UPS – TNT Express vs. FedEx – TNT Express

A case study into the role of the European Commission and involved organizations during the UPS – TNT Express deal and the FedEx – TNT Express deal
ABSTRACT

Four years ago, world’s largest package delivery organization UPS tried to acquire its believed competitor TNT Express. After long and heavy negotiations, UPS withdrew its offer because the European Commission did not approve the intended deal. While UPS was still awaiting its appeal against the decision of the European Commission, FedEx and TNT Express were combining their forces in the meanwhile. This case study is aimed at comparing the obstruction of the UPS – TNT Express deal with the approval of the FedEx – TNT Express deal by the European Commission, and to find strategies used by the involved organizations to influence the potential outcome of these decisions. Unlimited possibilities to merge and acquire would probably lead to a weakened competition. A regulative institution is necessary in the nonmarket environment to constrain and regularize behavior. Hence, national and international competition authorities are trying to maintain fair and effective competition by enforcing competition policies. To maintain fair and effective competition in the European Union, the European Commission needs to constantly monitor the internal market and should have the possibility to intervene when necessary. Part of most national and international competition policies is the obliged pre-notification of intended mergers and acquisitions. The European Commission uses six main steps in their analysis to reach a decision: (1) Defining the relevant markets; (2) Determining a possible dominant position on the market; (3) Identifying possible effects; (4) Checking for preservation of effective competition; (5) Checking for a failing firm defense; and (6) Judging if efficiencies will be created. During the entire merger control procedure, organizations are trying to influence the (decision by the) European Commission, by means of corporate political activities. These strategies will be primarily used to provide (countering) information or to withhold certain information. Remedies will be offered as well by organizations as attempt to eliminate the doubts as to the compatibility of the deal with the internal market. During the procedure, organizations can choose to use certain strategies that focus on compliance or can choose more recalcitrant strategies to rub the European Commission up the wrong way.
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1. Introduction

This preliminary chapter will provide general information about this study into the role of the European Commission and involved organizations during the UPS – TNT Express deal and the FedEx – TNT Express deal. First, the motive for conducting this study and the main research objective will be discussed. Subsequently, multiple paragraphs will elaborate on the research objective, the research question and the relevance of this study. The chapter will conclude with basic information about the three main organizations in this study and a conveniently arranged research outline.

1.1 Motive

The parcel delivery business is primarily about getting parcels and high value mail intact, at the right place, at the right time. The main condition of this business involves the size of the shipment, because the transportation and delivery of these shipments should be small enough to be dealt with by one person, but are usually larger than a single letter (Morlok, Nitzberg & Balasubramaniam, 2000). Because of changes in (a) the production of services and goods, (b) the distribution of services and goods, and (c) parcel service itself, the parcel delivery business showed enormous growth last decades (Morlok et al., 2000). Changes were due to new trends which focused on reducing inventories and on rapid customer service, which meant faster and more specified deliveries for the parcel delivery business (Morlok et al., 2000). Furthermore, parcel service itself is constantly responding to the changing demand, which often results in new features, like extensive tracking.

During these years of change, of course with assistance of globalization, sending shipments all over the world was not out of the ordinary anymore. To facilitate these deliveries around the world, organizations in the parcel delivery business needed to expand their services and operations. Key players in parcel delivery business are accomplishing this growth by expanding their organizations by means of mergers, acquisitions and alliances (Singh, Burgess, Singh & Kremer, 2006). If sufficient advantages are considered to be present, existing parcel delivery organizations or organizations in highly related businesses will be used to strengthen the position in the parcel delivery business. Nevertheless, strict competition regulations cause some mergers and acquisitions to be obstructed by competition authorities. Competition authorities with different levels of competence, like the Autoriteit Consument & Markt (cases regarding The Netherlands), the European Commission (cases regarding the internal market of Europe) and the Federal Trade Commission (federal cases in the United States), are able to interfere in case of jeopardizing mergers and acquisitions.
In general, competition authorities feature the authority to block certain mergers and acquisitions, because of the risk that (new) organizations will negatively affect the (national or international) effective competition because of, for example, their size, their market position or their prevalence. Blocking perilous mergers and acquisitions will help to avoid new arising oligopolies and even monopolies. Therefore, competition authorities are monitoring mergers and acquisitions continuously and are able to enforce competition regulations if necessary to maintain fair competition. These combined activities are called: **merger control**.

Four years ago, world’s largest package delivery organization UPS, based in the United States, tried to acquire one of its competitors: TNT Express, based in The Netherlands. After long and heavy negotiations, UPS withdrew its offer of over EUR 5 billion because the European Commission did not approve the deal. While UPS is still waiting for its appeal against the decision of the European Commission, FedEx and TNT Express are combining their forces in the meanwhile. TNT its strength in Europe, combined with FedEx its strength in the United States, will present a major threat to UPS. Obviously UPS, left dumbfounded, was trying to delay or call a halt to this new deal. Nevertheless several other competition authorities already approved the deal and FedEx and TNT Express were just inches away from closing the deal. On 8 January 2016 the merger was eventually approved. Immediately, and needless to say, the question arises: Why did the European Commission approve the FedEx – TNT Express deal, but blocked the UPS – TNT Express deal within a time frame of 2 years?

### 1.2 Research objective

Competition authorities can be categorized as regulatory institutions because they can influence organizations to behave in certain ways (also patterns) repeatedly and noncompliance will in most cases result in regulatory sanctions (Grewal & Dharwadkar, 2002). Furthermore, competition authorities, in the capacity of regulatory institutions, are part of the nonmarket environment (Baron, 2006). Hence, besides formulating a market strategy, it is crucial nowadays to formulate a nonmarket strategy as well to encounter the influences, forces and pressures coming from regulatory institutions (Baron, 1995; Hillman & Hitt, 1999; Baron, 2006; Kranenburg & Ross, 2014). Although a lot of executive decisions are explained and supported by market arguments, both of these cases actually emphasize the importance of nonmarket actors, like in this case government authorities. UPS, FedEx and TNT Express have to adopt their actions and strategies to the legal framework enforced by multiple competition authorities and to their corresponding decisions, in order to facilitate compliance with applicable rules and regulations. Furthermore, organizations will probably tend to influence the behavior of competition authorities and in doing so, steering the outcome of
the decisions in their favor. Simple actions - like organizations trying to come up with interpretations of definitions and thresholds which will be construed in their favor, or organizations hiding information for competition authorities, or filing remedies to eliminate the doubts of incompatibilities with the internal market - can be noted as (potential) strategies to influence the (outcome of the decisions by the) competition authority.

Hence, it is expected that organizations will try to influence the judgement of a competition authority if they endeavor the approval of a intended merger or acquisition. So, mergers involve an important political dimension, because in order to have a successful merger, a competition policy approval is indispensable (Clougherty, 2003).

Particularly because of the fact that UPS is still waiting for its appeal and the FedEx – TNT Express deal is approved by several competition authorities (including the European Commission, while the UPS – TNT Express deal was blocked by that same authority), the differences and similarities between these two deals are highly fascinating. Therefore, the aim of this study is to compare the obstruction of the UPS – TNT Express deal with the approval of the FedEx – TNT Express deal by the European Commission, and to find strategies used by the involved organizations to influence the potential outcome of the decisions.

To carry out a proper comparison, it is crucial to understand (a) the legal framework - which is the guidance for competition authorities to reach a decision - and (b) the strategies pursued by UPS, FedEx and TNT Express to influence the outcome of the decision by the European Commission.

In this study only the European Commission and its corresponding legal framework concerning competition policies will be discussed. The European Commission has exclusive power in Europe considering transnational mergers and acquisitions, and therefore will incorporate both the UPS – TNT Express and the FedEx – TNT Express deals. This kind of one stop shop system was introduced to set standard regulation in the entire European Union and to reduce transaction costs for organizations (Morgan, 1998; Motta, 2004). Unless it will contribute to answering the research question, the influence of other (national) competition authorities will not be discussed in this study.

1.3 Research question

By making a comparison between the UPS – TNT Express deal and the FedEx – TNT Express deal, several differences and similarities between both deals should come forward. Especially, differences which caused the FedEx – TNT Express deal to be approved and the UPS – TNT Express deal to be
blocked. To find these differences, some basic information about the involved actors is required. The most important actor in this research is the European Commission, including its corresponding legal framework considering competition policy. All three organizations involved (UPS, FedEx and TNT Express) in the two deals are actors as well, which need to be taken into account in this study. Considering the aim of this research, a research question can be derived.

The general research question in this study is:

*Which factors lead to the approval of the FedEx – TNT Express deal in comparison to the rejection of the UPS – TNT Express deal and which strategies were used by the involved organizations to influence the (outcome of the decisions by the) European Commission?*

To answer this research question, the following sub-questions need to be answered:

- What are the regulatory institutions concerning competition law in Europe?
- What is the influence of regulatory institutions concerning competition law on organizations?
- What is the legal framework to approve or block mergers and acquisitions in Europe?
- What are the nonmarket strategies of organizations to influence (the outcome of the decisions by) competition authorities?

The answer to the first sub-question will provide basic information, like characteristics, goals, legal basis and enforcement possibilities about the regulatory institutions concerning competition law in Europe. In this study this information will be primarily about the European Commission.

Second, organizations need to adapt their behavior to regulatory institutions, although these institutions are not legislative, they do have an enormous influence on organizations though. Specific nonmarket strategies will be used to deal with regulatory institutions, like the European Commission. The basis of these strategies will be discussed by answering sub-question two.

Sub-question three will focus on the legal framework for the European Commission, which will be used to analyze and judge the proposed merger or acquisition and to reach a decision eventually. Next to the legal framework, it is interesting and useful to see if organizations show particular actions and specific nonmarket strategies, called corporate political approaches, to influence the European Commission and the outcomes of its decision. Corporate political approaches will be introduced in the following chapters to examine the strategies pursued by the involved organizations in order to influence (the decision of) the European Commission. The different approaches discussed by Hillman & Hitt (1999) will play an important role in this study and will be used as point of departure. Thereupon the next two specific strategies will be discussed in detail: (a) Information strategy and (b)
Remedy strategy. These strategies will guide the analysis when examining the endeavors of the involved organizations to influence the (outcome of the decisions by the) European Commission. Sub-question four will seek for these kind of strategies used during the UPS – TNT Express deal and the FedEx – TNT Express deal.

1.4 Theoretical relevance

Although the aim of this study is very specific and is focusing primarily on three specific organizations, it is also interesting for academics. Existing literature about nonmarket strategies used towards institutions and about competition authorities is usually explained in a general sense, is mostly not specialized and only roughly combined. Literature, handbooks and studies on competition authorities are usually focused on the legal framework: explaining definitions, explaining competition policies, explaining benchmarks, explaining enforcement etc. Appeldoorn & Vedder (2010) give clear and comprehensive insights into European competition policies, while Facey and Huser (2004) provide a great insight in the scope of competition authorities in Canada, in the European Union and in the United States. Although Motta (2004) explains competition theory and policies in a much broader spectrum (more economical points of view are used), the nonmarket actions and reactions of organizations are usually neglected when discussing competition authorities. In some handbooks and studies compliance programs are discussed though (e.g. Appeldoorn & Vedder, 2010), but these programs are most often focused on preventing organizations (thus its employees) from breaking stringent competition policies, like concerted practices that will endanger effective competition. These compliance programs are definitely not designed to provide guidelines for filing a notification in case of a intended merger or acquisition, but primarily to prevent fines. Next to discussing the legal framework as well, this study will examine the organizations its point of view when filing a notification consider a merger or acquisition.

On the other hand, there is no lack of nonmarket strategy literature in general either. Lots of studies pay attention to actors like governmental institutions, which are identified and properly listed by Mellahi, Frynas, Sun & Siegel (2016). Although some of these studies are (partly) focused on competition authorities as well (Baron, 2006; Van Kranenburg & Ross, 2014), they are usually discussed in a broad sense. This study will focus solely on competition authorities and more precise solely on the European Commission and merger control. Different kinds of nonmarket strategies can be used towards regulatory institutions in a general matter, this study will provide additional insights about nonmarket strategies towards the procedure and decisions of the European Commission (and
competition authorities in general) in merger control. This study will use the corporate political approaches discussed by Hillman & Hitt (1991) as point of departure and will elaborate on information strategies because of the fact that providing information is essential for an appropriate notification in merger control. The information strategies will concentrate on the notification procedures in merger control, and the dimension of remedies strategies will be added to describe the endeavors of involved originations to influence (the outcome of the decisions by) the European Commission.

1.5 Practical relevance

Besides a theoretical relevance, this study will add more information to the already existing knowledge and experience about filing a merger notification. The knowledge about the influence of competition authorities on organizations, the nonmarket strategies to counteract this influence and the right legal framework can be used by organizations to work towards a smooth procedure and an immediate approval of their merger notification. This does not only apply for the organizations examined in this research, but for other organizations in the package delivery industry and imaginably for organizations weighing in mind a merger or acquisition in general as well.

Moreover, the nonmarket strategies towards the competition authorities can be interesting for all kinds of organizations, when one sees the different strategies (and their outcomes) used by UPS, FedEx and TNT Express. Even competition authorities can understand and create more awareness about actions and reactions by organizations involved in a merger control procedure. Eventually, the nonmarket strategies are intended to influence the decision of a competition authority, so both parties can benefit from the results of this study.

1.6 UPS, FedEx & TNT Express

A brief description about organizations - UPS, FedEx and TNT Express - involved in this study will be provided first, to get an overall insight into their identity and operations.

1.6.1 UPS

UPS (United Parcel Service) based in Atlanta (Georgia, United States), is one of the oldest organizations in the package delivery industry. Founded in 1907 as American Messenger Company in
Seattle (Washington, United States), it moved to Oakland (California, United States) in 1919 and changed its name to United Parcel Service. Over time, the well-known company with its patented Pullman Brown color, has become one of the largest organizations in the package delivery industry and is now listed at the NYSE. Nowadays, the organization consists of three core segments: (a) U.S. Domestic Package, (b) International Package and (c) Supply Chain & Freight. While started to expand to the European market in 1976, 22 per cent of the total revenues in 2015 (USD 58.4 billion) was earned internationally. With a total of 444,000 employees it serves over 220 countries and territories and can deliver to every address in North-America and Europe. (Information retrieved from UPS website and Year Report 2015)

1.6.2 FedEx
FedEx (Federal Express Corporation) based in Memphis (Tennessee, United States), is the main competitor of UPS in the package delivery industry. Founded in 1971 in Little Rock (Arkansas, United States), this quite young organization moved to Memphis in 1973. The organization is known for its delivery services and the introduction of its real-time track and trace solutions. FedEx is listed at NYSE since 1978 and consists of four core segments: (a) FedEx Express, (b) FedEx Ground, (c) FedEx Freight and (d) FedEx Services. In 2015 the organizations consisted of 325,000 employees and had a total revenue of USD 47.4 billion. FedEx serves over 220 countries and territories as well. (Information retrieved from FedEx website and Year Report 2015).

1.6.3 TNT Express
TNT Express (TNT Express N.V.) based in Hoofddorp, is a well-known package delivery service in The Netherlands. Founded in 2011, the organization originates from the state owned Staatsbedrijf der Posterijen, Telegrafie en Telefonie (founded in 1928). TNT N.V. (originally Thomas Nationwide Transport from Australia) operating in parcel delivery and the national post service, demerged in 2011 into TNT Express (parcel delivery) and PostNL (national post service in The Netherlands). The organization reached EUR 6.9 billion in total revenues in 2015 and employed 57,000 people. (Information retrieved from TNT Express website and Year Report 2015).

In March 2012 UPS announced its intention to buy TNT Express but the deal was obstructed by the European Commission. In April 2015 competitor FedEx announced its intention to buy TNT Express, thanks to approval of the European Commission and the Federal Trade Commission both organizations received the admired go-ahead for the intended merger.
1.7 Research outline

To compare the obstruction of the UPS – TNT Express deal with the approval of the FedEx – TNT Express deal, a basic understanding of the applicable legal framework and existing theories about nonmarket strategies is required. Therefore, the next chapter will consist of the theoretical background, which will focus on the European Commission in its capacity of competition authority and on corporate political approaches as component of nonmarket strategies. Chapter three will elaborate on the legal framework used by the European Commission in merger control. Next, chapter four will discuss the research methods, including the characteristics of the analysis and the data collection in this study. The analysis in this study will be conducted and described in chapter five. Concluding, chapter six will show the results of the analysis. This chapter will commence with a discussion of the results with regard to the theories and the legal framework explained in chapter two and three. Furthermore, the research question and its sub-questions will be answered. Finally, the limitations of this study and possible further research will be discussed.
2. Theoretical framework

In this chapter a theoretical framework will be provided to prepare for the analysis in this study. In line with the aim of this study, but especially in order to make a useful and fair comparison between the UPS – TNT Express and FedEx – TNT Express deals, a thorough understanding of fundamental concepts retrieved from existing literature is indispensable. This chapter will commence with a concise explanation and discussion regarding the nonmarket environment and several coherent theories. Second, the major actor in this research, the European Commission in its capacity of competition authority, will be discussed in combination with its influence on organizations. At that point only one perspective is yet exposed. One should definitely not neglect the considerations from the perspective of the organizations. For this reason, the last paragraph of this chapter will be considering specific nonmarket strategies, called corporate political approaches. The paragraph will focus on the actions and reactions of organizations towards competition authorities. A comprehensive discussion on the legal framework used by competition authorities, in this case the European Commission, will be provided in the next chapter.

2.1 Nonmarket environment

Nowadays one cannot imagine a business strategy which neglects the importance of the nonmarket environment. Most often the pursued strategy and the corresponding success is not solely about the organization its products, services and (internal) operations, but also about forces generated by actors outside of the market environment, like governments, interest groups, activist and the public (Baron, 1995a). Organizations should be aware of the fact that these actors are different from the actors in the market environment. Market actors and nonmarket actors should be distinguished because of their specific (and different) characteristics, like due process (legal rights), collective action and publicness (Baron, 1995). While most interactions in the market environment are voluntary, this is not self-evident for interactions in the nonmarket environment. ‘The interactions in the nonmarket environment may be voluntary, such as when the firm adopts a policy of developing relationships with government officials, or involuntary when government regulates an activity or activist groups organize a boycott of a firm’s product’ (Baron, 1995:47).

Usually the nonmarket environment is described as existent of multiple arrangements which structure the occurring interactions: (a) social arrangements, (b) political arrangements, (c) legal arrangements and (d) cultural arrangements (Baron, 1995a; Doh, Lawton & Rajwani, 2012). The
nonmarket forces cannot be considered completely independent though, because they work in conjunction with the market environment and usually do have an enormous impact on the organization its performance as well (Baron, 1995a). Not focusing solely on the market environment, but on the nonmarket environment as well, can positively influence the organization its performance and perhaps even create a competitive advantage (Mellahi et al., 2016).

Baron (1995a) mentions several differences between the market environment and the nonmarket environment:

- In the nonmarket environment actors are not solely participants in economic exchange but could be governmental as well or, for example, the media and the public.
- The nonmarket environment is more likely to provide public benefits instead of the private benefits in the market environment.
- The number of constituents is the decisive role in nonmarket environments instead of resource commitment or money in the market environment.
- Some actions are considered to be prohibited in the market environment while these same actions are not illegal in the nonmarket environment.
- While generated profits is the most important measure in the market environment, broader dimension are used to express performance in nonmarket environment.

In general the nonmarket environment is characterized and defined by four elements: (a) issues, (b) institutions, (c) interests and (d) information (Baron, 1995a). The element issues is quite self-evident and can best be described by examples like a lawsuit or a legislative proposal. Institutions in the nonmarket environment are the (influencing) actors, and most often governmental organizations, committees or commissions, like the European Central Bank, the United States Congress and (federal) courts. As mentioned before, also interest groups, activists and the media are considered to be institutions. The element interests consists of ‘individuals and groups with preferences about, or a stake in, an issue’ (Baron, 1995a:74). The last element information is about the knowledge about ‘the relationship between actions and consequences and about the preferences and capabilities of the interested parties’ (Baron, 1995a:75).

A slightly different definition is used by Boddewyn (2003:320): ‘Nonmarket refers to (a) values expressing the purposive pursuit of public interests; (b) internal and external interchange mechanisms of coercion and cooperation that complement and balance competition in a reciprocal
manner at various levels of interaction; (c) relationships among market and nonmarket organizations resting principally on their actors’ sovereignty rights; and (d) the conflictual integration in the light of their failures of society’s economic, political, social, and cultural organizations.’

Both definitions mention the existence of institutions in the nonmarket environment (in the definition of Boddewyn (2003), institutions can be found incorporated in sub c as nonmarket organizations). One of the following key focus areas will be the existence and the legitimacy of institutions, acting in the nonmarket environment.

### 2.2 Institutions

In order to continue the theoretical framework, and later on to carry out the analysis, a good perception of institutions as primary actor is necessary. Scholars tried, and many times succeeded, to define the concept of institutions. In this paragraph, background information will be provided about the concept of institutions in the nonmarket environment. One can approach this concept from several angles, considering the fact that governmental agencies are the actual kind of institutions which need to be discussed. Using stakeholder theory as point of departure, the classic definition of a stakeholder by Freeman (1984:46) is indispensable: ‘any group or individual who can affect or is affected by the achievement of the organization’s objectives.’ Institutions, as governmental organizations in the nonmarket environment, would definitely be covered by this definition of a stakeholder. As shown in Figure 1 governments are indeed expected to affect and be affected by organizations according to stakeholder theory.

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Contrasting Models of the Corporation: The Stakeholder Model

![Contrasting Models of the Corporation: The Stakeholder Model](image)

**Figure 1**: Contrasting Models of the Corporation: The Stakeholder Model by Donaldson & Preston 1995:69.
Governmental organizations are usually defined as nonsupportive stakeholders. This is because these stakeholders are high on potential threat (considering for example legislation and possible enforcement), but actually low on potential cooperation (considering for example the difference in status) (Savage, Nix, Whitehead & Blair, 1991). These elements will be more thoroughly discussed in paragraph 2.4 of this study.

The concept of institutions in the nonmarket environment is approachable through institutional theory as well. According to Scott (2014), a precise and universally agreed definition of institutions is still not provided for. Several characteristics can be addressed though: ‘Institutions comprise regulative, normative and cultural-cognitive elements that, together with associated activities and resources, provide stability and meaning to social life. (…) In this conception, institutions are multifaceted, durable social structures, made up of symbolic elements, social activities, and material resources. (…) Institutions exhibit stabilizing and meaning-making properties because of the processes set in motion by regulative, normative and cultural-cognitive elements. These elements are the central building blocks of institutional structures, providing the elastic fibers that guide behavior and resist change’ (Scott, 2014:56-57). So, in general one can distinguish three elements, or pillars, regarding institutions: (a) regulative systems (‘Institutions constrain and regularize behavior’ (Scott, 2014:59)), (b) normative systems (‘Emphasis here is placed on normative rules that introduce a prescriptive, evaluative, and obligatory dimension into social life’ (Scott, 2014:64)) and (c) cultural-cognitive systems (‘the shared conceptions that constitute the nature of social reality and create the frames through which meaning is made’ (Scott, 2014:67); as seen in Table 1. Although Scott (2014) criticizes the explanation by some scholars by using only one or two of the three pillars of institutions, it seems rather obvious to concentrate on the regulative conception in case of governmental institutions in this study. In such cases a regulatory process is almost self-evident, because the governmental institution deals with rule-setting, supervision and possible sanctioning. Supervision, enforcement and possible sanctioning are main characteristics which can be applied on governmental organizations, and more specific, on competition authorities. So, competitions authorities would be also covered by the definition of a regulatory institution, according to the theory by Scott (2014).
Another general definition is provided by North (1991:97): ‘Institutions are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights).’

