Reports of Cases

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

20 December 2023 * [i]

(Competition – Concentrations – German electricity and gas markets – Decision declaring the concentration to be compatible with the internal market – Obligation to state reasons – Concept of a 'single concentration' – Right to effective judicial protection – Right to be heard – Definition of the market – Analysis period – Assessment of the effects of the transaction on competition – Manifest errors of assessment – Commitments – Duty of diligence)

In Case T-53/21,

EVH GmbH, established in Halle (Saale) (Germany), represented by I. Zenke and T. Heymann, lawyers,

applicant,

v

European Commission, represented by G. Meessen and J. Szczodrowski, acting as Agents, and by T. Funke and A. Dlouhy, lawyers,

defendant,

supported by

E.ON SE, established in Essen (Germany), represented by C. Grave, C. Barth and D.-J. dos Santos Goncalves, lawyers,

and by

RWE AG, established in Essen, represented by U. Scholz, J. Ziebarth and J. Siegmund, lawyers,

interveners,

THE GENERAL COURT (Fifth Chamber, Extended Composition),

composed of M. van der Woude, President, J. Svenningsen, C. Mac Eochaidh, J. Martín y Pérez de Nanclares (Rapporteur) and M. Stancu, Judges,

Registrar: S. Jund, Administrator,

* Language of the case: German.

having regard to the written part of the procedure,

further to the hearing on 18 April 2023,

gives the following

Judgment [1]

1 By its action under Article 263 TFEU, the applicant, EVH GmbH, seeks annulment of Commission Decision C(2019) 6530 final of 17 September 2019 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case M.8870 – E.ON/Innogy) ('the contested decision').

I. Background to the dispute

A. The undertakings concerned

2 E.ON SE is a company incorporated under German law which, at the time of the notification of the proposed concentration, was active across the energy supply chain, including generation, wholesale supply, transmission, distribution, retail supply and energy-related activities (such as metering and e-mobility) ('the energy market'). E.ON is active in several European States, including the Czech Republic, Denmark, Germany, Italy, Hungary, Poland, Romania, Slovakia, Sweden and the United Kingdom.

3 Innogy SE (together with E.ON, 'the parties to the concentration'), a majority-owned subsidiary of RWE AG, is a company incorporated under German law which is active across the energy supply chain, including generation, distribution, retail supply and energy-related activities such as metering and e-mobility. Innogy is active in several European States, including Belgium, the Czech Republic, Germany, Spain, France, Croatia, Italy, Hungary, the Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia and the United Kingdom.

4 The applicant is an undertaking incorporated under German law which operates at all levels of the energy supply chain. Electricity and gas distribution to households and small commercial customers is part of its core business. It operates electricity and gas distribution networks through EVH Netz.

B. Context of the concentration

5 The concentration at issue in this case forms part of a complex asset swap between RWE and E.ON, announced on 11 and 12 March 2018 by the two undertakings concerned ('the overall transaction'). Through the first transaction, RWE wishes to acquire sole or joint control of certain E.ON generation assets. The second transaction, the concentration at issue in the present case, consists in the acquisition by E.ON of sole control of the distribution and retail trade business and certain innogy generation assets controlled by RWE. The third transaction envisages RWE acquiring 16.67% of the shares in E.ON.

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

6 On 17 April 2018, the applicant sent a letter to the European Commission informing it that it wished to participate in the procedure relating to the first and second concentrations and, therefore, to receive the documents relating to them. It also took the opportunity to send critical comments in relation to those two concentrations.

7 On 26 June 2018, a meeting was held between the applicant's representative and the Commission, at which that representative raised with the Commission his client's concerns regarding the first and second concentrations and its wish to participate in the related procedures.

8 On 28 August 2018, an individual meeting was held between the Commission and the applicant at which the applicant submitted its observations on the first and second concentrations.

9 The first concentration was notified to the Commission on 22 January 2019 ('Concentration M.8871'). With regard to this first transaction, the Commission adopted Decision C(2019) 1711 final of 26 February 2019 declaring that a concentration is compatible with the internal market and with the EEA Agreement (Case M.8871 – RWE/E.ON Assets) ('Decision M.8871').

10 The third transaction was notified to the Bundeskartellamt (Federal Cartel Office, Germany), which authorised it by decision of 26 February 2019 (Case B8-28/19; 'Concentration B8-28/19').

C. Administrative procedure

11 On 31 January 2019, the Commission received notification of a proposed concentration under Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), by which E.ON wished to acquire, within the meaning of Article 3(1)(b) of that regulation, sole control over the distribution and consumer solutions business and certain innogy electricity generation assets controlled by RWE.

12 As part of its examination of that concentration, the Commission conducted a first market investigation, which was sent to competitors of the parties to the concentration ('the first market investigation'), and therefore, on 1 February 2019, sent a questionnaire to certain undertakings, including the applicant, to which the applicant responded on 8 February 2019.

13 On 8 February 2019, the Commission published in the *Official Journal of the European Union* the prior notification of that concentration (Case M.8870 – E.ON/Innogy) (OJ 2019 C 50, p. 13, 'Concentration M.8870') pursuant to Article 4(3) of Regulation No 139/2004.

14 By letter of the same date, the applicant reiterated its wish to participate in the procedure being conducted by the Commission and, in doing so, to be heard by the Commission.

15 The concentration comprises two steps. The first step involves E.ON acquiring the whole of innogy. The second step involves E.ON (i) carving out the majority of innogy's renewable electricity generation business, 11 gas storage facilities operated by innogy in the Czech Republic and Germany and innogy's 49% stake in Kärntner Energieholding Beteiligungs GmbH and (ii) transferring those assets to RWE.

16 By decision of 7 March 2019, the Commission found that Concentration M.8870 raised serious doubts as to its compatibility with the internal market and the Agreement on the European Economic Area (OJ 1994 L 1, p. 3; 'the EEA Agreement'). The Commission therefore decided to initiate the in-depth examination procedure in accordance with Article 6(1)(c) of Regulation No 139/2004.

17 On 14 March 2019, the Commission sent the applicant a request for information under Article 11 of Regulation No 139/2004. That request for information sought to obtain documents relating to customer surveys carried out by the applicant between 2016 and 2018 concerning retail supply of electricity and gas in Germany ('the request for information'). The applicant responded to that request on 21 March 2019.

18 On 18 March 2019, the Commission published in the Official Journal a notice of initiation of proceedings (OJ 2019 C 102, p. 2) in accordance with Article 6(1)(c) of Regulation No 139/2004.

19 On 12 April 2019, the applicant sent a letter to the Hearing Officer in which it requested that it be granted the status of interested third party with a view to being heard in the procedure relating to Concentration M.8870. The Hearing Officer granted its request by letter of 23 April 2019.

20 At a state of play meeting held on 27 May 2019, the Commission informed the parties to the concentration of the preliminary results of the market investigation and the scope of its preliminary concerns.

21 In order to address the competition concerns identified by the Commission at the state of play meeting held on 27 May 2019, E.ON proposed commitments on 20 June 2019 in accordance with Article 8(2) of Regulation No 139/2004.

22 The Commission conducted a second market investigation, which related to the commitments offered by E.ON ('the second market investigation') and therefore, on 21 June 2019, sent to certain undertakings, including the applicant, two questionnaires, one concerning the commitments offered for the market for electricity used for heating and the other concerning the commitments offered for the e-mobility market. The applicant responded to that investigation on 26 June 2019.

23 E.ON submitted a final version of its commitments on 3 July 2019.

D. The contested decision

24 Since the Commission considered that the commitments submitted by E.ON were sufficient to eliminate serious doubts as to the compatibility of the concentration with the internal market, it did not send a statement of objections to E.ON and adopted the contested decision. By that decision, a summary of which was published in the Official Journal (OJ 2020 C 379, p. 16), the Commission declared the concentration compatible with the internal market and the EEA Agreement.

25 The concentration leads to significant overlaps between the activities of E.ON and those of innogy, particularly in Germany. The Commission therefore examined the effects of the concentration on the markets in Germany.

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II. Forms of order sought

74 The applicant claims, in essence, that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

75 The Commission, supported by RWE and by E.ON, contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

III. Law

76 In support of its action, the applicant raises, in essence, six pleas in law, alleging, first, that the analysis of the overall transaction was divided erroneously, second, a breach of the obligation to state reasons, third, an infringement of its right to be heard, fourth, an infringement of its right to effective judicial protection, fifth, manifest errors of assessment and, sixth, a breach of the duty of diligence.

…

E. The fifth plea in law, alleging manifest errors of assessment

170 By the fifth plea in law, alleging manifest errors of assessment, the applicant asserts, in essence, that the Commission erred in holding that the concentration was compatible with the internal market, whereas it ought to have declared the concentration incompatible with the internal market under Article 8(3) of Regulation No 139/2004. According to the applicant, the Commission ought to have explored all the decisive facts which could make it possible for it to predict the impact of the concentration, including the numerous vertical effects, and in particular ought to have pursued theories of harm in relation to the digital economy and data arising from the exceptional amount of customer data to which E.ON has access and from its presence on gatekeeper channels.

1. Preliminary considerations

171 Under Article 2(3) of Regulation No 139/2004, a concentration 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, is to be declared incompatible with the common market.

172 As regards the standard of proof, it is apparent from the judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala* (C-413/06 P, EU:C:2008:392, paragraphs 50 to 53), 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, based on 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 (judgment of 11 December 2013, *Cisco Systems and Messagenet* v *Commission*, T-79/12, EU:T:2013:635, paragraph 47).

173 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 (judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 136).

174 Furthermore, according to settled case-law, the basic provisions of Regulation No 139/2004, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and, consequently, review by the Courts of the European Union of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations (see judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 29 and the case-law cited).

175 It follows that the review by the EU Courts of a Commission decision relating to concentrations is confined to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment (see judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 144 and the case-law cited).

176 Nonetheless, that does not mean that the EU Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the EU Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent, they must also determine whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (judgments of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 39, and of 7 May 2009, *NVV and Others* v *Commission*, T-151/05, EU:T:2009:144, paragraph 54).

177 It should also be noted that the question whether the substantive assessment of the concentration at issue raised problems of compatibility with the internal market, in accordance with Article 8(2) of Regulation No 139/2004, falls within the scope of examining whether there was a manifest error of assessment. In order to determine whether the Commission was entitled to rely on the

abovementioned provision in making its decision, it must be considered whether the Commission committed a manifest error in its assessment of the effects of the proposed concentration on competition (see, to that effect and by analogy, judgment of 7 June 2013, *Spar Österreichische Warenhandels* v *Commission*, T-405/08, not published, EU:T:2013:306, paragraph 48).

178 It is in the light of those considerations that it must be examined whether the Commission made a manifest error of assessment.

179 The fifth plea in law consists of three parts. The first alleges that the analysis period was defined incorrectly, the second alleges that the relevant markets were defined incorrectly and the third alleges that the effects of the concentration were assessed incorrectly. However, before examining those three parts, consideration should be given to the criticisms put forward by the applicant concerning the factors taken into account by the Commission for the purposes of its analysis.

2. The factors taken into account by the Commission for the purposes of its analysis

(a) Information provided by the parties to the concentration and all the relevant information

180 The applicant asserts that the Commission relied solely on information provided by the parties to the concentration, without examining such information critically, and that it ignored other sources of information, in particular divergent comments from the market.

181 In the first place, the results of the market investigations conducted by the Commission and information provided by the applicant, namely publicly available references, the LBD study, the study from October 2020 carried out by Büro für Energiewirtschaft und technische Planung GmbH (BET), entitled 'Kurzgutachten zu den Ergebnissen der Marktbefragung im Zusammenhang mit der Neuaufteilung der Geschäftsfelder zwischen E.ON und RWE/innogy' (Short expert report on the results of the market survey concerning the redistribution of lines of business between E.ON and RWE/innogy; 'the BET study'), and the study of 13 January 2021 carried out by Innoplexia, entitled 'Digitale Marktbeobachtung. Deutschlandweite Erhebung zur Untersuchung von dominanten Stellungen deutscher Energieversorger' (Digital market monitoring. Germany-wide survey to investigate dominant positions of German energy suppliers; 'the Innoplexia study'), contradict the facts used by the Commission. Thus, if the Commission had taken the necessary preparatory steps, it could and should have refuted the claims made by the parties to the concentration.

182 In the second place, the Commission cannot legitimately claim that the BET and Innoplexia studies should be ignored in their entirety on the ground that they were drawn up after the adoption of the contested decision. In particular, the applicant submits that the BET study draws inspiration from the Commission's general investigation approach and aims only to verify the plausibility of the Commission's findings, while the Innoplexia study quantifies E.ON's predatory online presence, which was firmly criticised by competitors in the course of the procedure, with the result that those two studies cannot be regarded as new facts arising after the adoption of the contested decision.

183 The Commission, supported by E.ON and RWE, asserts that it gathered all the decisive facts on the basis of which it could predict the impact of the concentration on the internal market. In this regard, the Commission had not only its own knowledge of the market, public information and

data provided by the parties to the concentration, but also information from third parties. The Commission considers that the BET and Innoplexia studies are inadmissible as evidence because they did not exist on the date when the contested decision was adopted. Lastly, the Commission contests the relevance, consistency and reliability of the evidence provided by the applicant.

184 The Court will begin by considering the general complaint that the Commission failed to take into account other public information or information provided by third parties and relied solely on information provided by the parties to the concentration. The Court will then examine the admissibility, as well as the relevance, consistency and reliability of the studies submitted by the applicant in so far as they seek to demonstrate that the Commission failed to take into account all the relevant facts for the purposes of its analysis of the effects of the concentration.

185 In the first place, with regard to the applicant's argument that the Commission relied solely on information provided by the parties to the concentration, without examining it critically, and ignored other sources of information, it should be stated that the applicant does not indicate the existence of a legal provision prohibiting the Commission from relying on information provided by the parties to the concentration themselves in the administrative procedure or, to the contrary, requiring it to conduct its own market investigation independently of the information provided by the parties to the concentration (see, to that effect, judgment of 7 June 2013, *Spar Österreichische Warenhandels* v *Commission*, T-405/08, not published, EU:T:2013:306, paragraph 126).

186 Similarly, it should be noted that, in view of the need for speed and the tight deadlines to which the Commission is subject in the procedure for the control of concentrations, the Commission cannot be required, in the absence of evidence indicating that the information provided is inaccurate, to carry out checks in respect of all the information it receives. Although the diligent and impartial examination which the Commission is obliged to carry out in the context of that procedure does not permit it to base itself on facts or information which cannot be regarded as accurate, the abovementioned need for speed presupposes, however, that it cannot itself verify down to the last detail the authenticity and reliability of all the information it receives, since the procedure for the control of concentrations is based, of necessity and to a certain extent, on trust (see judgment of 20 October 2021, *Polskie Linie Lotnicze 'LOT'* v *Commission*, T-240/18, EU:T:2021:723, paragraph 87 and the case-law cited).

187 It should be observed in that regard that, in the context of merger control legislation, various measures have been laid down in order to discourage and punish the communication of inaccurate or misleading information. Not only are the notifying parties subject, under Article 4(1) and Article 6(2) of Regulation No 802/2004, 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 – that obligation being confirmed by Article 14 of Regulation No 139/2004 – but the Commission may also revoke the decision on compatibility, on the basis of Article 6(3)(a) and Article 8(6)(a) of Regulation No 139/2004, if it is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit (see judgment of 20 October 2021, *Polskie Linie Lotnicze 'LOT'* v *Commission*, T-240/18, EU:T:2021:723, paragraph 88 and the case-law cited).

188 There is therefore nothing to prevent the Commission from relying solely on information provided by the parties to the concentration, in the absence of evidence that it is inaccurate, provided it constitutes all the relevant information which must be taken into account in order to assess a complex situation.

