Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

4 October 2024*

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* Language of the case: English.

(Appeal – Competition – Regulation (EC) No 139/2004 – Concentration between undertakings – Decision declaring the concentration incompatible with the internal market and the functioning of the EEA Agreement – Determination of the relevant markets – Significant impediment to effective competition – Creation or strengthening of a dominant position – Non-coordinated effects – Standard of proof – Concepts of 'important competitive force' and 'close competitors' – Closeness of competition between the merging parties – Herfindahl-Hirschmann Index – Requests for information – Distortion)

In Case C-581/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 1 September 2022,

thyssenkrupp AG, established in Duisburg and Essen (Germany), represented by M. Klusmann, O. Schley and J. Ziebarth, Rechtsanwälte,

appellant,

the other party to the proceedings being:

European Commission, represented initially by G. Conte, T. Franchoo, C. Sjödin and I. Zaloguin, and subsequently by G. Conte, T. Franchoo and I. Zaloguin, acting as Agents,

defendant at first instance,

THE COURT (First Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, T. von Danwitz, P.G. Xuereb, A. Kumin and I. Ziemele, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, thyssenkrupp AG asks the Court of Justice to set aside the judgment of the General Court of the European Union of 22 June 2022, *thyssenkrupp* v *Commission* (T-584/19, EU:T:2022:386; 'the judgment under appeal'), by which the General Court dismissed its action for annulment of Commission Decision C(2019) 4228 final of 11 June 2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement (Case M.8713 – Tata Steel/thyssenkrupp/JV) ('the decision at issue').

Legal context

Regulation (EC) No 139/2004

2 Recital 25 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1) states:

> '(25) In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted [Council] Regulation (EEC) No 4064/89 [of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1)] as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.'

3 Article 2 of Regulation No 139/2004, headed 'Appraisal of concentrations', provides:

> '1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the [European] Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article [101](1) and (3) [TFEU], with a view to establishing whether or not the operation is compatible with the common market.

5. In making this appraisal, the Commission shall take into account in particular:

– whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

– whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.'

4 Article 3 of that regulation, headed 'Definition of concentration', provides in paragraphs 1(b) and 4 thereof:

'1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

…

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

…

4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).'

5 Article 4 of that regulation, headed 'Prior notification of concentrations and pre-notification referral at the request of the notifying parties', provides in paragraph 1 thereof:

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

Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

For the purposes of this Regulation, the term "notified concentration" shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term "concentration" includes intended concentrations within the meaning of the second subparagraph.'

6 Article 6 of the same regulation, headed 'Examination of the notification and initiation of proceedings', provides in paragraph 1(c):

'The Commission shall examine the notification as soon as it is received.

…

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.'

7 Article 8 of Regulation No 139/2004, headed 'Powers of decision of the Commission', provides in paragraphs 2 and 3 thereof:

'2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article [101](3) [TFEU], it shall issue a decision declaring the concentration compatible with the common market.

The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article [101](3) [TFEU], it shall issue a decision declaring that the concentration is incompatible with the common market.'

8 Article 11 of that regulation, headed 'Requests for information', provides in paragraph 1:

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

9 Article 14 of that regulation, headed 'Fines', provides in paragraph 1(c):

'The Commission may by decision impose on the persons referred to in Article 3(1)(b), undertakings or associations of undertakings, fines not exceeding 1% of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 where, intentionally or negligently:

…

(c) in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit'.

10 Article 15 of the same regulation, headed 'Periodic penalty payments', provides in paragraph 1(a):

'The Commission may by decision impose on the persons referred to in Article 3(1)(b), undertakings or associations of undertakings, periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 for each working day of delay, calculated from the date set in the decision, in order to compel them:

(a) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(3);

…'

Regulation (EC) No 802/2004

11 Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Regulation No 139/2004 (OJ 2004 L 133, p. 1, and corrigendum OJ 2004 L 172, p. 9), as amended by Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 (OJ 2013 L 336, p. 1), provides in Article 13(2) thereof:

'The Commission shall address its objections in writing to the notifying parties.

The Commission shall, when giving notice of objections, set a time limit within which the notifying parties may inform the Commission of their comments in writing.

The Commission shall inform other involved parties in writing of these objections.

The Commission shall also set a time limit within which those other involved parties may inform the Commission of their comments in writing.

The Commission shall not be obliged to take into account comments received after the expiry of a time limit which it has set.'

Horizontal Merger Guidelines

12 Paragraphs 14, 16, 19 to 21, 28, 32 to 35, 37 and 38 of the Commission notice entitled '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 Horizontal Merger Guidelines') state:

'III. Market share and concentration levels

14. Market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.

…

16. The overall concentration level in a market may also provide useful information about the competitive situation. In order to measure concentration levels, the Commission often applies the Herfindahl-Hirschman Index (HHI) … The HHI is calculated by summing the squares of the individual market shares of all the firms in the market … The HHI gives proportionately greater weight to the market shares of the larger firms. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly. While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, the change in the HHI (known as the "delta") is a useful proxy for the change in concentration directly brought about by the merger …

…

HHI levels

19. The Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1 000. Such markets normally do not require extensive analysis.

20. The Commission is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1 000 and 2 000 and a delta below 250, or a merger with a post-merger HHI above 2 000 and a delta below 150, except where special circumstances such as, for instance, one or more of the following factors are present:
    (a) a merger involves a potential entrant or a recent entrant with a small market share;
    (b) one or more merging parties are important innovators in ways not reflected in market shares;
    (c) there are significant cross-shareholdings among the market participants …;
    (d) one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct;
    (e) indications of past or ongoing coordination, or facilitating practices, are present;
    (f) one of the merging parties has a pre-merger market share of 50% [or] more …

21. Each of these HHI levels, in combination with the relevant deltas, may be used as an initial indicator of the absence of competition concerns. However, they do not give rise to a presumption of either the existence or the absence of such concerns.

…

IV. Possible anti-competitive effects of horizontal mergers

…

Merging firms are close competitors

28. Products may be differentiated … within a relevant market such that some products are closer substitutes than others … The higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly … For example, a merger between two producers offering products which a substantial number of customers regard as their first and second choices could generate a significant price increase. Thus, the fact that rivalry between the parties has been an important source of competition on the market may be a central factor in the analysis … High pre-merger margins … may also make significant price increases more likely. The merging firms' incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes … It is therefore less likely that a merger will significantly impede effective competition, in particular through the creation or strengthening of a dominant position, when there is a high degree of substitutability between the products of the merging firms and those supplied by rival producers.

…

Competitors are unlikely to increase supply if prices increase

32. When market conditions are such that the competitors of the merging parties are unlikely to increase their supply substantially if prices increase, the merging firms may have an incentive to reduce output below the combined pre-merger levels, thereby raising market prices … The merger increases the incentive to reduce output by giving the merged firm a larger base of sales on which to enjoy the higher margins resulting from an increase in prices induced by the output reduction.

33. Conversely, when market conditions are such that rival firms have enough capacity and find it profitable to expand output sufficiently, the Commission is unlikely to find that the merger will create or strengthen a dominant position or otherwise significantly impede effective competition.

34. Such output expansion is, in particular, unlikely when competitors face binding capacity constraints and the expansion of capacity is costly … or if existing excess capacity is significantly more costly to operate than capacity currently in use.

35. Although capacity constraints are more likely to be important when goods are relatively homogeneous, they may also be important where firms offer differentiated products.

…

Merger eliminates an important competitive force

37. Some firms have more of an influence on the competitive process than their market shares or similar measures would suggest. A merger involving such a firm may change the competitive dynamics in a significant, anti-competitive way, in particular when the market is already concentrated … For instance, a firm may be a recent entrant that is expected to exert significant competitive pressure in the future on the other firms in the market.

38. In markets where innovation is an important competitive force, a merger may increase the firms' ability and incentive to bring new innovations to the market and, thereby, the competitive pressure on rivals to innovate in that market. Alternatively, effective competition may be significantly impeded by a merger between two important innovators, for instance between two companies with "pipeline" products related to a specific product market. Similarly, a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products …'

Background to the dispute and the decision at issue

13 The background to the dispute is set out in paragraphs 1 to 23 of the judgment under appeal and may be summarised as follows.

14 thyssenkrupp is a German company that carries on its activities in the production of flat carbon steel products, material services, elevator technology, industrial solutions and component technology. The company is one of Europe's major flat carbon steel producers and carries on its activities throughout the flat carbon steel value chain from primary steel production to coated finished products. It thus produces and supplies a range of flat carbon steel products, including hot rolled coils, cold rolled coils, metallic coated steel and laminated steel for packaging, galvanised steel, organic coated steel, grain-oriented electrical steel ('GOES') and non-grain-oriented electrical steel. thyssenkrupp's activities are centred in Germany, and its integrated plants are all located in Duisburg (Germany), however it also has a number of finishing plants elsewhere in the European Economic Area (EEA), including in France, Germany and Spain.

15 Tata Steel Ltd ('TSE') is an Indian company which is active in the mining of coal and iron ore, manufacturing of steel products, and selling those steel products globally. TSE further produces ferro-alloys and related minerals and manufactures certain other products such as agricultural equipment and bearings. In particular, TSE produces and sells a range of carbon steel products, including hot rolled coils, cold rolled coils, metallic coated steel and laminated steel for packaging, galvanised steel, organic coated steel, GOES and non-grain-oriented electrical steel. TSE also produces further downstream products such as carbon steel tubes and steel elements for construction. TSE's plants are located predominantly in the United Kingdom and the Netherlands, however it also has a number of finishing plants elsewhere in Europe, such as in Belgium, France, Germany and Sweden.

16 On 25 September 2018, thyssenkrupp and TSE (together, 'the parties to the proposed concentration') notified the Commission, in accordance with Article 4(1) of Regulation No 139/2004, of a proposed concentration ('the proposed concentration') by which they would acquire joint control of a newly created joint venture ('the JV'), within the meaning of Article 3(1)(b) and (4) of that regulation.

17 In accordance with the proposed concentration, the JV would carry on its activities in the production of flat carbon steel and electrical steel products. Each of the parties to the proposed concentration would bring to the JV its European flat carbon steel and electrical steel production assets and businesses. thyssenkrupp's steel mill services would also be transferred to the JV. Furthermore, the parties to the proposed concentration would each hold 50% of the shares in the JV. Neither of the parties would be granted relevant veto rights the other would not have, and the parties would thus jointly control the JV. The JV would perform all the functions of an autonomous economic entity on a lasting basis with independent market presence both upstream and downstream. Therefore, the JV would be a fully functional joint venture.

18 By decision of 20 October 2018, the Commission considered that the proposed concentration raised serious doubts as to its compatibility with the internal market, and adopted a decision to initiate an in-depth examination procedure pursuant to Article 6(1)(c) of Regulation No 139/2004.

19 On 13 February 2019, the Commission adopted a statement of objections by which it concluded that the proposed concentration would result in a significant impediment to effective competition in a substantial part of the internal market for the purposes of Article 2 of Regulation No 139/2004.

20 On 27 February 2019, the parties to the proposed concentration submitted to the Commission their response to the statement of objections. They confirmed that they were not requesting a hearing.

21 On 20 March 2019, the Commission sent the parties to the proposed concentration a letter setting out the facts and evidence corroborating the objections set out in the statement of objections. The parties to the proposed concentration submitted their observations on that letter on 25 March 2019.

22 On 1 April 2019, the parties to the proposed concentration submitted commitments in order to address the competition concerns identified in the statement of objections.

23 On 23 April 2019, the parties submitted revised commitments.

24 During the administrative procedure, in addition to requests for information sent to the parties to the proposed concentration, the Commission contacted a number of market participants – including customers and competitors of the parties to the proposed concentration – and requested information from them, in accordance with Article 11 of Regulation No 139/2004. A series of discussions and meetings between the parties to the proposed concentration and the Commission also took place. In addition, the Commission provided a number of documents to the parties and granted them access to the file on a number of occasions.

25 On 11 June 2019, the Commission, pursuant to Article 8(3) of Regulation No 139/2004, adopted the decision at issue, by which it declared that the proposed concentration was incompatible with the internal market and the EEA.

26 In that decision, the Commission set out considerations relating to, inter alia, the relevant markets, the effects of the proposed concentration on competition and the commitments of the parties to the proposed concentration.

27 As regards the product markets in question, the Commission found, in recital 256 of the decision at issue, that hot-dip galvanised steel ('HDG') and electrogalvanised steel ('EG') likely constituted distinct product markets but that it was not necessary to conclude on that specific question.

28 In recital 257 of that decision, the Commission found, in essence, that the production and supply of HDG to the automotive industry ('automotive HDG') constituted a distinct product market, separate from the production and supply of HDG for other applications.

29 In recital 301 of the decision at issue, the Commission found that the production and supply of tin plate ('TP') and electrolytic chromium coated steel ('ECCS') for packaging constituted distinct product markets.

30 In recital 302 of that decision, the Commission further concluded that the production and supply of laminated steel for packaging also constituted a distinct product market.

31 As regards the geographic markets concerned, in recital 456 of the decision at issue, the Commission found, in essence, that the relevant geographic market for the production and supply of automotive HDG was at most EEA-wide, and there was also evidence of geographic differentiation within the EEA.

32 In recital 457 of the decision at issue, the Commission found that the relevant geographic markets for the production and supply of TP, ECCS and laminated steel for packaging were at most EEA-wide.

33 Concerning the effects of the proposed concentration on competition, the Commission found in recitals 1250 and 1669 of the decision at issue that the transaction would result in a significant impediment to effective competition in relation to the production and supply of automotive HDG in the EEA due to horizontal non-coordinated effects resulting from the elimination of an important competitive constraint.

34 In recitals 1416, 1417, 1419 and 1670 of the decision at issue, the Commission also considered that the proposed concentration would result in a significant impediment to effective competition as regards the production and supply of TP and of laminated steel for packaging in the EEA, since it created a dominant position in the relevant markets. In that regard, the Commission stated that, in any event, the proposed concentration would also give rise to horizontal non-coordinated effects on the production and supply of TP and laminated steel for packaging in the EEA by eliminating an important competitive constraint.

35 In recitals 1418, 1419 and 1671 of the decision at issue, the Commission found that the proposed concentration would result in a significant impediment to effective competition in relation to the production and supply of ECCS for packaging in the EEA due to horizontal non-coordinated effects resulting from the elimination of an important competitive constraint.

36 As regards the commitments offered by the parties to the proposed concentration, the Commission concluded, in recitals 1668 and 1672 of the decision at issue, that those commitments did not entirely eliminate the significant impediments to effective competition that would be caused by the proposed concentration with regard to, first, metallic-coated steel (TP and ECCS) and laminated steel for packaging in the EEA and, second, automotive HDG in the

EEA, and that they were not comprehensive or effective from all points of view. In addition, the Commission considered that it could not be concluded with the requisite degree of certainty that the JV's business would be viable under the envisaged remedy structure.

37 Consequently, the Commission declared the proposed concentration to be incompatible with the internal market.

The procedure before the General Court and the judgment under appeal

38 By an application lodged at the Registry of the General Court on 22 August 2019, thyssenkrupp brought an action for annulment of the decision at issue.

39 In support of that action, thyssenkrupp relied on eight pleas in law.

40 The first plea alleged procedural errors, errors of law and manifest errors of assessment regarding the definition of the markets for automotive HDG and for steel for packaging. The second plea alleged procedural errors, errors of law and manifest errors of assessment regarding the definition of the geographic markets for automotive HDG and for steel for packaging. The third plea alleged procedural errors, errors of law and manifest errors of assessment concerning the finding of a significant impediment to effective competition in the alleged market for automotive HDG. The fourth plea alleged procedural errors, errors of law and manifest errors of assessment concerning the finding of a significant impediment to effective competition in the alleged markets for TP, ECCS and laminated steel for packaging. The fifth plea alleged procedural errors and manifest errors of assessment of the remedies offered by the parties to the proposed concentration. The sixth plea alleged that there was no statement of reasons for the decision at issue with regard to GOES. The seventh plea alleged a procedural error in not enforcing replies from market participants to requests for information. The eighth plea alleged errors of assessment concerning the analysis of the concentration which led to the decision of 7 May 2018, Case COMP/M.8.444 ArcelorMittal/Ilva ('the AM/Ilva Case') following the alleged failure of that concentration.

41 By the judgment under appeal, the General Court rejected all of those pleas and, accordingly, dismissed thyssenkrupp's action in its entirety.

Forms of order sought

42 thyssenkrupp claims that the Court should:

– set aside the judgment under appeal;

– annul the decision at issue;

– in the alternative, refer the case back to the General Court for determination in accordance with the judgment of the Court of Justice; and

– order the Commission to pay the costs incurred by the appellant before the General Court and the Court of Justice.