Also Baron (2006) would not be complete, when describing the elements of the nonmarket environment without discussing institutions. He uses a broad concept of institutions in the nonmarket environment by stating that institutions do not need to be governmental to meet the definition. But in the meantime he acknowledges the importance of the principal governmental institutions. ‘The principal government institutions are legislatures, the executive branch, the judiciary, administrative agencies, regulatory agencies and international organizations’ (Baron, 2006:9). When focusing on governmental institutions, legislative and regulatory institutions can be distinguished. Legislative institutions, like the United States Congress need to take the following interests into consideration: following legislative procedures, respecting committee jurisdiction and respecting the preferences of electoral constituents (Baron, 2006). Regulatory institutions, like the European Commission, need to take the following interests into account: respecting mandates, following administrative procedures and being attentive to their political principles (Baron, 2006).

So, like Oliver (1991) did before, Baron (2006) broadens the range of the concept of institutions in the nonmarket environment. Baron (2006) explains that, for example, markets and insurance
systems are considered to be institutions as well, although they are established by private means. Furthermore, a governmental background does not seem to be a necessary condition. The media and the public sentiment are (nongovernmental) institutions as well (Baron, 2006). So, many kinds of institutions are considered to be present in the nonmarket environment. That is why Baron (2006:9) stresses the importance of acknowledging them: ‘Understanding the workings of these institutions, their procedures, and the forces that operate within them is essential for effective management in the nonmarket environment.’ Although the broadened concept of institutions could be helpful for several scholars, in this study competition authorities will be considered to be governmental institutions with a regulatory function. Therefore, the next paragraph will focus on regulatory, governmental institutions and more specific, on competition authorities.

2.3 Competition authorities in their capacity of (regulatory) institutions

Mergers and acquisitions take place all over the world and some authors even argue that one can distinguish certain waves in the 1900’s (e.g. Montgomery and Wilson, 1986). Organizations will try to seek opportunities and possibilities to, for example, eliminate a direct competitor or to expand their businesses, which can be accomplished by a merger or acquisition. Usually supported by market arguments, mergers and acquisitions are intended to create economic value for one or more organizations, because of the ability to reduce costs, the ability to charge higher prices, or a combination of both (Chatterjee, 1986). Unlimited possibilities to merge and acquire would probably lead to a weakened competition, because in general there will be one competitor less to compete with. For this reason, national and international competition authorities are trying to maintain fair and effective competition by enforcing competition policies. Part of most national and international competition policies is the obliged (pre-)notification of intended mergers and acquisitions, or at least a possibility to obstruct certain mergers and acquisitions.

2.3.1 Regulatory institutions

Although governmental institutions concerned with competition policies can be involved in legislative proceedings as well, competition authorities can be typically mapped as regulatory institutions. These institutions can influence certain actors (organizations) to behave in certain ways (patterns) repeatedly and while the basis of compliance is usually expedience, noncompliance will in most cases result in regulatory sanctions (Grewal & Dharwadkar, 2002). Thus, competition authorities apply and implement the rules set (in advance) by other governmental (but legislative) institutions and will enforce these rules if necessary. Regulation is becoming more and more
important thanks to, for example privatization and the desire to create unanimous policy, like in the European Union (Majone, 1997). Competition policies are intended to maintain fair and effective competition, but one could argue if this intervention is necessary at all. Although governments are not shy to embark on regulations before examining the necessity of them, regulation should only be used if the market cannot fully function in the intended manner without them (Ogus, 2002). A situation which can be defined as an incorrect functioning market is in case of market failures, like monopolies and significant impediments of the competition (Ogus, 2002: 629). Considering the former mergers and acquisitions in the parcel delivery business, the competition would have been severely weakened if no regulatory institution would have intervened. Far more mergers and acquisitions would have manifested because the largest organizations would have acquired probably all smaller competitors in the same business.

Besides an incorrect functioning market, Ogus (2002) provides an extra reasoning. If private law does not solve the problem (which can be possible in some rare competition cases though), regulating governmental institutions need to step in (Ogus, 2002). For this reason, competition authorities are created by a legislative governmental institution to maintain fair competition by applying and enforcing competition policies.

The continuous call for mergers and acquisitions will delay or even prevent the creation of competitive advantage, while a strong competition policy will encourage innovation (Porter, 1990). Trying to maintain fair and effective competition is the basic and core objective of competition authorities in their capacity of regulatory institutions. Several objectives regarding competition policies can be deducted and should be mentioned briefly as well. Motta (2004) mentions seven different objectives for competition policies:

- Maintaining economic welfare (maintaining balance between monopoly price vs. marginal costs of production).
- Maintaining consumer welfare (maintaining balance between the willingness of a consumer to pay vs. the actual prices).
- Defense of smaller firms (helping smaller firms to survive in the market).
- Promoting market integration (creating one single market from two separate markets with the same product, in European Union objectives: economic integration of the European markets).
- Economic freedom (possible contradictions regarding economic efficiency).
- Fighting inflation (highly questionable).
- Creating and maintaining fairness and equity (firms are ought to act fair and with respect to consumers and competitors).

Besides these economic objectives one can think of objectives that are focused on social, political, environmental and strategic reasons as well (Motta, 2004). To reach these and above mentioned objectives, (legislative and regulatory) institutions need to intervene. In literature there is a rough division between regulation and competition policy (see: Rey, 2000 and Motta, 2004). Usually competition authorities are ought to operate ex post, so they will only intervene when suspicions of an offense arise, like price fixing. Regulators are supposed to act ex ante, by authorizing certain behavior or imposing investments. At first sight, this seems like a plausible and quite easy distinction. But, when taking a look at the instruments of competition authorities to realize above mentioned objectives, one can encounter certain difficulties.

Usually one can distinguish three main instruments to realize fair and effective competition:

1. Prohibition of certain agreements, decisions and concerted practices that will endanger fair competition, like price fixing.
2. The prohibition of abusing a dominant position in the market.
3. The possible obstruction of mergers and acquisitions to prevent incompatibility with the economic market.

While considering these three instruments, it is clearly that the first two instruments should be used after the discovery of certain facts or behavior (of course organizations should conform to and obey to these set rules at all times). Competition authorities can only enforce these regulations when these rules are broken, so ex post. But the third instrument is about a possible blockage of a merger or acquisition, so definitely prior to any violation (ex ante). So, actually it is not possible to make a clear distinction between regulators and competition policy if competition authorities with ex ante and ex post instruments will be examined. Motta (2004:30) describes competition policy as: ‘the set of policies and laws which ensure that competition in the marketplace is not restricted in such way as to reduce economic welfare.’ This definition will be used in this study to indicate all regulations concerning competition law. Although, antitrust law is more often used to address competition law in the United States, the term competition (law) will be used in this study.

2.3.2 The competition authority in the European Union: European Commission
The European competition policy is enforced by the European Commission (and the Court of Justice of the European Union). The European Commission, based in Brussels and established in 1958, has
several tasks including: proposing new laws, managing EU policies, allocating EU funding and
enforcing EU law (retrieved from European Commission website). In control of all competition
centered matters is the Directorate General for Competition. On behalf of the European
Commission the directorate can examine, analyze, prohibit and fine certain actions of organizations.
For this reason the European Commission, in its capacity of competition authority, can have an
ever-normous influence on organizations and their strategies.

One of the primary treaties regarding the European Union is the Treaty on the Functioning of the
European Union (TFEU). Article 3, subsection 1 of this treaty states:

The Union shall have exclusive competence in the following areas:
(a) customs union;
(b) the establishing of the competition rules necessary for the functioning of the internal market;
(c) monetary policy for the Member States whose currency is the euro;
(d) the conservation of marine biological resources under the common fisheries policy;
(e) common commercial policy.

The basic and most important articles in the TFEU are shown in the table below.

<table>
<thead>
<tr>
<th>Article</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 101</td>
<td>Prohibition of cartels and certain agreements</td>
</tr>
<tr>
<td>Article 102</td>
<td>Prohibition of the abuse of a dominant position in the internal market</td>
</tr>
<tr>
<td>Article 103</td>
<td>Legal basis to propose additional/further competition policy</td>
</tr>
<tr>
<td>Article 105</td>
<td>European Commission as competent institution to enforce competition policy</td>
</tr>
<tr>
<td>Article 107-108</td>
<td>Prohibition of certain aids granted by states</td>
</tr>
</tbody>
</table>

Table 2: Competition policy in the TFEU

The clause internal market should not be neglected, because generally speaking all national countries
still have their own competition policy for the domestic or non-transnational market. The European
Commission is only authorized to enforce European competition policy when it has full jurisdiction on
the matter (the next chapter will elaborate on the legal requirements).

Article 105 TFEU appoints the European Commission as competent institution to enforce the
European competition policy and attributes a huge task to the institution:
(...), the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

The following components will not be discussed in this study: (a) prohibition of cartels, article 101 TFEU, (b) prohibition of the abuse of a dominant position, article 102 TFEU and (c) unapproved state-aid, article 107-108 TFEU. The missing component of European competition policy and most important in this study is merger control. Merger control is not stated in the TFEU, but in a separate legal act: EU Regulation 139/2004. This regulation provides the European Commission with the authority to prohibit certain mergers and acquisitions and to intervene if mergers or acquisitions will lead to negative effects on competition in general. Therefore, the competition policy of the European Union uses a pre-notification system. All mergers and acquisitions of a certain proportion and with a European dimension need to be announced to the European Commission (the next chapter will elaborate more on this matter). The European Commission, in its capacity of competition authority, will investigate the proposed merger or acquisition and will decide if it will be allowed or obstructed. This decision is binding for the organizations involved in the procedure (decision is subject to appeal though). This kind of measure will ensure a fair and effective competition in the internal market, because mergers and acquisitions that will negatively affect the competition in the European Union will not be allowed to proceed.

In short, acting without the permission of the European Commission to engage in a merger or acquisition is not favorable. As a matter of fact, a pre-notification is obliged according to article 4, subsection 1, EU Regulation 139/2004:

Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

A proposed merger or acquisition should be compatible with the internal market and should not result in a significant impediment to effective competition (the next chapter will elaborate more on this matter too). Appeldoorn & Vedder (2010) emphasize the drastic nature of merger control and the interrelated pre-notification, because of the fact that the eventual decision is based on predictions by virtue of market conditions and economic assumptions. According to Appeldoorn & Vedder (2010), this kind of ex ante instrument interferes in one of the essential features of the open market system.
2.4 Nonmarket strategies

The previous paragraph illustrated that organizations are obliged to notify the European Commission about their intended mergers and acquisitions (certain conditions apply). After the complete notification is received by the European Commission, a preliminary investigation will be carried out to rule out a possible impediment to effective competition and doubts as to the compatibility of the intended merger or acquisition with the internal market.

Exact numbers or percentages to confirm a *significantly impediment to effective competition* do not exist and would be difficult to provide (probably also because of the fact that the analysis performed by the European Commission is partly based on assumptions and predictions). When the European Commission analyses the notification, it uses all kind of indicators to substantiate their decision. Examples of these indicators are (a) the use of thresholds, (b) the use of knowledge gained by prior experiences, (c) the assessment of counter-arguments etc. In order to provide an insight in the used line of thought, several guidelines are presented like the *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* and the *Commission Notice on the definition of relevant market for the purposes of Community competition law*.

Appeldoorn & Vedder (2010) emphasize (for the EU) that a pre-notification is not simply an application, but both parties (involved organizations and the European Commission) will negotiate about the requirements and actual *remedies* can be stipulated (e.g. selling certain parts of the organization) to receive the desired approval. Together with the notification, organizations are obliged to hand over all kind of relevant information to the European Commission. The European Commission is eager to learn about the organizations its characteristics and performance in order to judge the approval properly. One can think of previous notifications of intended mergers, financial ties of the organizations, characteristics of the board, intended efficiency improvements, market analysis (market size, market shares, price level, import, market development) etcetera (Korsten & Van Wanroij, 2008; Appeldoorn & Vedder, 2010). Although the European Commission carries out its own investigation as well, most information is provided by the organizations that file the application.

Because of the fact that the outcome of the investigation is partly open to interpretation and organizations will provide most of the information, it is to be expected that organizations will try to influence the (outcome of the) investigation. Due to the usage of a pre-notification system, the willingness of organizations to get the deal closed is set in advance. Therefore, it is possible that organizations will do everything within their power to influence the outcome of the investigation and
receive the desired approval from the European Commission to proceed with the merger or acquisition.

Organizations can try to influence the outcome of the investigation by means of misrepresenting facts, by representing facts too optimistically, by keeping facts up their sleeve etc. This kind of strategy is not about market prices and competitors but about the nonmarket environment and its institutions.

Considering the fact that the European Commission has the power to obstruct certain mergers and acquisitions, it can have a tremendous effect on organizations and their strategies. While all kind of market arguments can be indicating that the establishment of a merger or acquisition will be advantageous, a regulatory institution like the European Commission could spoil the party. So, organizations will most likely pursue a specific strategy on how to cope with this regulatory institutions in the nonmarket environment, which can possible obstruct their intentions. A good nonmarket strategy will map ‘the institutional situation to a set of possible nonmarket actions, such as building coalitions, lobbying legislators or regulators, making campaign contributions, and providing information to affect institutions that might defend or create revenues, while a market strategy maps the industry structure to a set of market actions, such as pricing, quality improvements, or product differentiation’ (Doh et al., 2012:23; Hillman, Keim and Schuler, 2004). In principle, nonmarket strategies are not specially designed to cope with competition authorities during a merger control process. A nonmarket strategy is ‘a concerted pattern of actions taken in the nonmarket environment to create value by improving its overall performance’ (Baron, 1995:47). Nonmarket strategies are actually intended to cope and interact with, and even influence, institutions in the nonmarket environment. Because of this broad definition, nonmarket strategies could exist of lobbying, providing information, enthusing the public, campaign contributions, involving social actors etc. So, it is expected that nonmarket strategies will be used by involved organizations during the merger control process to aim at the approval of their intended merger or acquisition by the European Commission. Mind you, nonmarket strategies can be used to cope with competition authorities or to influence the outcome of their decision, but some strategies can aim at reaching goals through dishonesty and exploitation, resulting in corruption and bribery (Doh et al., 2012).

2.4.1 Interacting with a regulatory institution
While market strategies are mainly concentrated on creating value by improving economic performance, nonmarket strategies are mainly focused on creating value by improving overall performance, which include stakeholders and institutions for example (Baron, 1995). Considering this
idea, stakeholder theory can provide a first hint on how to cope with regulatory institutions, like competition authorities and more specific the European Commission. Savage et al. (1991) examine two different assessments to classify stakeholders. They come up with four different kind of stakeholders based on their potential for threat to the organization and their potential for cooperation with the organization. The potential for threat is being described as follows: ‘The stakeholder’s relative power and its relevance to a particular issue confronting the organization determines the stakeholder’s capacity for threat’ (Savage et al., 1991:63). The potential for cooperation with the organization is referred to as: ‘Cooperation should be equally emphasized since it allows stakeholder management to go beyond merely defensive or offensive strategies. The potential for stakeholder cooperation is particularly relevant because it may lead to companies joining forces with other stakeholders resulting in better management of business environments’ (Savage et al., 1991:63). These two assessments together result in four different types of stakeholders with four different kind of corresponding responses or strategies (see Table 3).

<table>
<thead>
<tr>
<th>STAKEHOLDER’S POTENTIAL FOR THREAT</th>
<th>STAKEHOLDER’S POTENTIAL FOR COOPERATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>HIGH</td>
<td>HIGH</td>
</tr>
<tr>
<td>STAKEHOLDER TYPE 4</td>
<td>STAKEHOLDER TYPE 1</td>
</tr>
<tr>
<td>Mixed Blessing</td>
<td>Supportive</td>
</tr>
<tr>
<td>STRATEGY</td>
<td>STRATEGY</td>
</tr>
<tr>
<td>Collaborate</td>
<td>Involve</td>
</tr>
<tr>
<td>LOW</td>
<td>LOW</td>
</tr>
<tr>
<td>STAKEHOLDER TYPE 3</td>
<td>STAKEHOLDER TYPE 2</td>
</tr>
<tr>
<td>Nonsupportive</td>
<td>Marginal</td>
</tr>
<tr>
<td>STRATEGY</td>
<td>STRATEGY</td>
</tr>
<tr>
<td>Defend</td>
<td>Monitor</td>
</tr>
</tbody>
</table>

Table 3: Different types of stakeholders, adapted from Savage et al., 1991.

A Type 1 Stakeholder will score low on potential threat, but high on potential cooperation and could, thus, be described as supportive towards the organization its goals and actions (Savage et al., 1991). A Type 2 Stakeholder will score low on potential threat and low on potential cooperation, making them generally not concerned about the organization its issues (Savage et al., 1991).

A Type 3 Stakeholder will score high on potential threat but low on potential cooperation, like
competing organizations, governments and even media (Savage et al., 1991).

A Type 4 Stakeholder is characterized by having significant influence and potential for cooperation at first sight, but the stakeholder could eventually become either more or less supportive (Savage et al., 1991).

A competition authority like the European Commission should be classified as Type 3 Stakeholder. First, the European Commission has a high potential for threat, because its regulating task, its investigations and eventually its decisions, which can lead to possible fines or the obstruction of a intended deal. Second, the European Commission scores low on potential for cooperation. Although the European Commission usually discusses the case with the involved organizations, there is no intention of cooperation or building a relationship. The European Commission will not join forces with the involved organizations because of the independent decision it needs to reach. A Type 3 Stakeholder comes with a Defend strategy according to Savage et al. (1991). This kind of strategy involves traditional marketing and strategic tactics which cope with competitors, because it ‘tries to reduce the dependence that forms the basis for the stakeholders’ interest in the organization’ (Savage et al., 1991:66).

However, this kind of nonmarket strategy is way too broad for organizations to use when dealing with the European Commission during the merger control process. A combination with other theories seems to be necessary.

2.4.2 Corporate Political Activity

Nonmarket strategy is under great attention for several decades now and is divided in several strands (Aguinis & Glavas, 2012). Two main strands of nonmarket strategies, which can be seen as parallels, are corporate social responsibility and corporate political activity (Mellahi et al., 2014). While corporate social responsibility focuses on advancing social goods, corporate political activity focuses on the interactions between organizations and political actors. The latter strand of nonmarket strategies will be used to elaborate on the subject in question. Corporate political activity (CPA) is about organizations dealing with political institutions and shaping government policy in favorable ways (Hillman et al., 2004). Lux, Crook & Woehr (2011) showed a positive relation between corporate political activity and performance of organizations, which again, confirms the importance of nonmarket strategies. It is proposed that in strongly regulated environments, e.g. in the case of competition policies, organizations could definitely strengthen their competitive advantage by using a corporate political strategy (Hillman & Hitt, 1999).
As seen before, competition authorities can obstruct certain mergers and acquisitions, and impose fines when a violation of competition policy is noticed. Organizations will need to cope with these kind of measures and this is actually possible by designing and implementing corporate political strategies (Van Kranenburg & Ross, 2014). Organizations often assume that the political and regulatory environment should be taken for granted and that the coherent policies are not changeable (Van Kranenburg & Ross, 2014). Nevertheless, they could not have been more wrong. Using a nonmarket strategy, like a corporate political strategy, can result in several competitive advantages, through: (a) a thorough understanding of the political and regulatory environment, (b) trying to foresee relevant government and regulatory actions, and (c) above all, in the best case, organizations could end up shaping the public and regulatory policies to the organization its best interest as well (Van Kranenburg & Ross, 2014).

Corporate political strategies should be considered as nonmarket strategies that focus on governments as actor in the nonmarket environment and have the intention to reduce dependence on governmental actions and influences (Hadani, 2007). However, the question still remains: What kind of corporate political strategy should be used in order to cope with a competition authority like the European Commission?

*Bargaining and nonbargaining approaches*

A distinction solely focused on behavior towards governments is made by Boddewyn & Brewer (1994). They distinguish two approaches: the *bargaining* and the *nonbargaining* approach, each consisting of several other categories. The *nonbargaining* approach is more likely to be used when organizations are dependent on decisions by government institutions and consists of three forms: *Compliance*, *Avoidance* and *Circumvention* (Boddewyn & Brewer, 1994). Starting with explaining the most passive form of the *nonbargaining* approach: *Compliance*. This form is characterized by acceptance: ‘Many international trading and investing firms are satisfied with the requirements imposed or the incentives offered by home and host governments, and they simply comply with them because (a) they do not unduly constrain business strategies and operations, (b) they provide attractive benefits (e.g., tax deferrals and holidays), or (c) they are uncontrollable by a particular firm’ (Boddewyn & Brewer 1994:128). The consecutive form in this approach is *Avoidance*, which is literally about avoiding the (applicable rules set by the) government. The last form in this approach is *Circumvention* and addresses a rather extreme behavior. ‘Circumvention through illegal activities (…) provides another nonbargaining form of political response, although there may be legitimacy costs to bear if government detects such behaviors’ (Boddewyn & Brewer, 1994:128). The *bargaining* approach is more suitable for semi-sovereign government institutions which cannot impose their
decisions or wills and consists of two forms of managing governments: Conflict and Partnership (Boddewyn & Brewer, 1994). The first form of the bargaining approach focuses on governments and organizations having different interests; they bargain ‘either trying to prevent or mitigate governmental gains at their expense or striving to make gains at the expense of governments’ (Boddewyn & Brewer, 1994:129). The last form of the bargaining approach is Partnership, it ‘(...) rests on a positive-sum-game view of business-government interaction (Boddewyn & Brewer, 1994:130).

Recalcitrant and responsive approaches
Another distinction is made by Baron and Diermeier (2001). The distinction between a recalcitrant (rather fighting than conceding) and responsive (more likely to make proactive changes) approach by Baron & Diermeier (2001) sounds actually quite familiar, when one reminds above mentioned. Organizations using a recalcitrant approach resist policies or decisions by government institutions and are not willing to change their practices (Baron & Diermeier, 2001; Van Kranenburg & Ross, 2014). While organizations using a responsive approach will probably comply and conform to rules set by the government and decisions made by government institutions (Baron & Diermeier, 2001; Van Kranenburg & Ross, 2014).

