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-64/20,

Deutsche Telekom AG, established in Bonn (Germany), represented by C. von Köckritz, U. Soltész, M. Wirtz, M. Schulz, P. Lohs and S. Zinndorf, lawyers,

applicant,

v

European Commission, represented by G. Conte, J. Szczodrowski and C. Urraca Caviedes, 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 21 September 2023,

* Language of the case: English.

gives the following

Judgment

1 By its action under Article 263 TFEU, the applicant, Deutsche Telekom 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').

I. Background to the dispute

A. The undertakings concerned

2 Vodafone Group plc ('the intervener' or 'Vodafone'), established in the United Kingdom, is active mainly in the operation of mobile telecommunications networks and in the provision of mobile telecommunications services, such as voice, messaging and mobile data services. Some of its operating companies also provide cable TV, fixed telephony, broadband internet or TV services using the internet protocol (Internet Protocol Television, IPTV). Within the European Union, Vodafone is active in 12 Member States, including the Czech Republic, Germany, Hungary and Romania. In Germany, Vodafone owns a coaxial cable network which is present in 13 of the 16 German *Länder* (Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Mecklenburg-Western Pomerania, Lower Saxony, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia), allowing it to offer high-speed TV and internet services. In that Member State, Vodafone is also active in the supply of retail mobile telecommunications services nationwide and offers fixed telecommunications services nationwide based on wholesale access to the applicant's fixed network.

3 Liberty Global plc, also established in the United Kingdom, offers TV, broadband internet, fixed telephony and mobile services in various EU countries. Liberty Global owns and operates cable networks offering TV, broadband internet and voice telephony services in the Czech Republic, Germany, Hungary and Romania. Liberty Global is present in Germany through Unitymedia GmbH and in the Czech Republic, Hungary and Romania through UPC. In Germany, Unitymedia owns a co-axial cable network present in the three *Länder* which are not covered by Vodafone's cable network, namely North Rhine-Westphalia, Hesse and Baden-Württemberg, enabling it to offer high-speed TV and internet services. In addition, Liberty Global is active as a mobile virtual network operator in Germany and Hungary.

4 The applicant, established in Germany, offers, inter alia, IPTV, broadband internet and fixed telephony services, mainly via its copper telephone network and its fibre optic network, as well as mobile services in various countries of the European Union.

B. Administrative procedure

5 On 19 October 2018, the European Commission received notification of a proposed concentration pursuant to Article 4(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1)

whereby Vodafone intended to acquire sole control of the telecommunications businesses of Liberty Global in the Czech Republic, Germany, Hungary and Romania. The transaction consisted of a sale and purchase agreement by which Vodafone envisaged acquiring 100% of the shares in the companies carrying out the relevant telecommunication activities of Liberty Global ('the transaction' or 'the concentration'). In Germany, the transaction consisted of the acquisition of 100% of the shares in Unitymedia.

6 On 11 December 2018, after a preliminary examination of the notification and based on the first phase market investigation, the Commission raised serious doubts as to the compatibility of the transaction with the internal market and decided to initiate proceedings pursuant to Article 6(1)(c) of Regulation No 139/2004.

7 On 25 March 2019, the Commission issued its Statement of Objections ('SO') to Vodafone.

8 On 8 April 2019, Vodafone submitted its response to the SO.

9 On 6 May 2019, Vodafone proposed commitments under Article 8(2) of Regulation No 139/2004 in order to address the competition concerns identified by the Commission. On 7 May, the Commission launched a market test of the commitments submitted.

10 On 11 June 2019, following certain revisions, Vodafone submitted a final set of commitments ('the Final Commitments').

11 On 18 July 2019, the Commission adopted the contested decision pursuant to Article 8(2) of Regulation No 139/2004.

C. Contested decision

12 In the contested decision, the Commission first assessed the effects of the concentration, particularly in Germany. The Commission then assessed whether the commitments proposed by Vodafone were capable of rendering the transaction compatible with the internal market and the Agreement on the European Economic Area (EEA).

1. Assessment of the effects of the transaction on competition in Germany

13 As regards Germany, the Commission first analysed the horizontal effects of the concentration, namely the effects deriving from the fact that the parties to that concentration were actual or potential competitors on the relevant market. Next, the Commission examined the vertical effects of the concentration, namely the effects deriving from the fact that the parties to that concentration operated at different levels of the supply chain. Lastly, the Commission assessed the conglomerate effects of the merger, namely the effects deriving from the fact that the relationship between the parties to that concentration was neither horizontal nor vertical, but those parties were active in closely interrelated markets and, in particular, supplied complementary products or services.

(a) Horizontal effects

14 In the contested decision, the Commission examined, inter alia, horizontal non-coordinated effects on the following markets: the market for the retail supply of fixed internet access services in Germany ('the market for fixed internet access'), the market for the retail supply of TV signal transmission services, the market for the retail supply of multiple play services, the market for the retail supply of TV services, the wholesale market for the supply and acquisition of TV channels and the market for the wholesale transmission of TV signal in Germany ('the market for wholesale TV signal transmission').

(1) Horizontal non-coordinated effects on the market for fixed internet access

15 It follows from the contested decision that, in the market for fixed internet access, telecommunications operators (supply side) provide subscriptions enabling end customers (demand side) to access the internet through a fixed telecommunications connection. In the present case, the Commission concluded that, for the purposes of its decision, the relevant market was the overall retail market for the provision of fixed internet access services (including all product types, distribution modes, speeds and bandwidths) to residential customers and small business customers, excluding the supply of fixed internet services provided through mobile network infrastructure. As regards the geographic scope of the market, the Commission considered that the market was national in scope.

16 Following its analysis, the Commission concluded that the transaction would significantly impede effective competition on the market for fixed internet access, owing, in particular, to the elimination of the on account of the important competitive constraint exerted by the merging parties on each other prior to the transaction, notably with regard to the cable footprint of Unitymedia, and the creation of an operator with a market share of more than 30% in terms of subscribers (which would exceed 40% on Unitymedia's cable footprint, and be even higher in some *Länder* and districts).

(2) Horizontal non-coordinated effects in the market for the retail supply of TV signal transmission

17 It is apparent from the contested decision that, in the market for the retail supply of TV signal transmission services, infrastructure owners (supply side) provide the TV signal to customers (demand side), mainly via cable, satellite, terrestrial, in accordance with the digital video broadcasting – terrestrial standard (Digital Video Broadcasting – Terrestrial, 'DVB-T'), and via IPTV.

18 As regards the product market definition, the Commission observed that the German market for the supply of TV signal transmission services was characterised by the importance of the rental housing market and of housing associations. Housing associations negotiate and conclude basic TV supply contracts on behalf of their tenants and then pass on the fees as part of the monthly rent, in accordance with a special feature of German law known as 'Nebenkostenprivileg' (ancillary rental cost privilege). The Commission explained that the majority of retail TV households in Germany are located in multi-dwelling units ('MDUs'). Those MDUs are owned by housing associations or private landlords ('MDU customers'). As regards single-dwelling units ('SDUs'), the end customers ('SDU customers') typically choose their own TV distributor and pay directly for their subscription.

19 For the purposes of the contested decision, the Commission, in view of the results of the market investigation and the specific characteristics of the market for the retail supply of TV signal transmission services to customers living in multi-dwelling units in Germany ('the MDU market'), considered it appropriate to distinguish between the MDU market and the market for the retail supply of TV signal transmission services to SDU customers ('the SDU market'). It also considered that the geographic definition of the MDU and SDU markets could be left open.

20 Following its analysis, the Commission found that the transaction was not likely to significantly impede effective competition in either the MDU market or the SDU market as a result of horizontal non-coordinated effects.

(3) ***Horizontal non-coordinated effects in possible markets for the retail supply of multiple play services***

21 The Commission clarified that the term 'multiple play' refers to products comprising two or more of the retail services provided to retail customers by the same supplier on the basis of single or multiple contracts, namely mobile telecommunications services, fixed telephony services, fixed internet access services and TV services. Multiple play offers comprising two, three or four of those services are referred to respectively as dual play, triple play or quadruple play services (dual play or '2P'; triple play or '3P' and quadruple play or '4P'). Multiple play offers comprising one or more of those fixed services in combination with a mobile component are referred to as 'fixed-mobile multiple play' or 'fixed-mobile convergence' ('FMC') products. The Commission concluded that, for the purposes of its decision, the question whether there exist one or more multiple play markets, which are distinct from each of the underlying individual telecommunications services markets, could be left open.

22 Following its analysis, the Commission concluded that the transaction would significantly impede effective competition in the market for the retail supply of 2P bundles, including fixed telephony services and fixed internet access services in Germany as a result of horizontal non-coordinated effects. By contrast, the Commission concluded that the transaction would not significantly impede effective competition (i) in the possible market for the retail supply of 3P bundles including fixed telephony services, fixed internet access services and mobile telecommunications services in Germany, (ii) in the possible market for the retail supply of 3P bundles including fixed telephony services, fixed internet access services and TV services in Germany, and (iii) in the possible market for the retail supply of 4P bundles in Germany, as a result of horizontal non-coordinated effects. The Commission made clear that that was without prejudice to the assessment of the conglomerate effects of the transaction in relation to the supply of the various components of the bundles.

(4) ***Horizontal non-coordinated effects on the market for the retail supply of TV services***

23 It is apparent from the contested decision that, in the market for the retail supply of TV services, the supply side comprises providers of linear TV, that is to say, linear programme streams broadcast according to a timetable set by the TV channel, and non-linear TV, namely programme streams provided at the end user's request. Those providers serve final customers who wish to use such services (demand side). The television services provided by TV distributors to end users consist of packages of linear free-to-air ('FTA') TV channels or linear pay-TV channels, as well as content aggregated in non-linear services, such as video on demand ('VOD'). TV content may be provided to end users via a number of technical means, including cable,

satellite, terrestrial TV (DVB-T) and IPTV. Suppliers of over-the-top TV services provide channels and content in both a linear and non-linear manner via high-speed internet connection ('OTT') TV services provide channels and content in both a linear and non-linear manner via the internet. In the present case, the Commission concluded, for the purposes of the contested decision, that the market was national in scope and that, from a substantive point of view, the exact definition of the market could be left open.

24 Following its analysis, the Commission concluded that the transaction was not likely to significantly impede effective competition in the market for the retail supply of TV services in Germany as a result of horizontal non-coordinated effects.

(5) ***Horizontal non-coordinated effects on the wholesale market for the supply and acquisition of TV channels and on the market for wholesale TV signal transmission***

25 It is apparent from the contested decision that, in the wholesale market for the supply and acquisition of TV channels, broadcasters (supply side) supply linear channels (free-to-air and pay-TV channels) which retail TV providers (demand side) acquire in order to provide audiovisual services to end users. In the contested decision, the Commission took the view that that market was limited to Germany and had to be segmented between free-to-air channels and pay-TV channels.

26 In the market for wholesale TV signal transmission, retail TV providers (supply side) use their infrastructure to offer broadcasters (demand side) a TV signal transmission service for their channels. In the contested decision, the Commission considered that it was necessary to define the relevant market as being the wholesale market for TV signal transmission via cable, the geographic scope of which was the footprint of each cable network and it stated that it would take account of a product market covering IPTV. It added that it would assess the effects of the concentration at national level.

27 In the contested decision, the Commission acknowledged that the wholesale market for the supply and acquisition of TV channels and the market for wholesale TV signal transmission were closely linked in so far as the negotiations between TV broadcasters and TV platforms (retail TV providers) usually covered both aspects (signal transmission and acquisition of channels). Accordingly, the Commission stated that it would analyse the effects of the concentration on those two markets in the same section of the contested decision.

28 Following its analysis, the Commission found that the transaction would not significantly impede effective competition in relation to the market for the wholesale supply of TV channels in Germany.

29 In the market for wholesale TV signal transmission in Germany, the Commission examined whether, following the increase in market power as a supplier of TV signal, the merged entity could (i) obtain terms and conditions from broadcasters that would ultimately have a negative impact on the access of competing retail TV providers to TV content, (ii) negatively influence the breadth and quality of programming content offered in Germany, (iii) hamper the emergence of innovative TV services, and (iv) hamper the emergence of addressable TV advertising or targeted advertising ('ATV') applications.

30 First of all, the Commission explained that, even if the transaction could likely lead to the increase in the merged entity's market power in the market for wholesale TV signal transmission, it was not possible to conclude that, as a result of such increase in market power, that entity would be likely to obtain terms and conditions from broadcasters and TV rights holders, in the form of exclusivity agreements, which would have a negative impact on the access of competing retail TV providers to TV channels or content.

31 Next, the Commission concluded that, on account of the merged entity's increased market power resulting from the transaction, it would have the ability and incentive to put in place a strategy in the market for wholesale TV signal transmission which could harm consumers downstream through a reduced quality of the viewer experience, reduced choice and fewer investments in content by TV broadcasters. In particular, as a consequence of the merged entity's increased market power, the transaction could lead to a form of partial foreclosure of free-to-air and pay-TV channels, notably through the worsening of the contractual and financial conditions imposed by the merged entity on broadcasters, and, as a consequence, to a deterioration in the quality of the TV offer to final viewers in Germany.

32 Furthermore, the Commission found that, as a result of Vodafone's increased market power resulting from the transaction, Vodafone would have the ability and incentive to put in place a strategy in the market for wholesale TV signal transmission aimed at hampering the emergence and development of innovative TV services, such as the transmission of Hybrid Broadcast Broadband TV ('HbbTV') and offers of OTT TV services. Such impediment could harm consumers downstream through a reduced quality of the viewer experience and reduced choice.

33 Lastly, the Commission concluded that the transaction would not significantly impede effective competition with regard to the possibility of the merged entity to prevent or somehow hinder the emergence and development of ATV applications.

(b) Vertical effects

34 As regards the vertical effects of the concentration, the Commission examined, in particular, the likelihood of foreclosure of retail providers of TV signal transmission services to MDU customers.

35 In the intermediary market for TV signal transmission ('the intermediary market'), level 3 network operators (supply side), namely the network which runs from the cable head-end to the boundary of a property, provide the TV signal to level 4 network operators (demand side), namely the network which runs within the property. In the present case, the Commission concluded, for the purposes of its decision, that both cable and fibre to the home ('FTTH') or fibre to the building ('FFTB') formed part of the same relevant market and that, from a geographic standpoint, the market was regional in scope, in other words limited to the cable footprint of the level 3 operator.

36 Following its analysis, the Commission concluded that the transaction would not significantly impede effective competition in the MDU market defined at national level, or in the potential regional market corresponding to Unitymedia's cable footprint as a result of vertical non-coordinated effects.

(c) Conglomerate effects

37 Since, as it had previously explained, it was not possible to conclude that there was a single multiple play market in Germany, the Commission also examined whether the concentration would give rise to conglomerate effects by foreclosing competitors in the retail market for mobile telecommunications services, the retail for fixed telephony services, the market for fixed internet access and the retail market for TV services.

38 Following its analysis, the Commission concluded that the transaction would not significantly impede effective competition as a result of conglomerate effects in Germany.

(d) Conclusion on the effects of the concentration in Germany

39 In the contested decision, the Commission therefore found that there was a significant impediment to effective competition ('SIEC') on the market for fixed internet access and on the market for wholesale TV signal transmission.

2. Commitments made binding in the contested decision

40 In the contested decision, the Commission concluded that the commitments undertaken by Vodafone were capable of rendering the transaction compatible with the internal market and the EEA Agreement. It therefore concluded that the transaction, as amended following the commitments offered by Vodafone, would not significantly impede effective competition in the markets in which competition concerns had been identified.

41 The following commitments were undertaken by Vodafone:

– a prior commitment to give a new cable operator, namely Telefónica, access to the merged entity's cable infrastructure in order to enable that cable operator to offer, on a retail basis, fixed internet access services (and, if it so wished, fixed voice telephony services) and its own OTT TV services or those of third parties ('the WCBA commitment');

– a commitment relating to OTT TV ('the OTT commitment'), comprising two aspects, namely (i) the commitment to refrain from contractually restricting, directly or indirectly, the possibility for broadcasters which are carried on the merged entity's TV platform of distributing their content via an OTT service , and (ii) the commitment to maintain sufficient direct interconnection capacity between its internet network covering Germany and third-party providers of internet connectivity (transit) services;

– a commitment not to increase the feed-in fees paid by free-to-air broadcasters ('the feed-in fees commitment');

– a commitment to continue to transmit the HbbTV signal of free-to-air broadcasters ('the HbbTV commitment').

42 Accordingly, Article 1 of the contested decision states that the transaction is compatible with the internal market and the EEA Agreement pursuant to Article 8(2) of Regulation No 139/2004 and Article 57 of the EEA Agreement. Furthermore, Articles 2 and 3 of that decision lay down conditions and obligations respectively, in order to ensure that Vodafone complies with the commitments it has given to the Commission.

II. Procedure and forms of order sought

43 By order of 30 June 2022, the Court required the Commission to adduce certain documents.

44 By order of 30 March 2023, made on the basis of Article 103(3) of the Rules of Procedure of the General Court, the Court ordered the Commission to adduce (i) a new non-confidential version of the contested decision and certain annexes thereto, to be provided to the applicant, containing a number of previously redacted passages and (ii) a new confidential version of the contested decision and one of its annexes, to be provided only to the applicant's representatives who had already signed a confidentiality undertaking, containing other previously redacted passages.

45 By document of 16 May 2023, the Court put to the applicant, the Commission and the intervener a number of written questions to be answered in writing and to be answered at the hearing.

46 By document lodged at the Registry of the General Court on 2 June 2023, the applicant submitted its observations on the documents adduced by the Commission in accordance with the order of 30 March 2023.

