Reports of Cases

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

23 February 2022 *

(Non-contractual liability – Competition – Markets for international express small package delivery services in the EEA – Concentration – Decision declaring the concentration incompatible with the internal market – Annulment of the decision by a judgment of the Court – General reference to other documents – Pleas in law or complaints raised by a third party in another case – Evidence submitted in the reply – No justification for the delay – Inadmissibility – Sufficiently serious breach of a rule of law intended to confer rights on individuals)

In Case T-540/18,

ASL Aviation Holdings DAC, established in Swords (Ireland),

ASL Airlines (Ireland) Ltd, established in Swords,

represented by N. Travers, Senior Counsel, H. Kelly, K. McKenna and R. Scanlan, Solicitors,

applicants,

v

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

defendant,

APPLICATION under Article 268 TFEU for compensation for the damage allegedly suffered by the applicants as a result of the unlawfulness of Commission Decision C(2013) 431 of 30 January 2013 declaring a concentration incompatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.6570 – UPS/TNT Express),

THE GENERAL COURT (Seventh Chamber, Extended Composition),

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

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 29 October 2020,

* Language of the case: English.

gives the following

Judgment

Background to the dispute

1 From 26 April 2012, TNT Express NV ('TNT'), ahead of its merger with United Parcel Service, Inc. ('UPS'), entered into negotiations with ASL Aviation Holdings DAC, formerly ASL Aviation Group Ltd, and ASL Airlines (Ireland) Ltd, formerly Air Contractors Ireland Ltd, with a view to divesting its air transportation business to those companies (together 'ASL' or 'the applicants'). The rationale for those negotiations was the prohibition on entities from third countries, such as UPS, from operating air transportation services in the European Union, in accordance with Article 4(f) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3).

2 On 26 June 2012, the European Commission published a notice of prior notification of a concentration (Case COMP/M.6570 – UPS/TNT Express) (OJ 2012 C 186, p. 9), pursuant to Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), as implemented by Commission Regulation (EC) No 802/2004 of 21 April 2004 (OJ 2004 L 133, p. 1).

3 On 15 November 2012, the applicants entered into two agreements with TNT (together 'the 2012 Agreements'):

– the purchase agreement entitled 'UPS SPA' ('the UPS SPA'), according to which, following completion of the transaction between UPS and TNT, ASL was to acquire 100% of TNT Airways SA/NV and Pan Air Lineas Aereas SA;

– the services agreement entitled 'UPS ATSA', according to which, following completion of both the transaction between UPS and TNT and the UPS SPA, ASL would provide air transportation services to UPS and third parties using the airline assets of TNT Airways acquired by ASL under the UPS SPA for five years.

4 The date of entry into force of the 2012 Agreements was set at 1 February 2013, subject to the Commission's declaration that the concentration between UPS and TNT was compatible with the internal market.

5 On 16 November 2012, UPS informed the Commission of the conclusion of the 2012 Agreements.

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

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

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

competition on the markets for the services in question in 15 Member States, namely in Bulgaria, the Czech Republic, Denmark, Estonia, Latvia, Lithuania, Hungary, Malta, the Netherlands, Poland, Romania, Slovenia, Slovakia, Finland and Sweden.

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

10 On 5 April 2013, UPS brought an action before the General Court for annulment of the decision at issue, registered as Case T-194/13.

11 On 12 May 2015, the Commission published a non-confidential version of the decision at issue.

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

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

14 On 5 February 2016, FedEx and the applicants concluded an agreement for the acquisition by the applicants of TNT's airline assets and an agreement for the supply of air transportation services to FedEx.

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

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

Procedure and forms of order sought

17 By application lodged at the Court Registry on 11 September 2018, the applicants brought the present action.

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

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

20 On a proposal from the Judge-Rapporteur, the Court (Seventh Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties. The parties answered those questions within the prescribed period.

21 At the hearing, the applicants stated that they were reducing the quantum of their claim for compensation on account of matters arising after the action was brought, which was noted in the minutes of the hearing.