Relational and transactional approaches
A distinction in two other kind of approaches is made by Hillman & Hitt (1999). They distinguish a transactional and a relational corporate political approach. In the first approach an organization normally awaits the development of an important government related issue and therefore it is more based on individual issues (short-term exchange relationships) (Hillman & Hitt, 1999). Key characteristics of this approach are (a) specific salient issues, (b) the development of issues will be awaited, and (c) a low amount of existing contacts and resources will be used. The second approach focuses on issue spanning relationships, these organizations ‘(...) attempt to build relationships across issues and over time so that when public policy issues arise that affect their operations, the contacts and resources needed to influence this policy are already in place (Hillman & Hitt, 1999:828). Key characteristics of this approach are (a) a long term approach, (b) building relationships is considered to be highly important, and (c) a high amount of existing contacts and resources will be used.

Besides the distinction in temporal consistency (relational or transactional), Hillman & Hitt (1999) describe two more decisions for corporate political strategies. The second decision is about the level of participation, and consists of two approaches. Individual approaches refer to ‘solitary efforts by individuals, or individual companies in this case, to affect public policy’ (Hillman & Hitt, 1999:830).
Collective approaches refer to ‘the collaboration and cooperation of two or more individuals or firms in the policy process (Hillman & Hitt, 1999:830).

The third decision is about the specific tactic to deploy and contains three options: (a) Information strategy, a strategy to influence the institutions by providing or hiding specific information (about preferences); (b) Financial incentive strategy, users of this strategy ‘attempt to influence public policy by directly aligning the incentives of the policy makers with the interests of the principals through financial inducements’ (Hillman & Hitt, 1991:834); and (c) Constituency-building strategy, a strategy used to influence institutions through constituent support by others, which on their turn try to influence institutions.

The different approaches and tactics distinguished by Hillman & Hitt (1999) will be used primarily as guidance to elaborate on the corporate political strategies towards competition authorities.

2.5 Corporate political approaches concerning competition authorities

The different approaches discussed in the previous paragraph gave a general insight in how organizations could (re)act and behave towards competition authorities. But still, it is not clear yet which approach or strategy can be used to influence the decision of a competition authority in the desired one. Considering the case that an organizations and a competition authority will not reach agreement about particular subjects, the competition authority can use its power and block a merger or acquisition, or it can fine the involved organizations. This particular kind of actions by competition authorities can limit the organization in its strategies (Van Kranenburg & Ross, 2014). Since the European Commission is a sovereign institution which makes crucial decisions for organizations (their intended strategy or future can rely on those decisions), compliance is the most important strain in the discussed strategies. Compliance with competition policies involves both the procedure and the competition policy (Baron, 2006). Compliance is, more or less explicit, intertwined in above mentioned approaches (especially the nonbargaining approach and the responsive approach).

Now, the question arises in which actions and reactions organizations engage to comply with competition policies. Most often, organizations provide training and guidance to employees on how to act in situations in which competition issues may arise (Baron, 2006). Actually, the European Commission requires organizations to use a proactive attitude to prevent violation of European competition policy. Most notable example is the use of a compliance program. Compliance programs can contain information, education, internal control mechanisms and exams to avoid and to deal with competition issues (Slot & Swaak, 2012).
On the other hand, even some competition authorities provide nonbinding rules of play for organizations, like the *Spelregels bij Concentratiezaken* in the Netherlands and the *DG Competition Best Practices on the conduct of EC merger proceedings* by the European Commission. These rules of play are intended to inform about the procedures in practice (mode of operations, communications with third parties, opportunities to get an informal opinion etc.) and are based on several years of experience of the Dutch and European competition authorities (Korsten & Van Wanroij, 2008).

2.5.1 Compliance and information
Leaving the question aside if compliance is a choice, merger control cases are different from other components of competition policy. In concerned cases, compliance is almost self-evident because organizations want the competition authority to approve their intended merger or acquisition. Organizations will do as much as possible to comply with the set regulations in order to receive approval for their deal. Nevertheless, the European Commission needs a lot of information to reach a valid decision. It needs (a) general information about the market (market size, market shares, import numbers, price levels, sales numbers, market positions, market development) and (b) specific information about the involved organizations, which will be most often confidential information. In case of existing regulations being violated (e.g. abusing a dominant market position), the European Commission has several powers to carry out proper research and to enforce this violation (e.g. EU Regulation 1/2003 assigns the power to take statements and the power of inspection to the European Commission). In merger and acquisition cases, violated regulations are (usually) out of the question because it is still an application or notification (ex ante). Hence, one should expect the European Commission unable to use mentioned powers during merger control. On the contrary, article 13, EU Regulation 139/2004 provides the European Commission with several, drastic powers of inspection as well.

In order to carry out its duties, the European Commission may conduct all necessary inspections of undertakings and associations of undertakings. During this inspections, all authorized personnel is legally entitled to: (a) to enter any premises, land and means of transport of undertakings and associations of undertakings; (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored; (c) to take or obtain in any form copies of or extracts from such books or records; (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers (article 13, subsection 2, EU Regulation 139/2004).
However, although powers to gain information are within reach of the European Commission, it is primarily depended on information provided by the organizations which are involved in the merger control procedure. For this reason, the European Commission requires an enormous amount of information (as mentioned before) from the organizations themselves. Requiring this much information is actually considered impractical and causing long and labor intensive investigations (Bellis, Elliott & Van Acker, 2011). But, by way of concession, most competition authorities provide two useful guides: (a) a possible informal opinion about merger issues (solely based on provided information and nonbinding) and (b) a possible pre-notification meeting, in which the organizations come up with their ideas for a merger or acquisition and the competition authority explains which information is required to reach a decision (Korsten & Van Wanroij, 2008). Bellis et al., (2011:327) note that: ‘while the practice of providing the case team with one or more draft notifications before formally filing is generally seen as being of mutual benefit to the case team and the parties, it inevitably results in delaying deals, usually by a matter of weeks, but in some cases the delay can be significantly longer.’ They even support the idea of reducing the amount of prescribed forms and requiring less information in advance and instead, reserving the more onerous information requests for serious and in-depth investigations.

Of course, competition authorities carry out their own data collection as well. Third parties are involved to provide information about the market conditions, market definitions and about their opinions about market development (Korsten & Van Wanroij, 2008). Additionally, competition authorities use media coverage, trade journals, investigations performed by competition authorities based in other states, customer complaints, inquiries, leniency programs etcetera to acquire information and to use in their analysis later on (Korsten & Van Wanroij, 2008). But in general, competition authorities have to rely on the information provided by organizations.

From an organization its point of view, the fact that the European Commission is basing its decision primarily on the provided information could be tempting. As discussed before, Hillman & Hitt (1991) distinguished three political strategies: (a) Information strategy; (b) Financial incentive strategy; and (c) Constituency-building strategy. Due to the fact that the European Commission needs to base its decisions on extremely confident information (e.g. business strategies should not be made public), it is primarily dependent on the information filed by the involved organizations during the merger control process. For this reason and due to the fact that regulatory institutions are not allowed to accept financial incentives and constituency-building is not easily applicable for short-term transactional issues (Holburn & Vanden Bergh, 2008), this study will focus on information strategy. Holburn & Vanden Bergh (2008) and Buchholz (1990) emphasize the importance of information strategies and even label providing information as most important tactic for organizations when
interacting with regulatory institutions. Table 5 shows information strategy with its corresponding tactics, according to Hillman & Hitt (1991).

<table>
<thead>
<tr>
<th>Strategy</th>
<th>Tactics</th>
<th>Characteristics</th>
</tr>
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<tbody>
<tr>
<td>Information</td>
<td>• Lobbying</td>
<td>Targets political decision makers by providing information</td>
</tr>
<tr>
<td>strategy</td>
<td>• Commissioning research projects and reporting research results</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Testifying as expert witnesses</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Supplying position papers or technical reports</td>
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Table 4: Information strategy, adopted from Hilmann & Hitt, 1991:835

When applying this specific strategy and these corresponding tactics on the merger control process, organizations can try to influence the process of defining the market, they can take their chances on providing the European Commission with false or misleading information in position papers (two randomly chosen recalcitrant possibilities) or they can propose remedies to favor the European Commission and show their willingness to be cooperative, and of course they can simply comply and provide the necessary and requested information (two randomly chosen responsive possibilities).

One of the most frequently used tactics in the merger control process is providing the European Commission with internal documents. These internal documents are submitted together with the notification to underpin the organization its position in the steps of the investigation (usually deviating from the position of the European Commission). These positions are usually aimed at enlargement of the product market, enlargement of the geographical market, different interpretation of market shares etc.

A tactic which is often used in merger control procedures as well, is offering remedies to the European Commission. Remedies are proposals to eliminate existing or arising doubts by the intended merger or acquisition as to its compatibility with the common market. These remedies usually exist of the willingness to sell parts, divisions or locations of the organization, in order to get approval by the European Commission to carry on with the intended merger or acquisition. Remedies can be offered together with the notification or during the investigation by the European Commission.
With these tactics, organizations can pursue a responsive strategy by providing all the necessary information, which is correct and not manipulated. On the other hand, organizations can show recalcitrant behavior by deliberately leaving out essential information (while the European Commission asked for this information) or even adjusting the requested information in a way favorable to the organization. Theoretically, if an organization chooses to use a recalcitrant approach, this could (a) lead to a jurisdictional decision; (b) could transform the organization to a preferred target for the competition authority; (c) could increase the chance of a bad relation between the organization and the competition authority and, lastly; (d) can lead to higher transaction costs (Van Kranenburg & Ross, 2014). Using a responsive strategy ‘can reduce the vulnerability to negative assessment of their behavior, their products or services. When companies use the responsive approach depends on their conscious intent to conform to or to accept the decision, their degree of awareness of regulatory institutional processes, and their expectation that conformity will be self-serving to their own interest’ (Van Kranenburg & Ross, 2014:7).

Note that every single notification is considered to be one individual case, which eventually means that organizations use a transactional approach. Organizations are trying to receive approval by the European Commission regarding their intended merger or acquisition and are usually not building a long-term relationship. ‘The only effective way for companies to influence the regulator is to use a proactive approach in the period before the final decision of an obligation will be made. In this period, companies negotiate and lobby with institutions about the issue in an attempt to affect the decision of the regulator in favor of the companies’ (Van Kranenburg & Scott, 2014:6-7).

Eventually, the organizations involved in the intended merger or acquisition determine which information will be provided to the European Commission. Either way, the involved organizations would like the merger of acquisition to be approved, so they do have an extremely important role in delivering and shaping the information requested by the European Commission.
3. Legal framework

Besides the nonmarket environment and corresponding strategies and tactics, the core tasks and cornerstones of competition policy in the European Union are briefly discussed in the previous chapters. This chapter will examine the legal conditions which are used by the European Commission to judge the submitted pre-notification. The importance of these legal conditions is not unilateral. Legal experts and economist, hired by the organizations which are filing the notification, are aware of these conditions as well and will use this knowledge to advise the organizations and even mold the data of the organizations to get approval to seal the deal.

While one can distinguish roughly three or four areas of expertise in competition policies, this study will focus solely on merger control because the UPS – TNT Express and the FedEx – TNT Express deal are being compared in this case study. Mergers and acquisitions are usually mentioned together in literature, as in practice. The difference is actually not extremely important considering the legal framework used by the European Commission. Yet, there is no harm in understanding the difference. In general one describes a merger when two organizations are combining forces and will create a new entity, while an acquisition is about one organization buying another organization managing it consistent with the needs of the acquirer (Schuler & Jackson, 2001). Both forms are being used in competition law and are jointly referred to as merger control (concentrations to be precise).

3.1 Formal requirements

While most part of European competition policy is encountered for in the Treaty on the Functioning of the European Union, merger control is stipulated in a separate EU Regulation. Regulations do not need to be transposed into national law by each country, but are directly effective from a set date. EU Regulation 139/2004 is introduced specifically for merger control and replaces the old Regulation 4064/89 on the control of concentrations since January 2004. One of the most important principles of merger control, and already most discussed in this study, can be deducted from article 4, subsection 1, EU Regulation 139/2004, it contains the ‘Prior notification of concentrations’:

Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.
The article states that all concentrations with a Community dimension need to be announced to the European Commission for approval before it will be executed. The notification procedure is obliged and violation of this principle is liable to a fine (article 7, subsection 1, EU Regulation 139/2004):

*A concentration with a Community dimension (...) shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).*

Article 14, subsection 2, EU Regulation 139/2004 provides the possibility to impose a fine of maximum 10% of the aggregate turnover of involved organizations if a concentration is not notified or if a concentration is implemented in breach of article 7 of the regulation. Nevertheless, the European Commission will not criminally prosecute offenders of European competition policy. United States competition policy is enforced by the Federal Trade Commission, by the United States Department of Justice Antitrust Division and by United States Courts. In contrast to the European system, a violation of some sections of the United States its competition policy is considered to be a felony. Next to the possible criminally enforcement of competition policies, private enforcement is possible in the United States as well. Although private lawsuits brought by injured parties is the main way of enforcement of competition policy in the United States, private enforcement is really uncommon in the European Union (Elhauge & Geradin, 2011).

Article 1 and 4 of EU Regulation 139/2004 (the regulation commences with defining the scope of the regulation by stating that this regulation covers all concentrations with a Community dimension) show two main elements of merger control by the European Commission: (1) Concentrations and (2) Community dimension. These main elements will be discussed below, to get a good oversight on the scope of EU Regulation 139/2004, the exclusive competence of the European Commission and merger control in the European Union in general.

### 3.1.1 Concentrations

First of all, EU Regulation 139/2004 uses the umbrella term concentrations to include both mergers and acquisitions. Although the regulation begins with emphasizing the community dimensions, the following elaboration will start with the definition of concentrations, which can be found in article 3, subsection 1, EU Regulation 139/2004. The core factor of an arising concentration in European competition policy is the (1) change of control (2) on a lasting basis. The intended (1) change of control can be reached in three ways:
• a *merger* of 2 or more previously independent (parts of) undertakings;
• an *acquisition* of direct or indirect control of the whole or parts of one or more other undertakings
  o achieved by one or more persons already controlling one undertaking, or by one or more undertakings,
  o achieved by purchase of securities or assets, by contract or by any other means;
• the *creation of a full-function joint venture* (this means a joint venture performing on a lasting basis with all the functions of an autonomous economic entity, see European Commission Case T-282/02 Cementbouw for the full set of criteria)

Now the question arises what is to be construed as control (2) *on a lasting basis*. Because of differences in all national legal systems in the European Union, article 3, subsection 2, EU Regulation 139/2004 provides a simple and non-technical answer to this question. Regarding concerned regulation, control is all about influence on an organization:

*Control shall be constituted by rights, contracts or any other means which, (…) confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*

This solution offsets the entire discussion of over 25 law systems which use their own set of rules to determine a (completed) merger or acquisition, or in any event, a shift of control. Two concluding remarks are in place regarding this article: (1) subsection 3 elaborates on the acquisition of control on a technical base, while (2) subsection 5 exonerates three possible situations from being determined as a concentration, e.g. an insurance company acquiring a controlling interest.

### 3.1.2 Community dimension

The second main element of the formal requirements which need to be discussed, is the *Community dimension*. To avoid reviewing all (minor) concentrations in the entire European Union, a Community dimension is required for applicability of European competition policy and assessment by the European Commission. The European Commission uses two turnover thresholds regarding the last financial year, to determine the existence of a Community dimension (please mind: this is not a market share threshold, but a threshold to determine the (exclusive) competence of the European Commission).
The *primary threshold* can be found in article 1, subsection 2, EU Regulation 139/2004. A Community dimension applies if:

- *the combined aggregate worldwide turnover of all the undertakings concerned is more than € 5 000 million*;
- *the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than € 250 million.*

If the primary threshold is not met, a *secondary threshold* is provided to qualify for a Community dimension as well. A Community dimension is also applicable, if:

- *the combined aggregate worldwide turnover of all the undertakings concerned is more than € 2 500 million*;
- *in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than € 100 million*;
- *in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than € 25 million*;
- *the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than € 100 million.*

Please do mind, both the *primary* and the *secondary threshold* do have one joint exception. A Community dimension is not supposed to exist if above mentioned criteria are met, but when each undertaking achieves more than two-third of its aggregate Community-wide turnover within one and the same Member State (article 1, end of subsection 2 and 3, EU Regulation 139/2004). One short side note: it is expected that domestic mergers with international effects will be approved easier than mergers with only domestic interest, because of the better effect on national welfare (Clougherty, 2003). Due to the fact that the scope of this study is pretty narrow, this subject will not be discussed in more detail, but one should consider the possibility that different strategies and tactics can be used by international and national organizations in a merger control procedure.
Next, the actual calculation of the turnover is encountered for in article 5 of EU Regulation 139/2004. Subsection 1 states that the turnover is calculated by using (1) the sales of products plus (2) the provision of services of the concerned undertakings minus (3) sales rebates, minus (4) value added tax and minus (5) taxes related directly to turnover. In general, the turnover of all involved organizations and subsidiaries is taken into account. Turnover derived from internal transactions, so transactions in a group structure between an organization and the parent company are excluded (subsection 5, point (a)). Turnover of subsidiaries is included in case of a majority stake and is included for the corresponding percentage of control when control is between 50 and 0% (Appeldoorn & Vedder, 2010).

Please mind, in case of the acquisition of parts of an organization, only the turnover of these parts should be taken into account, unless two or more transactions are taking place between the same person or undertaking within a two-year period (article 5, subsection 2). See also EU Notice 2008/C 95/01.

If all above mentioned criteria are not met, a Community dimension is absent and the European Commission has no exclusive competence. Hence, a concentration with the lack of a Community dimension could exist. This will result in a merger or concentration which is not subject to European competition policy but to national competition policy. An organization solely based and operating in The Netherlands will need to take the Dutch competition policy (primarily Mededingingswet) into account. A cross-border merger or acquisition is generally subject to multiple national competition policies. Mind that dealing with different national competition authorities, will definitely not guarantee corresponding policies, because thresholds or even the entire system can differ.

Both the concentration criterion and the Community dimension criterion, which lead to the exclusive competence of the European Commission, are subject to four exceptions. First, before finalizing the deal and therefore prior to the pre-notification stadium, involved parties can (1) request for referral to a national competition authority when the European Commission has official competence (article 4, subsection 4, EU Regulation 139/2004) or (2) request for referral to the European Commission when a national competition authority has official competence in first place (article 4, subsection 5, EU Regulation 139/2004). These two options are called pre-notification referrals. Next to these, two post-notification referrals are possible as well. The (3) Dutch clause (article 22, EU Regulation 139/2004) provides the possibility for a national competition authority to apply for judgment by the European Commission while the concentrations do not have a Community dimension in fact, but do
affect trade between Member States though. The (4) German clause (article 9, subsection 2, EU Regulation 139/2004) is quite the opposite of previous referral possibility and provides the opportunity to the European Commission to refer a notified concentration to a national competition authority in case of defined circumstances.

3.2 Substantive opinion - Phase I and Phase II

The European Commission its notification procedure can be roughly divided in two phases. EU Regulation 139/2004 commences with addressing the scope of the regulation by stating that the regulation shall apply on all concentrations with a Community dimension (article 1, subsection 1). In Phase I, the requirements mentioned in the previous paragraph are analyzed and the European Commission will conduct a preliminary investigation while bearing in mind the possible effects on the internal market if the concentration will be approved. The European Commission will decide if it is plausible that a dominant market position which will endanger a fair competition, will be consolidated by the intended concentration.

3.2.1 Phase I

After a fully complete notification is submitted, Phase I of the investigation (the preliminary investigation) will be initiated and the European Commission has 25 working days to analyze the deal. During this period, the European Commission can request information from the involved organizations and third parties, and will question third parties about their opinion on the intended concentration. According to article 1, subsection 1, EU Regulation 139/2004, the time period can be increased to 35 working days if remedies are offered by the involved organizations. These time periods are strict and will commence when the notification is fully complete, according to article 5, subsection 2, EU Regulation 802/2004: Where the information, including documents, contained in the notification is incomplete in any material respect, the Commission shall inform the notifying parties or their representatives in writing without delay. In such cases, the notification shall become effective on the date on which the complete information is received by the Commission.

The European Commission will reach one of the following three decisions, excluding referrals and withdraws, after it received the notification.

- First, it can conclude that the concentration does not fall within the scope of European merger control (article 6, subsection 1(a), EU Regulation 139/2004). At that point the
examination on behalf of the European Commission is over, but this does not mean that national competition policies cannot provide any (similar) restrictions.

- **Second**, it can conclude that the concentration falls within the scope of European merger control but it does not raise serious doubts as to its compatibility with the common market (article 6, subsection 1(b), EU Regulation 139/2004). Possibly subjected to commitments (certain conditions and obligations to guarantee continued competition).

- **Third**, it can conclude that the concentration falls within the scope of the European merger control and it raises serious doubts as to its compatibility with the common market and proceedings will be initiated (article 6, subsection 1 (c), EU Regulation 139/2004).

3.2.2 Phase II
If the European Commission confirms serious doubts as to the compatibility of the merger with the common market, Phase II will be initiated. This preliminary opinion (!) will lead to a comparable but far more thorough investigation on the compatibility with the common market. According to article 10, subsection 3, EU Regulation 139/2004, the time period for Phase II is initially 90 working days of the date on which the proceedings are initiated and 105 working days if remedies are offered (plus a maximum extension of 20 working days in both cases).

Immediately the question arises which measures are used to decide if a concentration is compatible or incompatible with the common market. There is a significant lead in EU Regulation 139/2004, which addresses the question. Article 2, subsection 1 states that, the European Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community and (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.
These are definitely really broad criterion. Considering these broad dimensions, one could imagine that organizations will try to influence these criterion and standards. One of the tools of the European Commission is to conduct a so called SIEC-test (Significant Impediment of Effective Competition). This test takes all kind of circumstances into account, but one of the main elements is to examine the overall market shares before and after a merger or acquisitions (Facey & Huser, 2004). The European Commission uses several guidelines to state when a certain percentage in market share would increase the change to an impediment of the effective competition. A more elaborated discussion on how to analyze an impediment of the effective competition will be discussed in the next paragraph.

In general, two outcomes are possible in Phase II:

- A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market (article 8, subsections 1 and 2, EU Regulation 139/2004). Possibly subjected to commitments (certain conditions and obligations to guarantee continued competition).

- A concentration which would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market (article 8, subsection 3, EU Regulation 139/2004).

### 3.2.3 Acquiring information and offering commitments

As seen in the previous chapter, the primary source of information used by the European Commission is the information provided by the organizations when the notification is submitted. EU Regulation 139/2004 provides several other possibilities to gain information. The most drastic tools can be derived from article 13 which contain several powers to carry out the duties assigned to the European Commission. Article 13, subsection 2, EU Regulation 139/2004 states:

*The officials and other accompanying persons authorized by the Commission to conduct an inspection shall have the power:*

*(a) to enter any premises, land and means of transport of undertakings and associations of*
undertakings;
(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
(c) to take or obtain in any form copies of or extracts from such books or records;
(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

Although these powers seem rather rigorously, the European Commission hardly ever uses the power of inspections in merger control (Todino, Fattori & Pera, 2012). Most often the European Commission uses its right to request for information ex article 11 EU Regulation 139/2004. Subsection 1 of this article states:

In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require the persons referred to in Article 3(1)(b), as well as undertakings and associations of undertakings, to provide all necessary information.

