the network resources ([Confidential information regarding the commitments offered by UPS]*) reduces the level of services that can be offered to the clients and will thus reduce the global value proposition of the Purchaser."*¹⁵⁶² [Competitor's name]* also explained that: *"The Air Transportation Services Agreement (ATSA) would lead to high costs [Confidential information regarding the commitments offered by UPS]*. The quality of the express product is highly dependent on an excellent international intra-European network. [Confidential information regarding the commitments offered by UPS]* This creates many possibilities to constrain the competitiveness of the purchaser"*¹⁵⁶³.
- (1866) As to the duration of the access remedy, a large majority of competitors consider that [...] years will be sufficient for the purchaser to find suitable air transport solutions to replace the ATSA in the case where the purchaser does not control an intra-EEA air network¹⁵⁶⁴. However, several main competitors ([Competitor's name]*¹⁵⁶⁵, [Competitor's name]*¹⁵⁶⁶, [Competitor's name]*¹⁵⁶⁷, [Competitor's name]* and [Competitor's name]*¹⁵⁶⁸) considered that it would not be sufficient. For instance, [Competitor's name]* argued: *"There are two possibilities to replace the ATSA after [...] years: 1. The purchaser has to build up its own air network within the [...] years of the ATSA. Due to the high investment and a significant lack of volumes compared to the Integrators it would be impossible to set up an own air network that it is able to compete with the current networks of UPS and TNT (costs would simply be too high). 2. The purchaser has to find another air network (either FedEx or DHL) and sign a new ATSA. It will be uneconomic to change the ATSA provider due to the high investments and process / technical adjustments that had been made to harmonise the purchaser's network with the one of UPS/TNT – any Integrator will see the purchaser as an intruder into an established oligopolistic market with high margins. Chances are very low that any Integrator would offer an ATSA to help a new competitor to come to life."*¹⁵⁶⁹
- (1867) As to the pricing formula, the majority of respondents saw it as sufficiently clear and detailed¹⁵⁷⁰. Nevertheless, [Competitor's names]* expressed concerns as regards notably

¹⁵⁶⁰ [Competitor's name]*'s response to question 3 of the market test on commitments – competitors 1.
¹⁵⁶¹ Replies to question 4 of the market test on commitments – competitors 1.
¹⁵⁶² [Competitor's name]*'s response to question 4.1 of the market test on commitments – competitors 1.
¹⁵⁶³ [Competitor's name]*' response to question 4.2 of the market test on commitments – competitors 1.
¹⁵⁶⁴ Replies to question 5 of the market test on commitments – competitors 1.
¹⁵⁶⁵ [Competitor's name]*' response to question 5.1 of the market test on commitments – competitors 1.
¹⁵⁶⁶ [Competitor's name]*'s response to question 5.1 of the market test on commitments – competitors 1.
¹⁵⁶⁷ [Competitor's name]*' response to question 5.1 of the market test on commitments – competitors 1.
¹⁵⁶⁸ [Competitor's name]*'s response to question 5.1 of the market test on commitments – competitors 1.
¹⁵⁶⁹ [Competitor's name]*' response to question 5.1 of the market test on commitments – competitors 1.
¹⁵⁷⁰ Replies to question 6.1 of the market test on commitments – competitors 1.

[Confidential information regarding the commitments offered by UPS]*. [Competitor's name]* explained that: "[Confidential information regarding the commitments offered by UPS]*. *In our opinion, this remedy should be reviewed, so as to provide effective means to the Purchaser to be offered neutral and equal chance to compete with UPS*"¹⁵⁷¹ [Competitor's name]* also argued that "*Elements of the pricing method are not clearly defined. E.g., what is a "reasonable" management fee?*"¹⁵⁷²

- (1868) As regards the destination countries, a large majority of competitors saw the absence of Commitments with respect to destination countries (assets / access) as a problem for a potential Purchaser to be viable¹⁵⁷³. In addition, a majority, [Competitor's names]*, also believed that relying on outsourcing to UPS in the destination countries where the Buyer did not have sufficient own operations would not allow it to be a viable competitor in the [5-15]* origination countries covered by the remedy package¹⁵⁷⁴. [Competitor's name]* argued that outsourcing to UPS would mean: "*At the same time, UPS will be a partner and a competitor, too*"¹⁵⁷⁵.
- (1869) This result has to be read in conjunction with the responses regarding the viability of the remedy where a majority of the respondents considered that it depends on the identity of the purchaser¹⁵⁷⁶. [Competitor's name]* explained: "*Such business can only be viable provided that the purchaser can combine it immediately with existing integrated operations in the rest of Europe, i.e. the major markets (Germany, the United Kingdom, France, Benelux, Spain, Italy,..). A purchaser not having an existing operational network (or a set of existing networks) in the other European countries would have to build such a network in these countries, which would take 5 years or more and represent a heavy financial investment, making the business not viable. Besides, such purchaser would remain in competition with UPS/TNT in those markets, who have/has acquired a deep knowledge of the business*"¹⁵⁷⁷.
- (1870) Seven companies indicated that they would be interested in acquiring the remedy package: La Poste/DPD¹⁵⁷⁸, [Competitor's name]*¹⁵⁷⁹, [Competitor's name]*¹⁵⁸⁰, [Competitor's name]*¹⁵⁸¹, [Competitor's name]*¹⁵⁸² and two incumbent postal operators.
- (1871) FedEx declared it was not interested in the Commitments of 29 November 2012: "*The Divestment Business does not constitute a viable and stand-alone business across the EEA or in each of the Divestiture Countries individually either for FedEx or for DPD or GLS. There are numerous disincentives against customers moving any significant portion of their business from an integrator to the purchaser under these conditions. It is unclear how customers could be compelled to shift or remain with the purchaser long enough to justify the purchaser's investment. Why tender high value, time sensitive*

1571 [Competitor's name]*'s response to question 6.2 of the market test on commitments – competitors 1.
1572 [Competitor's name]*'s reply to question 6.2 of the market test on commitments – competitors 1.
1573 Replies to question 9 of the market test on commitments – competitors 1.
1574 Replies to question 9.2 of the market test on commitments – competitors 1.
1575 [Competitor's name]*'s response to question 9.2 of the market test on commitments – competitors 1.
1576 See replies to question 1 of the market test on commitments – competitors 1.
1577 [Competitor's name]*'s response to question 1 of the market test on commitments – competitors 1.
1578 La Poste's email dated 14 January 2013.
1579 [...]*
1580 [Competitor's name]*'s reply to question 12 of the market test on commitments – competitors 1.
1581 [Competitor's name]*'s response to question 12 of the market test on commitments – competitors 1.
1582 [Competitor's name]*'s email dated 15 January 2013.

shipments to a service provider that is wholly dependent on an integrator, and that can offer only a partial solution in selected markets for an uncertain length of time."¹⁵⁸³

[...]* in Malta

(1872) The Commission addressed specific questionnaires relating to the Commitments of 29 November 2012 to [...]* and [...]* in Malta, [...]* and [...]*.

(1873) To the question "Are you willing to contract with a new partner whatever the identity of the Buyer of the Proposed commitments is?" [...]* replied: "The business of [...]* is centred around its joint operating agreement with [...]*. [...]* has invested in premises in Malta and human resources to meet the service levels of [...]* and customer expectations considering current levels of business and the possibility of growth in the future. Accordingly [...]* would be willing to contract with a new partner subject to certain conditions, including (in no order of priority): • The Buyer enjoying international brand recognition and a sound reputation in the market similar or comparable to [...]*; • The Buyer enjoying an international network, scale of operations and levels of business similar or comparable to [...]*; • The business of the Buyer being complimentary to the business of [...]* as it is currently being conducted and the services/products on offer being equivalent to those currently on offer by [...]* which [...]* clients have come to rely upon; • The Buyer being committed to support business growth in the medium to long term; • The Buyer providing [...]* with terms of business which are similar or comparable to those provided by [...]* or which are otherwise commercially acceptable to [...]*".

(1874) In addition, to the question "Which Buyers replacing [...]* in your partnership and becoming your co-contracting party would be suitable to operate efficiently and to exert a significant competitive constraint on [...]* in Malta, both for inbound and outbound packages?", [...]* replied: "[...]*".¹⁵⁸⁴

(1875) [Details on the Parties' operations and business strategy]*¹⁵⁸⁵

The customers

(1876) When asked if the Commitments of 29 November 2012 would solve the competition issues raised by the takeover of TNT by UPS, the majority of the respondents consider that it would be the case in the following Member states: [Confidential information regarding the commitments offered by UPS]*¹⁵⁸⁶. Conversely, the majority of the respondents considered that the Commitments of 29 November 2012 would not solve the competition issues raised by the takeover of TNT by UPS in the following Member states: [Confidential information regarding the commitments offered by UPS]*¹⁵⁸⁷.

(1877) As regards the fact that the Commitments of 29 November 2012 do not include operations, assets or arrangements covering the receiving EEA countries where packages are delivered when shipped outbound from the Remedy Countries, the customers were asked if they thought that this would be sufficient to allow a purchaser of the divestment package to operate a viable and competitive intra-EEA express

¹⁵⁸³ FedEx' reply to questions 12 and 16 of the market test on commitments – competitors I.

¹⁵⁸⁴ [...]* response of 6 December 2012 to the market test on remedies.

¹⁵⁸⁵ [Details on the Parties' operations and business strategy]*

¹⁵⁸⁶ Replies to question 3 *et seq* of the market test on commitments – customers.

¹⁵⁸⁷ Replies to question 3 *et seq* of the market test on commitments – customers.

delivery business out of the Remedy Countries. A majority of respondents replied positively¹⁵⁸⁸.

- (1878) As regards the air access, a majority of respondents considered this element of the Commitments of 29 November 2012 generally sufficient to enable a non-integrator to compete immediately, effectively and on a lasting basis in the market for intra-EEA express services¹⁵⁸⁹. Additionally, a majority replied that the Air Transportation Services Agreement contemplated by UPS would be sufficient for a non-integrator to compete effectively against UPS as concerns international intra-EEA express deliveries originating from all the Remedy Countries¹⁵⁹⁰.
- (1879) To the question "*which company do you think would be a suitable candidate for the Proposed commitments?*", the company mentioned most often is DHL¹⁵⁹¹. As to the company which would not be a suitable purchaser, there is no clear trend, even though a significant number of replies stress the fact that there would be no point to give the remedy package to an operator which already enjoys quite a significant position on the intra-EEA express market¹⁵⁹².
- (1880) To the question "*In the case where the Commission would eventually clear the Transaction and if the Proposed Commitments were carried out, if you are currently a customer of TNT in one the 15 concerned countries, what do you plan to do?*", the majority of the respondents confirmed that they would remain a customer of the divested businesses even if they are not owned by TNT anymore, depending on the identity of the purchaser¹⁵⁹³.
- (1881) In addition, the majority of customers replied that their answer to this question would not be different from what they originally intended to do when they learnt that TNT was about to be acquired by UPS¹⁵⁹⁴.

State-of-play meeting of 11 December 2012

- (1882) During a state-of-play meeting held on 11 December 2012, the Commission informed UPS and TNT of the outcome of the market test and of the Commission's assessment of the Commitments of 29 November 2012.
- (1883) The Commission informed the Parties that the proposed Commitments of 29 November 2012 were not sufficient enough to allay the identified competition concerns.
- (1884) The Commission highlighted that the identity of the purchaser is key for the viability of the remedy. It emphasized that the divestiture package should, in combination with the existing business of a suitable purchaser, enable it to compete fully with the Parties on the intra-EEA express market.
- (1885) The Commission also stressed that due to the limited number of potential suitable buyers, and the uncertainties surrounding the process and the potential buyers themselves, a fix-it-first or an up-front buyer solution would be required for the case.

¹⁵⁸⁸ Replies to question 4 of the market test on commitments – customers.
¹⁵⁸⁹ Replies to question 6.1 of the market test on commitments – customers.
¹⁵⁹⁰ Replies to question 6.2 of the market test on commitments – customers.
¹⁵⁹¹ Replies to question 7 of the market test on commitments – customers.
¹⁵⁹² Replies to question 8 of the market test on commitments – customers.
¹⁵⁹³ Replies to question 9 of the market test on commitments – customers.
¹⁵⁹⁴ Replies to question 9.4 of the market test on commitments – customers.

- (1886) The Commission indicated that based on the outcome of the market test, it appeared at that stage that two potentially suitable buyers could in principle be contemplated – FedEx and La Poste/DPD.
- (1887) As regards La Poste/DPD, the Commission expressed doubts as to whether the company would have the incentives and the abilities to act as an independent and effective competitor on the intra-EEA express market, both in short and in the long term. The Commission explained that a purchaser such as La Poste/DPD would not only need assets at the origin, but also operations for delivery in the other EEA destination countries, and sustainable air capacity. [Confidential information regarding a potential remedy taker]*. A divestiture package for a purchaser like La Poste/DPD would therefore need to be substantially upgraded and extended beyond the currently proposed [Confidential details regarding the commitments offered by UPS]*, to potentially constitute a viable business.
- (1888) In addition, the Commission pointed to a number of additional shortcomings of the proposed package as market-tested. Indeed, the divestments proposed in the Netherlands and Denmark were not sufficient in order to run a viable business. In addition, the duration of the air access remedy was not long enough so that for the purchaser to compete efficiently with UPS on the international intra-EEA express market. The Commission also raised the lack of clarity as to the pricing method of the air access.
- (1889) UPS submitted revised commitments on 16 December 2012.
- 9.1.2. *The Commitments of 16 December 2012 and the results of the ensuing market test*
- 9.1.2.1. Description of the Commitments of 16 December 2012
- (1890) The format of the Commitments of 16 December 2012 was similar to the Commitments of 29 November 2012 even though with several improvements:
- a divestment remedy, whereby UPS would sell TNT's subsidiaries in 15 countries: (i) Bulgaria, (ii) the Czech Republic, (iii) Denmark, (iv) Estonia, (v) Finland, (vi) Hungary, (vii) Latvia, (viii) Lithuania, (ix) Malta ([Confidential information regarding the commitments offered by UPS]*), (x) the Netherlands, (xi) Poland, (xii) Romania, (xiii) Slovakia, (xiv) Slovenia and (xv) Sweden to a single purchaser. The Netherlands and Denmark were thus added to the divestment package. Poland was offered for all buyers including FedEx.
 - an air access remedy whereby UPS would provide access to its intra-European air network from / to the 15 above-listed countries for five years (instead of [...]*) years in the Commitments of 29 November 2012), unless the purchaser already has control over an air network.
- (1891) In addition, unless the purchaser was to be FedEx or DHL, the Divestment Business also included the local subsidiaries of TNT in Portugal and Spain, raising the total number of Remedy Countries to (potentially) 17.
- (1892) As a consequence, hereafter in this Section 9.1.2, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Spain, Slovakia, Slovenia and Sweden will be designated as "the Remedy Countries". All the other EEA countries will be qualified as "the non-Remedy Countries".

The divested businesses

- (1893) The businesses to be divested would notably include assets located in the 15 or 17 Remedy Countries (including local sorting centres, ground hubs, vehicles etc.), personnel and customer contracts. [Confidential information regarding the commitments offered by UPS]*.
- (1894) In the Commitments of 16 December 2012, UPS provided an evaluation of the [...] excluded from the divested business [...]*: they accounted for EUR [...]*, an average of around [...] % of TNT's revenues in the Remedy Countries.
- (1895) Finally, the Commitments of 16 December 2012 were, like the first, [Confidential information regarding the commitments offered by UPS]*.

The air access remedy

- (1896) The basic principles of the access remedy in the Commitments of 16 December 2012 were the same as the Commitments of 29 November 2012: UPS would enter into an air service agreement with the purchaser, such that it would have to carry the purchaser's volumes through its air network from / to the Remedy Countries.
- (1897) UPS would enter into an air service agreement with the purchaser for five years. [Confidential information regarding the commitments offered by UPS]*. UPS would then transport these small packages by air to the destination countries in the EEA and outside the EEA.
- (1898) [Confidential information regarding the commitments offered by UPS]*
- (1899) Compared to the Commitments of 29 November 2012, UPS undertook in the Commitments of 16 December 2012 [Confidential information regarding the commitments offered by UPS]*. [Confidential information regarding the commitments offered by UPS]*.
- (1900) As to the "[...]" pricing methodology, it was described in a more detailed manner than in the initial package, in order to make it more transparent.