43 The Commission contends that the Court should:

– dismiss the appeal; and

– order thyssenkrupp to pay all of the costs of the proceedings.

The appeal

44 thyssenkrupp puts forward five grounds in support of its appeal.

45 The first ground alleges multiple errors of law concerning, inter alia, the definition of a separate product market for automotive HDG, the definition of the relevant geographic market, the assessment of the incentive of ArcelorMittal ('AM') to constrain a post-transaction price increase, the possible existence of a significant impediment to effective competition, and the standard of proof required of the Commission. The second ground alleges, in essence, that the General Court, first of all, made multiple errors of law relating to the determination of the automotive HDG and laminated steel markets. Next, the General Court erred in dismissing certain arguments advanced by thyssenkrupp as ineffective. Lastly, the General Court failed to rule on certain complaints set out in the application at first instance because it had not correctly understood thyssenkrupp's criticisms. The third ground alleges, first, that the General Court misinterpreted Article 2 of Regulation No 139/2004 and recital 25 of that regulation, and that it erred in finding that the Commission could rely on the same factors in order to support its two theories of competitive harm. Second, the General Court, in essence, misinterpreted the concept of 'important competitive force'. Third, the General Court misinterpreted the concept of 'close competitors'. Fourth, the General Court made multiple errors concerning AM's future conduct after the proposed concentration and whether that undertaking could be considered a viable switching option for customers of TP or ECCS. Fifth, the General Court made multiple errors concerning the impact on competition of imports of automotive HDG products and steel for packaging. Sixth, the General Court distorted certain evidence and erred in law in exercising its judicial review of the HHI calculation in respect of the markets for HDG, TP and ECCS. The fourth ground alleges, first, that the General Court, distorting certain evidence, failed to adjudicate on a line of argument advanced by thyssenkrupp and, second, that the General Court erred in law in finding that the Commission had not infringed thyssenkrupp's rights of defence. The fifth ground alleges, in essence, that the General Court failed to rule on the seventh plea of the application at first instance because it had not properly understood that plea.

The first ground of appeal

The first part of the first ground of appeal

– *Arguments of the parties*

46 thyssenkrupp argues that the General Court made multiple errors of law in the judgment under appeal, which come within five different legal categories. First, the General Court failed to engage in a proper and full judicial review of the decision at issue. Second, the General Court merely repeated and described the Commission's assessment as set out in that decision. Third, the

General Court endorsed the Commission's assessment without carrying out its own assessment. Fourth, the General Court quoted evidence without examining it. Fifth, the General Court left relevant points or pleas undecided.

47 thyssenkrupp thus submits a table schematically indicating more than 70 paragraphs of the judgment under appeal, the corresponding categories of error and the issue concerned by each alleged error.

48 In that context, by giving, in essence, five concrete examples of errors of law which the General Court is alleged to have made, thyssenkrupp raises five specific complaints.

49 First, thyssenkrupp argues that, in paragraphs 58 to 63 of the judgment under appeal, which relate to certain market definitions, the General Court merely reproduced, multiple times, certain recitals of the decision at issue, but did not carry out an assessment of them. The General Court thus failed to examine whether the Commission's reasoning was correct; nor did it provide reasons for not conducting that assessment.

50 Second, by rejecting, in paragraphs 80 to 85 of the judgment under appeal, thyssenkrupp's line of argument seeking to demonstrate that the Commission should have applied the 'small but significant and non-transitory increase in price (SSNIP)' test to evaluate supply-side substitutability in the HDG market, the General Court did not examine the Commission's assessment, but merely repeated it.

51 Third, in paragraphs 186 to 189 of the judgment under appeal, the General Court merely summarised the Commission's reasoning as set out in the decision at issue, without carrying out its own assessment, which led it to err in finding that there was a set of evidence demonstrating that the Commission's conclusions were 'valid' and that the Commission had implicitly taken into account thyssenkrupp's objections.

52 Fourth, thyssenkrupp submits that, in paragraphs 279 and 283 of the judgment under appeal, the General Court erred in finding that the Commission was not required to evaluate the economic evidence presented to it or to prove its theory of competitive harm. thyssenkrupp argues that, in any event, the General Court erred in law in finding, in paragraph 279 of the judgment under appeal, that the specific and available economic evidence of the prospective effects of the proposed concentration could be ignored. Having regard to the principle of EU law that the evaluation of evidence should be unfettered, the General Court cannot consider that the absence of economic studies establishing the likely development of the market situation at issue and demonstrating that there is an incentive for the market participants and the merged entity to behave in a particular way is not in itself decisive.

53 This would also be true, it is submitted, even where the commercial interests of an undertaking must be taken into account in order to ascertain whether those interests militate predominantly in favour of a given course of conduct. According to thyssenkrupp, the 'commercial interest of an undertaking' is in itself a fundamentally economic question which requires the analysis of economic evidence, and the General Court cannot divorce that purely economic question from a consideration of the available economic evidence. Furthermore, the deficiencies in the economic evidence in the Commission's assessments and the General Court's assessments constitute a distortion of the evidence by the Commission and the General Court, respectively.

54 Fifth, according to thyssenkrupp, the General Court failed to carry out a full review of the decision at issue since, as is apparent from paragraphs 279 to 290 of the judgment under appeal, the General Court confined itself to examining specific issues.

55 In the alternative, thyssenkrupp argues that, in all of the paragraphs of the judgment under appeal cited in the table it has submitted, the General Court breached its duty to state reasons.

56 The Commission disputes both the admissibility and the merits of thyssenkrupp's arguments.

– *Findings of the Court*

57 As regards the admissibility of thyssenkrupp's arguments presented schematically in a table setting out paragraphs of the judgment under appeal, the corresponding categories of error and the issue concerned by each alleged error, it should be borne in mind that, in accordance with settled case-law, it is apparent from the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment under appeal and the legal arguments specifically advanced in support of the appeal, failing which the appeal or the ground of appeal in question will be dismissed as inadmissible (judgment of 28 September 2023, *QI and Others* v *Commission and ECB*, C-262/22 P, EU:C:2023:714, paragraph 71).

58 A ground of appeal supported by an argument that is not sufficiently clear and precise to enable the Court to exercise its powers of judicial review, in particular because essential elements on which the ground of appeal is based are not indicated sufficiently coherently and intelligibly in the text of the appeal, which is worded in a vague and ambiguous manner in that regard, does not satisfy those requirements and must be dismissed as inadmissible. The Court has also held that an appeal lacking any coherent structure which simply makes general statements and contains no specific indications as to the points of the decision under appeal which may be vitiated by an error of law must be dismissed as clearly inadmissible (judgment of 28 September 2023, *QI and Others* v *Commission and ECB*, C-262/22 P, EU:C:2023:714, paragraph 72).

59 The Court observes that, in the present case, while, in its table, thyssenkrupp precisely identifies the paragraphs of the judgment under appeal which it seeks to challenge by its first ground of appeal, it does not precisely and specifically state the errors of law allegedly made by the General Court in those paragraphs.

60 Merely listing, out of context and schematically, more than 70 paragraphs of the judgment under appeal, the corresponding categories of error and the issue concerned by each alleged error does not meet the requirements set out in paragraphs 57 and 58 above. Consequently, all of the complaints that are not specifically supported by legal arguments must be dismissed as inadmissible.

61 Only the five complaints in respect of which thyssenkrupp has precisely indicated the contested elements of the judgment under appeal and submitted legal arguments which specifically support those claims can therefore be considered admissible.

62 As regards the merits of thyssenkrupp's first complaint by which it argues that, in paragraphs 58 to 63 of the judgment under appeal, the General Court did not carry out its own assessment of thyssenkrupp's arguments, but merely reproduced, multiple times, certain recitals of the decision at issue, without stating reasons for that lack of assessment, it should be stated that that complaint is based on a misreading of the judgment under appeal.

63 In paragraphs 58 to 70 of that judgment, the General Court examined thyssenkrupp's arguments by which that company challenged the Commission's findings that, first, 'EG and HDG likely constitute distinct markets' and, second, 'the outcome of the competitive assessment would be the same regardless of whether a distinct HDG market or [an overall galvanised steel] (HDG+EG) market is considered'. As is apparent from paragraph 52 of the judgment under appeal, which is not contested by thyssenkrupp, that company had argued before the General Court that those findings were incorrect for three reasons. First, competitors have significant spare capacities for EG, the inclusion of which would have to lead to lower capacity shares of the merging parties. Second, such inclusion would have shown that spare capacities are not scarce and would not, post-transaction, largely be in the hands of AM and the parties to the proposed concentration. Third, there is no justification not to include EG in a relevant market for automotive HDG.

64 While, in its assessment of those arguments, the General Court referred to certain recitals of the decision at issue, the fact remains that it did so as part of its own review of that decision and of the Commission's reasoning set out therein.

65 First, in paragraphs 58 and 59 of the judgment under appeal, the General Court found that the Commission's conclusion, in recital 132 of the decision at issue, that it was unnecessary to determine whether HDG and EG constitute distinct product markets or whether an overall galvanised steel market should be considered, was based on two facts, set out in recitals 133 to 136 of that decision. First, the Commission stated that TSE was not active in the EG market. Secondly, it found that including EG in the same market with HDG would increase the combined market share held by the parties to the proposed concentration. Nonetheless, given the small volume of EG compared to HDG and the consequently small part of galvanised steel that it represented, the outcome of the competitive assessment was, according to the Commission, likely the same. The General Court noted that those reasons had not been contested by thyssenkrupp. In those circumstances, the General Court held, in paragraph 59 of the judgment under appeal, that the Commission could not therefore be criticised for failing to justify the conclusion set out in recital 132 of the decision at issue.

66 Second, it is apparent from paragraphs 60 to 62 of the judgment under appeal that the General Court examined the Commission's assessment concerning substitutability between HDG and EG. Indeed, in paragraph 60 of that judgment, the General Court noted that 'supply-side substitutability between HDG and EG cannot arise, since, as is apparent from recital 138 of the [decision at issue], which refers to an internal TSE document which has not been challenged by [thyssenkrupp], HDG and EG production processes are different, and that it is undeniable that the equipment used to produce one cannot be used to produce the other. Therefore, as stated in recital 144 of that decision, from the supply side, switching from HDG to EG is not sufficiently cheap and swift'.

67 As regards supply-side substitutability between HDG and EG, the General Court relied on recitals 137 and 144 of the decision at issue to conclude, in paragraph 61 of the judgment under appeal, that, even assuming that the substitutability between HDG and EG, which are only

substitutable in a single direction, that is to say, from EG to HDG, would justify a broader market definition, the fact remains that any EG spare capacity could not be used to satisfy the demand of HDG customers.

68 It is on the basis of those reasons, which have not been specifically challenged by thyssenkrupp, that the General Court held, in paragraph 62 of the judgment under appeal, that taking into account the presence of spare capacities for EG would have no bearing on the conclusion reached by the Commission in recital 132 of the decision at issue.

69 Third, the General Court found, in paragraph 63 of the judgment under appeal, that thyssenkrupp had not substantiated its claim that rivals of the parties to the proposed concentration other than AM possessed significant EG spare capacities.

70 In those circumstances, it cannot be claimed that the General Court did not carry out its own assessment of the Commission's reasoning and merely cited certain recitals of the decision at issue.

71 The first of the five specific complaints raised in the first part of the first ground of appeal must therefore be rejected as unfounded.

72 By its second complaint, thyssenkrupp argues, in essence, that, in rejecting, in paragraphs 80 to 85 of the judgment under appeal, its line of argument seeking to demonstrate that the Commission should have applied the SSNIP test to evaluate supply-side substitutability in the HDG market, the General Court did not carry out its own assessment of thyssenkrupp's arguments, but simply repeated the Commission's assessment.

73 It is clear, however, that that complaint is also based on a misreading of the judgment under appeal, in particular paragraphs 74 to 85 of that judgment.

74 It is apparent from paragraphs 74 to 76 of the judgment under appeal that, after recalling the content of paragraph 15 of the Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5; 'the notice on market definition'), the General Court considered that the Commission is not bound by any test when determining whether the products concerned may be substitutable and that it retains the right to choose, from a range of evidence permitting an assessment of the extent to which substitution may take place, which evidence it considers the most appropriate in each individual case. The General Court therefore found that the Commission was not required to apply the SSNIP test.

75 In paragraph 78 of the judgment under appeal, the General Court stated that defining the 'relevant market' did not require the Commission to follow a rigid hierarchy of different sources of information or types of evidence, but instead the Commission was required to make an overall assessment and could take account of a range of evidence.

76 In that context, the Court of Justice finds that, contrary to thyssenkrupp's submission, the General Court, in paragraphs 79 to 84 of the judgment under appeal, carried out its own examination of that company's arguments in order to verify whether and how the Commission had examined the extent of supply-side substitutability with respect to automotive HDG, including as regards HDG production capacity currently used for non-automotive customers.

77 At the end of that examination, the General Court found, in paragraph 85 of the judgment under appeal, that the Commission had not erred in basing its conclusions as to the definition of a distinct market as regards automotive HDG on its assessment of the evidence gathered without applying a SSNIP test, and therefore the second complaint put forward by thyssenkrupp in the first part of the first plea before the General Court had to be rejected.

78 In those circumstances, it cannot be claimed that the General Court did not carry out its own assessment of thyssenkrupp's arguments and simply repeated the Commission's assessment. The second of the five specific complaints raised in the first part of the first ground of appeal must therefore be rejected as unfounded.

79 By its third complaint, thyssenkrupp submits that, in paragraphs 186 to 189 of the judgment under appeal, the General Court simply reproduced the Commission's reasoning as set out in the decision at issue, without carrying out its own assessment of the arguments raised before it, which led it to err in finding that there was a set of evidence referred to in that decision demonstrating that the Commission's conclusions were valid and that the Commission had implicitly taken thyssenkrupp's objections into account.

80 In that regard, it should be recalled that, in paragraphs 186 to 189, the General Court examined thyssenkrupp's line of argument that, in the context of its interpretation of certain of thyssenkrupp's and TSE's internal documents, the Commission failed to take account of explanations provided by those companies during the administrative procedure, which demonstrated that those documents were not suitable to prove a limitation of the geographic scope of the markets for automotive HDG and steel for packaging to the EEA.

81 Contrary to thyssenkrupp's submission, the General Court set out the reasons why it considered that that company's line of argument, set out in the preceding paragraph of the present judgment, could not succeed.

82 In its detailed examination of that decision, the General Court found, first of all, in paragraph 186 of the judgment under appeal, that the evidence taken into account by the Commission consisted not only of internal documents of the parties to the proposed concentration, but also of statements by competitors gathered during the Commission's market investigation.

83 Next, the General Court held, in paragraph 187 of the judgment under appeal, that thyssenkrupp had not established that the Commission had misconstrued the internal documents of the parties to the proposed concentration in a manner manifestly at odds with their wording.

84 In addition, in paragraph 188 of that judgment, the General Court carried out its own examination of thyssenkrupp's line of argument concerning the Commission's assessment of those documents and found that that company's explanations were not sufficiently convincing to render implausible the findings made by the Commission in recitals 351 to 361 of the decision at issue.

85 Lastly, the General Court found, in paragraph 189 of the judgment under appeal, that the Commission could not be criticised for having ignored the arguments of the parties to the proposed concentration, given that that institution had responded implicitly but necessarily to those arguments, taking the view that the explanations provided by thyssenkrupp and TSE were not capable of altering the assessment which it had adopted in its statement of objections.

86 Accordingly, it cannot be claimed that the General Court did not carry out its own assessment of thyssenkrupp's arguments and simply repeated the Commission's findings.

87 The third of the five specific complaints raised in the first part of the first ground of appeal must therefore be rejected as unfounded.

88 By its fourth complaint, thyssenkrupp argues that, in paragraphs 279 and 283 of the judgment under appeal, the General Court erred in finding that the Commission was not required to evaluate the economic evidence submitted to it or to prove the theory of competitive harm on which it relied in order to prohibit the proposed concentration. In any event, the General Court erred in finding, in paragraph 279 of the judgment under appeal, that the specific and available economic evidence of the prospective effects of the proposed concentration could be ignored. Furthermore, thyssenkrupp submits that the deficiencies in the economic evidence in the assessments made by the Commission and by the General Court amount to a distortion of the evidence on the part of the Commission and the General Court.

89 In that regard, it is clear that that complaint is based on a misreading of the judgment under appeal and, in any event, is unfounded.

90 As is apparent from paragraph 277 of that judgment, the General Court found that the Commission had to rely on evidence that is reliable and consistent, and that all of that evidence had to contain all the relevant information which must be taken into account in order to assess a complex situation.