At first sight, it seems that this right to request for information is contrasting sharply with the powers of inspection mentioned above. But, the appearances are slightly deceptive because fines up to 1% of the aggregate turnover of involved organizations are applicable when incorrect or misleading information is provided (article 14, EU Regulation 139/2004).

Offering commitments
During Phase I and Phase II, involved parties can try to avoid a negative decision by the European Commission by offering remedies. A notice on remedies was introduced by the European Commission as guideline. Structural (divestiture remedies) and other remedies (e.g. behavioral remedies) can be accepted as long as they can be implemented quickly and effectively. Paragraph 5 and 8 of the Commission notice on remedies states:
Where a concentration raises competition concerns in that it could significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of their merger. Such modifications may be fully implemented in advance of a clearance decision. However, it is more common that the parties submit commitments with a view to rendering the concentration compatible with the common market and that those commitments are implemented following clearance. Proposals submitted by the parties in accordance with these requirements will be assessed by the Commission. The Commission will consult the authorities of the Member States on the proposed commitments and, when considered appropriate, also third parties in the form of a market test, including in particular those third parties and the recognised representatives (2) of those employees whose positions are directly affected by the proposed remedies.

One should note that remedies offered in Phase I should be effective to such an extent that it will eliminate the serious doubts to compatibility of the concentration with the common market. The actual success of the offered remedies will mostly depend on (a) type of remedy (structural or behavioral), (b) duration and (c) modification. Furthermore, during the investigation the European Commission can issue a Statement of objections - which is incorporated in article 18 EU Regulation 139/2004: Before taking any decision (...) the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them), - which can trigger or stimulate involved organizations to offer remedies. The European Commission can convert these remedies in strict commitments which will eliminate the objection by the European Commission to approve the proposed concentration (Appeldoorn & Vedder, 2010). Article 14, subsection 2, EU Regulation 139/2004 provides the possibility to impose a fine of maximum 10% of the aggregate turnover of involved organizations if organizations fail to comply with commitments or obligations imposed by a decision by the European Commission.
3.3 Examining the effects

Anyhow, the European Commission will need to judge if the effective competition will be endangered by the proposed merger or acquisition. Unfortunately, or perhaps even fortunately, the precise text of EU Regulation 139/2004, does not stress the exact requirements or criterion. Additional tools and guidelines will help to find the most suitable way to examine the notification and to reach a well-founded decision. What is the milestone plan for the European Commission on how to examine and judge the notifications? Facey and Huser (2004) identified six analytical steps performed by the European Commission, the competition authority of the United States (primarily Federal Trade Commission) and the competition authority of Canada (Canadian Competition Bureau). These six steps are carried out by three important competition authorities over the world and will be used in this study to examine the analysis and the eventual decision by the European Commission. Several additional European Guidelines, including the Horizontal Merger Guideline (vertical mergers – mergers between organizations of different levels of production – will not be discussed in this study), will be used to elaborate on the six steps.
### Comparison of Horizontal Merger Guidelines

<table>
<thead>
<tr>
<th>Elements of Analysis</th>
<th>Canada</th>
<th>European Union</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal Test</strong></td>
<td>Prevents or lessens, or is likely to prevent or lessen, competition substantially</td>
<td>Significantly impedes effective competition</td>
<td>Substantially to lessen competition or tends to create a monopoly</td>
</tr>
<tr>
<td><strong>Market Definition</strong></td>
<td>SSNIP test; Demand-side substitution only (supply-side substitution considered in concentration and/or entry analysis)</td>
<td>SSNIP test; Demand-side substitution primarily, but supply-side substitution also potentially relevant</td>
<td>SSNIP test; Demand-side substitution only (supply-side substitution considered in entry analysis)</td>
</tr>
<tr>
<td><strong>Concentration Thresholds</strong></td>
<td>No inferences of market power from concentration: Unilateral: &gt;50% combined share; Coordinated: CRI &gt;55%, unless combined share is &lt;10% (limited use of HHIs); Implicit safe harbors below these thresholds, in most cases</td>
<td>Rebuttable inferences of market power: Unilateral: &gt;50% combined share (strong inference); &gt;40% (moderate inference); &lt;25% (no inference); Coordinated HHIs (post-merger/delta): &gt;2000&gt;150; 1000 to 2000&gt;250; Implicit safe harbors below these thresholds, unless “special circumstances” present</td>
<td>Rebuttable inferences of market power: Unilateral: &gt;55% combined share; Coordinated: HHIs (post-merger/delta): &gt;1800&gt;100 (strong inference); &gt;1800&gt;50 (moderate inference); 1000 to 1800&gt;100 (moderate inference); Implicit safe harbors below these thresholds</td>
</tr>
<tr>
<td><strong>Entry</strong></td>
<td>Must be likely, timely, and sufficient in scale and scope to make post-merger price increase unprofitable</td>
<td>Must be likely, timely, and sufficient to deter or defeat any potential anticompetitive effects of a merger</td>
<td>Must be likely, timely, and sufficient in magnitude, character, and scope to make post-merger price increase unprofitable</td>
</tr>
<tr>
<td><strong>Countervailing Customer Bargaining Power</strong></td>
<td>May be sufficient to offset a merger’s increase in market power if buyers could immediately switch to other suppliers, credibly threaten to vertically integrate, or sponsor new entry</td>
<td>May be sufficient to offset a merger’s increase in market power if (1) buyers could immediately switch to other suppliers, credibly threaten to vertically integrate, or sponsor new entry or expansion, or (2) buyers can refuse to buy other products supplied by the merged firm or to delay purchases</td>
<td>Not formally recognized in Merger Guidelines, but implicit in U.S. competitive effects analysis (e.g., ability of customers to facilitate entry, expansion, or repositioning or vertical integration)</td>
</tr>
<tr>
<td><strong>Failing Firm</strong></td>
<td>Must demonstrate imminent failure probable and, absent merger, assets of firm likely to exit market; Must demonstrate none of following alternatives exist and likely to result in materially greater level of competition than merger: (1) acquisition by a competitively preferable purchaser (“shop”); (2) reformation; or (3) liquidation</td>
<td>Must demonstrate (1) failing firm and its assets would exit the market in the near future because of financial difficulties absent the merger; (2) no less anticompetitive alternative purchaser; and (3) market structure would deteriorate to at least the same extent absent the merger</td>
<td>Must demonstrate failing firm: (1) unable to meet financial obligations; (2) unable to reorganize successfully (Chapter 11 of Bankruptcy Act); (3) unsuccessful good faith efforts to elicit reasonable alternative offers of acquisition of assets of failing firm; and (4) absent acquisition, assets would exit relevant market</td>
</tr>
<tr>
<td><strong>Efficiencies Defense</strong></td>
<td>Merger Specificity: Bureau will analyze whether efficiencies are “likely to be achieved by alternative means”; Consumer Pass-On Requirement: No consumer pass-on requirement. Full defense is if the total efficiency benefits in all markets are greater than and offset the competitive anticompetitive effects of the merger in all markets; both fixed and variable cost savings are recognized; efficiencies can save a merger to monopoly or near monopoly; Productive v. Dynamic Efficiencies: More receptive approach towards dynamic efficiencies (“qualitative verification”); Welfare Standard: Balancing Weights (hybrid Total Surplus standard)</td>
<td>Merger Specificity: Efficiencies must be “a direct consequence of the merger and cannot be achievable by less anticompetitive alternatives; Consumer Pass-On Requirement: Efficiencies must be passed-on in markets where anticompetitive effects arise and fully offset those effects; marginal cost synergies presumed more likely to meet this pass-on requirement than fixed cost synergies; efficiencies presumed rarely to offset effects of a merger to monopoly or near monopoly; Productive v. Dynamic Efficiencies: Productive efficiencies considered more likely to be objectively verifiable and quantifiable; Welfare Standard: Consumer Surplus</td>
<td>Merger Specificity: Efficiencies must be “likely” to be accomplished by the merger and “unlikely” to be accomplished by less anticompetitive alternatives; Consumer Pass-On Requirement: Efficiencies generally must be passed-on in markets where anticompetitive effects arise and fully offset those effects; marginal cost synergies presumed more likely to meet this pass-on requirement than fixed cost synergies; efficiencies presumed rarely to offset effects of a merger to monopoly or near monopoly; Productive v. Dynamic Efficiencies: Productive efficiencies considered more likely to objectively verifiable and quantifiable; Welfare Standard: Consumer Surplus</td>
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3.3.1 Six steps in the analysis by the European Commission

**Step 1: Defining the relevant product and geographic markets**

Traditionally one of the most discussed and crucial elements of (enforcement of) competition policies is actually defining the markets. The Horizontal Merger Guidelines start with noting that the European Commission needs to assess the compatibility of a concentration with the common market and therefore it needs to assess if there is a significant impediment of the effective competition through a possible dominant market position, created or strengthened by the intended merger or acquisition. *The creation or strengthening of a dominant position held by a single firm as a result of a merger has been the most common basis for finding that a concentration would result in a significant impediment to effective competition* (paragraph 4, Horizontal Merger Guidelines). According to the Horizontal Merger Guidelines, a market share level is one of the first indicators concerning the market structure. In order to determine the market share level, a market definition will be necessary. The European Commission explains the purpose of market definition in the Horizontal Merger Guidelines as: (a) to identify in a systematic way the immediate competitive constraints facing the merged entity; (b) a tool to identify and define the boundaries of competition between firms; and (c) to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings’ behavior and of preventing them from behaving independently of effective competitive pressure (paragraph 10, Horizontal Merger Guidelines and paragraph 2, Market definition notice).

The mentioned boundaries and specifications refer to the relevant product market and the relevant geographic market. Both definitions provided by the European Commission will be used in this study: *A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use (…) The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area* (paragraph 7 and 8, Market definition notice).
The European Commission uses the SSNIP-test (Small but Significant and Non-transitory Increase in Price) as one of the tools to define the relevant market. It is all about cross elasticity of demand, which includes the following formula:

\[ X = \frac{\Delta \text{demand organization A}}{\Delta \text{price organization B}} \]

The European Commission uses an price increase of 5-10% over a longer period of time. If consumers are likely to switch to organization A when the prices of organization B will increase, they are considered to be active in the same market. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties’ products in the short term (paragraph 16, Market definition notice). Although the usage of the SNIPP-test could help to define the market, some critics mention several disadvantages of the test (Appeldoorn & Vedder, 2010). Next to this test, the European Commission uses other evidence for market definition purposes as well (Facey and Huser, 2004).

The European Commission distinguishes three kinds of competitive constraints: (a) demand substitutability, (b) supply substitutability and (c) potential competition. According to the Horizontal Merger Guidelines, the European Commission will focus primarily on the demand-side substitution, but the side of the supplier can be taken into account as well: Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy (paragraph 20, Market definition notice).

One of the possible tests to determine the relevant geographical market is the Elzinga-Hogarty-test, by comparing the production and consumption in a certain area with surrounding areas (Appeldoorn & Vedder, 2010).

**Step 2: Determining market shares and industry concentration levels**

The next step is to determine if a dominant position is applicable in the relevant market. The European Commission uses concentration thresholds (which are rebuttable) to assess the possible market power. *Post-merger market shares are calculated on the assumption that the post-merger combined market share of the merging parties is the sum of their pre-merger market shares*
Available information is used to calculate unilateral combined market shares. However, like the European Commission continues in paragraph 15 of the Horizontal Merger Guidelines: *However, current market shares may be adjusted to reflect reasonably certain future changes, for instance in the light of exit, entry or expansion.*

The competitive situation can also be partly determined by concentration levels. In this case the European Commission uses the Herfindahl-Hirschman Index for expressing the coordinated market power. The index is a tool to seek for inferences, by taking the individual market shares of the organizations in the just demarcated market and summing the squares of these shares.

**Step 3: Identifying possible non-coordinated and coordinated effects implicated by the proposed transaction**

After the market share is calculated and a possible dominant position is examined, the European Commission will continue its analysis and will focus on possible anticompetitive effects that could be possibly raised by horizontal mergers (Facey & Huser, 2004). The so-called SIEC-test is performed in order to compare the most likely post-merger market structure with the market structure that is likely to develop when the merger or acquisition will not be approved and will not be carried out (Slaughter & May, 2016).

Two types of effect are distinguished in paragraph 22-57 of the Horizontal Merger Guidelines:

- *impediment of effective competition by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour (non-coordinated/unilateral effects).* ‘The Commission also envisages situations in oligopolistic markets where, despite the absence of single-firm dominance, a merger may result in the elimination of important competitive constraints that the parties previously exerted on each other. This, combined with a reduction of competitive pressure on the remaining undertakings may result in non-coordinated (or unilateral) effects, so giving rise to a SIEC even if there is little likelihood of coordination between the members of the oligopoly’ (Slaughter & May, 2016).

- *impediment of effective competition by changing the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger (coordinated effects).* ‘The Commission examines whether
the pre- and/or post-merger market structure is oligopolistic (e.g. limited to say only three or four major players) and whether the merger will facilitate “tacit collusion” between the members of that oligopoly with the consequences of prices being raised, output being reduced or other harmful effects on competition’ (Slaughter & May, 2016).

Three extra conditions apply to the existence of coordinated effects:

‘(1) the merger must increase the likelihood that competitors will reach a common understanding on the terms of coordination;

(2) there must be means for effectively monitoring firms’ adherence to the common understanding; and

(3) there must be credible deterrent mechanisms to respond to deviation’ (Facey and Huser, 2004:45).

Step 4: Analyzing whether the likelihood of significant easy entry or the exercise of countervailing bargaining power by customers will maintain effective competition

The possibilities for new organizations to enter the relevant market are examined as well, in order to search for inferences to anti-competitiveness. The idea behind this thought is actually really simple: When entering a market is sufficiently easy, a merger is unlikely to pose any significant anti-competitive risk (paragraph 68 Horizontal Merger Guidelines).

For entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents. Entry is thus less likely if it would only be economically viable on a large scale, thereby resulting in significantly depressed price levels. (…) When entry barriers are low, the merging parties are more likely to be constrained by entry. Conversely, when entry barriers are high, price increases by the merging firms would not be significantly constrained by entry. Historical examples of entry and exit in the industry may provide useful information about the size of entry barriers (paragraph 69 and 70, Horizontal Merger Guidelines).

Entry analysis is quite important during the overall in-depth analysis: Therefore, entry analysis constitutes an important element of the overall competitive assessment. For entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger (paragraph 68, Horizontal Merger Guidelines).
Countervailing power by customers is taken into account as well in this step of the analysis. A definition is given by the Horizontal Merger Guidelines in paragraph 64: *Countervailing buyer power in this context should be understood 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.*

**Step 5: Assessing whether a failing firm defense is applicable**

The fifth step is a possible failing firm defense. If certain criteria are met, the concentration can ought to be compatible with the internal market though if one of the merging organizations is a failing organization, while it would otherwise have been declared incompatible with the internal market. The possible use of a failing firm defense will be assessed by the European Commission during its investigation.

The European Commission provides three main criteria in paragraph 90 and 91 of the Horizontal Merger Guidelines:

- **First,** the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking.
- **Second,** there is no less anti-competitive alternative purchase than the notified merger.
- **Third,** in the absence of a merger, the assets of the failing firm would inevitably exit the market.

It is for the notifying parties to provide in due time all the relevant information necessary to demonstrate that the deterioration of the competitive structure that follows the merger is not caused by the merger.

**Step 6: Determining whether efficiencies are likely to be generated by the proposed transaction and outweigh the deal’s potential anticompetitive effects**

The last step in the analysis is the assessment of a possible efficiency defense. The European Commission will examine, in this secondary analysis, if the efficiency benefits submitted by the involved organizations will outweigh the anticompetitive effects (Facey & Huser, 2004). Examples of arguments used in a efficiency defense are usual economical, but can also be technical or in advantage of the consumer. According to paragraph 76 of the Horizontal Merger Guidelines: *Corporate reorganisations in the form of mergers may be in line with the requirements of dynamic competition and are capable of increasing the competitiveness of industry, thereby improving the*
conditions of growth and raising the standard of living in the Community (...). It is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have (...).

The European Commission takes three primary criteria into consideration:

1. consumer benefit;
2. merger-specificity;
3. verifiability.

The Horizontal Merger Guidelines (paragraph 77 and 78) elaborate on this criteria: 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. For the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative.

3.3.2 Adherence

The previous six steps together, will form the analysis performed by the European Commission to assess the compatibility of the proposed concentration with the internal market. It should be noted that above mentioned and discussed analysis is based on actual guidelines. It is not out of the question that the European Commission will deviate from the guidelines in the best interest of fair and effective competition. Like the Horizontal Merger Guidelines express in paragraph 13: It should be stressed that these factors are not a ‘checklist’ to be mechanically applied in each and every case. Rather, the competitive analysis in a particular case will be based on an overall assessment of the foreseeable impact of the merger in the light of the relevant factors and conditions. Not all the elements will always be relevant to each and every horizontal merger, and it may not be necessary to analyse all the elements of a case in the same detail.

However, Facey and Huser (2004) point out that the three examined competition authorities, including the European Commission, show a generally constituent adherence to their guidelines. This is probably explainable by the willingness and duty to create (and retain) legal certainty. Organizations and their (external) experts will use the published (!) guidelines to serve as point of
reference when assessing the chances of success (thus meaning approval of the intended merger or acquisition). As mentioned before, experience gained from earlier confrontations, but the guidelines published by the European Commission as well, will assist organizations in choosing their nonmarket strategy towards the European Commission itself. The next chapters will elaborate on this matter and will search for a possible link, while comparing the UPS – TNT Express deal and the FedEx – TNT Express deal.
4. Methodology

This chapter will discuss the methodology of this study. The first paragraph will debate the research design of this study and will elaborate on case study research. The second paragraph will shortly elaborate on qualitative research. Further on, paragraph three will discuss the data collection and the different kinds of information used to conduct the analysis. While paragraph four will discuss the data analysis procedure. In conclusion, paragraph five will elaborate on the validity and reliability of this study and will touch upon research ethics.

4.1 Research design

The goal of this study is to answer the research question mentioned in the first chapter: Which factors lead to the approval of the FedEx – TNT Express deal in comparison to the rejection of the UPS – TNT Express deal and which strategies were used by the involved organizations to influence the (outcome of the decisions by the) European Commission?

Besides the already formulated sub-questions, a divergent approach is necessary to answer the research question. For this reason the previous chapters (a) explained about regulatory institutions like competition authorities, (b) elaborated on different kinds of theories regarding nonmarket environment and corresponding corporate political strategies, approaches and tactics, and (c) provided the legal framework applicable on European merger control cases and therefore used by the European Commission.

Although the understanding of these theories and legal requirements is essential and indispensable for this study, an answer to the research question is still not accounted for. While indicators retrieved form the literature in the previous chapters are pointing to a general answer to the research question and even some recommendations could have been deducted, the research question is far more precise. For this reason, a thorough analysis on this matter is still required. Collection of different kinds of data, preparation of the data and eventually an analysis of the data is required to answer the research question in this study.

Of course, European competition policy is not solely focused on the package delivery industry. However, the UPS – TNT Express and FedEx – TNT Express cases are extremely suitable to examine
the roles of the different actors in this merger control procedure. First, it is extremely interesting to see an approval and a rejection by one competition authority, the European Commission, concerning cases in the same industry and having one organization (TNT Express) that is being targeted in both deals. So, it will be possible to analyze the corporate political strategies, approaches and tactics in both deals. Second, the existence of a link between the use of these approaches and tactics, and the approval or obstruction by the European Commission can be examined as well. Furthermore, both cases are quite recent, so the discussed legal framework is up-to-date and was applicable when both concentrations were notified to the European Commission.

By means of a case study, the decisions of the European Commission concerning both mergers, UPS – TNT Express and FedEx – TNT Express, will be analyzed and discussed. ‘A case study is an empirical enquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident’ (Yin, 2003:13). Although research questions for a case study are usually formed in a how or why manner, this study does focus on contemporary events though and requires no control of behavioral events (Yin, 2003). The comparison between two specific (intended) deals definitely indicate a case study. To compare these two intended deals, of which only one of them succeeded, the legal framework and the strategies and tactics of the different actors itself should be examined. Next to the kind of research question, as seen above, more criteria apply to the usage of a case study. It is ought to be an in-depth research in one or more cases. ‘In other words, the case study as a research strategy comprises an all-encompassing method - covering the logic of design, data collection techniques, and specific approaches to data analysis’ (Yin, 2003:14). This corresponds to the in-depth analysis in this research, because an in-depth research is necessary to determine the differences between the approval and the obstruction of the two merger proposals. ‘The case study is preferred in examining contemporary events, but when the relevant behaviors cannot be manipulated’ (Yin, 2003:7). During this in-depth analysis, the researcher does not control the behavioral events, because the decision of the European Commission and the followed strategies by the actors cannot be manipulated and changed anymore. Next to that, although the decisions by the European Commission concerning the UPS – TNT Express and the FedEx – TNT Express deals are reached some time ago, the research is considered to focus on contemporary events because of the same procedure and legal framework during both deals.
The analysis will commence with assessing the decisions by the European Commission in the UPS – TNT Express case and in the FedEx – TNT Express case. It is of extreme importance to verify adherence by the European Commission to the legal framework and the guidelines. The European Commission is ought to follow the steps and procedures provided in the previous chapter. At the same time, an analysis on how the European Commission reached both decisions will be next. After focusing on the decisions, an analysis on the strategies and tactics used by UPS, FedEx and TNT Express will be carried out. The behavior of involved organizations before and after the decision by the European Commission will be considered, as well as the actions and reactions during the investigation. The existence of a possible link between the behavior and the (outcome of the) decisions by the European Commission, and the corporate political strategies, approaches and tactics used by the involved organizations will be discussed as well.

4.2 Qualitative research method

The research method that will be used in this study is a qualitative method. The decisions by the European Commission need to be analyzed very precise and it needs to become clear how it reached both decisions. Because of the usage of a case study to perform the analysis, it is actually quite difficult to use a quantitative research method. A quantitative research will not suit this study, because no actual performance can be measured and two merger deals, in which the motivation by the European Commission will be of most importance, are being compared. Therefore, this research will focus primarily on describing certain occurrences. A definition of a qualitative research is given by Gorman and Clayton (2005:3): ‘Qualitative research is a process of enquiry that draws data from the context in which events occur, in an attempt to describe these occurrences, as a means of determining the process in which events are embedded and the perspectives of those participating in the events, using induction to derive possible explanations based on observed phenomena.’ After having assessed the decisions by the European Commission, a describing analysis of the corporate political approaches and tactics used by involved organizations will be started. Because of the fact that the legal framework is, as seen before, not binary, these nonmarket strategies should be thoroughly examined. Besides, the actual data is expressed on paper, is open to interpretation and received mostly by induction, which makes a qualitative research the most suitable way to conduct the analysis. This is only supported by the fact that the amount of research entities is quite low, the data collection is intensive and most of the research material exists of texts retrieved from different
A continuous interaction among the theory, the data collection and the actual analysis substantiates the use of a qualitative research method as well (Wester & Peters, 2004).