9.1.2.2. Results of the market test of the Commitments of 16 December 2012

- (1901) In order to assess the effectiveness of the Commitments of 16 December 2012 to allay the competition concerns, the Commission addressed tailor-made market questionnaires to four specific categories of players: airport managers¹⁵⁹⁵, customers, competitors who expressed their willingness to take up the Commitments of 29 November 2012 and competitors who did not express their willingness to take up the Commitments of 29 November 2012. In addition, a separate request for information was sent to La Poste/DPD¹⁵⁹⁶, as UPS had told the Commission that it had initiated very detailed negotiations with La Poste.

The airport managers

- (1902) As concerns the airport managers, only four replied. The reply of Liege airport was rather negative and considered that the remedy package as such would not solve the

¹⁵⁹⁵ The market test was sent to the managers of the airport terminals dedicated to freight located in the following cities: Madrid, Köln, Paris, London, Leipzig, Liège and Milano-Bergamo.

¹⁵⁹⁶ La Poste/DPD's reply to the market test on the revised commitments.

identified competition problem. The other respondents, Madrid, Bergamo and London airport managers, which do not host any integrator air-hub, were more positive.

The companies which expressed their interest in the Commitments of 29 November 2012

- (1903) [Company name]*¹⁵⁹⁷ and one of the incumbent postal operators which had declared an interest in the Commitments of 29 November 2012 eventually declared it was no longer interested in acquiring the Divestment business.
- (1904) As regards [Company name]* was not interested any longer and stated: "*In general, many of the details of the Commitments are not precise enough. E.g. "[Confidential information regarding the commitments offered by UPS]*. The document should be checked for vague wording as it will be hard to judge whether all Commitments are kept if there is no precise definition"*¹⁵⁹⁸. In addition, it stated in reply to the question as to whether it could compete on price with UPS if it outsourced the air transport from UPS [Confidential information regarding the commitments offered by UPS]*: "*No. [Confidential information regarding the commitments offered by UPS]*. In addition to that the significant investments (see Q9.2) in the non-divested countries would lead to significantly higher prices.*"¹⁵⁹⁹ Finally, to the question "would your company acquire the divested businesses", [Company name]* replied: "*In the case of the completion of the takeover and under the precondition that the local infrastructure of the divestment business can be changed from an express infrastructure to a standard parcel one, an acquisition of the divestment business could be interesting in order to expand [...]*. Moreover, in some countries it might be interesting to keep the express infrastructure in order to offer national express products alongside the national standard parcel product. The profits of the existing businesses would be significantly reduced as most of the Express Export activities and a big part of the existing customer basis will be lost (see Q2.1) and any transition process from an Express network to a Standard Parcel network will be very costly. Therefore an acquisition could probably only be interesting if a significant negative purchase price consideration could be agreed on"*¹⁶⁰⁰.
- (1905) In addition, the overall respondents insisted on the fact that the remedy package was designed in such way that the only suitable candidate was a small package company which already operated a network across the EEA. For instance, to the question as to whether the proposed Commitments would have been sufficient to allow the Purchaser to operate efficiently and effectively compete with UPS in the international intra-EEA express markets of the 15 countries where competition concerns were identified, [Company name]*'s reply reads: "*Depends if the purchaser already has a global network. Not enough just to be able to provide a service in the 15 countries especially when the "support period" ends"*¹⁶⁰¹. Also, [Company name]* states that: "*It depends on the Purchaser. Domestic capabilities for pre- and on-carriage of cross-border consignments in other EEA countries (non-Divestiture Countries) are needed*"¹⁶⁰².

¹⁵⁹⁷ [Company name]*'s reply to question 9 of the market test on commitments II – Competitors II.
¹⁵⁹⁸ [Company name]*'s reply to question 10 of the market test on commitments II – Competitors II.
¹⁵⁹⁹ [Company name]*'s reply to question 9.4 of the market test on commitments II – Competitors II.
¹⁶⁰⁰ [...]*
¹⁶⁰¹ [Company name]*'s reply to question 1 of the market test on commitments II – Competitors II.
¹⁶⁰² [Company name]*'s reply to question 1 of the market test on commitments II – Competitors II.

(1906) Finally only [Company name]*¹⁶⁰³, [Company name]*¹⁶⁰⁴ as well as a national postal incumbent operator declared themselves interested in the divested businesses.

The companies which did not express their interest in the Commitments of 29 November 2012

(1907) In response to the question whether the Commitments of 16 December 2012 would be sufficient to allow the purchaser to compete efficiently and effectively with UPS in the international intra-EEA express markets, a majority of the respondents had no opinion¹⁶⁰⁵. Likewise, regarding the viability of the divested businesses, a majority had no opinion¹⁶⁰⁶. For both questions the second largest portion of replies was positive. More generally, [Confidential information regarding the commitments offered by UPS]* was welcomed by a large majority of companies¹⁶⁰⁷. By contrast, a majority had no opinion as to the extension of the air access to five years¹⁶⁰⁸.

(1908) When asked about the lack of arrangements in the countries not covered by the Commitments of 16 December 2012 in order for the purchaser to be capable of receiving intra-EEA express shipments originating from Remedy Countries, the majority had no opinion¹⁶⁰⁹. However, the second largest share considered it as an issue that would prevent the Purchaser from providing effectively international intra-EEA express delivery services. As an example, [Company name]* explains that for the purchaser to be able to compete with UPS in the Remedy Countries on the international intra-EEA express market, it would need in the receiving countries the following elements: "(i) a minimum next day coverage of 95% of the EEA population (including key markets of UK, Germany and France), (ii) full track and trace capability within those countries and real (or close to real) time reporting of events and tracking, (iii) integrated customer service, (iv) recovery operations to handle missorts and misroutes across EEA within 24 hours, (v) volume flex capability, (vi) capability to manage multiple access arrangements across the 14 countries"¹⁶¹⁰.

(1909) FedEx confirmed that it was not interested by the divested business: "*As the Divestment Business fails to provide the density and scale of operations across the EEA, so as to allow the purchaser to compete effectively as an integrator, it must be rejected in its entirety. The Commission's Remedies Notice, at paragraph 23, recognises that: "...For the business to be viable, it may also be necessary to include activities which are related to markets where the Commission did not identify competition concerns if this is required to create an effective competitors in the affected markets". Accordingly, FedEx considers that it is appropriate for the Commitments to be very significantly improved such that they contribute the density and scale of operations across the EEA that drive down PUD costs*"¹⁶¹¹.

¹⁶⁰³ [Company name]* reply to question 11 of the market test on commitments II – Competitors I.

¹⁶⁰⁴ [Company name]* email dated 17 January 2013

¹⁶⁰⁵ See replies to question 1 of the market test on commitments II – Competitors I.

¹⁶⁰⁶ See replies to question 2 of the market test on commitments II – Competitors I.

¹⁶⁰⁷ See replies to question 3 of the market test on commitments II – Competitors I.

¹⁶⁰⁸ See replies to question 4 of the market test on commitments II – Competitors I.

¹⁶⁰⁹ See replies to question 8 of the market test on commitments II – Competitors I.

¹⁶¹⁰ [Company name]*'s reply to question 8.1 of the market test on commitments II – Competitors I.

¹⁶¹¹ FedEx' reply to question 11.1 of the market test on commitments II – competitors I.

La Poste/DPD

(1910) La Poste/DPD reiterated its interest for the remedy package¹⁶¹². Nevertheless, La Poste/DPD saw the remedy package as insufficient: "*for the remedy package to really constitute a viable and stand-alone business, the following items should be included so as to enable GeoPost to maintain the same level of service currently offered to customers [...]*"¹⁶¹³. In addition, La Poste/DPD argued that the [...]¹⁶¹⁴. [Confidential information regarding the commitments offered by UPS]¹⁶¹⁵.

The customers

(1911) From the customers' perspective, in the case where the purchaser did not have sufficient of its own operations in certain delivery countries and when asked if they think that the purchaser could offer attractive competitive prices if it would have to rely on outsourcing from UPS or from other partners to deliver packages in these destinations, the majority had no opinion. The second largest portion was positive¹⁶¹⁶.

(1912) To the question "*if you as a customer would be faced with the Divested Business being transferred to a new purchaser, which companies in your view could be suitable purchasers for the remedy package so that the combined business would satisfy your needs?*", a clear trend points towards, by order of preference, DHL and FedEx. A much smaller number referred to La Poste/DPD and GLS¹⁶¹⁷.

(1913) To the question "*which characteristics and complementary assets should the Purchaser have in order to be able to run the divested business efficiently and to compete effectively with UPS in the 15 markets for international intra-EEA express deliveries?*", the respondents mostly mentioned companies being able to offer the same level of services and to the same extent as UPS and having their own network across the EEA¹⁶¹⁸.

(1914) As to whether the Commitments of 16 December 2012 would be sufficient to allow the purchaser to compete effectively and efficiently on the international intra-EEA express markets with UPS and offer a comparable service to that currently offered by TNT, the majority had no opinion. The second largest group of respondents considered that the Commitments would be the sufficient¹⁶¹⁹.

State-of-play meeting of 21 December 2012

(1915) On 21 December 2012, the Commission held a state-of-play meeting with UPS and TNT in order to inform them of the outcome of the market test and of its assessment of the Commitments of 16 December 2012.

(1916) The Commission explained to the parties that, in spite of the improvements in the Commitments of 16 December 2012, they were still unsatisfactory.

¹⁶¹² La Poste/DPD's reply to question 1 of the market test on the revised commitments.

¹⁶¹³ La Poste/DPD's reply to question 5.1 of the market test on the revised commitments.

¹⁶¹⁴ La Poste/DPD's reply to question 9.1 of the market test on the revised commitments.

¹⁶¹⁵ La Poste/DPD's reply to question 11 of the market test on the revised commitments.

¹⁶¹⁶ Replies to question 3 of the market test on commitments II – customers.

¹⁶¹⁷ Replies to question 4 of the market test on commitments II – customers.

¹⁶¹⁸ Replies to question 5 of the market test on commitments II – customers.

¹⁶¹⁹ Replies to question 6 of the market test on commitments II – customers.

- (1917) Indeed, the outcome of the market test shows that respondents view this package as non-viable on a stand-alone basis. The buyer has to be an operator which has a local presence in both the sending and receiving country.
- (1918) The Commission reiterated that a fix-it-first or an up-front buyer solution was necessary in the present case. It indicated that only two companies appear to be potentially suitable, namely FedEx and La Poste/DPD. FedEx was very critical as regards the remedy package, and there were doubts whether the company would be willing to take up the package as proposed.
- (1919) In view of the more detailed information requested and received from La Poste/DPD, the Commission again expressed doubts as to the company's suitability as a potential purchaser.
- (1920) The Commission reiterated the doubts that La Poste/DPD would have the incentive to re-adapt its ground networks in non-Remedy Countries where it has current operations, as the inbound intra-EEA volumes may not be high enough so as to justify the investments into network re-organisation needed to deliver intra-EEA express parcels.
- (1921) Furthermore, in five non-Remedy Countries where La Poste/DPD does not have its own network (including Italy), there were uncertainties whether the partners of La Poste would be willing to adapt its network to inbound international express volumes.
- (1922) Moreover, the Commission also expressed its doubts as to the long-term viability of the remedies, after the air access remedy has come to an end, given that La Poste/DPD indicated that it had no intention to purchase, lease or charter aircraft. Thus, it was not clear that DPD would find a suitable solution for air transport, allowing it to compete actively and credibly against UPS in the Remedy Countries after the expiry of the access remedy.
- (1923) The Commission also expressed its doubts as to whether La Poste/DPD would exert a significant constraint on UPS during the first two years because they would still have to rely on UPS for air transport and [...]*. [Confidential information regarding La Poste/DPD as a potential remedy taker]*.
- (1924) Several other shortcomings, as raised by La Poste/DPD itself in the market test, were also mentioned, including details of the pricing method for the access remedy ([...]*) , IT aspects, duration, access to UPS's global air network [Confidential information regarding La Poste/DPD as a potential remedy taker]*.
- (1925) Therefore, should UPS wish to pursue a solution with La Poste/DPD, the Commission stressed that a coherent business plan demonstrating that La Poste/DPD would become a viable express operator had to be submitted by La Poste/DPD. In addition, the points raised by La Poste/DPD in reply to the market test on the Commitments of 16 December 2012 would have to be addressed in any revised remedies. Third, [Confidential information regarding La Poste/DPD as a potential remedy taker]*. Finally, UPS would have to provide to the Commission a clear understanding of how La Poste/DPD would address the access to the airlift after the expiry of the commitments.
- (1926) The Commission informed the Parties that even if a fix-it-first solution was presented, a solution with La Poste/DPD that did not lift all the doubts raised during the meeting would not be acceptable.
- (1927) As concerns FedEx, the Commission informed the Parties that it would be a viable purchaser if an agreement between UPS and FedEx were to be found.

(1928) The Commission reiterated that only a fix-it-first or an up-front buyer solution would be the possible solution in the present case.

(1929) UPS submitted a revised remedy package on 3 January 2013.

9.1.3. *The Commitments of 3 January 2013*

(1930) The Commitments of 3 January 2013 cover the same countries as the Commitments of 16 December 2012 and offer a similar access to UPS's air network.

(1931) As a consequence, hereafter in this Section 9.1.3, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Spain, Slovakia, Slovenia and Sweden will be designated as "the Remedy Countries". All the other EEA countries will be qualified as "the non-Remedy Countries".

(1932) As compared to the previous remedy packages, the Commitments of 3 January 2013 refer only to La Poste/DPD which is the sole company named in the Commitments of 3 January 2013 as a potential purchaser. The Commitments are submitted on condition that the Commission formally approves La Poste/DPD as a suitable purchaser.

(1933) First, by contrast with the Commitments of 16 December 2012, UPS would grant [Provisions of the Commitments of 3 January 2013]*

(1934) Second, as to the air access, [Provisions of the Commitments of 3 January 2013]*.

(1935) Third, [Provisions of the Commitments of 3 January 2013]*.

(1936) Finally, [Provisions of the Commitments of 3 January 2013]*.

(1937) The Commission did not market test the Commitments of 3 January 2013, as the improvements were rather marginal and tailor made to the wishes La Poste/DPD stated in its response to the market test of the second remedies package of 16 December 2012. In addition, there was no time left for a third market test in view of the deadlines provided by the Merger Regulation. Indeed, it is beyond question that the Commission had already shown considerable forbearance towards the Parties' in accommodating their efforts to devise acceptable remedies by allowing the submission of a third package of Commitments on Day 83 of the procedure, whereas the formal time-limit set for submitting remedies had already expired on Day 65 of the merger procedure.

(1938) Nevertheless, the Commission addressed two very detailed¹⁶²⁰ requests for information to La Poste/DPD after UPS submitted the Commitments of 3 January 2013 in order to assess the suitability of La Poste/DPD as potential purchaser.

(1939) During a state-of-play meeting held on 11 January 2013, the Commission informed UPS and TNT that the Commitments were still unsatisfactory.

(1940) Indeed, the Commission informed the parties that in light of La Poste/DPD's replies to the various requests for information sent before and after the submission of the Commitments of 3 January 2013 and in particular in view of the "business plan" provided by La Poste/DPD on 8 January 2013¹⁶²¹, the Commission still had doubts as to:

¹⁶²⁰ Request for information Q62 and request for information Q63.

¹⁶²¹ La Poste/DPD's draft business plan submitted on 8 January 2012.