189 In the present case, it is clear from the contested decision that the Commission relied partly on information produced by the parties to the concentration. Nevertheless, it is apparent from reading the contested decision in its entirety that the Commission did not place indiscriminate trust in the information provided by the parties to the concentration. On the contrary, in so far as the applicant contests the reliability of the information provided by the parties to the concentration to the Commission, it should be noted that that information was supported by other evidence available to the Commission. For example, in paragraph 81 et seq. of the contested decision, the Commission examined critically, in the light of the LBD study, the statements made by the parties to the concentration concerning the definition of the geographic market for retail supply of electricity. Similarly, in paragraph 230 of that decision, the Commission compared the assertions made by the parties to the concentration regarding their competitive relationship in calls for tenders for electricity and gas concessions with the view of certain competitors. In addition, in paragraph 293 of the contested decision, the Commission also compared the information it obtained from its market study on possible effects of crowding competitors out of price comparison websites with its own knowledge of the market. Furthermore, in paragraph 191 of the contested decision, the Commission addressed information provided by the parties to the concentration in the light of other relevant information, such as the reports of the Federal Cartel Office, on the significant overprice by fuel stations located on motorways compared with fuel stations located in the close vicinity of motorways and further from motorways.

190 In those circumstances, it should be stated that the Commission verified the information provided by the parties to the concentration in the light of all the information available to it. All the information taken into account by the Commission thus comprised not only information from the parties to the concentration, but also other public information and other information gathered from third parties through requests for information, market investigations or interviews, as is evident from paragraphs 12, 13, 21 or 58 of the contested decision, for example.

191 It must therefore be concluded, without at this stage prejudging the question whether the Commission did in fact take into account all the relevant information in each specific part of its analysis, that it sought in general to gather the relevant evidence on the basis of which it could predict the impact of the concentration and that it cross-checked that information.

192 In any event, it is for the Commission to assess whether the information available to it is sufficient for the competitive analysis (judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 109) and to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation. In carrying out that overall assessment, the Commission may prioritise certain items of evidence and discount other evidence. The Court must review the legality of that examination and its reasoning (see, to that effect, judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 136).

193 In that regard, the applicant merely states, in essence, that the Commission established the facts erroneously or incompletely, ignoring certain evidence. However, it is clear from the contested decision that the Commission took into account all the evidence available to it and that it prioritised certain items of evidence and discounted other evidence, which falls within its margin of discretion, comparing all the evidence and setting out, in general terms, the reasons why it decided not to accept certain information.

194 In the second place, with regard to the three studies submitted by the applicant, as mentioned in paragraph 181 above, it has been ruled that the legality of an EU measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see

judgments of 18 July 2013, *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 31 and the case-law cited, and of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 260 and the case-law cited). In particular, the legality of a decision concerning competition is to be assessed, according to settled case-law, in the light of the information available to the Commission when the decision was adopted (see judgment of 27 January 2021, *KPN* v *Commission*, T-691/18, not published, EU:T:2021:43, paragraph 141 and the case-law cited).

195 Consequently, the contested decision must be assessed on the basis of the facts existing at the time when the measure was adopted and not in the light of subsequent events (judgment of 4 July 2006, *easyJet* v *Commission*, T-177/04, EU:T:2006:187, paragraph 204).

196 The contested decision was adopted on 17 September 2019. As for the LBD study, which is dated 9 May 2019, the Commission explicitly mentioned that study in the contested decision in paragraphs 81, 83, 84 and 86 and in footnotes 79, 80, 84, 85, 90 to 92 and 315. Consequently, not only is that study relevant in assessing the legality of the contested decision, but it also cannot be claimed that the Commission failed to take it into account in its examination of the effects of the concentration.

197 On the other hand, it is common ground that the BET study, which dates from October 2020, and the Innoplexia study, which dates from 13 January 2021, post-date the adoption of the contested decision.

198 However, the Commission cannot invoke, in a general manner, the case-law to the effect that the legality of a contested measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (judgment of 21 September 2005, *EDP* v *Commission*, T-87/05, EU:T:2005:333, paragraph 158) in order to discount those two studies for the purposes of assessing the legality of the contested decision.

199 In so far as the production of an annex is not an attempt to alter the legal and factual framework previously submitted to the Commission for the purposes of the adoption of the contested decision, but contributes to a line of argument in the simple exercise of the rights of the defence, such an annex must be regarded as admissible (judgment of 7 May 2009, *NVV and Others* v *Commission*, T-151/05, EU:T:2009:144, paragraph 63).

200 In the present case, it must be stated that the BET and Innoplexia studies were prepared specifically to challenge the legality of the contested decision. Thus, in accordance with the case-law mentioned in paragraph 199 above, the Commission cannot claim that the BET and Innoplexia studies should be declared inadmissible merely because they were prepared after the contested decision was adopted, without their content being examined to determine whether or not they are an attempt to alter the legal and factual framework as it stood at the time when the contested decision was adopted.

201 On the other hand, the Commission is entitled to rely in its defence, in relation to specific points, on the fact that an annex disregards the express declarations or the omissions of the parties during the administrative procedure (judgment of 21 September 2005, *EDP* v *Commission*, T-87/05, EU:T:2005:333, paragraph 158). Similarly, the analysis of an annex in relation to a specific point may be based on information existing at the time when the contested decision was adopted in accordance with the case-law cited in paragraph 198 above. In other words, there is nothing to

prevent an applicant, in the exercise of its rights of defence, referring to an analysis contained in an annex, which was carried out after the contested measure was adopted, provided that analysis is based on facts available at the time when that measure was adopted.

202 First, the BET study includes, in Section 2, a criticism of the methodology employed by the Commission in the first market investigation. That criticism must be considered an integral part of the line of argument exercising the applicant's rights of defence. That section of the BET study is therefore admissible.

203 By contrast, Section 3 of the BET study presents the results of a market investigation conducted by BET between 29 July and 18 August 2020, almost a whole year after the adoption of the contested decision, as is apparent from paragraph 41 in Section 3 of that study.

204 It should be stated in that regard that the applicant has neither demonstrated nor even claimed that the view of the participating undertakings was the same as it would have been if they had been surveyed at the time when the contested decision was adopted. In addition, given the dynamic nature of the energy market, it can reasonably be expected that the responses from undertakings participating in the BET study, almost a year after the adoption of the contested decision, would change as the energy market evolved. Furthermore, the responses were given in a context where the concentration had already taken place. The analysis of the responses was thus based on facts which were not available to the Commission at the time of adoption of the contested decision. The Commission could not know what the opinion of market participants would be almost a year later, particularly after the concentration had been implemented.

205 Because the situation on the energy market at the time when the BET study was carried out was inevitably different from its situation when the Commission conducted its own investigations, the relevance and probative value of the analyses contained in the BET study based on that subsequent information are at best limited. The use of that information not only contributes to a line of argument for the exercise of the applicant's rights of defence but is, at least in part, an attempt to alter the factual framework as it stood at the time when the Commission adopted the contested decision, in accordance with the case-law cited in paragraph 199 above.

206 Second, as regards the Innoplexia study, it should be noted that the data used in that study were collected in two stages. In a first step, there was daily data collection throughout Germany between 4 and 17 December 2020 on the search engine Google and two comparison websites: 'Check24' and 'Verivox'. In a second step, in order to include the comparison website data in the investigation over a longer period, Innoplexia used continuous data scanning for the period from 1 January to 31 December 2020.

207 In this regard, it should be noted that both the search engine Google and the comparison websites 'Check24' and 'Verivox' show the results of offerings of operators at a given time. Those platforms are therefore subject to the same changing dynamics as the energy market.

208 The applicant has not even claimed, let alone proved, that the results obtained would have been the same if data had been collected during the period over which the Commission conducted its own analysis. Thus, as was found with regard to the BET study, it is fair to assume that those results evolved over time as the energy market itself changed.

209 Furthermore, it is clear from that study that Innoplexia had data obtained from continuous scanning of websites, which imitate human search behaviour and allow several million requests per day to be processed over several years. However, even though data contemporary with the Commission's market study could have been used, Innoplexia opted to use data from 2020.

210 Given that the analysis in the Innoplexia study was based largely on data from 2020, subsequent to the contested decision having been adopted, the use of those data is, at least in part, an attempt to alter the factual framework as it stood at the time when the Commission adopted the contested decision in accordance with the case-law cited in paragraph 199 above. Consequently, even assuming they are admissible, the relevance and probative value of those analyses are, at best, limited.

211 In short, the BET and Innoplexia studies submitted by the applicant do not contain data which the Commission failed to take into account in the adoption of the contested decision. The applicant will therefore not be able to demonstrate successfully through those studies that the Commission failed to take into account certain information.

(b) The first Commission market investigation

212 The applicant asserts that the design, form, time limit and content of the first market investigation conducted by the Commission were not optimal.

213 The Commission contends that the first market investigation was properly conducted.

214 In the first place, with regard to the sample used for the first market investigation, it is stated in footnote 52 of the contested decision that 161 undertakings actually took part in the first market investigation, including, in addition to large competitors such as EnBW and Vattenfall, over 50 Stadtwerke (municipal utilities) of different sizes, cooperatives of municipal utilities, companies in which only municipalities or their municipal utilities held shares, companies in which municipal utilities and independent suppliers held shares, companies in which only independent suppliers held shares, independent suppliers and new market entrants.

215 The Commission thus selected a wide range of market participants to respond to its market investigation.

216 In order to determine the correct sample size for a market study, account must be taken of, first, the size of the population among which the survey is to be conducted, second, the confidence level, which is the percentage indicating the degree of certainty with which the population will choose a response between two given values, and, third, the margin of error, which is the percentage indicating the extent to which the survey results are likely to reflect the opinion of the general population.

217 In the present case, the total population is approximately 2 500 undertakings whose opinion could be helpful. For a confidence level of 95%, which is the industry standard, and a margin of error of 10%, the appropriate sample size would be 93 respondents. Thus, by surveying 383 undertakings on the energy market, a number of which could be expected to fail to respond, the Commission sought to establish a sufficiently representative sample.

218 Similarly, the Commission cannot reasonably be criticised for contacting only 383 undertakings, since the logistics and organisation of such an investigation require considerable effort, as does the subsequent processing of the information, especially bearing in mind the Commission's limited resources and the need for speed to be observed by it in the context of merger control. Thus, given the speed requirement in the merger control procedure, the Court considers that, since 161 of the 383 undertakings contacted actually responded to the first market investigation, that sample can be considered sufficiently representative and capable of giving meaningful results on which the Commission could base its conclusions.

219 In the second place, the applicant criticises the fact that the questionnaire was provided in English. In that regard, it is not disputed that the questions were in English but there was nothing to prevent the recipient undertakings from responding in German.

220 In the judgment of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg* v *Commission* (T-441/14, EU:T:2018:453), the applicants maintained that the Commission had breached their right to a fair hearing and their rights of defence by notifying the requests for information and the statement of objections to them exclusively in English in a cartel proceeding, although one of the applicants had on several occasions asked to communicate in German. In paragraphs 46 to 50 of that judgment, the Court concluded that the Commission's refusal to send the requests for information to Brugg Kabel AG in German had not prevented it from expressing its point of view effectively as regards the information requested by the Commission, in particular given that the Commission had not required Brugg Kabel to answer the requests for information in English.

221 The a fortiori application of that case-law leads the Court to conclude that the questionnaire in the first market investigation, which could not, in itself, lead to the adoption of penalties against undertakings to which it was sent, could be drafted in English. Furthermore, if the undertakings encountered translation problems, they could have requested an extension of the time limit for linguistic reasons. Lastly, there was clearly nothing preventing them from expressing their point of view effectively as they could respond in German to the questions asked in English.

222 Bearing in mind, additionally, the need for speed, the Commission cannot therefore be expected to translate the questions into the languages requested by the undertakings surveyed.

223 For the sake of completeness, it should be noted that such an approach is all the more reasonable as the Commission conducted market investigations on the different geographic markets concerned, including the Czech Republic, Hungary, Slovakia and the United Kingdom. It would be disproportionate in terms of costs to the Commission's services and incompatible with the need for speed which it must observe to expect it to translate its questionnaires into the languages of the Member States in whose territory it conducts its market investigations.

224 In the third place, it is necessary to examine the complexity of the questionnaire and the time limit for responses granted by the Commission. It should be noted in that regard that the Commission must balance the need to conduct a full investigation in order to have all the relevant information for its assessment with the need for speed which it must observe. The Commission cannot therefore be criticised for having asked 228 questions. In addition, although the time limit for responses was short, the fact that 161 undertakings responded within the time limit and undertakings were able to request an extension of the time limit is sufficient to conclude that the Commission did not breach its duty of diligence in that regard.

225 It follows from all the foregoing that the first market investigation was properly conducted. It cannot therefore be considered, in itself, to be vitiated by manifest errors of assessment.

3. The first part of the fifth plea in law, alleging the analysis period was defined incorrectly

226 The applicant asserts that the Commission relied mainly on outdated considerations, without giving any prediction with regard to the e-mobility market and the market for metering services in particular.

227 In essence, the applicant criticises the definition of the analysis period in respect of, first, the e-mobility market and, second, the market for metering services.

228 The Commission disputes the applicant's arguments.

229 As regards the market for metering services more specifically, the applicant alleges, in essence, that the Commission failed to take into account the future impact of the fact that, as a result of the concentration and the activities which it could develop in the market for metering services, E.ON would collect a large volume of data, allowing it to offer innovative solutions to consumers.

230 It should be noted that in merger control, the Commission must assess whether a concentration is such as to significantly impede effective competition in the internal market or in a substantial part of it. That follows from Article 2(2) and (3) of Regulation No 139/2004.

231 The review of concentrations by the Commission calls for a prospective analysis which consists 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 serious impediment to effective competition. Such a prospective analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely (judgments of 19 June 2009, *Qualcomm* v *Commission*, T-48/04, EU:T:2009:212, paragraph 88, and of 9 March 2015, *Deutsche Börse* v *Commission*, T-175/12, not published, EU:T:2015:148, paragraph 62; see also, to that effect, judgment of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 43).

232 In addition, as was recalled, in essence, in paragraph 94 above, the appraisal by the Commission of the compatibility of a concentration between undertakings with the internal market must be carried out solely on the basis of matters of fact and law existing at the time of notification of that transaction, and not on the basis of hypothetical factors, the economic implications of which cannot be assessed at the time when the authorisation decision is adopted (see judgment of 13 September 2010, *Éditions Odile Jacob* v *Commission*, T-279/04, not published, EU:T:2010:384, paragraph 327 and the case-law cited).

233 It follows that the Commission is expected to carry out an assessment of the effects of the concentration over a period which can be no longer than the timeframe within which, with a sufficient degree of certainty, certain events will occur. The further away in time the event to be predicted, the greater the uncertainty as to its occurrence. Accordingly, the Commission cannot be expected to undertake a prospective analysis based on elements the long-term effects of which it would not be able to envisage with a reasonable margin of error.

234 In the present case, it is evident from the contested decision that in its analysis the Commission took into account prospective elements which had a sufficient degree of predictability to be relevant.

235 First, as regards the e-mobility sector, it is clear from paragraph 183 of the contested decision that the Commission took account of the parallel growth in the number of electric vehicle charging stations and electric vehicle sales themselves, which were expected to grow by approximately 27% per year until 2029. The Commission also stated, in paragraph 193 of the contested decision, that market participants expected that ultra-fast charging stations would become increasingly common and the price of fast and ultra-fast charging stations would diverge and, in paragraph 199, that market participants expected that the electric vehicle charging station business would develop similarly to traditional fuel stations where the competitive conditions at local level influence the strategy of fuel operators. Similarly, in paragraph 385 of the contested decision, the Commission referred to foreseeable developments on the market for installation and operation of regular and fast charging stations, which was rapidly evolving. It follows that further market entry could be expected, including by Deutsche Telekom, which announced recently its plan to integrate electric vehicle charging stations into telephone network distribution boxes, and Volkswagen, which also announced its plans to enter the e-mobility market and aimed to build electric vehicle charging stations at the facilities of its 4 000 car dealer and service station partners in Europe.