47 The parties presented oral argument and replied to the Court's oral questions at the hearing on 21 September 2023.

48 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

49 The Commission and the intervener contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

III. Law

50 In support of its action, the applicant puts forward five pleas in law, alleging (i) infringement of Article 2(2) and (3) of Regulation No 139/2004 and manifest errors of assessment as regards the MDU market, (ii) a manifest error of assessment as regards the competitive relationship between the parties to the concentration on the SDU market, (iii) a manifest error of assessment concerning the vertical effects as regards intermediary TV signal transmission services, (iv) manifest errors of assessment concerning the effects of the concentration on the wholesale

markets for the acquisition of TV channels and for TV signal transmission and (v) a manifest error of assessment in so far as the Commission found that the OTT and feed-in fees commitments were sufficient to render the concentration compatible with the internal market.

A. Applicable case-law principles

1. The standard of judicial review

51 In accordance with settled case-law, the substantive rules of Regulation No 139/2004, in particular Article 2, confer on the Commission a certain discretion, especially with regard to assessments of an economic nature, and that, consequently, review by the Courts of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (judgments of 18 December 2007, *Cementbouw Handel & Industrie* v *Commission*, C-202/06 P, EU:C:2007:814, paragraph 53, and of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 85).

52 Review by the EU Courts of complex economic assessments made by the Commission in the exercise of the power of assessment conferred on it by Regulation No 139/2004 is confined to ascertaining compliance with the rules governing procedure and the statement of reasons, as well as ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment or misuse of powers (judgments of 13 July 2023, *Commission* v *CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraph 84, and of 9 July 2007, *Sun Chemical Group and Others* v *Commission*, T-282/06, EU:T:2007:203, paragraph 60).

53 In particular, it is not for the Court to substitute its own economic assessment for that of the Commission (judgments of 7 June 2013, *Spar Österreichische Warenhandels* v *Commission*, T-405/08, not published, EU:T:2013:306, paragraph 51, and of 23 May 2019, *KPN* v *Commission*, T-370/17, EU:T:2019:354, paragraph 107).

54 However, while it is not for the Court to substitute its own economic assessment for that of the Commission for the purposes of applying the substantive rules of Regulation No 139/2004, that does not mean that the EU Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. The EU Courts not only must establish, inter alia, whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data which must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, judgments of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 145, and of 23 May 2019, *KPN* v *Commission*, T-370/17, EU:T:2019:354, paragraph 60).

2. The rules of evidence

55 A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a

prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted (judgment of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 42).

56 However, the prospective nature of the economic analysis which the Commission must carry out precludes a requirement for that institution to meet a particularly high standard of proof in order to demonstrate that a concentration would or would not significantly impede effective competition. In those circumstances, having regard, in particular, to the symmetrical structure of Article 2(2) and (3) of Regulation No 139/2004 and to the prospective nature of the Commission's economic analyses when conducting the review of concentrations, it must be held that, in order to declare that a concentration is incompatible or compatible with the internal market, it is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it (judgment of 13 July 2023, *Commission* v *CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraphs 86 and 87).

57 As regards the standard of proof, it is apparent from paragraphs 50 to 53 of the judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala* (C-413/06 P, EU:C:2008:392), that the Commission is, in principle, required to adopt a position, either in the sense of approving or of prohibiting the concentration notified to it, in accordance with its assessment of the economic outcome attributable to the concentration which is the most likely to ensue. An assessment of probabilities is therefore involved and not an obligation on the Commission to show beyond any reasonable doubt that a concentration does not give rise to any competition concerns (see, to that effect, judgment of 11 December 2013, *Cisco Systems and Messagenet* v *Commission*, T-79/12, EU:T:2013:635, paragraph 47).

58 In that context, it is the Commission's task to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation. It is possible, in that regard, for certain items of evidence to be prioritised and other evidence to be discounted. That examination and the associated reasoning are subject to a review of legality which the Court carries out in relation to Commission decisions on concentrations (see, to that effect, judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 136).

59 Lastly, it must be noted that there is no principle of EU law which precludes the Commission from relying on a single item of documentary evidence provided that its probative value is undoubted (see, to that effect, judgment of 5 October 2020, *HeidelbergCement and Schwenk Zement* v *Commission*, T-380/17, EU:T:2020:471, paragraph 460 (not published)).

60 The applicant's pleas referred to in paragraph 50 of the present judgment must be examined in the light of those considerations.

B. The first plea: infringement of Article 2(2) and (3) of Regulation No 139/2004 and manifest errors of assessment as regards the MDU market

61 In support of its first plea, the applicant maintains that the Commission's analysis in the contested decision of the horizontal non-coordinated effects of the concentration on the MDU market is vitiated by an error of law and manifest errors of assessment.

1. Preliminary observations

62 In Section VIII.C.2.4 of the contested decision, the Commission examined the horizontal non-coordinated effects of the transaction on the MDU market. As stated in paragraph 19 above, the Commission concluded that the geographic definition of that market could be left open.

63 After setting out, in recitals 683 to 701 of the contested decision, certain specific features of the MDU market, the Commission examined, in recitals 702 to 712 of that decision, the market shares of the parties to the concentration both at national level and at the level of their respective cable footprints, and the concentration levels on the MDU market, before concluding, in recitals 718 to 720 of that decision, that, while that market was highly concentrated and each of the parties had a very strong position in its respective cable footprint, the transaction would not give rise to any merger-specific change as the parties were not competitors on that market, given the absence of any meaningful overlap between their activities.

64 The Commission then examined, in recitals 721 to 764 of the contested decision, the competitive constraints exerted by the parties. In that analysis, the Commission concluded that neither Vodafone (see recitals 723 to 746) nor Unitymedia (see recitals 747 to 764) exerted a competitive constraint within the other party's cable footprint, that there was no indication that that would have been the case absent the transaction and that they were therefore not potential competitors.

65 In recitals 765 to 785 of the contested decision, the Commission analysed the competitive constraints exerted by the parties on each other and concluded that the parties were neither actual direct competitors (see recitals 766 to 772) or actual indirect competitors (see recitals 773 to 785).

66 Lastly, in recitals 786 to 831 of the contested decision, the Commission examined and compared the competitive constraints exerted by competitors, and more particularly Tele Columbus, by the applicant and by other smaller players pre-transaction (see recitals 787 to 820) and post-transaction (see recitals 821 to 831), before concluding that those constraints were likely to remain unchanged.

67 In view of the lack of merger-specific change and the fact that the merger would not involve any loss of direct, indirect or potential competition between the parties and would not weaken the competitive constraint exerted by their competitors, the Commission concluded that the merger would not lead to any anticompetitive horizontal non-coordinated effects and, therefore, to no SIEC on that market (see recitals 832 to 835 of the contested decision).

68 In the present case, the applicant's arguments in support of the present plea relating to that examination carried out by the Commission in the contested decision concerning the horizontal non-coordinated effects of the concentration on the MDU market may be divided into two parts, alleging (i) an error of law and infringement of Article 2(2) and (3) of Regulation No 139/2004, on the ground that the Commission failed to consider that the transaction would lead to the creation or strengthening of a dominant position and (ii) manifest errors of assessment.

69 In that regard, the Court considers it appropriate to begin by examining the second part of the present plea.

2. The second part: manifest errors of assessment

70 The applicant maintains, in essence, that the Commission made manifest errors of assessment in the contested decision as regards (i) the competitive relationship between the parties to the concentration and (ii) the competitive effects of the transaction on the MDU market.

(a) Manifest errors of assessment regarding the competitive relationship between the parties to the concentration

71 The applicant submits that the Commission made manifest errors of assessment when it found, in the contested decision, that the parties to the concentration were not, prior to that transaction, either actual competitors (directly or indirectly) or potential competitors. Furthermore, the applicant relies on the Commission having conducted an insufficient examination of whether tacit collusion existed between the parties prior to the concentration.

(1) Direct competition

72 The applicant submits that the parties to the concentration were direct competitors before the transaction

73 As a preliminary point, it must be recalled that, in the contested decision, the Commission concluded that the parties to the concentration were not direct competitors, having found that they were almost exclusively active within their respective cable footprints, which did not overlap, with the result that customers on the MDU market could not switch from one party to the concentration to the other (see recital 766).

74 As regards the few contracts concluded by the parties to the concentration outside their cable footprints, the Commission stated that the parties had explained that they were not the result of active competition on their part, but had been concluded by way of exception, either because they were specific legacy contracts, or they were contracts with housing associations operating at national level, which were already customers of one of the parties and preferred to contract with that party for all their properties (see recital 768 of the contested decision).

75 The Commission added that that lack of direct competition between the parties had been confirmed by the responses provided by competitors and housing associations in the market investigation, as well as by the parties' data relating to their participation in tenders on the MDU market (see recitals 769 to 771 of the contested decision).

76 In the present case, in the first place, the applicant submits that, if the MDU market had to be regarded as being national in scope prior to the concentration, both parties were necessarily actual competitors. Whether or not the parties 'actively compete' with each other in that entire market or confine their activities to certain (geographic) segments of the market, namely their respective cable footprints, is irrelevant in that regard. In the applicant's view, neither Regulation No 139/2004 nor the case-law of the EU Courts requires the elimination of 'active' competition between two undertakings in order to establish that there is a SIEC.

77 In the second place, the applicant maintains that, even if the relevant geographic markets were confined to the merging parties' cable footprints, the contested decision contains indications that at least some direct competitive interaction between the parties occurred prior to the

concentration. Indeed, it is clear from Tables 16 (see recital 710) and 17 (see recital 714) of the contested decision that limited, but far from insignificant, overlaps between the activities of the parties to the concentration existed at the very least in Unitymedia's cable footprint. Furthermore, recital 767 et seq. of the contested decision refer to specific examples of 'legacy contracts' or 'split contracts' concluded by the parties to the concentration outside their cable footprint.

78 The applicant states that it follows that the Commission's view that the parties were not direct competitors before the transaction is manifestly erroneous.

79 The Commission, supported by Vodafone, disputes the applicant's arguments.

80 In that regard, it must be pointed out that there is direct competition between undertakings when they compete for the same customers.

81 In the present case, it is common ground that the merging parties' cable networks do not overlap and that, in fact, when an MDU customer wishes to conclude a contract with a TV signal provider, it is, in principle, only able to choose between the merging party within whose cable footprint the building to be connected is located and one of its competitors, such as the applicant. Whether the MDU market was, prior to the transaction, national in scope or whether it was limited to the cable footprints of the merging parties changes nothing, since, in both cases, that observation holds true.

82 It follows that the products marketed by the merging parties were, in practice, not in competition and, consequently, the Commission did not make a manifest error of assessment when it concluded that those parties were not direct competitors prior to the concentration.

83 The arguments put forward by the applicant do not enable a finding to the contrary to be made.

84 In the first place, it must be noted that, in response to a question put by the Court on 16 May 2023 to be answered in writing, the Commission confirmed that there were strong indications that the MDU market was, prior to the transaction, geographically limited to the cable footprint of each of the parties, but that, because of the existence of nationally active suppliers and customers and the fact that any price differences within the country were not linked to those footprints, it could not completely rule out the possibility that the MDU market could be national.

85 Accordingly, the fact that the Commission envisaged that the market could be national in scope does not mean that it concluded that, on such a hypothetical market, the parties to the concentration were in direct competition. It is only as a later step, in its examination of the effects of the transaction on the MDU market, that the Commission assessed whether, on a possible national market, the transaction would, in view of the parties' activities, lead to a loss of direct competition between them. The fact that, in the contested decision, the Commission envisaged that the MDU market could already have been national in scope before the transaction does not therefore permit the inference that the merging parties were necessarily actual competitors on such a market, as the applicant submits. Lastly, it cannot be ruled out that two undertakings operate with other undertakings in the same geographic market, without those two undertakings seeking to win the same customers, in particular on account of the geographical limits of their cable networks.

86 It should be added that the sole purpose of Commission's finding in recital 768 of the contested decision that the parties were not in 'active competition' was to explain that the parties had concluded, on very rare occasions, contracts for the supply of TV signals on the other party's cable footprint only in response to unsolicited requests from MDU customers. In order to respond to such requests, the parties then had to acquire intermediary services for the transmission of TV signals from another operator. In so doing, the Commission in no way concluded that the elimination of 'active' competition was necessary in order to establish the existence of a SIEC.

87 In the second place, while there was no overlap between the merging parties' 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.

88 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.

89 Such agreements outside their cable footprints were also concluded by the merging parties only on an exceptional basis, which the applicant itself confirmed during the market investigation, as is apparent from recital 770 of the contested decision.

90 Therefore, the applicant has not demonstrated that the Commission made a manifest error of assessment in finding that the parties to the concentration were not direct competitors prior to the concentration.

(2) Indirect competition

91 The applicant submits that the parties to the concentration were indirect competitors prior to the transaction.

92 As a preliminary point, it should be recalled that, in the contested decision, the Commission assessed whether there was an indirect commercial constraint between the merging parties prior to the concentration. In that context, the Commission recognised that in order to give rise to a SIEC, any existing indirect competitive pressure which would be removed as a result of the transaction would have to be particularly strong (see recital 776). Following that analysis, the Commission concluded that the parties to the concentration were not indirect competitors on the basis of a series of factors.

93 First, the Commission took into account the fact that the few respondents to the market investigation which had argued that there was indirect competition between the merging parties themselves acknowledged that pricing on the MDU market was specific to local factors and could not be compared across the different regions concerned (see recital 774 of the contested decision).

94 Second, the Commission indicated that three possible transmission mechanisms had been identified during the market investigation, which could have given rise to indirect competition between the parties, the first from competitors active at national level, such as the applicant, the second from customers active at national level and the third from specialist intermediaries, such as law firms or consultancy firms (see recital 775 of the contested decision). The Commission then explained that it had not discovered any evidence demonstrating that those transmission mechanisms could have led to indirect competition between the parties or that such indirect competition had existed (see recital 777 of the contested decision).

95 Accordingly, the majority of housing associations which took part in the market investigation replied that they never used (for local companies, which could have influenced the third transmission mechanism) or rarely (for nationwide societies, which could have influenced the second transmission mechanism) indirect competitive benchmarking analyses. As regards competing operators, only the applicant and Tele Columbus stated that indirect competitive benchmarking analyses were often used (see recitals 778 to 780 of the contested decision). However, neither of those two competitors was able to provide the Commission with specific examples demonstrating that the parties were indirect competitors, such as evidence of alignment of conditions on the MDU market throughout Germany (see recital 781 of the contested decision).

96 Third, the Commission examined the internal documents of the merging parties and found no evidence that Vodafone or Unitymedia took into account the other party's terms in its negotiations on MDU contracts (see recital 782 of the contested decision). The Commission also took into account evidence provided by the merging parties demonstrating that there was no alignment at national level of the conditions applicable to the contracts concluded on the MDU market (see recital 783 of the contested decision).

97 Finally, the Commission took account of the fact that that sort of cross-region benchmarking could not in any event be an effective means of leverage, given the lack of actual competition between the parties and given it is therefore impossible for housing associations to switch from one party to the concentration to the other (see recital 784 of the contested decision).

98 In the present case, in the first place, the applicant maintains that the Commission misapplied Article 2 of Regulation No 139/2004 in concluding in recital 776 of the contested decision that, in order to give rise to a SIEC, any existing indirect competitive pressure which would be removed as a result of the transaction would have to be particularly strong. According to the applicant, indirect competition is a relevant form of actual competition, protected by Regulation No 139/2004, irrespective of a particular threshold for such competition. Given that both parties to the concentration were dominant in their respective footprints prior to the transaction, even a limited increment in market power consisting in a removal of a (direct or indirect) competitive constraint gives rise to a SIEC, as the Commission itself accepts with regard to the position of the merging parties on the wholesale TV markets.

99 In the second place, the applicant states that, in the contested decision, the Commission found significant incidents of indirect competition, namely the fact that the parties to the concentration monitored each other's respective activities and benchmarked their product offerings, that large housing associations benchmarked the merging parties' offers against each other and that there was infrastructure competition between the parties to the concentration. According to the

applicant, what matters in order to prove that there is an indirect competitive constraint is that the parties take each other's terms and conditions into account when determining their own competitive strategy.

100 It follows, in the applicant's view, that the Commission's conclusion that the transaction does not give rise to a loss of indirect competition between the parties is manifestly erroneous.

101 The Commission, supported by Vodafone, disputes the applicant's arguments.

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

103 In the first place, as regards the fact that the parties to the concentration monitored each other's respective activities and compared their product offers, it must be stated that the applicant itself acknowledges that recital 460 et seq. as well as recital 892 et seq. of the contested decision, to which it refers, concern the market for fixed internet access and the SDU market, but not the MDU market.

104 Furthermore, the Commission explained that those instances of benchmarking had not exceeded 'simple commercial benchmarking aimed at monitoring and possibly imitating best practices in the industry'. As the Commission correctly submits, that form of comparison, which consists of an analysis of market performance or best practices in the industry, including in other Member States or in third countries, cannot be classified as indirect competitive pressures as referred to in paragraph 102 above.

105 The Commission stated, in response to a question to be answered in writing put by the Court, that, in order for direct benchmarking to give rise to an indirect competitive constraint, there must, in its view, be evidence that the information gathered through benchmarking by one party concerning the other party is actually taken into account by the former party in making its commercial decisions and that that information therefore actually constrains that party by triggering a competitive reaction on its part. In the present case, the Commission has found no evidence indicating that that had been the case, on the MDU market, in relation to the benchmarking to which the applicant refers, and it must be held that the applicant has not demonstrated the contrary, or that the Commission committed a manifest error of assessment in such reasoning.