- first La Poste/DPD's commitments to the air-based international intra-EEA express market,
- second La Poste/DPD's incentives to adapt its domestic networks to international express inbound deliveries in non-Remedy Country,
- third the future situation in the countries where La Poste/DPD has no network (Italy notably),
- fourth La Poste/DPD's ability to compete aggressively [Provisions of the Commitments of 3 January 2013]*,
- fifth La Poste/DPD's willingness and ability to find a suitable air transport solution once the air access remedy has come to an end (in 5 years) in order to maintain and expand its air-based express business,
- sixth La Poste/DPD's real willingness to take up the entirety of the package. According to the commitments, La Poste/DPD may decide not to purchase the whole of the divested business. In view of its business plan, La Poste/DPD may "opt out" for certain countries, which would leave competition concerns unremedied in these countries.

(1941) In addition, by contrast with the Commitments of 16 December 2012, [Provisions of the Commitments of 3 January 2013]*.

(1942) Finally, the Commission noticed that no legally-binding agreement had yet been signed, not least with UPS.

9.2. Assessment of the proposed Commitments

(1943) According to the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004¹⁶²² ("the Remedies Notice"), where a concentration raises competition concerns in that it could significantly impede effective competition the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of their merger. The commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. In assessing whether the proposed commitments are likely to eliminate the competition concerns identified, the Commission will consider all relevant factors including *inter alia* the type, scale and scope of the proposed commitment, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other participants on the market¹⁶²³.

(1944) It remains, however, for the parties to put forward commitments.

(1945) In this Decision, the Commission has found that the Transaction would be likely to give rise to a significant impediment to effective competition in 15 international intra-EEA express markets (defined on a national basis), as a result of the elimination of TNT as an independent competitive force constraining UPS. In order to remedy this problem, UPS proposed to divest TNT's subsidiaries in the countries in question ("the SIEC

¹⁶²² Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C267, 22.10.2008, p. 1).

¹⁶²³ See Remedies Notice, paragraphs 5, 9, and 12

countries") to a single purchaser, to offer an ATSA to this purchaser if it is a non-integrator, and to divest TNT's subsidiaries in two countries for which no significant impediment to effective competition has been found to be likely if the purchaser is a non-integrator in order to strengthen the viability of the commitments. The objective of these commitments would be to allow the purchaser to continue the international intra-EEA express operations of the acquired businesses and act as a constraining competitive force in the international intra-EEA express markets of the SIEC countries.

(1946) In view of the conclusions of its competitive assessment, the Commission has to verify whether the divested business, combined with other elements of the commitments, notably the ATSA, would constitute a viable business. In order to authorise the Transaction on the basis of the submitted commitments, the Commission must also be in a position to conclude with a sufficient degree of certainty that the divested businesses will be acquired by a company able and willing to continue the international intra-EEA express operations of the divested TNT subsidiaries. It must be sufficiently certain that the purchaser will compete actively and effectively against UPS on the international intra-EEA express markets of the SIEC countries, exerting a comparable competitive constraint to that previously exerted by TNT, such that the divestment would compensate for the loss of competition brought about by the Transaction in these countries.

9.2.1. *The viability of the international intra-EEA express operations of the divested businesses strongly depends on the characteristics of the purchaser.*

(1947) The Commitments of 29 November 2012 and 16 December 2012 were designed by UPS to be open to a wide range of potential purchasers, including non-integrators. Indeed, the purchaser requirements proposed by UPS for the Commission's approval did not include [Confidential information regarding the Commitments offered by UPS]*¹⁶²⁴. As will be shown below, the viability of the international intra-EEA express operations of the businesses proposed to be divested (whether pursuant to the Commitments of 29 November 2012 or to the Commitments of 16 December 2012) strongly depends on the characteristics of the company that would eventually take up the divested package.

(1948) The divested TNT subsidiaries¹⁶²⁵ offer a comprehensive range of small package delivery services, including domestic, international intra-EEA deferred, international intra-EEA express and extra-EEA delivery services. They also offer services outside the scope of small package delivery services, notably freight transportation and forwarding services, same day / overnight services and contract logistics services, [Confidential information regarding the Commitments offered by UPS]*¹⁶²⁶.

(1949) If the purchaser were DHL or FedEx, which both have a business model focusing on international express, any uncertainties that each of these two integrators would actively continue the international intra-EEA air-based express operations of the divested businesses in the SIEC countries would be limited.

¹⁶²⁴ Commitments of 29 November 2012, Section D, paragraph 14; Commitments of 16 December 2012, Section D, paragraph 13.

¹⁶²⁵ Unless otherwise indicated, the "divested TNT subsidiaries" or the "divested businesses" refer in this Decision to the TNT subsidiaries that UPS proposed to divest in 17 countries pursuant to the Commitments of 16 December 2012 (provided that the purchaser is not FedEx or DHL) as well pursuant to the Commitments of 3 January 2013.

¹⁶²⁶ See for example Commitments of 3 January 2013, Schedule 1, paragraph 8.

- (1950) If however the purchaser were a non-integrator, this would not necessarily be the case. Indeed, non-integrators do not have significant international intra-EEA air-based express operations, save in a few countries (like France and Spain for La Poste), but focus on ground-based – mainly domestic and / or international deferred operations. Moreover, most assets of the divested businesses ([Confidential information regarding the Commitments offered by UPS]*) are used for all types of small package delivery operations, including domestic and international deferred services. In addition, international intra-EEA express services account for EUR [...] of revenues, that is to say, only [...] % of the total revenues of the divested businesses (EUR [...])¹⁶²⁷.
- (1951) Furthermore, as explained in detail in the general assessment of the competitive constraint exerted on the Parties by La Poste and Royal Mail (see section 7.2.1), certain operators such as GLS have a business model clearly geared towards domestic and international deferred and no strategy to expand into the international express markets in any significant manner.
- (1952) Therefore, there is a significant risk that if the purchaser were a non-integrator, its main rationale for purchasing the divested businesses and the principal focus of its strategy after the acquisition would be to use [Confidential information regarding the Commitments offered by UPS]* mainly for its core business of domestic and / or international deferred operations and not for international intra-EEA express services, which it could choose to neglect or even abandon altogether.
- (1953) The risk that some non-integrators may be willing to take up the divested businesses but would neglect its international intra-EEA express component if they acquired the divested businesses is not purely theoretical, as illustrated by the following statement by [...]*, which expressed interest in the divested businesses: *"In the case of the completion of the takeover and under the precondition that the local infrastructure of the divestment business can be changed from an express infrastructure to a standard parcel one, an acquisition of the divestment business could be interesting in order to expand [...]. [confidential] Moreover, in some countries it might be interesting to keep the express infrastructure in order to offer national express products alongside the national standard parcel product."*¹⁶²⁸
- (1954) This risk is strengthened by the fact that for a hypothetical non-integrated purchaser, as will be shown below, the continuation of the international intra-EEA express operations of the divested businesses would be impossible for destinations located in countries falling outside the scope of the divested businesses where the purchaser would have no network or suitable partnership, and would be likely to require, in other countries falling outside the scope of the divested businesses, significant investments and / or operational changes to adapt the purchaser's network to international intra-EEA express inbound deliveries.
- (1955) Among the various types of services provided by the divested TNT subsidiaries, only the domestic services could possibly be regarded as forming a viable business on a stand-alone basis. As regards the international small package and freight delivery operations, they rely on TNT's overall network and not only on the assets of the

¹⁶²⁷ UPS's letter of 17 December 2012 relating to the Commitments of 16 December 2012.

¹⁶²⁸ [...]*'s reply to question 9 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors II

divested businesses. In particular, as currently operated, the divested businesses' international intra-EEA small package deliveries require the use of TNT's intra-EEA air and long-haul trucking network as well as TNT's ground networks (ground hubs, local centres, "last mile" delivery vehicles) in all the EEA countries where small packages picked up by the divested TNT subsidiaries are delivered, that is to say, all EEA countries¹⁶²⁹.

- (1956) If the purchaser were DHL or FedEx, it could use its existing air and ground small package delivery network in the EEA and worldwide to continue the international intra-EEA express operations of the divested TNT subsidiaries, with however some limitations in the case of FedEx due to its relatively limited geographic coverage in the EEA compared to that of TNT. By contrast, should the purchaser be a non-integrator, it would have to rely on UPS's air network through the ATSA proposed by UPS for five years under the Commitments of 16 December 2012 and 3 January 2013 (unless it could find a more attractive air transport solution on the basis of outsourcing on commercial terms, which is a very uncertain prospect). However, after that period, the ability of the purchaser to continue the air-based international operations of the TNT subsidiaries would depend on its ability to find a suitable air transport solution to substitute for the ATSA. [Provisions of the Commitments of 3 January 2013]*.
- (1957) Given the magnitude of the investments necessary to operate an own air fleet (through ownership, chartering, leasing or equivalent agreements), and the fact that outsourcing depends on third parties, the ability of a non-integrator to secure such a suitable air transport solution cannot be taken for granted. This is illustrated by the following statement by La Poste: "*As already explained, the main obstacle to GeoPost's expansion on the intra-EEA market in the past was the ability to have access to a proper air transport solution.*"¹⁶³⁰ This confirms that once the ATSA has expired, the purchaser is likely to face difficulties to secure a suitable air transport solution (unless it is one of the integrators), in particular given that it would have to enter into an agreement on normal commercial terms and would not necessarily enjoy the specific conditions that UPS would be legally obliged to offer in the ATSA pursuant to the commitments, [Provisions of the Commitments of 3 January 2013]*.
- (1958) As already indicated in Section 7.2.1.6, according to La Poste, among other obstacles to the generalisation of the business model based on outsourcing that it applies in France and Spain with respect to air-based international express, there is a risk that an integrator such as DHL would decline to offer a suitable air transport solution if that could help a competing small package delivery company to expand its international intra-EEA express operations¹⁶³¹. The purchaser of the divested businesses would face the same risk on the expiry of the ATSA, as confirmed by [Company name]*: "*After the expiry of the ATSA in 5 years the Purchaser will face a difficult situation. Due to the already provided reasons, it will be very unlikely that the Purchaser was able to set up its own network. However, he will not be able to find another integrator that enters into a new ATSA. The integrators have no incentives to support the establishment and development of any new express market player in Europe. Hence an unlimited access to*

¹⁶²⁹ UPS's response to request for information Q54 of 14 December 2012, Annex 2.

¹⁶³⁰ La Poste's reply to question 1.1 of the market test questionnaire on the Commitments of 16 December 2012.

¹⁶³¹ Agreed minutes of a teleconference call of 25 September 2012 with La Poste, paragraph 9.

*UPS's global air network for at least 10 years would be necessary in order to build up enough volumes to operate an own air network afterwards"*¹⁶³².

- (1959) Moreover, the likelihood that the purchaser would secure a suitable air transport solution after five years is not only a matter of ability but also a matter of incentives. As explained by [Company name]*, the constitution of an air fleet - or a chartering, leasing or equivalent type of agreement conferring on the purchaser control over routes and schedules of aircraft - would not be economically justified without significant international intra-EEA express volumes: *"After the 5 year transition period: A non-integrator as purchaser will need to have built up significant Express activities in most of the 11 countries that are not divested by TNT (success is very unlikely – see above) in order to have enough volume to feed a full-scale European air network and to ensure that the divested countries would get as many import volumes as they receive today out of the TNT Express system. The non-integrator will not be able to generate in 5 years the same amount of global export volumes (i.e. in 220 countries with destination to one of the divested countries) that TNT has been building up across the globe in its 66 year old history."*¹⁶³³ The decision to acquire control over an air fleet via ownership, chartering, leasing or equivalent agreements would indeed depend on the overall intra-EEA express volumes of the purchaser.
- (1960) In addition, in the Commitments of 29 November 2012 and 16 December 2012, UPS did not commit to offering "gateway-to-door" services¹⁶³⁴ in the countries falling outside the scope of the divested businesses to the purchaser in order to allow it to perform international intra-EEA express inbound deliveries in the countries in question. [Provisions of the Commitments of 3 January 2013]*.
- (1961) Therefore, in order to be able to carry out international intra-EEA express deliveries from the Divestiture Countries to the non-Divestiture Countries, the purchaser would need suitable networks in the latter countries, or at least suitable partnerships with third parties controlling such networks. This condition is not met by most non-integrators, which have a national or regional footprint and have no significant presence in the whole of the 12 non-Divestiture Countries.
- (1962) In response to the market test questionnaire addressed to competitors, a majority of respondents considered that the fact that the Commitments of 16 December 2012 foresaw no divestments or arrangements for the non-Divestiture Countries with respect to the handling of international intra-EEA express inbound deliveries would be a shortcoming affecting the viability and competitiveness of the international intra-EEA express operations of the divested businesses¹⁶³⁵. [Company name]* stated that: *"The purchaser would need to have an existing infrastructure in the receiving EEA countries*

¹⁶³² [Company name]*'s reply to question 9.5 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors II.

¹⁶³³ [Company name]*'s reply to question 2.1 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors II (Attachment A).

¹⁶³⁴ This covers the part of the delivery process from the arrival at the air gateway up to the handing-over to the final consignee. It includes sorting at the arrival air gateway, ground transportation in the destination country and sorting in ground hubs and local centres.

¹⁶³⁵ See replies to question 8 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I.

to effectively compete."¹⁶³⁶ [Company name]* took the view that "a *minimum next day coverage of 95% of the EEA population (including key markets of UK, Germany and France)*", among other things, would be necessary in order to solve this problem¹⁶³⁷. [Company name]*, for its part, underlined that the ability to manage international intra-EEA express inbound deliveries in non-Divestiture Countries would depend on the potential purchaser¹⁶³⁸ [Company name]*, for its part, indicated: "[...]* *This means that the remedies can only address the competition concerns if the purchaser today already has efficiently scaled express operations across all EEA countries and particularly the top four markets*"¹⁶³⁹.

- (1963) These views confirm those expressed during the market test of the Commitments of 29 November 2012. Indeed, a large majority of competitors had considered the absence of arrangements relating to operations in the destination countries to be a problem¹⁶⁴⁰. For example, [Company name]* took such a view and remarked: "*To offer a competitive intra-EEA service, the Purchaser would need to be able to cover all of Europe to satisfy customer demands*"¹⁶⁴¹ According to [Company name]*, "*[The] Purchaser must have an existing ground distribution network in the receiving EEA countries.*"¹⁶⁴² [Company name]* stated: "*The receiving EEA countries make up a significant part of the EEA market and not having own express operations in these countries is expected to be a major problem for a purchaser*"¹⁶⁴³.
- (1964) Therefore, it appears clearly that the viability of the international intra-EEA express part of the divested businesses would depend on the purchasers' capabilities or partnerships in countries falling outside the scope of the divested businesses.
- (1965) In response to the market test of the Commitments of 29 November 2012, La Poste insisted on the importance of the purchaser's capabilities in non-Divestiture countries for the "success" of the international intra-EEA express deliveries originating from the countries where the TNT subsidiaries would be divested: "*The success of such delivery service from the Divestiture Countries towards the other 15 European countries strongly depends on the Purchaser capacity to successfully collect the parcels at their arrival.*". La Poste also stated: "*Air transportation is only one part of the Express service: a strong, dense and efficient ground network is also needed to ensure the last mile cost-effective and on-time delivery. In our opinion, complete reliance of the Purchaser on UPS to deliver its own clients is not a viable solution: the Purchaser's clients might be settled in different areas than those of UPS. However, UPS last-mile*

¹⁶³⁶ [Company name]* replies to question 8.1 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I.

¹⁶³⁷ [Company name]*'s reply to question 8.1 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I.

¹⁶³⁸ [Company name]*'s reply to question 8.1 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I.

¹⁶³⁹ [Company name]*'s reply to question 8.1 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I.

¹⁶⁴⁰ See reply to question 9 of market test questionnaire on Commitments of 29 November 2012 – competitors.

¹⁶⁴¹ [Company name]*'s reply to questions 9 and 9.1 of the market test questionnaire on the Commitments of 29 November 2012.

¹⁶⁴² [Company name]* reply to questions 9 and 9.1 of the market test questionnaire on the Commitments of 29 November 2012.