22 The applicants claim that the Court should:

– hold the Commission liable, on the basis of Article 268 TFEU and the second paragraph of Article 340 TFEU, for the damages incurred, in the amount of EUR 93 881 731, or such other amount as the Court may rule to be appropriate, arising from the unlawfulness of the decision at issue;

– hold the Commission liable to pay default interest, starting from the date of delivery of the Court's judgment determining this action until full payment, at the rate set by the European Central Bank (ECB) for its main refinancing operations, increased by two percentage points, on the sum of EUR 93 881 731 or on such other sum as the Court may rule to be appropriate; and

– order the Commission to pay the costs.

23 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

24 The applicants claim compensation for the loss of profit resulting from the fact that it was impossible to implement the 2012 Agreements, entered into with TNT, on account of the intervention of the decision at issue declaring the transaction between UPS and TNT incompatible with the internal market.

25 In support of that claim, the applicants rely on the sufficiently serious breach of their fundamental rights and those of UPS by the Commission (first and second pleas in law) and the existence of serious and manifest errors in the Commission's assessment of the concentration between UPS and TNT (third plea in law), before claiming that those unlawful acts directly caused them damage (fourth plea in law) and evaluating that damage (fifth plea in law).

26 The Commission contends that the action is in part time-barred and in part inadmissible and, in any event, unfounded.

Preliminary observations

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

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

29 In the present case, it should be noted that the applicants' line of argument alleging a serious breach of their fundamental rights and those of UPS by the Commission and the existence of serious and manifest errors in the Commission's assessment of the concentration between UPS and TNT relates to the first condition for the non-contractual liability of the European Union to be incurred, whereas the line of argument alleging that those illegalities directly caused them damage and the line of argument relating to the evaluation of that damage relate, respectively, to the third and second conditions.

30 Before examining the first condition, it is necessary to determine the link between the present action for damages and the action in Case T-834/17.

31 The applicants submit that the 2012 Agreements were terminated as a result of the intervention of the decision at issue, by which the Commission opposed the transaction between UPS and TNT. Since that decision was annulled by the General Court on account of the infringement of UPS' rights of defence, the applicants submit that the unlawful adoption of the decision at issue was the direct cause of the fact that it was impossible to implement the 2012 Agreements, which were essential to the implementation of the concentration between UPS and TNT. As a result of that unlawful decision, the applicants claim that they were deprived of the benefit that they expected to derive from those agreements, or at least from the chance of being able to derive such benefit from them. The applicants are thus seeking compensation for the loss of profit which they claim to have suffered.

32 The applicants rely, in essence, on two illegalities as events giving rise to non-contractual liability on the part of the European Union. The first concerns the breach of fundamental rights, in particular UPS' rights of defence, resulting from the Commission's failure to communicate the econometric model used in the decision at issue to analyse the effects of the concentration on prices. That illegality was found by the Court in the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144). The second alleged illegality lies in the errors of assessment of the concentration between UPS and TNT alleged by UPS in its action for damages in Case T-834/17. Those errors concern the analysis of the effects of the concentration on prices, of the efficiencies and of FedEx's situation.

33 The applicants thus submit that the breach of UPS' rights of defence found by the Court in the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), and the errors of assessment alleged by UPS in support of its action for damages in Case T-834/17 show that the Commission committed sufficiently serious breaches. They rely in that regard on the close links between the present action for damages and that brought by UPS in Case

T-834/17 and explain that they had only very limited access to the Commission's assessments, since they did not intervene in UPS' action for annulment in the case that gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144). At the hearing, the applicants stated that they accepted that their action was closely linked to the action brought in Case T-834/17.

34 It is in the light of those preliminary observations that the alleged sufficiently serious breaches which vitiate the contested decision, as set out in the first three pleas in the action, must be examined.

