Reports of Cases

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

13 November 2024*

(Competition – Concentrations – German markets for TV services and telecommunications services – Decision declaring the concentration compatible with the internal market and the EEA Agreement – Commitments – Assessment of the horizontal and vertical effects of the transaction on competition – Competitive relationship between the parties to the concentration – Merger-specific change – Manifest error of assessment)

In Case T-69/20,

Tele Columbus AG, established in Berlin (Germany), represented by C. Wagner and J. Hackl, lawyers,

applicant,

v

European Commission, represented by G. Conte, A. Keidel, J. Szczodrowski and C. Vollrath, acting as Agents,

defendant,

supported by

Vodafone Group plc, established in Newbury (United Kingdom), represented by V. Vollmann, Solicitor, C. Jeffs, A. Chadd and D. Seeliger, lawyers,

intervener,

THE GENERAL COURT (Seventh Chamber, Extended Composition),

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

Registrar: S. Jund, Administrator,

having regard to the written part of the procedure,

further to the hearing on 22 September 2023,

* Language of the case: German.

gives the following

Judgment [1]

1 By its action under Article 263 TFEU, the applicant, Tele Columbus AG, seeks the annulment of Commission Decision C(2019) 5187 final of 18 July 2019 declaring the concentration involving the acquisition by Vodafone Group plc of certain assets of Liberty Global plc to be compatible with the internal market and the EEA Agreement (Case COMP/M.8864 – Vodafone/Certain Liberty Global Assets) ('the contested decision').

…

II. Procedure and forms of order sought

…

48 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

49 The Commission and Vodafone contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

III. Law

…

A. The first plea in law, alleging manifest errors of assessment and procedural irregularities in the examination of horizontal non-coordinated effects on the MDU market

…

1. The first part: a manifest error of assessment affecting the assessment of whether the merging parties are direct competitors

…

82 In that regard, it should be stated that there is direct competition between undertakings when they compete for the same customers.

[1] Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

83 In the present case, it is not disputed that the cable networks of the merging parties do not overlap and that, in fact, where an MDU customer wishes to conclude a contract with a television signal provider, it is, in principle, only able to choose between (i) the party to the concentration within whose cable footprint the building to be connected is located and (ii) one of its competitors, such as the applicant. Whether the MDU market was, prior to the transaction, national in scope or limited to the cable footprint of the merging parties makes no difference since that finding applies in both cases.

84 It follows that Unitymedia could not validly be classified as an 'alternative supplier' to housing associations on the MDU market, which, according to the applicant, the concentration would eliminate. It also follows from the foregoing that the products marketed by the merging parties were not, in practice, in competition, irrespective of the geographical definition of the MDU market, so that the first part of the present plea cannot succeed.

85 The other arguments put forward by the applicant are not capable of demonstrating the contrary.

86 With regard, first of all, to the applicant's allegation that the activities of the merging parties overlapped, it should be noted that although there was no overlap between Vodafone's and Unitymedia's cable networks, which the applicant does not call into question, it is true that, in the contested decision, the Commission found that there were nevertheless certain overlaps between their activities, since those operators purchased, in that case, intermediary services for the transmission of TV signals from the other party or from another level 3 network operator in order to be able to reach the MDU customers concerned.

87 It should be noted that the applicant does not call into question the figures, as such, disclosed by the Commission during the proceedings before the Court regarding the contracts concluded by the merging parties outside their cable footprints or the number of customers concerned, although it does dispute that those figures were negligible. In that regard, it must be stated that those figures show that those agreements represented (i) a very limited number of MDU customers in terms of households connected and (ii) a market share so negligible, since it was less than 1%, that it could not represent residual competition needing protection.

88 With regard, next, to the applicant's allegation that the commercial strategy of the merging parties could evolve, with the result that they could decide to expand their activities outside their respective cable footprint, it must be stated that such an assertion relates to the existence of potential competition, rather than to alleged existing direct competition, which renders it ineffective in the context of the first part of the present plea.

89 The same applies with regard to the applicant's allegation that the cumulation of market shares and the Herfindahl-Hirschman Index on the MDU market, defined as national in scope, is very high, since that data is not intended to show that there is direct competition between two parties prior to the concentration. With regard, in particular, to the Herfindahl-Hirschman Index, which is equal to the sum of the squares of the individual market shares of each of the undertakings in the market, it must be stated that that index is used to measure concentration levels on a particular market and that it can give an initial indication of the competitive pressure in the market post-merger (see, to that effect, judgment of 7 June 2013, *Spar Österreichische Warenhandels* v *Commission*, T-405/08, not published, EU:T:2013:306, paragraph 65).

90 It follows from all of the foregoing that the applicant has not demonstrated that the Commission's finding in the contested decision that the merging parties were not direct competitors prior to the concentration was manifestly incorrect. The first part of the present plea must, consequently, be rejected.

2. The fourth part: a manifest error of assessment affecting the assessment of whether the merging parties were indirect competitors

…

103 As a preliminary point, it should be noted that undertakings which are not direct competitors may nonetheless be indirect competitors, in particular where they are subject to similar competitive pressures from undertakings other than each of them, directly, or where other factors, such as requirements imposed by customers, limit comparably their ability to set their prices and commercial conditions.

104 In that regard, it should be observed that the applicant's arguments, described, in essence, in paragraphs 98 to 101 above, are highly general, are not supported by any evidence and are based on vague allegations, which cannot be sufficient to call into question the assessments made by the Commission. The only specific argument is based on the prices and characteristics of the internet and telephone bundle offers. Since they concern other markets, the prices and characteristics of the offers referred to by the applicant are not relevant to assessing whether there was indirect competition on the MDU market, which concerns TV signal transmission.

105 In addition, it is apparent from the contested decision (see in particular recital 697 of the contested decision), and it is not disputed by the applicant, that many contracts with MDU customers are the result of negotiations, bids or formal tender procedures, which are in principle confidential. Contrary to the applicant's assertion, the contracts concluded by the merging parties with their MDU customers are therefore not standard contracts, the terms and conditions of which could be influenced by the other party's offer in its cable footprint or by certain operators active at national level.

106 It should also be noted that, in the contested decision, the Commission explained, first, that the examination of the merging parties' internal documents had provided no evidence suggesting that those parties took into account each other's respective terms and conditions in negotiations relating to MDU contracts and, second, that the parties to the concentration had put forward convincing evidence to challenge MDU agreements being aligned throughout Germany. The fact that the applicant does not regard such findings as 'plausible' is not sufficient to call them into question.

107 Therefore, the applicant has not shown that the Commission manifestly erred in finding in the contested decision that the merging parties were not indirect competitors.

108 In so far as the applicant has not demonstrated that the Commission made a manifest error of assessment when it concluded that the transaction would not result in the loss of any indirect competition, the present complaint must be rejected, there being no need to assess whether it erred in finding that indirect competition had to be particularly strong or that systematic transmission of the conditions was necessary.

109 The fourth part of the present plea must, therefore, be rejected.

3. The third part: manifest error of assessment and infringement of the right to be heard and of the principle of sound administration affecting the assessment of whether the merging parties were potential competitors

…

(a) The Commission's manifest error of assessment, in that it relied exclusively on subjective investment criteria and internal documents of the merging parties

…

139 In that regard, in the first place, it should be recalled that, in matters relating to the control of concentrations, according to settled case-law, the examination of the conditions of competition is based not only on existing competition between undertakings already present on the relevant market, but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to enter the relevant market and compete with established undertakings (see judgment of 4 July 2006, *easyJet* v *Commission*, T-177/04, EU:T:2006:187, paragraph 116 and the case-law cited).