¹⁶⁴³ [Company name]*'s reply to questions 9 and 9.1 of the market test questionnaire on the Commitments of 29 November 2012.

network would most likely be tailored and organised to serve in priority UPS's clients. In our experience, controlling a strong and dense domestic network in each country of destination is key to ensure successful express service to end-consignee" and: "Again, in our experience, to control one own domestic network in the country of destination is paramount in express service. Using the network of partners would not prove efficient enough. Indeed: - If the last-mile destination network is provided through partnerships with integrators or parcel operators that are present in several countries, including countries of origin and countries of arrival, this would most likely end-up with a less competitive service price than the price directly offered by this unique provider - If the last-mile destination network was provided through a list of local partners, the solution would be extremely complex and would include added costs (because it would imply the integration of process and IT of many players)"¹⁶⁴⁴.

- (1966) Even though these comments related to the Commitments of 29 November 2012, they are also relevant to the subsequent sets of Commitments, which are based on the same basic principle: divestment of TNT's subsidiaries in certain countries only, combined with an ATSA, the purchaser being responsible for arranging for ground transportation and last-mile delivery in destination countries falling outside the geographic scope of the divested businesses (save for a short transitional period provided for in the Commitments of 3 January 2013). The replies by [Company names]* as well as La Poste/DPD's statement illustrate the importance of strong domestic networks, adapted to the needs of the express market, in non-Divestiture countries as a condition of viability of the international intra-EEA express part of the divested businesses, in the eyes of La Poste.
- (1967) These statements also indicate that La Poste has serious misgivings about a solution involving partnerships (instead of networks controlled by the purchaser itself) in non-Divestiture Countries, including partnerships with UPS (save for a short transitional period allowing the purchaser to adapt its own networks). These misgivings are shared by a range of other significant competitors. In response to the market test on the Commitments of 29 November 2012, a bare majority of the competitors indicated that a solution involving such partnerships would be appropriate. However, the most significant competitors active in the international intra-EEA express market, in particular DHL, FedEx, La Poste and Royal Mail, took the opposite view¹⁶⁴⁵. [Company name]*, for instance, referred to *"the inherent difficulty in managing multiple partner arrangements and the complexity of IT solutions across many providers to provide the required level of service and visibility"* and considered that *"Margin erosion within partnership arrangements would reduce cashflow and therefore funds for dividends and investment."*¹⁶⁴⁶ [Company name]* also made the following comment: *"Any of the other two Integrators would not help a new competitor to evolve. Other national Express systems would not be fine-tuned to the UPS air gateways. Many new traffics would need to be established. Furthermore, such an Export parcel would touch 3 different IT systems: old TNT system in the 12 divested countries, UPS system for air transportation, third party system in the receiving country. It is very unlikely that the*

¹⁶⁴⁴ La Poste's reply to question 9 of the market test questionnaire on the Commitments of 29 November 2012 – Competitors.

¹⁶⁴⁵ See replies to question 9.3 of the market test questionnaire on the Commitments of 29 November 2012.

¹⁶⁴⁶ [Company name]*'s reply to question 9.3 of the market test questionnaire on the Commitments of 29 November 2012.

same quality level as with an Integrator can be established. (...) A partnership model has significant limitations and will not be able to compete effectively against the integrators."¹⁶⁴⁷ As regards the weaknesses of a solution involving partnerships in the destination countries, [Company name]* stated: *"losing operational control over a parcel for one or more legs of its journey adds inefficiency and a certain delay. The case team should be mindful that too many partnerships will inevitably impact the quality of the overall express service. This will make deliveries with a very short time commitment close to impossible."*¹⁶⁴⁸

- (1968) These statements cast doubts on the viability of a solution resting on a partnership on the destination side in non-Divestiture Countries, instead of direct control of a network by a purchaser. In any event, a pre-condition for such a solution would be the ability of the purchaser to find a suitable partner in the relevant non-Divestiture Countries that would accept to perform international intra-EEA express inbound deliveries on behalf of the purchaser, and that would accept to adapt its network for such purpose. This cannot be taken for granted and would have to be assessed on a case-by-case basis.
- (1969) Moreover, even for non-Divestiture Countries where the purchaser would control a network, it may not be able to use it for international intra-EEA inbound express deliveries without significant adaptation measures. Even a company such as [Company name]*, which controls small package delivery assets in a number of EEA countries, may not be able to perform inbound international intra-EEA express deliveries from Divestiture Countries to non-Divestiture Countries using its own capabilities on the destination side without costly adaptations of its networks which may not be economically justified in view of the volumes involved. [Company name]* stated: *"In general, [Company name]* only operates ground networks in terms of standard parcel distribution. Those national networks are usually not designed to process express parcels"*. [Company name]* added that very significant adjustments would be necessary to allow these networks to sustain international intra-EEA express inbound deliveries, noting: *"The adjustments are linked to additional line hauls from the depots to the air gateways of UPS/TNT. Such line hauls would create significant costs, which cannot be compensated via additional volumes. There is also the need to set up line hauls to collect the parcels in the destination country from the air gateways of the integrator and bring it to the GLS depot. Additional costs arise due to the relabeling in country of origin and in the destination country. Moreover, it is possible that standard parcel depots would need to be adjusted to handle international express volumes. The handling of such parcels requires a fast processing and therefore enough capacity has to be available. Besides, most of the current depots are too far away from the air gateways of UPS/TNT. It is therefore likely that new depots would have to be built in order to guarantee that parcels can be delivered within one day. However, these depots would lack sufficient volumes in order to achieve a sufficient capacity utilisation and a return*

¹⁶⁴⁷ [Company name]*'s reply to question 9.3 of the market test questionnaire on the Commitments of 29 November 2012.

¹⁶⁴⁸ [Company name]*'s reply to question 8.1 of the market test questionnaire on the Commitments of 16 December 2012.

on the investments. All in all, the low express volumes would not allow taking such high investments"¹⁶⁴⁹.

- (1970) La Poste also referred extensively to the needs for adjustments of its existing ground networks in non-SIEC countries should it purchase the divested businesses, as illustrated by the following table, where La Poste provided details on the measures to be implemented and the ensuing costs to be expected:

Table 60: [Confidential information regarding a potential remedy taker]*

[...]*

Source: [...]*¹⁶⁵⁰

- (1971) The cost indications outlined in Table 60 show that these measures would be substantial. In addition, La Poste considers that two years would be necessary to implement them, which is a further indication of their significant magnitude¹⁶⁵¹.
- (1972) [Confidential information regarding the air transportation agreements concluded between La Poste and third parties]*¹⁶⁵², [Confidential information regarding the air transportation agreements concluded between La Poste and third parties]*. This is a further indication that the adaptation of ground networks (notably in terms of additional routes between air gateways and ground hubs or local centres) in order to make them suitable and efficient for the handling of international intra-EEA air-based express deliveries requires significant measures. [Confidential information regarding the air transportation agreements concluded between La Poste and third parties]*.
- (1973) Therefore, even for the only two non-integrators that control their own networks in a relatively large number of EEA countries – La Poste and Royal Mail –, their ability to carry out international intra-EEA express deliveries from the SIEC countries to the non-Divestiture countries – should they acquire the divested businesses – would be riddled with significant uncertainties.
- (1974) This is even more so for the other non-integrators, whose international operations have a much more limited geographic scope. For small package delivery companies cooperating in partner networks such as Eurodis, there would be very significant uncertainties as to their ability to rely on partners in the non-Divestiture Countries for international inbound intra-EEA express deliveries originating from the SIEC countries. Indeed, such partner networks are usually geared towards international deferred services. Moreover, as follows from both La Poste and [Company name]* statements, the adaptation of a network to international intra-EEA express inbound deliveries (when this network is not yet used for such deliveries), requires significant measures and may not always be economically justified, depending on the volumes involved. Furthermore, the main partner networks only cover part of the EEA.

¹⁶⁴⁹ [Company name]*'s reply to question 9 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors II.

¹⁶⁵⁰ [Confidential information regarding a potential remedy taker]*

¹⁶⁵¹ La Poste's reply to question 12 of the market test questionnaire on the Commitments of 16 December 2012.

¹⁶⁵² La Poste's submission of 27 September 2012.

- (1975) Had the Commission authorised the Transaction on the basis of the Commitments of 16 December 2012, a non-integrator other than GLS acquiring the divested businesses would have to develop networks or establish suitable partnerships in a number of countries in order to be able to continue to provide international intra-EEA express services in the Divestiture Countries to the same extent as TNT currently does. Because of this constraint, non-integrators other than La Poste or Royal Mail are very unlikely to be suitable purchasers. At the very least, their suitability would have to be assessed on a case-by-case basis.
- (1976) Overall, competitors' responses to the market test confirm that the divested businesses cannot be seen as viable stand-alone businesses in all their components (in particular international intra-EEA express small package deliveries) irrespective of the identity and characteristics of the purchaser. Among the respondents that took an explicit position on that matter, a majority considered that the divested businesses could not be run as a viable stand-alone business as of the date of acquisition so as to enable the purchaser to perform international intra-EEA small package delivery services and to efficiently deliver small packages to EEA destinations¹⁶⁵³. The comments of the respondents that took this view refer in particular to the need to have an adequate presence in the non-Divestiture Countries. Competitor's views on that matter are particularly relevant since competitors are best placed to understand what is required to run the divested TNT subsidiaries in all their components as viable stand-alone businesses.
- (1977) [Company name]*considered that the viability of the divested businesses would be *"dependent upon the purchaser's ability to access comparable express services in all EEA countries"* and added: *"Without this the purchaser cannot fulfil the end to end service requirement for express services. Additionally, the divested countries represent a small percentage of pan-EEA express volumes and therefore the divested business would have to establish partnership(s) within the major EEA countries to have a viable business."*¹⁶⁵⁴ [Company name]* stated: *"In order to have a viable and stand-alone business of international intra-EEA express delivery services of small packages, a local presence in both sending and receiving country is needed. 'Presence' refers to access to infrastructure, personnel, and IT systems. In addition, there is a requirement of an air transportation capacity between the sending and receiving country. From an EEA-wide perspective, this means that any Purchaser which does not have existing infrastructure in all EEA countries except for the Divestiture Countries, will not be able to have a viable business as of the acquisition date."*¹⁶⁵⁵ [Company name]* took the view that the viability of the divested businesses *"depends on the purchaser"* and added: *"We assume that there is only a small number of potential purchasers that meet the requirements detailed in the proposed commitments. A potential purchaser would have to be able to offer services for the main countries in the EEA: UK, Germany, France."*¹⁶⁵⁶

¹⁶⁵³ See replies to question 2 of the market test questionnaire on the Commitments of 16 December 2012 – competitors I and competitors II.

¹⁶⁵⁴ [Company name]*'s reply to question 2 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I.

¹⁶⁵⁵ [Company name]*'s reply to question 2 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I.

¹⁶⁵⁶ [Company name]*'s reply to question 2 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I.

- (1978) Whereas the international intra-EEA express operations of the divested businesses are likely to be viable if combined with an integrator's network (if the purchaser is DHL and FedEx), their viability would strongly depend on the purchaser's characteristics if the purchaser was a non-integrator. In particular, their viability would crucially depend on the ability of the purchaser to manage international intra-EEA express inbound deliveries in non-Divestiture Countries with its own capabilities, or at least on the basis of suitable partnerships (assuming that the latter option is sustainable, which as already explained is far from certain).
- (1979) As regards La Poste and Royal Mail, their ability to manage international intra-EEA express inbound deliveries in non-Divestiture countries would have to be assessed on the basis of their own characteristics and cannot be presumed. There would be even greater uncertainties as to the ability of other non-integrators to perform international intra-EEA express inbound deliveries in all 12 non-Divestiture Countries, since these operators (i.e. non-integrators other than La Poste and Royal Mail) only have a national or regional footprint. Even if they cooperate with other small package delivery companies within a partner network, their partners would be likely to have to agree to significant adaptations of their domestic networks, since partner networks are mostly geared towards international deferred operations, as follows from Section 7.2.3. The willingness and ability of partners to implement such adaptations cannot be taken for granted. In any event, partner networks have a very limited market presence, as explained in Section 7.2.3, and a relatively limited geographic extension within the EEA. For these reasons, non-integrators other than La Poste and Royal Mail would be highly unlikely to qualify as suitable purchasers.
- (1980) Moreover, the ability of a non-integrator to continue the international intra-EEA express operations of the divested businesses after the expiry of the ATSA would depend on its ability and incentives to secure a suitable air transport solution at that time. This also cannot be presumed and would have to be assessed on a case-by-case basis. This is an important point since the commitments must ensure that the purchaser is able to exert a significant competitive constraint on UPS in the international intra-EEA express markets of the SIEC countries on a lasting basis¹⁶⁵⁷.
- (1981) Therefore, there is a risk that if a non-integrator were the purchaser, it may not be able and willing to continue the international intra-EEA express operations of the divested businesses on a lasting basis. Such a purchaser may downsize or abandon these operations after a transitional period if their continuation in the current scale would require significant adaptations and investments, while actively continuing the domestic and / or international deferred and / or freight and / or contract logistics operations of the divested businesses. However, in view of the competition concerns identified in this Decision, the relevant criterion is not the viability of each individual divested TNT subsidiary as a whole but the viability of their international intra-EEA express operations. In the case of the non-integrators, this depends to a critical extent on the purchaser's characteristics, in particular in terms of business model and development strategy but also network capabilities and operations in non-Divestiture Countries as well as ability and incentives to develop a lasting and viable solution for air transport. [Confidential information regarding the Commitments offered by UPS]*¹⁶⁵⁸.The

¹⁶⁵⁷ Remedies Notice, paragraph 23.

¹⁶⁵⁸ See for example Commitments of 3 January 2013, Section B, paragraph 1 (i)

existence of this commitment does not affect the above conclusions, [Confidential information regarding the Commitments offered by UPS]*. In particular, it does not affect the above findings as regards the fact that the viability of the international intra-EEA express (outbound) deliveries of the divested businesses would strongly depend on the characteristics of the purchaser, notably in terms of business model and incentives to maintain international intra-EEA express outbound operations, networks and partnerships in non-Divestiture Countries, as well as its ability and willingness to find a suitable air transport solution after five years.

9.2.2. *There would only be very few possible suitable purchasers for the divested businesses*

(1982) In the context of the market test, a broad range of small package delivery companies and freight forwarders have been consulted on the Commitments of 29 November and 16 December 2012. As indicated in Sections 9.1.1.2 and 9.1.2.2, only a few respondents showed interest in the divested businesses¹⁶⁵⁹.

(1983) Neither FedEx nor DHL showed willingness to acquire the divested businesses. DHL would in any event be unlikely to be a suitable candidate. Indeed, given its market position, the combination of the divested TNT subsidiaries with DHL instead of UPS would be likely to have, *prima facie*, negative effects on competition.

(1984) As regards FedEx, [Details on Fedex's view on the proposed commitments]*¹⁶⁶⁰

(1985) Furthermore, in regard to the Commitments of 29 November 2012, FedEx had made the following comment: "*The Divestment Business does not constitute a viable and stand-alone business across the EEA or in each of the Divestiture Countries individually either for FedEx or for DPD or GLS.*"¹⁶⁶¹ As regards FedEx' negative views on the Commitments of 16 December 2012, they are illustrated in particular by the following statement: "*The divestiture countries are mostly low volume, high cost markets, largely on the periphery of Europe. [...]** *The divestment business as proposed cannot constitute a viable and stand-alone business in any of the divestiture countries or taken as a whole.*"¹⁶⁶² FedEx also stated: "*Even including the Netherlands and Denmark, the Divestment Business still lacks scale to have any meaningful impact. The Divestiture Countries represent [10-20]*% of the total EEA express market ([20-30]*% if Spain and Portugal which are offered only to DPD are included). Consequently, no new entrant purchaser would be able to bridge the gap to credibly offer express coverage in the remaining intra-EEA markets in order to constitute a competitive constraint on the merged entity.*"; and: "*In order to be a competitive constraint against UPS / TNT, FedEx requires [...]** *As the Divestment Business fails to provide the density and scale*

¹⁶⁵⁹ See replies to question 12 of the market test questionnaire on the Commitments of 29 November 2012 – Competitors, replies, to question 11 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I and replies to question 9 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors II.

¹⁶⁶⁰ FedEx's reply to question 11.1 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I.