106 It follows that there was no indirect competitive constraint, the elimination of which could have given rise to even a limited increase in the merged entity's market power, which differentiates the MDU market from wholesale TV markets, where the Commission found that there was a SIEC as a result of the merged entity's increased market power (see paragraphs 31 and 32 above).

107 Finally, it is apparent from the contested decision (see in particular recital 697), which is not disputed by the applicant, that many contracts with MDU customers were the result of negotiations, bids or formal tender procedures. The contracts resulting from those negotiations or procedures included numerous requirements concerning, inter alia, infrastructure, the services provided and maintenance. Furthermore, the Commission noted that, at the end of the market investigation, there was agreement on the fact that prices did not vary according to

geographic region as such, but rather varied depending on the level of competition, infrastructure costs (for example, civil engineering costs) and the clustering of the buildings to be supplied. In addition, as acknowledged by third parties, 'pricing of MDU contracts [was] specific to local factors and [could] not be compared across areas'. The contracts concluded with MDU customers were therefore not standard contracts which could easily have been the subject of benchmarking simply based on observing industry practices.

108 In the second place, it should be noted that, contrary to the applicant's assertions, only Vonovia, of the 6 national housing associations and the 230 000 other housing associations, some of which were active in several *Länder*, replied that it often used benchmarking, but that Vonovia was unable to provide relevant examples demonstrating indirect competition between the merging parties, as is apparent from recital 779 and recital 781(c) of the contested decision.

109 In the rejoinder, the Commission stated in that regard that it had requested additional information from Vonovia and GdW (the latter being an umbrella and confederation organisation representing approximately 3 000 housing associations which, in total, managed approximately 6 million dwellings in Germany) following their replies to the questionnaires in the market investigation, but that they had not been able to provide evidence of the indirect benchmarking allegedly carried out by certain housing associations.

110 Lastly, the observations submitted by GdW during the administrative procedure, adduced by the applicant before the Court, do not call such an assessment into question, since they also do not contain any specific examples of benchmarking or, more generally, of indirect competition between the parties.

111 Therefore, the arguments put forward by the applicant do not call into question the Commission's finding that national or local housing associations had not, in the present case, participated in creating an indirect competitive constraint between the parties to the concentration.

112 In the third place, as regards infrastructure competition between the parties to the concentration, it should be noted that it is apparent from recital 441 and recital 453(b) of the contested decision that the Commission found that the investment and network innovation activities implemented by each of the parties to the concentration had not had a direct competitive impact on the other party's strategy of network investment and innovation strategy and that each party's monitoring of the other party's activities in that respect had not gone beyond 'simple commercial benchmarking aimed at monitoring and possibly imitating best practices in the industry', which the applicant does not contradict.

113 As stated in paragraphs 104 and 105 above, that form of comparison, which consists of an analysis of market performance or best practices in the industry, including in other Member States or in third countries, is merely a form of comparison which has been freely chosen, but is not the same as indirect competitive pressures referred to in paragraph 102 above.

114 In the fourth place, it should be stated 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. Contrary to the applicant's assertions, those findings were relevant for assessing

whether each party to the concentration took account of the conditions offered by the other party when determining its commercial strategy, and therefore for assessing whether there was indirect competition between them prior to the concentration on the MDU market.

115 It follows from the foregoing that the applicant has not demonstrated that the Commission erred manifestly in finding in the contested decision that the parties to the concentration were not indirect competitors.

116 In so far as the Commission did not commit a manifest error of assessment in concluding that there was no indirect competition between the merging parties, it is no longer necessary to examine the substance of the arguments relating to whether the type of competition eliminated must be 'particularly strong' in order to give rise to a SIEC as provided for in Article 2 of Regulation No 139/2004.

(3) Potential competition

117 The applicant submits that even if the parties could not have been regarded as actual competitors, they were at least potential competitors prior to the transaction.

118 As a preliminary point, it should be recalled that, in the contested decision, the Commission first of all examined whether Vodafone was a potential competitor of Unitymedia. In that context, the Commission recalled that Vodafone was mainly active in its own cable footprint and noted that it had indicated that it had no plans to expand its cable network infrastructure, in particular to Unitymedia's footprint, due to the lack of profitability of the underlying investment (see recital 726).

119 Given that almost all competing operators replied, in the context of the market investigation, that they expected Vodafone to expand its cable infrastructure into Unitymedia's footprint, the Commission then investigated the likely evolution of the competitive pressure exerted by Vodafone absent the transaction. In that regard, the Commission stated that Vodafone's theoretical ability to expand into Unitymedia's cable footprint was not sufficient, taking the view that, in order to demonstrate that there was potential competition between the parties to the concentration, the removal of which would have resulted in a SIEC, that would have to occur with a sufficient likelihood (see recital 730 of the contested decision).

120 In recitals 731 to 746 of the contested decision, the Commission explained that it had not identified a coherent body of evidence suggesting that Vodafone's expansion into Unitymedia's cable footprint would have been likely or reasonably predictable absent the transaction, but rather that it had identified evidence demonstrating the contrary.

121 The Commission noted that, first, Vodafone had never overbuilt Unitymedia's cable infrastructure in the past and found that that operator had undertaken only very limited development of its cable infrastructure, even within its own footprint and around it, even though such development was more profitable than overbuilding cable infrastructure. Second, the Commission's analysis of Vodafone's internal documents confirmed that Vodafone did not envisage overbuild projects in Unitymedia's cable infrastructure, since similar projects would not have met its investment criteria. The Commission took into account projections made by Vodafone, taking into consideration the infrastructure already available to that operator, which

had confirmed that lack of profitability. Third, the Commission stated that it had found no evidence which would have shown that overbuilding the cable infrastructure of another operator would become more profitable in the future.

122 Furthermore, the Commission's view was that the overbuild work undertaken by other operators such as Tele Columbus, local operators or the applicant addressed specific commercial considerations which differed from those aimed at developing a network which was in parallel to that of a competing operator. As regards Tele Columbus, the Commission observed that that operator had not made any significant investment in expanding its level 3 network (see recital 744 of the contested decision). Lastly, the Commission stated that there was no indication that it would have been likely that Vodafone would have intended to enter Unitymedia's footprint by technical or commercial means other than the extension of its own network infrastructure (see recital 742 of the contested decision).

123 Next, the Commission examined whether Unitymedia was a potential competitor of Vodafone. In that context, the Commission recalled that Unitymedia was mainly active in its own cable network footprint and noted that that operator had indicated that it had no plans to expand its network infrastructure, in particular into Vodafone's footprint, due to the lack of profitability of the underlying investment (see recital 726 of the contested decision).

124 Given that almost all competing operators indicated, in response to the market investigation, that they expected Unitymedia to expand its network in Vodafone's cable footprint, while nevertheless acknowledging that Unitymedia had a lesser incentive to do so than Vodafone, the Commission investigated the likely evolution of the competitive constraint exerted by Unitymedia absent the transaction.

125 In recitals 755 to 764 of the contested decision, the Commission explained that it had not identified a coherent body of evidence suggesting that Unitymedia's expansion into Vodafone's cable footprint would have been likely or reasonably predictable absent the transaction, but rather that it had identified evidence, relatively similar to that identified for Vodafone, demonstrating the contrary.

126 The Commission noted that, first, Unitymedia had never overbuilt Vodafone's cable infrastructure in the past and found that that operator had undertaken very little development of its cable infrastructure, even within its own footprint and in the proximity of its own footprint, whereas such development was more profitable than overbuilding cable infrastructure. Second, the Commission's analysis of Unitymedia's internal documents confirmed that that operator did not envisage overbuilding Vodafone's cable infrastructure, since similar projects have not met its investment criteria. The Commission took into account a projection made by Unitymedia confirming that lack of profitability. Lastly, the Commission stated that the other factors taken into account when examining whether there was potential competition from Vodafone also applied for Unitymedia.

127 In the present case, in the first place, the applicant maintains that an undertaking is a potential competitor on a particular market if there are real concrete possibilities for the undertaking in question to enter the market and to compete with the undertakings already established. It is thus only relevant to understand whether an undertaking has the ability to enter a particular market. That ability as such constitutes potential competition and is protected by Regulation No 139/2004, irrespective of whether that undertaking has any concrete plans actually to act upon its ability in the future. Accordingly, a situation of potential competition must primarily be

assessed objectively with a view to determining whether market entry would be objectively possible and thus whether the potential entrant is exerting a significant constraint on the undertakings which are already active in the relevant market. The subjective intentions or business plans of the merging parties, such as internal investment plans and profitability thresholds, are not decisive in that regard.

128 In the second place, the applicant submits that the market investigation concerning undertakings already active in the relevant markets clearly confirmed that the merging parties could realistically have expanded their cable (or fibre) infrastructure into each other's footprint. Market participants further stated that the merging parties would have been likely to become more aggressive competitors in each other's footprints within the next two to three years.

129 In the third place, according to the applicant, the contested decision contains a number of specific examples demonstrating the objective feasibility and economic viability of an expansion into another cable operator's footprint. The applicant itself as well as Tele Columbus and other operators in Europe could overbuild cable infrastructure, which demonstrates that such an operation would be economically viable. Moreover, the Commission erred, in the applicant's view, in confining itself to examining the likelihood of potential competition by means of overbuild of the other party's cable infrastructure, when the parties to the concentration could very well have served MDU customers outside their respective cable footprints on the basis of intermediary TV signal delivery services sourced from another operator. Nor did the Commission take account of there being 'white areas' in which no operator was present, so that the question of infrastructure overbuild did not arise.

130 In the fourth place, the applicant submits that the Commission erred in relying on the parties' investment criteria in order to conclude that overbuild of the other party's cable infrastructure was unprofitable, given that such criteria may be modified at any time, or even manipulated, and that 'economic viability' is an objective concept. In its observations of 2 June 2023, the applicant also submits that the merging parties' investment criteria, as referred to in the contested decision, (i) were by no means industry practice, (ii) did not correspond with the investment criteria of other market participants and (iii) were much higher than its own criteria, which showed that those criteria had been deliberately chosen to make any overbuild of the other party's cable infrastructure appear unprofitable.

131 In the fifth place, in the applicant's view, the Commission failed to take account of the fact that the Bundeskartellamt (Federal Cartel Office, Germany) regarded the parties as at least potential competitors.

132 According to the applicant, it follows that the Commission made a manifest error of assessment in finding that the parties to the concentration were not potential competitors prior to that transaction.

133 The Commission, supported by Vodafone, disputes the applicant's arguments.

134 In that regard, in the first place, it should be noted that, in the area of merger control, according to settled case-law, the examination of conditions of competition must be 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).

135 In order to determine whether an undertaking is a potential competitor in a market, the Commission is required to determine whether, if the absence of the concentration, there would have been real concrete possibilities for it to enter that market and to compete with established undertakings. 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).

136 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, consequently, may 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 for itself for that purpose.

137 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 to 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.

138 In the second place, as regards the perception of the undertakings already active on the relevant market as expressed during the market investigation, it is clear from recitals 727, 728, 752 and 753 of the contested decision that the Commission did indeed take account of the views of competing operators, since it follows from those recitals that it undertook a thorough examination of whether there was potential competition between the parties to the concentration on the basis, in particular, of the observations made by them.

139 In that regard, it must be stated that, while the Commission is entitled to take account of the perception of undertakings active on the market, that cannot be decisive for the assessment of whether potential competition exists.

140 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 the 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)).

141 In the third place, as regards the evidence which, according to the applicant, demonstrates that it is objectively feasible and economically viable to expand into the coverage area of another cable operator, it is sufficient, in order to reject that complaint, to recall, as is apparent from the case-law cited in paragraph 136 above, that the economic viability of a market entry strategy does not amount simply to such a strategy being profitable, and that account must be taken 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.

142 Therefore, even if the evidence and examples put forward by the applicant were to demonstrate that an expansion into the cable footprint of the other party to the concentration was objectively feasible and economically viable, the fact remains that the Commission, in the contested decision, explained in detail, relying in particular on their internal documents, that, prior to the transaction, none of the parties intended to overbuild the other party's network or had an economic interest in doing so, given that the underlying investments did not meet their respective investment criteria. Moreover, the Commission also took into consideration the fact that the parties to the concentration had never overbuilt their respective networks in the past. It must be held that the foregoing is sufficient to reject the third complaint put forward by the applicant.

143 In addition, the evidence put forward by the applicant does not demonstrate that it would have been objectively feasible and economically viable for the parties to the concentration to expand their activities on the MDU market into the cable footprint of the other party.

144 Accordingly, first, as regards the fact that other competitors were willing to expand their network, the Commission explained, in the contested decision, why those strategies did not apply to the parties to another concentration.

145 As regards, more specifically, the applicant's case, as is apparent in particular from recital 744(c) of the contested decision, its situation was very different from that of the parties to the concentration because it already had a very extensive fibre optic network and because it used that network to provide broadband access services via digital subscriber line (DSL) technology. Consequently, in order to expand its offer to MDU customers to new areas, the applicant could rely on its own optic fibre lines or its existing ducts and generally needed to build only short parts of the level 3 network.

146 As regards Tele Columbus, the evidence set out in recital 744(a) and in recitals 797 to 799 of the contested decision, which the applicant does not dispute, indicates that Tele Columbus had not carried out any significant overbuild of the cable infrastructure of another operator 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 Tele Columbus's network did not increase significantly between 2012 and 2018, except as a result of the acquisition of pre-existing assets from other companies.

147 As regards the cases of overbuild of cable infrastructure in other Member States referred to by the applicant, as the Commission states in its pleadings, they can be explained by historical factors or by low deployment costs in those Member States. Furthermore, the Commission referred before the Court to examples of Member States in which cable networks did not overlap. The

Commission also stated, and substantiated, that the fact that operators do not, as a rule, expand their cable networks is a general trend in Europe. It follows that the cases of infrastructure overbuild relied on by the applicant do not call into question the Commission's assessments regarding potential competition between the parties to the concentration.

148 Second, contrary to the applicant's allegations, the Commission did not confine itself to examining the likelihood of potential competition by means of overbuilding the cable infrastructure of the other party to the concentration, as is apparent from recital 745 of the contested decision in relation to Vodafone and recital 763 of that decision in relation 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.

149 Furthermore, the Commission explained before the Court, without being contradicted by the applicant, that while 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, the Commission found that level 4 operators 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 undertake 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 into the cable footprint of the other party other than via infrastructure.

150 Third, as regards the Commission's failure to take account of the existence of 'white areas', it must be held that while no operator had already rolled out cable networks in those areas, it was highly unlikely that the parties to the concentration would both decide to make an entry there, and there is no need to make a ruling on whether that argument, which the Commission disputes, is admissible. In that regard, it must also be stated that the Commission's investigation revealed no evidence indicating that, absent the transaction, the parties would have undertaken a roll out in the same white area and the applicant has produced no evidence to the contrary.

151 In the fourth 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 135 and 136 above) and, consequently, on its investment criteria.

152 In that regard, it should be observed that the Commission must rely on a body of evidence in order to assess whether potential competition exists. When conducting that exercise, it cannot disregard the investment strategies of the undertakings concerned. That is so, in particular, for large international groups such as Vodafone, which must be able to decide between investment projects relating to a number of national markets on the basis of the best rates of return.

Furthermore, it must be stated that the information provided by the applicant is not sufficient to support the conclusion that the Commission was in possession of evidence that the figures submitted by the party which notified the concentration were incorrect.

153 It should also 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 Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Regulation No 139/2004 (OJ 2004 L 133, p. 1, and corrigendum OJ 2004 L 172, p. 9), 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).

154 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.

155 As regards, in the fifth place, decisions made by the Federal Cartel Office not taken into account by the Commission, 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 another concentration and another period.

156 It follows from the foregoing that the applicant has not succeeded in demonstrating that the Commission made a manifest error of assessment in finding, in the contested decision, that it was unlikely that, absent the concentration, the merging parties would have expanded their activities on the MDU market into the cable footprint of the other party, with the result that there would have been potential competition between them which the transaction would have eliminated, thereby giving rise to a SIEC.

(4) The collective dominant position resulting from tacit collusion between the parties to the concentration

157 On a number of occasions, the applicant submits that if the parties to the concentration were not competitors and had never overbuilt their cable networks, that was because they were in a position of collective dominance as a result of tacit collusion between them, which the Commission had failed to investigate sufficiently.

158 Accordingly, the applicant submits that the absence of active competition between the merging parties does not mean that they were not competitors, but rather suggests that they held a collective dominant position as a result of tacit collusion between them, with a view to divide the German market and to avoid creating the impression that there was a competitive relationship between them in order to facilitate approval of the concentration, which had been planned for a long time. In support of such allegation, the applicant refers to a number of decisions of the Federal Cartel Office, which found that the parties were in a collectively dominant position, and submits that the MDU market has all the characteristics of a market subject to collective dominance and that there is no credible alternative explanation for the absence of active competition between the merging parties.

159 The Commission, supported by Vodafone, disputes the applicant's arguments.

160 In that regard, it must be observed that the applicant does not maintain that the transaction would have created or strengthened a collective dominant position on the MDU market, thereby significantly impeding effective competition in the internal market or in a substantial part of it, but rather submits that the parties to the concentration were, prior to the concentration and as a result of tacit collusion between them, in a collectively dominant position.

161 Assuming that the applicant is, by its argument, seeking to draw attention to a cartel, 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).

162 It follows that the applicant's complaint alleging 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.

163 However, although the applicant is, by its argument, seeking to draw attention to the existence of a collectively dominant position, it must be recalled that, in the contested decision, the Commission concluded that third parties' allegations that the merging parties were in a position of collective dominance as a result of tacit collusion between them were not confirmed by a review of the parties' internal documents and were contradicted by the evidence on the file concerning the insufficient profitability of overbuilding the other party's cable network (see footnotes 534 and 566). The arguments put forward by the applicant do not call into question that assessment by the Commission.