140 In order to determine whether an undertaking is a potential competitor in a market, the Commission is required to determine whether, in the absence of the concentration at issue, there would have been real concrete possibilities for it to enter that market and to compete with undertakings established therein. Such a demonstration must not be based on a mere hypothesis, but must be supported by evidence or an analysis of the structures of the relevant market. Accordingly, an undertaking cannot be described as a potential competitor if its entry into a market is not an economically viable strategy (see, by analogy, judgment of 29 June 2012, *E.ON Ruhrgas and E.ON* v *Commission*, T-360/09, EU:T:2012:332, paragraph 86 and the case-law cited).

141 Moreover, the economic viability of a market entry strategy does not amount simply to such a strategy being profitable. If that were the case, a mere theoretical ability to enter a market could be regarded as sufficient to establish that potential competition exists. Therefore, the Commission may take account of the commercial or economic interest in entering a market on the part of the undertaking whose status as a potential competitor is under analysis (see, to that effect, judgments of 21 September 2005, *EDP* v *Commission*, T-87/05, EU:T:2005:333, paragraphs 177, 185, 187, 188, 191 and 195, and of 4 July 2006, *easyJet* v *Commission*, T-177/04, EU:T:2006:187, paragraph 123) and, therefore, rely on its investment criteria. Accordingly, the Commission cannot classify an undertaking as a potential competitor on the basis of general, abstract considerations without taking into account the commercial interests of that undertaking, its short-term and medium term development strategy and the profitability criteria which it has set itself for that purpose.

142 It follows that where the Commission observes, first, that the undertaking concerned has taken no steps to enter the market within a sufficiently short period of time, calculated in the light of the characteristics of the market, second, that that undertaking does not believe that it is economically rational and attractive for it to enter the market and, therefore, third, that that undertaking is not intending to undertake significant market entry in the future, it may, without making a manifest error of assessment, conclude that the undertaking in question is not a potential competitor of the other party to the concentration. That finding is sufficient to reject

the applicant's first complaint, that the Commission failed in the present case to have due regard to the relevant criteria for examining potential competition by relying almost exclusively on subjective investment criteria and on internal documents of the merging parties.

143 In the second place, as regards the applicant's allegation that the Commission was not entitled to rely on the merging parties' investment criteria, given that those criteria could have been modified at any time, or even manipulated, and that they were not industry practice, it must be recalled that the economic viability of a market entry strategy does not amount simply to such a strategy being profitable and that the Commission may rely on the commercial or economic interest in entering a market on the part of the undertaking whose status as a potential competitor is under analysis (see paragraphs 140 and 141 above) and, consequently, on its investment criteria.

144 In view of the need for speed and the very tight deadlines to which the Commission is subject in merger control proceedings, the Commission cannot be required, in the absence of evidence indicating that information provided to it is inaccurate, to verify all the information it receives. Although the diligent and impartial examination which the Commission is obliged to carry out in the context of that procedure does not permit it to base itself on facts or information which cannot be regarded as accurate, the abovementioned need for speed presupposes, however, that it cannot itself verify down to the last detail the authenticity and reliability of all the information it receives, since the procedure for the control of concentrations is based, of necessity and to a certain extent, on trust (judgment of 7 May 2009, *NVV and Others* v *Commission*, T-151/05, EU:T:2009:144, paragraph 184).

145 In addition, it should be pointed out that various measures to discourage and punish the communication of inaccurate or misleading information are provided for in the legislation applicable to the control of concentrations. Parties which notify a concentration are, under Article 4(1) and Article 6(2) of Regulation No 802/2004, subject to an express obligation to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for the decision on compatibility, since penalties in respect of that obligation are laid down in Article 14 of Regulation No 139/2004. Furthermore, the Commission may also, on the basis of Article 6(3)(a) and Article 8(6)(a) of Regulation No 139/2004, revoke the decision on compatibility if that decision is based on incorrect information for which one of the undertakings is responsible or where it has been brought about by deceit (judgment of 7 May 2009, *NVV and Others* v *Commission*, T-151/05, EU:T:2009:144, paragraph 185).

146 Lastly, it should be noted, (i) that it is apparent in particular from recital 742 of, and footnote 553 to, the contested decision that the Commission verified the merging parties' projections, in which they examined the profitability, in the light of their investment criteria, of a number of infrastructure deployment projects, and concluded that the results of those projections were sufficiently robust and, (ii) that the Commission did not rely solely on the merging parties' investment criteria in order to conclude that they were not potential competitors, but took account, inter alia, of the fact that, in practice, neither Vodafone nor Unitymedia had ever overbuilt the other party's cable infrastructure and that the parties' expansions within their own cable footprint had been negligible, even though such an internal expansion was more profitable.

147 The applicant's second complaint concerning the reliability of the merging parties' investment criteria cannot, therefore, be upheld.

148 In the third place, with regard to the Commission's decision of 16 June 2011 in Case M.5900 – LGI/KBW, to which the applicant refers, it should be pointed out that, in that decision, the Commission referred the concentration which had been notified to it and which related to the acquisition of KBW by LGI to the competent authorities of the Federal Republic of Germany, in accordance with Article 9(3)(b) of Regulation No 139/2004, after finding that the conditions for referral under Article 9(2)(a) of Regulation No 139/2004 were satisfied. In such a referral decision, the Commission does not give a ruling on the compatibility of a concentration with the internal market (see, to that effect, judgments of 3 April 2003, *Royal Philips Electronics* v *Commission*, T-119/02, EU:T:2003:101, paragraph 275, and of 30 September 2003, *Cableuropa and Others* v *Commission*, T-346/02 and T-347/02, EU:T:2003:256, paragraph 52). The purpose of the contested decision is not to give a ruling on the effects of the concentration on the relevant markets which are the subject of the referral, but to transfer responsibility for that examination to the national authorities which have requested the referral in order that they may give a ruling in accordance with their national competition law (see, to that effect, judgments of 3 April 2003, *Royal Philips Electronics* v *Commission*, T-119/02, EU:T:2003:101, paragraph 276, and of 30 September 2003, *Cableuropa and Others* v *Commission*, T-346/02 and T-347/02, EU:T:2003:256, paragraph 53).

149 Moreover, in a referral decision, the Commission cannot, without depriving such a mechanism of its substance, conduct an examination of the compatibility of the concentration in such a way as to bind the national authorities in regard to their substantive findings but must merely establish whether, prima facie, on the basis of the evidence available to it at the time when it assesses the merits of the request for referral, the concentration whose referral is requested threatens to create or strengthen a dominant position on the relevant markets (see judgment of 30 September 2003, *Cableuropa and Others* v *Commission*, T-346/02 and T-347/02, EU:T:2003:256, paragraph 217 and the case-law cited).

150 It must therefore be held that, in the decision of 16 June 2011 in Case M.5900 – LGI/KBW, the Commission did not make any definitive assessment of whether the merging parties were possibly potential competitors. That assessment is, moreover, confirmed by the fact that the decision is worded in hypothetical terms.

151 Furthermore, even if such an assertion by the applicant concerning Case M.5900 – LGI/KBW were correct, it is sufficient to recall that the Commission is not bound, in any event, by its previous practice. It must be noted that when the Commission takes a decision on the compatibility of a concentration with the internal market on the basis of a notification and a file pertaining to that transaction, an applicant is not entitled to call the Commission's findings into question on the ground that they differ from those made previously in a different case, on the basis of a different notification and a different file, even where the markets at issue in the two cases are similar, or even identical (judgments of 14 December 2005, *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraph 118, and of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 142).