¹⁶⁶¹ FedEx's reply to question 16 of the market test questionnaire on the Commitments of 29 November 2012 – Competitors.

¹⁶⁶² [...]*

of operations across the EEA, so as to allow the purchaser to compete effectively as an integrator, it must be rejected in its entirety."¹⁶⁶³

- (1986) On the basis of these statements, it appears very unlikely, had the Commission authorised the Transaction on the basis of the Commitments of 16 December 2012, that FedEx would have agreed to purchase the divested businesses. [Confidential information regarding a potential remedy taker]*. In view of these statements, in particular, it appears very unlikely that FedEx would have sought to acquire the divested businesses had the Commission authorised the Transaction on the basis of the Commitments of 16 December 2012.
- (1987) Even if, following the first divestiture period, the divested businesses had been put up for sale by a divestiture trustee at no minimum price, it would have been very uncertain that FedEx would have purchased them. [Details on Fedex's strategy]*. Therefore, it is very uncertain that FedEx would be willing to purchase the divested businesses even in the context of a trustee divestiture process, had the Commission authorised the Transaction on the basis of the Commitments of 16 December 2012. It should also be remarked that in any event, FedEx would be unlikely to agree to such acquisition without significant due diligence investigations, notably in view of the fact that at this stage, it has not entered into any meaningful negotiations with UPS and is thus likely to have only limited information at its disposal as regards the divested businesses. In this context, it can be noted that La Poste itself believed it would need [...] months to conduct proper due diligence of the divested businesses.
- (1988) However, notably in view of FedEx's overall expansion strategy in Europe, the Commission considers that it would not be appropriate to completely exclude that FedEx might be interested in purchasing the divested businesses pursuant to the Commitments of 16 December 2012, should the Commission have authorised the Transaction on the basis of these commitments. It is only concluded that the position expressed by FedEx in the context of the market tests makes it very unlikely that FedEx would have been interested in purchasing the divested businesses had the Commission authorised the Transaction on the basis of the Commitments of 16 December 2012.
- (1989) As regards non-integrators, La Poste expressed interest in the divested businesses¹⁶⁶⁴ as did [Company name]*. However, [Company name]* stated: *"In the case of the completion of the takeover and under the precondition that the local infrastructure of the divestment business can be changed from an express infrastructure to a standard parcel one, an acquisition of the divestment business could be interesting in order to expand [...]*. [confidential] Moreover, in some countries it might be interesting to keep the express infrastructure in order to offer national express products alongside the national standard parcel product. The profits of the existing businesses would be significantly reduced as most of the Express Export activities and a big part of the existing customer basis will be lost (...) and any transition process from an Express network to a Standard Parcel network will be very costly. Therefore an acquisition could probably only be interesting if a significant negative purchase price consideration*

¹⁶⁶³ FedEx's reply to question 11.1 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I

¹⁶⁶⁴ La Poste's reply to question 1 of the market test questionnaire on the Commitments of 16 December 2012 [ID 9870].

could be agreed on"¹⁶⁶⁵. These statements indicate that [Company name]*'s strategy would clearly consist in focussing on deferred services and even in converting the acquired networks into deferred networks. At best, [Company name]* might keep the express infrastructure in order to offer express services as a side-product. Furthermore, [Company name]* would expect to lose a large part of the customers of the divested TNT subsidiaries for international express.

- (1990) Furthermore, [Company name]* made a number of comments which cast serious doubts on its ability and willingness to continue the international intra-EEA express operations of the divested TNT subsidiaries should it acquire these. In particular, as already indicated, [Company name]* took the view that the costly adaptations of its domestic networks in non-Divestiture Countries to international intra-EEA express inbound deliveries from the Divestiture Countries would be very unlikely to be economically justified in view of the volumes involved.
- (1991) On the basis of these elements, it is concluded that [Company name]* would not be a suitable purchaser.
- (1992) Apart from La Poste and [Company name]*, only two postal operators expressed a potential interest in the remedy package proposed on 16 December 2012¹⁶⁶⁶. [Company name]* was one of them. However, it stressed that it would be ready to acquire only part of the divestment assets, claiming that a number of these assets were in a very bad economic state¹⁶⁶⁷. Moreover, as already explained, notably in Section 7.2.3, [Company name]* is, directly and via its [...] subsidiary, active only in a very limited number of non-Divestiture Countries. Via [...] network, it provides international services from the countries where it is established to a limited number of countries where it is not, such as for example Belgium and the Netherlands. However, these are deferred services. There is no indication that [Company name]*'s partners in the [...] network would accept to adapt their own networks to international intra-EEA express deliveries from the Divestiture Countries, which, as already indicated, is likely to involve substantial investments.
- (1993) [Company name]* itself had indicated it would not be able to carry out international intra-EEA express inbound deliveries in most of the non-Divestiture Countries and would need to invest to constitute its own international network in order to perform such inbound deliveries in non-Divestiture Countries: "[...]"¹⁶⁶⁸. With respect to this point, it should also be noted that [Company name]* raised serious doubts as to the possibility to perform international intra-EEA express inbound deliveries in a viable and competitive manner by establishing new partnerships with third parties: "*Additionally,*

¹⁶⁶⁵ [Company name]*'s reply to question 9 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors II [ID 9957]

¹⁶⁶⁶ As already indicated, a third national postal operator had expressed interest in the remedy package proposed on 29 November 2012, but was no longer interested in the one proposed on 16 December 2012. In any event, this operator has an international footprint limited to a few EEA countries, and would have needed to develop new networks or at least new partnerships in a number of non-Divestiture Countries in order to be able to handle the international intra-EEA inbound express deliveries of the divested businesses. This operator would have been unlikely to be a suitable purchaser.

¹⁶⁶⁷ [Company name]* reply to question 11.1 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I.

¹⁶⁶⁸ [Company name]*'s replies to question 13 and 13.1 of the market test questionnaire of the Commitments of 29 November 2012 – Competitors I ("[...]").

even with the most diverse forms of cooperation, a network with broad coverage can only be established with great efforts and a considerable amount of time, particularly when considering the fact that innumerable bilateral agreements are necessary for this. Even with these agreements it is difficult to achieve a broad coverage since all the necessary bilateral agreements lead to a situation in which the administration of them is disproportionate to the volume handled by [Company name]. [...]*"¹⁶⁶⁹. These comments related to the Commitments of 29 November 2012 but given that only two countries – Spain and Portugal – were added to the geographic scope of the divested businesses in the Commitments of 16 December 2012, there are also relevant to the latter.*

- (1994) [Company name]* also raised serious doubts as to the possibility to find a suitable air transport solution after the ATSA has expired: *"Thus, for a stand-alone a potential purchaser would need a road- and air-network with broad coverage. The temporary access to UPS's air network would not solve the problem and only cause suspend it or delay it for [...]* more years as nobody but the integrators would be able to establish such a network from scratch. As already stated in other statements concerning this merger, regular airlines are no alternative to the integrators' air-networks, especially not the one of UPS. This alone is reason enough that the sale to a potential purchaser cannot be considered a stand-alone possibility."*¹⁶⁷⁰ Finally [Company name]* emphasised that a 5-year access would not provide enough certainty and opportunities to the purchaser to plan and invest in the long-run¹⁶⁷¹. Indeed, the prospect of being present on the international intra-EEA express markets of the Divestiture Countries for 5 years only may strongly limit the purchaser's incentives to invest and implement other measures in order to capture customers and volumes and thereby actively compete against the merged entity.
- (1995) In view of these various elements, [Company name]* cannot be regarded as a suitable potential purchaser.
- (1996) A second postal operator expressed interest, but the geographic scope of its current operations in the EEA is limited, such that this company is very unlikely to be a suitable purchaser.
- (1997) Two freight forwarders – [Company name]* and [Company name]*, expressed interest in the Commitments of 29 November 2012. However, in response to the market test of the Commitments of 16 December 2012, [Company name]* declared it was no longer interested¹⁶⁷².
- (1998) As regards [Company name]*, [Details on the Company's activities]*¹⁶⁷³. [Details on the Company's activities]*¹⁶⁷⁴. [Details on the Company's activities]*. In view of these

¹⁶⁶⁹ [Company name]*'s replies to question 9.3.1 of the market test questionnaire of the Commitments of 29 November 2012 ("[...]*)"

¹⁶⁷⁰ [Company name]*'s reply to question 2.1 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I ("[...]*)"

¹⁶⁷¹ [Company name]*'s reply to question 4.1 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors I ("[...]*)"

¹⁶⁷² [Company name]*'s reply to question 9 of the market test questionnaire on the Commitments of 16 December 2012 – Competitors II.

¹⁶⁷³ [...]*

¹⁶⁷⁴ Agreed minutes of a teleconference call of [...]* 2012 with [...]*, paragraph 10.

elements as well as the general assessment of the competitive constraint exerted on the Parties by freight forwarders, there would be major uncertainties as to [Company name]*'s ability to continue the international intra-EEA express of the divested businesses once acquired from TNT, and to compete aggressively against the integrators.

- (1999) Moreover, as already indicated in Section 9.1.2.2, in answer to the question whether Commitments of 16 December 2012 would be sufficient to allow the Purchaser to operate efficiently and compete effectively with UPS in the international intra-EEA express markets of the 15 countries where competition concerns are identified, [Company name]* replied: "*It depends on the Purchaser. Domestic capabilities for pre- and on-carriage of cross-border consignments in other EEA countries (non-Divestiture Countries) are needed*"¹⁶⁷⁵. In response to the market test questionnaire on the Commitments of 29 November 2012, [Company name]* had indicated: "*The Purchaser should have certain parcel capabilities in other European countries.*"¹⁶⁷⁶ Therefore, [Company name]* itself does not fulfil the conditions which it considers indispensable to compete effectively against UPS in the international intra-EEA express markets of the Divestiture Countries.
- (2000) Finally, as already indicated in Sections 9.1.1.2 and 9.1.2.2, La Poste expressed interest pursuant to both the Commitments of 29 November 2012 and the Commitments of 16 December 2012. On the basis of the following sections, La Poste is the only company that has both expressed interest in the divested businesses and that might possibly be a suitable purchaser.

9.2.3. *Need for a fix-it-first or an up-front purchaser solution*

- (2001) Neither the Commitments of 29 November 2012 nor the Commitments of 16 December 2012 were based on an "up-front buyer" or a "fix-it-first" approach. An "up-front buyer" commitment implies that the parties may not complete the notified operation before having entered into a binding agreement with a purchaser for the business, approved by the Commission. A "fix-it-first" commitment is a solution whereby the parties identify a purchaser for the business to be divested and already conclude a binding agreement during the Commission's review of the notified operation. The main difference between the two options is that in the case of an up-front buyer, the identity of the purchaser is not known to the Commission prior to the authorisation decision¹⁶⁷⁷. A clearance of a merger on such terms therefore leaves the Notifying party exposed to the commercial risks consequent on being unable to find a suitable buyer for the business to be divested.
- (2002) The Commitments of 29 November and 16 December 2012 only foresaw the sale of the divested businesses within a fixed time-limit after the adoption of the decision that would clear the Transaction. In application of these Commitments, the identity of the purchaser, which would have had to be approved by the Commission, would not have been known prior to the authorisation decision and UPS's failure to reach an agreement

¹⁶⁷⁵ [Company name]*'s reply to question 1 of the market test on the Commitments of 16 December 2012 – Competitors II

¹⁶⁷⁶ [Company name]*'s reply to question 10 of the market test on the Commitments of 29 November 2012 – Competitors

¹⁶⁷⁷ Remedies Notice, paragraph 50.

with a suitable purchaser approved by the Commission after the authorisation of the Transaction would not have prevented the completion of the Transaction.

- (2003) According to the Remedies Notice, commitments of this type are acceptable "*provided that a number of purchasers can be envisaged for a viable business and that no specific issues complicate or stand in the way of the divestiture*"¹⁶⁷⁸. However, this condition is not fulfilled in the present case.
- (2004) There appear to be – *prima facie* - only two companies – FedEx and La Poste – which could possibly be envisaged as suitable purchasers for the divested businesses, and in the case of FedEx, there is only a slim likelihood that it would purchase the divested businesses should the Commission authorise the Transaction on the basis of the Commitments of 16 December 2012 (that is to say, with no upfront buyer or fix-it-first solution)¹⁶⁷⁹. Moreover, as regards the only potentially suitable purchaser that expressed a clear interest in the divested businesses – La Poste – a number of issues complicate or stand in the way of the divestitures and their implementation by La Poste so as to remedy the Commission's concerns, as will be shown in the following recitals.
- (2005) As regards FedEx, the likelihood that it would purchase the divested businesses had the Commission authorised the Transaction on the basis of the Commitments of 16 December 2012 appears very low as explained in Section 9.2.2.
- (2006) As to La Poste, it would have had to negotiate with UPS, in due time, not only a share purchase agreement, but also an ATSA.¹⁶⁸⁰ [Scope of the possible negotiations between La Poste/DPD and UPS]*¹⁶⁸¹. [Scope of the possible negotiations between La Poste/DPD and UPS]*¹⁶⁸². [Scope of the possible negotiations between La Poste/DPD and UPS]*¹⁶⁸³. [Scope of the possible negotiations between La Poste/DPD and UPS]*¹⁶⁸⁴. That was considered necessary by La Poste for the divested businesses to be regarded as a viable stand-alone business since the divested businesses provide their customers with extra-EEA services¹⁶⁸⁵ UPS indicated on 3 January 2013 that these terms were currently being negotiated with DPD¹⁶⁸⁶.
- (2007) Alongside the share purchase agreement with La Poste – should the latter have been the purchaser-, other important arrangements would have had to be negotiated "on commercially reasonable terms". [Scope of the possible negotiations between La Poste/DPD and UPS]*¹⁶⁸⁷. [Scope of the possible negotiations between La Poste/DPD

¹⁶⁷⁸ Remedies Notice, paragraph 52.

¹⁶⁷⁹ If FedEx would have purchased the divested businesses pursuant to the Commitments of 3 January 2013, this would have been done following a fix-it-first approach, on which those commitments rested. However, no legally-binding agreement was signed between UPS and FedEx before the end of the procedure, which means that no real fix-it-first solution has been implemented.

¹⁶⁸⁰ Commitments of 3 January 2013, Schedule 2, paragraph 7.

¹⁶⁸¹ Commitments of 3 January 2013, Schedule 2, paragraph 24.

¹⁶⁸² [Confidential information regarding UPS' air network post-merger]*

¹⁶⁸³ Commitments of 3 January 2013, Schedule 2, paragraph 4.

¹⁶⁸⁴ Commitments of 3 January 2013, Schedule 2, paragraph 10.

¹⁶⁸⁵ La Poste's reply to question 5.1 to the market test questionnaire on the Commitments of 16 December 2012.

¹⁶⁸⁶ UPS's letter of 3 January 2013 on the Commitments of 3 January 2013.

¹⁶⁸⁷ La Poste's reply to questions 5.1 and 12 to the market test questionnaire on the Commitments of 16 December 2012.

and UPS]*.¹⁶⁸⁸ UPS indicated on 3 January 2013 that these terms were currently being negotiated with DPD¹⁶⁸⁹.