164 As regards, in the first place, the decisions of the Federal Cartel Office, it must be recalled that they cannot bind the Commission.

165 As regards, in the second place, the MDU market, which, according to the applicant, has all the characteristics of a market subject to collective dominance, it must be stated that most contracts on that market are concluded following negotiations, competitive tenders or formal tender procedures launched by customers (see recital 697 of the contested decision), which the applicant does not dispute, with the result that that market is unlikely to fulfil the condition of transparency necessary to enable undertakings in a collectively dominant position to align their conduct on that market (see, to that effect, judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 121).

166 As regards, in the third place, the applicant's allegation that only tacit collusion between the merging parties could explain the absence of active competition between them, it should be recalled that it is apparent from the examination of the previous complaints put forward by the applicant in support of the second part of the present plea that the Commission did not make a manifest error of assessment in finding that suck lack of competition between the parties resulted, principally, from the lack of overlap between their respective cable footprints and the substantial infrastructure costs generated by overbuilding the other party's cable infrastructure, which did not satisfy the merging parties' investment criteria. It must also be stated that the applicant has provided no evidence whatsoever capable of substantiating such an allegation.

167 It follows from the foregoing that the applicant has failed to demonstrate that the Commission manifestly erred in concluding in the contested decision that third parties' allegations of tacit collusion between the merging parties were unfounded.

(b) Manifest errors of assessment as regards the competitive effects of the transaction on the MDU market

168 The applicant maintains that, since the parties to the concentration were actual or potential competitors before the transaction, the Commission made a manifest error of assessment in concluding that the transaction would not have brought about any change specific to the merger. Rather, the transaction would result in a merger-specific increase in Vodafone's market power and the elimination of competitive constraints between the merging parties. Furthermore, the applicant submits that the transaction further weakens the competitive constraint exerted by the remaining competitors of the merged entity.

(1) The increase in the merged entity's market power and the elimination of competitive constraints

169 The applicant submits that, following the transaction, a single undertaking, namely the merged entity, would decide on the competitive strategy and pricing policy in the whole of Germany, which constitutes a change in the competitive conditions in the MDU market which is merger-specific, since, prior to the transaction, each of the two parties adopted its strategic decisions individually, without being sure of the other party's intended conduct. The applicant adds that that competitive pressure between the parties would, following the transaction, have been permanently eliminated. The applicant submits that such a change in the competitive conditions on the market is sufficient for a finding of a SIEC and, in addition, that the Commission erred in law in concluding that that was not a direct and immediate consequence of the transaction.

170 The Commission, supported by Vodafone, disputes the applicant's arguments.

171 In that regard, it should be stated that the applicant's argument that the transaction would have resulted in a merger-specific increase in Vodafone's market power and the elimination of the competitive constraints between the merging parties is based on the premiss that, prior to the transaction, the parties to the concentration were actual or, at the very least, potential competitors or, in any event, that those parties were in a situation of tacit collusion.

172 As is apparent from the examination of the second part of the present plea above, the applicant has not demonstrated that the Commission made a manifest error of assessment when it concluded that the merging parties were not actual or potential competitors on the MDU market. Furthermore, the applicant's arguments alleging tacit collusion between the merging parties prior to the transaction have been rejected for the reasons set out in paragraphs 157 to 167 above.

173 It follows that that argument of the applicant is based on a false premiss, with the result that it cannot be upheld.

(2) The weakening of the competitive constraints exercised by the remaining competitors

174 The applicant submits that the transaction would also have weakened the competitive constraints exercised by the merging parties' remaining competitors on the MDU market, which was sufficient for a finding of a SIEC.

175 In the first place, the applicant submits that, following the transaction, Vodafone, and no longer Unitymedia, would, in particular in Unitymedia's cable footprint, have determined the commercial strategy, including the pricing policy, of the merged entity vis-à-vis Tele Columbus, the strongest of the parties' competitors, as well as vis-à-vis other level 4 network operators in relation to intermediary services for the transmission of TV signals. After the transaction, those operators would therefore have depended, including within Unitymedia's cable footprint, on Vodafone, which, according to the applicant, had a reputation of wishing to harm its smaller competitors via uneconomical terms and conditions, whereas that was not the case before the transaction.

176 In the second place, the applicant submits that other competitors (such as the applicant itself and smaller local players) were already unable to exert significant competitive pressure on Unitymedia and Vodafone prior to the transaction, in particular because of the 'Nebenkostenprivileg' (ancillary rental cost privilege), which favoured cable network operators, given that that mechanism entitled housing associations to charge to their tenants direct cable TV supply costs as ancillary costs, which reduced their incentive to switch provider.

177 In the third place, the applicant maintains that the merged entity's increased market power vis-à-vis TV broadcasters means that the merged entity would have the ability and incentive to weaken further its remaining TV infrastructure competitors in the MDU market by (i) (at least partially) foreclosing them or (ii) deteriorating their access conditions to TV channels or audiovisual content or the competitively relevant features of such channels or audiovisual content. In the applicant's view, the Commission completely fails to take account of such 'partial foreclosure' options and their repercussions on the competitive situation in the MDU market.

178 The Commission, supported by Vodafone, disputes the applicant's arguments.

179 In that regard, it is true that a situation in which the competitive pressure exerted by competitors would be significantly reduced as a result of a merger may give rise to a SIEC.

180 In the present case, it must be noted that the applicant expressly acknowledges that the other competitors on the MDU market, such as the applicant itself and smaller local players, were not already able to exercise significant competitive pressure on Unitymedia and Vodafone prior to the transaction, on account, in particular, of the 'Nebenkostenprivileg' (ancillary rental cost privilege), which, according to the applicant, was a significant barrier to entry and expansion in that market.

181 Therefore, the other competitors, by the applicant's own admission, exerted no competitive pressure on the merging parties prior to the transaction. Accordingly, it is unlikely that that transaction could have had the effect of significantly reducing the competitive pressure exerted by those other competitors and, therefore, of giving rise to a SIEC. It follows that it is necessary to reject the present complaint, alleging a manifest error of assessment by the Commission as regards the competitive effects of the transaction on the MDU market, in that the Commission failed to take account of the fact that the transaction would have weakened further the competitive constraint exerted by the remaining competitors of the merged entity.

182 In addition, the applicant's arguments are difficult to separate from those on which it relies it in the context of its third plea. It must be observed that, when the applicant alleges a change to the merged entity's incentives in relation to pricing and foreclosure vis-à-vis Tele Columbus and other operators, it is pleading vertical non-coordinated effects consisting of the foreclosure of retail suppliers of TV signal transmission services to MDU customers in Germany. Those effects were examined by the Commission in recitals 1467 to 1506 of the contested decision, which the applicant disputes by its third plea, which will be examined below.

183 Similarly, it must be pointed out that the question of the merged entity's increased market power on the market for the wholesale transmission of TV signal in Germany and its effects vis-à-vis broadcasters and retail TV service providers was dealt with by the Commission in recital 1006 et seq. of the contested decision, in a dedicated section of that decision addressing whether the transaction would have horizontal non-coordinated effects on the wholesale market in question. The applicant disputes those assessments by its fourth plea, which will be analysed below.

184 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 competition from other competitors had weakened as a result of that transaction, giving rise to a SIEC.

3. The first part: error of law and infringement of Article 2(2) and (3) of Regulation No 139/2004

185 The applicant maintains, in essence, that the Commission infringed Article 2(2) and (3) of Regulation No 139/2004 on the ground that it failed to conclude that the creation of Vodafone's dominant position amounted to a merger-specific structural change in market conditions and gave rise to a SIEC.

186 In the first place, the applicant recalls that, in the contested decision, the Commission found that the merging parties each held a dominant position in the MDU market in their respective cable footprints. From that, the applicant infers that the combination of those two footprints, which together covered the whole of Germany, would inevitably have conferred a dominant position at national level on the merger entity which none of the merging parties, taken individually, held prior to the transaction, which would have constituted a very significant structural and merger-specific change in the market conditions, which would have given rise to a SIEC. According to the applicant, the Commission erred in concluding that such a change was not merger-specific, since the parties already held a dominant position in their respective cable footprints prior to the transaction.

187 In reply to a question put by the Court in a document dated 16 May 2023 to be answered in writing, the applicant stated in that regard that, in its view, the creation or strengthening of a dominant position is, in itself, the prime example of a SIEC and that, therefore, if a dominant position is created or strengthened, that is sufficient for a finding of a SIEC. The applicant argues that in the present case, the Commission therefore erred in examining whether the concentration would have given rise, first, to a merger-specific reduction of competition between the parties and, second, to merger-specific effects on competitors, whereas it ought to have confined itself to finding that that transaction would have created a national dominant position as a result of the merger of two players in a dominant position at regional level. The creation of such a national dominant position would indeed have been merger-specific and would have constituted a SIEC, which the Commission ought to have noted.

188 In the second place, the applicant submits that even if the merging parties had to be regarded as collectively dominant on the MDU market prior to the transaction, the move from a position of collective dominance to a position of sole dominance would also constitute a significant structural change in the competitive conditions in that market, in so far as it permanently eliminates any possibility of a breakdown of the collusive equilibrium characterising a collective dominant position (and thus of an improvement of the competitive situation in the market).

189 In the third place, the applicant maintains that the Commission erred in law in considering that a finding of a SIEC necessarily requires a finding of an elimination of 'important competitive constraints' that the merging parties exerted on each other prior to the concentration. According to the applicant, it is apparent from recital 25 of Regulation No 139/2004 that the elimination of 'important competitive constraints' between the merging parties concerns only concentrations in oligopolistic markets and is required only in order to find a SIEC based on non-coordinated effects in cases not involving the creation or strengthening of a dominant position.

190 The Commission, supported by Vodafone, disputes the applicant's arguments.

191 In that regard, in the first place, it should be recalled that, in accordance with Article 2(2) and (3) of Regulation No 139/2004, only concentrations which would 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, are to be declared incompatible with the internal market. It follows from the wording of those provisions that the essential test for examining whether a concentration is compatible with the internal market is found in the creation of a SIEC in the internal market. Use of the phrase 'in particular' indicates that the creation or strengthening of a dominant position constitutes one of the cases in which such an impediment may be observed.

192 In addition, the Court has previously held that the fact that a concentration produces anticompetitive effects 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).

193 Therefore, 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 would not significantly impede effective competition in the internal market or in a substantial part of it, with the result that the applicant's argument – that if a dominant position is created or strengthened, that is sufficient for a finding of a SIEC – cannot succeed.

194 Next, it should be noted that the objective of Regulation No 139/2004 is to establish effective control of all concentrations which would significantly impede effective competition, in the internal market or in a substantial part of it, including those giving rise to non-coordinated effects (judgment of 13 July 2023, *Commission* v *CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraphs 109 and 113).

195 In addition, it should be noted that, in the field of merger control, the Commission is required to carry out a prospective analysis consisting of an examination of how such a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a SIEC (judgment of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 43; see also, to that effect, judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 47).

196 Consequently, the Commission cannot be criticised for having carried out, in the present case, a prospective analysis relating in particular to the horizontal non-coordinated effects of the concentration on the MDU market. Since, in the context of that analysis, the Commission was entitled, without making a manifest error of assessment, to find, as is apparent from the examination of the second part of the present plea above, that the concentration would not eliminate competitive constraints between the parties and would not weaken further the competitive constraints exerted by the remaining competitors, it was entitled to conclude that there was no SIEC. The Commission was therefore not required to examine, in addition, whether that transaction would, post-merger, create or strengthen a dominant position, in particular on account of the national coverage of the merging parties' combined cable networks post-transaction.

197 Furthermore, it is not possible to conclude, in the abstract, that the extent of the merging parties' cable infrastructure could constitute a factor determining the state of competition on the MDU market as provided for in the case-law referred to in paragraph 195 above, the alteration of which would give rise to a SIEC. Consequently, the mere geographical extension of the merged entity's cable network, whether merger-specific or not, does not necessarily give rise to an alteration of a factor determining the state of competition on the MDU market and, therefore, to a SIEC.

198 In the second place, it is apparent from paragraphs 163 to 166 above, first, that the Commission made no manifest error of assessment when it found, in the contested decision, that there was no indication that the merging parties were, prior to the concentration, in a position of collective dominance on the MDU market as a result of tacit collusion between them and, second, that the arguments put forward in that regard by the applicant were not capable of demonstrating the contrary.

199 In the third place, the applicant's argument that the Commission erred in law in finding that the competitive constraints removed by a concentration had to be sufficiently 'important' to give rise to a SIEC cannot succeed.

200 It is apparent from the examination of the second part of the present plea that, in the present case, there were no competitive constraints between the merging parties on the MDU market prior to the concentration. Therefore, even if the Commission had to conclude that only the elimination of 'important' competitive constraints could possibly give rise to a SIEC, that would not affect the lawfulness of the contested decision.

201 It follows from the foregoing that the applicant has not demonstrated that the Commission erred in law or infringed Article 2(2) and (3) of Regulation No 139/2004, with the result that the first part of the first plea must be rejected.

202 It follows from all of the foregoing that the first plea must be rejected.

C. The second plea: manifest error of assessment related to the competitive relationship between the parties to the concentration on the SDU market

203 In support of its second plea, the applicant maintains that the Commission's analysis in the contested decision of the horizontal non-coordinated effects of the concentration on the SDU market is vitiated by an error of law and manifest errors of assessment.

1. Preliminary observations

204 In Section VIII.C.2.5 of the contested decision, the Commission examined the horizontal non-coordinated effects of the transaction on the SDU market. As stated in paragraph 19 above, the Commission concluded that the geographic definition of that market could be left open.

205 After setting out, in recitals 843 to 848 of the contested decision, certain specific features of the SDU market, the Commission examined, in recitals 849 to 859 of that decision, the market shares of the parties to the concentration both at national level and at the level of their respective cable footprints, and the concentration levels in the SDU market, before concluding, in

recitals 860 to 862 of that decision, that although that market was highly concentrated the concentration would not give rise to any merger-specific change, since the parties competed on that market to a very limited extent only and there was no meaningful overlap in their activities.

206 The Commission then examined, in recitals 863 to 885 of the contested decision, the competitive constraints exerted by the parties which would be removed by the transaction and their likely evolution absent the transaction.

207 In relation to Vodafone, the Commission recalled that, as regards the retail supply of TV signal transmission services to MDU customers, it had concluded that the evidence in the file did not support third parties' allegations relating to a loss of potential competition from Vodafone. The Commission pointed out that the evidence in the file suggested that the position of Vodafone's IPTV and OTT products was very limited on the SDU market. From that, it inferred that Vodafone was not a significant player in Unitymedia's cable footprint and that neither its IPTV offer nor its new OTT platform posed a competitive constraint to Unitymedia (see recitals 865 to 880 of the contested decision).

208 In relation to Unitymedia, the Commission pointed out that, whatever the market definition, its market share resulted exclusively from its position within its cable footprint. Furthermore, the Commission recalled that, as regards the retail supply of TV signal transmission services to MDU customers, it had concluded that the evidence in the file did not support third parties' allegations of a loss of potential competition from Unitymedia (see recitals 881 to 885 of the contested decision).

209 In recitals 886 to 896 of the contested decision, the Commission analysed the competitive constraints exerted by the parties on each other and concluded that the parties were neither actual direct competitors (see recitals 887 to 891) nor actual indirect competitors (see recitals 892 to 896).

210 As regards direct competition, the Commission observed that the parties to the concentration supplied retail TV signal transmission services to SDU customers almost exclusively within their respective cable footprints, which did not overlap. Although the Commission found a small overlap in Unitymedia's cable footprint from Vodafone's IPTV and OTT products, it nevertheless concluded that the transaction would not bring about a significant loss of direct competition between the merging parties. The Commission came to that conclusion by taking into account, first, Vodafone's limited market share in that area, second, the fact that those parties were not close competitors, because they used different transmission technologies and, third, the fact that there was nothing unique about Vodafone's IPTV and OTT products, with the consequence that they could easily be replaced by other products.

211 As regards indirect competition, the Commission explained that the internal documents which it had identified concerning the market for fixed internet access and which suggested that the parties benchmarked themselves against each other also related, to a certain extent, to the SDU market. However, following the explanations provided by the parties, the Commission concluded that those documents did not establish that comparative analysis exceeding simple benchmarking aimed at monitoring and possibly imitating best practices in the industry had taken place. Next, the Commission pointed out that a retail price analysis did not indicate that Vodafone and Unitymedia indirectly constrained each other via a sequential pricing mechanism transmitting price changes of one firm to the cable footprint of the other via price responses of competitors active at national level.

212 Lastly, in recitals 897 to 903 of the contested decision, the Commission examined the competitive constraints exerted by the remaining competitors on the SDU market, and more particularly by the applicant, by Tele Columbus, by city carriers such as NetCologne and satellite service operators, and found that, following the concentration, those numerous competitors would remain active on that market. The Commission also found that the evidence in the file demonstrated that competitors established in that market faced increasing competitive constraints from new operators and from many OTT TV service providers and concluded that the transaction would not lead to a weakening of the competition from other competitors.

213 Therefore, the Commission concluded that the transaction was not likely to give rise to any SIEC on the SDU market as a result of horizontal non-coordinated effects (see recital 907 of the contested decision).