4.3 Data sources

Although the examined and discussed literature in this study established a solid theoretical background, the actual analysis still needs to be performed. The empirical material used in this study will be primarily existing, but non-adapted material (Vennix, 2006). Several legal sources are necessary to expand the legal framework which is used to reach a decision in both the UPS – TNT Express and the FedEx – TNT Express cases. To examine and compare the corporate political approaches and (re)actions pursued by all three organizations, several documents will be used. Due to the confidentiality of most information that was submitted by the organizations together with the notification, it is not open to the public and cannot be used in the analysis. Therefore, a large amount of different types of documents will be used in this study. First, documents published by the European Commission, like guidelines, forms and notices will provide an insight in the sort and amount of information desired (and requested) by the European Commission to conduct a proper investigation and to reach its decision. Second, valuable information will be retrieved from the decisions by the European Commission in the UPS – TNT Express and the FedEx – TNT Express deals, while the arguments brought forward by the organizations will be taken into consideration as well. Third, press releases and newspaper articles will give a good insight in the entire process of the notification and the intentions of, and even nonmarket strategies by, the organizations. Fourth, if possible, information from, for example, year reports and the organizations its websites will be used to compare information accessible to the public with the information used in the notification.

To perform the analysis, the following empirical materials will be used primarily:

- Implementation regulations and guidelines by the European Commission
  - EU Regulation 802/2004
  - Horizontal Merger Guidelines
  - Market definition notice
  - Commission notice on remedies
  - EU Notice 2008/C 95/01
CO form

- Decisions and documents of the European Commission
  - EU case M6570 UPS – TNT Express
    - Published summary of Commission decision
    - Published Commission decisions
    - Opinion of the Advisory Committee
    - Final report of the Hearing Officer
  - EU case M7630 FedEx – TNT Express
    - Published summary of Commission decision
    - Opinion of the Advisory Committee
    - Final report of the Hearing Officer

- Press releases
  - Concerning the (intended) mergers of UPS, FedEx and TNT Express

- News articles
  - Concerning the (intended) mergers of UPS, FedEx and TNT Express

- Year reports
  - Concerning UPS, FedEx and TNT Express (2011-2015)

These sources combined, will provide a solid overview regarding the path from the pre-notification to the decisions of the European Commission (in some cases even further, like the appeal of UPS). The press releases together with several news articles will show the actions and reactions of UPS, FedEx an TNT Express before, during and after the two decisions of the European Commission. The intention is to translate the (pattern of) (re)actions into a nonmarket strategy, more specific a corporate political approach and tactic, used by the involved organizations.

The primary source of evidence in this case study will be documents. In the best scenario, new empirical material will be gathered by means of interviews. Considering the expected non-collaboration of the European Commission (because the innovative part of this study is mainly about how it is being influenced) and the expected non-collaboration of all three organizations (because the organizations have just finished a merger, waiting their appeal or the case might be experienced rather negatively), the chances to perform an interview that contributes to this study were, unfortunately, considered low. For this reason, only documents will be used in the analysis. The use of documentation comes with several strengths and weaknesses which should be taken into account.
by the researcher. Yin (2009) provided a summary of the advantages and disadvantages of using documentation. An overview of these advantages and disadvantages is shown in Table 7.

<table>
<thead>
<tr>
<th>Source of evidence</th>
<th>Strengths</th>
<th>Weaknesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Documentation</td>
<td>Stable – can be reviewed repeatedly</td>
<td>Retrievability - can be difficult to find</td>
</tr>
<tr>
<td></td>
<td>Unobtrusive – not created as a result of the case study</td>
<td>Biased selectivity, if collection is incomplete</td>
</tr>
<tr>
<td></td>
<td>Exact – contains exact names, references, and details of an event</td>
<td>Reporting bias – reflects (unknown) bias of author</td>
</tr>
<tr>
<td></td>
<td>Broad coverage – long span of time, many events, and many settings</td>
<td>Access – may be deliberately withheld</td>
</tr>
</tbody>
</table>

Table 6: Strengths and Weaknesses of documentation, adapted from Yin, 2009:102.

Because of the fact that a comparison is being made between two (intended) mergers, a large time period needs to be examined. This is due to the large amount of negotiations between the involved organizations and all necessary preparations prior to the notification. After the intentions are brought public, the entire merger control is just about to begin. For this reason the analysis will start on 17 February 2012 and actually cannot be closed at the moment because not all procedures are finished yet. The timeline will be used as a secondary guidance through the analysis as well.

A large percentage of the information will be retrieved from press releases. The search engines on the websites (www.ups.com, www.fedex.com and www.tnt.com/express) will be used to find all relevant information about the mergers in press releases. Keywords that were used are: ‘UPS’, ‘FedEx’, ‘TNT’, ‘merger’, ‘European Commission’, ‘EC’, ‘acquire’, ‘cooperation’ and ‘collaboration’. With these keywords dozens of press releases were found. All press releases are downloaded and checked for usability and stored in a Word file. All duplicates were deleted, because several of the press release were joint press releases, while saving the ones from UPS and FedEx (so deleting the joint press releases retrieved from TNT Express).
Almost the same tactic will be used to find news articles about the intended mergers. Search engine Google.com was used to find news article regarding the (intended) mergers, the decisions by the European Commission and the actions and reactions by the organizations. Next to Google.com, search engine LexisNexis was used to gather information as well. LexisNexis is an extensive database which was used to search for national or international news articles about the two deals. Keywords that were used are: ‘ups tnt merger’, ‘ups tnt blocked’, ‘ups tnt appeal’, ‘ups tnt obstructed’, ‘ups tnt european commission’, ‘ups tnt federal trade commission’, ‘fedex tnt merger’, ‘fedex tnt approved’, ‘fedex tnt european commission’, ‘fedex tnt federal trade commission’ and ‘ups fedex tnt’. Newspaper articles are used to confirm the press releases in order to increase the objectiveness.

With the theoretical background, the legal framework and the above mentioned data, it will be possible to examine the actions, reactions and corporate political approaches and tactics of organizations towards competition authorities, and more specific the European Commission. Strategies ranging from organizations trying to change competition policy, to organizations trying to comply with set regulations to get approval regarding their intended merger, can now be analyzed.

To analyze all the data received by the data collection, an appropriate data analysis is necessary. In this study a directed content analysis will be used. By using this analysis, the decisions by the European Commission and later on the press releases, news articles and year reports can be examined really thoroughly in search for actions and reactions which indicate certain corporate political strategies, approaches and tactics.

4.4 Data analysis procedure

After all data is gathered, the data will be coded and analyzed. As mentioned before, a directed content analysis will be used to analyze the gathered data. ‘Content analysis is a set of procedures for collecting and organizing information in a standardized format that allows analysts to make inferences about the characteristics and meaning of written and other recorded material’ (GAO, 1989:1). This set of procedures contains actions like defining, developing codes, analyzing, interpreting, validating and reporting (GOA, 1989). The analysis is suitable for analyzing press releases, news articles, year reports and documents by the European Commission, because any recorded material can be used to study if it can be analyzed again to check for reliability (GAO, 1989). Three kinds of content analysis can be distinguished: the conventional content analysis, the directed
content analysis and the summative content analysis (Hsieh & Shannon, 2005). This study will use a directed content analysis, because this analysis is most suitable when ‘existing theory or prior research exists about a phenomenon that is incomplete or would benefit from further description’ (Hsieh & Shannon, 2005:1281). The theory discussed in chapter two and three can ‘provide predictions about the variables of interest or about the relationships among variables, thus helping to determine the initial coding scheme or relationships between codes’ (Hsieh & Shannon, 2005:1281). The coding will be performed by the following strategy: (1) all text that appears to be of any significance will be highlighted; (2) consequently the highlighted text will be coded by means of the predetermined codes; and (3) in case of a missing category a new code will be created.

Several steps are provided to conduct the coding by, for example, Fereday & Muir-Cochrane (2006): (1) Developing the code manual, (2) Testing the code, (3) Summarizing data and identifying initial themes, (4) Applying template of codes and additional coding, (5) Connecting the codes and identifying themes and (6) Corroborating and legitimating coded themes. But, a different kind of approach is needed because a directive content analysis is being used.

This analysis will be conducted through several steps, as will be discussed in the next paragraph. It needs to be stressed that due to the choice of using a directed content analysis, both inductive and deductive approaches will be used. This will influence the coding process because preexisting codes will be used but in the meanwhile new codes will be developed during the process of coding. Figure 2 below, will show the process when inductive and deductive approaches are used together.
4.4.1 Data analysis
After most of the data is gathered - some more data is expected to be gathered during the analysis - it is not ready for immediate examination. Several authors developed helpful guidelines to guide researchers through the entire process of the examining the collected data. The next steps are based on several guidelines, tips and tricks from Baarda, De Goede & Teunissen (2005) and Creswell (2009).
Step 1: Prepare data and read through all data
Like addressed before, all data needs to be examined on usability and needs to be prepared for analysis. Before the directed content analysis can be conducted, the data needs to be prepared first. Baarda et al. (2005) mention four preparatory steps. First of all, one should normally start with creating a single document in a text editing program which will contain all the collected data. Because most collected data is in Portable Document Format (competition policies, guidelines, decisions and year reports) only the news articles and press release will be converted into a editable document if necessary. The second step is to eliminate irrelevant text from the dataset. Especially the news articles, year reports and press releases will contain enough data that will be irrelevant and not necessary to conduct the analysis. Therefore the irrelevant text elements will be deleted. After having reduced the data, there is still too much data to analyze. Baarda et al. (2005) distinguish four possible analysis units: (a) words; (b) sentences; (c) fragments; and (d) themes. In this study, fragments will be used as unit of analysis because by using this approach, a detailed representation of different aspects of different subjects can be created, while the relations between these different aspects can be examined as well (Baarda et al. 2005). The last step is to actually divide the relevant data into fragments and trying to get each fragment focused on one theme or subject (Baarda et al. 2005).

Step 2: Start labeling and coding
The second step of the analysis will be to start labeling or coding. But, because there is a theoretical framework and a legal framework which can be used as a starting point, part of the codes are already known. The first part of the analysis will consist of the comparison of the decisions by the European Commission that resulted in the rejection of the UPS – TNT Express deal and the approval of the FedEx – TNT Express deal. In order to make a decent and appropriate comparison, the steps provided in the guidelines and discussed in the previous chapter will be used as guidance. The predetermined codes will start with the official jurisdiction of the competition authority, followed by the topic significantly impediment of effective competition divided into the six steps discussed in chapter two. Appendix 1 will show the initial codes for this part.

The second part of the analysis will focus on nonmarket strategies, and more precise on corporate political approaches and tactics used by UPS, FedEx and TNT Express. The predetermined codes for this part of the analysis are derived from the theoretical framework as well. These codes will be distinguished in the three decisions made by Hillman & Hitt (1991), which subsequently can be divided into several keywords. As mentioned before, it is not to be expected that organizations will
use the Financial incentive strategy and the Constituency-building strategy, so these are left out in
the coding. The corporate political decisions are supplemented by the theories by Boddewyn &
Brewer (1994) and Baron & Diermeier (2001), to judge the nature of the strategy. The third, but
actually intertwined, step will focus on the information strategy and remedy strategy used by UPS,
FedEx and TNT Express in the merger process. Providing information, the correctness of the
information and possible withholding of information will be adopted in the coding scheme. In
addition, several keywords about remedy strategy are accounted for as well. Appendix 2 will show
the initial codes for this part.

**Step 3: Performing labeling and coding**
After the themes and keywords are determined, the actual labelling or coding of the fragments can
begin. If some fragments cannot be coded but should be added to the analysis, extra codes will be
assigned and used for further analysis. Changing codes and adjusting the predetermined codes
during the analysis is to be expected (Wester & Peters, 2004). By carrying out a proper coding
procedure, it is expected that coding will reduce the amount of information and situations and
processes will be grouped.

**Step 4: Organizing the labels**
The third step is to organize the codes. Having all data labeled and partly analyzed, some structure or
rating should be discovered in all those labels, while paying attention to mutual differences and
similarities (Baarda et al, 2005).

**Step 5: Interpretation**
The fourth and almost consecutive step is to interpret and analyze the codes and the collected data.
With this step, coded data will be summarized, patterns and relationships will be discovered within
the data, recommendations will be tested and the validity should be tested (GAO, 1989). This step
comes with important consequences and, it ‘can take many forms, be adapted for different types of
designs, and be flexible to convey personal, research-based, and action meanings’ (Creswell,
2009:190). In this study, interpretation will be performed through a comparison of the information
derived from the data examination with theories retrieved earlier from literature.

**4.5 Validity, reliability and research ethics**

While conducting a qualitative research, one should also consider the validity and the reliability of
the study. Validity is about the accuracy of the findings in the study. It is important that the findings
retrieved from the analysis reflect a correct representation of the actual situation in practice (Baarda et al., 2005). Commonly, three forms of validity are distinguished: (1) internal validity; (2) external validity; and (3) construct validity. Yin (2009) has several concerns about the validity (about all three forms) when applied to the use of a case study. Internal validity is defined as: ‘seeking to establish a causal relationship, whereby certain conditions are believed to lead to other conditions, as distinguished from spurious relationships’ (Yin, 2009:40). External validity is defined as: ‘defining the domain to which study’s findings can be generalized’ (Yin, 2009:40). While construct validity is defined as: ‘identifying correct operational measures for the concepts being studied’ (Yin, 2009:40). Several tactics are used in this study to overcome problems with all forms of validity. Considering the researcher, a researcher ‘(…) cannot be value-free, but they can try to be non-judgmental in favor of the validity of the research and try to reflect on possible influences’ (Boeije, 2010:176). Negative information is presented in the theoretical background that runs counter to the theme and rich descriptions are used to convey the findings (Creswell, 2009). Furthermore, because of the fact that this study comprises of a single-case study, theory is been used instead of replication, and appropriate citations of literature and documents have been used to make repetition possible (Yin, 2009). Triangulation with the use of observations and interviews could have strengthened the validity as well (Boeije, 2005). But, in this case triangulation has been applied through analyzing and coding different types of documents. For example, news articles were used to verify and oppose press releases from the involved organizations.

The objective of ensuring a high reliability of the study, is to be sure that another investigator will retrieve the same findings and arrive at the same conclusions when he or she will conduct the same case study using the exact same procedure (Yin, 2009; Baarda et al. 2005). ‘The general way of approaching the reliability problem is to make as many steps as operational possible and to conduct research as if someone were always looking over your shoulder’ (Yin, 2009: 45). Extra procedures will check for obvious mistakes and will monitor for drifts in the definition of the codes (Creswell, 2009). The analysis in this study is performed by the steps discussed in the previous paragraph and carried out with many efforts and precision.

Research ethics should be taken into account as well when carrying out this study. It is important to conduct the analysis, and the entire study, in a honest way, in which manipulation of information or results is out of the order. All steps in the previous paragraph were carried out as described, with as much carefulness, precision and integrity as possible for the researcher. All performed processes are described in detail to use a transparent mode of operation and literature references are provided. On
top of that, all information used in this study is online accessible and open to the public. Manipulation, in any way, of this online accessible information is out of the question in this research. Furthermore, the researcher was unbiased and independent when carrying out this study, because he has no ties with any of the involved actors. Hence, there is no reason for breaking research ethics, because the researcher his interests in (finishing) this study are solely based on graduation.
5. Analysis

The first two paragraphs in this chapter will extensively elaborate on the UPS – TNT Express deal and the FedEx – TNT Express deal, guided by a timeline starting from 17 February 2012. The third paragraph will search for explanations regarding the obstruction of the UPS – TNT Express deal and the approval of the FedEx – TNT Express deal, with referral to the legal framework and the performed investigation by the European Commission. The last paragraph will focus on the actions and reactions of the organizations towards the European Commission combined with the corresponding approaches and tactics during the entire process. Certain phrases and sentences are underlined by the author to stress their importance. Appendix III will show the used data and corresponding references.

5.1 UPS – TNT Express

Since both UPS and TNT Express are in the same industry (package delivery industry) and the two are (supposed to be) competitors, most news articles and press releases are about strengthening their competitive position, at expense of each other. Two press releases by UPS and TNT Express its predecessor TNT N.V. though, are about their collaboration in 2008 and 2010 to offer help during the cyclone crisis in Myanmar and the flood crisis in Pakistan (Logistics Emergency Teams) (TNT1-TNT2).

The first indicator of an actual intended collaboration actually dates from 17 February 2012. Mind the different ways of stating the non-successful deal.

TNT3: ‘TNT Express N.V. announces that it has received an unsolicited non-binding and conditional proposal from United Parcel Service, Inc. (UPS) for the acquisition of the whole of the issued capital of TNT Express at an indicative price of € 9 per ordinary share. (...) The TNT Express N.V. boards have rejected the proposal. They have informed UPS accordingly but continue to be in discussions.’

UPS1: ‘In response to the announcement from TNT Express NV ("TNT"), UPS confirms that, on 11 February, 2012, following discussions with TNT, it made a revised, increased and comprehensive proposal to acquire the entire issued share capital of TNT for EUR9 per share in cash. Discussions between the parties concerning this proposal are ongoing, although there is currently no certainty that any agreement will be reached. Further details will be provided when appropriate.’
No intentions about an intended collaboration were published prior to these press releases. Although UPS director of global media services Norman Black stated in an interview that UPS had been monitoring TNT Express for years and the acquisition became more interesting for UPS due to a number of factors, of which the de-merger from PostNL was most notable (NEWS1).

UPS published on 16 March 2012 that it remains negotiating with TNT Express: ‘UPS remains in constructive discussions with TNT Express N.V. regarding a potential transaction to acquire the entire issued share capital of TNT Express’ (UPS2).

Although the TNT Express board rejected the first proposal, on 19 March 2012 both organizations published a joint press statement, stating:

UPS3: ‘United Parcel Service and TNT Express Reach Agreement on Recommended All-Cash Public Offer of €9.50 per Ordinary TNT Express Share. (…) United Parcel Service, Inc. (“UPS”) and TNT Express N.V. (“TNT Express”) have reached agreement on a recommended all-cash offer of €9.50 per ordinary share for TNT Express, representing a premium of 53.7% to the unaffected share price of TNT Express of €6.18 on February 16, 2012, the day before TNT Express and UPS announced their on-going discussions.’

The final price ‘(…) is up €0.50 from UPS’ original offer of €9.00 per share, made last month, and is a 54% premium to TNT’s closing price of €6.18 on 16 February, the day before talks between the two companies became public knowledge’ (NEWS2).

A news reporter immediately spotted a UPS truck at the TNT Express headquarters (NEWS3):
‘A courier van of UPS is seen in front of the head office of TNT in Hoofddorp, the Netherlands March 19, 2012. United Parcel Service will pay $6.85 billion for Dutch peer TNT Express in a deal making the world’s largest package delivery company the market leader in Europe.’

On 3 May 2012 UPS announced that its financial strength made it possible ‘(…) to use approximately $5 billion of available cash and issue about $1.8 billion in new debt to finance the acquisition of TNT Express. Compared to the company’s initial guidance, this represents a $2 billion increase in cash used to fund the acquisition. (…) We believe this acquisition creates a global leader in the logistics industry, enhancing long-term growth for UPS investors’ (UPS4).

On 11 May 2012 UPS officially announced that it has the necessary financing in place to continue the acquisition of TNT Express (UPS5).

In a speech given by UPS COO David Abney on 6 June 2012 he mentions the growth and evolution of UPS the last decades and that one of the most important features of this evolution will be the integration of the TNT acquisition at the moment. He addresses the subject like it has already been settled, but he adds: ‘This acquisition is still awaiting approval from the European Commission’ (UPS6). TNT shows also enthusiastic, also in 1Q12, perhaps also due to negative price and product mix developments in several of its regions at that time.

Eventually the transaction was notified to the European Commission on 15 June 2012, due to the obligation to notify the European Commission about an intended merger in an early stage.

One can deduct several key factors from the joint press release by UPS of 21 June 2012. In this press release is announced that the request for approval by the European Commission is filed on 15 June 2012, and a public cash offer for all issued and outstanding shares of TNT is announced at the same time (from 22 June 2012 until 21 August 2012) (UPS7). But above all, several indicators regarding compliance can be noticed. Especially, since European and Dutch company law are very regulated, UPS needs to take into account (and it does) several laws and regulation like, Wet op het financieel toezicht, SER Fusie gedragsregels 2000, Dutch Corporate Governance Code and Besluit openbare biedingen Wft. UPS also requested the advice from the Central Works Council and the European Works Council and received positive reactions from both of them.

On 13 July 2012 UPS published a joint press release, probably after contact with the European Commission, that the analysis of the European Commission is expected to move to Phase II because some areas need to be investigated more thoroughly (UPS8). The two organizations indicate a
possible extension of the offer period because of the extra analysis by the European Commission (both organizations indicate the finalization of the merger to be planned in the fourth quarter of 2012). Moving to Phase II emphasizes the European Commission its concerns about the compatibly of the concentration with the internal market.

On 20 July 2012 the European Commission published a press statement, informing that an in-depth investigation is ought to be necessary due to potential competition concerns: ‘The Commission’s preliminary investigation indicated potential competition concerns in the markets for small parcel delivery services, in particular international express services, in numerous Member States, where the parties would have very high combined market shares. The opening of an in-depth inquiry does not prejudge the result of the investigation. The Commission now has 90 working days, until 28 November 2012, to take a decision on whether the proposed transaction would significantly impede effective competition in the European Economic Area (EEA)’ (EC1).

With this press release and the corresponding official decision of the European Commission, interested third parties were invited to share their thoughts and observations concerning the intended concentration. Mind, third parties are now being invited to share their ideas and in all likelihood no parties are being questioned in this stage with the use of the European Commission its powers yet.

On 22 August 2012 UPS and TNT Express announced, as expected, the extension of the offer period until 9 November 2012 (UPS9).

On 5 September 2012 the offer period was officially extended through a joint press release until 9 November 2012 because not all conditions regarding the offer were met, in particular the competition clearance by the European Commission was not received yet (UPS10).

While both organizations are awaiting the European Commission its decision, UPS emphasizes the fantastic partnership with TNT Express while it also congratulates TNT Express with its efforts for humanitarian help: ‘UPS salutes TNT for its dedication to humanitarian efforts, its 10 year partnership with the WFP and our joint efforts to bring relief to communities around the world in need.’ (NEWS4)

On 24 September 2012 TNT Express announced CEO Marie-Christine Lombard to resign (TNT4). Seen her direct appointment as CEO at Geodis France, one cannot easily indicate coherence with the success or failure of the UPS - TNT Express merger. Lombard brushes aside criticism about her quite
unexpected resignation, because she felt like her role at TNT Express was fulfilled, although the acquisition was not finished yet (NEWS5).