91 In paragraph 278 of the judgment under appeal, the General Court also stated that the Commission's review of concentrations called for a prospective analysis which consisted in an examination of how a concentration might alter the factors determining the state of competition on a given market and, consequently, constitute a serious impediment to effective competition. It pointed out that that prospective analysis made it necessary to envisage various chains of cause and effect with a view to ascertaining which of them was the most likely.

92 In addition, in paragraph 279 of the judgment under appeal, the General Court considered that 'the onus [was] on the Commission to produce convincing evidence as to the likelihood of those chains of cause and effect. In some cases, such evidence [could] consist of economic studies establishing the likely development of the market situation at issue and demonstrating that there is an incentive for the market participants and the merged entity to behave in a particular way. However, having regard to the principle of EU law that the evaluation of evidence should be unfettered, the absence of evidence of that type [was] not in itself decisive. In particular, in a situation in which it [was] obvious that the commercial interests of an undertaking militate predominantly in favour of a given course of conduct, the Commission [did] not commit a manifest error of assessment in finding that it [was] likely that the market participants or merged entity will actually engage in the conduct foreseen. In such a case, the simple economic and commercial realities of the particular case [could] constitute such convincing evidence.'

93 It is in the light of those considerations that the General Court examined thyssenkrupp's complaint alleging a manifest error of assessment as regards AM's incentive to constrain a price increase after the proposed concentration.

94 Thus, in paragraph 283 of the judgment under appeal, the General Court held that, 'in order to establish the likely development of the market situation at issue and to determine whether there is an incentive for the market participants and the merged entity to behave in a particular way, the Commission [was] not bound to rely on sophisticated economic studies'. The General Court found that the Commission could 'rely on considerations relating to whether those market participants or that merged entity will actually engage in the conduct foreseen, where it [was] obvious that the commercial interests of an undertaking [militated] predominantly in favour of a given course of conduct, which it [had] demonstrated to be the case here'. The General Court considered that it followed 'that the Commission was able, in particular, to rely in that regard on the simple economic and commercial realities of the present case'.

95 However, it must be stated that it does not in any way emerge from the abovementioned paragraphs of the judgment under appeal that the General Court considered that the Commission was not required to evaluate the economic evidence submitted to it by the parties concerned, or to prove its theory of competitive harm.

96 Indeed, the General Court stated, in paragraphs 279 and 280 of that judgment, that the onus was on the Commission to produce convincing evidence in order to demonstrate that a transaction was likely significantly to impede effective competition in the internal market or in a substantial part of it.

97 Admittedly, the General Court considered, in essence, that, in order to establish the likely development of the market situation at issue and to assess whether there is an incentive for the market participants or the merged entity to behave in a particular way, the Commission was not bound to rely necessarily on sophisticated economic studies, in particular, where it was clear from other evidence that the commercial interests of an undertaking militated predominantly in favour of a given course of conduct.

98 Nevertheless, it should be stated, in that regard, that it does not follow either from Regulation No 139/2004 or from case-law that the only admissible evidence, in order to establish the likely development of the market situation at issue and to assess whether there is an incentive for the market participants or the merged entity to behave in a particular way, are economic studies.

99 It should be borne in mind that the prevailing principle of EU law is that the evaluation of evidence should be unfettered (judgment of 10 September 2020, *Hamas* v *Council*, C-386/19 P, EU:C:2020:691, paragraph 73 and the case-law cited), with the result that the Commission may, in principle, rely on evidence of any kind, which does not negate the requirement emanating from the case-law that the evidence must be sufficiently cogent, consistent, reliable and factually accurate (see, to that effect, judgment of 13 July 2023, *Commission* v *CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraphs 75 and 125).

100 In the present case, the General Court referred, in paragraph 277 of the judgment under appeal, to the reasons contained in paragraph 35 of that judgment, by which it recalled that the EU judicature must not only establish whether the evidence put forward is factually accurate, reliable and consistent, but also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it. It is in the light of paragraph 35 in particular that the General Court made the findings set out in paragraphs 282 and 283 of the judgment under

appeal, examining the items of evidence taken into account by the Commission in the decision at issue, in addition to the economic data provided by thyssenkrupp and TSE in order to rebut the economic analysis presented by those companies during the administrative procedure.

101 In those circumstances, it cannot be held that the General Court made the error of law alleged by thyssenkrupp as regards paragraphs 279 and 283 of the judgment under appeal.

102 Lastly, as to the argument based on an alleged distortion in the General Court's assessment, it follows from the second paragraph of Article 256(1) TFEU, Article 58(1) of the Statute of the Court of Justice of the European Union, and Article 168(1)(d) and Article 169(2) of the Rules of Procedure of the Court of Justice that an appeal must identify precisely the contested elements of the judgment which the appellant seeks to have set aside and the legal arguments specifically advanced in support of the appeal. Thus, where an appellant alleges distortion of the evidence by the General Court, that person must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in that person's view, led to such distortion (judgment of 26 July 2017, *Staatliche Porzellan-Manufaktur Meissen* v *EUIPO*, C-471/16 P, EU:C:2017:602, paragraph 34).

103 However, by its argument, thyssenkrupp does not precisely identify the evidence allegedly distorted by the General Court.

104 Therefore, that argument must be rejected as inadmissible.

105 In those circumstances, the fourth of the five specific complaints raised in the first part of the first ground of appeal must be rejected as being in part unfounded and in part inadmissible.

106 As regards, lastly, thyssenkrupp's fifth and final complaint, by which it argues that the General Court failed to carry out a full review of the decision at issue, since, in paragraphs 279 to 290 of the judgment under appeal, it confined itself to examining specific issues, it should be borne in mind that it follows from the rules governing the procedure before the EU Courts, in particular Article 21 of the Statute of the Court of Justice of the European Union and Article 76 and Article 84(1) of the Rules of Procedure of the General Court, that the dispute is in principle determined and circumscribed by the parties and that the EU Courts may not rule *ultra petita* (judgment of 13 July 2023, *Commission* v *CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraph 324).

107 While certain pleas may, and indeed must, be raised by the courts of their own motion, such as the question whether a statement of reasons for the decision at issue is lacking or is inadequate, which falls within the scope of essential procedural requirements, a plea going to the substantive legality of that decision, which falls within the scope of infringement of the Treaties or of any rule of law relating to their application, within the meaning of Article 263 TFEU, can, by contrast, be examined by the EU Courts only if it is raised by the applicant (judgment of 13 July 2023, *Commission* v *CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraph 325).

108 Thus, the judicial review which the General Court can exercise is, in principle, strictly linked to the specific pleas in law put forward in the application at first instance.

109 The fifth of the five specific complaints raised in the first part of the first ground of appeal must therefore be rejected as unfounded.

110 In addition, in the light of the foregoing, thyssenkrupp's contention, raised in the alternative, that the General Court failed to comply with its obligation to state reasons in respect of those five specific complaints must also be rejected.

111 Therefore, the first part of the first ground of appeal must be rejected as being in part unfounded and in part inadmissible.

The second part of the first ground of appeal

– *Arguments of the parties*

112 By its first complaint, thyssenkrupp argues that the General Court erred in law by failing to find that, in order to demonstrate a significant impediment to effective competition, the Commission should have applied a two-stage test, within the meaning of paragraph 51 of the judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala* (C-413/06 P, EU:C:2008:392), and of paragraph 113 et seq. of the judgment of the General Court of 28 May 2020, *CK Telecoms UK Investments* v *Commission* (T-399/16, EU:T:2020:217).

113 That test involves, in the first place, an evaluation of the future conduct to be engaged in by the merged entity and the other operators post-merger, by means of the assessment of the economic outcome attributable to the concentration which is most likely to ensue.

114 In the second place, that two-stage test requires, by means of a prospective analysis of the reference market, an assessment of whether the future conduct will probably lead to a situation in which effective competition in the relevant market is significantly impeded.

115 By its second complaint, thyssenkrupp argues that, in particular in paragraphs 270 to 290, 304, 432 and 433, 448 to 453, 540 to 544, 551, 570, 613, 633, 737 and 754 of the judgment under appeal, the General Court erred in law by finding that the Commission was not required to demonstrate with a 'strong probability' the existence, in the present case, of a significant impediment to effective competition.

116 However, according to thyssenkrupp, it follows from paragraph 118 of the judgment of 28 May 2020, *CK Telecoms UK Investments* v *Commission* (T-399/16, EU:T:2020:217), that the Commission is required to demonstrate with a 'strong probability' the existence of significant impediments to effective competition following a concentration and that the standard of proof applicable to that institution is therefore stricter than that under which a significant impediment to effective competition is 'more likely than not'.

117 According to thyssenkrupp, applying a standard of proof that is less strict, such as that applied by the General Court in the present case, entails wrongfully reversing the burden of proof because the notifying party would be required to prove with a 'strong probability' that there is no significant impediment to effective competition.

118 Furthermore, thyssenkrupp submits that, by not requiring the Commission to demonstrate with a 'strong probability' that the proposed concentration would result in a significant impediment to effective competition in the internal market, the General Court accepted that the Commission could rely on a general presumption that such impediment exists.

119 The Commission disputes both the admissibility and the merits of thyssenkrupp's arguments.

120 In its reply, thyssenkrupp states that, contrary to the Commission's submission, the second part of the first ground of appeal is admissible since the shortcomings in the Commission's analysis of the concentration in relation to the need to carry out a two-stage test had already been raised at first instance, as is apparent from paragraph 14 et seq., 26 et seq., 58 et seq., 63, 69, 72 et seq., 128, 135, 139 and 153 of the application at first instance.

– *Findings of the Court*

121 As regards, in the first place, the admissibility of thyssenkrupp's first complaint in the second part of the first ground of appeal, although that company argues that it stated on multiple occasions before the General Court that the Commission's findings concerning automotive HDG and steel for packaging were vitiated by manifest errors of assessment and of law, it has failed to show that it raised specific pleas at first instance concerning the alleged obligation on the Commission and on the General Court to carry out a two-stage test, within the meaning of paragraph 51 of the judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala* (C-413/06 P, EU:C:2008:392), and paragraph 113 et seq. of the judgment of 28 May 2020, *CK Telecoms UK Investments* v *Commission* (T-399/16, EU:T:2020:217).

122 None of the paragraphs of the application at first instance to which thyssenkrupp refers in order to demonstrate that it had raised, before the General Court, the complaints set out in the preceding paragraph contain such specific pleas or arguments.

123 In that regard, it is sufficient to point out that, under Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. The jurisdiction of the Court of Justice in an appeal is confined to a review of the findings of law on the pleas argued before the General Court. A party cannot therefore put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court, since that would amount to allowing that party to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court (judgment of 25 March 2021, *Slovak Telekom* v *Commission*, C-165/19 P, EU:C:2021:239, paragraphs 98 and 99 and the case-law cited).

124 Since the first complaint of the second part of the first ground of appeal was not put forward by the applicant before the General Court, it must be rejected as manifestly inadmissible.

125 As regards the admissibility of the second complaint of the second part of the present ground of appeal, based on the standard of proof incumbent on the Commission when it has to prove the existence of a significant impediment to effective competition, in accordance with Article 2(3) of Regulation No 139/2004, it must be borne in mind that, in accordance with settled case-law, the alleged failure to have regard to the applicable rules of evidence is a question of law which is admissible in an appeal (see, inter alia, judgment of 28 November 2019, *ABB* v *Commission*, C-593/18 P, EU:C:2019:1027, paragraph 28 and the case-law cited). As stated in paragraph 115 above, thyssenkrupp criticises the General Court for having found that the Commission was not required to demonstrate with a 'strong probability' the existence of a significant impediment to effective competition. In those circumstances, it must be found that the second complaint of the second part of the first ground of appeal is admissible.

126 As regards the merits of that complaint, suffice it to state that thyssenkrupp's argument is based on the premiss that it follows from paragraph 118 of the judgment of 28 May 2020, *CK Telecoms UK Investments* v *Commission* (T-399/16, EU:T:2020:217), that the Commission is required to demonstrate with a 'strong probability' the existence of significant impediments to effective competition following a concentration and that the standard of proof applicable to the Commission is therefore stricter than that under which a significant impediment to effective competition is 'more likely than not'.

127 However, as the Court of Justice held in paragraphs 87 and 88 of its judgment of 13 July 2023, *Commission* v *CK Telecoms UK Investments* (C-376/20 P, EU:C:2023:561), that premiss is incorrect. Having regard, in particular, to the symmetrical structure of Article 2(2) and (3) of Regulation No 139/2004 and to the prospective nature of the Commission's economic analyses when conducting a review of concentrations, it must be held that, in order to declare that a concentration is incompatible or compatible with the internal market, it is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it.

128 In those circumstances, the second complaint of the second part of the first ground of appeal is unfounded.

129 It follows that the second part of the first ground of appeal must be rejected as in part manifestly inadmissible and in part unfounded.

The second ground of appeal

The first part of the second ground of appeal

– *Arguments of the parties*

130 thyssenkrupp argues that, in paragraphs 55 to 71, 74 to 85, 88 to 93, 98 to 107 and 112 to 114 of the judgment under appeal, the General Court made multiple errors with regard to the definition of the relevant market in the present case. The General Court is also said to have distorted the evidence and/or failed to comply with its obligation to state reasons.

131 In the first place, in paragraphs 55 to 57 of the judgment under appeal, the General Court erred in finding that the Commission did not base the decision at issue on the existence of a separate market for automotive HDG.

132 In the second place, thyssenkrupp argues, in essence, that the Commission made a manifest error when it confined itself, in Sections 9.1 to 9.4 of the decision at issue, to carrying out a competitive assessment of the proposed concentration by relying only on the automotive HDG market and not also on a broader market including EG and HDG. According to thyssenkrupp, that manifest error on the part of the Commission should have been uncovered and found by the General Court.

133 In the third and final place, thyssenkrupp argues that, for the purpose of defining the relevant market, the General Court erred in imposing, in particular in paragraph 103 of the judgment under appeal, a 'requirement for perfect substitutability' between automotive and

non-automotive HDG. The General Court is also said to have erred in law by not requiring the Commission to specify the technical criteria on the basis of which certain production lines of the product market in question could be included for the purpose of determining supply-side substitutability. Furthermore, the General Court reversed the burden of proof by requiring the notifying parties to demonstrate that no factors whatsoever existed that might limit substitution possibilities between automotive and non-automotive HDG production.

134 The Commission disputes both the admissibility and the merits of thyssenkrupp's arguments.

– *Findings of the Court*

135 As regards, in the first place, the admissibility of the first part of the second ground of appeal, by which the appellant contends that the General Court made multiple errors with regard to the definition of the relevant market in the present case, it should be borne in mind that, as is apparent from the case-law referred to in paragraphs 57 and 58 above, an appeal must indicate precisely the contested elements of the judgment under appeal and the legal arguments specifically advanced in support of the appeal, failing which the appeal or the ground of appeal in question will be dismissed as inadmissible. A ground of appeal supported by an argument that is not sufficiently clear and precise to enable the Court of Justice to exercise its powers of review, in particular because essential elements on which the ground of appeal is based are not indicated coherently and intelligibly in the appeal, does not satisfy those requirements and must be dismissed as inadmissible. The Court has also held that an appeal lacking any coherent structure which simply makes general statements and contains no specific indications as to the points of the decision at issue which may be vitiated by an error of law must be dismissed as clearly inadmissible.

136 In the present case, since the complaints put forward by thyssenkrupp concerning the paragraphs of the judgment under appeal other than paragraphs 55 to 57 and 103 of that judgment are not supported by specific legal arguments, they must be rejected as inadmissible. The same is true as regards the argument that the General Court breached its obligation to state reasons.

137 In so far as thyssenkrupp also challenges paragraphs 55 to 57 of the judgment under appeal on the ground that, contrary to the finding in recital 132 of the decision at issue, the Commission relied, in essence, on the existence of a separate market for automotive HDG in other sections of that decision, thyssenkrupp must be regarded as contesting the merits of that finding and therefore as asking the Court of Justice to carry out a fresh assessment of the facts, which is not permissible at the appeal stage.

138 In the second place, as regards the admissibility of the line of argument that the General Court distorted certain evidence, it should be recalled, as is apparent from paragraph 102 above, that where an appellant alleges distortion of the evidence by the General Court, the appellant must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in that person's view, led to such distortion.

139 However, by its argument, thyssenkrupp does not precisely identify the evidence that was distorted by the General Court.