214 In the present case, the applicant's arguments in support of the present plea, concerning the Commission's examination in the contested decision of the horizontal non-coordinated effects of the concentration on the SDU market, may be divided into three parts, alleging, first, an error of law and a manifest error of assessment, on the ground that the Commission did not conclude that the transaction would lead to the creation of a dominant position giving rise to a SIEC; second, a manifest error of assessment, in that the Commission did not conclude in the contested decision that the transaction would eliminate actual and potential competition between the merging parties; and, third, a manifest error of assessment, on the ground that the Commission did not conclude that the transaction would weaken the remaining competitors.

2. The first part: error of law and manifest error of assessment, on the ground that the Commission did not conclude that the transaction would lead to the creation of a dominant position giving rise to a SIEC

215 The applicant maintains that, if the relevant market is regarded as comprising only cable TV and IPTV, the transaction leads to very high combined market shares both at national level and in Unitymedia's footprint, which indicate the existence of a dominant position. Given the very strong position of the merged entity, even the elimination of a minor overlap can lead to a SIEC.

216 The Commission disputes the applicant's arguments.

217 In that regard, it should be recalled that a concentration which creates or strengthens a dominant position does not automatically give rise to a SIEC, as is apparent from Article 2(2) and (3) of Regulation No 139/2004.

218 In the present case, first, the applicant has not demonstrated how the concentration, if it were to result in the creation of a dominant position on the national SDU market or the strengthening of a dominant position on the SDU market limited to Unitymedia's cable footprint, would give rise to a SIEC.

219 Second, the applicant refers only to 'very high combined market shares' and infers therefrom that 'these combined market shares as such indicate a dominant position of the merged entity' on the SDU market. Contrary to such an allegation, those market shares are not sufficient to demonstrate that the merged entity would find itself in a dominant position following that transaction.

220 In that regard, it must be stated, first, that it is apparent from Table 20 in recital 850 of the contested decision, the content of which the applicant does not dispute, that on the national SDU market including cable, IPTV, satellite and terrestrial TV (DVB-T), the parties to the concentration each held a market share of [10-20]% before the transaction and that they together would have a combined market share of [20-30]% after the transaction and that, in the national SDU market limited to cable and IPTV, those parties each held a market share of [20-30]% before the transaction and that their combined market share would be [40-50]% after the transaction. Such market shares cannot in themselves result in the merger creating or strengthening a dominant position.

221 Second, it must also be stated that the Commission found that the merged entity would face significant competition, in particular from the applicant and Tele Columbus, since those two operators had significant market shares in the SDU market, whether it be national in scope or limited to Unitymedia's cable footprint, which the applicant does not dispute, with the result that that entity would not have the opportunity to act on that market with the independence which characterises a dominant position, as otherwise its customers SDU would switch to those two competitors, to urban operators, or even to providers of satellite services.

222 Therefore, since the Commission did not err regarding the fact that no dominant position would be created on the SDU market following the transaction, the premiss on which the applicant relies in order to demonstrate the existence of a SIEC (see paragraph 215 above) is misconceived.

223 It follows from the foregoing that the first part of the second plea is sufficiently comprehensible and, consequently, is admissible, contrary to the Commission's assertions, but that the applicant has not demonstrated that the Commission erred in law or made a manifest error of assessment in failing to conclude that the transaction would lead to the creation of a dominant position giving rise to a SIEC on the SDU market, with the result that that part of the plea is unfounded.

3. The second part: manifest error of assessment, in that the Commission failed to conclude that the transaction would eliminate actual and potential competition between the parties to the concentration

224 The applicant submits that, for the reasons set out in relation to the MDU market, the Commission's view that the transaction would not lead to a loss of actual (direct or indirect) or potential competition between the parties on the SDU market is vitiated by errors of law and manifest errors of assessment.

225 In particular, in the first place, the applicant disputes the Commission's assertion that the merging parties' benchmarking does not prove an indirect competitive relationship and does not go beyond 'simple commercial benchmarking aimed at monitoring and possibly imitating best practices in the industry'. In the view of the applicant, the Commission failed to assess why 'simple commercial benchmarking' would not be sufficient to constitute relevant actual competition between the merging parties prior to the transaction, in particular considering that there is (at least limited) direct competition between the merging parties in the SDU market.

226 In the second place, the applicant submits that, as regards 'indirect competition', the Commission does not explain why an indirect competitive constraint between the merging parties resulting from the transmission of price changes via national operators such as Tele Columbus or the applicant would necessitate a 'sequential pricing mechanism', or why such a 'sequential pricing mechanism' would require 'element changes' to be 'consistently initiated by Vodafone or

Unitymedia, sufficiently close in time to each other and in the same sequence'. The mere fact that Tele Columbus and the applicant apply a uniform national pricing policy and compete with both of the merging parties in their respective cable footprints is, according to the applicant, sufficient to create indirect competition between the merging parties.

227 In the third place, the applicant disputes the Commission's assertion in recital 890 of the contested decision that Vodafone and Unitymedia are not close competitors as they rely on different technologies. According to the applicant, that assertion is at odds with the Commission's assessment of Vodafone's position on the market for fixed internet access, as a result of which it found a SIEC on account, inter alia, of the elimination of important competitive constraints between the parties, notwithstanding the use of those different technologies, namely cable for Unitymedia and DSL technology for Vodafone. The applicant adds that Vodafone had 800 000 DSL broadband customers in Unitymedia's footprint and that all of those DSL subscribers could have been served by Vodafone's IPTV offer in the short term and without significant investment. The applicant infers therefrom that Vodafone at least had the potential to increase its IPTV customer base in the Unitymedia footprint rapidly and significantly.

228 The Commission, supported by Vodafone, disputes the applicant's arguments.

229 In that regard, it must be recalled that the applicant's arguments alleging errors of law and manifest errors of assessment put forward in the context of its first plea relating to the MDU market have been rejected (see paragraphs 72 to 90 above as regards direct competition, paragraphs 91 to 116 above as regards indirect competition and paragraphs 117 to 156 above as regards potential competition). The applicant cannot therefore reasonably rely on a reference to those arguments in support of the second part of its second plea.

230 As regards the specific arguments on which the applicant relies in the context of the second part of the present plea, the following assessments must be made.

231 As regards, in the first place, the fact that the parties to the concentration monitored their respective activities and compared their product offers, it must be stated that the Commission explained that such benchmarking had not gone beyond 'simple commercial benchmarking aimed at monitoring and possibly imitating best practices in the industry' and that that form of comparison, which consisted of an analysis of market performance or best practices in the industry, including in other Member States or in third countries, could not, in itself, give rise to any competitive pressure between two undertakings the disappearance of which, on account of a concentration, could lead to a SIEC. As the Commission correctly states, if a European cable operator monitors, or even imitates, the best practices of a United States cable operator which is enjoying significant success, that does not mean that those two operators are actual, albeit indirect, competitors.

232 The Commission also stated that, in response to a question put by the Court, there was no evidence in the present case that those comparative analyses were designed to guide the commercial decisions of the party performing it in reaction to the commercial behaviour of the other party, or that it actually led to any reaction by either party in terms of its commercial strategy. Furthermore, it is apparent from recital 894 of the contested decision, the content of which is not disputed by the applicant, that the documents in question emanated from public affairs, communication and investor relations teams, but did not influence the commercial strategy of the parties.

233 The applicant's first complaint in support of the second part of the present plea must, consequently, be rejected.

234 As regards, in the second place, the applicant's arguments relating to the sequential pricing mechanism, the Commission cannot be criticised for having examined whether, in the present case, the merging parties priced in a way which could have revealed that they were indirect competitors.

235 As is apparent from the examination of the first part of the present plea, the Commission did not have sufficient evidence demonstrating that the merging parties monitored and compared their respective offers to an extent that such comparison influenced their commercial strategy. In those circumstances, the examination of a transmission mechanism, in the form of sequential pricing, made it possible to ascertain whether there was nevertheless a link between the parties' pricing practices and, consequently, an indirect competitive constraint between them.

236 In that regard, the applicant's allegation that indirect competitive constraints between the parties to the concentration already resulted from the fact that Tele Columbus and the applicant applied a uniform national pricing policy and competed with the two merging parties in their cable footprints is unsubstantiated. In addition, if that were the case, a change by one of the merging parties to its prices would trigger, by means of Tele Columbus or the applicant reacting to that change, a change to the other party's prices. That is precisely what the Commission was looking for, and did not find, when it examined whether there was a sequential pricing mechanism, as is apparent from recital 896 of the contested decision.

237 The applicant's second complaint in support of the second part of the present plea must, consequently, be rejected.

238 As regards, in the third place, the Commission's assertion in recital 890 of the contested decision, which the applicant disputes, that Vodafone and Unitymedia were not close competitors, on the ground that they used different technologies, it is necessary first of all to reject there being an alleged contradiction between that assertion and the Commission's assessment of Vodafone's position on the market for fixed internet access.

239 A comparative analysis of the grounds of the contested decision relating to the market for fixed internet access and the grounds of that decision relating to the SDU market shows that Vodafone's situation was not the same on those markets.

240 On the market for fixed internet access, it is apparent from recital 413 of the contested decision that Vodafone held a not insignificant share of [5-10]% in Unitymedia's cable footprint. Furthermore, it is apparent from recital 417 of that decision that the Commission found that Vodafone's customer base in that area was growing. Lastly, as regards the offer of fixed internet access using DSL technology in Unitymedia's cable footprint, the Commission noted, in recital 454 of the contested decision, that Vodafone had been able to operate more competitively than other access providers operating on the basis of wholesale access due to unique characteristics and, more specifically, because it had specific assets. It follows that the Commission had a number of items of evidence which demonstrated the significance of Vodafone's position on the market for fixed internet access in Unitymedia's cable footprint.

241 By comparison, on the SDU market, it is apparent from Table 21, set out in recital 853 of the contested decision, that the overlap between Vodafone's activities and Unitymedia's activities in the latter's cable footprint was negligible, since Vodafone's market share was almost zero there (whether the market was limited to cable and IPTV or also included satellite and terrestrial TV), as the Commission stated during the proceedings before the Court. Furthermore, it is apparent from the first sentence of recital 873 of the contested decision, which was disclosed by the Commission in accordance with the order of 30 March 2023, that the Commission observed that the number of subscribers to Vodafone's IPTV in Unitymedia's cable footprint had decreased during the two years preceding the transaction.

242 It follows that Vodafone's position on those two markets was not the same, with the result that the Commission could, without contradicting itself, make a different assessment as regards the SDU market from that relating to the market for fixed internet access and conclude that there was a SIEC on the latter market, on account, in particular, of the elimination of important competitive constraints between the parties, despite the use of those different technologies.

243 As regards, lastly, the applicant's allegation that Vodafone could have converted its DSL broadband customers in Unitymedia's cable footprint into IPTV customers, it is apparent from the first sentence of recital 874 of the contested decision, which was disclosed by the Commission in accordance with the order of 30 March 2023, that Vodafone ceased selling its IPTV product, which was based on DSL technology, to new customers in March 2019, which the applicant does not dispute. The Commission did not, therefore, make a manifest error of assessment by failing to take account, in its examination of whether Vodafone was a potential competitor in Unitymedia's cable footprint on the SDU market, of the possibility, relied on by the applicant, that Vodafone might convert those DSL customers into SDU customers.

244 The applicant's third complaint in support of the second part of the present plea must, consequently, be rejected.

245 It follows from the foregoing that the applicant has not demonstrated that the Commission made a manifest error of assessment in failing to conclude that the transaction would have eliminated actual and potential competition between the merging parties on the SDU market, with the result that the second part of the second plea must be rejected.

4. The third part: manifest error of assessment, in that the Commission failed to conclude that the transaction would weaken the remaining competitors

246 Referring to its first, third and fourth pleas, the applicant complains that the Commission failed to take account of the fact that the merged entity's enormous market power vis-à-vis broadcasters in the TV wholesale markets would further weaken the competitive constraints exercised by the remaining competitors, which, according to the applicant, ought to have been sufficient for a finding of a SIEC on the SDU market.

247 The applicant asserts that the deterioration in competitive conditions would affect even more operators than in the MDU market given that there is a larger group of competitors active in the SDU markets, all of which would be exposed to the merged entity's ability and incentive to conclude (total or partial) exclusivity agreements with TV channels/content providers and to deteriorate competitors' access on the upstream wholesale TV markets.

248 The Commission disputes the applicant's arguments.

249 In that regard, in order to demonstrate that the competitive pressure exercised by the remaining competitors on the SDU market was weakened, the applicant puts forward the same argument which it put forward for that purpose in the context of its first plea relating to the MDU market, to which, moreover, it refers in support of the third part of the present plea. That argument has been rejected for the reasons set out in paragraphs 174 to 184 above, in particular because the smaller competitors were not, as the applicant acknowledges, already able, prior to the concentration, to exercise a competitive constraint on the merging parties, with the result that that third part of the present plea cannot succeed.

250 In any event, it must be stated that the applicant does not call into question the Commission's finding, set out in recitals 897 to 901 of the contested decision, that many competitors, such as the applicant, Tele Columbus and a number of city carriers, or indeed satellite service operators, would continue to operate on the SDU market post-merger, nor does it dispute that there was increasing competitive pressure from new operators and several OTT TV service providers on that market (see recital 903), which enabled the Commission to conclude that the merger would not weaken the competitive pressure exercised by the remaining competitors on the SDU market.

251 Therefore, the applicant has not demonstrated that the Commission made a manifest error of assessment when it concluded that the transaction would not have led to a weakening of the competitive pressure exerted by the competitors of the parties to the concentration on the SDU market, with the result that the third part of the second plea must be rejected.

252 It follows from all of the foregoing that the second plea must be rejected.

D. The third plea: manifest error of assessment concerning the vertical effects of the transaction on intermediary TV signal transmission services

253 In support of its third plea, the applicant maintains that the Commission's analysis in the contested decision of the vertical effects of the transaction on intermediary services for TV signal transmission is vitiated by manifest errors of assessment.

1. Preliminary observations

254 As set out in paragraph 35 above, on the intermediary market, level 3 network operators, such as Vodafone and Unitymedia, provide, via wholesale access, TV signal to level 4 network operators, such as Tele Columbus, in order to enable the level 4 operators to provide retail TV signal transmission services, in particular to MDU customers.

255 In the contested decision, the Commission analysed the vertical effects of the concentration and, in particular, examined the likelihood of the merged entity foreclosing those operators by worsening their conditions on the intermediary upstream market in Unitymedia's cable footprint, in response to complaints received in that regard (see recitals 1476 to 1506).

256 As a preliminary point, the Commission first observed, in recital 1476 of the contested decision, that the concentration would not create any new vertical linkages between the intermediary upstream market and the downstream MDU market, given that both Vodafone and Unitymedia were already active on those two markets in their respective cable footprints. The Commission therefore concluded that the concentration would not lead to any merger-specific change in the structure of the markets concerned, whether upstream or downstream. The Commission also

explained that, since Tele Columbus was the only meaningful competitor sourcing intermediary TV signal from the merging parties, it had focused its analysis on the likely effects on the competitive constraint to be exerted by that operator of a worsening of its commercial conditions (see recitals 1478 to 1480).

257 Next, as regards, first, the ability of the merged entity to foreclose Tele Columbus, the Commission investigated whether that entity would have the technical capacity to stop providing wholesale access to Tele Columbus or to deteriorate, vis-à-vis Tele Columbus, the terms and conditions of that access on the intermediary market (see recitals 1483 to 1491 of the contested decision).

258 In that context, the Commission stated that there was a framework agreement between Unitymedia and Tele Columbus stipulating that Tele Columbus was contractually protected in the medium term in relation to some of the customers it served via the intermediary signals provided by Unitymedia. The Commission inferred therefrom that the merged entity would be able to deteriorate the commercial conditions applicable to Tele Columbus's intermediary TV signal transmission services in relation to only some of its MDU customers in Unitymedia's cable footprint.

259 The Commission then added that, in order for the merged entity to have the technical ability to foreclose Tele Columbus from the MDU market, it would have to have significant market power on the intermediary upstream market. In the light of the limited number of credible alternatives available on that market, the Commission concluded that that would be the case post-merger, but added that that was also the case pre-merger, since Unitymedia already had such power in its cable footprint vis-à-vis Tele Columbus. The Commission inferred therefrom that the merger would in no way change that, with the result that that transaction would have no impact on the ability of the merged entity to foreclose the level 4 network operators in the cable footprint of each of the merging parties.

260 As regards, second, the merged entity's incentive to foreclose Tele Columbus, the Commission investigated whether the merged entity might have an incentive, post-merger, to apply its access conditions to its level 3 network, which Tele Columbus regarded as less favourable than those applied by Unitymedia, in the latter's cable footprint (see recitals 1492 to 1496 of the contested decision).

261 In that context, the Commission concluded that, even if Vodafone's access conditions were to be regarded as less favourable and even if the merged entity had an incentive to apply them in Unitymedia's cable footprint following that transaction, such a change in the business strategy of that entity would not be the result of changes in the structure of the market determined by the concentration. In other words, any deterioration in the access conditions for its level 3 network offered by the merged entity to level 4 network operators would simply result, according to the Commission in the contested decision, from changes in that entity's business approach, which could very well have happened independently of the concentration and which, therefore, were not merger-specific.

262 The Commission concluded that the merged entity would acquire no merger-specific incentive to foreclose Tele Columbus from the MDU market.

263 Third, the Commission examined the effects on competition of the scenario where Vodafone were to have had the ability and incentive to extend its allegedly less favourable terms and conditions on the intermediary market in Unitymedia's cable footprint post-merger and concluded, for the following reasons, that such effects would be limited (see recitals 1497 to 1505 of the contested decision).

264 First of all, it reached that conclusion because it found that the weakening of Tele Columbus in Unitymedia's cable footprint would not affect that operator's core business, namely the retail offer of TV signal transmission services on the MDU market through its own level 3 network, which is located to a large extent within Vodafone's cable footprint (see recital 1501 of the contested decision).