236 It is thus clear from paragraphs 183, 193, 199 and 385 of the contested decision that, contrary to the assertion made by the applicant, the Commission did not confine itself, in its analysis of the effects on competition of the concentration, to examining the situation on the date when the contested decision was adopted, but took account of foreseeable developments in the e-mobility sector.

237 Second, as regards the metering services sector, in which the applicant asserts that E.ON's dominant position also makes it the leader in data-driven customer solutions, the applicant does not identify specifically the developments which the Commission ought to have taken into consideration or the relevant period in this regard. On the contrary, it merely claims that, as the Commission does not concur with its predictions of damaging effects, the Commission's prospective analysis is incorrect.

238 In any event, it should be noted that the Commission did actually examine the potential effects of the concentration in that field and stated in paragraph 423 of the contested decision that additional data beyond a critical mass could not necessarily bring additional value. Similarly, in paragraph 424 of the contested decision the Commission noted that there was significant uncertainty as to the minimum amount (and the type) of data that was required to develop new energy solutions.

239 Consequently, the Commission did not have information allowing it to undertake a prospective analysis based on a longer period than it adopted. It did not therefore make a manifest error of assessment in defining the prospective analysis period.

240 Lastly, in paragraph 432 of the contested decision the Commission noted the limitations of its analysis, stating that the electricity market was profoundly changing and that even among market participants there was no consensus about how the market would ultimately evolve.

241 It follows from all the foregoing that, in view of the uncertainties over the development of the electricity market in general, the Commission could not reasonably extend its prospective analysis to a longer period than it adopted. Consequently, it did not make a manifest error of assessment in defining the analysis period.

242 The first part, alleging the analysis period was defined incorrectly, must therefore be rejected.

4. The second part of the fifth plea in law, alleging the relevant markets were defined incorrectly

243 In the present case, the Commission defined the relevant markets in Germany in Section 7.1 of the contested decision. The Commission examined inter alia the definition of the product and geographic markets in the following areas: generation and wholesale supply of electricity (Section 7.1.1), distribution of electricity or electricity networks (Section 7.1.2), retail supply of electricity (Section 7.1.3), retail supply of electricity used for heating (Section 7.1.4), distribution of gas or gas networks (Section 7.1.5), retail supply of gas (Section 7.1.6), metering services (Section 7.1.7) and e-mobility (Section 7.1.8).

(a) The first complaint, alleging the markets for retail supply of electricity and gas were defined incorrectly

244 The applicant asserts, in essence, that the Commission did not examine adequately the facts in the sector of retail supply of electricity to households and small commercial customers and that its definition of the markets for retail supply of electricity and gas was manifestly incorrect.

245 In the first place, the Commission defined the relevant product market incorrectly in so far as it did not take sufficient account of the view of consumers. Consequently, it erred when it concluded that the market for retail supply of electricity and gas to households and small commercial customers under basic supply was different from the market for retail supply of electricity and gas to households and small commercial customers under special contracts.

246 In the second place, the Commission incorrectly assessed the geographic definition of the market for retail supply of electricity and gas to households and small commercial customers, incorrectly taking the view that the market for customers under special contracts is a national rather than a local market. The Commission did not therefore take account of the increase in E.ON's local market shares as a result of the concentration, which were 70% and more in some cases.

247 The Commission, supported by E.ON, disputes the applicant's arguments.

248 It should be noted that the Commission examined, inter alia, the definition of the markets for retail supply of electricity and gas in Sections 7.1.3 and 7.1.6 of the contested decision. In paragraph 91 of the contested decision, it concluded that for the purposes of the decision:

– the market for retail supply of electricity to large industrial customers was to be regarded as national in scope;

– the market for retail supply of electricity to households and small commercial customers under basic supply was to be regarded as a separate product market and as local in scope, restricted to the relevant basic supply area;

– the market for retail supply of electricity to households and small commercial customers under special contracts was to be regarded as a separate product market and as national in scope with local elements.

249 In paragraph 129 of the contested decision, the Commission considered that the structure and functioning of the market for retail supply of gas were very similar to the market for retail supply of electricity.

(1) The definition of the relevant product market

250 As regards the relevant product market, the Commission examined the product market for retail supply of electricity in Section 7.1.3.2 (paragraphs 52 to 62) and for retail supply of gas in Section 7.1.6.1 (paragraphs 130 to 133) of the contested decision.

251 It should be stated at the outset that it is clear from the contested decision that the Commission analysed a number of sources of information in order to define the product markets for retail supply of electricity and gas. It thus not only considered the view of the parties to the concentration (paragraphs 51, 55, 58 and 132), but also took account of its previous decision-making practice and that of the Federal Cartel Office and the Bundesnetzagentur (BNetzA, Federal Network Agency, Germany) (paragraphs 52 to 54, 58, 130 and 131), information from the Federal Cartel Office (paragraph 50), the applicable legislation (paragraphs 47, 51, 56 and 133), a report by the Agency for the Cooperation of Energy Regulators (ACER) (paragraph 59), responses from competitors in the first market investigation (paragraphs 58 and 60) and internal documents of the parties to the concentration (paragraph 61). The Commission therefore took into account the relevant evidence available to it. In any event, the applicant rather complains that the Commission did not reach the same conclusions as it. The problem is not so much that the Commission ignored relevant evidence, but rather that the applicant does not concur with the Commission's analysis of that evidence.

252 It should be noted, as a preliminary remark, that by distinguishing between the market for retail supply of electricity and gas to households and small commercial customers under basic supply and under special contracts, the Commission adopted a narrower definition of the relevant markets than if it had not distinguished between basic supply and special contracts. In that regard, it can also be noted, as is evident from paragraphs 55 and 132 of the contested decision, that the parties to the concentration also took the view during the administrative procedure that a distinction between basic supply and special contracts was not appropriate.

253 First, the applicant submits that if the Commission had examined the behaviour of households and small commercial customers, it would have found that customers under basic supply did not demonstrate inertia and that there was a general permeability between basic supply tariffs and special tariffs because electricity and gas, as homogeneous products, are substitutable.

254 In the present case, in the light of the evidence cited in paragraph 251 above the Commission analysed certain crucial factors from the demand side perspective.

255 Thus, the Commission drew a distinction as regards the product market between customers under basic supply and customers under special contracts, because there was no demand-side substitution. Despite the fact that the percentage of households supplied under basic electricity tariffs was steadily decreasing, falling from approximately 59% in 2007 to 37% in 2012, 31% in 2016 and 28% in 2017 (paragraph 50 of the contested decision), the Commission considered that tariffs

for basic supply of electricity and gas were not materially constrained by special contract tariffs and that, as a result, the two types of contract constituted two separate product markets (paragraphs 62 and 133 of the contested decision).

256 In that regard, the Commission based much of its analysis on consumer inertia. It drafted an introductory part of Section 7.1.3.1 of the contested decision in which it explains the concept of customer inertia, characterised by the fact that after the liberalisation of the electricity market in Germany in 1998 a significant proportion of customers, especially households and small businesses, stayed with the historical supplier despite the availability of more competitive offers, which is common in most of the European retail electricity markets (paragraph 48 of the contested decision). According to the Commission, this incumbency effect is particularly pronounced for customers who are still supplied under basic supply contracts, who do not engage in switching supplier and remain with the more expensive basic supply tariffs offered by the incumbent (paragraph 50 of the contested decision). In the Commission's view, a concentration such as that at issue in the present case is not likely to have only a limited or no immediate substantive impact on such consumers (paragraph 49 of the contested decision). The Commission considers that the same considerations apply to the gas sector (paragraph 133 of the contested decision).

257 Thus, although the Commission does not mention the homogeneous nature of electricity and gas, which it does not call into question, it did observe that in 2017, despite the gradual decrease in the number of basic supply contracts and the generally more favourable conditions of special contracts, 28% of households still had a basic contract for electricity supply.

258 In the light of the foregoing, the Court finds that the Commission did substantiate the existence of some inertia on the part of basic supply customers, whose demand is more inelastic, as is shown by the fact that despite the more advantageous conditions of special contracts, a proportion of the demand is still reticent to benefit from switching contract.

259 It is true that the gradual reduction in the number of basic contracts on account of customers entering into special contracts indicates a certain level of demand-side substitution between basic contracts and special contracts. However, it lies within the Commission's discretion to note that there is still a significant number of basic contracts, suggesting that there is a separate product market. The Commission did not therefore make a manifest error of assessment in not confining itself to establishing that the objective characteristics of electricity and gas were homogenous, while also analysing the competitive situation, in particular the structure of supply and demand on the market. That argument must therefore be rejected.

260 Second, as regards the alleged misapplication of the 'small but significant non-transitory increase in price' test ('the SSNIP test'), on account of the poor presentation of the results of the first market investigation as well as the absence of a large-scale SSNIP test and the quantitative assessment of the SSNIP normally required, it should be noted that, under paragraph 17 of the Commission Notice of 9 December 1997 on the definition of [the] relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5; 'the Notice on market definition'), that test asks whether a price increase in the range 5 to 10% would lead customers under basic supply to opt for special contracts.

261 In that regard, in paragraph 60 of the contested decision the Commission mentioned, relying on the first market investigation, that while a number of respondents had indicated that such an increase in the price of basic supply contracts could trigger an increase in the level of switching

to special contracts, almost 70% of the competitors had responded that the increase in switching was probably small or negligible. Thus, a majority of market participants considered that there was no demand substitutability for the purposes of the SSNIP test.

262 Although it is true that the Commission did not produce a quantitative or large-scale analysis beyond the responses from competitors, it is important to bear in mind that it is for the Commission to assess whether the information available to it is sufficient for the competitive analysis (judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 109).

263 It must also be borne in mind that there is no need to establish a hierarchy between 'non-technical evidence' and 'technical evidence', but 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 and that it is possible, in that regard, for certain items of evidence to be prioritised and other evidence to be discounted (see, to that effect, judgment of 9 March 2015, *Deutsche Börse* v *Commission*, T-175/12, not published, EU:T:2015:148, paragraph 133).

264 In the light of the assessments made in that regard by the majority of respondents in the first market investigation, the Commission did not make a manifest error of assessment in taking the view that the information available to it was sufficient for the competitive analysis of substitutability between basic contracts and special contracts on account of a slight, but significant and permanent, increase in the price of basic contracts.

265 In any event, the applicant's argument cannot call into question the Commission's conclusions concerning the SSNIP test. The applicant does not indicate the specific elements which the Commission ought to have analysed or submit any argument to call into question the Commission's conclusion that the quantitative analysis was not relevant.

266 Third, as regards the applicant's argument that the Commission ought to have established that supplier switching rates stagnated not because of customer inertia, but on account of the market splitting agreement concluded between E.ON and RWE, it need only be stated that it provides no evidence in support of its claims. In any event, in paragraph 287 of the contested decision the Commission analysed on the basis of information provided by the parties to the concentration the diversion ratios from E.ON to innogy in the E.ON DSO area between 2015 and 2018, well before the conclusion of the agreement between E.ON and RWE.

267 Fourth, the applicant asserts that the Commission stated incorrectly that the parties to the concentration applied different price setting mechanisms for basic supply tariffs and for special tariffs, whereas in reality they applied local tariffs to set not only special tariffs but also basic supply tariffs.

268 The Commission noted in paragraphs 51 and 60 of the contested decision that the regulatory regime governing the conclusion of basic contracts and the regime for special contracts were different. In Germany, the law establishes that there can only be one basic supplier per area of supply and which company is to act as basic supplier must be determined every three years by the relevant DSO. Basic supply is thus subject to specific regulation. There is a legal obligation on the basic supplier to conclude basic supply contracts and the basic supplier can terminate a basic supply contract only in exceptional circumstances, whereas the customer can terminate the contract at any time with a notice period of only two weeks. Basic suppliers also have the legal obligation to pass on irrecoverable legal costs, that is, taxes, concession fees, surcharges and

levies except network charges, and face limitations on price increases on account of the fact that profit margin increases are not allowed. Lastly, price fluctuation in the wholesale markets can only be reflected to a limited extent in the retail prices of basic supply.

269 It follows that price setting and tariff policy for basic supply and special contracts are ultimately not comparable and that the Commission did not make a manifest error of assessment in concluding that the distinction between basic supply tariffs and special contract tariffs was also evident from the fact that the parties to the concentration adopted different pricing and price adjustment policies for the two types of tariff. In support of its claims, the Commission relied not only on regulatory differences but also on internal documents of the parties to the concentration which, in the Commission's practice, constitute generally preferential evidence with a high probative value, on account of the fact that they have not been processed by the parties to the concentration for the purposes of the concentration but are documents containing unprocessed information.

270 Fifth, as regards the applicant's argument that the Commission erred by failing to examine how the definition of the product market was influenced by the lack of importance that customers attached to the legal categorisation of their contract, by simple and free options for switching from a basic contract to a special contract and by supplier switches actually made by customers, the Court considers that the regulatory differences identified by the Commission and recalled in paragraph 268 above have a direct effect on demand-side substitutability. The obligation to enter into a contract and limitations on determining tariffs reduce the homogeneity of contracts. Whilst it is true that the final product, electricity or gas, is homogenous, the fact remains that there are differences in tariffs between basic contracts and special contracts and that, as was stated in paragraphs 261 and 264 above, the vast majority of the competitors of the parties to the concentration took the view that such contracts were not substitutable on the demand side.

271 In addition, with regard to the ease of switching contract, the Commission stated in paragraph 59 of the contested decision, on the basis of the report by ACER mentioned in paragraph 251 above, that the perceived low level of the monetary gain which could result from switching supplier, the lack of trust in new suppliers, the perceived complexity of the switching process and the level of satisfaction with their current supplier were identified as the factors which were most influential in inhibiting consumer switching behaviour. Thus, irrespective of the fact that switching supplier is as easy as the applicant suggests, there are a large number of customers who, despite the theoretical benefits, retain their basic contracts.

272 Sixth, as regards an alleged departure from the Commission's decision-making practice, in paragraphs 52 to 54 of the contested decision the Commission analysed its previous decision-making practice and that of the Federal Cartel Office.

273 In that regard, it is stated in paragraphs 53 and 133 of the contested decision that the Commission has not in the past taken any firm view as to whether special contracts and basic supply tariffs are in separate markets. Thus, in Commission Decision C(2015) 9088 final of 8 December 2015 declaring a concentration compatible with the internal market and the EEA Agreement (Case M.7778 – Vattenfall/ENGIE/GASAG), the Commission assessed the impact of the merger on households and small commercial customers, taking into account at national level, on the one hand, without distinguishing between them, customers under basic supply and customers under special contracts and, on the other, taken separately, customers under special contracts. However, in that decision the Commission left open the product market definition. The

Commission stated in paragraph 19 of that decision that, in that case the precise definition of the product market at issue could be left open, since the proposed concentration did not raise serious doubts as to its compatibility with the internal market, whatever the envisaged definition.

274 It follows that in the present case the Commission cannot be considered to have departed from its previous decision-making practice. On the contrary, the Commission considered its past assessments to be a relevant element of the analysis. The Commission, exercising its discretion, held in paragraphs 56 to 62 and 133 of the contested decision that market conditions at the time of the adoption of the contested decision called for a narrower definition of the product market.

275 In any event, it should be borne in mind that, when the Commission takes a decision on the compatibility of a concentration with the internal market on the basis of a notification and a file pertaining to that transaction, an applicant is not entitled to call the Commission's findings into question on the ground that they differ from those made previously in a different case, on the basis of a different notification and a different file, even where the markets at issue in the two cases are similar, or even identical. Thus, in so far as that applicant relies on assessments made by the Commission in a previous decision, those parts of its arguments are irrelevant (see judgment of 18 May 2022, *Wieland-Werke* v *Commission*, T-251/19, not published, EU:T:2022:296, paragraph 78 and the case-law cited).