- (2008) Moreover, UPS and La Poste would have to negotiate a transitional services agreement [Scope of the possible negotiations between La Poste/DPD and UPS]*¹⁶⁹⁰.
- (2009) It thus appears that important arrangements would still need to be negotiated between UPS and La Poste alongside the share purchase agreements to allow the divestiture to take place in such a way that La Poste could viably continue the international intra-EEA express operations of the divested businesses. This would complicate and render more uncertain the divestiture process.
- (2010) Indeed, the need to successfully negotiate a series of important agreements, notably the ATSA and the [...]*, in order to allow La Poste to continue the international intra-EEA express operations of the divested businesses would have added a significant degree of uncertainty as to the effective completion of the sale to La Poste after the Transaction had it been authorised. Moreover, La Poste indicated that the due diligence, the completion of which would be a pre-requisite for the signature of the final agreements, could take up to [...]* months¹⁶⁹¹. This is an additional risk that the sale to La Poste may not have occurred (or at least not on terms that would ensure the effectiveness of the Commitments in addressing the Commission's concerns) should the Commission have approved the Transaction on the basis of the Commitments of 16 December 2012 or the Commitments of 3 January 2013.
- (2011) Furthermore, there were doubts expressed by the Commission during the remedy discussions whether even La Poste would have qualified as a suitable purchaser for a viable business, therefore reducing the possible scope of the number of purchasers. Indeed, after a detailed verification of La Poste/DPD's specific circumstances and business plan, the Commission concluded that it could not be regarded as suitable (see Section 9.2.5 below).
- (2012) [Confidential information regarding La Poste/DPD as a potential remedy taker]*¹⁶⁹². There are therefore, still at this late stage significant uncertainties as to whether La Poste, even assuming that it would be willing to purchase the divested businesses and complete the negotiations of all necessary transaction agreements with UPS, would have actively continued these operations. [Confidential information regarding La Poste/DPD as the potential remedy taker]*. There are therefore, at the very least, significant uncertainties as to the suitability of La Poste as a potential purchaser.
- (2013) Moreover, as explained in Section 9.2.1, the viability of the international intra-EEA express operations of the divested businesses depends to a significant extent on the characteristics of the purchaser and most non-integrators – including GLS – are clearly unlikely to be able to maintain the viability of these operations. Therefore, even if companies other than La Poste, FedEx and those that expressed real interest in the divested businesses in the course of the market test showed interest, they would not necessarily be suitable. Their ability to establish and maintain the viability of the

¹⁶⁸⁸ Commitments of 3 January 2013, Section B, paragraph 5 (j).

¹⁶⁸⁹ UPS's letter of 3 January 2013 on the Commitments of 3 January 2013.

¹⁶⁹⁰ Commitments of 3 January 2013, Section B, paragraph 5 (k).

¹⁶⁹¹ La Poste's reply to questions 6.5 and 6.6 of request for information Q63 of 9 January 2013.

¹⁶⁹² La Poste's reply to question 3 of request for information Q63 of 9 January 2013

international intra-EEA express operations of the divested businesses on a lasting basis would have to be assessed on a case-by-case basis.

- (2014) Therefore, had the Commission approved the Transaction on the basis of the Commitments of 16 December 2012 (without a fix-it-first or upfront buyer solution), there would have been significant material uncertainties as to whether the divested businesses could have been eventually sold to a suitable purchaser, and whether that divestiture would have been possible without significant complications.
- (2015) In these circumstances, a "classical" sale within a fixed time-limit after this Decision (including a period for a divestiture trustee who may attempt to find a suitable purchaser and sell the divested businesses at no minimum price), as proposed by UPS in the Commitments of 29 November and 16 December 2012, is not appropriate. Therefore, the Commission indicated to UPS, notably during the State of Play meetings of 11 and 21 December 2012 that the proposed commitments were likely to be insufficient in that they foresaw no up-front buyer or fix-it-first approach.
- (2016) The Commission does not exclude that an up-front buyer approach could have been adequate in this case, provided that the Commitments contained strict and detailed criteria as to the suitability of a potential purchaser, for example with respect to (i) its ability and incentives to adapt its domestic networks in non-Divestiture Countries to international intra-EEA express deliveries (or, possibly, to perform such inbound express deliveries on the basis of suitable partnerships with third parties established in these countries with respect to the "gateway-to-door" part of the process), and (ii) its ability and incentives to secure a suitable and lasting air transport solution once the ATSA has expired. Indeed, according to the Remedies Notice, up-front buyer solutions may be adequate in "*cases where there are considerable obstacles for a divestiture, such as third party rights, or uncertainties as to finding a suitable purchaser*"¹⁶⁹³. It follows from the foregoing that in this case, there are considerable obstacles for the divestiture (notably due to the need to conclude agreements coming in addition to the share purchase agreement in order to allow the purchaser to continue the international intra-EEA express operations of the divested businesses). It also follows from the foregoing that there are significant uncertainties as to the likelihood of finding a suitable purchaser, notably in view of the very small number of potentially suitable and interested purchasers, doubts as to the suitability of La Poste, and the fact that the viability of the international intra-EEA express operations of the divested businesses strongly depends on the characteristics of the purchaser.
- (2017) However, a fix-it-first solution would appear even more appropriate in this case.
- (2018) According to the Remedies Notice, "*[T]he Commission welcomes fix-it-first remedies in particular in cases where the identity of the purchaser is crucial for the effectiveness of the proposed remedy. This concerns cases where, given the circumstances, only very few potential purchasers can be considered suitable, in particular as the divested business is not a viable business in itself, but its viability will only be ensured by specific assets of the purchaser, or where the purchaser needs to have specific characteristics in order for the remedy to solve the competition concerns.*"¹⁶⁹⁴ This is precisely the case here. Indeed, the viability of the divested business crucially depends

¹⁶⁹³ Remedies Notice, paragraph 54.

¹⁶⁹⁴ Remedies Notice, paragraph 57.

on the purchaser, and there are only very few companies which could be potentially considered as suitable.

- (2019) In view of the limited number of potential buyers, there can be no sufficient likelihood, at the date of the adoption of the Commission decision ruling on the Transaction, that a legally-binding agreement providing for the divestiture will be signed with any of them in due time, unless such an agreement is signed before the adoption of the Decision. This is all the more true since the prospect that FedEx would be willing to take up the divested businesses would appear to be at best very uncertain (even if, as already indicated, the divested businesses would have been put up for sale following the first divestiture period by a divestiture trustee at no minimum price), and that La Poste would still need to establish a clear and credible business plan, carry out significant due diligence investigations, negotiate the ATSA and the [...] and obtain the necessary agreement of its shareholders before it could enter into the share purchase agreement.
- (2020) Furthermore, the viability of the divested businesses would strongly depend on the characteristics of the purchaser, in particular its domestic networks or partnerships in non-Divestiture Countries, its willingness and ability to find a suitable air transport solution once the ATSA has expired, and its willingness to continue the international intra-EEA express operations of the divested businesses. Besides, as already indicated, the Commitments of 16 December 2012 contained an opt-out clause whereby the purchaser could decide not to purchase all the divested TNT subsidiaries¹⁶⁹⁵. The ability of the commitments to solve the competition concerns found in all SIEC countries would thus also depend on the willingness of the purchaser to acquire the whole of the divested businesses, which cannot be presumed. Indeed, as already indicated, some companies such as Austrian Post explicitly acknowledged that they would be prepared to acquire only part of the divested businesses. In addition, with the possible exception of La Poste, non-integrators – including GLS – appear unlikely to be potentially suitable.
- (2021) In view of the foregoing, the Commission considers that, apart from any other considerations of their merits, the proposed commitments cannot be considered suitable to remedy the Commission's concerns without an upfront buyer or fix-it-first solution.

9.2.4. UPS has submitted no genuine fix-it-first or up-front buyer commitment

- (2022) UPS has not at any stage proposed any up-front buyer approach.
- (2023) The Commitments of 3 January 2013 refer to a fix-it-first [Confidential information regarding the commitments offered by UPS]*¹⁶⁹⁶.
- (2024) However, the proposed Commitments of 3 January 2013 do not constitute genuine fix-it-first commitments. Indeed, at the date of the meeting of the Advisory Committee, no legally-binding agreement ensuring that the divestiture to La Poste or any other company would effectively take place had been submitted. [Confidential information regarding the commitments offered by UPS]*
- (2025) According to La Poste, the due diligence, the completion of which would be a prerequisite for La Poste to sign the final agreements may take up to [...] months¹⁶⁹⁷. The

¹⁶⁹⁵ Commitments of 16 December 2012, Section B, paragraph 1.

¹⁶⁹⁶ Commitments of 3 January 2013, Section B, paragraph 2.

¹⁶⁹⁷ La Poste's replies to questions 6.5 and 6.6 of request for information Q63 of 9 January 2013.

signature of these legally-binding agreements could thus only occur a considerable amount of time after the deadline for the adoption of the Commission's decision closing the case. In view of the high likelihood that the share purchase agreement could not be submitted sufficiently early for the Commission to authorise the Transaction on the basis of a fix-it-first commitment before the deadline set for the adoption of this Decision (5 February 2013), UPS suggested to extend this deadline in the following manner: "[Confidential information regarding the commitments offered by UPS]"¹⁶⁹⁸ However, such an option must be excluded. The purpose of Article 11(3) of the Merger Regulation is to request existing information, and not to prolong artificially the investigation so as to allow documents that do not exist at the date of the request to be created.

(2026) The Commission concludes that the Commitments of 3 January 2013 foresee no genuine up-front buyer or fix-it-first solution. Consequently, they are insufficient to remedy the significant impediment to effective competition likely to arise as a result of the Transaction in any of the SIEC countries.

9.2.5. *La Poste/DPD could not be a suitable buyer*

(2027) The Commitments of 3 January 2013 only considered as a potential purchaser La Poste/DPD. However, La Poste/DPD cannot be considered as a suitable purchaser for two main reasons. First, it is unlikely that La Poste/DPD is willing to acquire all the divested businesses in all the Remedy Countries and it is thus unlikely that such solution would eliminate the competition concerns entirely. Second, it is insufficiently certain that La Poste/DPD is willing to take up the remedies in order to effectively operate on the international intra-EEA express market. These conclusions have been drawn on the basis of submissions from La Poste/DPD made in reply to various requests for information pursuant to Article 11(2) of the Merger Regulation addressed by the Commission.

9.2.5.1. The Commission's investigation as to La Poste/DPD's suitability as a potential purchaser of the successive remedy packages submitted by UPS

(2028) As of the submission of the Commitments of 29 November 2012, the Commission sent a number of very detailed requests for information pursuant to Article 11(2) of the Merger Regulation to La Poste in order to assess its possible suitability as a potential purchaser.

(2029) On 4 December 2012, the Commission sent a request for information (hereafter " RFI Q45").

The Request for information addressed by the Commission to La Poste/DPD on 4 December 2012 (RFI Q45)

(2030) In RFI Q45, the Commission sought to obtain: (i) details on La Poste's current international express air-based operations in terms of volumes as well as organisation put in place for gateway-to-door services (notably with respect to the outsourcing of such services to La Poste's providers of air transport services and the costs of outsourcing); (ii) details on measures to be taken if La Poste were to handle the gateway-to-door part of the process itself in 5 main destination countries instead of

¹⁶⁹⁸ UPS's letter of 3 January 2013 on the Commitments of 3 January 2013.

outsourcing it, ensuing costs, resulting geographic coverage and necessary inbound volumes of international intra-EEA express that would be necessary to justify this change, (iii) internal documents relating to gateway-to-door services, (iv) details on La Poste's domestic express business in various EEA countries, (v) details on measures to be taken if La Poste were the purchaser of the TNT subsidiaries proposed to be divested pursuant to the Commitments of 29 November 2012 and were to handle the gateway-to-door part of the process services itself in 5 main destination countries instead of outsourcing them, ensuing costs, resulting geographic coverage and necessary inbound volumes of international intra-EEA express that would be necessary to justify the internalisation of gateway-to-door services.

- (2031) La Poste submitted an incomplete reply to RFI Q45 on 7 December 2012. [Information on La Poste's reply to RFI Q45]*¹⁶⁹⁹.
- (2032) As a consequence, on 10 December 2012, the Commission sent a new request of information (hereafter "RFI Q47").

The Request for information addressed by the Commission to La Poste/DPD on 10 December 2012 (RFI Q47)

- (2033) In RFI Q47, the Commission requested clarifications on: (i) the Member States where La Poste outsources gateway-to-door services as well as to the Member States where it offers international intra-EEA air-based express services to a non-negligible extent, (ii) on various aspects of La Poste's current international intra-EEA air-based express services; relating in particular to volumes originating from Spain, track-and-trace, costs of outsourcing, (iii) the functioning of La Poste's domestic networks in the EEA.
- (2034) La Poste submitted its reply on 12 December 2012 to RFI Q47¹⁷⁰⁰.
- (2035) On 13 December 2012, La Poste submitted the last part of its replies¹⁷⁰¹ to RFI Q45. In this reply, it provided information on (i) the technical measures that would be necessary to adapt its domestic networks to international intra-EEA express inbound deliveries and on the associated costs as well as (ii) estimates of minimum international intra-EEA express inbound deliveries that would justify the adaptation of domestic networks to such deliveries.
- (2036) On 14 December 2012, the Commission requested clarifications on this reply via a new request for information (hereafter "RFI Q53").

The Request for information addressed by the Commission to La Poste/DPD on 14 December 2012 (RFI Q53)

- (2037) The requested clarifications in RFI Q53 concerned notably the minimum volumes of international intra-EEA express that would be necessary to justify the adaptation of La Poste/DPD's network to international intra-EEA express inbound deliveries: a country-by-country calculation of these volumes was requested (instead of the broad range provided in the previous submission for all EEA countries concerned), as well as all justifications and underlying calculations.

¹⁶⁹⁹ La Poste's response to questions 1 and 2 of request for information Q45 of 4 December 2012 (first part)

¹⁷⁰⁰ La Poste's reply to request of information Q47 of 10 December 2012.

¹⁷⁰¹ La Poste's reply to request of information Q45 of 4 December 2012

- (2038) Through RFI Q53, the Commission also asked for any "*relevant internal documents, including (outline) business plans, referring to GeoPost' analysis of the conditions under which the commitments proposed by UPS should be improved to be sufficiently attractive to GeoPost to be taken up by the latter and / or quantifying the expected profitability of this potential acquisition on each relevant market (in particular international intra-EEA express*"¹⁷⁰²
- (2039) Also, in reply to RFI Q45, La Poste/DPD had stated without substantiating it: "*According to our internal estimation, the volumes from [CONFIDENTIAL] combined with the volumes coming from the [...] Divestment Businesses, should reach the critical mass of items that would justify the operation of re-arrangements of domestic express delivery networks and related investments.*"¹⁷⁰³ Therefore, in RFI Q53, the Commission also asked for the underlying calculations and justifications underpinning the statement made by La Poste in reply to RFI Q45. The Commission requested in particular La Poste's existing international intra-EEA express air-based volumes on a lane-by-lane basis.
- (2040) The Commission also requested clarifications on La Poste's reply to RFI Q45, notably concerning the coverage of its domestic express services, and the countries where international intra-EEA express services are offered, given that information provided on this latter point in reply to RFI Q45 conflicted with earlier submissions.
- (2041) The Commission also asked La Poste to provide justification – in particular in the form of internal documents - for a statement made earlier, which was so far unsubstantiated, and which concerned the possible deployment of an air network solution by La Poste¹⁷⁰⁴. The Commission also asked for clarifications on statements made by La Poste in previous submissions in regard to the Commitments of 29 November 2012¹⁷⁰⁵.
- (2042) On 17 December 2012, La Poste submitted its reply to the RFI Q53¹⁷⁰⁶.
- (2043) La Poste/DPD's reply to RFI Q53 was incomplete. [Details on La Poste's reply to RFI Q53]*.
- (2044) [Details on LaPoste's reply to RFI Q53]* [Confidential information regarding the commitments offered by UPS and regarding potential remedy takers]*¹⁷⁰⁷. [Details on LaPoste's reply to RFI Q53]* [...]*[Details on LaPoste's reply to RFI Q53]*¹⁷⁰⁸. [Details on LaPoste's reply to RFI Q53]*. [...]*[Details on LaPoste's reply to RFI Q53]* [...]*[Details on LaPoste's reply to RFI Q53]*¹⁷⁰⁹.
- (2045) In its reply to RFI Q53, as regards the possibility to deploy its own air network solution, La Poste stated: "*GeoPost believes that with the significant additional Air Express Volume it will own, through the transfer of the remedy businesses, combined with the*

¹⁷⁰² Request for information Q53 of 14 December 2012, question 1) d)
¹⁷⁰³ La Poste's reply to question 2) a) of request for information Q53 of 14 December 2012.
¹⁷⁰⁴ Question 8 of request for information Q53 of 14 December 2012
¹⁷⁰⁵ La Poste's email dated 13 December 2012.
¹⁷⁰⁶ La Poste's reply to request for information Q53 of 14 December 2012.
¹⁷⁰⁷ La Poste's reply to question 2) a) of request for information Q53 of 14 December 2012; La Poste's email of 19 December 2012; La Poste's email of 19 December 2013.
¹⁷⁰⁸ Annex 15 to La Poste's reply to the market test questionnaire on the Commitments of 16 December 2012.
¹⁷⁰⁹ Calculation made on the basis of the data contained in Annex 2 to UPS's reply to request for information Q54 of 14 December 2012, (on the basis of 250 working days per year).