The first condition for the European Union to incur non-contractual liability

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

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

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

38 It is true that making it easier for the European Union to incur liability by extending the concept of a sufficiently serious breach of EU law to any failure to fulfil a legal obligation, which, regrettable though it may be, can be explained, inter alia by objective constraints to which the Commission is subject, would risk compromising, or even inhibiting, the Commission's action in the control of concentrations. However, a right to compensation must be available for persons who have suffered damage resulting from the conduct of the Commission where such conduct takes the form of an action which, without objective justification or explanation, is manifestly contrary to the rule of law and seriously detrimental to the interests of those persons (see, to that effect, judgments of 11 July 2007, *Schneider Electric* v *Commission*, T-351/03, EU:T:2007:212, paragraphs 123 and 124, and of 9 September 2008, *MyTravel* v *Commission*, T-212/03, EU:T:2008:315, paragraphs 42 and 43).

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

40 Thus, non-contractual liability of the European Union can arise only if an irregularity is found that would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence (judgment of 10 September 2019, *HTTS* v *Council*, C-123/18 P, EU:C:2019:694, paragraph 43).

The alleged sufficiently serious breach of the fundamental rights of UPS and the applicants

41 The applicants claim that the infringement of UPS' rights of defence found by the Court in the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144), constitutes a sufficiently serious breach capable of giving rise to non-contractual liability on the part of the European Union, which the Commission disputes.

42 It is true that the Commission was found to have infringed UPS' rights of defence by failing to communicate the final version of its econometric model to UPS, thereby leading to the annulment of the decision at issue in its entirety (judgment of 7 March 2017, *United Parcel Service* v *Commission*, T-194/13, EU:T:2017:144, paragraphs 221 and 222).

43 It must however be borne in mind that, in accordance with the settled case-law of the Court, it is necessary that the protection afforded by the rule relied on in support of an action for damages is effective as regards the person who relies on it and, therefore, that that person is among those on whom the rule in question confers rights. A rule that does not protect the person concerned against the illegality which he pleads, but another person, cannot be accepted as a source of compensation (judgments of 12 September 2007, *Nikolaou* v *Commission*, T-259/03, not published, EU:T:2007:254, paragraph 44; of 14 December 2018, *East West Consulting* v *Commission*, T-298/16, EU:T:2018:967, paragraph 142; and of 23 May 2019, *Steinhoff and Others* v *ECB*, T-107/17, EU:T:2019:353, paragraph 77).

44 In the present case, the applicants rely on the infringement of UPS' procedural rights as the basis of their claim for compensation, which, in the light of the factors referred to in paragraph 43 above, cannot be accepted.

45 The applicants nevertheless assert that, by acting unlawfully in relation to UPS, the Commission also directly infringed their fundamental rights, inter alia those stemming from Articles 16, 17 and 41 of the Charter of Fundamental Rights of the European Union ('the Charter').

46 However, it is common ground that the applicants did not participate in the procedure for the control of the concentration between UPS and TNT, even though Article 18(4) of Regulation No 139/2004 and Article 11(b) and (c) of Regulation No 802/2004 allowed them to be heard during that procedure. In reply to the Court's questions on that point at the hearing, the applicants confirmed that they had not participated in the procedure even though they had the opportunity to do so by using that route. In those circumstances, the applicants cannot rely on the Commission's infringement of their procedural rights, including those referred to in Article 41 of the Charter, in a procedure in which they chose not to participate.

47 In any event, it should also be noted that the Commission's duty of care under Article 41 of the Charter entails that the administration must act with care and caution, although the administration is not required to remove from economic operators all harm flowing from normal commercial risks (judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraph 93). The risk that a concentration will not obtain the prior approval of the Commission is inherent in every merger control procedure (see, to that effect, judgment of

16 July 2009, *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459, paragraph 203). In those circumstances, the applicants cannot thus rely on a lack of care towards them on the part of the Commission.

48 As regards the alleged infringement of the freedom to conduct a business and the right to property enshrined in Articles 16 and 17 of the Charter, it is sufficient to note that the applicants have confined themselves to a mere statement of that ground of illegality, without supporting it with any legal arguments. In the absence of any arguments calling into question the validity of the system for the control of concentrations resulting from Regulation No 139/2004, it must be borne in mind that, as stated in paragraph 47 above, the risk of a decision of incompatibility with the internal market is inherent in every control procedure.

49 In the light of those factors, the line of argument alleging a sufficiently serious breach of the applicants' fundamental rights and those of UPS by the Commission is unfounded and must therefore be rejected.