On 19 October 2012 UPS and TNT Express received a Statement of Objections from the European Commission which addresses the competitive effects of the intended merger. Both organizations emphasize that this is normal procedure which also does not prejudice the final decision and that they will react to this statement within several weeks (UPS11).

The joint press release (UPS12) of 31 October 2012 contained the announcement that the Autoriteit Financiële Marktien has granted an exemption to extend the offer period again until one week after clearance from the European Commission, but no later than 28 February 2013. This is the first time the Chinese Ministry of Commerce is mentioned as actor to receive clearance from as well: ‘UPS and TNT Express expect the competition clearances from the European Commission and MOFCOM to be the last material ones received.’

While both organizations announced that they are working closely with the European Commission and have, and will have, open and constructive discussion, remedies were filed on 30 November 2012. The remedies are filed to meet the concerns of the European Commission: ‘The proposed remedies comprise the sale of business activities and assets in combination with granting access to air capabilities. Eligible buyers of these activities will have to ensure the long-term viability of the divested activities and continuity of customer service’ (UPS13). Bear in mind that the European Commission can convert these remedies in strict conditions which could eliminate the objections to approve the proposed concentration.

Because of confidentiality at this time it cannot be stressed with certainty if the announcement on the conditional sale of the airlines of TNT Express to ASL Aviation Group was considered to be a remedy. It seemed that this measure was necessary to maintain the airline after the merger because: ‘EU regulation No 1008/2008 of 24 September 2008 requires that, for an airline to be permitted to operate intra-EU routes without restrictions, it shall be more than 50% owned and effectively controlled by one or more EU Member States and/or nationals of EU Member States. (…) To ensure that the airline operations will be able to continue despite the change in ownership and control of TNT Express, TNT Express and UPS have agreed to implement an independent European ownership and control structure for TNT Airways and PanAir’ (TNT5).
On 14 January 2013 UPS announced that the European Commission informed them about the intended blockage of their merger (UPS14). UPS states: ‘We are extremely disappointed with the EC’s position. We proposed significant and tangible remedies designed to address the EC’s concerns with the transaction. The combined company would have been transformative for the logistics industry, bringing meaningful benefits to consumers and customers around the world, while supporting growth in Europe in particular.’ It continues with thanking TNT Express for their cooperation and adjusting its focus on growth of the organization without TNT Express. TNT in turn states that it: ‘(…) regrets this situation, having believed the merger was feasible and beneficial for all stakeholders. UPS has confirmed to TNT Express payment of the agreed €200m termination fee.’ Quite remarkable though, is the fact that TNT Express states that the merger process was a distraction for management and it will now focus solely on (a) Reassuring customers of TNT Express’ commitment to providing industry-leading services, (b) Ensuring engagement and commitment of employees and (c) Strengthening its strategy, including further steps to improve profitability. (TNT6)

The European Commission spoke with both organizations that same day: ‘The case team informed the companies that on the basis of UPS’s current remedy proposal it is working towards proposing a prohibition decision. Subsequently, UPS informed TNT Express that UPS sees no realistic prospect that EC clearance can be obtained and that UPS will not pursue the transaction on any other basis. Formal termination of the Merger Protocol will occur upon receipt of the prohibition decision from the EC, which, based on the above, TNT Express deems inevitable. TNT Express regrets this situation, having believed the merger was feasible and beneficial for all stakeholders.’ (TNT6)

On 30 January 2013 the European Commission eventually reached the decision that the intended merger will not be allowed. Main reason for this decision is that the merger would have restricted fair competition in several countries regarding the express delivery of small packages to another European country. Eventual conclusion: ‘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 [15 countries]’ (EC2).

On 5 April 2013 UPS appealed the decision of the European Commission to obstruct the intended merger. The first reaction of UPS concerning the appeal dates from July 2014, shortly after the European Commission published the summary of its decision. UPS stresses that it is still not satisfied with the European Commission its decision because: ‘With its decision, the EC prevented a sizeable investment in Europe of approximately EUR 5.2 billion ($6.8 billion), better services and pricing, and
more important, an improvement of the European logistics infrastructure in those economies that are still struggling to return to economic growth’ (UPS15). UPS does mention the reasons underlying its appeal and stresses that it is an appeal on principle, and it is not a signal that new interest in TNT Express has arisen because the offer was withdrawn shortly after the obstruction by the European Commission. UPS mentions several reasons: ‘the decision was not based on an accurate assessment of the multi-product nature of customer contracts, it erroneously focused on a single product (next day cross-border shipments), ignored significant evidence from UPS and TNT about the strength and number of other competitors, and considered only a fraction of the efficiencies that would have been created following the acquisition’ (UPS15). UPS is still awaiting its appeal at the moment.

5.2 FEDEX – TNT Express

On 7 April 2015 FedEx and TNT Express released a joint press statement entailing an agreement on an all-cash public offer for all TNT Express shares. Both organizations announced: ‘FedEx Corporation (FedEx) and TNT Express N.V. (TNT Express) reached conditional agreement on recommended all-cash public offer of €8.00 per ordinary TNT Express share. (...) FedEx and TNT Express are confident that anti-trust concerns, if any, can be addressed adequately in a timely fashion.’ (FedEx1)

On 26 June 2015 the European Commission was notified about the intended merger. The European Commission stated almost a month later that it would open an extra investigation: ‘On 31 July 2015, the Commission decided to initiate proceedings in the above-mentioned case after finding that the notified concentration raises serious doubts as to its compatibility with the internal market. The initiation of proceedings opens a second phase investigation with regard to the notified concentration, and is without prejudice to the final decision on the case.’ (EC3)

On 21 August 2015, FedEx and TNT Express published a recommended public cash offer by FedEx for all issued and outstanding ordinary shares of TNT Express. In this press release, several advantages of the intended merger are mentioned, similar to the ones discussed during the intended UPS - TNT Express merger (except for sub c and d): ‘By combining their businesses (the Combination), TNT Express and FedEx have the intention to create a leading global player in providing logistics, transportation, express delivery and related business services, drawing on the considerable strengths of both TNT Express and FedEx. Key elements of the strategic rationale for, and the strength of, the Combination include: a. the Combination’s customers would enjoy access to a considerably enhanced,
integrated global network. This network would benefit from the combined strength of TNT Express’ strong European road platform and Liege hub and FedEx’s strength in other regions globally, including North America and Asia; b. TNT Express’ customers would benefit from the Combination’s comprehensive transportation solutions, such as express, global freight forwarding, contract logistics and surface transportation capabilities; c. FedEx would strengthen TNT Express with investment capacity, sector expertise and global scope; d. the strong balance sheet of the Combination is expected to support deploying additional capital to TNT Express’ business and support the growth of (the business of) TNT Express; e. a strong cultural fit, as both FedEx and TNT Express focus on customer service, operational excellence and good corporate citizenship; and f. the Combination would offer exciting new prospects and career opportunities to FedEx and TNT Express employees as part of a global, growing and highly respected organisation.’ (FEDEX2)

In the meantime rumors emerged about a possible approval. Especially when TNT Express shareholders adopted the resolutions: ‘FedEx Corporation’s EUR4.4 billion (USD4.8 billion) bid to acquire TNT Express N.V. outright took another step closer to finalization after the Dutch logistics firm’s shareholders voted in favour of the offer.’ (NEWS6).

Experts are not sure though if the enthusiasm and optimism radiated by FedEx is with good reason (NEWS7).

On 20 October 2015 FedEx and TNT Express jointly announced that they ‘jointly confirm in response to recent media coverage, that to date they have not received a Statement of Objections from the European Commission. The internal deadline of the European Commission for issuing a Statement of Objections would have expired on 23 October 2015, but FedEx and TNT have been informed by the European Commission that no Statement of Objections will be issued. FedEx and TNT continue to expect that the Offer will close in the first half of calendar year 2016.’ (FEDEX3) Although not receiving a Statement of Objections could be considered as a tremendous positive sign, it does not yet entail the approval of the intended concentration.

As seen earlier, competition authority approval can take some time. On 30 October 2015 the offer period was extended because of missing approvals. ‘The Acceptance Period has been extended because not all Offer Conditions, in particular the Offer Condition relating to Competition Clearances, were fulfilled upon expiry of the initial Acceptance Period.’ (FEDEX4)
The US government (Federal Trade Commission and Department of Justice) reached a verdict first on 23 November 2015 and granted the merger. An early termination notice of the investigation was issued by the Federal Trade Commission concerning involved organizations, which means the permission to continue the merger was granted. Unfortunately all documents considering the filing and the analysis of the merger are confidential. (FTC1)

On 8 January 2016 both FedEx and TNT Express as the European Commission released a press statement entailing the unconditionally approval of the intended merger. After conducting an analysis that almost reassembles the analysis in 2013 (according to the European Commission itself) a conclusion was made ‘(...) the proposed concentration would not significantly impede effective competition in the EEA or any substantial part of it.’ (EC4)

That same day, a statement was issued by FedEx concerning the multiple approvals necessary for the intended merger. Although the European competition authority and the competition authority in the United States approved the deal, a further extension of the acceptance period for the public offer was announced by FedEx: ‘The Offer Condition regarding Competition Clearances relates to obtaining competition approval from the relevant antitrust authorities in the EU, Brazil, China and the United States of America. Currently, clearances have been obtained from the relevant competition authorities in the United States and, as announced earlier today, the EU.’ (FEDEX5)

On 2 February 2016 the Brazilian competition authority CADE (Conselho Administrativo de Defesa Econômica) approved the merger of FedEx and TNT Express as well. In a press release that day the president and CEO of FedEx stressed: ‘Once the acquisition is closed, we look forward to the opportunities it will bring to our employees, customers and shareholders in Latin America and across the globe.’ (FEDEX6)

Then, all of a sudden, on 18 February 2016 UPS announced that it appealed the decision of the Brazilian competition authority, which granted the intended merger of FedEx and TNT Express. (NEWS8) Shortly after the appeal was filed, on 30 march 2016 FedEx and TNT Express announced that the appeal by UPS was rejected by Brazilian competition authority CADE. FedEx and TNT Express responded: ‘The Offer Condition regarding Competition Clearances relates to obtaining competition approval from the relevant antitrust authorities in the EU, Brazil, China and the United States of America. FedEx and TNT Express have obtained unconditional competition approval in the EU, Brazil and the United States of America and continue to work constructively with regulatory authorities to obtain clearance of the transaction in the remaining relevant jurisdictions, including China. FedEx and
TNT Express are making timely progress and continue to anticipate that the Offer will close in the first half of calendar year 2016.’ (FEDEX7)

On 29 April 2016 relieving news for FedEx was published: the last important regulatory institution, the Ministry of Commerce People’s Republic of China, granted their unconditional approval regarding the intended merger. ‘With the approval of MOFCOM, the Offer Condition with respect to Competition Clearances has now been fulfilled.’ (FEDEX8) Especially FedEx switched to even more extremely positive press releases from this point. David Bronczek, President and CEO of FedEx said: ‘I want to thank the team members who collaborated with regulatory authorities around the world to help us reach this important acquisition milestone. (...) With this final regulatory approval, we are one step closer to making the vision of combining the complementary networks of FedEx and TNT Express a reality.’ (FEDEX8)

At this point, the approvals by all relevant competition authorities, which should all be considered to be a sensory condition of the deal, were obtained.

On 25 May 2016 the transaction was a fact. FedEx officially acquired TNT Express, with approval of all relevant competition authorities. ‘FedEx Corporation (FedEx) (NYSE:FDX), FedEx Acquisition B.V. (the Offeror) and TNT Express N.V. (TNT Express) jointly announce that FedEx has acquired TNT Express. The €4.4 billion acquisition combines the strengths of the companies – the world’s largest air express network and an unparalleled European road network, which will expand the existing FedEx portfolio and reshape the global transportation and logistics industry’. (TNT7)

5.3 Comparison of both decisions by the European commission

After a concise overview of the significant events is provided, both cases and both decisions by the European Commission should be compared. The comparison will be guided by the layout of both decisions and by the six steps by Facey & Huser (2004) discussed in chapter 3 of this study to analyze the competitive effects of horizontal mergers.

5.3.1 Jurisdictional questions
The jurisdictional questions are mentioned only briefly in both decisions.
The UPS decision stated the following:

‘On 15 June 2012, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the ‘Merger Regulation’) by which the undertaking UPS intended to acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the whole of the undertaking TNT by way of a public takeover under Dutch law (2) (the ‘Merger’) (…)

The operation had an EU dimension in accordance with Article 1(2) of the Merger Regulation.’ (EC5§3-4)

In the full decision, the European Commission mentions the threshold though: ‘The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million. 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-wide turnover within one and the same Member State.’ (EC7§6)

The FedEx decision stated the following:

‘The Transaction involves the acquisition of sole control of TNT by FedEx and constitutes a concentration within the meaning of Article 3(1)(b) of Regulation (EC) No 139/2004 (‘the Merger Regulation’). It has a Union dimension pursuant to Article 1(2) of the Merger Regulation.’ (EC6§3)

5.3.2 Defining relevant markets

According to the CO Form, which is used as point of reference to notify the European Commission about an intended merger or acquisition, the following information should be provided by the involved organizations:

On the basis of the above definitions and market share thresholds, provide the following information:

Identify each affected market within the meaning of Section III, at:

— the EEA, Community or EFTA level;

— the individual Member States or EFTA States level.

In addition, state and explain the parties’ view regarding the scope of the relevant geographic market within the meaning of Section II that applies in relation to each affected market identified above (Section 6 CO Form).

The UPS decision stated the following:

The European Commission starts in the UPS decision with describing the package delivery industry and it mentions (a) significant economies of density and scale and (b) highly differentiated products
(main dimensions: speed of delivery, geography and quality of service), as particular characteristics. Next, the concept of an integrator is introduced: ‘The main characteristic of an integrator is that it has full operational control over the logistics of the parcel delivery from origin to destination, including air transport. Within the EEA, there are four integrators: UPS, TNT, DHL and FedEx.’ (EC5§11)

Integrators needs to be distinguished from (a) national postal operators (‘These operators nevertheless do not have their own air fleet network and offer international intra-EEA express delivery services based on road transportation for neighbouring countries as well as on air transportation that relies on commercial flights (belly space) or on integrators.’) and (b) national small package operators (predominantly domestic small package delivery). (EC5§12)

The European Commission stated: ‘In line with its decisional practice, (1) the Commission identifies the relevant product markets for small package delivery services (2) on the basis of the speed of delivery (i.e. express delivery services — commonly understood as services with a next day delivery commitment, and standard/deferred delivery services) and whether the packages are picked-up and delivered in the same country, in two different EEA countries, or in one EEA country and one non-EEA country (i.e. domestic, international intra-EEA and international extra-EEA services).’ (EC5§14)

The European Commission states in its full decision that although it is explicitly mentioned in the EU Guidelines, a SSNIP test is not ought to be suitable in this case. It is stressed that a SSNIP test is not obliged and other measures will be used. (EC7§154)

Continuing with the geographic market, the European Commission states: ‘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 (…).’ (EC7§243)

Conclusion formulated by the European Commission: ‘The Commission concluded for the purpose of the Decision that there is a separate product market for international intra-EEA express small package delivery services. This market is national in scope.’ (EC5§16)
**The FedEx decision stated the following:**

A few years later, the FedEx decision showed a more elaborated definition of an integrator: ‘(...) meaning that they have full operational control over all transportation assets, a sufficient geographic coverage on a global level, a hub and spoke operating model, a proprietary IT network, and the reputation of reliably delivering small packages on time (so-called end-to-end credibility).’ *(EC6§12)*

‘In previous cases, notably when assessing international *intra-EEA markets*, the Commission also identified a market for express delivery services (with a next day delivery commitment) as separate from the market of deferred/standard delivery services (with a longer time frame commitment). These findings were based on, among others, the fact that the two types of services are provided by making use of different infrastructure, that a significant number of customers depends on express deliveries and that express delivery services are also considerably more expensive.’ *(EC6§15)*

‘In the case at hand, given the substantial overlaps between the Parties in the provision of extra-EEA services, the Commission undertook an extensive inquiry into these markets not assessed in detail previously.’ *(EC6§15)*

‘For the integrators, both extra-EEA express (that is, the fastest possible guaranteed delivery service) and deferred (slower but still highly reliable, day-definite) small package shipments essentially use the same network and supply chain steps (including sorting in air-hubs, long haul flights and customs clearance) on their journey to the various intercontinental destinations. Moreover, all integrators are directly competing for both types of services and there were indications that prices for express and deferred extra-EEA services move together, thereby not contradicting that express and deferred would belong to the same market. On this basis, the Commission considered express and deferred services as segments of the same extra-EEA market.’ *(EC6§15)*

Considering the geographic market, the European Commission states: ‘However, in view of the network features of the industry and the crucial role of air networks for intercontinental deliveries, the competitive assessment on extra-EEA small package deliveries also included the EEA-level.’ *(EC6§18)*

Conclusion resulting from the European Commission its reasoning: The European Commission defines the market slightly different and now distinguishes Intra-EEA small package delivery services and Extra-EEA small package delivery services.
To make a fair comparison, only the first segment will be discussed.

5.3.3 Determining dominant position
According to the CO Form, which is used as point of reference to notify the European Commission about an intended merger or acquisition, the following information should be provided by the involved organizations:

7.1. an estimate of the total size of the market in terms of sales value (in euros) and volume (units). Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;

7.2. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the concentration;

7.3. an estimate of the market share in value (and where appropriate, volume) of all competitors (including importers) having at least 5% of the geographic market under consideration. On this basis, provide an estimate of the HHI index pre- and post-merger, and the difference between the two (the delta). Indicate the proportion of market shares used as a basis to calculate the HHI;

7.4. the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for the competitors identified under 7.3;

7.5. an estimate of the total value and volume and source of imports from outside the EEA territory and identify: (a) the proportion of such imports that are derived from the groups to which the parties to the concentration belong; (b) an estimate of the extent to which any quotas, tariffs or non-tariff barriers to trade, affect these imports; and (c) an estimate of the extent to which transportation and other costs affect these imports;

7.6. the extent to which trade among States within the EEA territory is affected by: (a) transportation and other costs; and (b) other non-tariff barriers to trade;

7.7. the manner in which the parties to the concentration produce, price and sell the products and/or services; for example, whether they manufacture and price locally, or sell through local distribution facilities;

7.8. a comparison of price levels in each Member State and EFTA State by each party to the concentration and a similar comparison of price levels between the Community, the EFTA States and other areas where these products are produced (e.g. Russia, the United States of America, Japan, China, or other relevant areas); and
7.9. the nature and extent of vertical integration of each of the parties to the concentration compared with their largest competitors (Section 6 CO Form EU).

Although the European Commission analyzed the non-integrators in the UPS decision, in the FedEx decision it chose a conservative method and it left out the non-integrators.

The UPS decision stated the following:
The non-integrators are ought to exert insufficient competitive constraint on the integrators due to weaknesses in coverage, air network and premium services. ‘For the above reasons, the Commission concluded that non-integrated players are unable to exert a sufficient competitive constraint on integrators.’ (EC5§21)

‘However, the in-depth investigation confirmed that FedEx is currently a weaker competitor for the following reasons: a) in terms of market shares, FedEx is the weakest of the four integrators in most of the EEA-countries. FedEx’ market share does not exceed [5-10 %] in 14 out of the 15 EEA-countries where the Commission found a significant impediment to effective competition and post transaction, FedEx would have held the smallest market share in all 29 EEA-countries among the integrators; b) its coverage is inferior compared to other integrators. If measured in terms of business addresses served, this holds true for all express services (end-of day, before noon and before 10 am); c) its network is less developed in Europe in comparison to the other integrators (in terms of number of pick up points, flight points, type of aircrafts, etc.); d) its European pick-up and delivery (PUD) costs are currently significantly higher than those of UPS and TNT.’ (EC5§22)

‘As concerns DHL, the outcome of the market investigation confirmed that DHL is a strong and credible player and that it is a close competitor to both UPS and TNT. Post merger, the customers would thus face two very strong integrators: DHL and the merged entity.’ (EC5§25)

The European Commission expects that integrator DHL remains as only competitor to the new concentration.

The FedEx decision stated the following:
‘The integrators have the tightest control over their network and are the only ones with a seamless express network covering all EEA-countries. In assessing the competitive strengths of the various categories of the Parties’ competitors in the international intra-EEA express markets, the Commission found, in line with the results of the market investigation, that non-integrated small package delivery providers generally exert a weak competitive constraint on the Parties. The Commission has therefore
adopted a conservative approach and limited its competitive assessment of the effects of the Transaction on international intra-EEA express delivery services in the different EEA-countries on the competitive constraints that the four integrators exert on each other.’ (EC6§19)

Next, without mentioning the non-integrators at all, the European Commission analyzes the remaining integrators after the merger would have taken place.

‘At EEA-level, the Merged Entity would have a market share below 30 %. It will still be the weakest of the three remaining integrators and thus the number three player after DHL and UPS. At country level, the Merged Entity would not have a market share exceeding 40 % based on 2014 revenue figures and would not become the number one player in any of the 30 national markets in the EEA investigated.’ (EC6§20)

Quite remarkable, and most important, is the fact that the European Commission expects the intended concentration to be left the weakest of the three remaining integrators.

5.3.4 Identifying possible coordinated and non-coordinated effects
The next step is to identify the different effects of the intended concentration.

The UPS decision stated the following:
‘The Commission assessed the effects of the merger in the different national markets as the Merger would have led to a significant increase in the level of concentration of the market and a strong combined market position of the Parties in a large number of EEA countries and reduced the number of competitors from four to three (UPS/TNT, DHL and FedEx) or even from three to two (UPS/TNT and DHL) in a significant portion thereof.

In fact, the Parties, together with DHL, can be considered to be close competitors on the international intra-EEA express market while all other companies are seen as offering products which are much more distant substitutes, FedEx included, than the ones offered by UPS, TNT and DHL. Absent any countervailing factors, the Commission concluded that the Parties, which are close competitors, would have had an incentive to increase prices after the merger. The price concentration analysis undertaken by the Commission concluded that there would be a price increase in all 29 EEA countries. UPS disagreed with the Commission on the magnitude of the price increase.’ (EC6§6-7)

The FedEx decision stated the following:
‘Even though both FedEx and TNT are integrators and therefore compete with each other in the field of international intra-EEA express delivery services in the 30 national markets in the EEA, the
Commission concluded that the Parties are not particularly close competitors. On the one hand, FedEx’s business focus is on customers with significant extra-EEA delivery needs. The majority of FedEx’s international intra-EEA express revenues are derived from customers that have also purchased extra-EEA delivery services from it. (...) This in turn translates into a weak market position vis-à-vis TNT and the other two integrators and is consistent with FedEx’s focus on extra-EEA deliveries.’ (EC§21)

‘On the other hand, TNT’s focus is on customers with standalone international intra-EEA and domestic/deferred delivery needs. (...) In contrast, TNT has been less successful at attracting international intra-EEA express customers that also require international extra-EEA delivery services.’ (EC§22)

‘The Commission considered that TNT does not have specific qualities that enable it to exert significant competitive pressure on the other integrators which would result in a lessening of competition post-Transaction.’ (EC§26)

‘Despite the fact that non-integrators, in particular road-based operators with a large network such as DPD and GLS, would exert a certain competitive constraint on the Merged Entity depending on the national market, the Commission took a conservative approach and limited its analysis of whether the Merged Entity’s competitors will have a constraining effect on prices to DHL and UPS.’ (EC§27)

Even in one of the main considerations the European Commission reverts: ‘(...) that the merged entity’s market position will be moderate and that, amongst integrators, FedEx and TNT are not particularly close competitors. The Commission’s investigation showed that FedEx still exerts a weaker competitive constraint on the other integrators due to the lack of density and scale of its European networks.’ (EC)

5.3.5 Maintaining effective competition
Organizations will try to substantiate the fact that effective competition will not be endangered when the merger will be continued. Entry barriers and the exercise of countervailing buyer power are the most common arguments.