[Confidential information regarding the commitments offered by UPS]*, *it will command an attractive position to negotiate competitive agreements with the various providers of Air network: 1. [CONFIDENTIAL], who will have operated the Air Network for GeoPost during the Transition period, and who will have a genuine economic interest in ensuring that its airplanes are filled with Cargo in each direction, will have a genuine interest to prolong the agreement with GeoPost beyond the transition period. 2. Other Integrators, owning or operating own air fleets, have a genuine interest to improve the load factor and optimize the cost of their network and will be interested to carry the significant volumes of GeoPost in their network. GeoPost is therefore confident that it will have the ability to find suitable partners to ensure the airlift beyond the Transition period. GeoPost (Chronopost's experience) demonstrates that with proper contract, including pay-for-performance clause, it can obtain from the third party air network, the quality and the commitment required to deliver competitive overnight air express services*"¹⁷¹⁰. However, these statements were accompanied by no internal documents or [...] calculations explaining why the international air-based express volumes handled by La Poste if it was the purchaser of the TNT subsidiaries proposed to be divested would incentivise air transport service providers to offer a commercially attractive service to La Poste at an appropriate scale.

- (2046) On 17 December 2012, the Commission addressed an *ad hoc* detailed market test questionnaire to La Poste following the submission of the Commitments of 16 December 2012 (hereafter "the *ad hoc* market test on the Commitments of 16 December 2012").

The Request for information addressed by the Commission to La Poste/DPD on 17 December 2012 (the ad hoc market test on the Commitments of 16 December 2012)

- (2047) La Poste was invited to comment on various aspects of the Commitments of 16 December 2012 and was asked follow-up questions relating to previous submissions. In particular, La Poste was again asked to provide "*internal document analysing or commenting on the attractiveness of the remedy package proposed by UPS and / or containing an (outline) business plan (or at least rough cost / revenue / profitability calculations) of a possible acquisition of this package by La Poste*"¹⁷¹¹.
- (2048) On 19 December 2012, La Poste submitted its reply to the *ad hoc* market test on the Commitments of 16 December 2012.
- (2049) In this reply, La Poste indicated that it had no intention to acquire, lease or charter aircraft in the future and provided no detail about the air transport solution it would envisage on the expiry of the ATSA, apart from using "*air service providers such as [...] or [...] to provide access to air capacity.*"¹⁷¹² It provided no internal document relating to this issue, even though it was explicitly requested by the Commission¹⁷¹³. Besides, La Poste submitted one truly internal document only relating to the commitments (an internal presentation to the governing bodies of GeoPost)¹⁷¹⁴.

¹⁷¹⁰ La Poste's reply to question 8 request for information Q53 of 14 December 2012.

¹⁷¹¹ Question 14 of request for information Q53 of 14 December 2012.

¹⁷¹² Question 14 of the market test questionnaire on the Commitments of 16 December 2012

¹⁷¹³ La Poste's reply to question 6.5 to the market test questionnaire on the Commitments of 16 December 2012.

¹⁷¹⁴ La Poste's reply to market test questionnaire on the Commitments of 16 December 2012, Annex 14.1

The Request for information addressed by the Commission to La Poste/DPD on 21 December 2012 (the RFI Q60)

- (2050) On 21 December 2012, the Commission addressed to La Poste/DPD the request for information Q60 (hereafter "RFI Q60").
- (2051) RFI Q60 focussed on La Poste's estimates of the additional international intra-EEA express volumes that it may obtain should it purchase the divested subsidiaries and whether it was aware that the figure of [...] small packages per day originating from the Remedy Countries was severely overestimated.
- (2052) On 3 January 2013, La Poste replied to the RFI Q60 confirming its replies to RFI Q45 and RFI Q53: *"The volume of circa [...] intra-EEA express shipments per day mentioned by GeoPost in its response to question 2.a. of request for information Q53 of 14 December 2012 is based on [Confidential information regarding the commitments offered by UPS and regarding potential remedy takers]. This volume concerns the 11 countries of the Remedy Package mentioned in page 2 of Annex 15 (i.e. Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia). In addition, UPS indicated to GeoPost that (i) should additional countries be added to the remedy package, this figure would sensibly increase and that (ii) [Confidential information regarding the commitments offered by UPS and regarding potential remedy takers]. On the basis of this information, GeoPost took the [...] figure as a basis for its calculations".*

The Request for information addressed by the Commission to La Poste/DPD on 3 January 2013 (the RFI Q62)

- (2053) On 3 January 2013, the Commission addressed a further request for information to La Poste/DPD (hereafter "RFI Q62").
- (2054) Through RFI Q62, the Commission asked for internal documents circulated within the La Poste group as regards (i) the Commitments of 29 November 2012, (ii) the Commitments of 16 December 2012 and (iii) the Commitments of 3 January 2013.
- (2055) In RFI Q62, the Commission also enquired on La Poste/DPD's prospect of becoming a provider of international intra-EEA express services in the Divestiture Countries.
- (2056) Finally, the Commission also asked La Poste about (i) information provided to it by UPS in the context of on-going negotiations on the proposed commitments, as well as on (ii) exchanges between La Poste and La Poste's partners such as [...] concerning the willingness and ability of such partners to handle international intra-EEA express inbound deliveries on behalf of La Poste in the non-Divestiture Countries¹⁷¹⁵.
- (2057) On 7 January 2013, La Poste provided an incomplete reply to RFI Q62¹⁷¹⁶.
- (2058) Indeed, La Poste provided documents communicated to it by UPS in the context of ongoing negotiations. However, La Poste provided only a few internal documents, including a presentation to the Strategic Committee of the Board of Directors of GeoPost, as well as a few more technical documents. In addition, La Poste did not reply to the questions relating to discussions with partners such as [...] with respect to the

¹⁷¹⁵ Request for information Q62.

¹⁷¹⁶ La Poste's reply to request for information Q62

possibility that these might handle international intra-EEA express inbound deliveries on behalf of La Poste.

- (2059) On 8 January 2013, La Poste provided a business plan relating to the acquisition of the divested businesses in draft form.

The Request for information addressed by the Commission to La Poste/DPD on 9 January 2013 (RFI Q63)

- (2060) On 9 January 2013, the Commission addressed to La Poste/DPD a further request for information (hereafter "RFI Q63").

- (2061) RFI Q63 concerned (i) La Poste/DPD's business plan related to the potential acquisition of the divested businesses, (ii) the adaptation of La Poste's domestic networks to international intra-EEA express inbound deliveries, (iii) the timing of its ongoing negotiations with UPS and (iv) [Confidential information regarding a potential remedy taker]*.

- (2062) On 10 January 2013, La Poste provided its reply to RFI Q63. It follows from this reply that La Poste has conducted no detailed analysis of the profitability of the international intra-EEA express operations of the divested businesses¹⁷¹⁷. [Confidential information regarding the potential remedy taker]*¹⁷¹⁸.

- (2063) As regards the justification for adapting its domestic networks to international intra-EEA express inbound deliveries, La Poste confirmed that the divested international intra-EEA express volumes would be lower than it thought initially but considered that it would nonetheless be profitable to implement the adaptations: "*Following a more thorough analysis of connection cost supported by further refined information provided by UPS it appears likely that flight schedules provided by UPS/TNT confirm that adequate connectivity with DPD standard delivery routes for large parts of non-Remedy Countries is possible. In certain standard regions, last mile delivery routes will not be reached in time and will thus require an additional delivery tour. While the volumes provided by UPS are lower than initially estimated in our cost modelling, DPD expects that the following considerations will have a positive effect, offsetting the volume shortfall:* [Confidential information regarding the commitments offered by UPS and regarding a potential remedy taker]*. [CONFIDENTIAL] ; [CONFIDENTIAL]; · [CONFIDENTIAL]. *Considering these factors, GeoPost firmly believes that the start-up costs associated with ensuing inbound connectivity are a necessary and reasonable investment with additional positive spill-over effects on the standard delivery quality, while unit costs should quickly reach highly competitive levels resulting in customary profitability levels.*"¹⁷¹⁹. La Poste provided no calculation or further detailed justification in support of this claim.

- (2064) As regards the timing of the negotiations with UPS, La Poste noted that the completion of due diligence investigations, which it viewed as a pre-requisite for the conclusion of the various transaction documents with UPS, would take [...] months¹⁷²⁰.

¹⁷¹⁷ La Poste's reply to question 3 of request for information Q63 of 9 January 2013.

¹⁷¹⁸ La Poste's reply to question 3 of request for information Q63 of 9 January 2013.

¹⁷¹⁹ La Poste's reply to question 5.1 of request for information Q63 of 9 January 2013.

¹⁷²⁰ La Poste's reply to questions 6.5 and 6.6 of request for information Q63 of 9 January 2013.

- (2065) On 11 January 2013, La Poste submitted a final version of the business plan and the [Confidential information regarding a potential remedy taker]*¹⁷²¹.
- 9.2.5.2. Were La Poste/DPD to take up the Commitments of 3 January 2013, it is unlikely that the Commitments would eliminate the competition concerns entirely
- (2066) Paragraph 9 of the Remedies Notice reads as follows: "*The commitments have to eliminate the competition concerns entirely*". However the Commitments of 3 January 2013, just as with the two previous packages, were designed in such way that La Poste/DPD could select the Remedy Country where it wishes to take up the remedy. On the basis of the evidence the Commission had access to, it is likely that La Poste/DPD would not acquire TNT's subsidiary in the Netherlands.
- (2067) The Commission has identified competition concerns on the international intra-EEA express markets in fifteen countries, namely Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia and Sweden. As part of the Commitments of 3 January 2013, UPS commits to divest TNT's subsidiaries in these fifteen countries and notably the international intra-EEA small package activities. Consequently, any overlap with regard to the international express delivery services between UPS and TNT would be eliminated.
- (2068) Nevertheless, the very first paragraph of the Commitments of 3 January 2013 reads as follows: "[Confidential information regarding the commitments offered by UPS and regarding a potential remedy taker]*".
- (2069) There is no clear and pre-defined rule to determine in which country La Poste/DPD might or might not purchase TNT's international intra-EEA express business. This is dependent on subjective evaluations by UPS and La Poste/DPD in order to determine whether La Poste/DPD has already a substantial small package business in a Remedy Country. This is entirely disconnected from the purpose of the remedy package which is to solve identified competition concerns on the international intra-EEA express markets. La Poste's substantial business on the small package is hence of no relevance.
- (2070) More importantly, there is no justification whatsoever why the buyer should be able to pick and choose the countries where it acquires TNT's subsidiaries through the commitments. The purpose of a remedy package is not to tailor the divestments solely to suit the purchaser's requirements, or even to ensure that the divestments result in the purchaser's network covering the whole EEA. The benchmark as set out in the Remedies Notice is not the economic necessity or the commercial interest of the purchaser, but the elimination of competition concerns and any such clause therefore cannot be accepted in the Commitments.
- (2071) From a competition point of view, cherry-picking the assets to be acquired or divested and thus the markets where competition concerns would be remedied would go against both the letter and the underlying purpose of the Remedies Notice.
- (2072) [Confidential information regarding the commitments offered by UPS and regarding a potential remedy taker]*

¹⁷²¹ La Poste's email dated 11 January 2013.

- (2073) It might not be by chance that the [Country's name]* [is]* expressly mentioned as an example of country where La Poste has already a *substantial* small package business and might choose not to acquire TNT's subsidiary. Indeed, La Poste/DPD is already present in this country where it operates [Number of hubs and depots]*¹⁷²² and has thus quite a strong footprint in [Country's name]*.
- (2074) Furthermore, according to La Poste's own business plan, in 2018, the remedy business in [Country's name]* would incur a growth of its revenues and EBIDTA of [...]*** only¹⁷²³.
- (2075) In response to a question by the Commission, La Poste confirmed that it would acquire all the divested businesses, including [Country's name]*. However, [details on LaPoste's reply]*¹⁷²⁴.
- (2076) [Confidential information regarding the commitments offered by UPS and regarding a potential remedy taker]*.
- (2077) The purchaser would be obliged to enter into the ATSA, which would cover intra-EEA routes from the Divestitures Countries, including [Country's name]*¹⁷²⁵. However, it is very uncertain that this alone could be sufficient for La Poste to exert a significant competitive constraint on UPS on the [...]*** international intra-EEA express market, in particular if it does not acquire the assets and the customer portfolio of TNT in [...]***.
- (2078) However, looking at the intra-EEA express market in [Country's name]*, La Poste/DPD is only a very small player (with a market share of [0-5]*** estimated by UPS) and not exerting any significant competitive constraint on the Parties [...]***. In order to remedy the competition concerns identified in this Decision on the [...]*** market as a result of the Transaction, it would have been clearly insufficient to rely on the competitive constraint posed by La Poste/DPD without the divestment of the divested business. In case the opt-out were exercised, UPS would have acquired the local TNT subsidiary. It is worth recalling that in [Country's name]* in particular, *post* transaction, [...]***, the merged entity would be the clear market leader on the international intra-EEA express market.
- (2079) The Commission therefore concludes that there are several mutually corroborating evidential elements that are consistent with the view that, were La Poste/DPD to take up the Commitments of 3 January 2013, there is a significant risk that it would not acquire the TNT subsidiary in [Country's name]*.

9.2.5.3. Were La Poste/DPD to take up the Commitments of 3 January 2013, it is insufficiently certain that La Poste/DPD would compete effectively on the international intra-EEA express market

- (2080) Paragraph 10 of the Remedies Notice reads as follows: "*Structural commitments, in particular divestitures, proposed by the parties will meet these conditions* [eliminate the competition concerns entirely, to be comprehensive and effective from all points of view, to be capable of being implemented within a short period of time] *only in so far as the Commission is able to conclude with the requisite degree of certainty that it will*

¹⁷²² La Poste's reply of 27 September 2012 to request for information of 20 September 2012.

¹⁷²³ La Poste's business plan attached to La Poste's email dated 15 January 2013.

¹⁷²⁴ La Poste's reply dated of 10 January 2013 to question 4 of the request for information Q63.

¹⁷²⁵ Commitments of 3 January 2013.

*be possible to implement them and that it will be likely that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialise*¹⁷²⁶

- (2081) For La Poste/DPD to compete efficiently with the integrators on the international intra-EEA express market on a lasting basis, it would need to have access to an air network not only for five years but also after the expiry of the remedy. In addition, it would have to develop a ground-network in order to handle express deliveries.
- (2082) In order to assess whether La Poste/DPD would be incentivised to expand on the international intra-EEA markets, it is worth mentioning that La Poste currently focuses on ground-based – mainly domestic and international deferred – services and has no significant air-based express services except for France and Spain. Additionally, the revenues generated by the international intra-EEA express operations of the divested businesses only account for [...] % of the total revenues of the divested businesses. Together with its existing revenues in international express, La Poste would be smaller than FedEx. Finally, La Poste has provided no evidence that it had made an assessment of the profitability of these operations, in light of the comparatively small volumes and the required investments to be made in the non-remedy destination countries. Instead, La Poste assessed the overall profitability of the divested TNT subsidiaries as a whole, per group of countries¹⁷²⁷.
- (2083) As such, these various elements cast doubts on the willingness of La Poste to continue actively the international intra-EEA express operations of the divested businesses and compete actively against the Parties.

Were La Poste/DPD to take up the Commitments of 3 January 2013, there is no certainty that La Poste would continue to have access to an air network after the expiry of the ATSA and therefore it is insufficiently certain that it would be able to continue competing on the international intra-EEA express markets.