276 In any event, neither the Commission nor, a fortiori, the Court is bound by the findings of fact or economic assessments in a previous decision. Even supposing that the analysis in the contested decision differs from that in the previous decision without any objective justification for that difference, the Court ought to annul the contested decision in the present proceedings only if satisfied that that decision, as opposed to the previous decision, is vitiated by errors. It is thus still for the applicant to show in what way the assessments in the contested decision are, in themselves and independently of those set out in the previous decision, incorrect (judgment of 18 May 2022, *Wieland-Werke* v *Commission*, T-251/19, not published, EU:T:2022:296, paragraph 79).

277 Furthermore, according to case-law, the Commission is not bound by the assessments of the relevant markets carried out in its earlier decisions (see, to that effect, judgment of 11 January 2017, *Topps Europe* v *Commission*, T-699/14, not published, EU:T:2017:2, paragraph 93).

278 It follows from all the foregoing that the applicant fails to demonstrate that the Commission made a manifest error of assessment in the definition of the relevant product market. The complaint alleging that the relevant product market was defined incorrectly in respect of retail supply of electricity and gas must therefore be rejected.

(2) The definition of the geographic market

279 In paragraph 90 of the contested decision, the Commission concluded that, for the purposes of that decision, although there were local elements of competition, the market for retail supply of electricity to households under special contracts was national, although the Commission had also considered the effects of the concentration on a local level and concluded that even on a local basis the concentration did not raise competition concerns. As regards gas, the Commission concluded in paragraph 147 of the contested decision that, for the purposes of that decision, the market for retail supply of gas to households under basic supply would be regarded as a separate product

market and as local in scope, restricted to the relevant basic supply area, and that the market for retail supply of gas to households under special contracts would be regarded as a separate product market and as national in scope.

280 The applicant asserts, in essence, that the market for retail supply of electricity or gas to households under special contracts should have been defined as a local market and not as a national market with local elements.

281 First, as regards the argument that the Commission adopted exactly the non-substantiated view of the parties to the concentration on the local definition of the market, without taking account of differing information and without carrying out its own research, the Court finds, in respect of electricity, that the Commission examined its decision-making practice in paragraphs 63 to 65 of the contested decision, that of the Federal Cartel Office in paragraphs 66 and 67 of the decision and the view of the parties to the concentration in paragraph 68 thereof, and that it conducted its analysis in paragraphs 69 to 90 of the contested decision.

282 With regard to the geographic market for retail supply of electricity to households and small commercial customers under special contracts, the Commission did not only, for the purposes of its analysis, take account of the view of the parties to the concentration (paragraphs 78, 83, 84 and 88). It also examined its previous decision-making practice (paragraphs 69 and 70), that of the Federal Cartel Office (paragraphs 69, 74, 85 and 86), information from the Federal Cartel Office (paragraphs 80, 82, 83 and 86), the applicable legislation (paragraph 66), responses from competitors in the first market investigation (paragraphs 74 to 76, 79 and 80), the questionnaire from the detailed examination phase sent to SME and micro-business customers in Germany (paragraph 85), contributions from competitors (paragraphs 75, 79, 81, 84 and 87) and the LBD study (paragraphs 81, 84 and 87). In addition, the Commission carried out its own analyses (paragraph 88). It follows that the Commission cross-checked the different sources of information available when defining the geographic market for retail supply of electricity.

283 With regard, further, to the geographic market for retail supply of gas, the Commission examined its decision-making practice in paragraphs 134 and 135 of the contested decision, that of the Federal Cartel Office in paragraph 136 of the decision and the view of the parties to the concentration in paragraph 137 thereof. In addition, it carried out an overall examination in paragraphs 138 to 146 of the contested decision.

284 As it did for the electricity sector, for the purposes of its analysis, the Commission not only considered the view of the parties to the concentration, but it also took into account the previous decision-making practice of the Federal Cartel Office (paragraphs 138 and 139), information from the Federal Cartel Office (paragraphs 142 and 144), responses from competitors in the first market investigation (paragraphs 138 and 143), its own analyses (paragraph 145) and internal documents of the parties to the concentration (paragraph 143). It follows that, as for the electricity sector, the Commission cross-checked the different sources of information in defining the geographic market for retail supply of gas.

285 Consequently, the applicant's argument concerning the inadequacy of the investigations conducted by the Commission regarding the geographic markets for retail supply of electricity and gas cannot be accepted.

286 Furthermore, as was the case for other aspects of merger control which the applicant alleges that the Commission failed to investigate adequately (see paragraph 251 above), in reality the applicant is criticising the Commission for failing to assess certain evidence in the same way as it and for failing to reach the same conclusions as it.

287 Second, the applicant identifies a shortcoming in the investigation on the ground that there are only local offerings with different prices.

288 First of all, with regard to the study of customers at postcode level and the local scope of suppliers' offerings, the Court notes that the Commission concluded in paragraph 73 of the contested decision that, while there were local elements of competition, the market for special contracts for electricity supply was national in scope with local elements of competition. In that regard the Commission stated, with regard to electricity, that there was a trend of an increasing number of suppliers active across multiple network areas (paragraph 74), that suppliers tended to pursue similar sales strategies across all areas (paragraph 75), that 65% of suppliers responding to the first market investigation had the same net price across the country apart from occasionally (paragraph 76), that there was considerable supply side substitution as expansion across local areas was relatively easy and common (paragraph 77) and that the average number of suppliers per area increased from 46 in 2008 to 124 in 2017 (paragraph 80).

289 With regard to gas, the Commission stated in paragraph 142 of the contested decision that, on average, gas consumers in Germany could choose between almost 120 suppliers in their network area and that more than 50 competitors operated across Germany. In paragraph 143 of the contested decision, it pointed out that only a minority of competitors had stated that net prices differed by area for all or the majority of products, that internal documents of the parties to the concentration had showed that the parties to the concentration monitored activities of competitors throughout Germany without focusing on specific regions or competitors, as competitive developments in the gas and electricity sector were monitored and assessed similarly by the parties to the concentration, that there was considerable supply side substitution and that it had not identified significant barriers to entry or expansion.

290 The Commission thus took into consideration the nature and characteristics of electricity, the existence of entry barriers, consumer preferences and price levels in the area in accordance with Article 9(7) of Regulation No 139/2004. In the light of those factors, the Commission concluded that customers under special contracts had access to a large number of electricity suppliers with similar conditions throughout Germany.

291 In view of the responses to question 12 in the first market investigation, the Commission concluded that around two thirds of suppliers, in general, offered national tariff rates with the same net prices. The applicant does not dispute the figure produced by the Commission.

292 With regard to gas, the responses to question 80 in the first market investigation formed the basis for the Commission's assessment that the majority of respondents indicated that prices were in general the same across the country but occasionally differed between areas. Whilst it is true that the Commission did not itself investigate whether the prices offered differed at postcode level, consulting the search engine Google and the comparison websites 'Verivox' or 'Check24', the fact remains that it is for the Commission to assess whether the information available to it is sufficient to conduct its analysis, as is clear from the case-law cited in paragraphs 192 and 262 above. The Court considers that the Commission established to the requisite standard, via the first market

investigation, that the majority of suppliers offered comparable prices across Germany. Consequently, additional investigations in that regard on the abovementioned websites were not necessary.

293 In any event, in paragraph 81 et seq. of the contested decision the Commission examined the substance of the criticisms raised by the applicant, including those relating to the LBD study. The Commission stated inter alia that the relatively high price which local basic suppliers of electricity or gas could charge for special contracts (paragraphs 83 and 144) was due to the incumbency advantage (paragraph 85). In addition, in paragraph 84 of the contested decision the Commission identified a methodological deficiency, namely that the LBD study had treated different subsidiaries of the parties to the concentration as independent entities, which could have had an important effect on the results if, for example, margins or pricing strategies were analysed in a region where one group company was the basic supplier and only the margins or prices of that entity in that region were taken into account, not those of the other group companies.

294 In the light of the above, the Commission did not make a manifest error of assessment in respect of the geographic scope of electricity and gas tariff conditions.

295 Even assuming that an analysis such as that proposed by the applicant would lead to the conclusion that suppliers offered different tariffs and conditions at postcode level, that would be only one of the supply factors within the meaning of paragraph 30 of the Notice on market definition. Other factors such as barriers to entry would also be relevant. In this connection, each electricity supplier is able to supply any household or small commercial customer across Germany. The applicant does not dispute the Commission's finding that suppliers, including small municipal utilities, regularly tried to expand and drive competition outside their own area or that, in the last two or three years before the adoption of the contested decision, on average two new players entered any given local postcode area and quickly gained non-negligible market shares (paragraph 79). In the case of gas, the current competition and threat of entry constrains local incumbents (paragraph 145). Accordingly, it is a fair assumption that, since there are supra-competitive margins in certain postcode areas, other suppliers compete in order to meet demand. In those conditions, the existence of local tariffs would not, in itself, be sufficient justification for the local scope of the definition of the geographic market.

296 In addition, the applicant denies the relevance of the number and the operating area of suppliers to the geographic definition of the market. However, the number of those electricity suppliers with an offering across Germany or in areas wider than their regional areas constitutes a supply factor within the meaning of paragraph 30 of the Notice on market definition, under which the Commission may, if necessary, check that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. The number and the operating area of suppliers is indicative of such an impediment.

297 Furthermore, with regard to the argument that the geographic market was local because customers were technically tied to a specific location, it is sufficient to note that, as the Commission asserts, that argument is ineffective on the ground that the relevant factor is whether consumers can be supplied by suppliers located elsewhere and not whether consumers are likely to move to be supplied by other suppliers.

298 As regards the applicant's argument that tariff structures are local in nature and suppliers adapt their distribution strategy based on regional factors, the applicant relies in part on the BET and Innoplexia studies, the probative value of which is, however, limited for the reasons set out in

paragraphs 202 to 210 above. In any event, it is clear from paragraph 81 of the contested decision that the Commission considered those claims but maintained its view that the geographic market was nationwide. Even assuming that suppliers had a local perspective in their offerings, that would merely be indicative of a possible local market compatible with the Commission's conclusion that there are local elements on the national market. It is not necessary for all parameters of competition to be identical throughout the territory of a Member State in order to consider there to be a national market.

299 Furthermore, it is clear from paragraph 81 of the contested decision that the Commission took account of local pricing offered by the parties to the concentration and observed by the LBD study.

300 Similarly, the Commission conducted its own investigation and worked on the assumption of suppliers pursuing a local tariff policy. It thus examined whether there was a link between a supplier's margin and its share of supply to the group of customers who do not have a special contract with the basic supplier. That is a reasonable starting point, as an undertaking with a certain market power in a certain sector can be expected to have some leeway to increase prices and profit margins. That analysis by the Commission showed in particular that there was no correlation at local level between margins and market shares for special contracts (paragraphs 88 and 89 for electricity and 145 for gas). The Commission concluded that the lack of a systematic link between margins and market shares as regards customers who were in the process of switching or willing to switch supplier suggested that current competition and the threat of entry constrained local incumbents at least with regard to that customer group, which indicated that there was a national market.

301 In those circumstances, the Commission did not make a manifest error of assessment by failing to endorse the view of competitors that retail supply of electricity and gas was local in scope.

302 Third, with regard to the applicant's argument that the Commission did not follow its usual decision-making practice, it is evident from the precedents cited in the contested decision that the practice established by the Commission cannot confirm the geographic market definitions proposed by the applicant. In its previous decisions, the Commission left open the definition of the geographic market for retail supply of electricity and the Commission considers that the national, regional or local definition of the gas market varies according to the case.

303 As regards electricity, the Commission stated in paragraph 63 of the contested decision that it had typically defined the geographic markets for the retail supply of electricity to end customers as national in scope. However, in its Decision C(2009) 5111 of 22 June 2009 declaring a concentration compatible with the internal market and the EEA Agreement (Case COMP/M.5496 – Vattenfall/Nuon Energy), the Commission also considered the possibility of a narrower geographic market definition at distribution network level for the retail supply of electricity to small customers for Germany, although it ultimately left the market definition open in that case. Nevertheless, the Commission noted in paragraphs 64 and 65 of the contested decision that, since 2009, the retail electricity supply market in Germany had significantly evolved and the geographic scope of competition had become increasingly broad, which was already reflected in its Decision C(2015) 9088 final of 8 December 2015 declaring a concentration compatible with the internal market and the EEA Agreement (Case M.7778 – Vattenfall/ENGIE/GASAG), in which it considered national market shares for the retail supply of electricity to households in general and for special contract customers only, while the geographic market definition was left open.

304 As regards gas, the Commission stated in paragraph 134 of the contested decision, citing its Decision C(2015) 9088 final of 8 December 2015 declaring a concentration compatible with the internal market and the EEA Agreement (Case M.7778 – Vattenfall/ENGIE/GASAG), its Decision C(2011) 2638 final of 11 April 2011 declaring a concentration compatible with the internal market and the EEA Agreement (Case COMP/M.6068 – ENI/ACEGASAPS/JV) and its Decision C(2006) 541[8] final of 14 November 2006 declaring a concentration compatible with the internal market and the EEA Agreement (Case COMP/M.4180 – Gaz de France/Suez), that in previous decisions it had considered that the market for the retail supply of gas could be national, regional or local (restricted to the distribution network area) in scope depending on the characteristics of the market.

305 It is true that the applicant draws a parallel with the food retail market, which the Commission has defined as local despite the presence of numerous national suppliers. It need only be observed, however, that the applicant does not put forward any reasons to show that the Commission is obliged to take into account decision-making practice developed in other sectors. Nor does it explain to what extent the parallel it seeks to draw is relevant. In any event, the decision-making practice in that sector is not relevant since customers cannot change the place of supply on the electricity and gas markets but can only switch contracts with suppliers established in other areas of the national territory, which is not the case in food retail, where the Commission considered that undertakings would have to make investments in order to operate in catchment areas where they were not yet present and customers were not generally prepared to travel long distances to purchase food.

306 In addition, with regard to the applicant's argument that the Commission ignored the fact that in its decision-making practice regional price differences tended to demonstrate the existence of markets smaller than national markets, the applicant cites certain cases without, however, indicating how they suggest that there is an established practice or to what extent the conclusions in those cases might be applicable to the present case. In any event, the Commission concluded, without making a manifest error of assessment, that the majority of suppliers applied their tariffs at national level, as was stated in paragraph 291 above.

307 It therefore follows that the Commission did not depart from its previous decision-making practice and that it took account of its past assessments as a relevant element of the analysis.

308 In any event, the Court recalls that the Commission is not bound by the assessments of the relevant markets carried out in its earlier decisions, as is clear from the case-law cited in paragraph 277 above.

309 The Commission did not therefore make a manifest error of assessment in taking the view, in paragraphs 91 and 147 of the contested decision, that, for the purposes of the contested decision, the retail supply of electricity and gas to households and small commercial customers under basic supply was local in scope, restricted to the relevant basic supply area, and that the retail supply of electricity and gas to households and small commercial customers under special contracts was national in scope with local elements.

310 It follows from all the foregoing that it is necessary to reject the first complaint, alleging that the markets for retail supply of electricity and gas were defined incorrectly.

(b) The second complaint, alleging that the definition of the markets for distribution of electricity and gas was incomplete

311 The applicant asserts, in essence, that the Commission incorrectly took the view that only the markets for transmission network operation and electricity and gas distribution networks are relevant. In that regard, the Commission failed to analyse the procurement of grid equipment, the provision of construction services, or information technology services, which are affected by the concentration on the demand side, or the provision of services for other DSOs, which is affected on the supply side. The subsequent analysis of the consequences of the concentration is therefore incomplete.

312 The Commission, supported by E.ON, disputes the applicant's arguments.

313 It should be noted that, where it is alleged that the Commission has failed to have regard to a possible competition concern in markets other than those covered by the competitive analysis, it is for the applicant to adduce serious indicia of the genuine existence of a competition concern which, by reason of its effect, should have been examined by the Commission. In order to discharge that burden, the applicant should identify the relevant markets, describe the state of competition in the absence of the merger and indicate what would be the likely effects of a merger given the state of competition in those markets (see judgment of 20 October 2021, *Polskie Linie Lotnicze 'LOT'* v *Commission*, T-240/18, EU:T:2021:723, paragraph 44 and the case-law cited).