152 With regard to the decisions of the Federal Cartel Office relied on by the applicant, it must be stated that, having regard to the clear division of powers on which Regulation No 139/2004 is based, decisions taken by the national authorities cannot be binding on the Commission in proceedings for the control of concentrations (see, to that effect, judgments of 18 December 2007, *Cementbouw Handel & Industrie* v *Commission*, C-202/06 P, EU:C:2007:814, paragraph 56, and of 7 May 2009, *NVV and Others* v *Commission*, T-151/05, EU:T:2009:144, paragraph 139), a fortiori where they concern the parties to a concentration and another period.

153 It follows from the foregoing that the Commission did not make a manifest error of assessment in taking into account the investment criteria and internal documents of the merging parties, in order to determine whether or not they ought to be regarded as potential competitors.

(b) The manifest error of assessment made by the Commission, in that it failed to take sufficient account of other factors

…

160 In that regard, as regards, in the first place, the opinion of the undertakings already active on the market in question, expressed during the market investigation, it must be pointed out that the Commission is entitled to take that into account. However, that criterion cannot be decisive in assessing whether potential competition exists.

161 In any event, while the opinions of competitors may constitute an important source of information on the foreseeable impact of a concentration on the market, they cannot bind the Commission when it makes its own assessment of the impact of a concentration on that market (see, to that effect, judgments of 25 March 1999, *Gencor* v *Commission*, T-102/96, EU:T:1999:65, paragraphs 290 and 291, and of 5 October 2020, *HeidelbergCement and Schwenk Zement* v *Commission*, T-380/17, EU:T:2020:471, paragraph 673 (not published)).

162 In any event, it must be noted that it is apparent from recitals 727, 728, 752 and 753 of the contested decision that the Commission did indeed take account of the opinions of competing operators, since it follows from those recitals that it undertook a thorough examination of whether there was potential competition between the merging parties, on account, inter alia, of the observations made by those operators.

163 With regard to the applicant's allegations that the merging parties were already active in each other's cable footprint, that Vodafone had already made investments in Unitymedia's cable footprint or that those parties monitored each other's activities, it must be stated that those factors relate to the alleged existence of actual direct or indirect competition, which renders such an allegation ineffective in the context of the present part of the present plea which concerns potential competition. In any event, it is apparent from the examination of the first and second parts above that the Commission made no manifest error of assessment in concluding, in the contested decision, that the merging parties were not, on the MDU market, either direct competitors or indirect competitors.

164 It follows from the foregoing that the applicant's first complaint must be rejected.

165 As regards, in the second place, the applicant's allegation that the Commission, after having found that smaller operators made investments outside their coverage areas, ought to have concluded that Vodafone and Unitymedia were also in a position to do so, it must be stated that the Commission explained, in the contested decision, why those strategies did not apply to the merging parties.

166 With regard, more particularly, to the applicant's situation, the evidence set out in recital 744(a) and in recitals 797 to 799 of the contested decision, which the applicant does not dispute, as such, indicates that the applicant had not carried out any significant overbuild of cable infrastructure during the years before the contested decision was adopted. In particular,

Figure 20 set out in recital 798 of the contested decision shows that the number of households connected to the applicant's network did not increase significantly between 2012 and 2018, except as a result of the acquisition of pre-existing assets from other companies.

167 With regard to Deutsche Telekom, it is apparent from recital 744(c) of the contested decision and from that operator's reply cited therein that its situation was very different from that of the merging parties, in particular because Deutsche Telekom already had a very extensive fibre network and that it used to provide broadband access services via digital subscriber line (DSL) technology, which the applicant does not dispute. Consequently, in order to expand its offer to MDU customers in new areas, Deutsche Telekom could rely on its own fibre optic lines or its existing ducts and generally needed to build only short parts of the necessary level 3 network.

168 It follows that the instances of cable overbuild carried out by those operators do not call into question the Commission's assessments of potential competition between the merging parties.

169 Therefore, the applicant's second plea must be rejected.

170 As regards, in the third place, the fact that the Commission did not take into account Vodafone's existing infrastructure, in particular in Unitymedia's cable footprint, and the fact that similar costs would have been necessary in order to expand a cable network, whether inside or outside the merging parties' cable footprint, it must be stated that it is apparent from recital 740 of the contested decision that the projections made by Vodafone and verified by the Commission did indeed take account of that operator's existing infrastructure and the deployment of 5G, which did not, however, make cable overbuild sufficiently profitable.

171 In addition, it must be stated that, in recital 737 of the contested decision, the Commission found that cable overbuild was not attractive overall to Vodafone, '[particularly when compared to adding] new homes within its existing cable footprint [which] requires less infrastructure to be built … and offers higher revenue opportunities given the absence of an incumbent cable operator'. It follows that the Commission found that a cable overbuild outside its footprint proved less profitable than an extension of the cable network within its own territory, which the applicant does not dispute. In the present case, the applicant merely submits that the costs associated with the development, by a cable operator, of its network within its cable footprint would have been similar to the costs incurred in extending its cable network outside its coverage area, without in any way substantiating such a claim, and in particular without disputing that evidence put forward by the Commission.

172 Meanwhile, it must be observed that, in two passages disclosed by the Commission pursuant to the order of 30 March 2023, of recitals 736 and 759 of the contested decision, the Commission indicated that it had found that, over the last five years, the merging parties had undertaken only a negligible extension of their network within their respective cable footprint or close to it. That finding, which the applicant did not challenge in its observations of 2 June 2023, confirms the Commission's conclusion that an extension by the merging parties into the cable footprint of the other party was unlikely absent the transaction. If Vodafone and Unitymedia's extension of their cable network had only been negligible within their respective cable footprint prior to the transaction, it was indeed unlikely that they would extend their cable network outside their footprint, and in particular into that of the other party, since such an extension was less profitable than an extension within their own respective cable footprints.

173 Therefore, the third complaint put forward by the applicant cannot succeed.

174 As regards, in the fourth place, the applicant's allegation that the Commission failed to take account of the fact that Vodafone and Unitymedia could have competed on something other than via infrastructure, it must be stated that, contrary to the applicant's allegations, the Commission did not confine itself to examining the likelihood of potential competition by means of cable overbuild, as is apparent from recital 745 of the contested decision with regard to Vodafone, and recital 763 with regard to Unitymedia. In that context, the Commission concluded that it was also unlikely that a party would enter the other party's cable footprint other than via infrastructure, such as, inter alia, via leased lines, satellite infrastructure or level 4 networks, with the result that the fourth complaint cannot be upheld.

175 In any event, the Commission explained before the Court, without being contradicted by the applicant, that, although it was theoretically possible to provide TV signal transmission services to MDU customers without using its own level 3 infrastructure, it was not, in practice, an attractive possibility from the point of view of competition. In that regard, it must also be stated that, in recital 820 of the contested decision, to which the applicant referred on a number of occasions in the present proceedings, the Commission found that level 4 operators, including the applicant, were fully dependent on the parties' willingness to offer intermediary TV signal transmission services on competitive terms, which the applicant does not dispute. Next, in recital 1479 of the contested decision, the Commission noted that level 4 operators had themselves explained that they were active in a niche segment of the market, whereas the housing associations had stated that level 4 operators frequently did not meet the required service level requirements and were not able to take care of level 3 network upgrades, which the applicant also does not dispute. Those factors support the Commission's finding that it was unlikely that the merging parties would expand their activities in the cable footprint of the other party other than via infrastructure.