265 Next, the Commission also concluded that Tele Columbus did not act as an important competitive constraint on the MDU market in Unitymedia's cable footprint. The Commission found that Tele Columbus was not able to participate in tenders initiated by MDU customers requiring level 3 network upgrades, that Tele Columbus's relevant market share was only [0-5]% and that Tele Columbus had not participated in a significant number of tenders in Unitymedia's cable footprint. The Commission inferred therefrom that only a very limited number of existing or new opportunities could be impacted by a foreclosure of Tele Columbus. In any case, even if Tele Columbus's access to inputs were foreclosed in Unitymedia's cable footprint, the Commission observed that such foreclosure concerned only its activities as a reseller of Unitymedia's product, through which it did not exercise a meaningful competitive constraint (see recitals 1502 and 1503 to the contested decision).

266 Finally, the Commission explained that Tele Columbus had engaged in only very limited level 3 infrastructure expansion in the years preceding the contested decision and that there was no evidence that Tele Columbus would, absent the transaction, have used Unitymedia's signal to build its own infrastructure (see recital 1504 of the contested decision).

267 In any event, the Commission took note of the fact that Vodafone had made two irrevocable offers to Tele Columbus, ensuring that its commercial terms applicable to intermediary TV signal delivery would, following the concentration, remain unchanged in Unitymedia's cable footprint (see recital 1505 of the contested decision).

268 The Commission concluded that the concentration would not significantly impede effective competition on the MDU market as a result of vertical non-coordinated effects (see recital 1506 of the contested decision).

269 In the present case, the applicant's arguments in support of the present plea can be divided into two parts. In the first part of the present plea, the applicant submits that the Commission erred in denying that Vodafone's likely roll out of its less attractive business terms and conditions applicable to intermediary TV signal services for level 4 network operators in Unitymedia's cable footprint post-merger was a merger-specific change. In support of that first part, the applicant challenges the Commission's reasoning in recitals 1494 to 1496 of the contested decision. In the second part, the applicant disputes the Commission's conclusion regarding the effects on competition on the downstream MDU market of a worsening, vis-à-vis Tele Columbus, of conditions on the intermediary market in Unitymedia's cable footprint.

270 In that regard, the Court considers it appropriate to begin by examining the second part of the present plea.

2. The second part: manifest errors made by the Commission in its assessment of the potential effects of a foreclosure strategy on downstream competition

271 In first place, the applicant submits that, when examining the potential effects on downstream competition of a deterioration of the applicable terms and conditions on the intermediary market, the Commission disregarded existing evidence, namely statements from Tele Columbus that it would, prior to the transaction, rely on intermediary TV signal delivery provided by Unitymedia only temporarily while building out its own level 3 network. Furthermore, in the applicant's view, the Commission overlooked the fact that other level 4 network operators could also have used temporary access to the merging parties' level 3 infrastructure to reach MDU customers before building out their own level 3 networks.

272 In the second place, the applicant maintains that the Commission erred in concluding that the foreclosure of Tele Columbus would not have weakened the competitive constraint it exercised in the MDU market, since such foreclosure would have concerned only its activities as a reseller of Unitymedia's product. According to the applicant, since Tele Columbus was able freely to decide the prices and terms and conditions applicable to the resale of that product, it did exercise competitive constraints on Unitymedia.

273 In the third place, the applicant submits that the Commission ought not, in its analysis of the vertical effects of the transaction, to have taken into account Vodafone's irrevocable offer not to worsen the contractual terms applied to Tele Columbus in Unitymedia's cable footprint. Such an offer clearly did not meet the requirements of the Commission notice on remedies acceptable under Regulations Nos 139/2004 and 802/2004 (OJ 2008 C 267, p. 1; 'the Remedies Notice') and could, therefore, not be a sufficient basis for ruling out a SIEC on the MDU market based on vertical non-coordinated effects.

274 The Commission, supported by Vodafone, disputes the applicant's arguments.

275 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 condition as absent the merger.

276 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.

277 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.

278 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, examined those three conditions without the applicant criticising that approach, as such.

279 In support of the second part of the present plea, the applicant puts forward a number of factors for the purposes of demonstrating that the Commission, in the contested decision, manifestly erred in concluding that the third condition was not satisfied.

280 In that regard, it must be noted that, in that context, the applicant is not challenging a number of important factors relied on by the Commission relied for the purposes of demonstrating the limited nature of the effects on competition of a foreclosure strategy put in place by the merged entity, consisting of worsening, for Tele Columbus (and other level 4 network operators), the commercial conditions applicable to intermediary TV signal services in Unitymedia's cable footprint.

281 Accordingly, the applicant is not disputing that such a strategy would not affect Tele Columbus's core business, since Tele Columbus was active outside Unitymedia's cable footprint. Furthermore, the applicant is not challenging a number of factors which resulted in the Commission concluding that any foreclosure strategy would not, in any event, have a significant detrimental effect on downstream competition, that is to say, the fact that Tele Columbus was not able to participate in tenders requiring level 3 network upgrades, Tele Columbus's market shares being minimal, that is to say [0-5]%, and Tele Columbus's limited participation in tenders in Unitymedia's cable footprint.

282 In addition, it is necessary to examine the other arguments put forward by the applicant.

283 As regards, in the first place, the applicant's allegation that Tele Columbus relied only temporarily on intermediary TV signal delivery provided by Unitymedia pending its own level 3 network being built out, it must be observed that the applicant is, in essence, submitting that the Commission's assessments were based on Vodafone's response to the statement of objections and maintaining that the Commission fails to explain how that response is more credible than Tele Columbus's own statements.

284 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 reply to the statement of objections and on the Tele Columbus's own figures which it provided. The evidence set out in recital 744(a) and in recitals 797 to 799 of the contested decision shows that Tele Columbus had not really carried out any overbuild of another operator's cable infrastructure during the years preceding the adoption of the contested decision, which, moreover, the applicant does not dispute. In particular, Figure 20 of the contested decision, which is found in recital 798 of that decision, shows that the number of households connected to Tele Columbus'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 has failed to adduce any evidence contradicting the finding that Tele Columbus 'has engaged in very limited Level 3 infrastructure expansion in recent years'.

285 The applicant further submits that an investment in level 3 infrastructure does not automatically lead to an increase in the number of households actually connected (contrary to what is apparent from recital 799 of the contested decision). In addition, according to the applicant, the stagnation of the overall number of households connected is an insufficient proxy for the competitive relevance of Tele Columbus as the acquisition of new customers through network expansion may be offset by a temporary loss of other customers.

286 In that regard, it must be pointed out that the absence of an increase in the number of households actually connected by Tele Columbus was a serious indication of a lack of significant investment in its network expansion or, at the very least, that any network expansion was unsuccessful or unprofitable. Furthermore, the applicant does not propose any methods for quantifying the effect on competition of a network expansion other than the increase in households connected.

287 Lastly, the applicant maintains that other competitors, such as itself, could use (temporary) access to the merging parties' level 3 infrastructure to compete in the MDU market before continually building out their own (fibre) level 3 networks.

288 However, as the Commission indicates, in essence, in recital 1479 of the contested decision, independent level 4 operators play a very limited competitive role. Furthermore, as the Commission submits without being contradicted by the applicant, at the date of the contested decision the applicant had not made use of access to the merging parties' level 3 infrastructure in order to be able to compete on the MDU market, before continually building out its own fibre optic network. Lastly, the applicant has not adduced any evidence that it expected, in the near future, to have access to the merging parties' level 3 infrastructure in order to be able to compete on the MDU market, before continually deploying its own fibre optic network.

289 As regards, in the second place, the applicant's allegation that Tele Columbus exercised a competitive constraint on Unitymedia, despite the fact that it was merely reselling Unitymedia's product in its cable footprint, it must be stated that that mere assertion is not accompanied by evidence capable of calling into question the explanations set out in recitals 1501 and 1503 of the contested decision, as set out in paragraphs 264 and 265 above.

290 It follows that the arguments put forward by the applicant do not demonstrate that the Commission made a manifest error of assessment when it concluded that the evidence available to it showed that the weakening of Tele Columbus on Unitymedia's cable footprint would have limited effects on competition on the MDU market.

291 As regards, in the third place, Vodafone's irrevocable offers to Tele Columbus and the applicant's allegation that the Commission could not take them into account, it follows from those two offers that Vodafone clearly indicated its intention not to worsen Tele Columbus's conditions in Unitymedia's cable footprint, which the Commission was entitled to take into account when examining the effects. Indeed, no provision of Regulation No 139/2004 prevented the Commission from taking that factual element into consideration in order to strengthen its conclusion that the transaction would not significantly impede effective competition on the MDU market, and on the regional potential market corresponding to Unitymedia's cable footprint, on account of vertical non-coordinated effects.

292 The Commission simply took note of Vodafone's irrevocable offers as an additional factual element supporting its conclusion, as is apparent from the contested decision. The Commission did not treat those offers an obligation for the purposes of Article 8(2) of Regulation No 139/2004.

293 Consequently, it must be held that the Commission did not make a manifest error of assessment when it concluded that any foreclosure strategy would not have had a significant detrimental effect on downstream competition.

294 Furthermore, the ability substantially to foreclose access to inputs, the incentive to do so and the detrimental effects on downstream competition of a foreclosure strategy are three cumulative conditions, so that the absence of any of them is sufficient to rule out the likelihood of anticompetitive input foreclosure (see paragraph 277 above and the case-law cited).

295 Therefore, in so far as the applicant has not demonstrated that the Commission made a manifest error of assessment when it assessed the potential effects of a foreclosure strategy on downstream competition (namely the third of those conditions), the second part of the third plea must be rejected. Consequently, there is no need to examine the substance of the first part, which alleges that the Commission's reasoning in recitals 1494 to 1496 of the contested decision was incorrect, following which the Commission concluded that the merged entity would have no merger-specific incentive to foreclose Tele Columbus from the MDU market (namely the second of those conditions).

296 In the light of the foregoing, the second part of the third plea and the third plea in its entirety must be rejected, there being no need to examine the plea of inadmissibility raised by the Commission.

E. The fourth plea: manifest errors of assessment by the Commission concerning the effects of the transaction on the wholesale market for the acquisition of TV channels and the market for wholesale TV signal delivery

297 In support of its fourth plea, the applicant maintains that the Commission's analysis in the contested decision of the effects of the transaction on the wholesale market for the acquisition of TV channels and on the market for wholesale TV signal transmission is vitiated by manifest errors of assessment.

1. Preliminary observations

298 As set out in paragraphs 25 and 26 above, on the wholesale market for the supply and acquisition of TV channels, broadcasters (supply side) provide TV channels which retail TV providers (demand side), such as Vodafone, Unitymedia or the applicant, acquire in order to provide audiovisual services to end users. In the market for wholesale TV signal transmission, those same providers of retail TV services (supply side) used their infrastructure to offer those same broadcasters (demand side) a TV signal transmission service for their channels, in exchange for payment of feed-in fees. Put another way, the operators on the market for wholesale TV signal transmission were the same as on the wholesale market for the supply and acquisition of TV channels, but TV service providers, such as the merging parties, were on the supply side on the first market and on the demand side on the second market. In the contested decision, the Commission found that those two wholesale markets were closely linked, in so far as negotiations between broadcasters and retail TV providers usually covered both aspects (signal transmission, on the one hand, and acquisition of channels, on the other).

299 Following its analysis of those markets, the Commission found that the transaction would not significantly impede effective competition in the wholesale market for the supply and acquisition of TV channels in Germany.

300 On the market for wholesale TV signal transmission, the Commission concluded that there was a SIEC resulting from the merged entity's ability and incentive, first, to worsen the contractual and financial terms and conditions imposed by that entity on broadcasters and, second, to hamper the emergence and development of innovative TV services, such as OTT and HbbTV, and found that that would have negative effects on viewers in Germany (see, first, recitals 1205 to 1265 and, second, recitals 1266 to 1292 of the contested decision).

301 However, the Commission found that it was not possible to conclude that, following the merged entity's increased market power on that market, that entity would be likely to obtain terms and conditions from broadcasters and TV rights holders, in the form of exclusivity agreements, which would have a detrimental effect on rival retail TV providers' access to TV channels or TV content.

302 In that regard, the Commission first of all observed, in recital 1164 of the contested decision, that that market was not characterised, in Germany, by such exclusivity agreements between broadcasters and TV rights holders, on the one hand, and retail TV service providers, on the other.

303 The Commission then examined whether, as a result of the increase in its market power as a retail provider of TV signal, the merged entity would be able to require broadcasters and holders of TV rights to negotiate exclusivity agreements relating to TV channels or content. In that context, the Commission stated that it had, in particular, focused its analysis on the German football league (Bundesliga), that is to say, the most important sports event in Germany, while stating that the same considerations applied to other sports events or popular TV content, for which it had found no direct evidence in the file (see recital 1165 of the contested decision).

304 First, in recitals 1173 to 1176 of the contested decision, the Commission examined whether Sky, the holder of the majority of the exclusive rights to broadcast the Bundesliga, would be likely to agree to conclude an exclusive agreement with the merged entity. The Commission concluded that that was unlikely to be the case, given that while it is true that Sky depended on the merged entity to distribute its content, that broadcaster depended to a similar extent, if not a greater extent, on other means of broadcasting, in particular the satellite operator Astra, with the result that Sky would lose a substantial part of its revenues if it were to conclude an exclusive agreement with the merged entity. The Commission also took into account the fact that Sky, an international player and the major pay-TV service provider in Germany, enjoyed certain countervailing buyer power.

305 Second, in recitals 1177 to 1183 of the contested decision, the Commission verified whether the merged entity could reasonably follow a strategy aimed at gaining exclusive access to other TV channels or content, in particular vis-à-vis TV broadcasters or TV rights holders with less countervailing buyer power than Sky. Relying on internal documents of the merging parties and their response to the statement of objections, the Commission concluded that, even if the merged entity had the ability to implement such a strategy, it was doubtful whether it would have an incentive to do so since such a strategy would have had high implementation costs, but uncertain results in terms of profits.

306 Third, in recitals 1184 to 1197 of the contested decision, the Commission went into more depth in its analysis of the merged entity's incentive to foreclose its competitors by acquiring exclusive rights to certain TV content, examining the parties' internal documents relating to such a strategy. According to the Commission, it was apparent from those documents that each of the

merging parties had already contemplated the possibility of acquiring sports channels or content on an exclusive basis, but had ultimately abandoned such plans, which those parties had explained, with supporting evidence, in response to the statement of objections. The Commission inferred therefrom that it could not be concluded that the merged entity would have had an incentive to use its broader customer base for the purpose of negotiating certain exclusivity deals with broadcasters relating to 'premium' content in order to foreclose competing providers of retail TV services.

307 Lastly, for the sake of completeness, the Commission examined, in recitals 1198 to 1203 of the contested decision, whether a hypothetical exclusivity strategy put in place by the merged entity could have significant anticompetitive effects leading, in particular, to the foreclosure of competing retail TV service providers, with a detrimental effect on consumers.

308 On the basis of data showing that the vast majority of German viewers would not switch their retail TV service provider in order to access exclusive sports content, the Commission concluded that, even if the merged entity were to implement an exclusivity strategy, that would not deprive competing suppliers of a large customer base. The Commission also took account of the fact that, even in such a hypothetical situation, the merged entity would face competition from Sky, which pursued a strategy of non-exclusive distribution of its TV content on different platforms, which would allow competing providers, in any event, to have access to its 'premium' content. The Commission inferred therefrom that it was unlikely that the merged entity's implementation of an exclusivity strategy could have significant anticompetitive effects.

309 For all of those reasons, the Commission found, in recital 1204 of the contested decision, that even if the merged entity were to enjoy increased market power post-transaction, it was not possible to conclude that the merged entity would be likely to obtain terms and conditions from broadcasters and TV right holders in the form of exclusivity deals which would have a negative impact on the access of competing retail TV providers to TV channels or content.

310 In the present case, the applicant's arguments in support of the present plea can be divided into two parts. In the first part, the applicant submits that the conclusion reached by the Commission, namely that broadcasters and TV right holders would not have been likely to grant exclusivity deals to the merged entity despite the increase in the latter's market power, is incorrect and is based on an incomplete and manifestly erroneous assessment of the effects of the transaction on competition on the market for wholesale TV signal delivery. In support of the second part of the plea, the applicant complains that the Commission confined itself to examining whether the merged entity would have the ability and incentive to hamper the emergence and development of OTT and HbbTV TV, but failed to take into account the impact of the transaction on other innovative TV services, such as IPTV.

2. The first part: manifest errors of assessment concerning foreclosure of the market by means of (partial or total) exclusivity agreements

311 In support of the first part of the present plea, in the first place, the applicant submits that the assessment in the contested decision of the merged entity's incentive to conclude total exclusivity agreements is erroneous and incomplete.

312 In the second place, the applicant maintains that the assessment in the contested decision of the merged entity's incentive to implement a partial exclusivity strategy is incomplete.

313 In the third place, the applicant disputes the Commission's conclusion that a hypothetical total or partial foreclosure of content is unlikely to have significant anticompetitive effects.

(a) Whether the Commission's examination of the merged entity's incentive to conclude total exclusivity agreements was incomplete and erroneous

314 According to the applicant, first, the Commission failed to take account of the fact that the costs arising from concluding total exclusivity agreements decrease as the number of the platform's end users increases and, as a result, it erred in finding that the merged entity would not have an incentive to conclude such agreements. The applicant adds that Unitymedia had acquired certain rights over the Bundesliga in the past, which showed that such a strategy had already existed. Having regard to the increase in its customers resulting from the transaction, exclusivity would have been more attractive to the merged entity.