314 It must be stated that the applicant merely presents unsubstantiated claims and has not made a serious suggestion for the definition of the relevant markets alleged to be affected, with the result that that complaint must be rejected.

(c) The third complaint, alleging the markets for metering services and e-mobility were defined incorrectly

315 The applicant asserts, in essence, that the Commission defined incorrectly the markets for metering services and e-mobility on account of errors made in its market study. In particular, the Commission disregarded crucial factors such as increased economies of scale, financial power, access to data and cooperation networks.

316 In the first place, with regard to the market for metering services, the applicant submits, in essence, that the Commission erred in distinguishing between nMPOs (normally responsible metering point operators) and cMPOs (competitive metering point operators). That is because, from the point of view of the consumer, it is immaterial whether metering services are provided by an nMPO or a cMPO. Consequently, there is only one market for metering services.

317 In the second place, the applicant maintains that the Commission failed adequately to assess the geographic definition of the market for installation and operation of public electric vehicle charging stations given that, as a general rule, the daily distance travelled by an electric vehicle is only 30 km and solely just over 1% of journeys exceed 100 km. It also complains that the Commission failed adequately to assess the scope of the operation of charging stations off motorways.

318 In the third place, on account of their activities on the market for metering services, the parties to the concentration are able to collect large volumes of data, allowing them to gain advantages on the market for data-driven customer solutions. The Commission failed to define that market.

319 The Commission, supported by E.ON, disputes the applicant's arguments.

(1) The markets for metering services

320 As was stated in paragraph 32 above, metering services consist of measuring the consumption of electricity, gas, water or heat for the purposes of invoicing and providing transparency and optimisation of consumption.

321 The Commission stated in paragraphs 151 to 153 of the contested decision that, in Germany, the operation of metering points was the responsibility of the respective DSO prior to liberalisation in 2005. The Messstellenbetriebsgesetz (Metering Point Operation Act) of 1 September 2016 (BGBl. I, p. 2034) unbundled network and metering point operation, created the roles of nMPO and cMPO and introduced:

– first, the obligation, solely for nMPOs, to replace all electricity meters in Germany with modern meters by 2032;

– second, the obligation for nMPOs to roll out smart metering systems with price caps differing by types of consumer and consumption levels, the system being optional for small customers; the same obligation applies to cMPOs, but without price caps;

– third, the general obligation to replace existing meters with gas meters compatible with a highly secure communication device, the smart meter gateway, which will allow the data metered to be communicated to authorised market participants.

322 In those conditions, the Commission considered it appropriate, in paragraph 169 of the contested decision, to distinguish between metering services for electricity and gas provided by nMPOs and metering services for electricity and gas provided by cMPOs, for reasons similar to those justifying the distinction between basic contracts and special contracts, namely, first, the fact that competition took place predominantly on the market for cMPOs, second, the fact that different regulation applied to nMPOs and cMPOs, in particular with regard to price caps and modern meter and smart meter roll-out obligations, and, lastly, the fact that nationwide market entry from outside the energy industry, such as Deutsche Telekom or Deutsche Bahn, took place on the cMPO market. However, the Commission ultimately decided that it could be left open whether the markets for electricity and gas metering services ought to be subdivided by nMPOs and cMPOs, as the concentration did not raise concerns with regard to its compatibility with the internal market under any plausible market definition.

323 Regard should be had in that connection to the case-law what indicates that the Commission may leave open the definition of the relevant product market where it is clearly and unequivocally demonstrated by the reasons given by the Commission in the contested decision that none of the possible market definitions could lead to a finding of a significant impediment to effective competition following the concentration (see, to that effect, judgment of 26 October 2017, *KPN* v *Commission*, T-394/15, not published, EU:T:2017:756, paragraph 60).

324 It thus follows from the foregoing that the applicant's argument that the Commission defined the product market incorrectly by subdividing by nMPOs and cMPOs must be rejected because the Commission did not explicitly advocate such a narrower definition, although it did suggest that such a distinction might be appropriate.

(2) The markets for installation and operation of public electric vehicle charging stations

325 First, with regard to the geographic definition of the market for installation and operation of fast public charging stations on motorways, on the one hand, and the market for installation and operation of ultra-fast public charging stations on motorways, on the other, the Commission held in paragraph 197 of the contested decision that a distance of 50 km was a good proxy to identify stations which were likely to place a material competitive constraint on each other. However, in paragraphs 200 and 218 of the contested decision it ultimately left open the definition of the geographic market (local or national with local elements of competition), since it identified significant impediments to effective competition under any market definition.

326 In that regard, the Commission stated in paragraphs 367 and 370 of the contested decision that, together, E.ON and innogy had concluded agreements to install and operate fast and ultra-fast public charging stations for more than 60-70% of the motorway fuel stations of Autobahn Tank & Rast, which operated more than 90% of the motorway fuel stations in Germany.

327 In those circumstances, the Commission stated in paragraphs 379 and 380 of the contested decision that, when E.ON's and innogy's public charging stations were within a distance of 50 km and when there was no other competitor's public charging station in between, E.ON and innogy placed the most direct constraint on each other.

328 Thus, under any geographic definition of the market, local or national with local elements of market competition, the Commission identified a distance of 50 km as a relevant element for the analysis of the existence of anticompetitive effects.

329 Similarly, it is clear that, although the Commission may leave open the definition of the relevant market at issue where none of the possible market definitions could lead to a finding of a significant impediment to effective competition following the concentration in accordance with the case-law cited in paragraph 323 above, it may equally leave open the definition of a relevant market when it establishes that there are anticompetitive effects under any definition, provided that, following the changes made by the undertakings concerned, the concentration is no longer likely to significantly impede effective competition on any definition of the market at issue.

330 The fact that the Commission left open the definition of the market in those conditions thus required it to analyse whether the elimination of overlaps between the parties to the concentration over a distance of 50 km removed anticompetitive effects on any geographic market definition.

331 In that regard, the applicant asserts that the distance which the Commission should have used was 30 km rather than 50 km. However, the applicant does not explain how, even assuming that the facts adduced by it are correct, namely, that the daily distance travelled by an electric vehicle is 30 km and only just over 1% of journeys exceed 100 km, those facts could call into question the distance of 50 km used by the Commission in respect of installation and operation of electric vehicle charging stations on motorways or substantiate any manifest error of assessment.

332 Accordingly, it has not been demonstrated that the Commission made a manifest error of assessment in leaving open the geographic definition of the market for installation and operation of fast public charging stations on motorways and the market for installation and operation of ultra-fast public charging stations on motorways.

333 Second, with regard to the market for installation and operation of charging stations off motorways, in paragraph 203 of the contested decision the Commission left open the geographic definition of the market as the concentration did not raise concerns under any plausible market definition because, as is evident from paragraphs 381 to 387 of the contested decision, the parties to the concentration operated very few ultra-fast charging stations and there were a large number of competitors on the market and several other large competitors with expansion plans.

334 The Commission thus expressly stated that none of the possible market definitions could lead to a finding of a significant impediment to effective competition following the concentration. In the light of the case-law cited in paragraph 323 above, it must be concluded that the Commission did not make a manifest error of assessment in leaving open the definition of the market in respect of charging stations off motorways.

(3) The market for data-driven customer solutions

335 As regards the alleged failure to define the market for data-driven customer solutions, the Court finds that it is true that the Commission did not make such a definition, even though it did examine the possible anticompetitive effects of the concentration in Section 7.4 of the contested decision concerning 'other theories of harm'.

336 However, having regard to the case-law cited in paragraph 313 above, that complaint must be rejected because the applicant does not explain the extent to which there was a competition concern on that market which, by reason of its effect, the Commission ought to have examined. The applicant merely states that the Commission analysed the possible anticompetitive effects of the concentration without, however, explaining how such analysis obliged it to define that market.

337 In the light of the foregoing, the third complaint, alleging the markets for metering services and e-mobility were defined incorrectly, must be rejected.

(d) Conclusion on the second part of the fifth plea in law

338 In the light of the foregoing, it should be stated that the Commission did take account of all the relevant information available to it and that it did not make a manifest error of assessment when identifying and defining the relevant markets in the present case.

339 It is therefore necessary to reject the second part of the fifth plea in law, alleging that the relevant markets were defined incorrectly.

5. The third part of the fifth plea in law, alleging that the effects of the concentration were assessed incorrectly

(a) The first complaint, alleging that the effects on the markets for retail supply of electricity and gas were assessed incorrectly

340 The applicant submits that the Commission's examination of the effects of the concentration on the markets for retail supply of electricity and gas was insufficient and that it also manifestly assessed those effects incorrectly.

341 In the first place, the Commission did not correctly assess the competitive situation with respect to basic supply. The Commission merely examined the basic supply areas in which the parties to the concentration were able to replace one another as basic supplier, which constitutes an incomplete analysis.

342 In the second place, the applicant submits that the Commission did not investigate the impact on other suppliers of combining the customer portfolios of the parties to the concentration within their basic supply areas, in particular in the context of E.ON's increasing ability to foreclose competitors.

343 In the third place, the applicant asserts that the Commission failed adequately to assess the effects of the elimination of competition between E.ON and innogy.

344 In the fourth place, the applicant asserts that the Commission failed to take sufficient account of E.ON's growing financial strength, which gave it competitive advantages.

345 The Commission, supported by E.ON, contends that it made a full assessment, with no errors made, of the effects of the concentration on the markets for retail supply of electricity and gas.

346 In the first place, it should be noted, with regard to the alleged incorrect assessment of the competitive situation on the markets for retail supply of electricity and gas to households and small commercial customers under basic supply, that the Court has already concluded, in paragraphs 278 and 309 above, that the Commission did not make a manifest error of assessment in stating in paragraphs 91 and 147 of the contested decision that basic supply of electricity and gas had to be regarded as a separate product market and as local in scope, restricted to the relevant basic supply area.

347 In that regard, the Commission also stated in paragraphs 265 and 331 of the contested decision that, as a single company was appointed as the basic supplier of electricity and gas in each basic supply area constituting a separate market, that company was, de facto for electricity and *de jure* for gas, a monopolist in that area. Accordingly, the Commission concluded in paragraphs 265 and 331 of the contested decision that the concentration would have limited direct or indirect effects in those markets.

348 First, it should be noted that the applicant does not challenge the fact that, on account of the *de jure* monopoly affecting basic supply areas, there is no competition between the different basic supply areas or, therefore, possible anticompetitive effects. The applicant does not explain how the fact that E.ON's market shares may reach 69% locally in the basic supply areas can, in itself, constitute a significant impediment to effective competition in the basic supply market or be indicative of such impediment. Following the concentration, it is not E.ON's market shares in a

market or a basic supply area which increased, but rather the number of areas where E.ON operates as basic supplier. The Commission therefore did not make a manifest error of assessment in concluding that the direct effects of the concentration in these markets would be, at most, limited.

349 Second, as regards the possible reduction in competitors' opportunities to become basic suppliers in the triannual review, it is clear from the contested decision that, even though the concentration was unlikely to have any direct substantive effect in those markets, the Commission nevertheless devoted a large part of Section 7.2.2.1 of the contested decision to examining possible indirect effects, namely whether the concentration could strengthen E.ON's ability to retain basic supplier status in some local areas and, by doing so, reduce the incentives to price special contracts competitively.

350 In that regard, the Commission stated in paragraph 266 of the contested decision that basic supplier status was determined every three years by the responsible DSO and was awarded to the electricity supplier that had the most household customers in the area, including customers on basic supply contracts and customers on special contracts and including electricity used for heating. Thus, as the Commission stated in the same paragraph of the contested decision, the determination of basic supply depends on the number of household customers on special contracts and price strategies on special contracts might have effects on the basic supply market.

351 However, while in theory the parties to the concentration could combine their household and small commercial customer base due to the concentration in order to increase their chances of retaining or winning the role of basic supplier, it is important to note that, as the Commission stated in paragraph 268 of the contested decision, only the customers held by a legal entity are taken into account when determining the basic supply, as opposed to combining the customers of all entities owned by the same parent company. The Commission considered in that regard that if the strategy of emptying certain legal entities in order to strengthen the customer base of another group entity or of combining customers under a single legal entity were profitable, the parties would most likely have already attempted to implement it pre-merger, which it has not observed.

352 In that regard, the applicant merely mentions that possible theory of harm but does not adduce evidence showing that that strategy was already being implemented by the parties to the concentration by virtue of the number of brands and subsidiaries controlled by them before the concentration. It should be noted that if the parties to the concentration had a genuine incentive to try to protect their basic areas or access new areas, they would probably already have combined brands or entities, as it is not disputed that the parties to the concentration already had a large number of brands and subsidiaries before the concentration. Nor does the applicant explain why the risk of pursuing that strategy would increase following the concentration. Given the lack of evidence of the reality of that theory of harm, it must be concluded that the applicant has not demonstrated that the Commission made a manifest error of assessment in stating that the risk of such an indirect effect was limited.

353 In any event, the Commission stated, in paragraph 269 of the contested decision, that the parties to the concentration were rarely each other's closest challengers and municipal utilities were most often the second largest household supplier and, in paragraph 270 of the contested decision, that, according to E.ON's internal documents, it had identified innogy as the second largest supplier in an area only once. The Commission also stated in paragraph 271 of the contested decision that in areas where one of the parties to the concentration was the basic supplier, the other party tended

to have a small share of customers, namely 5% or less. It therefore follows that, even though the strategy is theoretically possible, the Commission proved to the requisite standard that the parties to the concentration would not able to benefit from it materially, bearing in mind the limited regional overlap of their customers.

354 Third, the applicant maintains that the Commission did not analyse the effects related (i) to customer inertia in switching local basic supplier and (ii) to the fact that the basic supplier supplies the majority of customers on special contracts within its area. It must be stated in that regard that, once again, the applicant merely alleges a shortcoming in the Commission's investigation but does not explain what conclusion the Commission ought to have drawn regarding the effects on basic areas. The Court takes the view that those elements are not relevant in so far as the circumstances relating to customers on special contracts won by reason of basic supplier status or inertia on the part of innogy's or E.ON's basic customers are not subject to change on account of the concentration. That excludes direct effects in so far as, as was explained in paragraph 348 above, there is no direct competition between the different basic supply areas. As regards indirect effects, the applicant does not explain the extent to which the impact of such factors could be to strengthen E.ON's ability to retain or to obtain basic supplier status in some areas.

355 The Commission was therefore able to take the view, without making a manifest error of assessment, that the concentration would not significantly impede the exercise of effective competition on the market for retail supply of electricity and gas to households and small commercial customers under basic supply in Germany.

356 In the second place, with regard to the impact of combining the customer portfolios of the parties to the concentration on the market for retail supply of electricity and gas to households and small commercial customers under special contracts, it should be recalled that, in assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger (judgment of 23 May 2019, *KPN* v *Commission*, T-370/17, EU:T:2019:354, paragraph 115).

357 It should be noted that the existence of very large market shares is highly important and the relationship between the market shares of the parties to the concentration and of their competitors, especially those of the next largest, is relevant evidence of the existence of a dominant position or of a significant impediment to effective competition. Furthermore, a particularly small market share of one of the parties involved in the concentration tends to suggest, prima facie, an absence of any significant impediment to effective competition, especially where the other operators have much larger market shares (see, to that effect, judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 201).

358 It is clear from paragraph 17 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5; 'the Guidelines') that only very large market shares of 50% or more may in themselves be evidence of the existence of a dominant market position and that, although a concentration with a market share below 50% may nevertheless raise competition concerns, it is in view of other factors such as the strength and number of competitors (judgment of 7 June 2013, *Spar Österreichische Warenhandels* v *Commission*, T-405/08, not published, EU:T:2013:306, paragraph 59).

359 In addition, according to recital 32 of Regulation No 139/2004 and paragraph 18 of the Guidelines, concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the internal market. That presumption applies inter alia where the market share of the undertakings concerned does not exceed 25% either in the internal market or in a substantial part of it.