176 Therefore, the applicant's fourth complaint must be rejected.

…

(c) The alleged collusion between the merging parties

188 The applicant also submits that if the merging parties had not competed and had never overbuilt their cable networks, that was because there was implied or tacit collusion between them. According to the applicant, if the Commission had acted correctly, it would have had to find that, if neither Vodafone nor Unitymedia had expanded their activities in the MDU market into the cable footprint of the other, that would have been the result only of such collusion.

…

191 In that regard, it should be observed that the applicant's criticism does not relate to the concentration examined in the contested decision or to its effects on the MDU market, but rather is intended to attempt to explain why the parties to that transaction did not compete before it.

192 It follows from Article 21(1) of Regulation No 139/2004 that that regulation applies only to concentrations as defined in Article 3 of that regulation, and to which Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) does not, as a rule, apply. By contrast, Regulation No 1/2003 applies only to the actions of undertakings which, without constituting a concentration

within the meaning of Regulation No 139/2004, are nevertheless capable of leading to coordination between undertakings in breach of Article 101 TFEU and which, for that reason, are subject to the control of the Commission or of the national competition authorities (judgment of 7 September 2017, *Austria Asphalt*, C-248/16, EU:C:2017:643, paragraphs 32 and 33).

193 It follows that the applicant's complaint alleging implied or tacit collusion between the merging parties prior to the concentration is ineffective, since it does not relate to the subject matter of the contested decision, that is to say a concentration subject to Regulation No 139/2004, but rather to practices which potentially fall within the scope of Articles 101 or 102 TFEU and of Regulation No 1/2003. Accordingly, even if the applicant's allegations were well founded, that is to say, even if prior to the transaction there had been implied or tacit collusion between the parties to the concentration which explained the absence of actual or potential competition between them on the MDU market, as the applicant submits, that would not have called into question the conclusion reached by the Commission regarding that market, namely, there was no competition between the parties to the concentration, the elimination of which could have resulted in a SIEC.

194 In any event, it must be recalled that, in the contested decision, the Commission considered that the third parties' allegations based on tacit collusion between the merging parties were not confirmed by an examination of the parties' internal documents and were contradicted by the evidence in the file concerning the insufficient profitability of cable overbuild (see footnotes 534 and 566). The arguments put forward by the applicant, which have all already been rejected above, in the examination of the present part of the present plea, do not call into question that finding by the Commission. Moreover, when requested to comment on the question of tacit collusion between the merging parties at the hearing, the applicant was not in a position to adduce any evidence whatsoever in that regard. Finally, with regard to the two decisions of the Federal Cartel Office relied on, it must be recalled that they cannot bind the Commission, as was pointed out in paragraph 152 above.

…

4. The second part: a manifest error of assessment and a failure to state reasons, in that the Commission failed to take account of the massive increase in the merged entity's resources

…

(a) Manifest error of assessment

…

219 In that regard, it must be stated that Article 2(1)(b) of Regulation No 139/2004 does indeed mention economic and financial power among the factors which must be taken into account in assessing whether or not a concentration is compatible with the internal market.

220 However, in assessing the compatibility of a concentration with the internal market, the Commission takes account of a number of factors such as the structure of the relevant markets, actual or potential competition from undertakings, the position of the undertakings concerned and their economic and financial power, possible options available to suppliers and users, any

barriers to entry and trends in supply and demand (judgment of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 125). The finding of an increase in the merged entity's resources does not, therefore, in itself, support the conclusion that a SIEC exists.

221 It follows that the fact that a concentration between two undertakings causes an increase in the merged entity's resources, even if proved, is not sufficient, in itself, to declare that transaction incompatible with the internal market. It remains necessary to demonstrate that that increase in resources gives rise to a SIEC.

222 In the present case, there being no need to decide whether or not the increase in resources was merger-'specific' or not, the applicant fails to demonstrate how such an increase could have given rise to a SIEC.

223 It is not because a concentration gives rise to synergies or cost reductions in favour of the merged entity that the transaction necessarily impedes competition. In addition, it is also not because a concentration creates or strengthens a dominant position, or that a single dominant undertaking decides on the merged entity's competitive strategy and pricing policy throughout the national territory, that it automatically gives rise to a SIEC. The fact that a concentration would create or strengthen a dominant position is not, in itself, sufficient for that concentration to be regarded as incompatible with the internal market, provided that it does not significantly impede effective competition in the internal market or in a substantial part of it (see, to that effect and by analogy, judgment of 20 October 2021, *Polskie Linie Lotnicze 'LOT'* v *Commission*, T-296/18, EU:T:2021:724, paragraph 107).

224 Furthermore, it should be borne in mind that the Commission may declare a concentration incompatible with the internal market only if it finds a SIEC which is the direct and immediate effect of the concentration. Such an impediment, which would stem from future decisions by the merged entity, may only be regarded as a direct and immediate effect of the concentration if that future conduct is made possible and economically rational by the alteration of the characteristics and the structure of the market caused by the concentration (judgment of 11 December 2013, *Cisco Systems and Messagenet* v *Commission*, T-79/12, EU:T:2013:635, paragraph 118).

225 In the present case, it is common ground that both Vodafone and Unitymedia were already in a dominant position on the MDU market in their respective cable footprints prior to the concentration, with the result that they both already had the power to behave, to an appreciable extent, independently of their competitors and their MDU customers. Therefore, even if, as the applicant submits, the merged entity could, as a result of an increase in its resources, foreclose its remaining competitors by applying, inter alia, predatory prices, it must be held that that was already the case before the transaction and that that future conduct is not, therefore, made possible and economically rational by the alteration of the characteristics and structure of the market caused by the concentration.

226 In any event, if the merged entity were to engage in anticompetitive practices for the purposes of foreclosing residual competition on the MDU market, it would remain open to third parties to report such a potential abuse to the national competition authorities or to the Commission, without prejudice to the possibility that the latter may act on their own initiative, in accordance with Article 5 and Article 7(1) of Regulation No 1/2003 (see, to that effect, judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 250).

227 Finally, the Commission is not bound by the decision of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) of 14 August 2013 or by its own decision-making practice.

228 With regard to the decision of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), it must also be noted that that decision was delivered in 2013, whereas the transaction was notified in 2018. Telecommunications markets evolve very rapidly. In that context, the fact of five years having passed could also justify the failure to take that decision into consideration. It should also be stated that, having regard to the precise division of powers on which Regulation No 139/2004 is based, decisions of the national authorities cannot bind the Commission in merger control proceedings (see, to that effect, judgments of 18 December 2007, *Cementbouw Handel & Industrie* v *Commission*, C-202/06 P, EU:C:2007:814, paragraph 56, and of 7 May 2009, *NVV and Others* v *Commission*, T-151/05, EU:T:2009:144, paragraph 139).

229 With regard to the Commission's previous decision-making practice, it should be stated that when the Commission takes a decision on the compatibility of a concentration with the common market on the basis of a notification and a file pertaining to that transaction, an applicant is not entitled to call the Commission's findings into question on the ground that they differ from those made previously in a different case, on the basis of a different notification and a different file, even where the markets at issue in the two cases are similar, or even identical (judgments of 14 December 2005, *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraph 118, and of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 142).

230 It follows from the foregoing that the applicant has not demonstrated that the Commission made a manifest error of assessment in that it failed to find that there were horizontal non-coordinated effects on the MDU market as a result of the increase in resources resulting from the concentration.