140 Therefore, that line of argument must also be rejected as inadmissible.

141 In the third place, as regards the admissibility of thyssenkrupp's line of argument that, in essence, the General Court should have uncovered and found that the Commission had made a manifest error of assessment when it confined itself, in Sections 9.1 to 9.4 of the decision at issue, to carrying out a competitive assessment of the proposed concentration based only on the automotive HDG market and not also on a broader market including EG and HDG, it should be pointed out that, before the General Court, thyssenkrupp merely argued that the Commission was wrong to conclude that the outcome of that competitive assessment would have been the same for either market. Contrary to thyssenkrupp's argument in its reply, that finding is confirmed by paragraph 14 et seq. of the application at first instance, to which it had referred in that regard.

142 As stated in paragraph 123 above, under Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. The jurisdiction of the Court of Justice in an appeal is confined to a review of the findings of law on the pleas argued before the General Court. A party cannot therefore put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court, since that would amount to allowing that party to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court.

143 Consequently, thyssenkrupp's line of argument must be rejected as inadmissible.

144 In the fourth and final place, as regards the admissibility of thyssenkrupp's argument that the General Court erred in law by not requiring the Commission to specify the technical criteria on the basis of which certain production lines of the product market in question could have been included for the purpose of determining supply-side substitutability, suffice it to state that, since thyssenkrupp did not raise such an argument at first instance, that argument must also be classified as a 'new plea in law' and, accordingly, rejected as inadmissible.

145 As regards the merits, first, of thyssenkrupp's line of argument by which that company claims that the General Court erred in finding that the Commission had not based the decision at issue on the existence of a distinct market for automotive HDG, it should be held that, in any event, that line of argument is based on a misreading of the judgment under appeal. In paragraphs 55 to 57 of the judgment under appeal, the General Court did not make such a finding. It found, in paragraphs 55 to 57, that, according to the Commission, it was unnecessary to determine, in the present case, whether or not HDG and EG constituted distinct product markets, given that the outcome of the competitive assessment would be the same for both a distinct HDG market and an overall galvanised steel (HDG + EG) market.

146 Consequently, that complaint put forward by thyssenkrupp must also be rejected as unfounded.

147 Second, as regards thyssenkrupp's complaint that, for the purpose of defining the relevant market, the General Court erred in imposing, in particular in paragraph 103 of the judgment under appeal, a 'requirement for perfect substitutability' between automotive and non-automotive HDG, it should be found that that complaint is also based on a misreading of the judgment under appeal.

148 In paragraphs 101 to 103 of the judgment under appeal, the General Court simply addressed one of the arguments advanced by thyssenkrupp. It is apparent from paragraph 95 of the judgment under appeal, which contains an accurate summary of that argument, that thyssenkrupp argued before the General Court that those types of steel were perfectly substitutable from a supply-side

perspective and that, except in the case of advanced high-strength steel, which requires specific assets, the vast majority of HDG production lines in the EEA could produce other HDGs for automotive customers or could be upgraded accordingly with minor investments.

149 In addition, it is apparent from paragraphs 101 and 102 of the judgment under appeal that the General Court examined the question whether, in the light of paragraph 20 of the notice on market definition, suppliers could easily switch their product range to such an extent as to justify an expansion of the scope of the market to all HDG. No requirement for perfect substitutability can be derived from that paragraph.

150 In paragraph 103 of the judgment under appeal, the General Court considered that the investments needed to upgrade production lines to adapt them for the production of automotive HDG were far from minor. The General Court thus found that the Commission could not be criticised for considering that automotive and non-automotive HDG were not perfectly substitutable from a supply-side perspective.

151 In those circumstances, the complaint that the General Court allegedly imposed a 'requirement for perfect substitutability' between automotive and non-automotive HDG must be rejected as unfounded.

152 Third, as regards thyssenkrupp's line of argument that the General Court reversed the burden of proof by requiring the notifying parties to demonstrate that no factors existed that might limit substitution possibilities between automotive and non-automotive HDG production, it should be stated that that line of argument is based on a misreading of the judgment under appeal.

153 In paragraphs 79 to 83 of that judgment, the General Court found that the Commission had indeed examined the extent of supply-side substitutability and had demonstrated that that substitutability was insufficient to justify including non-automotive HDG in the relevant product market. Thus, it cannot be claimed that the General Court reversed the burden of proof by not requiring the Commission but rather the notifying parties to demonstrate that no factors existed that might limit substitution possibilities between automotive and non-automotive HDG production.

154 The first part of the second ground of appeal must therefore be rejected as in part inadmissible and in part unfounded.

The second part of the second ground of appeal

– *Arguments of the parties*

155 thyssenkrupp claims that the General Court infringed Article 2(3) of Regulation No 139/2004 by finding, in paragraphs 118 to 122 and 127 to 136 of the judgment under appeal, that laminated steel for packaging constituted a distinct product market.

156 In particular, thyssenkrupp submits, in the first place, that the General Court's assessment of supply-side substitutability is vitiated by errors of law, an insufficient statement of reasons and a distortion of the evidence. That company argues that the General Court erred in stating, in

paragraph 118 of the judgment under appeal, that the Commission had found in recital 293 of the decision at issue that participants in the packaging steel sector did not produce laminated steel with existing organic coated steel production equipment.

157 thyssenkrupp submits that, in recital 293 of the decision at issue, the Commission stated only that the production of laminated steel requires specific manufacturing equipment, setting it apart from the production of TP and ECCS. According to thyssenkrupp, the General Court should have examined whether existing organic coated steel production equipment could be used to produce laminated steel, thus enabling supply-side substitutability.

158 In the second place, thyssenkrupp argues that, in paragraph 119 of the judgment under appeal, the General Court reversed the burden of proof in finding that that company was required to show broader supply-side substitutability.

159 In the third and final place, thyssenkrupp argues, first, that in, inter alia, paragraphs 132 to 134 of the judgment under appeal, the General Court erred in law on the ground that it failed to find that the Commission should have applied the SSNIP test to determine the range of substitutable products, in accordance with the requirements stemming from the notice on market definition.

160 Second, according to thyssenkrupp, the General Court, in paragraph 132 of the judgment under appeal, distorted the evidence when it found that customers' responses to the questions concerning substitutability between laminated steel and lacquered steel in the market investigation launched by the Commission clearly showed that the majority of the customers expressing a position cogently indicated limitations in substitutability.

161 The Commission disputes thyssenkrupp's arguments.

– *Findings of the Court*

162 As regards, in the first place, thyssenkrupp's line of argument alleging, in essence, first, that in paragraph 118 of the judgment under appeal the General Court did not reproduce recital 293 of the decision at issue accurately and, second, that, for the purpose of determining supply-side substitutability, the General Court did not examine whether existing organic coated steel production equipment could be used to produce laminated steel, it should be stated that that line of argument is based on a misreading of both the judgment under appeal and the decision at issue.

163 First, it must be stated that the General Court did reproduce recital 293 of the decision at issue accurately, since it is clear from that recital that the Commission found that the fact that the parties to the proposed concentration had dedicated production lines for laminated steel and that competitors of the parties to the proposed concentration with organic coated steel production lines were not active in the production and supply of laminated steel questioned the parties' argument that existing organic coated steel production lines would enable supply-side substitutability.

164 Second, it is apparent from paragraphs 118 to 121 of the judgment under appeal that, for the purpose of determining supply-side substitutability, the General Court took account of existing organic coated steel production equipment in relation to the possibility of producing laminated steel.

165 First of all, in paragraph 119 of that judgment, the General Court found that technical feasibility is a necessary but not sufficient condition for supply-side substitutability. Next, in paragraph 120 of that judgment, the General Court stated that, as is apparent from paragraph 23 of the notice on market definition, in order for supply-side substitutability to be relevant for the purposes of product market definition, suppliers should be able to switch production, in particular, without significant delays and without incurring substantial additional investments, which is at odds with the additional production step needed to transform TP or ECCS into laminated steel, which requires them to add an additional coating, namely a plastic film applied to steel substrate. Lastly, in paragraph 121 of the judgment under appeal, the General Court considered that the Commission's finding, in recital 293 of the decision at issue, that thyssenkrupp and TSE have specific lamination lines for that additional step in the production of laminated steel shows that they have had to incur significant additional costs, which militates against any supply-side substitutability within the meaning of paragraph 23 of the notice on market definition.

166 In those circumstances, it cannot be claimed that the General Court failed to examine whether existing organic coated steel production equipment could be used to produce laminated steel, thus enabling supply-side substitutability.

167 In the second place, as regards thyssenkrupp's line of argument that, in paragraph 119 of the judgment under appeal, the General Court reversed the burden of proof in so far as it found that that company was required to show broader supply-side substitutability, it must be stated that that line of argument is also based on a misreading of that judgment.

168 It does not follow from paragraph 119 of the judgment under appeal that the General Court required thyssenkrupp to show broader supply-side substitutability while relieving the Commission of its burden of proof in merger cases.

169 On the other hand, it is apparent from paragraphs 118 to 121 of the judgment under appeal that the General Court considered that the Commission had substantiated its assessment of supply-side substitutability in the present case and that thyssenkrupp had failed to show that the Commission's assessment was vitiated by procedural errors, errors of law or manifest errors of assessment.

170 Therefore, it cannot be found that the General Court relieved the Commission of its obligation to prove whether or not the proposed concentration would significantly impede effective competition in the internal market or in a substantial part of it. Nor did the General Court require thyssenkrupp to show broader supply-side substitutability.

171 In the third and final place, regarding, first, thyssenkrupp's complaint that the General Court erred in law by not finding that the Commission had failed to apply the SSNIP test to determine the range of substitutable products, it should be stated that, as paragraph 15 of the notice on market definition confirms, the SSNIP test is merely 'one way' of assessing substitutability between the products concerned. It also follows from paragraph 25 of that notice that 'there is a range of evidence permitting an assessment of the extent to which substitution would take place' and that 'the Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases [and] does not follow a rigid hierarchy of different sources of information or types of evidence.'

172 It follows that the Commission did not limit itself in the sense that it would always apply the SSNIP test when determining whether the products concerned may be substitutable. It therefore has discretion to choose, from the range of evidence referred to in paragraph 25 of the notice on market definition, which evidence it considers the most appropriate in each individual case.

173 As regards, second, thyssenkrupp's criticism based on an alleged distortion of the evidence relating to the substitutability between laminated steel and lacquered steel, it should be pointed out that, in essence, thyssenkrupp merely argues that, in paragraph 132 of the judgment under appeal, the General Court distorted the evidence in finding that customers' responses to the questions concerning substitutability between laminated steel and lacquered steel clearly showed that the majority of the customers expressing a position cogently indicated limitations in substitutability. thyssenkrupp adds that the finding that that position is that of the 'majority' of customers constitutes a distortion of the evidence. According to that company, to reach that conclusion, it is not necessary to carry out a fresh assessment of the merits, but simply to count the responses.

174 However, instead of precisely identifying the evidence allegedly distorted by the General Court, thyssenkrupp merely refers to its application at first instance and to Annex A.4d mentioned in paragraph 132 of the judgment under appeal, which runs to 592 pages and includes all the responses given by customers to the questions asked by the Commission in its market investigation.

175 Accordingly, since thyssenkrupp has not precisely identified the evidence alleged to have been distorted in the present case, its line of argument must be rejected as inadmissible.

176 The second part of the second ground of appeal must therefore be rejected as in part inadmissible and in part unfounded.

The third part of the second ground of appeal

– *Arguments of the parties*

177 thyssenkrupp claims that the General Court erred in finding, in paragraph 56 of the judgment under appeal, that its arguments seeking to show that HDG and EG belong to the same market must be rejected in their entirety as ineffective.

178 The Commission disputes thyssenkrupp's arguments.

– *Findings of the Court*

179 It should be pointed out that, in paragraph 56 of the judgment under appeal, the General Court found, in essence, that since the Commission had not definitively concluded that HDG and EG belong to separate markets, the arguments by which thyssenkrupp seeks to show that HDG and EG belong to the same market had to be rejected in their entirety as ineffective.

180 In paragraph 57 of that judgment, the General Court found that, in any event, those arguments also had to be rejected as unfounded for the reasons set out in paragraphs 58 to 70 of that judgment.

181 Since, as is apparent, in essence, from paragraphs 62 to 70 above, thyssenkrupp has not demonstrated that the General Court erred in law in paragraphs 58 to 70 of the judgment under appeal, the third part of the second ground of appeal must be dismissed as ineffective.

The fourth part of the second ground of appeal

– *Arguments of the parties*

182 thyssenkrupp argues that the General Court failed to rule on the first complaint of the first plea of the application at first instance and breached its obligation to state reasons by misapprehending that company's criticism concerning the need to take account of the Commission's earlier decision-making practice and, in particular, the decision delivered in the AM/Ilva case.

183 According to thyssenkrupp, it in fact submitted at first instance that there was no factual basis for assuming a separate market for automotive HDG, relying on certain facts of the AM/Ilva case which, it is argued, should also have been taken into account in the present case, given that they relate to the same products and the same relevant markets. In particular, those facts included findings on the supply-side substitutability between high-end products and commodity products, the price constraint exerted by commodity products, and the fact that AM was about to acquire two large HDG plants from Ilva capable of producing large volumes of high-quality HDG and automotive HDG.

184 The Commission disputes thyssenkrupp's arguments.

– *Findings of the Court*

185 It is clear from the application at first instance that thyssenkrupp argued that, in the AM/Ilva case, automotive HDG was not considered a separate market and that a separate market should not be found to exist in the present case. According to that company, the fact that no such separate market exists was supported by two general findings by the Commission contained in recitals 295 and 602 et seq. of the decision in the AM/Ilva case.

186 In paragraphs 65 to 69 of the judgment under appeal, the General Court correctly understood thyssenkrupp's complaint and rejected its arguments.

187 In particular, in paragraph 65 of that judgment, the General Court held that the reference to Commission precedents concerning flat carbon steel products and, in particular, the decision in the AM/Ilva case was irrelevant.

188 In paragraph 66 of that judgment, the General Court held that, in accordance with the settled case-law of the General Court, 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, according to the General Court, in so far as thyssenkrupp relies in this instance on assessments made by the Commission in a previous decision, that part of its argument is irrelevant.

189 In addition, the General Court found in paragraph 68 of the judgment under appeal that, in any event, neither the Commission nor, a fortiori, the General Court is bound in this instance by the findings of fact or economic assessments in the Commission precedents concerning flat carbon steel products and, in particular, the decision in the AM/Ilva case, to which thyssenkrupp refers. Even on the assumption that the analysis conducted in that decision differs from that conducted in the decision at issue in the present case, without any objective justification for that difference, the General Court ought to annul the decision at issue in the present proceedings only if that decision, as opposed to the decision in the AM/Ilva case, was vitiated by errors.

190 Thus, in paragraph 69 of the judgment under appeal, the General Court held that thyssenkrupp cannot criticise the Commission for failing to follow its previous decision-making practice in the decision at issue by claiming that the Commission did not carry out the same assessment of the facts in the present case as in the previous cases, and in particular in the AM/Ilva case, to which thyssenkrupp refers.

191 The fourth part of the second ground of appeal must therefore be dismissed as unfounded.

192 It follows that the second ground of appeal must be dismissed as in part inadmissible and in part unfounded.

The third ground of appeal

The first part of the third ground of appeal

– *Arguments of the parties*

193 By its first complaint, thyssenkrupp claims that the General Court, in particular in paragraphs 561 and 562 of the judgment under appeal, misinterpreted and misapplied Article 2 of Regulation No 139/2004 and recital 25 of that regulation when it found that the Commission could conclude, in recital 1419 of the decision at issue, that there could be a significant impediment to effective competition resulting from the creation of a dominant position as regards TP and laminated steel for packaging, and a significant impediment to effective competition resulting from non-coordinated horizontal effects in the TP, ECCS and laminated steel markets. According to thyssenkrupp, recital 25 of Regulation No 139/2004 does not allow those two different concepts to apply in parallel. That recital does not, thyssenkrupp argues, make clear that the purpose of the legislative amendment resulting from that regulation was to facilitate a non-restrictive interpretation of the significant impediment to effective competition test. Thus, according to thyssenkrupp, the concept of non-coordinated effects in oligopolistic markets can come into play only if no dominant position has been found.

194 thyssenkrupp submits that, in the present case, the Commission and the General Court left open the question whether or not the merged entity would become dominant and, as a consequence, they erred in lowering the intervention threshold. Yet, as the General Court held in its judgment of 28 May 2020, *CK Telecoms UK Investments* v *Commission* (T-399/16, EU:T:2020:217), there is no indication that Article 2(3) of Regulation No 139/2004 was intended to introduce a lower intervention threshold.