The UPS decision stated the following:
‘UPS claimed that certain customers could exercise buyer power either by down-trading to less demanding services or by switching to other existing suppliers, either by selecting other suppliers for
express, or by shifting non-express volumes to other suppliers (multisourcing). However, this was not confirmed during the course of the market investigation.’ (EC§28)

‘With respect to the barriers to entry, it turned out that a new entrant would have had to set up (i) a sophisticated IT infrastructure, (ii) a sorting infrastructure all across the EEA and (iii) an air network ensuring an efficient air and road corresponding connection. As it is evidenced by the absence of major entry over the last 20 years, these barriers are quite high and cannot be overcome, not even by outsourcing. As regards outsourcing of airlift, in fact, the Commission’s findings were that it was not an effective alternative due to double marginalisation and generally lower service quality.’ (EC§29)

The FedEx decision stated the following:
The European Commission does not explicitly mention barriers to entry and countervailing buyer power. It solely addresses the positive reactions by certain customers. ‘The vast majority of the customers who have responded to the Commission’s first and second phase market investigation expressed a neutral or even a positive view about the overall effects of the Transaction on the market for international intra-EEA express small package delivery services.’ (EC§31)

5.3.6 Failing firm defense
The failing firm defense is not put forward and assessed in both decisions.

5.3.7 Creating efficiencies
The last step in the analysis is to determine whether efficiencies are likely to be generated.

The UPS decision stated the following:
‘UPS claimed that the Merger was expected to give rise to significant efficiencies through the combination of the UPS and TNT’s businesses. It pointed out the expected significant economies of density and of scope, improved service quality, and transactional efficiencies by combining their complementary networks: UPS customers gained access to TNT’s extensive European road and freight network and TNT’s customers benefited from access to UPS’s worldwide network.’ (EU§31)

‘Following UPS’ analysis, efficiencies would have benefited consumers, as the majority of the cost synergies were variable and merger-specific since they could not be achieved without full integration. To show that efficiencies were deemed verifiable, the Parties provided internal documents with estimates of the efficiencies following a certain number of years after closing the Merger, divided into three main areas: - operational (covering ground transportation costs), air network and management and administrative overheads, amounting to a total of EUR 400-550 million.’ (EU§32)
‘The Commission agreed that the efficiencies were merger-specific, but it confirmed as verifiable only the cost savings related to the European air network and the ground handling, arising during the first three years after the completion of the Merger, that amount to respectively EUR [...] million, for intra Europe air network synergies and to EUR [...] million for ground handling. (...) This is likely to be an underestimation of the actual pass-through of marginal costs.’ (EU5§33)

‘UPS put forward that the operation would also induce out-of-market efficiencies. However, the Commission concluded that those were not verifiable to the required standard.’ (EU5§35)

UPS pointed out the expected significant economies of density and of scope, improved service quality, and transactional efficiencies by combining their complementary networks. The suggested efficiencies were ought to be merger-specific by the European Commission though, but were declared non-verifiable.

The FedEx decision stated the following:
‘FedEx argues that significant efficiencies would arise from the Transaction, in particular from the integration of FedEx’s relatively inefficient European operations into TNT’s network. The main categories of efficiencies affecting the express intra-EEA services were pick-up and delivery (PUD) cost savings and air network cost savings. Based on the information provided to it, the Commission concluded that a part of the claimed PUD cost savings and a part of the claimed air network cost savings (after pass-through) qualify as relevant merger specific efficiencies which could not be achieved to a similar extent by less anti-competitive alternatives. The time window for the realisation of the identified efficiencies was estimated to be 3 years. Even if the results of the Commission’s price concentration analysis had been statistically significant, the PUD efficiencies associated with the Transaction would have more than offset the price increases estimated for FedEx customers in any of the national markets for international intra-EEA express delivery services.’ (EC6§33)

On a side note but quite remarkable is that regarding both Intra-EEA (inside the European Union) and Extra-EEA (one country is not in the European Union) express delivery services, efficiencies were accepted (merger-specific, verifiable and for the benefit of consumers) by the European Commission. The efficiencies were considered to be network cost savings and effective competition with DHL and UPS. The European Commission declared to have used the same framework: ‘Similarly to its approach for intra-EEA, the Commission assessed the verifiability of these efficiencies, their merger specificity and ability to be used to consumers’ benefit and concluded that the Transaction would
result in relevant efficiencies under the three-pronged test set out in the Horizontal Merger Guidelines.’ (EC6§50)

5.3.8 Extra dimension in the FedEx decision

Besides the additional Extra-EEA investigation, some other dimensions are elaborated on in the FedEx decision.

‘In order to ensure full consistency with the quantitative analysis carried out in the UPS/TNT case, the Commission applied a price concentration analysis to evaluate the possible price impact of the proposed Transaction on FedEx’s prices and, in turn, on TNT’s prices. The Commission found that the price increases estimated by the model were not statistically significant. Therefore, the results of the price concentration analysis could not be used in a reliable way as evidence towards or against establishing a significant impediment of effective competition.’ (EC6§32)

It is mentioned before, but quite remarkable is the fact that information from third parties is stressed. ‘The vast majority of the customers who have responded to the Commission’s first and second phase market investigation expressed a neutral or even a positive view about the overall effects of the Transaction on the market for international intra-EEA express small package delivery services.’ (EC6§31)

The European Commission focusses, with good reason, on determining if FedEx and TNT Express are ought to be competitors. ‘Even though both FedEx and TNT are integrators and therefore compete with each other in the field of international intra-EEA express delivery services in the 30 national markets in the EEA, the Commission concluded that the Parties are not particularly close competitors.’ (EC6§21) The organizations are not particularly close competitors for several reasons: (a) FedEx its business focus is on customers with extra-EEA delivery needs; (b) FedEx has a weaker EEA-wide network; (c) this translates into a weak market position vis-à-vis TNT and the other two integrators; (d) TNT its focus is on customers with international intra-EEA and primarily domestic delivery needs; and (e) only a small amount of its revenues is derived from extra-EEA deliveries (EC6§22-23).

‘Also the Parties’ internal documents confirmed that they do not perceive each other as particularly close competitors. Moreover, a clear majority of the Parties’ customers does not see the Parties as particularly close competitors either (e.g. in terms of pricing, range and quality of services, reliability, geographical reach, track and trace etc.). Moreover, customers view FedEx as weaker than the other three integrators in the markets for international intraEEA express delivery services. Last,
notwithstanding a number of limitations identified, the bidding analysis submitted by the Parties provided further confirmation that FedEx is a weaker competitor for TNT than DHL and UPS.’ (EC6§24-25).

Lastly, the European Commission refers to the decision from 2013 numerous times, is it clinging to the past? Probably not, the most fair approach is indeed to use an analysis in line with the analysis used in 2013. ‘In its investigation in the present case, the Commission replicated the same assessment as was undertaken in the UPS/TNT case both for intra-EEA express and for extra-EEA markets, thus ensuring full consistency with its previous practice.’ (EC4)

5.3.8 Conclusion

The following conclusions can be derived from the steps discussed above.

Regarding UPS:

Continuing to stress the close competiveness regarding UPS, TNT and DHL, the European Commission foresees (a) an increase in concentration levels, (b) a strong combined market position and (c) a reduced number of competitors (in some countries only leaving DHL). Furthermore, a lack of countervailing bargaining power (although UPS claimed otherwise), a difficult entry possibility (no major entry over the last twenty years), and an incentive and chance to increase the prices is ought to be present.

‘For the reasons mentioned above, the Decision concludes that the proposed operation whereby United Parcel Service Inc. acquires sole control of TNT Express N.V. within the meaning of Article 3(1)(b) of Regulation (EC) No 139/2004 is declared incompatible with the internal market and the EEA Agreement.’ (EC5§94).

Regarding FedEx:

The European Commission states: ‘(…)the acquisition will not give rise to competition concerns, because FedEx and TNT are not particularly close competitors and because the merged entity will continue to face sufficient competition from its rivals in all markets concerned.’ (EC4)

After entering the in-depth investigation and conducting a thorough analysis, the European Commission was rather sceptical at first: ‘The Commission was concerned that following the transaction, the merged entity would face insufficient competitive constraints from the only two remaining integrators, DHL and UPS. A lack of sufficient competitive constraints could lead to higher prices for business customers and consumers.’ (EC4)
But, the European Commission concluded that these doubts had been sufficiently dispelled. *The Commission concluded that the proposed concentration would not significantly impede effective competition in the EEA or any substantial part of it.* (EC4)

Conclusion in this decision: ‘Consequently, the concentration is declared compatible with the internal market and the functioning of the EEA Agreement, in accordance with Article 2(2) and Article 8(1) of the Merger Regulation and Article 57 of the EEA Agreement.’ (EC6§77)

### 5.4 Analysis on corporate political strategies and behavior

In this paragraph the different kind of strategies and (re)actions will be analyzed. The noticeable indicators will be discussed point by point.

#### 5.4.1 UPS

Indicators of possible influencing of stakeholders, in this case the European Commission, are present all the time.

*Expressing trust in the intended concentration*

UPS published the following two pictures with corresponding titles, which clearly hints to expected process in successful closing the deal. At the this early point though, it could have been an action towards the public (and the European Commission) to show the dedication behind the merger. Especially, the first pictures is almost implying that the organizations have already sealed the deal.

‘UPS, TNT drivers shake hands’

‘UPS and TNT CEOs’
Several indicators in a joint press release on 19 March 2012 show a strong believe that the merger will be successfully completed, of course this is addressed to shareholders but also to stakeholders like the European Commission (e.g. by offering a timetable, by discussing the termination fee in public, and by expressing their confidence in receiving the clearances). UPS is surprisingly positive regarding this subject and a penalty clause is provided for: ‘UPS and TNT Express have done extensive preparatory work on the required competition filings. UPS is confident that it will secure all relevant competition approvals. On termination of the Merger Protocol because of the competition offer condition not being satisfied or waived, UPS will forfeit a termination fee to TNT Express equal to EUR 200 million.’ (UPS3)

As mentioned earlier, on 6 June 2012 UPS COO David Abney addressed the growth and evolution of UPS the last decades and expected the integration of the TNT acquisition to be one of the most important features of this evolution at the moment. He addresses the subject like it has already been settled, but he adds: ‘This acquisition is still awaiting approval from the European Commission’ (UPS6).

UPS, almost randomly, emphasizes the fantastic partnership with TNT Express while it also congratulates TNT Express with its efforts for humanitarian help: ‘UPS salutes TNT for its dedication to humanitarian efforts, its 10 year partnership with the WFP and our joint efforts to bring relief to communities around the world in need.’ (NEWS4) Most likely to influence the European Commission by emphasizing the good relationship and willingness to seal the deal.

*Expressing compliance*

UPS publically stated several times that it will comply with Dutch regulations: ‘In line with regulatory requirements, UPS expresses it still has the intention to submit a request for approval of its offer document to the Netherlands Authority for the Financial Markets (AFM) within 12 weeks from its initial announcement of Feb. 17, 2012.’ (UPS2)

UPS expresses a bargaining strategy again: ‘UPS and TNT Express also confirmed today they mutually consented to a request from the European Commission to extend the review period for another 10 working days to enable the Commission to fully review additional information related to the transaction. As a result of this extension, UPS and TNT Express now anticipate completion of the Offer and close of the transaction in early 2013.’ (UPS12)
UPS stresses several times that one of the most important conditions is that relevant competition clearances will been obtained (UPS3, UPS12).

On 11 May 2012 UPS announced that the necessary financing for the intended recommended public offer is brought in order (UPS5). Next to that UPS announced that, in line with regulatory requirements it will submit the request for approval of the offer to the AFM the same day. Both examples, emphasize the compliance or responsive strategy used by UPS by showing that it of course will not proceed without approval by the European Commission and they are even willing to publically address the termination fee if the competition offer condition will be waived.

Quite remarkable is the enthusiastic and complying way of approaching the European Commission, implying a bargaining or responsive strategy: ‘UPS and TNT Express welcome the opportunity to further engage with the Commission’s competition services. UPS and TNT Express remain convinced the merger will benefit customers and other stakeholders and look forward to successful completion of the regulatory process.’ (UPS8)

Expressing the expected advantages
The advantages of the proposed merger are well argued as well, several crucial conditions are addressed and most important, synergies are expected to arise. Examples of the mentioned advantages are: (a) complementary strengths will create a customer-focused global platform; (b) expanding UPS its express capabilities in Europe; (c) TNT Express customers will benefit from UPS its unparalleled access to the North American market, as well as access to its logistics solutions, such as global freight forwarding and distribution capabilities; and (d) the employees of the combined group will have broader career opportunities based on future growth expectations. (UPS3)

UPS itself continuously announces in almost all press releases that the organizations are complementary, trying to explain that they are no competitors: ‘The complementary strengths of both organizations will create a customer-focused global platform that will be a leader in transportation technology and customer service.’ (UPS7) ‘UPS and TNT Express believe competition in Europe continues to be significant, coming from multiple players who offer similar services.’ & ‘A key part of UPS’s evolution in the next few years will be based on the integration of the TNT acquisition. TNT increases UPS’s presence in Europe, especially with European ground freight; strengthens UPS in China; and helps in South America, particularly Brazil.’ (UPS6) ‘The combined network will help facilitate the flow of trade, making customers more competitive not just in U.S. and European
markets, but also in markets across Asia and Latin America - helping to stimulate much needed economic growth.’ (UPS8)

UPS adduced an efficiency defense with among others, economies of density and economies of scope, improved service quality and a thorough complementary network. In several press releases UPS stated: ‘UPS and TNT Express believe their merger will help create a more efficient logistics market, thereby improving the competitiveness of Europe and the solutions offered to businesses and consumers. Customers and consumers will benefit from a broader portfolio of services and better global access, along with lower supply-chain costs overall and improved service levels in terms of timing and reliability. UPS and TNT Express value their employees highly. Both UPS and TNT Express will follow the required consultation and advice procedures with their works councils with regard to these remedies.’ (UPS11)

**Information strategy**

Some information submitted by UPS itself, was not reliable according to the European Commission. ‘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.’ (EU7§949)

Subsequently, UPS failed to provide requested information on time. ‘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.’ (EU7§941).

Although, the required information for a fully complete notification is addressed in the CO Form, UPS needed to hand in more information. ‘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.’ (UPS7§10)
The full decision by the European Commission shows several interesting indications of UPS bringing forward counter-arguments in the analysis. When the European Commission is trying to define the relevant product market, it is unbundling the market. A smaller relevant product market, means a higher market share and an increased chance of the deal being obstructed by the European Commission. So, several attempts by UPS to stop the unbundling of the relevant product market can be deducted from the decision. ‘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.’ (EC7§168)  ‘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 savings.’ (EC7§189)

Remedy strategy
Offered remedies are derived from the decision by the European Commission. ‘In November 2012, the notifying party submitted a first remedies package, which the Commission considered insufficient to solve the competition concerns arising from the merger. Subsequently, UPS submitted two revised remedies packages in 4 December 2012 and January 2013, consisting of the divestment of assets in a number of EU countries where competition concerns had been identified. The Commission continued to consider these remedies insufficient, in particular in view of the inadequacy of the proposed buyer to qualify as a suitable purchaser and a future viable competitor in the EEA.’ (EC8).

As seen before, coming up with remedies to please the European Commission should be considered as trying to influence the (decision of) the European Commission and is one of the expected strategies.

‘The three remedy packages had, to different degrees, a structural and a behavioural pillar:

— a divestment remedy: sale of TNT’s subsidiaries, in 17 countries to a single buyer

— an access remedy: engagement of UPS to provide access to its intra-European air network from/to the remedies countries.

Through the divestment, any overlap in the remedy Countries would have been eliminated. None of the market players interrogated on the Commitments of 29 November 2012 and on the Commitments of 16 December 2012 declared being interested by the divested business as a whole, with the exception of La Poste/DPD. As a result of the second market test, UPS presented another set of Commitments, on 3 January 2013, trying to accommodate particular needs of La Poste/DPD.
The overall conclusion reached by the Commission was that the proposed commitments were not likely to eliminate the competition concerns raised in the Statement of Objections. On the one hand, UPS was unable to offer a fix-it-first or upfront-buyer solution, and on the other hand the Commitments in combination with the business plan of the only interested purchaser, La Poste/DPD, were insufficient to remove the Commission’s concerns. In this respect, the following concerns were still present after the third package: (i) Timing of the conclusion of the divestment procedure. La Poste/DPD would have had to negotiate with UPS, inter alia, a Share Purchase Agreement, but La Poste/DPD itself indicated that the due diligence could take considerably longer than estimated by UPS. (ii) Suitability of La Poste/DPD as a buyer of the divested activities.‘ (EC§84-89)

Highly remarkable is the fact that serving as a remedy, the parties proposed to sell a large quantity of TNT Express its subsidiaries to a single buyer. Only one party, La Poste/DPD was interested, but was ought to be not qualified. FedEx was qualified but declined: ‘FedEx has rebuffed informal approaches from its arch-rival UPS to buy a package of TNT Express assets, further complicating UPS’s last-ditch efforts to win EU approval for its takeover of the Dutch delivery group.’ (NEWS10)

Appeals

Regarding UPS appealing the decision by the European Commission, multiple indicators to a pursued strategy arise. Appealing the decision of the European Commission and publicly expressing the negative feelings about that decision should be considered a non-bargaining or recalcitrant strategy.

The main arguments in this appeal are: (a) ‘alleging that the Commission committed an error of law and a manifest error of assessment when examining the likely price effects of the concentration. Further, the Commission breached its obligation to state reasons and infringed UPS’ rights of defence by substantially modifying the econometric model submitted by UPS without hearing UPS or explaining adequately the modifications made’; (b) ‘alleging that by setting an arbitrary standard for verifiability of efficiencies, the Commission erred in law and diverged from the standard set by the case law. Further, the Commission erred in law and committed a manifest error of assessment in assigning insufficient or zero weight to efficiencies that it accepted in principle. Finally the Commission breached UPS' rights of defence by basing its rejection of efficiencies on objections that UPS had not been confronted with previously’; (c) ‘alleging that the Commission erred in law and committed a manifest error of assessment by misapplying the concept of closeness of competition. It equally erred in concluding, without substantive evidence, that the merged entity's potential price increases would be accommodated by the rival to the merged entity’; (d) ‘alleging that the
Commission breached UPS’ rights of defence by denying it access to relevant and exculpatory
evidence. Moreover, the Commission failed to state reasons, erred in law and in fact and committed a
manifest error of assessment when it concluded that competitors who are not close competitors could
not expand to constrain effectively the merged entity in the foreseeable future; and (e) ‘alleging that
the Commission erred in law and committed a manifest error of assessment in analyzing customers’
ability to restrain the merged entity.’ (CURIA1)

TNT Express its only statement was that it took note of the appeal (TNT8). If there is no interest in
acquiring TNT Express anymore, why bother the appeal? The fine it should pay TNT Express for the
break? Probably not. UPS states: ‘The appeal was to ensure a more accurate assessment of the
European Union competitive landscape and to ensure no precedent is established by the EC that
would limit international growth opportunities.’ (NEWS9) At the moment the appeal is still in process.

Regarding the appeal against the decision by the Brazilian competition authority CADE, most news
articles state that the only purpose of this appeal was to delay the merger and save some time to
expand their own businesses (NEWS8, NEWS11). It is also mentioned that it can considered to be a
response to the fact that FedEx did not help UPS in 2013 (when UPS was looking for a buyer for some
of its subsidiaries and FedEx declined) (NEWS8).

According to UPS (no press statement is available): ‘The review process in Brazil contains an option to
submit an application to the senior level of CADE to consider a more in-depth review of an initial
finding (…) This option has been exercised as part of ensuring a fair and thorough investigation.’
(NEWS8) FedEx and TNT Express released the following statement: ‘FedEx and TNT Express continue
to work constructively with the regulatory authorities to obtain clearance of the transaction in the
relevant jurisdictions, including China, and are making timely progress. FedEx and TNT Express remain
confident that the Offer will close in the first half of calendar year 2016 and look forward to the
opportunities the combined company will deliver for customers, shareowners and employees around
the world.’ (FEDEX6)

Furthermore, UPS tried to engage in the decision by the European Commission regarding the FedEx –
TNT Express deal, by pleading to be a interested third person. With success: ‘Following its written
request of 15 October 2015, United Parcel Service, Inc. (hereinafter ‘UPS’) was recognised as an
interested third person on 21 October 2015. Pursuant to Article 16(1) of the Merger Implementing
Regulation ( 3 ) DG Competition informed UPS by letter of 27 October 2015 of the nature and subject
matter of the procedure and invited UPS to submit any additional comments in writing taking into
account that UPS had already met with DG Competition and made several submissions in the course of the investigation of the Transaction, thereby exercising its right to be heard pursuant to Article 18(4) of the Merger Regulation.’ (EC9)

5.4.2 FedEx
Several of FedEx its indicators are discussed when analyzing the strategies and (re)actions of UPS in the previous subparagraph, but some separate and explicit indicators will be discussed below. While UPS is, besides the use of responsive approaches, clearly trying a recalcitrant strategy as well to actually influence the process and the competition authority by appealing governmental decisions (to delay the intended merger). FedEx and TNT Express on the other hand, remain using responsive strategies to get clearance for their transaction.

Expressing trust in the intended merger
Also FedEx shows optimism in its press releases: ‘FedEx and TNT Express continue to work constructively with the regulatory authorities to obtain clearance of the transaction in the relevant jurisdictions, including China, and are making timely progress. FedEx and TNT Express remain confident that the Offer will close in the first half of calendar year 2016 and look forward to the opportunities the combined company will deliver for customers, shareowners and employees around the world.’ (FEDEX9)

And after the intended merger was granted: ‘We are extremely pleased to receive the European Commission’s unconditional approval,’ said David Binks, Regional President Europe, FedEx Express. ‘We believe the combination of TNT Express and FedEx will provide significant value to the employees, customers and shareholders of both companies.’ (FEDEX10)

Another form of trust in the intended merger: ‘The Executive Board and Supervisory Board of TNT Express restated their support and recommendation for FedEx’s offer, which is set to provide compelling benefits and opportunities to TNT’s customers, employees and shareholders. Accordingly, the Boards recommended to shareholders to tender their shares pursuant to the offer.’