The alleged existence of serious and manifest errors in the assessment of the transaction between UPS and TNT

50 In support of this line of argument, the applicants state, referring to UPS' arguments and form of order sought in Case T-834/17, that the decision at issue was vitiated by serious and manifest errors of assessment, without which the 2012 Agreements could have been implemented. They submit, in the alternative, that, by prohibiting the notified concentration and thereby preventing them from implementing those agreements, the Commission infringed Articles 16 and 17 of the Charter.

51 As a first step it is necessary to ascertain whether the present line of argument is admissible, taking into account, first, the applicants' reference to UPS' pleadings and, second, the fact that it appears to be supported only by an expert report produced as an annex to the reply.

– *The reference to the pleas in law and arguments raised by UPS in Case T-834/17*

52 On account of the close links between the present action for damages and that of UPS in Case T-834/17, the applicants request that the Court refer to the pleas in law and facts relied on by UPS in that case. They claim in that regard that they had only very limited access to the Commission's assessments, since they did not intervene in support of UPS' action for annulment.

53 The Commission objects that the applicants have not developed their line of argument in that regard with all the requisite clarity. They merely stated that, in the absence of briefly alleged illegalities, the transaction between UPS and TNT would have been approved, thus allowing them to benefit from the 2012 Agreements. According to the Commission, since they have not developed their own legal analysis and produced evidence in support of their line of argument, the applicants cannot refer the Court to the observations of the applicant in Case T-834/17.

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

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

56 The application must, accordingly, specify the nature of the grounds on which it is based, with the result that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (see judgment of 11 September 2014, *Gold East Paper and Gold Huasheng Paper* v *Council*, T-444/11, EU:T:2014:773, paragraph 93 and the case-law cited).

57 In the present case, the line of argument at issue consists essentially in referring to the application lodged by UPS in Case T-834/17.

58 To accept the admissibility of pleas in law not set out expressly in the application on the ground that they were raised by a third party in another case, to which reference is made in that application, would be to allow the mandatory requirements of Article 76(d) of the Rules of Procedure, noted above, to be circumvented (judgment of 14 December 2005, *Honeywell* v *Commission*, T-209/01, EU:T:2005:455, paragraph 64).

59 It should be noted that the requirement that the parties, in particular the applicant, be identical in both cases is an essential condition for the admissibility of pleas purportedly raised by means of a reference to pleadings in another case (judgment of 14 December 2005, *Honeywell* v *Commission*, T-209/01, EU:T:2005:455, paragraph 67).

60 The applicants claim, however, that the circumstances of the present case differ from those which gave rise to the judgment of 14 December 2005, *Honeywell* v *Commission* (T-209/01, EU:T:2005:455), in that Honeywell's reference clearly concerned pleas in law, whereas in the present action the applicants rely not on the pleas in law raised by UPS but on the relevant facts of the case.

61 However, it is sufficient to note that, contrary to what the applicants claim, their application contains a general reference to UPS' action in Case T-834/17 to demonstrate that the Commission made several serious and manifest errors in its assessment of the substance of the concentration between UPS and TNT which vitiate the validity of the decision at issue, as regards the price concentration analysis, the assessment of efficiencies, the assessment of FedEx's competitiveness and the assessment of the closeness of competition. That reference coincides with the wording of the pleas in law and main arguments set out in the notice of the action brought on 29 December 2017 in Case T-834/17, as published in the Official Journal (OJ 2018 C 72, p. 41).

62 It follows from the foregoing that the general reference by the applicants to the application lodged by UPS in Case T-834/17 is inadmissible.

63 Furthermore, in so far as the applicants claim that they were granted only very limited access to the Commission's assessments in order to draft the application, it is sufficient to recall that, as stated in paragraph 46 above, the applicants did not participate in the procedure for control of the concentration between UPS and TNT, even though they had the opportunity to do so.

Moreover, they acknowledge that they did not at any time apply for leave to intervene in support of UPS' claim for annulment in the case that gave rise to the judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144).