195 By its second complaint, thyssenkrupp argues, in essence, that, in paragraphs 564 and 565 of the judgment under appeal, the General Court, without carrying out its own analysis, simply referred to recitals 1413 to 1419 of the decision at issue in order to find that the Commission 'clearly distinguishe[d] the elements on which the finding of the creation of a dominant position [was] based from those which [led] it to conclude that there are non-coordinated horizontal effects'. According to thyssenkrupp, the assessment of economic effects must be different depending on whether the merger involves a dominant position or non-coordinated effects in an oligopolistic market. thyssenkrupp submits that even if, in paragraph 565 of the judgment under appeal, the General Court could find that the same factors could be taken into account to support both theories of competitive harm put forward by the Commission, the fact remains that the General Court could not consider that the Commission had clearly distinguished those two theories and the relevant markets.

196 In addition, in paragraph 563 of the judgment under appeal, the General Court erred in finding that thyssenkrupp did not refer to any specific element of the Commission's analysis in order to criticise the Commission for failing to distinguish between the two theories of competitive harm. According to thyssenkrupp, the very essence of its complaint that the Commission had failed to draw such a distinction means that it is unable to describe more specifically where in the Commission's analysis the omission occurred.

197 By its third and final complaint, thyssenkrupp criticises the General Court for simply summarising the decision at issue in paragraphs 567 and 568 of the judgment under appeal without assessing its content.

198 The Commission disputes the merits of thyssenkrupp's arguments and the admissibility of the second complaint.

– *Findings of the Court*

199 As regards thyssenkrupp's first complaint, it should be borne in mind that, 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 internal market.

200 As is apparent, in essence, from recital 25 of that regulation, Article 2(3) thereof concerns the incompatibility with the internal market of a concentration between undertakings active in an oligopolistic market where that concentration significantly impedes effective competition even though the merged entity does not hold a dominant position on the market concerned.

201 In particular, it stems from the last sentence of recital 25 of Regulation No 139/2004 that the notion of 'significant impediment to effective competition' within the meaning of Article 2(2) and (3) of that regulation must be interpreted as extending, beyond the concept of dominance, only to the anticompetitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned. As stated in the third sentence of that recital, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition.

202 In that context, it must be stated that the clearest non-coordinated horizontal effects occur when the merged entity obtains or strengthens an individual dominant position.

203 As the General Court stated in paragraph 562 of the judgment under appeal, relying on paragraph 51 of the judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36), a market may be dominated by an individual undertaking and at the same time be oligopolistic. Also in such an oligopolistic market, the individual dominant position of such an undertaking may be strengthened by the non-coordinated horizontal effects of such a merger, such as those referred to in paragraph 201 above.

204 In those circumstances, the General Court did not err in law when, in paragraphs 561 and 562 of the judgment under appeal, it interpreted Article 2(3) of Regulation No 139/2004 and recital 25 of that regulation as meaning that the concepts of, on the one hand, the creation or strengthening of a dominant position and, on the other, the existence of non-coordinated horizontal effects resulting from the elimination of an important competitive constraint in an oligopolistic market are compatible and not mutually exclusive.

205 The first complaint must therefore be rejected as unfounded.

206 As regards the plea of inadmissibility raised by the Commission concerning the second complaint and alleging that thyssenkrupp has not supported that complaint with specific legal arguments, suffice it to state that, in its appeal, that company has presented sufficiently specific legal arguments. In addition, by those arguments, thyssenkrupp is not asking the Court of Justice to carry out a fresh assessment of the facts in the present case, contrary to the Commission's contention. That plea of inadmissibility must therefore be rejected.

207 As regards the merits of the second complaint, it should be stated, in the first place, that, contrary to thyssenkrupp's submission, the General Court conducted its own analysis of thyssenkrupp's argument concerning whether, in the present case, the Commission relied on the same factors to arrive at two different conclusions.

208 It is apparent from paragraphs 564 and 565 of the judgment under appeal that the General Court found that, in recitals 1413 to 1419 of the decision at issue, the Commission had separately analysed, on the one hand, the creation of a dominant position and, on the other, the existence of non-coordinated horizontal effects, even if both analyses were, in part, based on the same factual elements. In particular, the General Court stated, in paragraph 564 of that judgment, that 'the Commission found, primarily, that a dominant position would be created on the basis of market shares and several other factors mentioned in Sections 9.5.3. to 9.5.9. of that decision and, in the alternative, that there would also be non-coordinated horizontal effects resulting from the elimination of a significant competitive constraint, on the basis of the considerations set out in Sections 9.5.3. to 9.5.12. of that decision'.

209 Concerning the fact that those analyses were, in part, based on the same factual elements, the General Court found, in paragraph 565 of that judgment, that 'the Commission's analysis of a dominant position and of non-coordinated horizontal effects [could not] be carried out other than by necessarily focusing on the same factual elements, such as market shares and capacity, imports, the reaction of competitors and buyer power, as examined in the subdivisions of Section 9.5. of the [decision at issue], since the same factors [had to] be taken into account for both analyses'.

210 It therefore follows from those findings of the General Court that the General Court itself carried out an examination of the Commission's analysis concerning the effects of the concentration at issue.

211 In the second place, since, as follows from paragraphs 202 to 204 above, the concepts of, on the one hand, the creation or strengthening of a dominant position and, on the other, the existence of non-coordinated horizontal effects due to the elimination of an important competitive constraint in an oligopolistic market are not mutually exclusive and the clearest non-coordinated horizontal effects occur when the merged entity obtains or strengthens an individual dominant position, it cannot be claimed that the General Court erred in law by finding, in paragraph 565 of the judgment under appeal, that the Commission could, to a certain extent, rely on the same factors and indicators to show that the proposed concentration could have given rise to the creation of a dominant position or result in non-coordinated horizontal effects.

212 In the third and final place, as regards thyssenkrupp's argument that, in paragraph 563 of the judgment under appeal, the General Court erred in finding that thyssenkrupp did not refer to any specific element of the Commission's analysis to support its claim that the Commission had failed to distinguish between its two theories of competitive harm, suffice it to state that, since thyssenkrupp has not proved that the General Court erred in finding, in paragraphs 564 and 565 of the judgment under appeal, that the Commission distinguished the elements on which those two theories are based, that argument must be rejected as ineffective.

213 In those circumstances, thyssenkrupp's second complaint must be rejected as unfounded.

214 As regards the third and final complaint, it must be found that, since thyssenkrupp's argument reproduced in paragraph 567 of the judgment under appeal and examined in paragraphs 567 and 568 of that judgment concerned only whether the Commission's assessment of the elements capable of demonstrating the creation or strengthening of a dominant position had to be carried out differently from the evaluation of other non-coordinated effects, it cannot be claimed that the General Court did not conduct its own analysis of the Commission's economic assessment when it sought to respond precisely to that argument.

215 In paragraph 568 of that judgment, the General Court stated, first, that 'as regards the market for TP, the Commission assessed AM's incentives to counter a price increase by the merged entity, taking into consideration, inter alia, economic factors, such as the oligopolistic structure of the market, the unwillingness of customers to increase their dependence on AM, the fact that combating a price increase would lead to a fall in prices on all volumes and the lack of AM's spare capacity (recitals 1288 and 1289)'. Second, 'as regards the market for ECCS, the Commission evaluated AM's incentives to offset such an increase, relying in particular on the oligopolistic structure of the market and on an analysis of the applicant's internal documents showing, according to the applicant, AM's likely behaviour in that market (recitals 1294 to 1297).' Moreover, since thyssenkrupp has not proved that the General Court erred in law in paragraphs 567 and 568 of the judgment under appeal, its criticisms concerning paragraph 566 of that judgment are ineffective.

216 In those circumstances, thyssenkrupp's third and final complaint must be rejected as unfounded. Consequently, the first part of the third ground of appeal is dismissed.

The second part of the third ground of appeal

– *Arguments of the parties*

217 By its first complaint, thyssenkrupp argues that the General Court misunderstood the content of the first complaint of the fifth part of the third plea of the application at first instance and failed correctly to define the relevant criteria for evaluating whether TSE could be categorised as an 'important competitive force'.

218 By that complaint, thyssenkrupp states that its submission before the General Court was that, in the decision at issue, the Commission neither indicated the legal standard applicable for the purpose of categorising TSE as an 'important competitive force' nor analysed whether the situation in question came within one of the two scenarios described in paragraphs 37 and 38 of the Horizontal Merger Guidelines. According to thyssenkrupp, the Commission simply claimed, in recital 965 of the decision at issue, that, before the proposed concentration, TSE was an important competitive force, even beyond what its current market share would suggest, in particular because it was actively targeting share expansion on the relevant market.

219 In that context, in paragraph 463 of the judgment under appeal, the General Court erred in interpreting the concept of 'important competitive force' very broadly and therefore erred in law when it found, as a consequence, that that concept captures situations where market shares of an undertaking only give a useful first indication of the competitive importance of market participants.

220 Furthermore, the General Court should have taken into account the lessons stemming from paragraph 174 of the judgment of 28 May 2020, *CK Telecoms UK Investments* v *Commission* (T-399/16, EU:T:2020:217), according to which an 'important competitive force' must stand out from its competitors in terms of impact on competition, otherwise any undertaking in an oligopolistic market exerting competitive pressure could be categorised as an 'important competitive force'.

221 By its second complaint, thyssenkrupp raises six main arguments.

222 First, the assessment carried out by the General Court as part of its examination of the second complaint of the fifth part of the third plea of the application at first instance is vitiated by an error of law, since the General Court failed to conduct a proper judicial review. In particular, thyssenkrupp submits that, in particular in paragraphs 476, 478, 484 and 486 of the judgment under appeal, the General Court merely repeated and described the Commission's assessment as contained in the decision at issue and did not provide any reasons making it possible to understand whether the General Court deemed the arguments and evidence presented by the Commission sufficient to support the latter's findings that, in essence, TSE is making above-average investments and focuses on growing its market share in the automotive HDG sector.

223 Second, thyssenkrupp submits that the General Court erred in finding, in paragraph 477 of the judgment under appeal, that, as regards the evidence adduced for the purpose of demonstrating that other automotive HDG suppliers were at the same time also making investments similar to those made by TSE in that sector, greater weight had to be given to the statements of those suppliers made in the Commission's market investigation than to the evidence adduced by thyssenkrupp and TSE.

224 Third, in paragraphs 478 and 485 of the judgment under appeal, the General Court was wrong to refer to recital 1079 of the decision at issue for the purposes of its examination of the Commission's assessment concerning whether TSE could be categorised as an 'important competitive force'. That recital, it is submitted, has nothing to do with that assessment.

225 Fourth, thyssenkrupp submits that paragraph 482 of the judgment under appeal is vitiated by contradictory reasoning. On the one hand, the General Court found in paragraph 482 that the Commission did not make an error of assessment when it found that the economic data submitted by thyssenkrupp and TSE, which concerned the evolution of TSE's market share from 2012 to 2017, were not decisive in the categorisation of that company as an 'important competitive force', in particular because, as is apparent from recital 901 of the decision at issue, after the investments made, some of TSE's assets would likely only start upgraded production at the earliest between 2019 and 2021.

226 On the other hand, the General Court found in paragraph 482 that, as was apparent from recital 901 of the decision at issue, the Commission had not assumed that TSE's market share between 2019 and 2021 would increase.

227 In that context, thyssenkrupp states that if the Commission considered that TSE's market share had not increased significantly in the past because some of its assets had not yet started upgraded production, it must have assumed that TSE's share would increase once the upgraded production would start. Otherwise, there would have been no argument for the Commission to categorise TSE as an 'important competitive force'.

228 In addition, according to thyssenkrupp, the General Court failed to take account of that company's argument that an increase in TSE's competitive force following the start of the upgraded production could not be assumed without considering the effects of known corresponding contemporaneous and parallel investments made by TSE's competitors.

229 Fifth, thyssenkrupp argues that, in paragraph 487 of the judgment under appeal, the General Court failed to independently examine its line of argument that, in essence, TSE's investments were only aimed at catching up with its competitors. In that context, the General Court also distorted recital 897 of the decision at issue in finding that thyssenkrupp and TSE admitted that they had no evidence to support their observation. Rather, thyssenkrupp and TSE had merely acknowledged that the fact on which they relied in that regard had not explicitly been stated in the evidence provided by those two undertakings. In addition, the General Court failed to examine the evidence before it.

230 Sixth, thyssenkrupp argues that, in paragraph 490 of the judgment under appeal, the General Court rejected its argument that the Commission had ignored evidence produced by thyssenkrupp and TSE seeking to show that a number of customers and competitors did not share the view that TSE was an 'important competitive force', without conducting its own analysis and without specifying the recitals of the decision at issue relating to the Commission's examination of that evidence.

231 The Commission disputes thyssenkrupp's arguments.

– *Findings of the Court*

232 As regards thyssenkrupp's first complaint, alleging, in essence, that the General Court misunderstood the content of the first complaint of the fifth part of the third plea of the application at first instance and failed correctly to define the relevant criteria for evaluating whether TSE could be categorised as an 'important competitive force', it should be pointed out, in the first place, that, in paragraphs 454 to 464 of the judgment under appeal, the General Court examined the first complaint of the fifth part of the third plea of the application at first instance.

233 In paragraphs 454 to 458 of that judgment, the General Court set out thyssenkrupp's arguments. As those paragraphs essentially show, by the first complaint of the fifth part of the third plea of the application at first instance, that company argued that, in recital 883 et seq. of the decision at issue, the Commission failed correctly to apply the criteria for defining what constitutes an 'important competitive force' set out in paragraphs 37 and 38 of the Horizontal Merger Guidelines.

234 As is clear from paragraphs 100 to 102 of the application at first instance, thyssenkrupp referred to the two scenarios described in paragraphs 37 and 38 of the Horizontal Merger Guidelines as relevant criteria and submitted that, in the decision at issue, the Commission failed to examine the applicability of those criteria for the concept of an 'important competitive force'.

235 It follows that the General Court did not misunderstand the content of the first complaint of the fifth part of the third plea of the application at first instance.

236 In the second place, as regards thyssenkrupp's complaint that, in essence, the General Court, first, failed correctly to define the relevant criteria for determining whether TSE could be categorised as an 'important competitive force' and, second, in paragraph 463 of the judgment under appeal, erred in interpreting the concept of 'important competitive force' very broadly, it should be pointed out that, in paragraphs 460 and 461 of the judgment under appeal, the General Court outlined the content of paragraphs 37 and 38 of the Horizontal Merger Guidelines which introduce that concept.

237 In paragraph 462 of that judgment, the General Court found that the two scenarios set out in paragraphs 37 and 38 of the Horizontal Merger Guidelines, namely (i) a firm may be a recent entrant that is expected to exert significant competitive pressure in the future on the other firms in the market, and (ii) a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products, are merely examples of situations in which an important competitive force may arise.

238 In addition, in paragraph 463 of the judgment under appeal, the General Court found that, as is clear from paragraph 37 of the Horizontal Merger Guidelines, the concept of 'important competitive force' captures any situation where a firm's market shares only give a first indication of the competitive importance of market players. According to the General Court, that concept is compatible with paragraph 14 of those guidelines, according to which market shares, although relevant, give only useful first indications of the competitive importance of market participants. The General Court thus held that the Commission must carry out an in-depth analysis of the conditions of competition also by taking into account factors other than market shares, such as the effects of the concentration on competition between the parties and possible reactions from customers and competitors.

239 In that context, in paragraphs 464 to 466 of the judgment under appeal, the General Court found, in essence, that the Commission had conducted a detailed analysis of the competition between the parties to the proposed concentration and the competitive constraint exercised by TSE in the automotive HDG market. The General Court therefore held that the Commission had analysed TSE's specific role and capabilities, reviewed its position relative to other players and found that TSE stood out from most of those other players.

240 In that regard, it should be borne in mind that, under a combined reading of paragraphs 26, 37 and 38 of the Horizontal Merger Guidelines, the elimination of an 'important competitive force' is, in principle, one of the factors which may influence whether significant non-coordinated effects are likely to result from a merger and which thus make it possible to assess, inter alia, whether that concentration would result in the elimination of important competitive constraints that the merging parties had exerted upon each other (judgment of 13 July 2023, *Commission* v *CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraph 160).

241 In addition, it has been held that the concept of 'important competitive force' cannot be applied exclusively to undertakings which compete particularly aggressively in terms of price and which force their competitors on the market to align with their prices or to undertakings whose pricing policy is likely to alter significantly the competitive dynamics of the market concerned (judgment of 13 July 2023, *Commission* v *CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraph 166).

242 Thus, the Court has previously held that, in order to classify an undertaking as an 'important competitive force', it is sufficient, as set out in paragraph 37 of the Horizontal Merger Guidelines, that it has more of an influence on the competitive process than its market share or similar measures would suggest (judgment of 13 July 2023, *Commission* v *CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraph 167).