‘During the quarter, FedEx announced its intention to acquire TNT. The management team believes this is a very positive development for all our stakeholders.’ (TNT10)

‘FedEx and TNT Express continue to work constructively with the regulatory authorities to obtain clearance of the transaction in the relevant jurisdictions, including China, and are making timely progress. FedEx and TNT Express remain confident that the Offer will close in the first half of calendar
year 2016 and look forward to the opportunities the combined company will deliver for customers, shareowners and employees around the world.’

With this final regulatory approval, we are one step closer to making the vision of combining the complementary networks of FedEx and TNT Express a reality,” said Tex Gunning, Chief Executive Officer, TNT Express. “This intended acquisition will bring value for our customers, shareholders and employees.” (FEDEX9)

‘FedEx and TNT Express are on track to obtain all necessary approvals and competition clearances.’ (FEDEX4)

Expressing compliance
Also FedEx tries to emphasize its willingness to comply with applicable regulations.

‘FedEx and TNT Express confirm that the companies are making timely progress on the preparations for the Offer. FedEx expects to submit a request for review and approval of its Offer Document with the Netherlands Authority for the Financial Markets (Stichting Autoriteit Financiële Markten, AFM) in any event before June 30, 2015, which is the date by which under Dutch law a request for approval must be submitted to the AFM.

In addition, FedEx and TNT Express confirm that the process to obtain the required regulatory merger control approvals for the Offer is proceeding without delays. The Offer will be conditional upon FedEx obtaining the required competition clearances in the European Union, China, Brazil and, to the extent applicable, the United States of America. FedEx and TNT Express remain confident that substantive anti-trust concerns, if any, can be addressed adequately and in a timely fashion. Although FedEx and TNT Express aim to obtain the required regulatory clearances as soon as possible, it is noted that completing the formal clearance procedures could take up to one year. As such, it may be required to obtain an exemption from the AFM to (further) extend the offer period.’ (FEDEX11)

‘The Offer is conditional on obtaining competition approval from the relevant antitrust authorities in the EU, Brazil, China and, to the extent applicable, the United States of America. FedEx and TNT Express anticipate making a filing in the U.S. before the end of the calendar year.

FedEx and TNT Express are on track to obtain all necessary approvals and competition clearances. Based on the required steps and subject to the necessary approvals, FedEx and TNT Express continue to anticipate that the Offer will close in the first half of calendar year 2016. The formal notification for EU competition clearance was filed on 26 June 2015. The European Commission has initiated a Phase
II review in connection with the Offer and on 13 August 2015 announced on its website that it extended its deadline for the completion of its Phase II review by 20 working days to 13 January 2016.

As indicated in their joint press release of 20 October 2015, FedEx and TNT Express have not received a Statement of Objections from the European Commission and have been informed by the European Commission that no Statement of Objections will be issued. The transaction is also being reviewed by other antitrust agencies, including the Ministry of Commerce (MOFCOM) in China and the Conselho Administrativo de Defesa Econômica (CADE) in Brazil.’(FEDEX4)

Expressing the expected advantages

This optimism continues when a list of all advantages regarding the intended deal is being published:

a) Transaction unanimously recommended and supported by TNT Express’ Executive Board and Supervisory Board.

b) High level of deal certainty.

c) PostNL N.V. has irrevocably confirmed to support the Offer and tender its 14.7% TNT Express shareholding.

d) Combination will transform FedEx’s European capabilities and accelerate global growth.

e) Customers will enjoy access to an enhanced, integrated global network, combining TNT Express strong European capabilities and FedEx’s strength in other regions globally, including North America and Asia.

f) FedEx and TNT Express employees share a commitment to serving customers and delivering value for shareholders and supporting the communities they live and work in.

g) The parties have agreed to certain non-financial covenants including:

h) Existing employment terms of TNT Express will be respected.

i) The European regional headquarters of the combined companies will be in Amsterdam/Hoofddorp.

j) TNT Express hub in Liege will be maintained as a significant operation for the group going forward.

k) TNT Express’ airline operations will be divested, in compliance with applicable airline ownership regulations. (FEDEX1)

‘The €4.4 billion acquisition combines the strengths of the companies – the world’s largest air express network and an unparalleled European road network, which will expand the existing FedEx portfolio and reshape the global transportation and logistics industry.’ (TNT7)
‘The Combination presents a highly pro-competitive proposition for the provision of small package delivery services within and outside Europe. The networks of TNT Express and FedEx are largely complementary, given that FedEx’s strength is providing US domestic and extra-EEA international services, while TNT Express’ focus is on providing intra-European services. The Combination would allow the parties to sell a more competitive e-commerce offering in the market, which should benefit consumers and SMEs in Europe and beyond.’ (FEDEX4)

**Information strategy**

The provided data by FedEx was mentioned as well: ‘Given the inherent limitations of the market share data submitted by FedEx for the purpose of the competitive assessment in this case and in line with the Commission’s approach in the UPS/TNT case, the Commission undertook a market reconstruction exercise.’ (EC6§20)

Although the Phase II investigation was initiated, no indicators appear about missing, incorrect or misleading information provided by FedEx yet. The filing of extra comments is noticed: ‘The Parties submitted their written comments to the 6(1)(c) decision on 12 August 2015.’ (EC9)

FedEx filed internal documents to underpin their statement that FedEx and TNT Express are no competitors: ‘Also the Parties’ internal documents confirmed that they do not perceive each other as particularly close competitors. Moreover, a clear majority of the Parties’ customers does not see the Parties as particularly close competitors either (e.g. in terms of pricing, range and quality of services, reliability, geographical reach, track and trace etc.). Moreover, customers view FedEx as weaker than the other three integrators in the markets for international intraEEA express delivery services. Last, notwithstanding a number of limitations identified, the bidding analysis submitted by the Parties provided further confirmation that FedEx is a weaker competitor for TNT than DHL and UPS.’ (EC6§24-25)

**Remedy strategy**

The summary of the decision by the European Commission regarding the FedEx – TNT Express deal does not show any offered remedies or commitments. This could be explained by the fact that the European Commission did not deliver a Statement of Objections in the FedEx – TNT Express case, because no competition concerns were expected to arise (which had to be eliminated).

**Appeals**

No appeals were filed by FedEx.
Like UPS, FedEx tried to engage in the decision by the European Commission regarding the UPS – TNT Express deal in 2012, by pleading to be a interested third person. ‘Three competitors of the merging entities, i.e., DHL, FedEx, and GeoPost, and one airport, i.e., Liege Airport, demonstrated “sufficient interest” within the meaning of Article 18(4) of the Merger Regulation and were, thus, given the opportunity to be heard as third persons in writing and orally.’ (EC8)
6. Conclusion

This chapter will first provide the discussion, in which the results retrieved from the previous chapter will be discussed. The second paragraph will provide the conclusions of this study by answering the research question and the sub-questions. Next and concluding, the limitations of this study and possible future research will be discussed.

6.1 Discussion

The first part of the analysis consisted of a comparison between two merger proposals, of which one is approved and one is obstructed by the European Commission. The fact that (a) TNT Express was the targets in both deals; (b) the deals took place in the same business industry; and (c) the same legal framework was used to assess both notifications and to reach two decisions, made the comparison extremely interesting. When both decisions were analyzed, a similar structure could be noticed. The six steps identified and described by Facey & Huser (2004) were followed in both decisions, which confirms their position that the European Commission complies with its own guidelines. A small deviation in the FedEx decision is noticeable during the process though, which should be analyzed to determine if the trend has been reversed. Unfortunately, the full decision by the European Commission regarding the FedEx – TNT Express is not published yet. While countervailing bargaining power by customers, likelihood of entry and the different kinds of effects are explicitly mentioned in the UPS – TNT Express decision, these steps are discussed in a more intertwined manner in the FedEx – TNT Express decision. The latter decision also focuses on the respondents of the European Commission its market investigation. The question arises why the European Commission did not explicitly mention the outcomes of the consumer investigation in the UPS decision as well. Perhaps, a small shift from the beaten track is noticeable.

The main differences between the decisions will not be found in the procedure though. As mentioned before, defining the relevant market is one of the most difficult and most discussed parts of the merger control procedure. Remarkable differences can be found in the definition of the relevant markets in both decisions. The European Commission revokes its own position in the FedEx – TNT Express decision because it is not separating express delivery services from the standard delivery services anymore. Now, express delivery and standard delivery services are considered to be
one market, this could be in favor of FedEx when its market share is calculated. But, the European Commission does additionally assess Extra-EEA markets and all the integrators in the FedEx – TNT Express deal though.

While both UPS and FedEx continuously substantiated that their services and TNT Express its services are complementary, only FedEx and TNT Express were considered to be no particularly close competitors regarding international intra-EEA express delivery services. DHL, UPS and TNT Express were considered to be close competitors in this market. FedEx was excluded from being a close competitor in 2012, as well. So actually, not much seems to have changed between 2012 and 2015.

With respect to the barriers to entry, the European Commission values the fact in the UPS decision that no major entry over the last 20 years was noticed. The European Commission does not mention the barriers to entry in the (summarized) FedEx decision.

Regarding the efficiencies in both decisions, the involved organizations submitted information to underpin their position about the efficiencies, which are expected to be created when the deal would be approved. The European Commission assessed the efficiencies, as expected, on consumer benefit, merger-specificity and verifiability. UPS pointed out the expected significant economies of density and of economies of scope, improved service quality, transactional efficiencies by combining their complementary networks and out-of-market efficiencies. All suggested efficiencies were ought to be merger-specific, but were declared non-verifiable. Regarding the FedEx decision, cost savings and air network cost savings were considered to be the main efficiencies, supported by the expected effective competition with UPS and DHL. Only these efficiencies submitted by FedEx were considered to be resulting in relevant efficiencies under the three-pronged test set, while the efficiencies submitted by UPS were considered to be merger-specific, beneficial for consumers, but not sufficiently verifiable.

It does not seem that the European Commission is clinging to the past, but made a decent decision by using an analysis in the FedEx – TNT Express decision which is in line with the analysis used in the UPS – TNT Express decision. Do mind, using the same sort of analysis but changing the relevant market in the beginning of the analysis could result in divergent outcomes though.

The consequences of the (minor) differences between the procedures used in both decisions can be more substantiated when the extensive decision of the FedEx – TNT Express deal will be published.
The second part of the analysis was focused on finding patterns of actions and reactions, and certain behavior by involved organizations, while dealing with the European Commission during the merger control procedure. Most indicators pointed at individual approaches, when considering the level of participation. TNT Express even showed signs that it almost distanced itself from certain issues, like during the appeal of UPS.

Several elements were pointed out and discussed in the previous chapter. First of all, each of the organizations expressed their confidence in getting the proposed deal approved by the European Commission multiple times. In most of the press releases indicators were found of the organizations expressing their trust in the intended deal and using corresponding positive statements. Although these press releases are probably intended for shareholders, different stakeholders, like the European Commission itself, could read these statements as well. These approaches are definitely indicating a responsive or bargaining strategy (while still assuming that organizations will not try to build relationships with regulatory institutions). Furthermore, all three organizations expressed their willingness to comply with applicable regulations multiple times, again indicating a bargaining or responsive strategy. Both organizations (unintendedly) use these strategies, because of the fact that they are waiting (and showing that to the public) for clearance from all relevant competition authorities before closing the deal. Actually, indications show that the approvals by different competition authorities were part of the official deals. Awaiting for the approval from e.g. the Chinese and Brazilian competition authorities was crucial for involved organizations as well.

Remarkable in this case is actually that both UPS and FedEx emphasize quite the same expected efficiencies and both organizations believe, or are trying to let others believe, that their businesses and TNT Express its businesses are complementary. One can assume that these approaches were used to influence the European Commission which needed to assess and analyze both cases. Eventually, only FedEx was proven to be right by the European Commission.

When focusing on information strategy, as one of the strategies mentioned by Hillman & Hitt (1991), different tactics were noticed in both merger control processes. Especially UPS showed different tactics regarding information strategy, even after the European Commission had reached its decision. First, UPS (and FedEx probably as well) tried several times to change the definition of the relevant market in its favor. Second, UPS was requested for further information because there was a lack of information in the notification. Prove that UPS was withholding information is not available. Third, UPS was not in time, when it needed to hand in certain data. Fourth, some data from UPS was
declared unreliable. Both UPS and FedEx handed in several internal documents to underpin their positions though. Concluding, especially UPS showed signs of recalcitrant behavior considering information strategy.

As suspected, remedies were offered to the European Commission during the notification procedure by UPS. UPS offered remedies three times, to eliminate the doubts as to the compatibility of the intended deal with the common market. Although, it contained structural and behavioral remedies, they were not converted in commitments and not considered to be sufficient enough. The FedEx – TNT Express deal was unconditionally approved and no indicators of offered remedies were present. It is still not sure if the divestment of TNT Express its airline operations is considered to be a remedy, because the divestment is continued during the FedEx – TNT Express deal as well and could be explained by European regulations.

UPS showed indications of recalcitrant approaches several times as well. It appealed against two decisions which were not in its favor. UPS is still awaiting their appeal on its case dating from 2013, and did not win that much time when trying to slow down the merger. At this point, one cannot say with certainty that appealing against the decision by the European Commission is a corporate political approach, or simply an attempt to frustrate FedEx. Although, UPS did not appeal the decision of the European Commission that approved the intended merger of FedEx and TNT Express either. One of the explanations could be that the European Commission stressed that not much has changed in about three years, and so UPS is still ought to be a large competitor for TNT Express and FedEx is not. But why is UPS still waiting its appeal? Because it believed that the decision was not based on the right motives? Was it trying to influence the European Commission and hoping for courtesy when TNT Express went looking for a buyer during the FedEx process? This could mean a small shift towards a relational approach. If the European Commission would ask for stringent conditions to approve the deal, perhaps some departments needed to be sold which then could be bought by UPS? Unfortunately this cannot be substantiated.

The analysis carried out in the previous chapter resulted in lots of indications of the use of information strategies and the use of several corporate political strategies, ranging from responsive and bargaining to recalcitrant and non-bargaining, to influence the (decision by the) European Commission.
6.2 Conclusion

The existence of institutions in the nonmarket environment is indispensable. The nonmarket environment is usually defined by four elements: (a) issues, (b) institutions, (c) interests and (d) information. A regulative institution is necessary in the nonmarket environment to constrain and regularize behavior. These institutions can influence organizations to behave in certain patterns repeatedly while noncompliance will result in regulatory sanctions in most cases. To maintain fair and effective competition in the European Union, a competition authority needs to constantly monitor the (internal) market and have the possibility to intervene when necessary. In the European Union it is the European Commission that assesses concentrations with a Community dimension, before execution of the deal, on their compatibility with the internal market. If necessary, the European Commission can obstruct the intended deal to maintain fair and effective competition. Because of the fact that the European Commission can obstruct certain mergers and acquisitions, it has an enormous influence on organizations. Organizations need to submit a notification about their intended deal and must comply with set regulations, enforced, and partly designed by the European Commission. If involved organizations do not comply, the deal will most likely be obstructed. The European Commission uses a broad legal framework that exist of treaties, regulations, notices and guidelines to assess the proposed merger or acquisition. The entire legal framework is accessible to the public to enhance legal certainty. The European Commission uses six main steps in their analysis to reach a decision: (1) Defining the relevant markets; (2) Determining a possible dominant position on the market; (3) Identifying possible effects; (4) Checking for preservation of effective competition; (5) Checking for a failing firm defense; and (6) Judging if efficiencies will be created. During the entire merger control process, organizations are trying to influence the (outcome of the) decision by the European Commission, by means of information strategies. These strategies will be primarily used to provide (countering) information or to withhold certain information. Remedies will be offered as well by organizations as attempt to eliminate the doubts as to the compatibility of the deal with the internal market. Furthermore, organizations can choose to use strategies that focus on compliance or can choose more recalcitrant strategies to rub the European Commission up the wrong way.

At first sight, it appeared that a change in defining the relevant market by the European Commission was one of the main reasons for the approval of the FedEx – TNT Express deal. When analyzing more thoroughly, one could determine a lightly changed market, but a lack of change in the characteristics and positions of the involved organizations in the past years. In the UPS – TNT Express decision and in
the FedEx – TNT Express decision, UPS and TNT Express are supposed to be close competitors while FedEx and TNT Express are actually not supposed to be close competitors at all. This statement can be supported by the fact that no remedies were offered by FedEx, and UPS did not appeal the decision regarding the FedEx – TNT Express deal. This major factor is considered to be the main difference in the obstruction of the UPS – TNT Express deal and the approval of the FedEx – TNT Express deal.

6.3 Limitations

Although the research question could be, and is answered, the limitations of this study should be mentioned in as well. First, one of the main limitations of this study is the usage of a case study in the research design. A case study is the best method to examine this subject and to answer this specific research question but it focuses extremely on one particular subject (in this case two intended mergers). This results in an extremely low generalizability. The results are not easily applicable to other mergers, other organizations or other competition authorities. The latter matter will lead to the second limitation. Now, only one competition authority, the European Commission, is analyzed. It would be ideal to examine more than one competition authority to compare the results retrieved from this cases study and get a better understanding of the entire procedure regarding premerger notifications. Because of a high level of confidentiality for merger documents, it was not possible to add the Federal Trade Commission in this study (it solely publishes granted or not granted). The third limitation of this research is that only documents were used for the analysis. An observation would not be appropriate to analyze this matter but several interviews would have contributed to a more detailed and broadened analysis (although it would have weakened the objectivity). But, as mentioned earlier it would be hard to question organizations about their recalcitrant (re)actions towards competition authorities and, the other way around, competition authorities are not likely to discuss confidential cases. So in this case, it was decided to not use interviews. A fourth limitation is the fact that only one researcher did the entire analysis. For a better score on reliability and validity it would be better to have at least two researchers. With two or more researchers results and divergences in for example coding could have been compared and discussed. Fifth and last limitation is the fact that it is not always clear in this study if certain (re)actions by involved organizations were aimed at corporate political approaches or at activities to obstruct the competitor.
6.4 Future research

Considering the limitations mentioned in the previous paragraph, different ideas with regard to future research could be mentioned. First, it would be interesting to expand this study in several ways: (a) analyzing another case in which one merger was blocked first and the second was approved, (b) doing a quantitative research on competition authorities and the nonmarket strategies of organizations, (c) adding more competition authorities in the research (like the Federal Trade Commission or the Conselho Administrativo de Defesa Econômica). Second, like mentioned in chapter three, a difference between organizations which will merge nationally and organizations which merger internationally probably exists. A study to endorse this expectations would be very useful. Third and last, considering the possible recalcitrant strategies, one could extensively examine the effects of the use of recalcitrant strategies. Does the use of an recalcitrant strategy really negatively influence an organization?
7. References

7.1 Literature


### 7.2 Regulations


COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (“EU Regulation 1/2003”)


Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03) (“Horizontal Merger Guidelines”)

COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law (97/C 372/03) (“Market definition notice”)

FORM CO RELATING TO THE NOTIFICATION OF A CONCENTRATION PURSUANT TO REGULATION (EC) No 139/2004 (“CO Form”)
### Appendix I

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#### Defining relevant markets

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| Recalcitrant | Rather fighting than conceding |
Appendix III

Press releases by TNT Express (TNT):

1. TNT mobilises fleet to deliver aid to Nargis victims in Myanmar -
2. TNT ships 110 tonnes of food aid to Pakistan on World Food Day -

Press releases by UPS (UPS):

2. UPDATE ON DISCUSSIONS BETWEEN UPS AND TNT EXPRESS - [http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTQzNzk1fENoaWxkSUQ9LTF8VHlwZT0z&t=1](http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTQzNzk1fENoaWxkSUQ9LTF8VHlwZT0z&t=1)
3. UNITED PARCEL SERVICE AND TNT EXPRESS TO CREATE A GLOBAL LEADER IN THE LOGISTICS INDUSTRY - [http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTMzMDE5fENoaWxkSUQ9LTF8VHlwZT0z&t=1](http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTMzMDE5fENoaWxkSUQ9LTF8VHlwZT0z&t=1)
4. UPS BOARD DECLARES DIVIDEND - [http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTQzNzQ4fENoaWxkSUQ9LTF8VHlwZT0z&t=1](http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTQzNzQ4fENoaWxkSUQ9LTF8VHlwZT0z&t=1)
5. FINANCING FOR UPS OFFER TO TNT EXPRESS IN PLACE - [http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTQzNzQ0fENoaWxkSUQ9LTF8VHlwZT0z&t=1](http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTQzNzQ0fENoaWxkSUQ9LTF8VHlwZT0z&t=1)
8. UPS and TNT Express Acquisition Expected to be Completed in Fourth Quarter 2012 - http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTQ1Njc0OFEnoaWxkSUQ9LT8VHlwZT0z&t=1
9. UPS Public Offer for TNT Express Extension of Offer Period - http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTUwNTM3fENoaWxkSUQ9LT8VHlwZT0z&t=1
10. UPS Public Offer for TNT Express – Offer Period extended until 9 November 2012; EU Competition Review Extended, Moves Completion Date - http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDc4NzM5fENoaWxkSUQ9NTExOTUxZFR5cGU9MQ==&t=1
11. United Parcel Service and TNT Express Receive Statement of Objections - http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTU3Njk5fENoaWxkSUQ9LT8VHlwZT0z&t=1
12. UPS Public Offer for TNT Express – Extension of Offer Period - http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTYwMDI2fENoaWxkSUQ9LT8VHlwZT0z&t=1
13. UPS and TNT Express announce remedies have been submitted to the European Commission - http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTYzNjMxfENoaWxkSUQ9LT8VHlwZT0z&t=1
15. UPS Statement Regarding the European Commission’s Summary of its Decision Blocking the TNT Acquisition - https://pressroom.ups.com/pressroom/ContentDetailsViewer.page?ConceptType=PressReleases&id=1426329932836-855

Press releases by FedEx (FEDEX):


News articles (NEWS):


3. UPS’s international footprint to grow with TNT deal - [http://www.reuters.com/article/us-ups-tnt-deal-idUSBRE82H0D320120319](http://www.reuters.com/article/us-ups-tnt-deal-idUSBRE82H0D320120319)

4. UPS Applauds TNT on its 10 Years of Support to the World Food Programme - [http://parcelindustry.com/print-article-3313-permanent.html](http://parcelindustry.com/print-article-3313-permanent.html)


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10. FedEx rebuffs UPS over TNT Express assets - [https://www.ft.com/content/2ffc3488-58b7-11e2-bd9e-00144f3eb49a](https://www.ft.com/content/2ffc3488-58b7-11e2-bd9e-00144f3eb49a)


Documents by the European Commission (EC):


Documents by the Federal Trade Commission (FTC):


Documents involving the Court of Justice (CURIA):

1. InfoCuria Case-law of the Court of Justice - Case T-194/13 United Parcel Service v Commission - http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30db1e81265da4f94f268ae7edcfd8561e3f.e34KaxILc3gMb40Rch0SaxuMa3z0?text=&docid=137696&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=270316