…

B. The third plea in law: a manifest error of assessment and procedural irregularities in the examination of vertical non-coordinated effects on the intermediary market and on the MDU market

…

1. The second part: manifest errors of assessment

…

314 In that regard, it must be observed that it is apparent from paragraph 31 of the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008 C 265, p. 6, 'the Guidelines on non-horizontal mergers') that input foreclosure arises where, post the merger at issue, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, in particular, where the new entity is likely to raise its downstream rivals' costs, by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger.

315 According to paragraph 32 of the Guidelines on non-horizontal mergers, in assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream.

316 It should be noted that those three conditions are cumulative, so that the absence of any of them is sufficient to rule out the likelihood of anticompetitive input foreclosure (judgments of 23 May 2019, *KPN* v *Commission*, T-370/17, EU:T:2019:354, paragraphs 118 and 119, and of 27 January 2021, *KPN* v *Commission*, T-691/18, not published, EU:T:2021:43, paragraphs 111 and 112). Furthermore, as regards more specifically the third of those conditions, it must be noted that, in order for such a condition to be satisfied, it is necessary to demonstrate a detrimental effect, which is significant, on downstream competition, as is apparent from paragraph 32 of the Guidelines on non-horizontal mergers.

317 It must be observed that, in the contested decision, despite there being no new vertical linkages between the intermediary upstream market and the downstream MDU market resulting from the concentration, the Commission, in recitals 1476 to 1506 of the contested decision, examined those three conditions without the applicant criticising that approach, as such.

318 In the present case, the Court considers it appropriate to begin by examining the arguments put forward by the applicant in order to demonstrate that the Commission, in the contested decision, manifestly erred in concluding that the third of those conditions was not satisfied, namely its third complaint, summarised in paragraph 312 above.

319 In that regard, it must be stated that, in that context, the applicant does not call into question a number of the factors which led the Commission to conclude that any foreclosure strategy would, in any event not have a significant negative impact on downstream competition.

320 Accordingly, the applicant does not dispute that such a strategy did not affect its main activity, since it was carried out outside Unitymedia's cable footprint. Furthermore, although the applicant disputes the Commission's conclusion that it was only rarely active in Unitymedia's cable footprint, it does not substantiate such an allegation in any way and, in particular, does not call into question the fact that it was not able to participate in tenders requiring level 3 network upgrades, its market shares being limited, that is to say [0-5]%, and its limited participation in tenders in Unitymedia's cable footprint.

321 In addition, none of the arguments put forward by the applicant is founded.

322 With regard to, first, the applicant's allegation that it exercised a sufficient competitive constraint in Unitymedia's cable footprint, despite the fact that it merely resold Unitymedia's product there, it must be stated that such an allegation is not accompanied by evidence capable of calling into question the explanations set out in recitals 1501 and 1503 of the contested decision, as recalled in paragraphs 283 and 284 above.

323 Accordingly, the applicant does not substantiate its allegation that the disappearance of resellers, who succeeded in winning tenders in the past, had a significant negative impact on competition.

324 In addition, it should be noted that, contrary to the applicant's allegation, it is not the role of a merger control procedure to ensure the applicant is strengthened as the main competitor of the merging parties and the main source of remaining competition, particularly since the applicant fails to specify what such strengthening would consist of, or which legal basis gives rise to it.

325 Lastly, the applicant is not justified in relying on the fact that, with regard to horizontal non-coordinated effects on the fixed internet access market, the Commission accepted a remedy purely focused on resellers. As the Commission explains, there are significant differences between the MDU market and the market for fixed internet access, which made it necessary to adopt a remedy in the case of the latter. The conditions of competition on the two markets were different (see recital 391 et seq. and recital 700 et seq. of the contested decision). In that respect, on the MDU market, the focus was above all on the infrastructure to be made available (see recitals 107 and 699 of the contested decision) and the level 4 suppliers did not exert any significant competitive pressure there (see recitals 818 to 820 and 1478 to 1480 of the contested decision). By contrast, prior to the concentration, Vodafone exerted a significant competitive constraint on the market for fixed internet access (see recitals 445 to 499, and in particular recital 454 to the contested decision), so that a remedy was necessary (see, in particular, recital 1898 of the contested decision).

326 With regard, second, to the applicant's allegation that it relied only temporarily on the intermediary television signal transmission services provided by Unitymedia pending the deployment of its own level 3 network, it is apparent from recital 798 and Figure 20 of the contested decision, to which the Commission refers in recital 1504 of that decision, that the Commission's assessments are based both on the response to the statement of objections and on the applicant's own figures. The evidence set out in recital 744(a) and in recitals 797 to 799 of the contested decision shows that the applicant had not really carried out any overbuild of another operator's cable infrastructure during the years preceding the adoption of the contested decision. In particular, Figure 20 of the contested decision, included in recital 798 of that decision, shows that the number of households connected to the applicant's network had not increased significantly between 2012 and 2018, apart from as a result of the acquisition of pre-existing assets from other companies. The applicant merely refers to its own statements, but adduces no evidence contradicting the finding that it '[had] engaged in very limited Level 3 infrastructure expansion in recent years'.

327 It follows that the arguments put forward by the applicant do not demonstrate that the Commission made a manifest error of assessment when it found that the evidence in its possession showed that the applicant's weakening of Unitymedia's cable footprint would have had no significant negative impact on competition in the market for the retail supply of MDU customers.

328 Consequently, the third complaint put forward by the applicant in support of the second part of the third plea must be rejected.

329 In view of the cumulative nature of the three conditions relating to the existence of a risk of input foreclosure, which, moreover, is not disputed by the applicant, the fact that the applicant has not demonstrated that the Commission made a manifest error of assessment in finding that the third of those conditions was not satisfied is sufficient to rule out such a risk of foreclosure, there being no remaining need to examine whether the Commission manifestly erred in finding that the other

two conditions were also not satisfied. Therefore, there is no need to examine the substance of the first and second complaints formulated by the applicant in support of the second part of the third plea, which concern, in essence, those first two conditions.

330 In the light of the foregoing, the third plea must be rejected, there being no need to examine whether the applicant had an interest in raising it.

C. The fourth plea: a manifest error of assessment in the examination of horizontal non-coordinated effects on the market for wholesale supply of television signal transmission

…

1. The manifest error of assessment alleged by the applicant

…

348 As regards, in the first place, its complaint that the Commission allegedly confined itself to analysing certain anticompetitive effects on feed-in fees or OTT and HbbTV services, the applicant merely cites certain technical functionalities and certain commercial aspects which, in its view, the Commission should have examined, but does not explain in any way how they could be affected by the concentration, and in particular the reasons why, and how, the merged entity would have the ability, and above all the incentive, to deteriorate those functionalities and commercial aspects during its negotiations with broadcasters, how, having regard in particular to their importance, that could have the effect of significantly impeding effective competition on the wholesale market for TV signal transmission and how such a likely deterioration of those functionalities and commercial terms would be merger-specific which makes it possible to reject the first complaint.

349 In any event, as the Commission correctly submits, the mere fact that the Commission did not carry out all the examinations desired or considered useful by the applicant does not in itself justify the annulment of the contested decision.

350 As regards, in the second place, the allegation that the Commission failed to take account of the fact that the merged entity would have the ability and the incentive to implement partial exclusivity in order to prohibit the dissemination of content via some of its competitors, such as itself, it must be stated that such an allegation is very general in nature and is in no way substantiated.