243 In those circumstances, the General Court did not err in law when it defined the relevant criteria for determining whether TSE could be categorised as an 'important competitive force', interpreted the concept of 'important competitive force' by finding that it also included any situation where market shares only give a first indication of the importance of market players, and found that the Commission was required to carry out an in-depth analysis of the conditions of competition also by taking into account other factors, such as the effects of the concentration on competition between the parties concerned and possible reactions from customers and competitors.

244 The first complaint must therefore be rejected as unfounded.

245 The second complaint comprises six main arguments.

246 As regards the first argument raised in the second complaint, referred to in paragraph 222 above, it should be recalled that the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas raised by the applicant and taking into account all the relevant evidence submitted by the applicant (see, to that effect, judgment of 26 September 2018, *Infineon Technologies* v *Commission*, C-99/17 P, EU:C:2018:773, paragraph 48).

247 The scope of the review exercised by the General Court is therefore limited by the pleas in law raised by the applicant, with the exception of pleas involving matters of public policy.

248 First, it is clear from paragraph 468 of the judgment under appeal, which is not contested by thyssenkrupp, that at first instance that company merely stated that it was unclear on which specific evidence the Commission had relied in order to conclude that TSE had been making above-average investments and was focused on growing its share in the automotive HDG sector. In addition, thyssenkrupp criticised the Commission for dismissing, in recital 896 of the decision at issue, the evidence provided by thyssenkrupp and TSE for the purpose of demonstrating that other automotive HDG suppliers were also making investments similar to those made by TSE in that sector, on the ground that that evidence contradicted the responses of the suppliers themselves and of customers in that sector.

249 Examining those complaints in paragraphs 475 to 479 of the judgment under appeal, the General Court found, in essence, that, contrary to thyssenkrupp's submission, the decision at issue contained a body of evidence demonstrating that TSE was making above-average investments in automotive HDG and was focusing on growing its share in the automotive HDG sector. In particular, in paragraph 476 of that judgment, the General Court found that the Commission could not be criticised for not having cited the evidence on which it relied, since, as is clear from recitals 884 to 892, 948 and 954 of the decision at issue, the Commission relied on internal documents of thyssenkrupp and TSE and on the responses of competitors and customers in the market investigation which it had carried out.

250 In addition, in paragraphs 477 and 478 of the judgment under appeal, the General Court found that, as regards thyssenkrupp's complaint that the Commission could not dismiss, in recital 896 of the decision at issue, the evidence provided by thyssenkrupp and TSE seeking to demonstrate that other automotive HDG suppliers were also making investments similar to those made by TSE, the Commission stated, in recital 896, that it had relied on its market investigation in dismissing that evidence.

251 Second, in paragraphs 484 to 486 of the judgment under appeal, the General Court examined thyssenkrupp's complaints that the Commission did not compare TSE's investments with those of its competitors and failed to take into account the research and development spending or internal strategic plans of those competitors.

252 However, it is clear from paragraphs 484 to 486 of the judgment under appeal that the General Court examined those complaints and held that, in the present case, the Commission had carried out, in recitals 883 to 966 of the decision at issue, a detailed analysis of TSE's specific role, position and capabilities relative to other players in the market concerned and found that TSE stood out from most of those other players. In paragraphs 485 and 486 of the judgment under appeal, the General Court stated that, for the purposes of its analysis, the Commission had taken into account, inter alia, the investments and expansion plans of four competitors of TSE.

253 In those circumstances, thyssenkrupp's criticism with regard to paragraphs 476, 478, 484 and 486 of the judgment under appeal is unfounded.

254 Concerning the second argument raised in the context of the second complaint, referred to in paragraph 223 above, suffice it to state that thyssenkrupp has failed to demonstrate the reason why the General Court should not have given greater weight to the statements of suppliers other than TSE when, as the Commission had stated, they were better placed than thyssenkrupp to comment on their own investment plans.

255 Therefore, that line of argument advanced by thyssenkrupp must be rejected as unfounded.

256 As regards the third argument raised in the context of the second complaint, referred to in paragraph 224 above, it should be stated that, first, in paragraph 478 of the judgment under appeal, the General Court seeks to respond to the line of argument by which thyssenkrupp criticises the Commission for not having cited the evidence on which it relied in categorising TSE as an 'important competitive force'.

257 thyssenkrupp does not dispute the General Court's finding, in paragraph 479 of the judgment under appeal, that the applicant had not shown that, in recitals 883 to 966 of the decision at issue, the Commission was incapable of relying on a body of factually accurate, reliable and consistent evidence that is capable of substantiating the inferences drawn from it.

258 Second, by paragraph 485 of the judgment under appeal, the General Court seeks to respond to thyssenkrupp's argument that the Commission did not compare TSE's investments with those of its competitors for the purpose of categorising TSE as an 'important competitive force'.

259 Even assuming that the General Court should not have referred to recital 1079 of the decision at issue since that recital is not part of the section of that decision specifically dealing with whether TSE constitutes an important competitive force, it should be pointed out that, in any event, the General Court relied on other recitals of that decision which show that the Commission had made that comparison.

260 It is clear from paragraph 484 of the judgment under appeal that, in recitals 883 to 966 of the decision at issue, the Commission analysed TSE's role and specific capabilities as well as TSE's position relative to other market players and found that TSE stood out from most of those other players.

261 It is apparent from recital 896 of that decision, which was examined by the General Court in paragraph 477 of the judgment under appeal, that the Commission had analysed the statement by the parties to the proposed concentration that TSE's competitors were themselves making investments comparable to those of TSE and that the Commission had found that that statement was contradicted by the feedback received from those competitors and customers of the products in question.

262 In those circumstances, thyssenkrupp's line of argument must be rejected as ineffective.

263 As to the fourth argument raised in the context of the second complaint, referred to in paragraphs 225 to 228 above, suffice it to state that that argument concerns a ground included in the judgment under appeal for the sake of completeness. Since arguments directed against grounds included in a decision of the General Court purely for the sake of completeness cannot lead to the decision being set aside and are therefore ineffective (judgment of 13 July 2023, *Commission* v *CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraph 96 and the case-law cited), that line of argument must be rejected as ineffective.

264 As regards the fifth argument raised in the context of the second complaint, referred to in paragraph 229 above, it must be stated that, even if the General Court did not correctly summarise recital 897 of the decision at issue in paragraph 487 of the judgment under appeal, such an error would be irrelevant to thyssenkrupp's contention that the General Court failed to independently examine its claim that TSE's investments were only aimed at catching up with its competitors. In paragraph 488 of the judgment under appeal, which is not challenged by thyssenkrupp, the General Court stated that, in any event, the Commission had rejected that claim in recitals 920

to 932 of the decision at issue and no sufficiently persuasive evidence to the contrary had been put forward by thyssenkrupp to render the assessments made by the Commission in those recitals implausible.

265 In those circumstances, the fifth argument raised in the context of the second complaint, referred to in paragraph 229 above, must be rejected.

266 As regards the sixth argument raised in the context of the second complaint, referred to in paragraph 230 above, it should be found that thyssenkrupp's line of argument is based on a misreading of the judgment under appeal.

267 As is clear from paragraphs 473 and 490 of the judgment under appeal, which contain a summary of thyssenkrupp's complaints, that company merely argued before the General Court that the Commission had ignored that evidence. That fact is confirmed by reading paragraph 107 of the application at first instance.

268 In that context, in paragraph 490 of the judgment under appeal, the General Court specifically addressed that complaint and, referring to recitals 883 to 966 of the decision at issue, found that, contrary to thyssenkrupp's submission, the Commission, in its examination of all of the evidence available to it, had taken that evidence into account, but had considered that it was not sufficiently persuasive to alter its assessment in that regard.

269 Thus, it cannot be claimed that the General Court did not itself assess the evidence adduced by the parties to the proposed concentration or did not specify the recitals of the decision at issue in which the Commission had examined that evidence.

270 In those circumstances, the second complaint of the second part of the third ground of appeal must be rejected as unfounded.

271 Consequently, the second part of the third ground of appeal must be rejected as unfounded.

The third part of the third ground of appeal

– *Arguments of the parties*

272 thyssenkrupp argues that, contrary to the guidance deriving from paragraph 227 et seq. of the judgment of 28 May 2020, *CK Telecoms UK Investments* v *Commission* (T-399/16, EU:T:2020:217), the General Court did not require the Commission to show a particular degree of closeness between thyssenkrupp and TSE both in the automotive HDG market and the packaging steel market. According to thyssenkrupp, the General Court thus misinterpreted and misapplied the concept of 'close competitors' contained in paragraph 28 of the Horizontal Merger Guidelines.

273 First, in paragraph 532 of the judgment under appeal, which concludes the section relating to automotive HDG, the General Court referred to the Commission's finding that thyssenkrupp and TSE are 'close' competitors and not 'particularly' close competitors. The approach followed by the General Court in paragraphs 513, 520 and 521 of the judgment under appeal shows that the General Court did not require the Commission to show that those two companies are particularly close competitors.

274 Second, throughout the section of the judgment under appeal relating to steel for packaging, in particular paragraphs 740 to 745 and 750 to 752 of that judgment, the General Court described the parties to the proposed concentration as 'close' competitors. In particular, it is clear from the General Court's findings contained in paragraphs 735, 739, 747 and 751 of that judgment that the General Court failed to recognise that closeness of competition, within the meaning of paragraph 28 et seq. of the Horizontal Merger Guidelines, requires a particular degree of closeness. It therefore follows from those paragraphs of the judgment under appeal that the General Court did not apply the correct standard of a particular degree of closeness of competition.

275 The Commission disputes both the admissibility and the merits of thyssenkrupp's arguments.

276 In its reply, thyssenkrupp argues that this part is admissible, first, on the ground that although it did not use the words 'particularly close competitors' in its application at first instance, it is clear, inter alia, from paragraph 161 of that application that it referred to paragraph 28 of the Horizontal Merger Guidelines and to the fact that the Commission failed to apply the correct test to determine whether the parties to the proposed concentration offered products which a substantial number of customers regarded as their first and second choices, which would indicate a particular degree of closeness of competition. Second, this issue was raised by thyssenkrupp at the hearing before the General Court.

– *Findings of the Court*

277 In that regard, it should be borne in mind, as is stated in paragraph 123 above, that, under Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. The Court's jurisdiction in an appeal is confined to a review of the findings of law on the pleas argued before the General Court. A party cannot therefore put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court, since that would amount to allowing that party to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court.

278 In the present case, it is apparent from the application at first instance, in particular paragraph 161 thereof, that although thyssenkrupp referred to paragraph 28 of the Horizontal Merger Guidelines, the fact remains that that company did not claim that the Commission had erred when, for the purpose of determining the closeness between thyssenkrupp and TSE, the Commission applied a less stringent test than that under which those two undertakings were to be categorised as 'particularly close competitors'. In fact, thyssenkrupp simply stated that the assessment as to whether there was closeness of competition was essentially an economic assessment of the extent of substitutability between the products of the parties to the proposed concentration and that the questions asked by the Commission to customers in order to determine closeness of competition between the parties to the proposed concentration were the wrong questions.

279 As regards thyssenkrupp's line of argument that, at the hearing before the General Court, that company, referring to the judgment of 28 May 2020, *CK Telecoms UK Investments* v *Commission* (T-399/16, EU:T:2020:217), expressly claimed that the Commission needed to show that thyssenkrupp and TSE are 'particularly close competitors' in relation to both the automotive HDG market and the packaging steel market, suffice it to state that thyssenkrupp has adduced no evidence to support that line of argument.

280 It follows that the third part of the third ground of appeal must be dismissed as unfounded.

281 Accordingly, the third part of the third ground of appeal is rejected.

The fourth part of the third ground of appeal

– *Arguments of the parties*

282 First, thyssenkrupp claims, in essence, that the General Court failed to examine, in paragraphs 279 to 287 of the judgment under appeal, that company's line of argument set out in paragraphs 63 to 68 of the application at first instance. According to that company, the General Court simply restated the evidence relied on by the Commission in the decision at issue.

283 Second, thyssenkrupp criticises the General Court, in essence, for having endorsed, inter alia in paragraph 285 of the judgment under appeal, the Commission's conclusions that post-merger price increases are sustained only by the threat that the merged entity will retaliate if AM were not to accommodate price increases. According to thyssenkrupp, without a finding of coordinated effects to support it, this reasoning would allow the Commission to find a significant impediment to effective competition in all mergers. thyssenkrupp states that all merged entities would have the incentive to raise prices if they could credibly threaten retaliation in the event that rivals were not to accommodate price increases.

284 Third, thyssenkrupp criticises the General Court for confining itself, in paragraphs 611, 612, 615, 617 and 619 of the judgment under appeal, without carrying out its own analysis of whether AM was a viable switching option for customers of TP or ECCS, to summarising the decision at issue, finding that the Commission's economic analysis was 'coherent', 'very plausible' and 'sound'.

285 Furthermore, according to thyssenkrupp, the General Court's assessment in paragraph 615 of the judgment under appeal concerning AM's future conduct after a price increase by the merged entity is flawed in so far as the General Court overlooked the fact that a competitor would only see its demand increasing if it does not follow the merged entity's (hypothetical) price increase.

286 In addition, thyssenkrupp claims that the General Court failed to evaluate, in paragraph 613 et seq. of the judgment under appeal, the amount of 'spare capacity' that might be considered 'sufficient'.

287 The Commission disputes thyssenkrupp's arguments.

– *Findings of the Court*

288 As regards, in the first place, thyssenkrupp's complaint that the General Court failed to examine, in paragraphs 279 to 287 of the judgment under appeal, that company's line of argument set out in paragraphs 63 to 68 of the application at first instance, it must be stated that that complaint results from a misreading of the judgment under appeal.

289 The line of argument put forward by thyssenkrupp in paragraphs 63 to 68 of the application at first instance and summarised in paragraphs 270 and 271 of the judgment under appeal is rejected in paragraphs 282 to 290 of that judgment. In particular, as evidenced by paragraphs 282, 283, 285 and 287 to 289 of that judgment, the General Court found that the Commission had relied on a

body of evidence, on AM's actual market conduct on the automotive HDG market and on the economic data provided by thyssenkrupp and TSE to show that AM did not have any incentive to react to a price increase by the merged entity by increasing its supply. In addition, as is apparent from paragraph 288 of the judgment under appeal, the General Court endorsed the Commission's findings, basing its decision on its own examination of that evidence.

290 In the second place, as regards thyssenkrupp's line of argument alleging, in essence, that the General Court, in particular in paragraph 285 of the judgment under appeal, erred in endorsing the Commission's conclusions that post-merger price increases are sustained only by the threat that the merged entity will retaliate if AM were not to accommodate price increases, it must be stated that that line of argument is also based on a misreading of the judgment under appeal.

291 First, as is apparent from paragraph 266 of that judgment, the General Court examined thyssenkrupp's line of argument that the Commission had made a case for an implicit finding of horizontal coordinated effects because, according to that institution, AM would coordinate its pricing with the merged entity and the merged entity would take such coordination into account in its post-transaction pricing decisions. In paragraphs 268 and 269 of that judgment, the General Court rejected that argument and held, in essence, that the Commission had not taken into account, even implicitly, any horizontal coordinated effects between AM and the merged entity.

292 Second, in paragraphs 282 to 290 of the judgment under appeal, the General Court rejected thyssenkrupp's argument that, in essence, the decision at issue is vitiated by a manifest error of assessment as regards the evidence relied on to establish AM's lack of incentive to constrain a post-transaction price increase, despite huge free capacities being available to it.

293 In its conclusion, the General Court made no finding that post-merger price increases are sustained only by the threat that the merged entity will retaliate if AM were not to accommodate price increases.

294 Third and lastly, as regards thyssenkrupp's line of argument referred to in paragraphs 284 to 286 above, it should be noted that, concerning paragraphs 611, 612, 615, 617 and 619 of the judgment under appeal, those paragraphs concern the General Court's examination of the third part of the fourth plea of the application at first instance relating to an error of law and manifest errors of assessment concerning the possibility for customers to switch supplier in the EEA.

295 It is sufficiently clear from paragraphs 611 to 620 of the judgment under appeal that, contrary to thyssenkrupp's submission, the General Court not only dismissed that company's claim that the Commission had not proved to the requisite legal standard that AM would not be a viable switching option for purchasers of TP or ECCS post-merger, but it also carried out its own assessment of the Commission's findings.