315 Second, the applicant submits that the examination carried out by the Commission is incomplete, since it covered only to the hypothesis of acquiring exclusive rights over the Bundesliga, and incorrect, since the Commission erred in concluding that the considerations applicable to the Bundesliga rights also applied to other sporting events or popular content, whereas in the view of the applicant, the potential benefits of a foreclosure strategy in relation to such content were different.

316 Third, the applicant complains that the Commission failed to take account of the fact the benefits of an exclusivity strategy for the merged entity (and the readiness of broadcasters to agree to exclusivity deals) were likely to change going forward due to the merged entity's increased opportunities to offer multi-product bundles to a very large customer base all across Germany and of the fact that exclusive content would be likely to help the merged entity to increase its sales of FMC bundles to customers who could view such content on the mobile phones.

317 The Commission, supported by Vodafone, disputes the applicant's arguments.

318 In that regard, first, it must be stated that the applicant does not call into question the Commission's assessments which enabled it to conclude that it was unlikely that the merged entity would have an incentive to conclude a total exclusivity agreement with Sky, as set out in recitals 1173 to 1176 of the contested decision (see paragraph 304 above), based in particular on the fact that Sky depended on operators other than the merged entity in order to be able to distribute its content to a similar or greater extent. Indeed, the applicant confirmed at the hearing that it did not dispute the fact that Sky's incentive to conclude a total exclusivity agreement with the merged entity was limited.

319 Furthermore, as regards the Commission's assessments which enabled it to conclude that it was doubtful whether the merged entity would have an incentive to conclude total exclusivity agreements with content providers other than Sky, as set out in recitals 1177 to 1183 of the contested decision (see paragraph 305 above), the applicant submits, in general terms, that the costs arising from the conclusion of total exclusivity agreements decrease as the number of end customers of the platform increases or an exclusivity strategy is more attractive post-merger than it was previously, but it has not adduced any specific evidence capable of calling the Commission's explanations into question.

320 In particular, the applicant has not demonstrated that there was, in Germany, a sufficiently strong correlation between the presence of attractive channels or content on an operator's TV platform and its ability to attract new viewers, which would have made it possible, with a sufficient degree of probability, to amortise the high costs of total exclusivity agreements. In addition, the applicant has adduced no evidence which demonstrates sufficiently that the merged entity would have had an incentive to adopt a commercial strategy based on total exclusivity in the future and which would accordingly make it possible to call into question the Commission's assessments in that regard.

321 Second, as regards the applicant's allegation that the Commission's examination of the merged entity's incentive to conclude total exclusivity agreements is incomplete because it is limited to the Bundesliga and incorrect, it must be held that input foreclosure may raise competition problems only if it concerns an 'important input' for the downstream product, as stated in paragraph 34 of the Guidelines on non-horizontal mergers.

322 Therefore, it must be concluded that if a total foreclosure strategy in respect of the most attractive content (such as the Bundesliga) does not cause sufficient switching of supplier to be profitable, other 'less important' types of content would be even less likely to achieve profitability, with the result that the merged entity would have less incentive to attempt to implement a total foreclosure strategy in relation to such content. The Commission cannot therefore be criticised for having examined only the hypothetical situation of the acquisition of exclusive rights over the Bundesliga and for having taken the view that its findings also applied to less popular content.

323 Furthermore, the applicant simply refers to the fact that a foreclosure strategy relating to less attractive content is less costly, but it does not explain either why it would be more profitable for the merged entity to pursue a strategy of acquiring exclusive rights to content less attractive than the Bundesliga or why such content would be sufficiently 'important', as referred to in paragraph 34 of the Guidelines on non-horizontal mergers, for foreclosure of that input to be able to give rise to competition concerns.

324 In any event, contrary to the applicant's assertions, it is apparent from recitals 1184 to 1197 of the contested decision (see paragraph 306 above) that the Commission examined whether the merged entity would have an incentive to acquire exclusive rights to sporting events or popular content other than the Bundesliga, taking into account in particular the fact that Unitymedia had, as the applicant submitted, acquired certain rights in the Bundesliga in 2005.

325 Third, as regards the applicant's allegation that the Commission failed to take account of the merger entity's increased opportunities to offer multi-product bundles to a very large customer base all across Germany, and of the fact that exclusive content would be likely to help it to increase its sales of FMC bundles, it must be observed that, in recital 149(b)(iv) to (vi) of the contested decision, the Commission found that FMC offers in Germany had a low level of penetration, which was confirmed by the merging parties' competitors during the market investigation. According to third-party reports, in 2017 only 8.4% of households or 10.8% of the fixed broadband customer base, that is to say 3.5 million households, purchased an FMC product. The Commission also found that the study by the consulting firm WIK-Consult, adduced by a third party during the administrative procedure, concluded that there would have been no significant change in the competitive dynamics in Germany in the near future through bundling of fixed products and mobile products, since German consumers would have continued to purchase those two types of products separately, which the applicant does not dispute.

326 Therefore, the Commission cannot be criticised for having failed to examine whether the benefits of an exclusivity strategy (and the readiness of broadcasters to accept exclusivity agreements) were likely to change in the future, on account of the merged entity's increased opportunities to offer multi-product bundles and, in particular, FMC bundles to a very large customer base all across Germany.

327 It follows from the foregoing that the applicant's complaint alleging that the Commission's examination of the merged entity's incentive to conclude total exclusivity agreements was incomplete and incorrect must be rejected.

(b) Whether the Commission's examination of the merged entity's incentive to conclude partial exclusivity agreements was incomplete

328 The applicant complains that the Commission failed to take account of the opportunity for the merged entity to engage in partial foreclosure individually targeting one or a number of competitors in the MDU and SDU downstream markets, such as the applicant, whereby broadcasters would be prevented from distributing their channels and content to those competitors, or by which those competitors would be deprived of access to certain innovative TV functionalities, such as VOD and deferred or catch-up viewing.

329 According to the applicant, such a partial foreclosure strategy is all the more likely because it is less costly for the merged entity and easier for broadcasters to accept, while having detrimental effects on the competitors targeted.

330 The Commission, supported by Vodafone, disputes the applicant's arguments.

331 In that regard, it must be stated that the Commission's findings when examining whether there was an incentive to conclude total exclusivity agreements with Sky (see recitals 1173 to 1176 of the contested decision and paragraph 304 above), were sufficient to rule out a strategy on the part of the merged entity based on partial exclusivity with Sky. As the Commission submits, given that it found that Sky had no incentive to conclude total exclusivity agreements, having regard in particular to its dependence on operators other than the merged entity, including the satellite TV operators, which the applicant does not dispute, it was unlikely that it would agree on exclusivity with Sky in the form of the exclusion of certain operators active on the MDU and SDU markets targeted individually, since its offer would have continued to be accessible on other platforms, or it would have agreed to deprive those platforms of certain innovative functionalities. The Commission cannot therefore be criticised for having failed to take account of the opportunity for the merged entity to conclude such agreements with Sky, aimed at depriving some of its competitors of innovative content or functionality.

332 Furthermore, as regards broadcasters other than Sky, it must be observed that the applicant has not put forward any evidence which would indicate that the absence of certain content or certain innovative features offered by those broadcasters in a competitor's offer had a significant impact on changes of provider and, consequently, that a potentially large proportion of housing associations in respect of the MDU market, or of German viewers in respect of the SDU market, would have been willing to switch to the merged entity's offer for the sole reason that those channels or functionalities were not offered by their current supplier. The applicant has therefore failed to demonstrate a detrimental effect on competition downstream which would be significant, as referred to in paragraph 32 of the Guidelines on non-horizontal mergers.

333 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 applicant 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.

334 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, targeted individually, would have been denied access to certain content or certain innovative functionality.

335 It follows from the foregoing that it is necessary to reject the applicant's complaint alleging that the Commission's examination of the merged entity's incentive to conclude partial exclusivity agreements was incomplete.

336 Moreover, the ability substantially to foreclose access to inputs, the incentive to do so and the significant detrimental effect on downstream competition of a foreclosure strategy are three cumulative conditions, so that the absence of any of them is sufficient to rule out the likelihood of anticompetitive input foreclosure (see paragraph 277 above and the case-law cited).

337 Therefore, in so far as the applicant has failed to demonstrate that the Commission made a manifest error of assessment as regards the merged entity's alleged incentive to implement a strategy to foreclose competing retail TV providers (namely the second of those conditions), the first part of the fourth plea must be rejected, there being no need to examine the substance of the third complaint, alleging that the Commission's examination of the effects on downstream competition of a strategy of total or partial foreclosure of content (namely the third of those conditions) was incorrect.

3. The second part: incomplete assessment of the competitive harm caused by the transaction as a result of the restriction of innovative TV services

338 As a preliminary point, the applicant explains that, in the contested decision, the Commission correctly considered that, post-transaction, the merged entity would have the necessary ability and incentive to hamper the emergence of innovative TV services such as HbbTV and OTT, which would have the effect of harming consumers by reducing the quality of the viewing experience and reducing viewer choice. However, the applicant complains that the Commission failed to take account of the fact that the merged entity could also harm other innovative TV services such as IPTV.

339 In support of that allegation, the applicant maintains that OTT services did not offer the same quality as IPTV, that they required specific equipment and that they were not as cost-effective as IPTV. The applicant states that any concern relating to the degradation of the quality and viewer experience for final consumers related to OTT TV services applies equally to IPTV.

340 The applicant also submits that the merged entity's ability and incentive to restrict the distribution of content via its competitors' IPTV offers were at least the same as for OTT and HbbTV services offered by broadcasters. The applicant argues that the Commission has offered no explanation whatsoever as to why a restriction of the transmission of content via IPTV should be unproblematic and how innovative services other than broadcasters' OTT and HbbTV are less relevant or less worthy of protection. The applicant adds that, first, the Commission's allegation that OTT could be a game changer in the medium term is not based on any evidence and that, even if that were the case, that cannot justify ignoring the negative effects of the transaction on IPTV, which already had significant traction in the market. Second, the merged entity had, according to the applicant, an even greater incentive to harm IPTV than OTT, since IPTV was a true substitute for cable TV and the only growing alternative technology in the market, whereas OTT was used only in addition to cable TV service, but not as a replacement for it.

341 In that regard, it should be noted that, as the Commission explained, and supported by the intervener, while it is a system allowing TV services to be delivered using the internet protocol, IPTV forms part of a dedicated and managed network which is controlled by the TV service provider, whereas OTT technology enables TV broadcasters to broadcast TV channels directly via the internet, without the network operator intervening in the control or distribution of the content. In contrast to IPTV, OTT technology therefore allows for a more direct interaction between broadcasters (channels) and the ultimate viewers.

342 Furthermore, in the contested decision, the Commission set out numerous factors which demonstrated that OTT was indeed a recent technology growing in use.

343 Accordingly, in recitals 948 and 950 to 954 of the contested decision, in its examination of whether the transaction would have horizontal effects on the retail market for TV services, the Commission provided a detailed explanation of the recent and growing offer of OTT TV services.

344 More specifically, in recital 948 of the contested decision, the Commission found that traditional retail TV providers increasingly offer linear TV services via OTT. In that regard, it observed that Vodafone (Giga TV OTT), the applicant (Magenta TV) and Telefónica (O2 TV) each had a standalone OTT TV offer. The Commission also found that other players offered an OTT TV product as an add-on option for their existing TV subscribers only, including Unitymedia (Horizon Go), United Internet (1 & 1 TV app), Tele Columbus (Advance TV app), NetCologne (NetGo app) and M-net (M-net TV Plus App).

345 In recital 950 of the contested decision, the Commission stated that OTT service providers, such as Amazon Prime and Netflix, already had large customer bases, with each already having (at least) over 3 million subscribers in Germany, with Netflix expecting to grow by more than 20% that year.

346 In recital 951 of the contested decision, the Commission found that the specialist OTT services were also increasingly prevalent in Germany and, in recital 952 of that decision, it observed that a number of broadcasters had also begun offering their own OTT services.

347 Furthermore, in recitals 1127 to 1132 of the contested decision, in its examination of the horizontal non-coordinated effects on the wholesale market for the supply and acquisition of TV channels and on the market for wholesale TV signal transmission, the Commission provided explanations of the growth of OTT services and, in particular, to the growth in demand for such services.

348 In that regard, the Commission pointed out, in recital 1127 of the contested decision, that, in defining the relevant market, it had observed that OTT distribution was becoming increasingly relevant in the TV sector in Germany, as in many other countries.

349 In recital 1129 of the contested decision, although the Commission stated that most broadcasters continued to regard OTT products as currently complementary to basic linear TV services, it also stated, with supporting evidence, that the same data demonstrated the rapidly increasing importance of OTT distribution in Germany, since 11.7% of respondents had stated that they could imagine using OTT as the exclusive means of receiving TV at home. Furthermore, the Commission recalled that some OTT distributors, such as Netflix, Amazon and DAZN, were already very popular and stated that a number of participants in the market investigation had argued that OTT services could substitute to some extent traditional TV services.

350 In recital 1130 of the contested decision, referring to various documents cited in a footnote to the contested decision, the Commission explained that, as the German State Media Authorities pointed out, OTT gained ground as the primary means of receiving audiovisual content, with an increase of 6% between 2017 and 2018. Furthermore, in terms of national viewership, OTT providers increased from 7.3% in 2015-2016 to 12.8% in 2017-2018. With specific regard to the 'premium' TV segment, OTT increased from 16.8% in 2015-2016 to 23% in 2017-2018. In addition, a similar growth rate had been experienced over those years in terms of subscribers (25.3% to 33.4%) and revenues (from 10.6% to 19.1%). The Commission also stated that, by comparison, cable TV market shares had decreased over the same period.

351 Lastly, in recital 1132 of the contested decision, the Commission stated that the situation was evolving rapidly. In that regard, the Commission stated that the development of OTT services could be able to limit substantially the market power of traditional TV platforms and to re-balance the negotiating position of the different players, in particular in presence of appropriate market conditions.

352 It must therefore be held that the Commission's allegation that OTT could be a game changer in the medium term is well founded on numerous items of evidence, contrary to the applicant's assertions.

353 Furthermore, the applicant has adduced no evidence capable, first, of calling into question the above findings and, second, of establishing that IPTV experienced growth similar to that of OTT, that IPTV had similar growth potential or that the OTT did not offer the same quality as IPTV, required specific equipment and was not as cost-effective as IPTV, with the result that any concern relating to the degradation of the quality and viewer experience for final consumers related to OTT ought to have applied to IPTV. It should also be noted that the applicant does not dispute the Commission's explanation in recital 291 of the contested decision that only 8% of households subscribed to IPTV in Germany, indicating that that technology had limited market share.

354 As regards, next, the merged entity's incentive to hamper the emergence of innovative TV services, the Commission stated, in recital 1275 of the contested decision, that OTT and HbbTV services aimed to create a direct connection between broadcasters and viewers, therefore limiting intermediation of classical TV platforms, such as those of the merging parties. The Commission inferred therefrom that the merged entity could have an incentive to foreclose the emergence of such services in order to preserve a business model based on the TV platform having control of the customer relation and there being no interaction between that customer base and broadcasters, and that the same issue did not arise for IPTV, which did not offer such interaction.

355 In that regard, the Commission stated that the examples given by the participants in the market investigation and the merging parties' internal documents indicated that the merging parties already had an incentive to limit the development of OTT and HbbTV services and explained that the existing incentive would increase following the transaction. First, the merged entity's increased market power would have limited broadcasters' ability to resist any attempt by Vodafone to adopt such strategies. Next, the merged entity would have had no incentive to introduce innovative interactive services to react to similar services offered by the main comparable competitor, namely Unitymedia. Finally, since the successful foreclosure of competition from OTT services at the retail level would have benefited all existing retail TV providers, they would have had an incentive to 'free-ride' on the foreclosure efforts of their competitors at the retail level. However, the combination of Vodafone and Unitymedia would have allowed the merged entity to internalise the benefit to both parties of successful foreclosure of OTT services. The Commission inferred therefrom that that would increase the incentive for the merged entity to engage in such a strategy (see recitals 1280 to 1283 of the contested decision).

356 It follows that the Commission had evidence enabling it to conclude, in recital 1284 of the contested decision, that the parties to the concentration might have had an incentive to hamper the development of OTT and HbbTV services in order to preserve a business model where the TV platform directly controlled the customer relation and broadcasters were prevented from bypassing cable networks' intermediation.

357 The applicant has not established that the merged entity would, in the same way, have an incentive to restrict the distribution of content via IPTV technology.

358 In that regard, it must be held that, contrary to the applicant's assertion, it follows from the various recitals of the contested decision referred to in paragraphs 342 to 351 above that IPTV is not a true substitute for cable TV and is not the only growing alternative technology, whereas OTT could well become a service replacing cable TV.

359 Accordingly, the applicant has not demonstrated that the Commission was required, in the present case, to assess the merged entity's incentive to restrict the distribution of content using IPTV technology and, consequently, that it made a manifest error by failing to carry out such an analysis. Furthermore, in the light of the foregoing considerations, the applicant was in a position, first, to understand why the Commission failed to carry out such an assessment and, second, to assert its rights, with the result that the Commission did not fail to comply with its obligation to state reasons in that regard.

360 The second part of the fourth plea must therefore be rejected, as must the fourth plea in its entirety.

F. The fifth plea: manifest error of assessment by the Commission, in that it found that the OTT and feed-in fee commitments were sufficient to render the concentration compatible with the internal market

361 In support of its fifth plea, the applicant maintains that the Commission made a manifest error of assessment in concluding that the OTT commitment, the feed-in fees commitment and the HbbTV commitment (together, 'the commitments relating to the market for wholesale TV signal transmission') offered by the parties to the concentration were capable of eliminating the SIEC found on the market for wholesale TV signal transmission. According to the applicant, those commitments were, on the contrary, manifestly inappropriate and insufficient.