- (2084) The purpose of the Commitments of 3 January 2013 is to restore competition on the 15 international intra-EEA express markets on which significant impediments to effective competition were identified. One of the means to achieve such goal is for UPS to grant La Poste/DPD access to its air network. Indeed, as demonstrated in the section relating to the barriers to entry (Section 7.6.3.3), in order for a player to be a credible alternative on the international intra-EEA express market, it needs to operate its own air network. La Poste/DPD notably argued that: "*In general, owning an aircraft is a strong strategic competitive advantage for international delivery at both extra and intra-European level*¹⁷²⁸". La Poste/DPD notably argued that: "*In general, owning an aircraft is a strong strategic competitive advantage for international delivery at both extra and intra-European level*¹⁷²⁹".
- (2085) The ATSA foreseen in the Commitments of 3 January 2013 will come to an end after five years. UPS also commits to: "[Confidential information regarding the commitments

¹⁷²⁶ Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paragraphs 555, 612.

¹⁷²⁷ La Poste's submission of 10 January 2013, *GeoPost Business Plan to develop a strong express activity in Europe, 10th January 2013, version 2*, page 23.

¹⁷²⁸ La Poste's response to question 53 (iii) of the questionnaire to competitors – Phase I.

¹⁷²⁹ La Poste's response to question 53 (iii) of the questionnaire to competitors – Phase I.

offered by UPS]*"¹⁷³⁰. Therefore, the Commitments provide La Poste with an air access only for five years, which is a rather short period, in the context of the relevant market. Indeed, FedEx re-entered the international intra-EEA express market in 1992, yet despite this lengthy period of activity on that market, has a much smaller air fleet and in general a much smaller position than the three other integrators on the international intra-EEA express market.

- (2086) La Poste submitted a final draft of a letter of intent with [...]*, the prospective purchaser of TNT Airways, on 10 January 2013¹⁷³¹: the final agreement would have been a chartering agreement whereby [...]* would have leased aircraft to La Poste. Yet, as provided by the final paragraph of the document itself: "*This Letter of Intent is non-binding*"¹⁷³². There is no legal certainty at all that should La Poste acquire the divested businesses, it would then conclude this chartering agreement with [...]*. It worth noting that the document submitted is only a *draft* letter of intent, which was not yet signed at the time it was provided to the Commission.
- (2087) In addition, the provisions of the letter of intent are extremely vague and give rise to questions. First, the chartering agreement would be concluded for [3-15] years as of 2013: "*The term of this Agreement (the "Term") shall commence on, 2013 for an initial period of [3-15] years until, [CONFIDENTIAL]*"¹⁷³³. This is rather intriguing since, should La Poste take up the remedy, it would have access to UPS's air network until 2018. Consequently for five years it appears to be contemplated that it would have access to two air network simultaneously. It is difficult to see the point of such a provision. [Details on the letter of intent content]*. Therefore, the draft letter of intent provided by La Poste cannot enable to presume that La Poste/DPD would continue to have access to an air network once the ATSA comes to an end.
- (2088) In addition, paragraph 4 of schedule 2 of the Commitments of 3 January 2013 reads: "[Confidential information regarding the commitments offered by UPS and regarding a potential remedy taker]*". However as confirmed by UPS, TNT Airways will be sold to [...]***¹⁷³⁴. Therefore, it remains unclear which company, that is to say UPS, TNT Airways or [...]*, will in practice provide the airlift to La Poste/DPD.
- (2089) Moreover, La Poste indicated that it did not intend to acquire, lease or charter aircraft in the future¹⁷³⁵, which casts further doubts on its willingness to acquire control over an air fleet as a substitute for the ATSA after five years.
- (2090) [Confidential information regarding the remedy taker]*. However, for all the reasons developed in the general assessment of the competitive constraint exerted by La Poste and Royal Mail and the Parties (Section 7.2.1.5), outsourcing of air transport does not allow a non-integrator to operate as efficiently as the integrators and to provide an equally reliable service, at prices that are competitive with those offered by the integrators, notably UPS. Therefore, La Poste is likely to be unable to exert a significant

¹⁷³⁰ Article 5(f) of the Commitments of 3 January 2013.

¹⁷³¹ Draft letter of Intent for the provision by [...]* of Air Cargo Transportation Services in Europe to Geopost S.A.

¹⁷³² Letter of Intent for the provision by [...]* of Air Cargo Transportation Services in Europe to Geopost S.A – Governing law.

¹⁷³³ Letter of intent between La Poste/DPD and [...]* attached to La Poste's email dated 15 January 2013.

¹⁷³⁴ UPS's email dated 16 November 2012.

¹⁷³⁵ La Poste's reply to question 6.2 of the market test of the Commitments of 16 December 2012 .

competitive constraint on the merged entity after the expiry of the ATSA on the basis of such a model. This is corroborated by the following statement by La Poste about outsourcing: "*this solution is viable for only more than two day deliveries, but subject to constraints of collaboration within the partner networks. Express deliveries require ownership of air network. However, outsourcing does not enable operators such as GeoPost to compete effectively with integrators for international express deliveries (e.g. capacity constraints on planes during peak periods, etc.)*"¹⁷³⁶. In addition, as indicated by La Poste, the integrators, which are the most suitable providers of air transport services to small package delivery companies for their provision of international express services, may not be willing to enter into air transport services agreements that would allow La Poste to compete aggressively against them in the international intra-EEA express markets of the SIEC countries¹⁷³⁷.

- (2091) As a consequence, on the basis of the available evidence the Commission must conclude that if the Transaction were cleared on terms that allowed La Poste/DPD to take up the Commitments of 3 January 2013, there is a serious risk that La Poste/DPD would not secure a suitable air transport solution allowing it to compete effectively against the merged entity after the expiry of the ATSA.

Were La Poste/DPD to take up the Commitments of 3 January 2013, it is unlikely that La Poste would develop a network in order to handle express deliveries across the EEA

- (2092) First, the first alleged business plan provided by La Poste¹⁷³⁸ on 7 January 2013 as well as the second one provided on 11 January 2013¹⁷³⁹ contains an assessment of expected revenue and profitability of the TNT divested businesses overall and in various groups of countries where the businesses are located. When asked by the Commission if it had conducted any specific assessment of the expected revenues and profitability of the international intra-EEA express part of these businesses¹⁷⁴⁰, La Poste's response was: "*GeoPost has not been provided with specific details on the profitability of individual Product segments within each entity. Based on the experience GeoPost has in operating and developing International Express Business with its subsidiary Chronopost, GeoPost understands that the average price per piece and average contribution is [CONFIDENTIAL] higher in this segment than in the international deferred segment and the domestic segment. La Poste therefore considers this business to be attractive and intends to pursue and develop the business*"¹⁷⁴¹. Therefore, La Poste has no precise economic data relating to the profitability of the international intra-EEA express

¹⁷³⁶ La Poste's reply to question 15.7 to questionnaire R30 to competitors – Phase II .

¹⁷³⁷ Agreed minutes of a teleconference call of 25 September 2012 with La Poste.

¹⁷³⁸ Power point titled "Business plan to develop a strong express activity in Europe".

¹⁷³⁹ Power point titled "Business plan to develop a strong express activity in Europe – January 10th 2013 – Version 2".

¹⁷⁴⁰ The entire question reads: "The business plan (page 24 and following) contains an assessment of expected revenue and profitability of the TNT divested businesses overall and in various groups of countries where these businesses are located. Has La Poste conducted any specific assessment of the expected revenues and profitability of the international intra-EEA express part of these businesses? If yes, please provide all documents containing these assessments. If not, please explain whether La Poste considers at this stage that the international intra-EEA express operations of the TNT divested businesses are expected to be profitable and would be worth pursuing should La Poste acquire the TNT divested businesses. Please indicate as precisely as possible the reasons that lead La Poste to reach this conclusion" – Question 3 of the request for information Q63.

¹⁷⁴¹ La Poste's reply to question 3 of request for information Q63

businesses it expresses an intention to acquire. In these circumstances, the Commission considers that it is scarcely credible that the essential purpose of this Transaction for La Poste, is, as claimed in the cover page of its business plan, "*to develop a strong express activity in Europe*".

- (2093) Second, the small package industry is a network industry which necessitates facilities not only at the origin point but also at the destination point. In particular as regards express deliveries, a company has to be capable to pick-up a package and to deliver it at both ends within a very short timeframe. This requires a very specific infrastructure, including depots and hubs close to airports as well as many more traffic feeders than for deferred delivery.
- (2094) La Poste's ground networks in non-Remedy Countries are, to a large extent, not used for inbound international express deliveries (with exceptions in particular in France and Spain). These networks would need to be adapted in order to sustain international intra-EEA express deliveries. In particular La Poste would need to add new line haul transport between air gateways and hubs and/or local centres which would require additional vehicles and drivers. Furthermore, it would need to set up additional sorting operations in local centres.
- (2095) This all has significant implications on investments and costs, with DPD's network needing to accommodate air-based intra-EEA express volumes even in countries where DPD has domestic (express) operations like in [...]*. It is recalled that in [...]*, La Poste is using [...]* for in-bound delivery of intra-EEA express volumes shipped from France via [...]*'s air network. Apparently, relying on [...]* to perform deliveries in [...]* has been a more economical solution than trying to re-adapt DPD's [...]* network to handle these volumes. In order to justify the additional investments and costs, a certain volume of packages must be reached.
- (2096) In its first estimate, La Poste considered that it would need 3 000 to 5 000 daily packages as international intra-EEA express volumes in a destination country to justify the additional costs to be incurred for the adaptation of the domestic network to cross-border express¹⁷⁴².
- (2097) However, according to data provided by TNT¹⁷⁴³, the daily intra-EEA express volumes originating from the Remedy Countries at destination of each of the non-Remedy Countries where La Poste/DPD has already a network are the following: (i) for Austria, [...]* small packages per day; (ii) for Belgium, [...]*; (iii) for Germany, [...]*; (iv) for France, [...]*; (v) for the United Kingdom, [...]*; (vi) for Ireland, [...]* and (vii) for Luxembourg, [...]*. Therefore, even though the air-based shipments coming from France and Spain would have to be added to these sums, they are still far from the level stated by La Poste as necessary to make it commercially justifiable to adapt its current networks.
- (2098) When asked about this gap between its estimates and the real inbound express figures provided by UPS, La Poste replied: "*While the volumes provided by UPS are lower than initially estimated in our cost modelling, DPD expects that the following considerations will have a positive effect, offsetting the volume shortfall: (i) [Confidential information*

¹⁷⁴² La Poste's reply to question 1 of request for information Q53.

¹⁷⁴³ Calculation made on the basis of the data contained in Annex 2 to UPS's reply to request for information Q54 of 14 December 2012, (on the basis of 250 working days per year).

regarding the commitments offered by UPS]* *will be sufficient in the initial phase. [CONFIDENTIAL]; (ii) [CONFIDENTIAL]; (iii) [CONFIDENTIAL]. Considering these factors, GeoPost firmly believes that the start-up costs associated with ensuing inbound connectivity are a necessary and reasonable investment with additional positive spill-over effects on the standard delivery quality, while unit costs should quickly reach highly competitive levels resulting in customary profitability levels"*¹⁷⁴⁴.

- (2099) However, La Poste did not provide any figures in relation to its response that would have enabled the Commission to verify its claim, which still is in a stark contrast to the statements made previously by La Poste on the minimal volumes necessary to sustain the investments and costs into re-arranging its network.
- (2100) This also has to be read in conjunction with the fact that the revenues stemming from the international intra-EEA express small package deliveries generated by TNT businesses included in the Commitments of 3 January 2013 amount only to [...]">% of the total revenues generated by the TNT's businesses included in the remedy package¹⁷⁴⁵.
- (2101) As a consequence, despite several requests by the Commission, La Poste has not brought forward any concrete data supporting its view that it would have incentives to turn its current deferred network into an express one, while actually, [...]">% of the revenues generated by the TNT's businesses included in the remedy package do not necessitate such adaptation.
- (2102) Third, La Poste/DPD does operate directly in some countries but through partners. For instance, in [...]%, where La Poste acts through a partnership with [...]%, [Confidential information regarding the commitments offered by UPS and regarding UPS' business strategy]*¹⁷⁴⁶. In addition, in the Commitments of 3 January 2013, UPS committed to grant access to its air gateways even in the countries not covered by the remedies, among others, [...]%.
(2103) This implies the need for [...]% to adapt its network in order to handle the additional express volumes originating from the Remedy Countries as La Poste/DPD would have to do in the countries where it operates its own network. In order to check the likelihood of such adaptation, the Commission asked La Poste: "*Has GeoPost already discussed with [...]% - and other partners in countries where GeoPost has no own network - about the willingness and ability of these partners to adapt their own networks to inbound international express deliveries should GeoPost takes up the remedy package? If yes, what is the reaction of these partners? Please provide any relevant internal documents and documents exchanged GeoPost or any company of La Poste group with these partners in that regard. If no, why have you not yet entered into such discussions? Does GeoPost consider that the divested Businesses would bring it sufficient international intra-EEA express volumes for destinations in [...]% (and other countries where GeoPost relies on partners) to incentivise these partners to adapt their networks to*

¹⁷⁴⁴ La Poste's reply to question 5.1 of request for information Q63

¹⁷⁴⁵ UPS's reply of 18 December 2012 to request for information dated 17 December 2012.

¹⁷⁴⁶ UPS's cover letter to the Commitments of 17 December 2012.

*these inbound international intra-EEA express deliveries?"*¹⁷⁴⁷ La Poste did not reply to this question¹⁷⁴⁸.

- (2104) The Commission was therefore not in a position to verify whether La Poste's partners, and in particular [...] in [...], would be willing to adapt their network in order to handle the additional express deliveries originating from the Remedy Countries.
- (2105) As a consequence, there is insufficient evidence to allow the Commission to conclude that, were La Poste/DPD to take up the Commitments of 3 January 2013, it is likely that it would develop a network in order to handle express deliveries across the EEA.
- (2106) In light of all the above considerations, the Commission concludes that the Commitments of 3 January 2013 do not eliminate the identified competition concerns entirely and are not comprehensive and effective from all points of view¹⁷⁴⁹. Furthermore, the Commission is not able to conclude with the requisite degree of certainty that it will be possible to implement them and that it is likely that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the significant impediments to effective competition will not materialise¹⁷⁵⁰.

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby United Parcel Service Inc. would acquire sole control of TNT Express N.V. within the meaning of Article 3(1)(b) of Regulation (EC) No 139/2004 is hereby declared incompatible with the internal market and the EEA Agreement

Article 2

This Decision is addressed to:

United Parcel Service Inc.

55 Glenlake Parkway
Atlanta Georgia 30328

United States

Done at Brussels, 30.1.2013

For the Commission

(Signed)

Joaquín Almunia

Vice-President

¹⁷⁴⁷ Question 3 of request for information Q62.

¹⁷⁴⁸ La Poste's reply to request for information Q62.

¹⁷⁴⁹ See Remedies Notice, paragraph 9 and case-law cited.

¹⁷⁵⁰ See Remedies Notice, paragraph 10 and case-law cited.

ANNEX - Further price-concentration analysis with UPS transaction data

[Confidential information related to the price concentration analysis]*¹

[Confidential information related to the price concentration analysis]*^{2 3}

[Confidential information related to the price concentration analysis]*

[Confidential information related to the price concentration analysis]*

[Confidential information related to the price concentration analysis]*

[Confidential information related to the price concentration analysis]*

[Confidential information related to the price concentration analysis]*⁴

[Confidential information related to the price concentration analysis]*

[Confidential information related to the price concentration analysis]*

Table 1 [Results of the price concentration analysis]*

Table 2 [Results of the price concentration analysis]*

Table 3 [Results of the price concentration analysis]*

Table 4 [Results of the price concentration analysis]*

Table 5 [Results of the price concentration analysis]*

Table 6 [Results of the price concentration analysis]*

Table 7 [Results of the price concentration analysis]*

¹ [Confidential information related to the price concentration analysis]*

² [Confidential information related to the price concentration analysis]*

³ [Confidential information related to the price concentration analysis]*

⁴ [Confidential information related to the price concentration analysis]*