296 After having found, in particular in paragraphs 612 and 616 of the judgment under appeal, that, in relation to both the TP market and the ECCS market, the Commission had supported its prospective analysis of AM's incentives to counter a potential price increase by the merged entity, the General Court, first, in paragraph 614 of that judgment, verified whether that analysis was consistent with paragraphs 32 to 35 of the Horizontal Merger Guidelines, which appear under the heading 'Competitors are unlikely to increase supply if prices increase'. At the end of its examination, it found that an increase in output was unlikely, in particular, when competitors faced binding capacity constraints, as is the case with AM in the present case with respect to TP.

297 Next, as is clear from paragraph 615 of the judgment under appeal, the General Court examined the Commission's prospective analysis and found that it was highly likely that, in the presence of a potential price increase by the merged entity, customers who tried to switch to a competitor, such as AM, which is the only other significant player on the market concerned, would also have faced price increases.

298 According to the General Court, when a competitor sees its demand increasing, it would itself, unilaterally, have an incentive to increase prices rather than keeping prices constant or lowering prices to gain further customers, since to do so would be at odds with the pursuit of profit maximisation. Therefore, the General Court endorsed the Commission's prospective analysis as being coherent and very plausible and, contrary to thyssenkrupp's submission, it cannot be claimed that the General Court incorrectly determined, in paragraph 615 of the judgment under appeal, AM's future conduct in the event of a price increase by the merged entity, having regard, in particular, to that company's capacity constraints, referred to in paragraph 613 of that judgment.

299 In addition, in paragraph 617 of the judgment under appeal, the General Court held that the reasoning set out in paragraph 612 et seq. of that judgment, relating to the market for TP, also applied, in essence, to the ECCS market. It thus confirmed that the Commission's prospective analysis, according to which AM would not have had any incentive to counter a potential increase in ECCS prices post-merger, but would instead follow it and benefit from it, was equally as coherent and very plausible also taking into account the fact that the oligopolistic structure of the ECCS market is likely to be further strengthened following the transaction.

300 Lastly, the General Court found, in paragraph 619 of the judgment under appeal, that the Commission's prospective analysis, in recitals 1288 and 1289 and in recital 1294 et seq. of the decision at issue, was effectively based on a sound economic analysis of AM's reaction to a hypothetical price increase by the merged entity in the markets for TP and ECCS.

301 In those circumstances, it cannot be claimed that the General Court did not carry out its own analysis of the Commission's assessment of the issue whether AM would be a viable switching option for purchasers of TP or ECCS. That complaint put forward by thyssenkrupp therefore results from a misreading of the judgment under appeal.

302 Nor can it be claimed that the General Court failed to evaluate, in paragraph 613 et seq. of the judgment under appeal, the amount of spare capacity that might be considered 'sufficient'. In that regard, suffice it to state, first, that it is not apparent from either paragraph 136 of the application at first instance or paragraph 601 of the judgment under appeal, which reproduces thyssenkrupp's line of argument at first instance, that that company raised such an argument before the General Court, which makes this complaint manifestly inadmissible. Second, the General Court did take account of AM's spare capacity because, as is apparent from paragraphs 612, 613, 618 and 619 of the judgment under appeal, the General Court referred to recital 1289 of the decision at issue, which contains estimates of the spare capacity of competitors of the merged entity, in particular that of AM.

303 Accordingly, the fourth part of the third ground of appeal must be rejected as in part inadmissible and in part unfounded.

The fifth part of the third ground of appeal

– *Arguments of the parties*

304 By its first complaint, thyssenkrupp claims that the General Court, first, failed to point out that it was not possible to find on the basis of TSE's current strategy that customers established in the EEA were not a strategic focus for Asian suppliers Posco, Hyundai Steel and Baosteel, without directly asking those undertakings what their strategic focus was. Second, thyssenkrupp submits that there is an inconsistency in paragraph 545 of the judgment under appeal in so far as, in that paragraph, the General Court found, on the one hand, that Posco, Hyundai Steel and Baosteel were succeeding in providing a material proportion of certain customers' requirements and, on the other, that 'customers themselves expressed a clear preference for sourcing within the EEA'. Third, thyssenkrupp submits that, in paragraph 545 of the judgment under appeal, the General Court erred in requiring that company to show that all customers could be supplied to a large extent by importers. Fourth, thyssenkrupp argues that the General Court ignored the relevant evidence when, in paragraph 545 of the judgment under appeal, it found that the reasons given to justify the fact that Fiat Chrysler Automobiles NV ('FCA') was supplied by imports were not transposable to other customers.

305 By its second complaint, thyssenkrupp argues, first, that, in paragraph 645 of the judgment under appeal, the General Court failed to carry out its own analysis of thyssenkrupp's arguments that the Commission had given disproportionate weight to certain customer statements regarding lead-time restrictions allegedly caused by demand volatility, but simply described the Commission's approach and referred to the responses to Questionnaire 13, without providing any further explanations.

306 Second, according to thyssenkrupp, in paragraph 646 of the judgment under appeal, the General Court reversed the burden of proof in finding that thyssenkrupp's complaint that the Commission disregarded the fact that the parties themselves sold significant volumes to non-EEA customers could have only very limited relevance for the assessment of the relevant markets and the reaction of EEA customers, since thyssenkrupp has not proved the contrary.

307 Third, thyssenkrupp argues, first, that, in paragraph 647 of the judgment under appeal, the General Court distorted the evidence before it and that its reasoning is contradictory. thyssenkrupp submits that, while the General Court found that thyssenkrupp's internal documents, reproduced in Figures 200 and 201 of the decision at issue, 'corroborate[d]' the Commission's findings as to the importance of lead times, the Commission's misinterpretation of those internal documents necessarily had an effect on that institution's assessment.

308 Second, as regards the quality of imports, thyssenkrupp complained, in essence, that the Commission, in recitals 1312 to 1316 of the decision at issue, selectively quoted from its market investigation and disregarded other – contradicting – information from the parties and from that investigation. In that regard, thyssenkrupp submits that it is clear from paragraph 649 of the judgment under appeal that the General Court simply referred to the responses to question 63 of Questionnaire 4 without carrying out its own analysis.

309 The Commission disputes both the merits of thyssenkrupp's line of argument and the admissibility of certain of its arguments.

– *Findings of the Court*

310 As regards thyssenkrupp's first complaint concerning the impact of imports of automotive HDG products on competition, it should be pointed out that the General Court examined the seventh part of the third plea of the application at first instance in paragraphs 534 to 551 of the judgment under appeal.

311 First of all, in paragraphs 541 to 544 of that judgment, the General Court examined thyssenkrupp's complaint that the Commission had not sufficiently assessed to what extent imports constitute a constraint on the parties post-transaction.

312 In that regard, the General Court found, in essence, that, as is apparent from recital 974 of the decision at issue, the Commission's market investigation had revealed that possible future trade flows into the EEA for automotive HDG were minimal and that imports constituted a limited constraint because of factors of a structural and regulatory nature, such as longer lead times, lack of reactivity of the importers, the risk of damage during transport, non-EEA suppliers' lack of technical ability, lack of commercial presence in the EEA and trade defence measures recently imposed on imports of automotive HDG products.

313 Next, in paragraphs 545 and 546 of the judgment under appeal, the General Court found, in essence, that the single example of FCA, as a customer that obtains supplies from imports, referred to by thyssenkrupp, could not alone undermine the fact that the vast majority of automotive customers do not rely, or rely only to a negligible extent, on imports from suppliers outside the EEA, which is not likely to change in the future, as is apparent from recitals 974 and 981 of the decision at issue, which have not been disputed by thyssenkrupp. In particular, the General Court found that the fact that a specific automotive customer was supplied by imports did not mean that this was true for all customers.

314 In addition, in paragraphs 547 to 549 of the judgment under appeal, the General Court examined thyssenkrupp's criticism levelled at the Commission that that institution, without asking Posco, Hyundai Steel and Baosteel whether EEA customers were their strategic focus, allegedly, in recital 1001 of the decision at issue, inferred from TSE's current strategy that EEA customers were not a strategic focus for those companies.

315 In that regard, first, the General Court found that those companies were not strategically focused on EEA customers because products were difficult and expensive to ship globally. Second, the General Court stated that the Commission relied on Table 8 of the decision at issue, drawn up on the basis of data provided by the parties to the proposed concentration, in order to state that the limited share of imports into the EEA indicated that those imports constituted a limited constraint on EEA suppliers. Third, the General Court found that the Commission's market investigation had showed that customers themselves expressed a clear preference for sourcing within the EEA. Thus, the General Court found that, even if the Commission had not inferred from TSE's current strategy that that company's customers were not a strategic focus for Posco, Hyundai Steel and Baosteel, that institution would necessarily have reached the same conclusion, namely that those customers were not a strategic target for those companies.

316 Lastly, in paragraph 550 of the judgment under appeal, the General Court found that Posco is of only minimal relevance as a competitor to thyssenkrupp and TSE in the market for automotive HDG in the EEA. That finding is not challenged by thyssenkrupp before the Court of Justice.

317 Thus, the General Court found in paragraph 551 of the judgment under appeal, that, in the light of all the considerations set out in paragraphs 540 to 550 of that judgment, thyssenkrupp could not validly criticise the Commission for having committed, in recitals 967 to 1033 of the decision at issue, manifest errors of assessment vitiating the finding that imports constituted a limited competitive constraint on EEA suppliers in the automotive HDG sector in the EEA.

318 In that context, it is necessary, in the first place, to examine the third argument put forward in the context of thyssenkrupp's first complaint that, in paragraph 545 of the judgment under appeal, the General Court erred in requiring that company to show that all customers could be supplied to a large extent by imports.

319 It must be found, in that regard, that that claim results from a misreading of paragraph 545.

320 It is true that, in paragraph 545, the General Court found that 'the fact that a specific automotive customer is supplied by imports does not mean that this is true for all customers'. However, that finding does not mean that the General Court required thyssenkrupp to show that all customers could be supplied to a large extent by importers. The General Court stated that, 'in any event, a single example, or even several singular examples, cannot alone undermine the fact that the vast majority of automotive customers do not rely, or only to a negligible extent, on imports from suppliers outside the EEA'. The General Court was simply stating that a general conclusion could not be drawn from isolated examples.

321 In the second place, it is necessary to examine the fourth argument put forward in the context of thyssenkrupp's first complaint that, in paragraph 545 of the judgment under appeal, the General Court ignored the relevant evidence when it found that the reasons justifying why FCA obtained supplies from imports were not applicable to other customers.

322 In that regard, in so far as thyssenkrupp does not contest the substance of the General Court's finding in paragraph 545 of the judgment under appeal that 'a single example, or even several singular examples, cannot alone undermine the fact that the vast majority of automotive customers do not rely, or only to a negligible extent, on imports from suppliers outside the EEA', all of thyssenkrupp's arguments concerning FCA must be rejected as ineffective.

323 In the third place, it is necessary to examine the second argument put forward in the context of thyssenkrupp's first complaint that there is an inconsistency in paragraph 545 of the judgment under appeal in so far as the General Court found, on the one hand, that Posco, Hyundai Steel and Baosteel were succeeding in providing a material proportion of certain customers' requirements and, on the other, that 'customers themselves expressed a clear preference for sourcing within the EEA'.

324 That argument is also based on a misreading of paragraph 545 of the judgment under appeal. The General Court did not find in paragraph 545 that Posco, Hyundai Steel and Baosteel were succeeding in providing a material proportion of the requirements of certain or all EEA customers. On the contrary, as recalled in paragraph 313 above, the General Court found, in essence, that the single example of FCA relied on by thyssenkrupp could not alone undermine the fact that the vast majority of EEA automotive customers did not rely, or relied only to a negligible extent, on imports from suppliers outside the EEA. In particular, the General Court found that the fact that a specific automotive customer was supplied by imports did not mean that this was true for all customers. That finding is consistent with the finding that those customers were not a strategic focus for suppliers outside the EEA.

325 In the fourth and last place, it is necessary to deal with the first argument put forward in the context of thyssenkrupp's first complaint by which that company submits that, without directly asking Posco, Hyundai Steel and Baosteel what their strategic focus was, the General Court could not find on the basis of the information before it that EEA customers were not a strategic focus for those Asian suppliers.

326 That argument must be rejected as ineffective. The question whether EEA customers were a strategic target for Posco, Hyundai Steel and Baosteel is irrelevant since, first, as is apparent from paragraphs 541 to 544 of the judgment under appeal, the Commission's market investigation revealed that possible future trade flows into the EEA for automotive HDG were minimal and that imports constituted a limited constraint because of factors of a structural and regulatory nature, such as longer lead times, lack of reactivity of the importers, the risk of damage during transport, non-EEA suppliers' lack of technical ability, lack of commercial presence in the EEA and trade defence measures recently imposed on imports of automotive HDG products.

327 Second, as is apparent from paragraphs 545 and 546 of the judgment under appeal, the General Court found that the vast majority of automotive customers did not rely, or relied only to a negligible extent, on imports from suppliers outside the EEA, which was not likely to change in the future, as is apparent from recitals 974 and 981 of the decision at issue, which have not been disputed by thyssenkrupp.

328 Thus, even if the Commission wrongly inferred from TSE's current strategy that those customers were not a strategic target for those suppliers, any such error cannot affect the General Court's finding, contained in paragraph 551 of the judgment under appeal, that, in the light of all the considerations set out in paragraphs 540 to 550 of that judgment, thyssenkrupp could not validly criticise the Commission for having committed, in recitals 967 to 1033 of the decision at issue, manifest errors of assessment vitiating the finding that imports constituted a limited competitive constraint on EEA suppliers in the automotive HDG sector in the EEA.

329 Consequently, the first complaint must be rejected as unfounded.

330 As regards the first of the three arguments raised in the context of the second complaint, referred to in paragraph 305 above, it must be found that that argument is based on a misreading of paragraph 645 of the judgment under appeal. In paragraph 645, the General Court stated that 'it is apparent from the market investigation carried out by the Commission and, in particular, from the responses to Questionnaire 13 (Annex A.4h) that the Commission did not, as [thyssenkrupp] claims, attach excessive weight to certain customer statements. The Commission's findings, in recitals 1307 to 1309 of the [decision at issue], reasonably reflect[ed] those responses'. It added that 'although the Commission did not mention, in the [decision at issue], the statements of customers who confirmed that they used consignment stocks in the EEA or the fact that they tolerated long lead times, that [did] not necessarily mean that the Commission disregarded them. In the present case, the Commission merely took the view, as is apparent in particular from recital 1311 of that decision, that those statements were not sufficiently representative or relevant from among all the responses obtained from customers in its market investigation'. Lastly, it noted that, 'on reading the responses to Questionnaire 13, that [was] indeed the case.'

331 It is sufficiently clear from that paragraph that, when the General Court referred to the market investigation carried out by the Commission and, in particular, the responses to Questionnaire 13, and inferred therefrom that the Commission had not attached excessive weight to the customer statements, the General Court carried out its own examination of the evidence. That

the General Court did in fact carry out that examination is further supported, first, by the second sentence of paragraph 645 of the judgment under appeal, by which the General Court held that the Commission's findings 'reasonably reflect[ed] those responses' and, second, by the final sentence of that paragraph from which it is clear, without any ambiguity, that the General Court gave its own interpretation of those responses.

332 In those circumstances, the first argument advanced by thyssenkrupp in the context of the second complaint must be rejected as unfounded.

333 Concerning the second argument raised in the context of the second complaint, referred to in paragraph 306 above, suffice it to state that that argument is the result of a misreading of paragraph 646 of the judgment under appeal, since, as is apparent from that paragraph, the General Court in fact found that that complaint is of limited relevance for the Commission's analysis of the competitive constraint on the merged entity from imports. That argument must therefore be rejected as unfounded.

334 As regards the third argument raised in the context of the second complaint, referred to in paragraph 307 above, suffice it to state that, concerning the alleged distortion of the evidence, thyssenkrupp, in the present case, confines itself to a general criticism of the General Court's findings without, however, showing that the General Court's reasoning is based on a distortion of the specific evidence from which it is clear that the General Court manifestly exceeded the limits of a reasonable assessment. Accordingly, and to that extent, thyssenkrupp's line of argument must be rejected as inadmissible, since it does not meet the requirements recalled in paragraph 102 above.

335 In so far as thyssenkrupp also argues that the reasoning contained in paragraph 647 of the judgment under appeal is contradictory, it should be stated that its line of argument results from a misreading of that paragraph. In paragraph 647 of the judgment under appeal, the General Court held that the Commission's findings as to the importance of lead times as a relevant factor in assessing whether imports exerted competitive pressure on the merged entity as regards metallic-coated steel for packaging in the EEA were properly and sufficiently supported in recitals 1307 to 1309 and 1311 of the decision at issue.

336 The General Court thus found that the question whether the Commission had misinterpreted internal documents, reproduced in Figures 200 and 201 of the decision at issue, which merely 'corroborate' the Commission's findings, could not have any decisive impact on the Commission's analysis which is sufficiently supported by other evidence.