360 It is therefore in the light of those considerations that it must be determined whether the Commission committed a manifest error of assessment in the present case by incorrectly describing the effects of combining customer portfolios of the parties to the concentration on the market for retail supply of electricity to households and small commercial customers under special contracts.

361 First, in the present case, it is apparent from paragraphs 274 and 333 of the contested decision that E.ON's market shares on the markets for supply to households and small commercial customers under special contracts in Germany were between 5% and 10%, namely [*confidential*],[2] for electricity, and between 5% and 10%, namely less than [*confidential*], for gas. Innogy's market shares are between 10% and 20%, namely [*confidential*], for electricity, and between 5% and 10%, namely less than [*confidential*], for gas.

362 In the judgment of 7 June 2013, *Spar Österreichische Warenhandels* v *Commission* (T-405/08, not published, EU:T:2013:306, paragraph 61), the Court concluded in that regard that the Commission had not failed to comply with the Guidelines when it took the view that the joint market share of the parties to the concentration was 'moderate' taking account of a joint market share of the parties to the concentration of both 35.1 and 35.5%.

363 Thus, the combined market shares of the parties to the concentration, being between 15% and 30%, namely [*confidential*], for electricity and between 10% and 20%, namely less than [*confidential*], for gas, constitute, at the very least, a strong indication that the concentration is not likely to impede effective competition on the markets for retail supply of electricity and gas to households and small commercial customers under special contracts in Germany.

364 Second, the Commission took account of other factors. In particular, it stated that there were a large number of competitors, that the parties to the concentration were not close competitors and that barriers to entry in the market were relatively low and competitive pressure was significant.

365 It is clear from paragraph 275 of the contested decision and page 253 of the Federal Cartel Office document cited in footnote 281 of the contested decision that, according to the analysis of data provided by 808 DSOs concerning the number of suppliers, in more than 89% of network areas more than 50 suppliers were active and in 71% of network areas more than 100 suppliers were active in 2017, with the result that, on average, every customer could choose between more than 120 suppliers in Germany in 2017. In addition, there are over 1 000 electricity suppliers active in Germany, including EnBW and Vattenfall, each of which have between 5 and 10% market shares, and EWE, Mainova and Stadtwerke München, each of which have less than 5%. The Commission also stated in paragraphs 334 and 335 of the contested decision that, on average, gas consumers in Germany could choose between around 116 suppliers in their network area, that the average number of suppliers per area had increased constantly in recent years and that suppliers sometimes came from outside the industry, as was the case with Shell in particular. Furthermore, more than

[2] Confidential information omitted.

1 000 gas suppliers are active in Germany, including EnBW, with a market share of between 5 and 10%, and EWE, Mainova, Enercity and Rheinenergie, each of which have market shares less than 5%. Similarly, the markets for the supply of electricity and gas are generally seen by the Federal Cartel Office as competitive, as is stated in paragraphs 276 and 336 of the contested decision.

366 In addition, the Commission stated in paragraphs 277 and 337 of the contested decision that the parties to the concentration were not particularly close competitors for the retail supply of electricity and gas under special contracts. The Commission observed that customers who switched from E.ON or innogy in their areas of incumbency rarely moved to innogy or E.ON, respectively. At most, 20% of customers chose the other party to the concentration. Furthermore, the Commission noted that nothing in the internal documents of the parties to the concentration indicated that they monitored each other any more closely than other suppliers. Moreover, the Commission stated that in their pricing decisions, E.ON and innogy did not pay particular attention to the other party. Lastly, the Commission noted that the majority of competitors responding to the first market investigation had indicated that they had been able to attract customers from the parties to the concentration. Similarly, it is evident from paragraph 278 of the contested decision that in the electricity sector the majority of respondents indicated that there was no customer segment in which E.ON and innogy competed particularly closely and for which there were limited alternatives to the parties to the concentration. The majority of respondents who were competitors to the parties to the concentration indicated that they were able to attract customers across the parties' entire customer base.

367 In addition, the Commission concluded in paragraphs 279 and 338 of the contested decision that barriers to entry and expansion in the market for retail supply of electricity and gas were relatively low.

368 Lastly, the Commission analysed, in the alternative, the effects of the concentration on hypothetical local markets for retail supply of electricity and gas to households and small commercial customers under special contracts in paragraphs 281 to 290 for electricity and in paragraphs 339 to 350 of the contested decision for gas. That analysis addresses the concerns raised by the municipal utilities. Given that, moreover, the Commission did not make a manifest error of assessment in the definition of the relevant market, as was made clear in paragraphs 294, 301 and 310 above, the Commission was not required to carry out that analysis, which was therefore conducted for the sake of completeness.

369 Third, the applicant relies on the fact that E.ON and RWE hold minority participations in undertakings active in the energy sector and complains that the Commission failed to take them into consideration. It should be made clear that Concentration M.8870, which is subject to review by the Court in the present action, concerns the acquisition of innogy by E.ON and that RWE is not therefore a party to the concentration. Accordingly, the minority shareholdings of RWE are not relevant to the analysis of the effects of the concentration at issue. Furthermore, the applicant does not explain what influence those participations might have for the analysis of impediments to competition related to the concentration. The applicant simply mentions the number of RWE's and E.ON's shareholdings in other undertakings, but does not explain whether they are active in the relevant markets, what positions they occupy on their markets, how their relationship with RWE and E.ON could impede competition or whether those hypothetical impediments would be consequences specific to the concentration.

370 In addition, in its assessment of the concentration the Commission took into account the market shares of undertakings in which innogy and E.ON had shareholdings. In that regard, the Commission stated in footnotes 280 and 367 of the contested decision, for electricity and gas respectively, that even if the entire market shares of the companies in which the parties to the concentration had a minority shareholding were to be added, they would increase the parties' combined share by less than 5%. The Commission added that, considering that that figure was limited and it had overestimated the actual financial stake which the parties owned in those companies, it took the view that the parties' minority shares would not materially alter their position post-merger and therefore the Commission's assessment of the concentration.

371 Furthermore, it is clear from subparagraph 3 of paragraph 287 of the contested decision that, pursuant to the Commission's analysis, there is no clear link between the margins of E.ON and of innogy on the tariffs targeted at customers who are more engaged and the position of the other party to the concentration at local level, which indicates that the parties to the concentration are not particularly close competitors in some local areas and that the concentration would not remove an important competitive constraint locally.

372 In those circumstances, it must be concluded that the Commission analysed sufficiently, indeed exhaustively and extensively, without making a manifest error of assessment, the effects on the markets for retail supply of electricity and gas to households and small commercial customers under special contracts.

373 In the third place, with regard to the effects of the elimination of competition between E.ON and innogy, the applicant maintains, in essence, that following the concentration E.ON would be able to deter its existing customer base from switching supplier, to win back customers or to grow in other areas.

374 The Court refers in that regard to the findings made in paragraph 364 et seq., which show that, without making a manifest error of assessment, the Commission established that there was healthy competition, that the parties to the concentration were not close competitors and that barriers to entry and expansion were low.

375 In the fourth place, with regard to E.ON's greater financial power following the concentration, the applicant complains, in essence, that the Commission did not analyse foreclosure effects in the light of the possible aggressive pricing that E.ON could pursue and the advertising campaigns it could undertake. The applicant does not, however, specify the markets to which that complaint relates.

376 It should be stated at the outset that in paragraphs 291 to 299 of the contested decision the Commission addressed the additional concerns raised by third parties about the possible impact of the concentration on retail supply of electricity in Germany.

377 First, as regards the risk of cross-subsidisation from basic supply contracts to special contracts, it is clear from paragraph 292 of the contested decision that the Commission analysed whether the parties to the concentration could make use of the large profits generated on the basic supply market in order to subsidise and sustain very aggressive pricing policies in the special contracts market. In that regard, the Commission considered that that theory of harm was unlikely because, if such strategies were profitable, E.ON and innogy would have already implemented them, given that pre-merger they had two of the largest portfolios of basic supply customers. The Commission did not find any indication of such behaviour in its first market investigation and

stated that on price comparison websites some suppliers, including discounters and municipal utilities, systematically or occasionally charged prices lower than the parties to the concentration. In addition, in view of the continuous entry and presence of a large number of new competitors, the Commission considered that no such strategies had been put in place and that, even if they had been, they had not been successful in foreclosing competitors or discouraging entry by third parties.

378 Second, as regards possible foreclosure of third parties from advertising space, in paragraph 293 of the contested decision the Commission analysed whether the parties to the concentration could occupy all the highest positions in the rankings of price comparison websites post-merger. It stated that, following the concentration, E.ON would have to lower the prices of its brands below the optimal level in order to make them appear on the first page of the price comparison website, thereby foreclosing competitors. It is not disputed that pre-merger E.ON already had numerous significant brands and financial resources. Such a strategy would not therefore be merger-specific.

379 Lastly, the Commission noted that it was not credible that increased competitiveness by the parties to the concentration on the German retail electricity supply market would give rise to consumer harm (paragraph 297 of the contested decision), in particular on the ground that the German retail electricity supply market had attracted substantial entry and was today highly fragmented, with more than 1 000 suppliers (paragraph 298 of the contested decision), which made it highly implausible that a predation strategy could be profitable. Similarly, even though the parties to the concentration had deep pockets pre-merger, the lowest prices in the market were often offered by smaller and new competitors, not the parties to the concentration (paragraph 299 of the contested decision).

380 In that regard, the only relevant evidence adduced by the applicant to challenge the Commission's findings is the LBD study. Although the applicant also cites the Innoplexia study, it should be recalled that its relevance and probative value are limited for the reasons set out in paragraph 210 above. Furthermore, the applicant refers to that annex without identifying adequately the passage supporting its claims.

381 It should be recalled that it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and ancillary purpose (judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 97, and of 14 December 2005, *Honeywell* v *Commission*, T-209/01, EU:T:2005:455, paragraph 57). That purely evidential and ancillary purpose of the annexes means that, where an annex contains elements of law on which certain pleas raised in the application are based, those elements must be set out in the actual body of the document to which that annex is attached, or, at the very least, be sufficiently identified in that document (judgment of 7 May 2009, *NVV and Others* v *Commission*, T-151/05, EU:T:2009:144, paragraph 61). Consequently, it is not for the Court to examine the Innoplexia study in order to identify therein elements to support the applicant's claims.

382 The LBD study states in Section 4.1 (page 9 et seq.) that E.ON engaged in a price race in February 2018. According to the applicant, that demonstrates that E.ON is able to influence the overall price structure on the market and that it offers prices with negative margins which could not be applied by a smaller supplier. Prices charged by innogy are generally higher than the 'top 5' and it records the highest margins.

383 This study shows that most suppliers on the market for retail supply of electricity to households and small commercial customers under special contracts achieve negative margins. Nevertheless, the study does not demonstrate that post-merger E.ON would have increased capacities to offer prices with negative margins. In addition, the practice of pricing with negative margins pursued by most competitors makes economic sense only in a situation of overcapacity where a price war is waged to discipline the market so that the least efficient competitors are foreclosed and prices then rise and allow positive margins to be restored for those remaining on the market. No such circumstances have been alleged.

384 In addition, the Commission identifies a methodological shortcoming in the LBD study in so far as the study allocates premiums for concluding a contract over the first year of supply and not over the contract's total period of validity, which directly influences the level of the margins recorded for the first year of supply. When questioned on that point at the hearing, the applicant did not effectively dispute the criticism raised by the Commission.

385 The applicant has not therefore proved that the Commission made a manifest error of assessment regarding the creation of capacity or incentives for a possible pricing strategy with sustained negative margins in order to foreclose small competitors or to occupy all the highest positions in the rankings of price comparison websites.

386 In those circumstances, it should be observed that the Commission analysed the markets to the requisite standard and did not make a manifest error of assessment in concluding that the concentration would not significantly impede the exercise of effective competition on the market for retail supply of electricity and gas to households and small commercial customers under special contracts in Germany.

387 Consequently, it is necessary to reject the first complaint, alleging that the effects on the markets for retail supply of electricity and gas to households and small commercial customers in Germany were assessed incorrectly.

(b) The second complaint, alleging that the effects on the markets for distribution of electricity and gas were assessed incorrectly

388 By the second complaint, alleging that the effects on the markets for distribution of electricity and gas were assessed incorrectly, the applicant asserts, in essence, that the Commission inadequately examined the effects on activities carried on in those markets and also manifestly assessed those effects incorrectly.

389 The Commission, supported by E.ON, asserts, in essence, that it did not make an error of assessment in establishing and analysing the facts in respect of the markets for distribution of electricity and gas.

390 In the first place, the applicant alleges that the parties to the concentration are likely to influence the setting of technical and regulatory standards. It should therefore be examined whether the Commission's assessment is vitiated by a manifest error of assessment, first, in respect of the regulations of the Federal Network Agency, and, second, as regards the rules laid down by other bodies and associations.

391 First, with regard the applicant's criticism that the Federal Network Agency would from then on have to focus regulatory requirements primarily or even exclusively on the needs of E.ON, the Court finds at the outset that the Commission analysed the concentration's influence on regulation by the Federal Network Agency in paragraph 253 et seq. of the contested decision. In the light of the statements made by the Federal Network Agency, the Commission concluded that it was unlikely that the concentration would have a significant impact on the Federal Network Agency's competence to regulate network tariffs. In that regard the applicant provides no evidence of the influence which E.ON could have and which is, moreover, denied by the Federal Network Agency itself, nor of how such influence could in itself be indicative of a significant impediment to effective competition.

392 Second, with regard to influence within important standard-setting bodies and associations, in paragraph 246 et seq. of the contested decision the Commission analysed the influence which E.ON could exert over regulators and standard-setting associations, in particular the Network Technology/Network Operation Forum of the Verband der Elektrotechnik Elektronik Informationstechnik e.V. (Association for Electrical, Electronic and Information Technologies, Germany; 'the VDE'). In the light of the telephone calls between the Commission and the VDE on 17 May and 24 July 2019 (footnotes 257 and 260 of the contested decision) and the submissions by the parties to the concentration of 25 and 29 July 2019 (footnotes 258 and 259 of the contested decision), the Commission stated in paragraph 252 of the contested decision that it was unlikely that the concentration would give E.ON the ability to influence unduly the VDE's decision-making process in relation to the setting of technical standards. As is clear from paragraphs 248 and 249 of the contested decision, E.ON would not hold a majority within the various steering committees which appoint the members of the working groups responsible for each technical standard post-merger and would potentially have a majority only in one of those working groups.

393 It is true that that association is one of those mentioned by the applicant and that the Commission used the dynamic of that particular association as an example.

394 In that regard, the Court must, in the course of its review, consider whether omissions in the Commission's analysis are capable of calling into question its finding that the present concentration does not raise serious doubts as to its compatibility with the internal market (see, to that effect, judgment of 9 July 2007, *Sun Chemical Group and Others* v *Commission*, T-282/06, EU:T:2007:203, paragraph 61 and the case-law cited).

395 In the present case, the applicant provides no evidence to substantiate the claims that E.ON would have a majority in the committees of other associations post-merger. In that regard, the documents in Annex A.19 which were submitted in support of the existence of such majorities merely indicate that E.ON and RWE are present in certain associations in Germany, but do not prove that E.ON would have a majority. In any event, the applicant does not demonstrate how a majority held by E.ON in any of those organisations could give rise to a significant impediment to effective competition.

396 The argument concerning influence on the Federal Network Agency and other bodies and associations must therefore be rejected.

397 In the second place, the applicant submits that following the concentration E.ON will obtain more advantageous conditions in relation to network equipment, construction and design services and network software on account of its increased buyer power.

398 The Commission considered that point in paragraphs 262 and 263 of the contested decision. First, with regard to the advantage over small DSOs arising from the fact that E.ON will have priority in accessing grid services from service providers whose ability to provide such services would be limited, the Commission did not identify any scarcity in the provision of grid services. In any event, it found in paragraphs 234 and 235 of the contested decision that E.ON and innogy were already larger than most of the other DSOs before the concentration.