351 Furthermore, although the applicant submits that the merged entity would have the ability and incentive to implement such a partial exclusivity strategy in relation to some of its competitors, it must be stated that it has not even attempted to demonstrate that such a strategy would have a significant negative impact on downstream competition, relying, for example, on evidence demonstrating that a potentially significant proportion of housing associations in the MDU market, or of German viewers in relation to the SDU market, would have been willing to switch to the merged entity's supply for the sole reason that certain channels would not have been offered by their current supplier. As is apparent from paragraphs 315 and 316 above and from the case-law cited therein, the three conditions referred to in paragraph 32 of the Guidelines on

non-horizontal mergers are cumulative, so that the absence of any of them is sufficient to rule out the likelihood of anticompetitive input foreclosure, which makes it possible to reject that second complaint.

352 In any event, the conclusion, by an undertaking in a dominant position, of exclusivity agreements with a supplier aimed at driving out of the downstream market one or a number of individually targeted competitors is capable of constituting conduct contrary to competition law (see, to that effect, judgment of 22 March 2011, *Altstoff Recycling Austria* v *Commission*, T-419/03, EU:T:2011:102, paragraph 51). When questioned in that regard at the hearing, the Commission confirmed, moreover, that if the merged entity concluded a total or partial exclusivity agreement with a broadcaster, that would potentially constitute an infringement of Article 101 or 102 TFEU.

353 Therefore, it must be held that it was unlikely that the merged entity would have an incentive to conclude such agreements post-transaction, which also applied to broadcasters. It is apparent from the case-law that, while it is appropriate to take account of the incentives to adopt anticompetitive conduct, account must also be taken of the fact that those incentives could be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities at both EU and national level, and the financial penalties which could ensue (see, to that effect, judgments of 25 October 2002, *Tetra Laval* v *Commission*, T-5/02, EU:T:2002:264, paragraph 159, and of 14 December 2005, *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraphs 303 to 311). The Commission cannot therefore be criticised for having failed to take account of the unlikely possibility – given it is potentially unlawful, that the merged entity would conclude an exclusivity agreement with a broadcaster by which one or more competitors on the downstream markets, such as the applicant, would have been denied access to certain content.

354 As regards, in the third place, the allegation that the merged entity could, on the MDU market, exploit the advantages it would have on the wholesale market for TV signal transmission, it must be held that that evidence has already been relied on by the applicant in support of the second part of its first plea, which alleges a manifest error of assessment and a failure to state reasons, in that the Commission, in its examination of the MDU market, failed to take account of the massive increase in the merged entity's resources. That second part has been rejected for the reasons set out in paragraphs 199 to 230 above, with the result that the third complaint cannot succeed.

355 In any event, if the alleged advantages enjoyed by the merged entity allowed it to offer more advantageous prices to MDU customers, as the applicant submits, it must be stated that that indicated positive effects for consumers, since it was likely that such a price reduction would be reflected in the amount of the monthly rent paid by the tenants of the buildings concerned, rather than of a SIEC. In addition, it should be noted that the applicant has in no way demonstrated that the advantages which it alleges, namely the collection of feed-in fees and the acquisition of content on more advantageous terms than the smaller cable operators, would have been merger-specific.

356 Therefore, the applicant has failed to show that the Commission made a manifest error of assessment in its examination of the horizontal non-coordinated effects on the wholesale market for TV signal transmission, with the result that the fourth plea must be rejected.

D. The fifth plea: a manifest error of assessment and a procedural irregularity in the examination of the commitments

…

1. The first part: a manifest error in the assessment of the WCBA commitment

…

370 Next, as regards the applicant's allegation that the WCBA commitment is ineffective because it does not compensate for the elimination of competitive pressure from the infrastructures and innovations exercised by Unitymedia prior to the transaction, it must be stated that the main objective of the WCBA commitment was to provide a remedy to the competition concern arising from the elimination of the competitive pressure exercised by Vodafone's DSL business in Unitymedia's cable footprint, as is apparent in particular from recital 1898 of the contested decision.

371 Following the transaction, Unitymedia's activity through its cable network would continue and would be taken over by Vodafone. By contrast, Vodafone intended to close, in Unitymedia's cable footprint, its DSL business, which it operated on the basis of wholesale access provided by Deutsche Telekom (see, inter alia, recitals 566, 604 and 605 of the contested decision). It follows that it is Vodafone's DSL business, that is to say, the business of reselling Deutsche Telekom's DSL product, which would disappear after the transaction.

372 The WCBA commitment could not, therefore, be regarded as ineffective in that it provided for the entry of an operator, Telefónica, which was not active in infrastructure, but was simply a reseller, since its very purpose was to compensate for the elimination of an operator, Vodafone, in the cable footprint of Unitymedia, which was not active in infrastructure, but was simply a reseller, with the result that the first complaint cannot be upheld.

373 In any event, it is apparent in particular from recital 452 of the contested decision that Vodafone was innovating and investing in its cable footprint prior to the transaction. Moreover, after the transaction, the merged entity's cable activity would continue to be exposed, in Unitymedia's cable footprint, to competition from other operators, such as Deutsche Telekom, United Internet and Telefónica, which is also apparent from that recital. It follows that the merged entity would probably have to make investments in Unitymedia's former cable footprint in terms of infrastructure and innovation similar to those made by Unitymedia prior to the transaction. In any event, the applicant has adduced no evidence to demonstrate sufficiently that, despite those circumstances and, more specifically, despite the competition posed by Deutsche Telekom, United Internet and Telefónica, the merged entity would cease to invest and innovate in Unitymedia's former cable footprint, with the result that the transaction would lead to the elimination of the competitive pressure resulting from such investments and innovations.

374 In the second place, with regard to the applicant's allegation that the Commission could not have accepted the WCBA commitment because it was behavioural and non-structural, it is true that, as the applicant observes, the Commission explains in paragraph 15 of the Remedies Notice that structural commitments, such as the commitment to sell a business, are as a rule preferable from the point of view of the objective of Regulation No 139/2004, inasmuch as they prevent, durably, the competition concerns which would be raised by the concentration as notified and do not

require medium or long-term monitoring measures. Furthermore, the Commission states in paragraph 17 of that notice that commitments relating to the future conduct of the merged entity may be acceptable only exceptionally in very specific circumstances.

375 Next, the Commission has power to accept only such commitments as are capable of rendering the notified transaction compatible with the internal market. In other words, the commitments offered by the undertakings concerned must enable the Commission to conclude that the concentration at issue would not significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position as provided for in Article 2(2) of that regulation (see judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 294 and the case-law cited).

376 Commitments entered into during phase II are intended, in particular, to remedy the competition concerns identified by the Commission during phase I which resulted in the Commission initiating the phase II procedure. Consequently, when the Court is called on to consider whether, having regard to their scope and content, the commitments entered into during the phase II procedure are such as to permit the Commission to adopt a decision approving the concentration, it must examine whether the Commission was entitled, without making a manifest error of assessment, to take the view that those commitments constituted a direct and sufficient response to the competition concerns observed during phase I (see, to that effect, judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 298).

377 According to recital 30 of Regulation No 139/2004, where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the internal market, the Commission should be able to declare the concentration, as modified, compatible with the internal market. Such commitments must be proportionate to the competition problem and must eliminate it entirely (see, to that effect, judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 307).

378 Lastly, behavioural commitments are not by their nature insufficient to prevent a SIEC in the internal market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, and must be assessed on a case-by-case basis in the same way as structural commitments (see, to that effect, judgment of 21 September 2005, *EDP* v *Commission*, T-87/05, EU:T:2005:333, paragraph 100 and the case-law cited).

379 Accordingly, in paragraph 15 of the Remedies Notice, the Commission states that the possibility cannot be automatically ruled out that types of commitments other than structural commitments may also be capable of preventing the SIEC.