337 In those circumstances, thyssenkrupp's line of argument based on contradictory reasoning in paragraph 647 of the judgment under appeal must be rejected as unfounded.

338 Lastly, as regards the argument that, in paragraph 649 of the judgment under appeal, the General Court simply referred to the responses to a question in a questionnaire used by the Commission without carrying out its own analysis, it must be found that that argument also results from a misreading of paragraph 649.

339 It is clear from paragraph 649 that the General Court found that thyssenkrupp's line of argument that less than half of the customers consulted stated that there were differences between EEA suppliers and importers from outside the EEA in their ability to meet customers' needs had to be rejected. To justify that finding, the General Court stated that thyssenkrupp's reading of the

responses provided by customers to the question concerned was incomplete and biased. As is clear from the third sentence of paragraph 649 of the judgment under appeal, the General Court necessarily carried out its own examination of the responses to that question of the questionnaire when it found that, contrary to thyssenkrupp's claim, it is apparent from those responses that the majority of customers which answered that question mentioned the existence of such differences.

340 Accordingly, the second complaint of the fifth part must be rejected as in part inadmissible and in part unfounded.

341 In the light of all of the above considerations, the fifth part of the third ground of appeal must be rejected as in part inadmissible and in part unfounded.

The sixth part of the third ground of appeal

– *Arguments of the parties*

342 thyssenkrupp argues that, in paragraphs 377 to 384 and 594 to 597 of the judgment under appeal, the General Court distorted the evidence before it and erred in law in exercising its judicial review of the Commission's HHI calculation in respect of the markets for HDG, TP and ECCS.

343 In the present case, according to thyssenkrupp, the HHI calculated by the Commission for each of the relevant markets were artificially inflated and the General Court should have held that significantly wrong HHI numbers could not be used to demonstrate the existence of a significant impediment to effective competition in those markets. The General Court erred in finding that those HHI had no impact on the Commission's assessment and that applying the correct HHI would have led the Commission to the same result, namely a finding that there was a significant impediment to effective competition.

344 The Commission disputes thyssenkrupp's arguments.

– *Findings of the Court*

345 As regards, in the first place, the HDG market, it should be pointed out that, in paragraphs 370 to 384 of the judgment under appeal, the General Court examined thyssenkrupp's criticisms concerning the calculation of HHI before and after the proposed concentration.

346 In its examination, the General Court found, in essence, in paragraphs 379 and 381 of the judgment under appeal, that, even if there were grounds for accepting the calculation proposed by thyssenkrupp, which suggested that the HHI in the HDG market would have been 1 821 pre-transaction and 2 013 post-transaction, with a 192 delta, the HHI levels and increment for the HDG market still exceeded the thresholds, set out in paragraphs 19 to 21 of the Horizontal Merger Guidelines, above which there could be horizontal competition concerns in the relevant market, as is also the case in the Commission's calculation.

347 Furthermore, as is apparent from paragraph 381 of the judgment under appeal, the General Court pointed out that the delta was the same both in the Commission's calculation and in that of thyssenkrupp, which meant that there was also no difference in that regard between the two HHI calculations.

348 As regards, in the second place, the TP and ECCS markets, it is apparent from paragraphs 594 to 596 of the judgment under appeal that although thyssenkrupp argued, in essence, that the Commission had made the same calculation error as that made in respect of the automotive HDG market, the General Court rejected that argument as ineffective for the same reasons.

349 In those circumstances, the General Court could find, without erring in law, that thyssenkrupp's arguments based on errors in the calculation of HHI had to be rejected as ineffective.

350 Indeed, it is clear from paragraphs 16 and 21 of the Horizontal Merger Guidelines that the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger. Furthermore, the delta is used by the Commission as a useful proxy for the change in concentration directly brought about by the merger. In any event, they do not give rise to a presumption of either the existence or the absence of such concerns.

351 Provided that the HHI and delta values exceed the thresholds set out in paragraph 20 of the Horizontal Merger Guidelines, that circumstance could be used as an indicator of the potential anticompetitive effects of the merger concerned.

352 Thus, since thyssenkrupp does not dispute the fact that, whatever calculation method applied (including the calculation method proposed by thyssenkrupp), the HHI and delta are above the threshold set out in paragraph 20 of the Horizontal Merger Guidelines, the sixth part of the third ground of appeal must be rejected as ineffective.

353 As regards thyssenkrupp's argument alleging a distortion of certain evidence contained in the file before the General Court, that argument must be rejected as inadmissible since that company does not precisely identify that evidence.

354 Accordingly, the sixth part of the third ground of appeal must be rejected as in part inadmissible and in part unfounded.

355 In the light of all of the above considerations, the third ground of appeal must be rejected as in part inadmissible and in part unfounded.

The fourth ground of appeal

Arguments of the parties

356 By its first complaint, thyssenkrupp claims that the General Court distorted certain evidence in paragraphs 300 to 303 of the judgment under appeal and, consequently, failed to rule on its line of argument that formed part of the third complaint of the second part of the third plea in law at first instance alleging that the Commission had communicated its new economic analysis, set out in recital 1095 of the decision at issue, to the parties to the proposed concentration only in the final decision.

357 thyssenkrupp argues, in essence, that the General Court distorted the evidence contained in its file in a way which is manifestly at odds with the correct reading of that recital. That company observes that, in paragraphs 301 and 302 of the judgment under appeal, the General Court simply referred to the letter of facts and erred in claiming that the Commission did not alter its economic analysis set out in that recital in any way.

358 By its second complaint, thyssenkrupp argues that, since recital 1095 of the decision at issue contains a new economic analysis by the Commission that was communicated to it for the first time prior to the decision at issue, the General Court erred in law in paragraphs 300 to 303 of the judgment under appeal by finding that the Commission had not infringed thyssenkrupp's rights of defence. In particular, that company did not have the chance to make its objections with regard to that analysis heard during the administrative procedure, which, according to thyssenkrupp, constitutes an infringement of its rights of defence under Article 18(3) of Regulation No 139/2004 and Article 13(2) of Regulation No 802/2004, as amended by Implementing Regulation No 1269/2013.

359 The Commission disputes thyssenkrupp's arguments.

Findings of the Court

360 As regards thyssenkrupp's first complaint alleging distortion of certain evidence contained in the file before the General Court, it should be borne in mind, as stated in paragraph 102 above, that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and the legal arguments specifically advanced in support of the appeal. Thus, where an appellant alleges distortion of the evidence by the General Court, that person must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in that person's view, led to such distortion.

361 However, in the present case, thyssenkrupp confines itself, in essence, to claiming that the General Court distorted the evidence contained in its file and, therefore, erred in finding, in paragraphs 300 to 302 of the judgment under appeal, that recital 1095 of the decision at issue did not contain any new economic analysis by the Commission.

362 However, that company does not identify the errors of appraisal which, in the General Court's assessment of the document referred to in the appeal, led to the distortion alleged. It confines itself to a general criticism of the General Court's findings without proving that the General Court's reasoning is based on a distortion of the specific evidence or that it is clear that the General Court manifestly exceeded the limits of a reasonable assessment.

363 Consequently, the first complaint of the fourth ground of appeal must be rejected as inadmissible.

364 As regards thyssenkrupp's second complaint that its rights of defence were infringed since it did not have the opportunity, during the administrative procedure, to make its objections heard as regards the alleged new economic analysis contained in recital 1095 of the decision at issue, it is clear from paragraph 302 of the judgment under appeal that the General Court found that that recital did not contain any new economic analysis by the Commission.

365 Consequently, since, as is apparent from paragraphs 361 and 362 above, thyssenkrupp has not succeeded in demonstrating that the General Court distorted the evidence by arriving at such a conclusion, the second complaint of the fourth ground of appeal must be rejected as unfounded.

366 Accordingly, the fourth ground of appeal must be rejected as in part inadmissible and in part unfounded.

The fifth ground of appeal

Arguments of the parties

367 By its fifth ground of appeal, thyssenkrupp argues, in the first place, that the General Court failed to rule on the seventh plea raised in the application at first instance because it had not properly understood that plea.

368 By its seventh plea, thyssenkrupp not only argued that the Commission had made a procedural error by not making use of its enforcement powers to receive a more significant number of replies to the simple requests for information sent in accordance with Article 11 of Regulation No 139/2004. By that plea, thyssenkrupp also submitted, in essence, that the Commission should not have attached evidential value to the random and incomplete feedback it had received during the administrative procedure, inter alia because less than half of the recipients to whom the Commission had deemed it necessary to send simple requests for information had actually replied.

369 In so far as the Commission deemed that it needed to obtain necessary information, within the meaning of Article 11 of Regulation No 139/2004, it could not send simple requests for information on pain of such a procedural approach being unlawful. Therefore, owing to the low number of responses received, those responses should not have been considered representative of the views of all market participants or, at the very least, of all market participants that received a request for information. Consequently, the responses received by the Commission in the present case could not justify the decision prohibiting the proposed concentration.

370 In the second place, thyssenkrupp argues that, in paragraph 956 of the judgment under appeal, the General Court erred in finding that there was a certain response rate to the requests for information providing a reliable measure of the representativeness of the market concerned. In particular, thyssenkrupp submits that it is irrelevant whether or not the percentage of responses received from competitors was above or below a '50% threshold' of the total number of requests for information sent by the Commission since no such threshold exists and the number of responses received in the present case was evidently too low.

371 In addition, thyssenkrupp submits that the General Court erred in finding, in paragraph 956 of the judgment under appeal, that the reliability of the Commission's statement that the 50% threshold of replies was passed could not be challenged.

372 The Commission submits that thyssenkrupp's line of argument is inadmissible and, in any event, unfounded.

Findings of the Court

373 As regards the admissibility of the fifth ground of appeal raised by thyssenkrupp, the Court of Justice notes that, contrary to the Commission's submission, this ground, which criticises the General Court for, first, failing to examine the seventh plea of the application at first instance and, second, imposing a threshold providing a reliable measure of the representativeness of the market concerned, raises issues of law and cannot be dismissed as inadmissible.

374 As to the merits, in the first place, of thyssenkrupp's line of argument that the General Court failed to adjudicate on the seventh plea of the application at first instance because it had not correctly understood it, it must be stated that that argument is based on a misreading of the judgment under appeal.

375 As a preliminary point, the Court of Justice notes that it is apparent from the application at first instance that the seventh plea raised at first instance was headed 'Procedural error in not enforcing answers to requests for information'. Consequently, it related to a possible procedural error on the part of the Commission.

376 It also follows from the content of that plea and, in particular, from paragraphs 197 to 199 of the application at first instance, that thyssenkrupp confined itself to criticising the fact that, in the case at hand, the Commission had sent simple requests for information to the market participants concerned and had not therefore required the recipients of those requests to reply, even though it had the power to require responses to its requests for information under Articles 11, 14 and 15 of Regulation No 139/2004. Consequently, as is clear from paragraph 198 of that application, thyssenkrupp was of the view that the market test conducted by the Commission by means of the responses received to those requests was voided due to a procedural error, in particular because this was a situation in which 'half or more of those questioned [did] not reply [to the Commission's requests for information] and [got] away with it without any enforcement action'.

377 In that context, it is clear that paragraph 947 of the judgment under appeal accurately reflects thyssenkrupp's line of argument contained in paragraphs 197 to 199 of the application at first instance.

378 In paragraphs 950 to 955 of the judgment under appeal, the General Court rejected thyssenkrupp's line of argument that the Commission had not properly conducted its market tests from a procedural perspective.

379 First of all, after recalling, in paragraph 950 of the judgment under appeal, Article 11(1) of Regulation No 139/2004, the General Court made a distinction, correctly, between requests for information from the Commission depending on whether they are made by simple request or by decision. In that context, in paragraphs 951 and 952 of the judgment under appeal, the General Court clarified that, if the recipients do not supply the information requested within the period prescribed, the Commission may, only where the requests for information have been made by decision, impose a fine pursuant to Article 14(1)(c) of Regulation No 139/2004 or a periodic penalty payment under Article 15(1)(a) of that regulation.

380 Next, in paragraphs 953 to 955 of the judgment under appeal, the General Court stated that, in the present case, the Commission claimed that it had sent simple requests for information and that it had systematically sent reminders to the recipients that did not reply within the period prescribed, which thyssenkrupp did not dispute. As regards thyssenkrupp's claim that the Commission should have adopted decisions under Article 11(3) of Regulation No 139/2004 and then possibly start procedures for the imposition of fines or periodic penalty payments for each case of failure of a market participant to reply, the General Court found that such requests for information were incompatible with the need for speed, which characterises the general scheme of Regulation No 139/2004 and which requires the Commission to comply with strict time limits for the adoption of the final decision. Therefore, in view of the broad discretion enjoyed by the Commission in applying Articles 11, 14 and 15 of Regulation No 139/2004, it cannot be criticised

for not having required all, or at least a sufficient number, of recipients to reply to those requests for information in accordance with those provisions, besides the reminders that it sent to recipients that did not reply within the period prescribed.

381 Lastly, concerning thyssenkrupp's line of argument contained in paragraph 198 of the application at first instance to the effect that 'if up to half or more of those questioned do not reply and get away with it without any enforcement action, the result of the market test is voided from a process perspective already', the General Court found, in paragraph 956 of the judgment under appeal, that, in the present case, the Commission stated that the average rate of replies to the relevant questionnaires sent to the relevant market participants was above the 50% threshold and that that rate could not be considered insufficiently representative. In addition, the General Court found that thyssenkrupp had not succeeded in proving the contrary.

382 In those circumstances, it cannot be claimed that the General Court did not correctly understand the seventh plea of the application at first instance or failed to adjudicate on it.

383 As regards, in the second place, thyssenkrupp's line of argument that the General Court erred in finding, in paragraph 956 of the judgment under appeal, that there was a certain response rate to the requests for information providing a reliable measure of the representativeness of the market concerned, it must be found that that argument is also based on a misreading of the judgment under appeal.

384 Admittedly, the General Court referred to a '50% threshold' when it found that, in the present case, the average rate of reply to the questionnaires exceeded that percentage.

385 Nevertheless, the General Court referred to that threshold in order to respond to thyssenkrupp's specific argument that the Commission should not have taken into account the replies to the requests for information received during the administrative procedure, since 50% or more of the undertakings questioned had not replied to those requests.

386 It is clear, inter alia, from paragraph 197 of the application at first instance and from paragraph 65 of thyssenkrupp's defence at first instance that it was the applicant, that is to say, that company, that had quoted that percentage before the General Court.

387 That fact is confirmed in paragraph 947 of the judgment under appeal in which the General Court summarised thyssenkrupp's main arguments. It is apparent from that paragraph that that company was of the view that, 'if the Commission fail[ed] to enforce outstanding replies, … and taking into account that, according to the case file, the percentage of replies received is on average less than 50%, the [decision at issue] [could not] draw any conclusions from the replies received as to whether or not a majority of customers or competitors [was] of a particular view or another'.

388 In that context, it must be held that, in paragraph 956 of the judgment under appeal, the General Court referred to that percentage only in order to respond to thyssenkrupp's line of argument.

389 It cannot be claimed, therefore, that the General Court deduced a rule that, in order for replies to the simple requests for information sent to the market participants concerned to be taken into account by the Commission in its analysis of a merger, at least 50% of the recipients of those requests must have replied.

390 Lastly, as regards thyssenkrupp's argument that the General Court erred in finding, in paragraph 956 of the judgment under appeal, that the reliability of the Commission's statement that the 50% reply threshold had been exceeded in the present case could not be challenged, suffice it to state that, while thyssenkrupp disputes that alleged finding, that company does not dispute the average rate of reply to the relevant questionnaires sent to the market participants in the markets where the Commission had found that a significant impediment to effective competition, namely the automotive HDG and packaging steel (TP, ECCS and laminated steel) markets, was in fact above the 50% threshold, as the General Court noted in paragraph 956 of the judgment under appeal. In those circumstances, thyssenkrupp's line of argument relating to that alleged finding is ineffective.

391 In those circumstances, the fifth ground of appeal must be dismissed as unfounded.

392 As none of the grounds raised by thyssenkrupp in support of its appeal has been upheld, the appeal must be dismissed in its entirety.

Costs

393 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

394 In the present case, since the Commission has applied for costs and the appellant has been unsuccessful, the appellant must be ordered to pay the costs of the present appeal.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders thyssenkrupp AG to pay the costs.

Arabadjiev von Danwitz Xuereb

Kumin Ziemele

Delivered in open court in Luxembourg on 4 October 2024.

A. Calot Escobar A. Arabadjiev
Registrar President of the Chamber