399 Second, the Commission concluded that customer foreclosure in access to the grid services of the parties to the concentration was unlikely, as the majority of grid services were mainly provided and purchased locally such that, the concentration being geographically complementary, it was unlikely that it would lead to a material increase in the volume of purchases at local level. The Commission also noted that services to DSOs constituted only part of the demand available for suppliers who were active upstream.

400 It must therefore be concluded that the Commission took into account the local nature of services of that kind. Given the level of detail in the Commission's analysis in general and the analysis of all the concerns regarding grid services, it cannot be alleged that the Commission carried out inadequate investigations. In reality, the applicant is complaining that the Commission failed to draw different conclusions from the information and evidence available to it.

401 Thus, according to the applicant, the Commission ought to have concluded, first, that E.ON would obtain more advantageous prices and conditions, second, that wholesale electricity suppliers would adapt to the needs of E.ON, third, that suppliers would give preferential treatment to E.ON and, fourth, that competitors would not be in a position to replicate the support services required. However, all the concerns raised by the applicant are merely speculation. The applicant offers no serious indication as to how plausible such scenarios are or how those scenarios might lead to a significant impediment to effective competition.

402 In those circumstances, the applicant's argument concerning the anticompetitive advantages which E.ON would obtain in relation to grid services must be rejected.

403 In the third place, the applicant submits that the Commission gave insufficient consideration to and incorrectly assessed concessions regarding rights to use lines to build and operate networks.

404 In that regard, the Commission assessed a number of hypothetical scenarios in which the concentration might cause harm to gas and electricity consumers, including a lessening of competition in concession tenders, in paragraphs 224 to 236 of the contested decision. It is not disputed that municipalities in Germany organise the operation of distribution networks by granting concessions to DSOs through a process calling for tenders to install and operate gas and electricity distribution networks in their areas for 15 to 20 years on average (paragraphs 224 and 225 of the contested decision).

405 The applicant raises a number of arguments regarding the anticompetitive effects of the concentration on those concessions.

406 First, the applicant suggests that the Commission ought to have envisaged an analysis period of 20 years prior to the concentration, in order to be able to analyse correctly the effects of the concentration on concessions.

407 It must be stated in that regard that in paragraph 224 of the contested decision, the Commission recognises that the average duration of concession agreements is 15 to 20 years. The Commission nevertheless considered an examination of concessions granted over a period of five years prior to the concentration to be sufficient for its analysis. Choosing that period allowed the Commission to consult more than 1 000 concession award procedures. It must also be stated that data lose their value over time as far as current and future market conditions are concerned. Thus, in limiting its analysis to a period of around five years prior to the concentration, the Commission adequately analysed competition for concessions and therefore did not make a manifest error of assessment.

408 Second, the applicant refers to the possibility that E.ON will submit better tenders for rights concessions because of its financial power, its experience and possible synergy effects.

409 In that regard, the Commission held in paragraph 231 of the contested decision that the parties to the concentration mostly lost tenders to municipal utilities. At least 90% of electricity concessions lost by E.ON were awarded to public or semi-public companies and at least 80% of such concessions lost by innogy went to municipal utilities. The Commission noted that the picture for gas was similar.

410 In addition, as regards the possible advantages of increased economies of scale, the Commission stated in paragraph 235 of the contested decision that pre-merger the parties to the concentration were much larger than most competitors, especially municipal utilities. In that regard, the parties to the concentration had mostly been successful in winning tenders when they were already the incumbent, but they had had limited success in acquiring new concessions.

411 In those circumstances it was reasonable to conclude, given that the Commission had no evidence that municipal utilities lost new concessions to large parties, that there was insufficient evidence that possible economies of scale or previous experience in participation in such tenders would confer an anticompetitive advantage on E.ON following the concentration.

412 In that regard, the applicant puts forward hypothetical scenarios without presenting evidence existing at the time when the contested decision was adopted. The applicant relies on the BET study to support its arguments. However, that survey has limited relevance and probative value in assessing the competitive situation at the time when the contested decision was adopted for the reasons set out in paragraph 205 above. Furthermore, the applicant refers to pages 48 et seq. of that study and, in the application, explicitly mentions questions 39, 42, and 44 to 47b. In response to question 39, 80% of the 87 respondents stated that the parties to the concentration could have synergies. However, there is no indication that the undertakings responding to the BET study considered that such synergies gave rise to a significant impediment to effective competition. As regards question 42, the wording of that question contains the underlying idea that synergies give rise to higher efficiency requirements. However, no evidence to that effect is provided by the study. On that basis, 71% of respondents understand that they would not be able to achieve those requirements. It is not clear from the study, however, whether those requirements would be implemented. It need only be noted that, overall, more than two thirds of respondents confirmed, in response to question 43, that the concessions awarded to them were not contested by E.ON or innogy. That confirms the Commission's conclusion that competition between the parties to the concentration in concessions was very limited.

413 The applicant has not therefore provided sufficient relevant evidence to demonstrate a manifest error of assessment on the part of the Commission or to suggest that following the concentration E.ON would be able to make better concession tenders, less still that, if that were the case, it could

be anticompetitive. On the contrary, if the concentration allowed E.ON to submit better tenders, that could be beneficial to competition. Detrimental effects on competition might in theory arise only if, in the longer term, the parties to the concentration were able to monopolise the market due to the fact that no competitor could match the parties' cost structure, as the Commission correctly pointed out in paragraph 234 of the contested decision.

414 Third, the applicant asserts that the parties to the concentration were close competitors because they competed for more than 100 concessions between 2010 and 2015. It is sufficient to note in that regard that, after examining more than 1 000 concession procedures which took place between 2013 and 2017, the Commission stated in paragraphs 228 and 229 of the contested decision that the parties to the concentration did not compete closely as they had participated in the same tenders in less than 5% of cases. It is also apparent from footnote 244 of the contested decision that the Commission analysed whether the parties to the concentration had participated in such procedures through undertakings in which they had minority shareholdings. The Commission therefore established to the requisite standard that there was no significant overlap between the parties to the concentration in different concession procedures.

415 Fourth, with regard to E.ON's presence throughout Germany, which could grant E.ON an advantage in expanding to areas adjacent to those in which it was already present, the Commission stated in paragraph 230 of the contested decision that the tenders in which the parties to the concentration had participated between 2013 and 2017 were not concentrated in any particular region and were not always located near the border of E.ON and innogy DSO areas. The Commission also noted in paragraph 231 of the contested decision, cited in paragraph 409 above, the strong competitive constraint exerted by municipal authorities. It follows that the Commission adequately analysed how close competition between the parties to the concentration was and the competitive pressure exerted by municipal authorities.

416 Fifth, it is common ground between the parties that there is a trend towards remunicipalisation. It is clear from paragraphs 232 and 233 of the contested decision that the parties to the concentration and several respondents to the first market investigation had acknowledged a trend towards remunicipalisation of networks. However, the applicant identifies a risk that that trend will weaken in the near future because of possible targeted deterrent strategies by E.ON. In that regard, in paragraph 236 of the contested decision the Commission analysed the possible tactics at issue aimed at deliberately delaying handing over concessions which the parties to the concentration have lost (sham litigation).

417 It should be noted, in that regard, that the Court has already had occasion to state that a legal action could sometimes constitute an abuse of a dominant position. To that end, two cumulative conditions must be satisfied. In the first place, it is necessary that the action cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party. In the second place, the action must be conceived in the context of a plan to eliminate competition (see judgment of 13 September 2012, *Protégé International* v *Commission*, T-119/09, not published, EU:T:2012:421, paragraph 49 and the case-law cited).

418 In the present case, the Commission correctly concluded in paragraph 236 of the contested decision that such tactics are not merger-specific in the sense that the concentration is unlikely to increase the incentives of the parties to the concentration to pursue strategies of that sort. It should be noted in that regard that, even assuming that the existence of such tactics was proven,

the applicant does not explain how incentives for the parties to the concentration to adopt such tactics would increase post-merger and has therefore not proved a manifest error of assessment on the part of the Commission.

419 Sixth, the applicant disputes the discretion of the municipalities in the concession of rights. E.ON submits that in the administrative procedure, municipalities had a wide discretion in selecting, weighting and designing the award criteria, including the consideration of municipal interests (paragraph 226 of the contested decision). It is not disputed, in that regard, that the municipality determines the award criteria. On the other hand, the applicant disputes that the municipality has discretion in selecting, weighting and designing those criteria. However, if it were true, as the applicant claims, that municipalities had no discretion in selection and the parties to the concentration were more efficient and benefitted from their financial strength, economies of scale and experience with concessions, the parties to the concentration ought already to have won a significant number of concessions at the expense of smaller competitors, which is not the case, as was stated, in essence, in paragraph 411 above. In any event, in view of the absence of specific evidence presented by the applicant and the normal operation of the concession procedures, it does not seem plausible that the municipalities have insufficient discretion, especially since some of the criteria to be taken into consideration are subjective. Thus, a recent amendment to the statutory provisions for concession tenders, implemented in 2017, introduced the 'consideration of municipal interests' as a legitimate criterion in concession tenders, as the Commission stated in paragraph 232 of the contested decision.

420 In view of the above, the Commission analysed all the applicant's concerns and did not make a manifest error of assessment in respect of concessions.

421 In the fourth place, with regard to the possibility of presenting bundled offers as a DSO, the applicant does not substantiate its allegations or submit evidence supporting the conclusion that following the concentration E.ON would have increased opportunities to present bundled offers. It simply speculates regarding hypothetical scenarios. In particular, the applicant does not explain why the parties to the concentration do not already have such capacities, when they are already network operators present throughout the value chain, or why competitors are not also able to present such offers and, as the case may be, what anticompetitive effects can be expected.

422 As regards the possibility of bundled offers, the Commission states in the defence that network operation is independent of the energy supply undertakings' other areas of business due to statutory requirements. In any event, E.ON already had financial power pre-merger and it could already have presented bundled offers with the result that such conduct cannot be considered merger-specific.

423 In the fifth place, the applicant asserts, without substantiating its assertion in any way, that the Commission failed to take into consideration interactions resulting from substitution effects, knock-on effects and domino effects on geographically limited adjacent markets. However, the applicant does not explain how these factors are relevant or how a significant impediment to effective competition could be inferred from them.

424 In the light of all the foregoing, it is necessary to reject the second complaint, alleging that the effects on the markets for distribution of electricity and gas were assessed incorrectly.

(c) The third complaint, alleging that the effects on the markets for metering services and e-mobility were assessed incorrectly

425 The applicant maintains, in essence, that the Commission did not adequately and correctly assess the effects of the concentration on the markets for metering services and e-mobility.

426 The Commission disputes the applicant's arguments.

(1) The markets for metering services

427 As regards the effects of the concentration on the market for metering services, in paragraph 355 of the contested decision the Commission observed that the market for metering services for electricity and gas as nMPO and potential submarkets according to the commodity measured were also monopolies at network area level, with the network operator as the sole entitled metering point operator. In addition, the Commission stated in paragraph 356 of the contested decision that the market for electricity and gas metering services for cMPOs was only starting to develop in Germany and that the combined market share in Germany of the parties to the concentration was less than 5%, even if submarkets were further divided. The Commission concluded that those markets were not affected by the concentration.

428 The applicant raises a number of arguments relating to the anticompetitive effects of the concentration on the markets for metering services.

429 First, it is necessary to reject the applicant's argument concerning substitution, knock-on and domino effects to which E.ON's position as an nMPO could give rise in municipalities in which it holds the operating concession for the electricity and gas distribution network for the same reasons as are set out in paragraph 423 above.

430 In any event, the Commission stated in paragraphs 406 to 409 of the contested decision that the concentration would not significantly impede the exercise of effective competition as a result of non-coordinated effects arising from vertical links between the upstream markets for distribution networks for gas and electricity operated by DSOs and the downstream markets for cMPO metering services in Germany. It noted that the concentration did not alter E.ON's ability to foreclose cMPO competitors, as DSOs were local monopolists pre- and post-merger. It also considered that the incentives to foreclose were weak and did not materially increase as a result of the merger because, first, the combined market share in Germany of the parties to the concentration in the emerging market of cMPO electricity and gas metering services was less than 5%, second, the market was still in its infancy and the development was overall still very small, third, there were market entrants also from other industries and, fourth, DSOs were regulated to ensure non-discriminatory grid connection and usage. It follows that, contrary to the claim made by the applicant, the Commission analysed the vertical effects between those two markets.

431 Second, the applicant asserts that following the concentration E.ON would become the leading competitor, with 41% of the sampling points as an nMPO, and has a market share of at least 44.14% by network length or more than 50% by number of municipalities served.

432 It should be noted that the Commission did not make a manifest error of assessment in defining the market for metering services, as was established in paragraph 337 above. Accordingly, the market shares of the parties to the concentration as nMPOs are not relevant to the analysis of the market for cMPO electricity and gas metering services.

433 In any event, it should be noted that the applicant simply uses its own data without explaining why the data used by the Commission are incorrect.

434 However, it cannot be sufficient for the applicant to use data different from those used by the Commission in the contested decision in order to establish the manifest error of assessment committed by the Commission without providing specific evidence to demonstrate that the consideration of the data in the contested decision constitutes a manifest error of assessment by the Commission (see, to that effect, judgment of 7 June 2013, *Spar Österreichische Warenhandels* v *Commission*, T-405/08, not published, EU:T:2013:306, paragraph 156).

435 It follows that the applicant has not demonstrated that the data used by the Commission, which are relevant to the calculation of market shares, were incorrect. Consequently, the applicant has not established that the Commission made a manifest error of assessment in concluding that the markets for nMPOs and cMPOs were not affected by the concentration.

436 Third, as regards the necessary performance capacity to satisfy human resource and technical resource requirements in respect of metering services and E.ON's national presence, the Court finds that the Commission carried out a number of assessments of the presence of white-label service providers which would be available to operate metering stations.

437 As far as a possible market definition is concerned, the Commission concluded in paragraph 358 of the contested decision that the concentration did not give rise to an affected market for white-label services or any potential submarkets. In that regard, it is clear from footnote 180 of the contested decision that the Commission considered that white-label services, at least at the time when the contested decision was adopted and in the near future, were more likely to play a role in respect of markets where there was an obligation to provide certain services which then could be outsourced. Therefore, the Commission did not conclude that a market for white-label services for gas and electricity metering was a cMPO market, since the cMPO market was still in its infancy and only players with their own capacity could enter that activity. In paragraph 178 and in footnote 186 of the contested decision, the Commission stated that it considered that white-label services to nMPOs and cMPOs were likely to be national in scope, as most if not all nMPOs and cMPOs were still local monopolists and, to have a customer base of a certain size, there had to be greater geographical coverage. In addition, the Commission stated in paragraph 359 of the contested decision that the combined market share of the parties to the concentration did not exceed 5% on a potential submarket for white-label services for metering of electricity and gas.

438 The Commission also assessed vertical effects between the downstream market for nMPOs and upstream white-label services in paragraphs 414 to 417 of the contested decision. First, it concluded that the concentration would not significantly impede the exercise of effective competition as a result of non-coordinated effects arising from vertical links between those two markets, since the nMPOs were local monopolists downstream, and there was therefore no competition and since the market share of the parties to the concentration for white-label services was below 5%. Second, the concentration did not alter the ability to foreclose white-label service providers upstream, as the nMPOs were already local monopolists, or the incentives to foreclose, which would not materially increase, in view of the very limited market position of the parties to the concentration on the upstream market for white-label services and the minor increment due to the merger.

439 Similarly, in paragraphs 178 and 407 of the contested decision the Commission noted that there were market entrants and that there were no barriers to entry. There were therefore no perceivable obstacles which would restrict the offer of such services to a certain area, given that most nMPOs and cMPOs also provide such white-label services and new entrants from outside the industry, such as Telefónica or Deutsche Telekom, were entering the national market.