380 It follows from the foregoing that it is true that, in the Remedies Notice, the Commission has a preference for structural commitments, in particular on account of the simplicity of implementing them. However, it must be observed that the acceptance of the commitments is governed principally by whether the commitments are appropriate and sufficient to resolve the competition problem identified, as well as the certainty that those commitments will be able to be implemented.

381 The applicant is therefore not justified in maintaining that the Commission ought to have rejected the WCBA commitment on the sole ground that it related solely to the behaviour of the merged entity, which makes it possible to reject the second complaint.

382 In the third place, as regards the applicant's allegation that Telefónica was unable to exert significant competitive pressure on the market for fixed internet access, it must be held that the content of recital 529 of the contested decision, on which the applicant relies in support of the present complaint, concerns a statement by Deutsche Telekom on Telefónica's competitive strength prior to the WCBA commitment being taken into account, which makes it possible to reject the applicant's argument that the Commission itself recognised Telefónica's inability to do so in that recital.

383 Furthermore, as regards the applicant's argument based on the allegedly limited speeds which would be offered to Telefónica pursuant to the WCBA commitment, it is true that, at recital 531 to the contested decision, the Commission made the following findings:

'Telefónica has included only recently a 250 Mbit/s in its product portfolio. So far, it had only offered speeds of 10, 50 and 100 Mbit/s, which is seen as [a] serious limitation to its competitiveness by competitors. This delay in introducing higher speeds to its product portfolio is … important evidence of the limited ability of Telefónica to compete in the market.'

384 However, it must be stated that such findings made by the Commission related to Telefónica's situation in the absence of the WCBA commitment.

385 Therefore, it must be held that those findings, which do not take account of all the obligations entered into by Vodafone in the context of the WCBA commitment, do not allow any conclusion to be drawn as to Telefónica's ability and incentive to operate as a viable and active competitive force once that commitment has been implemented.

386 In addition, it should be noted that, in recitals 1896 to 1917 of the contested decision, in a section entitled 'Scope', the Commission examined the WCBA commitment in detail. More specifically, in recitals 1901 to 1906 of that decision, the Commission examined the speeds which would be offered by Vodafone to Telefónica. As the intervener points out in the present proceedings, Telefónica had a hypothetical maximum download speed of 250 Mbits/s for its DSL business. By comparison, the WCBA commitment would allow it access download speeds of up to 300 Mbits/s at the time of its implementation and up to 500 Mbits/s thereafter. That is why, in recital 1906 of the contested decision, the Commission concluded that the speeds available under the WCBA commitment would offer significant advantages over those available on Deutsche Telekom's DSL infrastructure. In particular, it noted that that commitment would offer higher speeds than those of the fastest product technically available with the DSL infrastructure and would create a competitor which was closer to Unitymedia than to Vodafone's DSL business in terms of speed. In general, the Commission's view was that the speeds available under the WCBA commitment constituted an improvement compared with Deutsche Telekom's wholesale offer and that they were sufficient to enable Telefónica to compete effectively on the market for fixed internet access in the foreseeable future.

387 Accordingly, the mere fact that, prior to taking the WCBA commitment into account, the Commission concluded that the late introduction of higher speeds in its product portfolio constituted significant evidence of Telefónica's limited competitiveness on the market does not allow any conclusion to be drawn as to Telefónica's ability and incentive to operate as a viable

and active competitive force, and therefore as to whether the WCBA commitment, once implemented, would be appropriate and sufficient, which makes it possible to reject that third complaint.

388 It follows from all the foregoing that it is necessary to reject the first part of the fifth plea, which alleges that the Commission made a manifest error in assessing the WCBA commitment.

2. The second part: a procedural irregularity and a manifest error in the assessment of the commitments relating to the wholesale market for TV signal transmission

389 In the first place, the applicant maintains that the Commission committed a procedural irregularity by accepting the feed-in fees commitment, since that commitment was submitted out of time, after the expiry of the deadline laid down in Article 19(2) of Regulation No 802/2004, and without market testing.

…

400 With regard, second, to the applicant's allegation that the OTT commitment was insufficient, given that OTT services were still of limited importance in Germany and because it did not protect other cable operators and IPTV providers, it must be stated, first, that it is apparent from recital 1266 of the contested decision that the competition problem identified, to which that remedy sought to provide a solution, consisted in the increased ability for the merged entity to hamper the emergence and development of certain innovative TV services, including OTT, which allowed more interaction between the TV broadcaster and viewers, the increasing importance of which services had been noted.

401 Therefore, irrespective of the time period within which OTT services would have been able to limit the merged entity's discretion and increased bargaining power, it must be held that the OTT commitment, in so far as it prevents Vodafone, from the date of adoption of the contested decision, not only from concluding or renewing an agreement with a broadcaster which includes terms which directly or indirectly restrict that broadcaster's ability to offer an OTT service in Germany, but also obliged it not to implement such clauses which may exist and to waive similar restrictions in existing contracts (see paragraphs 13 and 14 of Section B.II of the text of the commitments), was capable immediately of preventing Vodafone from hampering the emergence and development of OTT services and, consequently, of eliminating the competition concern identified in respect of which it had been adopted.

402 Second, it should be noted that although the Commission concluded, in the contested decision, that (i) the merged entity would have the ability and incentive to hamper the emergence and development of innovative television services such as HbbTV and the OTT and (ii) Vodafone had, in order to address that competition concern, offered the OTT and HbbTV commitments, it did not conclude that that would have been the case for other means of broadcasting, such as other cable operators or IPTV providers. As regards IPTV, it must be stated that, unlike the OTT, that product was in a contraction phase, with a limited market share of 8% (see recital 291 of the contested decision), which the applicant does not dispute.

403 The applicant has not criticised the Commission for having failed to take the view that the merged entity would have had the ability and incentive to hamper the emergence and development of other means of broadcasting, such as other cable operators or IPTV providers, with the result that it was not necessary to impose a commitment in that regard, which makes it possible to reject the applicant's allegation.

404 With regard, third, to the applicant's allegation that the capacity existing between the merged entity's internet network and third-party providers of internet interconnectivity services provided for in the OTT commitment would not have been sufficient to ensure a speed enabling the distribution of OTT services, but which alleges that the number of accommodation units connected by distribution frame ought to have been set at 32, it must be held that the applicant has not substantiated any such allegation, with the result that the third complaint cannot be upheld.

405 In any event, it must be noted that it is apparent from paragraph 15 of Section B.II of the text of the commitments that the objective of the second aspect of the OTT commitment, relating to interconnection for OTT services, was to maintain at least three non-congested routes into the merged entity's IP network in Germany. In other words, the objective was to provide sufficient interconnection capacity to enable broadband customers of the merged entity to access any OTT service in Germany, either via the interconnection points described in point 16 of Section B.II of the text of the commitments or otherwise.

406 To that end, point 16 of Section B.II of the text of the commitments laid down, inter alia, the obligations set out below. First, Vodafone is to ensure that the daily peak utilisation across all of the merged entity's interconnection points with each of a group of at least three reputable interconnectivity providers who are willing to sell transit services, via one or more physical interconnection points in Germany, on which traffic could circulate to broadband customers, will not exceed 80%, with the result that there will be at least 20% capacity available above the daily peak. Second, Vodafone is to ensure that the capacity available above the daily peak is at least 20 Gbit/s. That figure is to be reviewed annually in accordance with a procedure described in the text of the commitments. However, the applicant does not explain specifically how that would have been insufficient.