1. Preliminary observations

362 As set out in paragraphs 31 and 32 above, the Commission found in the contested decision that, as a consequence of the merged entity's increased market power on the market for wholesale TV signal transmission, the transaction could have lead, first, to a form of partial foreclosure of free-to-air or pay-TV channels, notably through the worsening of the contractual and financial conditions imposed by that entity on broadcasters and, as a consequence, to a deterioration in the quality of the TV offer to final viewers in Germany, and, second, to the that entity putting in place a strategy to hamper the emergence and development of OTT and HbbTV TV services, which could have harmed consumers through a reduced quality of the viewer experience and reduced choice (see, first, recitals 1205 to 1265 and, second, recitals 1266 to 1292).

363 With a view to eliminating that SIEC found on the market for wholesale TV signal transmission, the Commission accepted a number of commitments offered by Vodafone, namely the OTT commitment, which prevented the merged entity from restricting the possibility for broadcasters which are carried on its platform of distributing their content via an OTT service and which guaranteed them, in order to do so, sufficient direct interconnection capacity, the HbbTV commitment, which required the merged entity to continue to transmit the HbbTV signal of free-to-air broadcasters and the commitment relating to feed-in fees, which prevented the merged entity from increasing the feed-in fees paid to it by free-to-air broadcasters, as is apparent from paragraphs 40 and 41 above.

364 In the present case, the applicant's arguments in support of the present plea can be divided into four parts, alleging, first, that a wrong legal standard was applied in order to assess the suitability of the commitments relating to the market for wholesale TV signal transmission; second, that those commitments were ineffective, in that they did not eliminate the identified competition concerns; third, the that the feed-in fees commitment was submitted too late; and, fourth, that the SIEC was not eliminated on all the affected markets.

365 The Commission, supported by the intervener, contends that the fifth plea is ineffective, on the ground that the applicant is not challenging the assessment of the 'Wholesale Cable Broadband Access' commitment, even though that commitment also contributed to eliminating the competition concerns identified on the market for wholesale TV signal transmission.

366 In that regard, the Court considers it appropriate to begin by examining the substance of the four parts raised by the applicant in support of the present plea.

2. First part: a wrong legal standard was applied in order to assess the suitability of the commitments relating to the market for wholesale TV signal transmission

367 In the first place, the applicant maintains that the Commission ought to have found the commitments relating to the market for wholesale TV signal transmission to be manifestly insufficient on the ground that they related purely to the behaviour of the merged entity. Indeed, the applicant's view is that, in principle, it was not permissible under the Remedies Notice to accept behavioural commitments to remedy horizontal competition concerns, such as those identified on the market for wholesale TV signal transmission.

368 In the second place, the applicant maintains that the Commission assessed the suitability of those commitments on the basis of an erroneous and overly lenient legal standard. In that regard, the applicant submits that the vague wording used by the Commission in the contested decision demonstrated a hope, rather than a certainty, that those commitments would be sufficient and effective to eliminate in full the competition concerns identified on the market for wholesale TV signal transmission, with the result that those measures ought not to have been accepted.

369 The Commission, supported by Vodafone, disputes the applicant's arguments.

370 As regards, in the first place, the applicant's allegation that the commitments relating to the market for wholesale TV signal transmission are purely behavioural and, consequently, insufficient to remedy competition concerns of a horizontal nature, it is true, as the applicant observes, that the Commission explains in paragraph 15 of the Remedies Notice that commitments which are structural in nature, such as the commitment to divest a business unit, are, as a rule, preferable from the point of view of the objective of Regulation No 139/2004, in as much as such commitments prevent, durably, the competition concerns which would be raised by the merger as notified, and do not require medium- or long-term monitoring measures. Furthermore, as the applicant points out, the Commission states in paragraph 17 of that notice that commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances.

371 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).

372 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).

373 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).

374 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.

375 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.

376 The applicant is therefore not justified in maintaining that the Commission ought to have rejected the commitments relating to the market for wholesale TV signal transmission as being manifestly insufficient on the sole ground that they related solely to the behaviour of the merged entity, which makes it possible to reject the first complaint.

377 As regards, in the second place, the applicant's allegation that the wording used by the Commission in the contested decision demonstrates that the Commission was not certain that the commitments relating to the market for wholesale TV signal transmission would be sufficient and effective to remedy the SIEC identified on the market for wholesale TV signal transmission, it must be stated that the Commission must declare a concentration compatible if it is sufficiently probable that that transaction, as modified by the commitments offered by the merging parties, will not significantly impede effective competition in the internal market or in a substantial part of it (see, to that effect, judgment of 23 May 2019, *KPN* v *Commission*, T-370/17, EU:T:2019:354, paragraph 110 and the case-law cited).

378 Furthermore, the commitments offered by the party which notified the concentration at issue can be regarded as being capable of rendering the transaction compatible with the internal market only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them and that the remedies resulting from them will be sufficiently workable and lasting for it to be unlikely that the SIEC observed, which the commitments are intended to prevent, will materialise in the relatively near future (see, to that effect, judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 294 and the case-law cited).

379 It follows that while the Commission must be certain that the proposed commitments will be able to be implemented and that they will be sufficiently workable and lasting, it may declare a concentration to be compatible if it is sufficiently likely that those commitments will be sufficient and effective to eliminate the SIEC observed.

380 Furthermore, the applicant is not justified in maintaining that the wording used by the Commission shows that the Commission relied on a mere possibility that the commitments would entirely eliminate all the negative effects resulting from the transaction on the market for wholesale TV signal transmission.

381 It is true that the part of the contested decision devoted to assessing the final commitments contains certain wording which, taken in isolation, could be interpreted as the Commission expressing doubt. However, that wording must be read in the light of that part of the contested decision as a whole and, in particular, in the light of the Commission's findings in recitals 1965, 1972 and 1973 of the contested decision.

382 In that regard, it must be stated that, as a general conclusion, the Commission stated in recital 1973 of the contested decision that 'the Final Commitments in their entirety [were] suitable and sufficient to eliminate the competition concerns expressed, according to which the [t]ransaction would result in a significant impediment to effective competition' and 'that the Final Commitments [were] capable of being implemented effectively within a short period of time'.

383 It follows from the foregoing that the first part of the present plea must be rejected.

3. The second part: the commitments concerning the market for wholesale TV signal transmission were ineffective in that they did not eliminate the identified competition concerns

384 In support of the second part of the present plea, the applicant submits that the commitments relating to the market for wholesale TV signal transmission were entirely ineffective and unsuitable to achieve the Commission's objective of compensating for the merged entity's increased bargaining power in relation to broadcasters.

385 In the first place, the applicant maintains that the OTT commitment did not protect broadcasters distributing linear channels without catch-up TV services on the merged entity's platform, or broadcasters providing non-linear (VOD) offers.

386 In the second place, the applicant submits that, given that OTT would be able to limit the market power of traditional TV platforms only in the medium term, according to the Commission's own statements in recital 1132 of the contested decision, the OTT commitment was ineffective, in that it would take effect only at a late stage, long after the competitive conditions on the market had further deteriorated, which is contrary to the requirements set out in paragraph 9 of the Remedies Notice.

387 In the third place, the applicant explains that the second aspect of the OTT commitment, that is to say the commitment relating to the interconnection for OTT services, was insufficient, given that capacity problems could arise in the entire footprint of the cable network, and mainly on the last mile, where all customers have to share the limited capacity of coaxial cable, which demonstrates that ensuring sufficient interconnection or peering capacity alone would not guarantee sufficient reception quality for OTT TV customers and would not improve the competitive conditions.

388 In the fourth place, the applicant asserts that the commitments relating to the market for wholesale TV signal transmission were insufficient in that they would not diminish the merged entity's ability and incentive to harm innovative TV services, such as the IPTV services of third parties. In the applicant's view, the merged entity therefore continues to be free to restrict TV broadcasters in using IPTV services of third parties and to inflict harm on broadcasters, competing TV retail service providers and their customers.

389 In the fifth place, the applicant submits that the commitments will not prevent the merged entity from imposing other unfavourable conditions on broadcasters which could have the same or worse results than those which those commitments were supposed to eliminate. Other elements discussed during the multi-faceted negotiations between the merged entity and broadcasters could thus have been negatively affected. Therefore, the feed-in fees commitment was bound to remain ineffective since it did not rule out the deterioration of other contractual terms to the detriment of broadcasters and did not prevent the merged entity from abusing its market power.

390 The Commission, supported by Vodafone, disputes the applicant's arguments.

391 In that regard, as concerns, in the first place, the applicant's allegation that the OTT commitment was ineffective, in that it did not protect broadcasters distributing linear channels without catch-up TV services on the merged entity's platform and broadcasters providing non-linear offers, it must be held that such an allegation is based on a misinterpretation of the OTT commitment.

392 It is apparent from paragraph 13 of Section B.II of the text of the commitments that, by means of the OTT commitment, Vodafone undertook not to conclude or renew an agreement with a broadcaster which includes the distribution of that broadcaster's linear channels and catch-up TV services relating to the content in such linear channels via Vodafone's TV platform, which included terms which would directly or indirectly restrict that broadcaster's ability to offer an OTT service, or its linear channels via an OTT service, or its content for inclusion in an OTT service in Germany (see also recital 1924 of the contested decision).

393 Given that the concept of a 'broadcaster' is defined in the commitments as any 'provider of one or more linear TV channels', the text of the OTT commitment cannot be interpreted in the sense proposed by the applicant, as meaning that it applied only to broadcasters which distributed both linear channels and catch-up TV services via the merged entity's platform and, therefore, as meaning that the commitment concerning OTT restrictions did not protect broadcasters distributing linear channels without catch-up TV services on the merged entity's platform, or TV broadcasters also providing non-linear offers.

394 The reference, in the text of the commitments, to an agreement with a broadcaster which included the distribution of that broadcaster's linear channels 'and' catch-up TV services relating to content in such linear channels via Vodafone's TV platform was intended to extend the scope of the commitment not only to agreements relating to the distribution of linear channels, but also to agreements concerning both the distribution of linear channels and the services associated with the distribution of linear channels, namely catch-up TV services relating to the content of those linear channels, rather than to exclude agreements entered into or to be entered into with broadcasters distributing linear channels without catch-up TV services on the merged entity's platform or with broadcasters also providing non-linear offers.

395 It follows that the OTT commitment must rather be interpreted as covering, first, agreements negotiated with broadcasters which related solely to the distribution of that broadcaster's linear channels and, second, agreements negotiated with broadcasters which concerned the distribution of that broadcaster's linear channels and the provision of catch-up TV services relating to the content of those linear channels via Vodafone's TV platform, which makes it possible to reject the applicant's first complaint.

396 In any event, it must be stated that the applicant has provided no indication regarding the impact on the effectiveness of the OTT commitment of its interpretation of that commitment that it did not protect broadcasters distributing linear channels without catch-up TV services on the merged entity's platform or broadcasters also providing non-linear offers. In particular, the applicant has not demonstrated that the OTT commitment was insufficient to address the competition problem identified on the market for wholesale TV signal transmission, justifying its adoption, on the ground that it did not apply to broadcasters distributing linear channels without catch-up TV services on the merged entity's platform or to broadcasters also providing non-linear offers. In that regard, the applicant adduces no evidence which would make it possible to assess the number of broadcasters which would not have been able, in that case, to benefit from the OTT commitment.

397 As regards, in the second place, the applicant's allegation that the OTT commitment was ineffective, in that it would take effect only at a late stage, it must be stated 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.

398 Therefore, irrespective of the time period within which OTT services would have been able to limit substantially the market power of traditional TV platforms, 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 requires it not to implement such clauses which may exist and to waive similar restrictions in existing contracts, was capable immediately of preventing Vodafone from hampering the emergence and development of OTT services and, consequently, of remedying the competition problem identified in respect of which it had been adopted. It follows that the OTT commitment could indeed be implemented effectively and within a short period of time, in accordance with paragraph 9 of the Remedies Notice, which makes it possible to reject the applicant's second complaint.

399 As regards, in the third place, the applicant's allegation that the interconnection commitment for OTT services was insufficient, given that capacity problems could arise in the entire footprint of the cable network, with the result that sufficient interconnection or peering capacity would not have ensured sufficient reception quality for OTT TV customers, it should be noted that it is apparent from paragraph 15 of Section B.II of the text of the commitments that the objective of that remedy was to maintain at least three uncongested 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 paragraph 16 of Section B.II of the text of the commitments or otherwise.

400 To that end, paragraph 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 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 was insufficient.

401 In that regard, it should also be stated 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 level of the local loop, on the ground that such congestion would have entailed a significant risk for it of losing customers on the market for fixed internet access to the benefit of other providers.

402 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 traffic reprioritisation or discrimination, which the applicant does not dispute.

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

404 As regards, in the fourth place, the applicant's allegation that the commitments relating to the market for wholesale TV signal transmission were insufficient in that they did not diminish the merged entity's ability and incentive to harm innovative TV services, such as third parties' IPTV, it should be recalled, as is apparent from the examination of the second part of the fourth plea, that while 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 TV services such as HbbTV and OTT and (ii) that Vodafone had, in order to address that competition concern, offered the OTT and HbbTV commitments, it did not conclude that that would be the case for IPTV, finding that, unlike 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.

405 Furthermore, it is apparent from paragraphs 338 to 360 above that the applicant has not demonstrated that the Commission made a manifest error of assessment by failing to examine whether the merged entity would have the ability and incentive to hamper the emergence and development of other innovative services, such as IPTV, with the result that it was not necessary to impose a commitment in that regard, so that the fourth complaint cannot be upheld.

406 As regards, in the fifth place, the applicant's allegation that the commitments relating to the market for wholesale TV signal transmission will not prevent the merged entity from imposing other unfavourable conditions on broadcasters which could have the same or worse results than those which those commitments were supposed to eliminate, 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.

407 However, it must be stated, first of all, that, in recital 1221 of the contested decision, the Commission stated that 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 revenues 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).

408 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.

409 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.

410 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.

411 Finally, even if the applicant's fifth complaint concerning 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 described by the applicant would be contrary to the OTT commitment.

412 It follows from the foregoing that the fifth complaint is sufficiently comprehensible and, consequently, that it is admissible, contrary to the Commission's assertions, but that it is unfounded. That complaint and the second part of the present plea must therefore be rejected.

4. The third part: the feed-in fees commitment was submitted out of time

413 In support of the third part of the present plea, the applicant maintains that the feed-in fees commitment was submitted after the expiry of the deadline for the submission of remedies, resulting in the Commission being unable to carry out a new market test. It is clear from the Remedies Notice that only commitments which completely resolve, by removing any ambiguity, the competition concerns identified can be accepted after the remedy deadline, which is not the case for that commitment, having regard to the arguments put forward in the context of the first two parts of the fifth plea. The Commission ought therefore to have rejected the feed-in fees commitment.

414 The Commission, supported by Vodafone, disputes the applicant's arguments.

415 In that regard, it should be noted that it is apparent from Article 19(2) of Regulation No 802/2004 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 adopting a decision pursuant to Article 8(2) of Regulation No 139/2004 is extended, the deadline of 65 working days is automatically extended by the same number of working days.

416 Furthermore, it is apparent from paragraph 94 of the Remedies Notice that, where parties subsequently modify the proposed commitments after the deadline of 65 working days, the Commission will only accept those modified commitments where it can clearly determine – on the basis of its assessment of information already received 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 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 Member States.

417 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).

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

419 As regards the first condition, it is apparent from the examination of the first and second parts of the present plea that the applicant's arguments alleging that the commitments, and in particular the feed-in fees commitment, were ineffective and insufficient were 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 fees commitment would clearly resolve, without the need for further investigation, the competition concerns previously identified.

420 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 revised draft 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.

421 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 third part of the present plea must be rejected.

5. The fourth part: the SIEC is not eliminated on all the affected markets

422 The applicant submits that, having regard to its previous arguments set out in the first, second and fourth pleas, the commitments were insufficient in that they did not eliminate the SIEC in the MDU and SDU markets, or the foreclosure effects to the detriment of the merged entity's competitors on the wholesale TV markets, namely problems which the Commission failed to identify in the contested decision.

423 The Commission disputes the applicant's arguments.

424 In that regard, it is sufficient to state that the arguments to which the applicant refers in support of its first, second and fourth pleas have been rejected above for the reasons set out in the examination of those pleas. It follows that the applicant has not demonstrated that the Commission made a manifest error of assessment in taking the view that the transaction did not give rise to any SIEC on the MDU and SDU markets or any significant negative effect on competition on the wholesale market for the acquisition of TV channels and on the market for wholesale TV signal transmission, with the result that the fourth part of the present plea cannot succeed.

425 In the light of the foregoing, the fifth plea must be rejected as being, in any event, unfounded.

G. The application by the applicant for measures of organisation of procedure to be adopted

426 In its observations of 2 June 2023, the applicant requested the Court to order the Commission to adduce certain confidential documents which had not yet been disclosed, in order to verify whether those documents did indeed support the conclusion it had reached regarding the merging parties not being competitors on the MDU market.

427 However, it follows in particular from paragraphs 71 to 167 above that such a measure of organisation of procedure is not necessary in order to give a ruling on the action.

428 Therefore, it is not appropriate to grant the applicant's request.

429 In the light of all the foregoing, the action must be dismissed.

IV. Costs

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

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Deutsche Telekom 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.

V. Di Bucci
Registrar

M. van der Woude
President

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