440 In that regard, the applicant provides no evidence to call into question the Commission's conclusions regarding white-label service providers which, according to the Commission, are available to meet the needs of nMPOs and cMPOs that do not have the necessary capacity for the proper operation of meters.

441 As to the fact that, because of their statutes or German municipal law, some potential municipal competitors can operate only at local level, the Commission correctly took the view that that was only of secondary importance for competition, given that only very few undertakings were subject to absolute prohibitions of that nature.

442 Fourth, as regards the alleged benefits derived from economies of scale and buyer power as an nMPO, the Commission stated in paragraphs 362 and 363 of the contested decision that certain assumptions, inter alia regarding costs and economies of scale for E.ON and innogy and other players, had not been substantiated. In support of that theory of harm, the applicant refers to the LBD study and the BET study.

443 Graph 7, on page 17 of the LBD study, to which the applicant refers, shows pricing for innogy brands in the basic area of LSW Energie GmbH & Co. KG, but the applicant does not explain how that graph can support the existence of benefits derived from economies of scale and buyer power following the concentration.

444 Relying on the BET study, the applicant asserts that the respondents to the investigation expect the market to be closed to the emergence of new players. However, that investigation is of limited relevance and probative value in assessing the competitive situation on the date when the contested decision was adopted, for the reasons stated in paragraph 205 above. Furthermore, the responses to questions 62, 63, 65 and 71 are not such as to refute the findings made by the Commission, as detailed in paragraph 439 above, concerning the lack of barriers to entry and the arrival of new competitors on the market.

445 In any event, the applicant does not explain how the LBD study and the BET study could call into question the Commission's conclusions regarding lack of effect on the markets for metering services and, above all, the implausibility of the claims relating to economies of scale. In paragraph 363 of the contested decision, the Commission contested the assertion that only certain large players would be able to provide smart meter operation services profitably. The Commission stated in that regard that that was unlikely because, first, the gateway hardware for smart meters and the necessary infrastructure were provided by several independent suppliers, second, 100 000 to 300 000 smart meters were needed for commercial operation, which represented a small proportion of the total number of meters, while, furthermore, suppliers with fewer meters could always cooperate in order to achieve greater scale, and, lastly, the entry of large players from outside the energy sector demonstrated that market entry and, consequently, competition, were possible.

446 The applicant's arguments concerning the market for metering services must therefore be rejected.

(2) The e-mobility market

447 With regard to e-mobility market, in the first place, the applicant alleges that the Commission wrongly assessed the competitive situation off motorways at local level.

448 In that regard, the Court observes, first, that the Commission stated in paragraph 381 of the contested decision that the combined market share of the parties to the concentration in terms of electric vehicle charging points off motorways in Germany was below 20%, even assuming distinct markets for normal charging stations and fast charging stations. Second, the Commission stated in paragraph 384 of the contested decision that the parties to the concentration operated very few ultra-fast public charging stations off motorways and that many large competitors, such as Allego, EnBW or Ionity, had expansion plans for ultra-fast charging stations, similar or larger in scale than the parties. In addition, the Commission held in paragraph 385 of the contested decision that on a nationwide basis there were a number of present and future competitors, such as Deutsche Telekom or Volkswagen, and that Volkswagen had also announced its plans to enter the e-mobility market and aimed to build public electric vehicle charging stations at the facilities of its 4 000 car dealer and service station partners in Europe. Lastly, in paragraph 386 of the contested decision the Commission stated that, even in the 16 local areas off motorways identified by it in which the combined market share of the parties to the concentration was higher than 25% or the delta of the Herfindahl-Hirschman Index was above 150, the concentration was not likely to significantly impede competition because, first, other competitors, including specialised e-mobility players and municipal utilities, were active, second, in some of those areas competitors had announced expansion plans, third, the merger-related capacity increment was often below 10% of the market shares and, fourth, some of the areas in the immediate vicinity of large cities or other municipalities were therefore subject to competitive pressure.

449 It follows that the Commission carried out a coherent and full analysis, including off motorways, of the competitive elements from the point of view of the smallest conceivable market, in particular in the light of the market shares of the parties to the concentration, their competitive proximity, the market structure and barriers to entry.

450 In the second place, the applicant puts forward several arguments concerning the anticompetitive effects of the concentration on the e-mobility market. Thus, on the basis of the BET study, the applicant asserts, in essence (i) that small suppliers would not be able to develop a nationwide charging network, (ii) that the economies of scale achieved by E.ON through the concentration would have foreclosure effects and (iii) that the disappearance of innogy would eliminate most of the competition.

451 In that regard, the Commission concluded that the concentration would not significantly impede the exercise of effective competition as a result of horizontal non-coordinated effects arising from the overlaps in the activities of the parties to the concentration in the markets for installation and operation of charging stations off motorways in Germany, inter alia for the reasons set out in paragraph 448 above.

452 As regards the applicant's statements based on the BET study, it should be added that, aside from the limited relevance and probative value of that study (see paragraph 205 above), the study is not sufficiently representative of the state of competition on the e-mobility market, as the participants

are only energy supply undertakings and DSOs, while undertakings from other sectors, such as Deutsche Telekom, Volkswagen, Ionity, Shell or BP, are active in that sector, as well as specialised e-mobility undertakings such as Fastned, eLoaded, ChargePoint or Allego.

453 The applicant also states that, according to page 19 of the presentation by LBD Beratungsgesellschaft reflecting the market situation on 9 January 2019, E.ON's market share post-merger at present amounted to 33%. It is apparent from the presentation that the combined market share of E.ON and innogy would actually be 21.2%. The applicant does not explain where the 12% difference comes from. In addition, the applicant's presentation also shows the presence of several competitors with appreciable market shares, such as [*confidential*]. Those percentages lie within the range of estimates and are consistent with the findings of the Commission, which considers that E.ON's market shares following the concentration would not exceed 20% and that there are a number of competitors on the market.

454 In any event, the applicant simply uses its own data without explaining why the data used by the Commission are incorrect. As was stated in paragraph 434 above, it cannot be sufficient for the applicant to use data different from those used by the Commission in the contested decision in order to establish that the Commission made a manifest error of assessment, without providing specific evidence to demonstrate that the taking into account of the data in the contested decision is vitiated by a manifest error of assessment. It follows that the applicant has not demonstrated that the data used by the Commission were incorrect.

455 The applicant states that the Monopolkommission (Monopolies Commission, Germany) highlighted regional concentrations of concern and an absence of competition at local level in its 7th Sector Report on Energy (2019). It should be noted that since that report post-dated the adoption of the contested decision, it was not available to the Commission and it therefore has no relevance in assessing the lawfulness of the contested decision in accordance with the case-law cited in paragraph 194 above. In any event, the market overview given in the report in no way calls into question the analysis of local factors described in paragraph 448 above. The Court notes that it is clear from page 96 et seq. of that report that the e-mobility market is an emerging market. More specifically, it is stated in paragraph 244 of the report that, as the Commission found in the contested decision, 'it is certainly impossible to predict the future development of e-mobility'. In any event, the applicant does not identify which specific evidence is such as to demonstrate the existence of a manifest error attributable to the Commission.

456 The applicant has not therefore demonstrated that the Commission made a manifest error of assessment in respect of the e-mobility market.

457 It follows from all the foregoing that the third complaint, alleging that the effects on the markets for metering services and e-mobility were assessed incorrectly, must be rejected.

(d) The fourth complaint, alleging that the effects of customer solutions based on customer data were assessed incorrectly

458 The applicant asserts that the Commission addressed data-driven customer solutions in the energy industry only very briefly, specifically with regard to megadata and innovative bundled products, in paragraphs 428 to 432 of the contested decision.

459 In the first place, as regards megadata, improved access to a wide range of data, particularly against the background of the proliferation of smart meters and the establishment of a market for cMPOs, constitutes a key factor for competitiveness in so far as those data make it easier to understand consumer needs and to tailor products and services better to customers. In that regard, E.ON has greater knowledge of households and small commercial customers, usage and charging behaviour of users of charging infrastructure and competitive operation of metering stations. According to the applicant, the Commission did not examine those points adequately.

460 In the second place, E.ON enjoys a competitive advantage in respect of innovative solutions and bundled offers.

461 In the third place, the applicant submits that the strong presence of the parties to the concentration on the market following the concentration would facilitate cross-selling.

462 The Commission, supported by E.ON, asserts that it adequately examined the effects of customer solutions based on customer data without making an error of assessment.

463 It should be stated that the Commission analysed other theories of harm in Section 7.4 of the contested decision. In particular, the Commission analysed theories of harm in connection with access to customer data in paragraphs 422 to 427 and bundled offers of energy-related services in paragraphs 428 to 435.

464 In the first place, with regard to data access, the Commission stated in paragraph 423 of the contested decision that E.ON would not have access, post-merger, to more varied types of data than the types already available to each of the parties pre-merger, but it would have access to more information of the same type. The Commission concluded that having more information of the same type did not necessarily bring additional value and the economies of scale which it could bring would be reduced. Similarly, the Commission found in paragraphs 424 and 425 of the contested decision that it was apparent from the first market investigation that there was great uncertainty as to the minimum amount and type of data required to develop new energy solutions. In addition, the Commission analysed the risk of foreclosure and stated that the first market investigation found that a number of competitors, including municipal utilities, already offered or were developing various data-driven solutions, either alone or in cooperation with other players. Similarly, the first market investigation and internal documents of the parties to the concentration showed that large companies such as Google, Amazon, Samsung, Bosch, Phillips were already offering, also in cooperation with small energy retailers, or looking into smart home or data-related services or products. Furthermore, the Commission noted in paragraph 427 of the contested decision that data collection and usage regulation ought to reduce the risk of abusive or discriminatory conduct by vertically integrated companies.

465 In this regard, the applicant maintains that the Commission did not sufficiently examine access to customer data, but provides no evidence that following the concentration E.ON would be able to act differently post-transaction from pre-transaction, given its already broad access to customer data. Nor does the applicant provide evidence of specific harm which would result from the provision of offers better tailored to customers. In addition, providing better tailored offers could, in itself, be beneficial to consumers if it did not lead to the monopolisation of the market by foreclosing competitors from the market. Thus, in the absence of evidence of any foreclosure effects, the applicant has not proved that the Commission made a manifest error of assessment.

466 In the second place, with regard to innovative solutions and bundled offers, the Commission noted in paragraphs 432 to 435 of the contested decision that many competitors, including small ones, were already today offering or developing bundled offers, the concept of bundling products being common across the industry. It stated that those competitors make such offers alone or in cooperation, that a number of multinational players were looking into energy bundles and platforms and that they were likely to have comparable cross-selling abilities and financial resources to the parties to the concentration. Lastly, it noted that some of those companies were large, financially strong corporations already active in 'Business-to-Consumer' (B2C) markets, that is, companies which target specific individual customers in other markets, and that they therefore already had a large customer base to whom they could cross-sell.

467 In that regard, the applicant gives no indication of the information available to the Commission before the adoption of the contested decision which would suggest that E.ON's financial strength, bundled sales or cross-selling or, more generally, innovative solutions resulting from the concentration could have anticompetitive effects. Nor does the applicant provide evidence to refute the presence and market entry of competitors capable of exerting competitive pressure on the parties to the concentration or the absence of evidence of barriers to entry or expansion. The applicant does not present any evidence to support the claim that post-merger E.ON's portfolio would be expanded due to previously unavailable capacities having been acquired. On the contrary, pre-transaction there was a geographic complementarity in E.ON's and innogy's portfolios with the result that post-merger E.ON would have the same capacities but in more locations. It follows that the applicant's claims constitute unsubstantiated assumptions which do not satisfy the requisite standard of proof.

468 In the light of all the foregoing, it is necessary to reject the fourth complaint, alleging that the effects of customer solutions based on customer data were assessed incorrectly.

(e) The fifth complaint, concerning the sharing of the electricity markets decided by RWE and E.ON

469 The applicant submits, in essence, that the sharing between E.ON and RWE of the steps of the value chain in the electricity sector involves a prohibited restriction of competition, being contrary to Article 101 TFEU.

470 The Commission, supported by RWE, asserts that it did not have any evidence of an infringement of Article 101(1) TFEU.

471 As regards the alleged sharing of the electricity market resulting from the overall transaction, the applicant submits, in essence, that RWE and E.ON thereby completely shared the electricity market between themselves, which represents a restriction of competition in contravention of Article 101 TFEU.

472 It must be stated that, as follows from Article 21(1) of Regulation No 139/2004, that regulation alone is to apply to concentrations as defined in Article 3 of the regulation, 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), is not, in principle, applicable. By contrast, Regulation No 1/2003 continues to apply 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).

473 It is not contested that the subject matter of the contested decision relates to a concentration. In the light of the foregoing, the complaint alleging an infringement of Article 101 TFEU is ineffective.

(f) The sixth complaint, concerning the assessment of the effects of the commitments

474 The applicant asserts that the commitments offered by E.ON and made binding by the Commission are limited, in respect of Germany, to the markets for electricity used for heating and electric vehicle charging stations on motorways and are not such as to eliminate the doubts which exist with regard to competition.

475 In the first place, the transfer of some 260 000 customers on the market for electricity used for heating concerns a different market from the market for retail supply of electricity to households and small commercial customers on which the concentration allegedly causes competitive harm.

476 In the second place, discontinuing the operation of 34 charging stations on motorways, out of more than 11 000 owned by E.ON before the concentration, has no effect in terms of protecting competition.

477 The Commission submits that that complaint is inadmissible because the applicant does not specify the necessary obligations. In the alternative, the Commission submits that additional obligations were not necessary.

478 It is necessary to examine the plea of inadmissibility raised by the Commission, which claims that that complaint is inadmissible because the applicant does not specify the necessary obligations.

479 In that regard, it should be recalled that it is for the applicant to show how the assessments contained in the contested decision are incorrect (see, to that effect, judgment of 18 May 2022, *Wieland-Werke* v *Commission*, T-251/19, not published, EU:T:2022:296, paragraph 438).

480 It should also be borne in mind that, under Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure of the General Court, the application initiating proceedings must contain a brief statement of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The application must, accordingly, specify the nature of the grounds on which it is based, with the result that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure. Similar requirements are called for where a submission is made in support of a plea in law (see judgment of 18 May 2022, *Wieland-Werke* v *Commission*, T-251/19, not published, EU:T:2022:296, paragraph 59 and the case-law cited).

481 In the present case, the applicant merely asserts that the commitments do not address the competition concerns, but it does not explain why that is the case or provide any evidence to show that the commitments are inappropriate for resolving directly and sufficiently the concerns identified during the merger control procedure, without there being any need to send a statement of objections.

482 In those circumstances, the applicant cannot be considered to have put forward any arguments to show that the Commission committed a manifest error of assessment in concluding that the commitments offered by E.ON were capable of making the concentration compatible with the internal market. Accordingly, it did not enable the Commission to prepare its defence properly or the Court to rule on whether the Commission committed a manifest error of assessment in its analysis of the commitments offered by E.ON.

483 That complaint must therefore be declared inadmissible.

(g) Conclusion on the third part of the fifth plea in law

484 Since all the complaints must be rejected, the third part of the fifth plea in law must be rejected in its entirety.

6. Conclusion

485 In the light of all the foregoing, it must be concluded that, contrary to the assertion made by the applicant, the Commission did not make manifest errors of assessment in coming to the conclusion that, subject to compliance with the final commitments, the concentration did not raise serious doubts as to its compatibility with the internal market within the meaning of Article 8(2) of Regulation No 139/2004.

486 It follows that the fifth plea in law must be rejected in its entirety.

…

On those grounds,

THE GENERAL COURT (Fifth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders EVH GmbH to bear its own costs and to pay the costs incurred by the European Commission, by E.ON SE and by RWE AG.

van der Woude Svenningsen Mac Eochaidh

Martín y Pérez de Nanclares Stancu

Delivered in open court in Luxembourg on 20 December 2023.

[Signatures]

[i] The heading immediately above paragraph 170 has been amended since it was first put online.