407 In that regard, it should also be noted that the Commission and the intervener explained, in essence, without being contradicted, that the merged entity would have a strong incentive to minimise congestion at the level of the local loop on the ground that such congestion, causing bottlenecks 'on the last mile', would also have undermined the attractiveness of its own fixed broadband services offer and would have exposed it to the risk of losing customers to the benefit of other operators.

408 In addition, it should be noted that, in recital 1929 of the contested decision, the Commission stated that the neutrality of the internet, which is guaranteed by Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ 2015 L 310, p. 1), should prevent the merged entity from adopting restrictive unilateral practices aimed at circumventing the commitment, such as redefining traffic priorities or discrimination, which the applicant does not dispute.

409 In the light of the foregoing, it must be held that the applicant has not demonstrated that the OTT commitment was insufficient to guarantee a sufficient reception quality for OTT TV customers, which makes it possible to reject the third complaint.

410 As regards, fourth, the applicant's allegation that the OTT commitment and the HbbTV commitment would not prevent the merged entity from abusing its position by undermining other technical functionalities, it must be recalled that it is apparent from paragraphs 348 and 349 above that, in the context of its fourth plea, the applicant has not succeeded in demonstrating that the Commission failed to find that the merged entity could also have undermined other technical functionalities such as 'CI Plus', 'TVHD', the electronic programme guide or VOD, catch-up television and instant replay services, namely the same as those it cites in support of the present allegation.

411 More specifically, the applicant has not demonstrated, first, how those functionalities could have been affected by the concentration, or the reasons why, and how, the merged entity would have had the ability, and above all the incentive, to deteriorate those aspects in its negotiations with broadcasters, second, in how, having regard in particular to their importance, that could have had the effect of significantly impeding effective competition on the wholesale market for TV signal transmission, and third, how such a likely deterioration of those functionalities would have been merger-specific, with the result that it was not necessary to impose a commitment in that regard, which makes it possible to reject the applicant's allegation.

412 As regards, fifth, the applicant's allegation that the feed-in fees commitment did not prevent the merged entity from making terms other than those fees less favourable to broadcasters, it should be noted that the applicant and the intervener agree that negotiations between broadcasters and TV platforms are not limited to TV broadcasters' revenue flows to the merged entity, that is to say, feed-in fees, but also cover content payments and payments for technical quality or additional functionalities and services, which were provided by the merged entity to broadcasters.

413 However, it must be stated, first of all, that, in recital 1221 of the contested decision, the Commission stated that the feed-in fees were directly connected with the transmission of the cable TV signal and therefore appeared to be the main element in the payment flow which would be affected by the increased market power of the merged entity on the wholesale market for TV signal transmission. Furthermore, in recital 1959 of that decision, the Commission explained that, although the recent development of value-added TV services had contributed to an increase in the revenue flow from TV platforms to broadcasters, feed-in fees still represented an extremely relevant financial element in the contractual relationship between free-to-air broadcasters and cable TV platforms. The Commission added that certain elements in the file suggested that the effect of the transaction on the revenues flow from the merged entity to broadcasters was likely to be limited (see Section VIII.C.2.11.3.9(ii) of the contested decision), whereas there was nothing in the file to suggest that the same was true for feed-in fees (see also recital 1261).

414 It follows that the Commission was entitled, without committing a manifest error, to take account of the fact that the commitment not to increase feed-in fees could counterbalance the risk that the scope and quality of the TV offer to retail customers would be reduced on account of a significant worsening of the contractual conditions imposed by the merged entity on free-to-air broadcasters.

415 Next, it must be held that the Commission was entitled to take account of the complementary nature of the feed-in fees commitment and the OTT commitment, on the ground that the former directly affected the financial relationship between the merged entity and the broadcasters at issue as regards traditional and linear TV offers, and the latter would have an effect on the provision of additional services.

416 Furthermore, during the proceedings before the Court, the Commission maintained, without being challenged by the applicant, that if the merged entity were to add considerable payments in addition to the feed-in fees, that would constitute an easily identifiable circumvention of the commitments.

417 Finally, even if its allegation concerning the circumvention of the commitments were also to apply to pay TV, the applicant has adduced no evidence to contradict the Commission's assertion that, for pay-TV channels, any conduct of the type which it describes would be contrary to the OTT commitment.

418 It follows from the foregoing that the applicant is unable to demonstrate that the Commission made a manifest error of assessment in accepting the OTT commitment, the feed-in fees commitment and the HbbTV commitment, with the result that the first complaint must be rejected.

419 With regard, in the second place, to the late submission of the feed-in fees commitment and the procedural irregularity which therefore arose from its acceptance by the Commission, it should be noted that it is apparent from Article 19(2) of Regulation No 802/2004, to which the applicant refers, that commitments offered by the undertakings concerned pursuant to Article 8(2) of Regulation No 139/2004 are to be submitted to the Commission within not more than 65 working days from the date on which proceedings were initiated. Where the period for the adoption of a decision pursuant to Article 8(2) of Regulation No 139/2004 is extended, the period of 65 working days is automatically extended by the same number of working days.

420 Moreover, it is apparent from paragraph 94 of the Remedies Notice that where the parties subsequently modify the proposed commitments after the deadline of 65 working days, the Commission will accept those modified commitments only if it can clearly determine – on the basis of its assessment of information already obtained in the course of the investigation, including the results of prior market testing and without the need for any other market test – that such commitments, once implemented, fully and unambiguously resolve the competition concerns identified and where there is sufficient time to allow for an adequate assessment by the Commission and for proper consultation with the Member States. Furthermore, it is apparent from footnote 107 to that notice, which relates to paragraph 94 thereof, that consultation with the Member States normally requires that the Commission has to be able to send a draft of the final decision, including an assessment of the modified commitments, to the Member States not less than 10 working days before the Advisory Committee with the Member States.

421 Lastly, it should be noted that the case-law has held that those two conditions were cumulative and clarified them, in that the Commission may take into account commitments submitted out of time by the parties to a notified concentration, first, where those commitments clearly and without the need for further investigation resolve the competition concerns previously identified and, second, where there is sufficient time to consult the Member States on those commitments (see judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 455 and the case-law cited).

422 In the present case, it must be held that those two conditions have been satisfied.

423 As regards the first condition, it is apparent from paragraphs 398 to 418 above that the applicant's arguments alleging that the feed-in fees commitment was insufficient, have been rejected. Consequently, it must be concluded that the applicant has not demonstrated that the Commission could not establish clearly – on the basis of its assessment of the information already obtained in the investigation, in particular the results of the prior market test – that, once implemented, the feed-in commitment would clearly resolve, without the need for further investigation, the competition concerns previously identified.

424 In addition, as regards the second condition, it should be noted that it is apparent from recitals 25 and 26 of the contested decision that the notifying party submitted a revised draft of the commitments on 11 June 2019 and that the Advisory Committee discussed the draft decision and issued a favourable opinion on 28 June. It follows that, in the present case, the Commission was indeed able to send the Member States a draft of the final decision including an assessment of the modified commitments not less than 10 working days before the Advisory Committee, a fact which the applicant does not dispute and, consequently, that it had sufficient time to consult the Member States on the feed-in fees commitment.

425 It follows from the foregoing that the Commission was entitled to take account of the feed-in fees commitment, despite it having been submitted out of time, with the result that the applicant's complaint alleging a procedural irregularity must be rejected, as must the second part of the present plea.

426 In the light of the foregoing, the fifth plea in law must be rejected.

…

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Tele Columbus AG to pay the costs.

van der Woude da Silva Passos Reine

Truchot Sampol Pucurull

Delivered in open court in Luxembourg on 13 November 2024.

[Signatures]