– *Admissibility of the Copenhagen Economics report*

64 As an annex to the reply, the applicants produce an expert report from Copenhagen Economics, entitled 'Assessment of economic analysis of the European Commission in the UPS-TNT case' and dated 8 July 2019. The Commission objects to the belated production of that report, which it considers unjustified. It requests that that document be rejected as inadmissible.

65 The applicants claim that that report is admissible. According to the applicants, it does not constitute new evidence, but brings together evidence already submitted to the Court. Its production is justified by the need to respond to the defence and to ensure their right to be heard.

66 It should be borne in mind that, in accordance with Article 76(f) of the Rules of Procedure, any application is to contain, where appropriate, any evidence produced or offered. Article 85(1) of the Rules of Procedure provides that evidence produced or offered is to be submitted in the first exchange of pleadings. Article 85(2) of those rules adds that in its reply or rejoinder a party may produce or offer further evidence in support of its arguments, provided that the delay in the submission of such evidence is justified.

67 Although, in accordance with the time-bar rule laid down in Article 85(1) of the Rules of Procedure, the parties must state the reasons for the delay in submitting or offering new evidence, the Courts of the European Union have jurisdiction to review the merits of the reasons for the delay in submitting or offering that evidence and, depending on the case, the content of that evidence and also, if its belated production is not justified to the requisite legal standard or substantiated, jurisdiction to reject it. The belated submission or offer of evidence by a party may be justified, in particular, by the fact that that party did not previously have the evidence in question at its disposal, or if the belated production of evidence by the opposing party justifies the file being supplemented, in such a way as to ensure observance of the *inter partes* principle (judgment of 16 September 2020, *BP* v *FRA*, C-669/19 P, not published, EU:C:2020:713, paragraph 41).

68 In the present case, the applicants state in the reply that they produced the Copenhagen Economics report in order to demonstrate, inter alia, that the Commission's approach, both as regards its failure to share the final econometric model with UPS and its inappropriate reliance thereon in reaching its substantive view that the notified concentration should be prohibited, so fundamentally departed from best practice and its own practice in previous and subsequent cases as to render its approach in the contested decision manifestly unreasonable.

69 It thus follows from the reply that that report is intended to support the line of argument alleging the existence of serious and manifest errors in the Commission's assessment of the concentration between UPS and TNT, in support of which the applicants have not put forward, in the application, any arguments other than a general reference to UPS' pleas and arguments in Case T-834/17, nor offered any evidence. It follows that the applicants produced the Copenhagen Economics report late, without justification, and that report cannot be regarded as evidence in rebuttal or the amplification of previous evidence submitted in response to evidence in rebuttal put forward by the opposing party.

70 In those circumstances, the Copenhagen Economics report must be declared inadmissible on account of its belated and unjustified production.

71 Since the applicants have not put forward any evidence in support of the errors of assessment allegedly made by the Commission other than the reference to UPS' pleas and arguments in Case T-834/17 and the Copenhagen Economics report, it must be held that the line of argument alleging the existence of serious and manifest errors in the Commission's assessment of the concentration between UPS and TNT is not substantiated.

72 Consequently, that line of argument must be rejected in its entirety.

73 Since the applicants have not established the existence of sufficiently serious breaches vitiating the decision at issue, one of the three cumulative conditions required in order for the European Union to incur non-contractual liability is not satisfied, with the result that the action is unfounded.

74 In the light of all the foregoing considerations, the action must be dismissed and it is unnecessary to examine the applicants' line of argument, set out in the fourth and fifth pleas, seeking to demonstrate the existence of damage and of a causal link. Since the action is unfounded, there is no need to rule on whether the applicants' claims are time-barred (see, to that effect, judgment of 13 July 1961, *Meroni and Others* v *High Authority*, 14/60, 16/60, 17/60, 20/60, 24/60, 26/60 and 27/60 and 1/61, EU:C:1961:16, p. 341).

Costs

75 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders ASL Aviation Holdings DAC and ASL Airlines (Ireland) Ltd to pay the costs.

Papasavvas da Silva Passos Reine

Truchot Sampol Pucurull

Delivered in open court in Luxembourg on 23 February 2022.

E. Coulon S. Papasavvas
Registrar President